Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-045

NOVEMBER TERM, 2002

Tammy Ryea	}	APPEALED FROM:
v.	}	Franklin Superior Court
William and Wilma McAllister, James Laden and David Record	}	DOCKET NO. S 373-98 Fc Trial Judge: Edward J. Cashman

In the above-entitled cause, the Clerk will enter:

Defendants William and Wilma McAllister appeal a jury verdict awarding plaintiff Tammy Ryea compensatory and punitive damages based on an incident in which defendants cut a disputed right of way through plaintiff' s adjoining property. Defendants challenge the jury' s award of punitive damages. Plaintiff cross-appeals, arguing that the court erred by not awarding her pre-judgment interest and attorney' s fees. We reject each of the parties' arguments and affirm the superior court' s judgment.

In 1968, defendants, then husband and wife, sold a fifty-acre parcel of land, but retained a right of way across the parcel to their remaining property. In the 1980's, defendants divorced and partitioned their property. William McAllister retained the eastern half of the property, and Wilma McAllister retained the western half. During that same period, the adjoining fifty-acre parcel was split in half and sold to separate buyers. The deed to the eastern half referenced the right of way, but the deed to the western half, which plaintiff purchased in 1997, did not. Around the time plaintiff was purchasing her twenty-five acre parcel, Wilma declared that she had a right of way through that parcel to her property. A dispute ensued, and plaintiff told Wilma to stay off of her property. On October 24, 1998, while plaintiff was at work, defendants entered plaintiff' s property and cut a fifteen-foot-wide, seven-hundred-foot-long swath across her land, destroying trees in the process. Plaintiff filed suit and obtained a preliminary injunction. The case was tried before a jury. The jury determined that there was no right of way across plaintiff' s land, and awarded plaintiff $5200 in compensatory damages and $10,400 in punitive damages. The superior court denied the parties' post-judgment motions, and both parties appealed.

Defendants challenge the jury' s award of punitive damages, arguing that (1) the court applied the wrong standard in determining that the award was not grossly excessive; (2) there was no evidence of malice to support the award; and (3) the award must be reversed because plaintiff failed to present evidence on the financial status of the defendants. In their first argument, defendants cite Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) for the proposition that the question of whether a jury's punitive damage award is grossly excessive is a mixed question of law and fact to be reviewed de novo by the trial court without giving deference to the jury' s decision. We find no merit to this argument. In Cooper, the Court held that nondeferential review is called for when a fine is challenged as unconstitutionally excessive. As the Court stated, however, " [i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's ' determination under an abuse-of-discretion standard.' " Id. at 433 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279

(1989)). Here, defendants did not raise a constitutional challenge to the punitive damage award in their motion to amend the judgment. Nor have they done so on appeal. Under Vermont law, the assessment of a punitive damage award " is largely discretionary with the finder of fact." Coty v. Ramsey Assoc., Inc., 149 Vt. 451, 466 (1988). " Once a jury has acted, a court may interfere with an award of punitive damages only if manifestly and grossly excessive." Pezzano v. Bonneau, 133 Vt. 88, 91 (1974) (internal quotations omitted). The superior court did not apply the wrong standard in declining to amend the jury's punitive damage award after finding that there was evidence to support it.

Next, defendants argue that there was no evidence of malice to support the jury's punitive damage award. Again, we disagree. Although a plaintiff seeking to recover punitive damages must demonstrate actual malice by the defendant, " no direct evidence of the defendant's mental state is required; instead, the nature of his conduct and the surrounding circumstances can establish his motive and his state of mind." Coty, 149 Vt. at 464. Thus, a plaintiff need present evidence sufficient for the jury to conclude only that the defendant engaged in " conduct manifesting personal ill will carried out under circumstances evidencing . . . reckless or wanton disregard of one's rights." Shortle v. Central Vermont Public Serv. Corp., 137 Vt. 32, 33 (1979). In this case, the jury could have reasonably determined, based on the evidence presented at trial, that defendants knew that they had no right of way across plaintiff's property, but nevertheless entered onto plaintiff's land and cut a right of way so that Wilma McAllister could have direct access to her property apart from the right of way that served William McAllister' s property from the parcel to the east of plaintiff' s land. Thus, there was sufficient support for the jury's punitive damage award..

Defendants also state in a single-sentence footnote in their principal brief, and a section of the reply brief, that the court committed clear error by instructing the jurors that a punitive damage award depended on them finding that defendants acted deliberately or

Finally, defendants argue that the punitive damage award cannot stand because plaintiff failed to present evidence on the financial status of defendants. In support of this argument, defendants contend that in Coty we reaffirmed the principle that a punitive damage award must take into account the financial status of the defendant. See 149 Vt. at 467. We did not hold, however, that the plaintiff is required to present evidence regarding the defendant's wealth. In Parker v. Hoefer, 118 Vt. 1, 20-21 (1953), we clarified that while ability to pay is a proper element of consideration, proof of actual means is not essential to recovery of punitive damages. Cotyy did not overrule Parker. Here, the parties were free to present evidence on defendants' financial status. But the fact that neither party did so does not mean that the award of punitive damages must be reversed. See D. Dobbs, Handbook on the Law of Remedies & 3.9, at 218-19 (1973) (argument that punitive damage award cannot be sustained absent proof of defendant's wealth " is properly rejected").

In her cross-appeal, plaintiff first argues that the trial court erred by failing to award her prejudgment interest. According to plaintiff, she was entitled to prejudgment interest because her damages were readily ascertainable. See , 170 Vt. 450, 463 (2000) (principal rationale for awarding prejudgment interest as of right is that, where damages are liquidated or readily ascertainable, defendant can avoid accrual of interest simply by tendering to plaintiff sum equal to amount of damages). We disagree. The restoration value of the trees destroyed when defendants cut the right of way through plaintiff' s property was not readily ascertainable, and thus plaintiff is not entitled to prejudgment interest as a matter of right. Because plaintiff has made no argument with respect to a discretionary award of prejudgment interest, we uphold the court's decision denying plaintiff's request for such interest..

Plaintiff also argues that the trial court erred by failing to award her attorney's fees under 13 V.S.A. § 3701(f). Section 3701 sets forth criminal penalties for the offense of unlawful mischief to property, and subsection (f) provides that " [a] person who suffers damages as a result of a violation of this section may recover those damages together with reasonable attorney' s fees in a civil action under this section." Because plaintiff did not bring a civil action under § 3701, she is not entitled to attorney's fees under § 3701(f). This is not a situation where the issue was tried by the express or implied consent of the parties. See V.R.C.P. 15(b).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice