

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CYNTHIA S. ANDREWS,

Plaintiff-Appellant,

v

DARYLL S. SUKHBIR and CHARLENE  
SUKHBIR,

Defendants-Appellees.

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UNPUBLISHED

May 1, 2007

Nos. 267181; 268488

Oakland Circuit Court

LC No. 2004-056322-CZ

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right the trial court order directing a verdict in favor of defendants with respect to plaintiff's claims of trespass and nuisance. The trial court permitted plaintiff's negligence claim, in part, to go to the jury, which entered a verdict of no cause of action. When ruling on the motion for directed verdict, the trial court limited the negligence claim to a time frame only during which any negligent conduct could be considered, and plaintiff appeals this ruling, as well as appealing rejected claims for injunctive relief. Additionally, plaintiff appeals as of right the trial court order awarding attorney fees and costs to defendants. We affirm.

Plaintiff and defendants are adjoining property owners. Plaintiff moved into her home in 1988, and defendants purchased their house in 2003. Both homes have sump pumps. When defendants moved into their home, they discovered that their sump pump had been connected to the city's sanitary sewer system, and the city instructed defendants to have the sump pump disconnected from the system. Defendants promptly complied with the city's demand. At that time, defendants were also informed by the city that they could not hook their sump pump up to the city's storm sewer system. Defendants then proceeded to hire a plumbing contractor to address the question regarding how and where to disperse waters from their sump pump, and, pursuant to the plumbing contractor's recommendation, defendants had a French drain system built in October 2003. The French drain consisted of a 50-foot long trench that ended in a drywell. Pea gravel was placed in the trench, and the trench was then covered with sandy soil.

About a month after the French drain was constructed, in late November 2003, plaintiff experienced flooding in her basement concentrated in the corner closest to the French drain. Plaintiff assumed that the flooding was caused by defendants' French drain. Specifically, plaintiff asserted that her sump pump stopped working because the pump's float became hooked

due to the force and amount of water flowing into her sump pump well as caused by defendants' French drain. Plaintiff conceded that there had been a heavy rainfall on the day the flooding occurred and that she had not been home. She did not actually witness water flowing into her sump pump well.

In January 2004, the city performed a dye test at plaintiff's request to determine whether water from defendants' sump pump was leaking into plaintiff's basement. Three weeks later, plaintiff discovered the dye on a test cloth in her sump pump well, showing that water from defendants' sump pump was making its way to plaintiff's basement. Following this discovery, plaintiff filed the instant action on February 20, 2004, alleging trespass, trespass-nuisance, negligence, and intentional nuisance. Defendants unhooked their sump pump from the French drain on February 25, 2004, and hooked up a tubing system that directed their sump pump discharge onto another location on their property. The next day defendants received a letter from the city that now allowed them to hook their sump pump up to the city's storm sewer system. Because the winter ground was frozen, defendants did not immediately connect their sump pump to the storm sewer system, but they did so in June 2004. In May 2005, the parties performed another dye test, under court order, to determine if water from the area of defendants' French drain continued to find its way to plaintiff's sump pump well. This time plaintiff discovered dye on the test cloth after 48 hours. The parties' experts agreed that water from the area of defendants' French drain was finding its way to plaintiff's basement and sump system; however, they disagreed on the mode or theory of delivery, i.e., how and by what path the water from around the French drain was making its way to plaintiff's property.

At trial, the court directed a verdict in favor of defendants with respect to the trespass and nuisance claims, and in part, with regard to the negligence claim.<sup>1</sup> The jury returned a verdict of no cause of action as to the surviving or limited negligence claim. Plaintiff's accompanying claims for injunctive relief seeking to eliminate the French drain were also rejected.

Plaintiff's first argument on appeal is that the trial court erred by granting defendants' motion for a directed verdict and denying plaintiff injunctive relief on her trespass claim. We review a trial court's decision on a motion for a directed verdict de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court reviews all the evidence presented up to the time of the motion in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). The trial court's decision to deny plaintiff injunctive relief is an equitable matter, which is also reviewed de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

"Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). "[A] 'direct or immediate' invasion for purposes of trespass

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<sup>1</sup> We note that plaintiff also alleged a claim of trespass-nuisance in the complaint; however, the claim was dismissed on a motion for summary disposition, which ruling has not been appealed.

is one that is accomplished by any means that the offender knew or reasonably should have known would result in the physical invasion of the plaintiff's land.” *Id.* at 71. It is sufficient that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter. *Id.* To sustain a trespass action, there must be an intent to intrude on the property of another without authorization, and an accidental intrusion is insufficient. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995).

Plaintiff did not present sufficient evidence to raise a factual question necessitating jury resolution regarding whether defendants knew or reasonably should have known that there was a substantial certainty that a physical invasion of plaintiff's property by underground flowing water would occur as a result of constructing the French drain. Defendants installed the French drain system for the express purpose of dispersing their sump pump discharge, and they chose the system upon the advice of a plumbing contractor who directed the construction. There is nothing in the record suggesting that defendants installed the French drain system with the knowledge that it would force water onto plaintiff's property, nor does the record find any support for a conclusion that defendants should have known about such a result being a substantial certainty. Even viewing the evidence in a light most favorable to plaintiff, any consequence attributable to defendants' installation of the French drain was clearly unintentional. There was no intent to intrude on plaintiff's property. Given the surrounding environment and the slope of the land, the placement and location of the French drain in and of itself would not have suggested a substantial certainty that water would invade plaintiff's premises in the manner alleged. The trial court did not err in directing a verdict in favor of defendants with regard to the trespass claim.<sup>2</sup>

With respect to injunctive relief, whether based on a trespass or nuisance related theory or simply the indication of water continuing to go from the French drain to plaintiff's property, we affirm the trial court's rejection of the requested relief. Considering the substantial cost related to removing the French drain and restoring the land, the fact that plaintiff had essentially already remedied the water problem by installing a backup sump pump, the lack of any true misconduct by the parties, the lack of impact on third persons, the questionable significance of any existing problem, and the arguable benefits of restoration, we conclude that equitable or injunctive relief is not appropriate in this case. See *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 142 n 6; 500 NW2d 115 (1993) (discussing factors relative to issuing injunctions).

Plaintiff's second argument on appeal is that the trial court erred in granting defendants' motion for a directed verdict on plaintiff's negligence claim. Plaintiff's only grievance with regard to this argument is that the court failed to analyze the issue on the record and explain its position; therefore, plaintiff is not in a posture to formalize an argument as to the error in the

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<sup>2</sup> Plaintiff cites, in support of her trespass claim, a local ordinance regarding footing discharges that allegedly was violated by defendants. Plaintiff failed, however, to submit evidence sufficient to create a triable fact showing that defendants knowingly violated the ordinance, assuming a violation, and that a violation supported the elements, which we found lacking, necessary to establish a trespass theory of recovery.

court's reasoning. Plaintiff has effectively abandoned this issue by failing to properly brief it and cite supporting authority for her position. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Despite plaintiff's protestations with respect to the trial court's alleged lack of reasoning, the record reveals that the court, having just finished discussing defendants' reasonable behavior relative to the trespass and nuisance claims in the context of the motion for a directed verdict, addressed the negligence claim in a sufficient manner. The court found a lack of negligence on defendants' part as a matter of law, except for possibly the time period during which defendants had permission to connect to the city storm sewer system but had not done so, and alleged negligence during this time frame was left for the jury to resolve. Plaintiff certainly had enough information to present a substantive appellate argument challenging the court's ruling but failed to present one. Moreover, evidence creating a factual issue on breach of duty, i.e., negligent conduct, was lacking. There was no showing of negligence by defendants. Accordingly, the trial court did not err in dismissing a portion of the negligence claim.

Plaintiff's third argument on appeal is that the trial court erred by granting defendants' motion for a directed verdict on her intentional nuisance claim. We find no error because there was no evidence indicating that defendants intentionally caused an invasion of plaintiff's interest in the private use and enjoyment of her property. See *Adkins v Thomas Solvent Co*, 440 Mich 293, 302-304; 487 NW2d 715 (1992). Additionally, plaintiff's reliance on a city ordinance as supporting the claim for nuisance is unavailing. The nuisance claim pled by plaintiff in the complaint was one alleging *intentional* nuisance, and any reference to the ordinance must be viewed in that context, regardless of whether the ordinance is framed in terms of intentional acts. Again, there was no evidence establishing an intentional effort by defendants to cause water to enter plaintiff's property. Moreover, the applicability of the ordinance to the particular facts of this case is questionable. In sum, we have considered all of plaintiff's arguments on nuisance and find them to be without merit.

The next series of arguments set forth by plaintiff address the taxation of costs and award of attorney fees in favor of defendants. Following trial, defendants submitted a taxed bill of costs to the clerk of the court under MCR 2.625(F), which requested, in part, the taxing of "expert opinion services." Copies of bills for expert opinion services were attached to the taxed bill of costs. Plaintiff objected to the taxed bill of costs, arguing, in part, that defendants were not entitled to be compensated for expert opinion services, that one claimed expert was not an expert, that defendants did not verify the costs and services incurred, and that the alleged supporting affidavit lacked an acknowledgment or jurat by a notary public. The court clerk issued a letter indicating that, in consideration of plaintiff's objections, the only costs that would be allowed were \$85 for a jury fee, \$26 for service fees, and \$15 for a witness fee.<sup>3</sup> Defendants also filed a motion for costs and attorney fees as case evaluation sanctions under MCR 2.403(O). In the motion, defendants indicated that they were entitled to actual costs not only under MCR 2.625, for which a separate request had been made, but also under MCR 2.403(O). Ultimately,

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<sup>3</sup> Defendants had requested nearly \$12,000 in costs.

the trial court awarded defendants \$12,975 in attorney fees (86.5 hours at \$150 per hour)<sup>4</sup> under MCR 2.403(O) and \$11,452 in costs, which mainly included costs for expert opinion services. The order did not specify under which court rule the costs were awarded.

Plaintiff argues on appeal that the costs were improperly granted because there was no verification or supporting affidavit as allegedly required by MCR 2.625(G)(2). Plaintiff cites no other provisions in support of her argument; thus, we shall only address MCR 2.625(G)(2). MCR 2.625(G)(2) provides that “[t]he bill of costs must be verified and must contain a statement that (a) each item of cost or disbursement claimed is correct and has been necessarily incurred in the action, and (b) the services for which fees have been charged were actually performed.” Defendants’ counsel submitted a document, entitled “affidavit in support of bill of costs,” which contained the required language. There was, however, no acknowledgment or jurat by a notary public. MCR 2.625(G)(2) only speaks of verification, and there is no express language within this provision requiring an affidavit. MCR 2.625 does not define the term “verified.” MCR 2.114, which “applies to all pleadings, motions, affidavits, and other papers provided for by these rules,” states that a document may be verified by either oath or affirmation (affidavit), or, “except as to an affidavit, including the following signed and dated declaration: ‘I declare that the statements above are true to the best of my information, knowledge, and belief.’” MCR 2.114(B)(2). The document submitted by defense counsel did not constitute an affidavit because it was not notarized, but it did declare personal knowledge of the facts stated in the document and counsel’s belief that they were true and accurate. We deem this sufficient for purposes of MCR 2.625(G)(2), especially considering that billings from the expert were also attached. Additionally, the dispute regarding whether costs covered expert opinion services was specifically addressed in a court hearing, and such costs were awarded by the trial court. See MCR 2.625(F)(1).

On a related topic, plaintiff argues that defendants were not entitled to expert witness fees relative to Gaylord Forbes because he was not actually an expert, because costs for “expert opinion services” are not recoverable, because “expert opinion services” is not interchangeable with “expert witness fees,” and because Forbes cashed a check intended for him as an ordinary lay witness.

We first note that Forbes was listed as an “expert” on defendants’ witness list without objection. Forbes, an architect, testified at trial regarding his background in dealing with building codes and regulations, his employment as a state instructor for purposes of training building inspectors, his work in examining allegedly defective buildings, and he testified regarding the importance and his knowledge of water management issues in the field of building construction. On cross-examination, plaintiff herself repeatedly referred to Forbes as an expert and asked for his opinion as an expert. Given these facts, we cannot agree with plaintiff that Forbes should not be considered an expert for purposes of taxable costs. Forbes certainly qualified as an expert

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<sup>4</sup> Defendants had sought a rate of \$250 per hour that was rejected. The trial court ruled, “With regard to attorney fees, I’m going to allow \$150, an hour, based on [counsel’s] experience and background and based under the criteria set forth in the case law regarding sanctions.”

under MRE 702. Forbes's act of cashing a standard \$20 witness fee check sent to him by plaintiff along with a trial subpoena does nothing to change his actual status from expert witness to lay witness for purposes of our review. Plaintiff cites no authority to the contrary.

Defendants' reference to "expert opinion services" does not defeat the award of costs. "MCL 600.2164(1) authorizes a trial court to award expert witness fees as an element of taxable costs." *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 466; 633 NW2d 418 (2001). MCL 600.2405(1) provides that the fees of officers, witnesses, or other persons mentioned in this chapter or in MCL 600.2501 *et seq.*, may be taxed and awarded as costs unless directed otherwise. MCL 600.2421b(1) defines "costs and fees" as "the normal costs incurred in being a party in a civil action after an action has been filed with the court," and these include:

- (a) The reasonable and necessary expenses of expert witnesses as determined by the court.
- (b) The reasonable cost of any study, analysis, engineering report, test, or project
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On review of Forbes's billing statement that was received by defendants, the "expert opinion services" rendered for which defendants sought recovery, regardless of the nomenclature used by defendants in identifying the costs, were encompassed by the court rules and statutes, cited above, allowing for the recovery of taxable costs. There was no error.

Plaintiff's final argument on appeal is that the trial court abused its discretion by awarding defendants attorney fees based on defense counsel's experience and background when there was no supporting evidence concerning his experience and background. We will uphold an award of attorney fees absent an abuse of discretion. *Antiphon, Inc v LEP Transport, Inc*, 183 Mich App 377, 386; 454 NW2d 222 (1990). When attorney fees are awarded as case evaluation sanctions, the amount awarded is for reasonable fees, not actual fees. MCR 2.403(O)(6)(b). The professional standing and experience of an attorney is a factor to consider in evaluating whether requested attorney fees are reasonable. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 114; 593 NW2d 595 (1999) (citing various factors to consider in determining a reasonable attorney fee); *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). A trial court need not detail its findings as to the various factors contemplated in awarding reasonable attorney fees. *Michigan Nat'l Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993).

In this case, defense counsel asked for attorney fees at an hourly rate of \$250 based on a survey of law firm billing rates that appeared in the Michigan Bar Journal in November 2000, but defendants were only awarded \$150 per hour in attorney fees. Defense counsel did not present any evidence as to his experience or background, but the trial court cited his experience and background in support of the award. It would not be unreasonable to assume that the court was familiar with defense counsel's experience and background. Plaintiff fails to note any deficiencies in defense counsel's experience and background such that an hourly rate of \$150 would be unreasonable. At the hearing on the issue, plaintiff expressly recognized the quality of counsel's firm in doing insurance defense work, and she focused on the actual fees incurred, \$110 per hour, not any lack of experience on defense counsel's part. Furthermore, at the hearing, defense counsel was sworn in and testified regarding his rates, but plaintiff failed to request

further testimony concerning such matters as defense counsel's experience and background. Moreover, the trial court cited not only counsel's background and experience in support of the award, but also the other various factors reflected in the case law, none of which are discussed by plaintiff on appeal. There was no abuse of discretion regarding the award of attorney fees.

Affirmed.

/s/ William C. Whitbeck

/s/ William B. Murphy

/s/ Jessica R. Cooper