

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA BARKER,

Plaintiff-Appellant/Cross-Appellee,

v

DOUGLAS MARSHALL,

Defendant-Appellee/Cross-
Appellant,

and

JEFFREY MARSHALL,

Defendant.

UNPUBLISHED

July 24, 2014

No. 308990

Benzie Circuit Court

LC No. 08-008217-CZ

BARBARA BARKER,

Plaintiff-Appellant/Cross-Appellee,

v

DOUGLAS MARSHALL,

Defendant-Appellee/Cross-
Appellant,

and

JEFFREY MARSHALL,

Defendant.

No. 311843

Benzie Circuit Court

LC No. 08-008217-CZ

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

I. FACTS

This case concerns standing timber cut from a 20-acre parcel of land (“the property”) owned by plaintiff Barbara Barker located in Benzie County. Plaintiff and her extended family use the property for camping. Plaintiff testified that, prior to the events that led to the instant litigation, approximately 15 of the 20 acres was comprised of forest.

Plaintiff and defendant, Douglas Marshall, both testified that on November 10, 2006, defendant arrived at plaintiff’s home in Auburn Hills in hopes of securing the right to harvest standing timber from the property. Plaintiff had previously received an unsolicited phone call from Jeffrey Marshall, defendant’s son and, at the time, business associate. Plaintiff testified that she agreed that defendant would remove 120 trees from the property and pay plaintiff \$20,000. Plaintiff claimed that defendant told her that 120 trees comprised approximately six truckloads. Defendant disputed this version of events. He testified that he never quotes specific numbers of trees and instead only deals in truckloads. In any event, the parties do not dispute that this meeting resulted in a signed contract that provided for defendant to harvest six truckloads of timber, 18” or larger on the stump, and pay plaintiff \$20,000.

Soon after this meeting, plaintiff began having second thoughts. She phoned her son Scott and expressed her concerns. At plaintiff’s request, Scott called Jeffrey and told him that his mother was unhappy with the contract. Jeffrey visited plaintiff at her home, without defendant, and modified the contract to provide for three truckloads of timber at a price of \$12,000. Plaintiff testified that, at this meeting, Jeffrey told her that only 55 trees would be removed, which she claimed he stated would comprise three truckloads. Jeffrey disputed this allegation, stating that he did not quote plaintiff a specific number of trees. Defendant testified that, while he did not “authorize” Jeffrey to modify the contract, it was acceptable for him to do so. Defendant also acknowledged that Jeffrey made him aware that the contract had been modified to three truckloads. In any event, the parties do not dispute that the contract was modified to provide that plaintiff was to be paid \$12,000 for three truckloads of timber. Plaintiff and Jeffrey testified that Jeffrey then paid plaintiff the \$12,000 contract price in cash.

In July 2007, the cutting began. Neither defendant nor Jeffrey were actually present – the cutting itself was performed by another independent contractor.¹ At some point during the multi-day operation, Jeffrey called defendant and remarked that the cutting seemed to be taking longer than necessary to obtain three truckloads. Defendant, who testified that he had forgotten that the contract had been modified from six truckloads, immediately drove to the property and instructed the crew to cease cutting trees. Defendant admitted that he previously told the crew to cut six truckloads of trees.

It is undisputed that more than three double-bottom truckloads of trees were removed from the property. Defendant did not dispute that this was in excess of the modified contract’s prescribed amount. When plaintiff first returned to the property after the cutting, she was horrified to discover what she characterized as “a war zone.” Plaintiff immediately suspected

¹ There was no testimony from any of the individuals that participated in the actual cutting.

that far more trees had been removed than she had agreed upon in the contract. She called defendant and expressed this opinion. Plaintiff, with the help of her friends, then cataloged the damage. Plaintiff identified 210 trees of 18" or larger diameter on the stump and 44 trees of smaller diameter that had been cut. Plaintiff also claimed that the property was littered with "tree tops"² and smaller trees that had not been sent to the sawmill.

Plaintiff also testified that she had requested that defendant not remove a large "special tree" located on the property. Although the special tree was not mentioned in the contract, defendant acknowledged that plaintiff told him about the tree and he agreed that it would not be cut down. Plaintiff testified that she spray-painted "NO" in large letters on the trunk of the special tree. It is undisputed that the special tree was cut down with the rest of the timber.

Plaintiff then reported the matter to the local sheriff's department. Plaintiff testified that the department advised her to negotiate with defendant in an attempt to resolve the matter. Plaintiff, apparently unsatisfied with the county prosecutor's decision not to pursue criminal charges against defendant, also called the local newspaper and asked whether it wanted to run a story regarding the incident. A story was published containing the following quote from plaintiff that defendant later argued was libelous: "I'm not trying to be vindictive or anything, I just feel like [defendant] took advantage of me."

On April 11, 2008, plaintiff sued defendant, alleging claims of statutory conversion, breach of contract, breach of implied contract, fraud against both defendant and Jeffrey, and trespass. Defendant counterclaimed for libel and slander, tortious interference with contract, and tortious interference with business expectancy. After a five-day bench trial, the trial court found for plaintiff against defendant on her claims of breach of contract, trespass, and conversion. The court found that the actual value of the excess timber removed and converted from the property was \$14,402.48 and trebled those damages to \$43,207.44. The court also awarded plaintiff \$9,000 for the loss of the special tree and \$15,000 for mental anguish for a total of \$67,207.44. The court further found for defendant against plaintiff on his claim of libel and assessed \$85,000 in damages. Accordingly, the court ordered that a net judgment for defendant be entered in the amount of \$17,792.56. On January 19, 2010, the trial court entered a judgment reflecting these awards.

On February 8, 2010, plaintiff filed a motion for reconsideration of the January 19, 2010 judgment. After hearing oral argument, the trial court increased plaintiff's award by \$15,000: \$2,000 for small trees cut and left on the property, trebled to \$6,000, \$4,000 for the tree tops left on the property, and an additional \$5,000 in mental anguish damages.

On February 19, 2010, defendant moved for case evaluation sanctions. Before trial, a case evaluation panel had unanimously awarded plaintiff \$60,000 on her various claims and defendant \$0 on his counterclaims. Plaintiff rejected both awards and defendant accepted both. Defendant argued that he was entitled to case evaluation sanctions because plaintiff's net loss as

² "Tree tops" refers to the branches and upper portions of trees that are removed at the site of cutting and left on the property, i.e., not hauled away for use as timber.

a result of the litigation was less than the 10% improvement, i.e., \$66,000, necessary for her to avoid sanctions. MCR 2.403(O)(3). Plaintiff responded by accusing defendant of violating MCR 2.403(N)(4) by disclosing the case evaluation award to the trial court and, accordingly, requested a new trial before a different judge and sanctions against defendant for his violation of the court rule. A visiting judge denied defendant's motion for case evaluation sanctions and denied plaintiff's motion for sanctions and a new trial before a different judge.

In sum, the trial court found for plaintiff on her claims of statutory conversion, breach of contract, and trespass. The court awarded plaintiff a total of \$82,207.44 in damages: \$43,207.44 for the trees removed in excess of the modified contract (\$14,402.48 trebled), \$9,000 for the special tree, \$20,000 for mental anguish, \$4,000 for waste, in the form of the tree tops left lying on plaintiff's property, and \$6,000 for small trees cut down, but not removed, to facilitate the removal of the timber cut in excess of the modified contract (\$2,000 trebled). The court also found for defendant on his counterclaim for libel and awarded \$85,000 in damages. On October 5, 2011, the trial court entered a net judgment in favor of defendant for \$2,792.56 that reflected these new awards.

II. CONTRACT INTERPRETATION

Plaintiff argues that the trial court erred by interpreting the modified contract to provide for the removal of three "double-bottom" truckloads of timber, contrary to plaintiff's alleged assumptions of smaller "truckloads."³ It is undisputed that the modified contract provided that defendant would harvest three "truckloads" of timber from plaintiff's property at a cost of \$12,000. It is further undisputed that the written contract itself makes no mention of a quantity of trees; the only indication of volume is three "truckloads." Plaintiff argues that she was unaware that she contracted to sell three double-bottom truckloads of timber.

Our Supreme Court has held that, "It is well settled that the failure of a party to obtain an explanation of a contract is ordinary negligence. Accordingly, this estops the party from avoiding the contract on the ground that the party was ignorant of the contract provisions." *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 92; 468 NW2d 845 (1991). Therefore, plaintiff's apparent failure to understand that the term "truckload" in the contract referred to "double-bottom truckloads" did not entitle her to a favorable reading by the trial court.

Plaintiff testified that defendant and/or Jeffrey gave her various estimates of how many trees would be included in the contractual "truckloads." However, defendant and Jeffrey denied

³ "This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003) (citations omitted). "The proper interpretation of a contract is a question of law that this Court reviews de novo." *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007).

making any promises regarding the number of trees and we defer to the factfinder, in this case, the trial court, on questions of witness credibility and the weight given to the evidence. See *In re Estate of Clark*, 237 Mich App 387, 396; 603 NW2d 290 (1999). Moreover, “[i]t is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of the contractual terms. Rather, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms.” *Zurcher v Herveat*, 238 Mich App 267, 299; 605 NW2d 329 (1999). Therefore, whether plaintiff’s discussions with defendant and/or Jeffrey led her to believe that less than three double-bottom truckloads were provided for in the contract is immaterial.

Given the express language of the contract and this Court’s deference to the trial court’s ability to judge the credibility of the witnesses before it, *Clark*, 237 Mich App at 396, the trial court did not err by interpreting the modified contract to provide for the removal of three double-bottom truckloads of timber from plaintiff’s property.

III. PLAINTIFF’S DAMAGES

The parties dispute the amounts and types of damages awarded to plaintiff.⁴ Plaintiff first argues that the trial court erred in its calculation of her actual damages for the timber removed in excess of the amount provided for in the modified contract. As discussed above, the trial court did not err by finding that plaintiff contracted to have defendant remove three double-bottom truckloads of timber from her property. Accordingly, the trial court was tasked with calculating plaintiff’s damages for the timber removed in excess of three double-bottom truckloads.

The parties presented theories of how the trial court should calculate plaintiff’s actual damages for the trees cut in excess of the modified contract. The trial court accepted one of defendant’s theories.⁵ Peter Barbier, an employee of the sawmill where defendant took the timber cut from plaintiff’s property, testified that the sawmill paid defendant \$33,502.56 for all of the timber harvested from plaintiff’s property. Cutting and freight charges totaled \$7,100.08, which defendant remitted to the sawmill. Thus, defendant received \$26,402.48 for the timber cut from plaintiff’s property. The court then subtracted the \$12,000 defendant paid plaintiff under the modified contract for an actual damage total of \$14,402.48.

The trial court’s calculation of plaintiff’s actual damages was supported by the evidence and, therefore, not clearly erroneous. Barbier testified that defendant was paid a total of \$26,402.48 for the timber removed from plaintiff’s property. The court subtracted the \$12,000 that defendant indisputably paid plaintiff for the first three truckloads under the modified contract. The trial court then reached a total of \$14,402.48, the amount defendant received for

⁴ “This Court reviews the trial court’s determination of damages following a bench trial for clear error.” *Alan Custom Homes, Inc*, 256 Mich App at 513.

⁵ Defendant’s other theory of damages was that plaintiff was limited to the \$8,000 difference between the original contract price and the modified contract price. Plaintiff argued that she was entitled to between \$122,000 and \$143,314.

timber cut in excess of the contract. This was a reasonable calculation of plaintiff's actual damages, measured in the monetary value defendant received for the trees cut in excess of the modified contract, and was supported by the evidence submitted at trial. The court's calculation also renders plaintiff's arguments regarding the exact number of extra truckloads cut irrelevant because the court's calculation was based on the actual monetary value of the trees. Accordingly, the trial court's calculation of plaintiff's actual damages for the trees cut in excess of the modified contract was not clearly erroneous.

Defendant argues that the trial court erred by awarding plaintiff \$4,000 for waste, in the form of tree tops left on the property that were unnecessarily cut when defendant obtained timber in excess of the modified contract. It is undisputed that tree tops were left on the property and that more than three double-bottom truckloads of trees were cut from plaintiff's property. Accordingly, the trial court's award for waste was supported by the evidence and not clearly erroneous. See *Miller v Wykoff*, 346 Mich 24, 26-27; 77 NW2d 264 (1956).

The trial court's award of \$9,000 for the loss of the special tree was also not clearly erroneous. Plaintiff testified that she explicitly requested that defendant not remove the special tree and defendant acknowledged plaintiff's request. Plaintiff also testified that she spray-painted the special tree with a large "NO" to indicate its location. Nonetheless, plaintiff testified that the special tree was cut down and removed from her property. Accordingly, the trial court did not err by awarding plaintiff \$9,000 in damages for the loss of the special tree.

The trial court likewise did not clearly err by awarding plaintiff \$2,000 for smaller trees cut down on her property. Defendant argues that these smaller trees were cut down for safety purposes and left on the property. Therefore, defendant posits, the smaller trees were not converted and the trial court's finding was erroneous. Defendant misconstrues the trial court's ruling. The court did not compensate plaintiff for every small tree that had been cut down. Indeed, there was testimony that plaintiff and defendant discussed the need to cut down smaller trees at the time of the original contract formation. Instead, the court estimated that approximately \$2,000 worth of smaller trees had been removed to facilitate the removal of the trees cut in excess of the contract and, therefore, plaintiff should be compensated. Since it is undisputed that trees were removed from plaintiff's property in excess of the modified contract and that the smaller trees were cut to necessitate removal of the larger trees, the trial court's award of \$2,000 for the smaller trees was not clearly erroneous.

However, the trial court clearly erred by awarding plaintiff mental anguish damages. Our Supreme Court has held that emotional distress damages are unavailable for breach of contract, even if the breach was committed in bad faith. *Kevin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980). Further, trees cut for timber constitute property and the Supreme Court has held that a plaintiff may not recover noneconomic damages, such as damages for mental anguish, as the result of the negligent destruction of real or personal property. *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 264; 828 NW2d 660 (2013). There is no language in MCL 600.2919 or 600.2919a that entitles plaintiff to mental anguish damages for conversion, breach of contract, or trespass arising from defendant's actions. In the absence of statutory or caselaw authority to support plaintiff's argument, the trial court clearly erred by awarding plaintiff \$20,000 in mental anguish damages.

IV. TREBLING OF PLAINTIFF'S DAMAGES

The trial court trebled plaintiff's damages for the trees cut in excess of the modified contract and the smaller trees cut to facilitate the removal of the excess trees. Plaintiff argues that the court should have also trebled her damages for the loss of the special tree and the tree tops left on the property.⁶ Defendant argues that none of plaintiff's damages should have been trebled.

Under MCL 600.2919(1), a person who injures any trees on another's land without permission of the landowners is liable for treble damages unless the trespassory injury was "casual or involuntary." Treble damages may not be awarded when the trespass "was merely negligent." *Boylan v Fifty Eight LLC*, 289 Mich App 709, 726; 808 NW2d 277 (2010) (quotation marks and citation omitted). "Imposition of treble damages for statutory trespass requires a showing that the trespass was intentional and with knowledge that it was without right." *Id.* (quotation marks and citation omitted).

The trial court stated that it found that defendant's overcutting of trees from plaintiff's property was "negligent," i.e., defendant merely forgot about the modified contract when instructing the lumbermen. However, the court nonetheless trebled plaintiff's damages for the trees cut in excess of the modified contract and the smaller trees cut to facilitate the removal of the extra timber.

We conclude that the trial court did not clearly err by trebling plaintiff's damages for the trees cut in excess of the modified contract of the smaller trees removed to facilitate the excess cutting. However, the court clearly erred by declining to treble plaintiff's damages for the loss of the special tree and waste.

Defendant's lumbermen cut down trees in excess of the modified contract, smaller trees to facilitate the removal of those excess trees, extra tree tops, and the special tree. Defendant testified that he was aware that the contract had been modified to only three truckloads and that the special tree was not to be cut down. While defendant may not have maliciously violated these agreements, he nonetheless failed to communicate these conditions to the lumbermen. In other words, defendant's trespass was not merely negligent because he does not assert that he had a "good faith and honest belief that he possessed the legal authority to commit the complained-of act [] sufficient to avoid treble damage liability." *Id.* at 725-726 (formatting, quotation marks, and citations omitted). Defendant was aware that he did not have the legal authority to remove more than three truckloads or cut down the special tree; thus, plaintiff was entitled to treble damages for defendant's actions.

The trial court also clearly erred by declining to treble plaintiff's \$4,000 in damages for waste, in the form of the tree tops left on the property. Our Supreme Court has held that clean-

⁶ Plaintiff also argues that the trial court should have trebled her mental anguish damages. However, as discussed above, the trial court erred by awarding plaintiff mental anguish damages and, accordingly, we need not address whether those damages should have been trebled.

up costs for tree tops and debris left on a plaintiff's property should be trebled under the statute. *Miller*, 346 Mich at 26-27; *Schankin v Buskirk*, 354 Mich 490, 494-495; 93 NW2d 293 (1958).

In sum, defendant removed the excess trees, the special tree, smaller trees, and tree tops without the permission of plaintiff, the landowner, and, therefore, was liable for treble damages. MCL 600.2919(1).⁷

V. LIBEL

Plaintiff next argues that the trial court erred by finding that defendant established libel and by awarding defendant damages and attorney fees based on that finding.

To prove libel, defendant was required to establish:

1) a false and defamatory statement concerning the [defendant], 2) an unprivileged communication to a third party, 3) fault amounting to at least negligence on the part of the publisher, and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. [*Collins v Detroit Free Press, Inc*, 245 Mich App 27, 32; 627 NW2d 5 (2001), quoting *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992).]

In ruling for defendant, the trial court stated:

Now, with respect to the libel, I've read the article, Defendant's 19. [Plaintiff] contends [defendant] and his son misled her and she's quoted:

"I'm not trying to be vindictive or anything, I just feel like he took advantage of me," she said.

And I think that is a libel. There is no evidence that he took advantage of her.

She had her son present when he was there. She talked with her other sons. She had a son call him to modify the contract.

So essentially this portrays this defendant, who is in this business of buying standing timber and selling it to these sawmills, who's been doing this for years and years, and it casts him in the light of someone who goes about preying on people through fast practices, shady practices.

⁷ Plaintiff has presented no authority in support of her argument that her damages should be trebled under both MCL 600.2919(1) and 600.2919a, i.e., that she should receive six times her actual damages.

And she initiated this contact to the paper, and so when she told the paper that, that's a libel.

The trial court erred by finding that plaintiff's quoted statement in the newspaper article constituted libel. Without extrapolation, the court found that plaintiff's statement, "I'm not trying to be vindictive or anything, I just feel like he took advantage of me," was libelous. This finding was erroneous for two reasons.

First, plaintiff's statement can reasonably be read as describing her personal feelings regarding the situation. Plaintiff stated that she *felt* that defendant took advantage of her. There can be little doubt that plaintiff felt that way, and likely continues to feel as such. Under this view, plaintiff statement was true and, therefore, not defamatory or libelous. See *Collins*, 245 Mich App at 33 ("substantial truth is an absolute defense to a defamation claim").

Second, plaintiff's statement can reasonably be read as her opinion. That is, by using the word "feel," plaintiff meant that it was her *opinion* that defendant took advantage of her. It is true that "a statement of 'opinion' is not automatically shielded from an action for defamation because 'expressions of opinion' may often imply an assertion of objective fact." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 128; 793 NW2d 533 (2010) (quotation marks and citation omitted).

As explained by the United States Supreme Court, the statement "In my opinion Jones is a liar" may cause just as much damage to a person's reputation as the statement "Jones is a liar." If a statement is about a matter of public concern, it is protected speech under the First Amendment, unless it can be objectively proven to be false. Thus, a statement of opinion that can be proven to be false may be defamatory because it may harm the subject's reputation or deter others from associating with the subject. [*Id.*]

Assuming, arguendo, that defendant's business reputation is "a matter of public concern," there was no evidence to prove plaintiff's statement of opinion objectively false. It is undisputed that defendant removed more trees from plaintiff's property than provided for in the modified contract. This action in itself could reasonably be construed as defendant "taking advantage" of plaintiff. In any event, even if defendant did not act in bad faith or maliciously toward plaintiff by removing the extra timber, there is no evidence in the record to establish that plaintiff's statement of opinion was objectively false. Accordingly, the trial court erred by finding plaintiff

liable for libel, awarding defendant \$85,000 in damages, and awarding defendant attorney fees⁸ for his successful counterclaim.⁹

VI. CASE EVALUATION

The parties bring competing arguments regarding defendant's motion for case evaluation sanctions. Plaintiff argues that defendant improperly disclosed the case evaluation in violation of court rule, while defendant argues that the trial court erred by denying his motion for case evaluation sanctions.

A. DISCLOSURE OF CASE EVALUATION

Plaintiff asserts that defendant, by disclosing the case evaluation in its motion for case evaluation sanctions, violated MCR 2.403(N)(4),¹⁰ which provides:

The ADR clerk shall place a copy of the case evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the clerk of the court. In a nonjury action, the envelope may not be opened and the parties may not reveal the amount of the evaluation until the judge has rendered judgment.

In *Cranbrook Prof Bldg, LLC v Pourcho*, 256 Mich App 140; 662 NW2d 94 (2003), "the case evaluation was revealed to the court before commencement of trial under the presumption that the case would be tried by a jury." *Id.* at 144. A bench trial was subsequently held. *Id.* After trial, the trial court vacated its judgment and granted a new trial, finding that MCR 2.403(N)(4) was violated. *Id.* at 142. This Court reversed, holding in part that:

Bennett [v Medical Evaluation Specialists, 244 Mich App 227; 624 NW2d 492 (2000)], *supra*, does not hold that a new trial is required in every case in which a violation of MCR 2.403(N)(4) occurs. Rather, the appropriate sanction depends on the particular facts of the case. This case is distinguishable from *Bennett, supra*, on several grounds. In *Bennett, supra*, the case-evaluation results were revealed to the trial court after the conclusion of a bench trial. The *Bennett* Court concluded that the plaintiff's act of revealing the results was a deliberate attempt to influence the trial court's decision.

⁸ MCL 600.2911(7) provides: "An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages *including attorney fees.*" (Emphasis added).

⁹ Because we find that defendant did not establish libel, we need not address plaintiff's alternative argument, i.e., that defendant did not present sufficient evidence to establish his alleged damages for libel.

¹⁰ The interpretation and application of court rules are issues this Court reviews de novo. *Ivezaj v Auto Club*, 275 Mich App 349, 356; 737 NW2d 807 (2007).

The essence of the *Bennett* decision is the prohibition against revealing the results of a case evaluation to a judge in a nonjury trial until judgment has been rendered. [*Cranbrook Prof Bldg*, 256 Mich App at 144.]

Even if we assume that a violation of MCR 2.403(N)(4) occurred, the facts of this particular case do not warrant a new trial. First, when defendant disclosed the case evaluation, the court had already rendered judgment. The court had found for plaintiff on her claims of trespass, breach of contract, and conversion, and found for defendant on his claim of libel. Plaintiff's claim that the January 19, 2010 judgment was not a "judgment" because it did not close all the remaining claims in the case, e.g., attorney fees and costs, is without merit. MCR 2.403(O) allows a party to seek case evaluation sanctions and the determination of those possible sanctions requires the disclosure of the case evaluation. Second, there is no indication that defendant sought to influence to trial court's decision by disclosing the case evaluation. Indeed, the court had already rendered its verdicts on plaintiff's claims and defendant's counterclaim. Verdicts had been rendered in neither *Bennett* nor *Cranbrook* when those case evaluations were disclosed. Third, the trial court asserted that it would not be influenced the disclosure of the case evaluation.

In sum, there is no evidence that defendant sought to influence the court by disclosing the case evaluation, there is no evidence that the court was in fact influenced by the disclosure, and the court had already issued its verdicts when the case evaluation was disclosed. Accordingly, under the facts of this case, a new trial before a new judge is not warranted.

B. CASE EVALUATION SANCTIONS

Defendant argues that the trial court erred by denying his motion for case evaluation sanctions. We need not address the trial court's decision and rationale, however, because, under this opinion, defendant is not entitled to case evaluation sanctions.¹¹

"Generally, a party who rejects a case evaluation award is subject to sanctions if the party does not improve its position at trial." *Rohl v Leone*, 258 Mich App 72, 75; 669 NW2d 579 (2003). "The purpose of this rule is to encourage settlement, deter protracted litigation, and expedite and simplify the final settlement of cases by placing the burden of litigation costs on the party who demands a trial by rejecting the case evaluation award." *Id.* (quotation marks and citation omitted).

In this case, the case evaluation panel unanimously awarded plaintiff \$60,000 on her claims against defendant and awarded defendant \$0 on his counterclaim against plaintiff. Plaintiff rejected both awards while defendant accepted both. Thus, to avoid liability for case evaluation sanctions, plaintiff was required to improve her position at trial by 10% of the case evaluation, i.e., a net judgment of \$66,000 in her favor. MCR 2.403(O)(3). The trial court's

¹¹ We review a trial court's decision on a motion for case evaluation sanctions under MCR 2.403(O) for an abuse of discretion, but review de novo the interpretation and application of court rules. *Ivezaj*, 275 Mich App at 356.

final judgment resulted in a net liability for plaintiff of \$2,792.56. However, as discussed above, the trial court erred by awarding plaintiff \$20,000 in mental anguish damages, failing to treble plaintiff's damages for the loss of the special tree (\$9,000) and the tree tops (\$4,000), and awarding defendant \$85,000 on his counterclaim for libel. Factoring in these errors, plaintiff's net judgment is an award of \$88,207.44. Thus, plaintiff improved her position at trial by more than 10% of the case evaluation and, therefore, defendant is not entitled to case evaluation sanctions.¹²

VII. PLAINTIFF'S ATTORNEY FEES UNDER MCL 600.2919a(1)

Plaintiff argues that the trial court abused its discretion by refusing to award her requested attorney fees of \$209,720.17 under MCL 600.2919a(1).¹³ Plaintiff asserts that the trial court violated the procedure set forth by our Supreme Court in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).¹⁴

In *Smith*, the Supreme Court set forth the following analysis for determining reasonable attorney fees:

We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. . . . Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors. [*Id.* at 531.]

The *Wood* factors referenced by the Supreme Court are:

(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Id.* at 529, quoting *Wood v Detroit*

¹² Because defendant accepted the case evaluation awards, plaintiff is not entitled to case evaluation sanctions. MCR 2.403(O)(1).

¹³ MCL 600.2919a(1) provides that a plaintiff damaged as a result of statutory conversion may recover reasonable attorney fees.

¹⁴ We review the reasonableness of a trial court's award of attorney fees for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

Auto Inter-Insurance Exch, 413 Mich 573, 588; 321 NW2d 653 (1982) (citations omitted in *Smith*).]

MRPC 1.5(a) overlaps the *Wood* factors, *Smith*, 481 Mich at 529, and includes:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

“The above factors have not been exclusive, and the trial courts could consider any additional relevant factors.” *Smith*, 481 Mich at 530.

As a preliminary matter, plaintiff appears to claim that defendant bore the burden of establishing that plaintiff’s billed attorney fees were unreasonable. This argument is legally erroneous and without merit. *Id.* at 528-529 (“As all agree, the burden of proving the reasonable of the requested fees rests with the party requesting them”).

Nonetheless, we conclude that the trial court abused its discretion in its calculation of plaintiff’s attorney fees. Under *Smith*, a trial court must first calculate a reasonable hourly fee and multiply it by a reasonable number of hours spent on the case. *Id.* at 531. While the trial court did comment on plaintiff’s attorney’s hourly rate in comparison with local averages and imply that it viewed the attorney’s billed hours as excessive, it did not specify a reasonable hourly rate nor multiply that rate by a reasonable number of hours. Such a calculation is a necessary starting point for the calculation of reasonable attorney fees. *Id.* Instead, the trial court considered that plaintiff was subject to a contingency fee arrangement and, accordingly, awarded plaintiff “one third of \$82,207.44, plus taxable costs, plus a positive adjustment to that fee of 80 hours at \$225.00 per hour to [plaintiff’s counsel] for extra work performed”

While the court discussed several of the *Wood*/MRPC factors, its failure to follow the steps of *Smith*, and its overreliance on plaintiff's contingent fee agreement, necessitates remand.¹⁵

VIII. MOTION FOR NEW TRIAL

Plaintiff argues that the trial court violated MCR 2.611(F) in denying her motion for a new trial.¹⁶ MCR 2.611(F) provides that, "In ruling on a motion for a new trial . . . , the court shall give a concise statement of the reasons for the ruling, either in an order or opinion filed in the action or on the record." However, as plaintiff acknowledges, "the absence of a court's reasons for denying a motion for a new trial does not necessarily require reversal or a remand." *Tempo, Inc v Rapid Electric Sales & Service, Inc*, 132 Mich App 93, 98; 347 NW2d 728 (1984).

On October 20, 2011, plaintiff moved for a new trial on four grounds, all but one of which was already ruled upon in the trial court's original judgments. In a written opinion and order, the court denied plaintiff's motion and explained its rationale regarding plaintiff's only newly raised argument. Plaintiff does not take procedural issue with this portion of the ruling. Plaintiff instead argues that the court's order was insufficient because it did not directly address the other three issues raised in plaintiff's motion. However, on the record at the motion hearing, the trial court stated that, "these are all issues that the Court has addressed before and I'm not – the Court sees no reason to change its position on the other issues[.]" On the record and in previous orders, the trial court had explained its reasoning for its ruling on plaintiff's other three asserted grounds. Accordingly, the trial court's statement at the motion hearing merely reaffirmed these rulings and constituted "a concise statement of the reasons for the ruling [on plaintiff's motion for a new trial] . . . on the record." MCR 2.611(F). Further, even if the trial court's statement was insufficient under the court rule, plaintiff has not established why reversal or remand would be necessary on this basis in this particular case. See *Tempo, Inc*, 132 Mich App at 98.

IX. MOTION FOR RECONSIDERATION

Defendant argues that the trial court erred by granting plaintiff's "motion for reconsideration." After hearing argument on the motion, the court awarded plaintiff an additional \$5,000 in mental anguish damages, \$6,000 for smaller trees, and \$4,000 for waste.

As a preliminary matter, defendant's argument that plaintiff brought the incorrect motion does not control. It is true that a motion for reconsideration is properly brought only for "rehearing or reconsideration of the decision on a motion," MCR 2.119(F)(1), and that plaintiff's

¹⁵ Our conclusion should not be read to imply that the trial court's final calculation of plaintiff's reasonable attorney fees was either excessive or inadequate.

¹⁶ A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *Campbell v Human Servs Dep't*, 286 Mich App 230, 243; 780 NW2d 586 (2009). The interpretation and application of court rules are issues this Court reviews de novo. *Ivezaj*, 275 Mich App at 356.

motion should have been styled as one for relief from judgment, MCR 2.612, given that she sought “reconsideration” of issues litigated at trial that the court had decided in its January 19, 2010 judgment. However, courts are not bound by the labels parties attach to their claims, *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012), and the trial court appears to have treated plaintiff’s motion as one for relief from judgment. See MCR 2.517(B); 2.612; 2.613. Accordingly, defendant is not entitled to relief on procedural grounds.

Defendant’s substantive arguments regarding plaintiff’s motion have already been addressed.¹⁷ As discussed above, the trial court erred by awarding plaintiff mental anguish damages of any kind but did not err by awarding plaintiff \$6,000 in damages for the smaller trees nor \$4,000¹⁸ for waste in the form of the tree tops left on the property.

X. CONCLUSION

The trial court’s verdicts for plaintiff on her claims of breach contract, statutory conversion, and trespass are affirmed. Plaintiff’s damages for the loss of the special tree are trebled from \$9,000 to \$27,000 and for waste from \$4,000 to \$12,000. Her award of \$20,000 in mental anguish damages is reversed. All of plaintiff’s other damages are affirmed, but we vacate the trial court’s award of plaintiff’s reasonable attorney fees under MCL 600.2919a(1) and remand for further proceedings consistent with this opinion.

The trial court’s verdict for defendant on his counterclaim for libel is reversed, as are defendant’s resulting award of \$85,000 in damages, and attorney fees. Finally, we affirm the trial court’s denial of defendant’s motion for case evaluation sanctions.

We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Douglas B. Shapiro

¹⁷ “[T]his Court reviews for an abuse of discretion a trial court’s ruling on a motion for relief from judgment.” *Dep’t of Environmental Quality v Waterous Co*, 279 Mich App 346, 364; 760 NW2d 856 (2008).

¹⁸ As discussed above, the trial court did err by declining to treble the \$4,000 award for waste.