

STATE OF MICHIGAN
COURT OF APPEALS

SAFA JUNDY and FADWA JUNDY,

Plaintiffs/Counter-Defendants-
Appellees,

v

CITY OF DETROIT,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

March 29, 2007

No. 264039

Wayne Circuit Court

LC No. 02-207409-CZ

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Defendant appeals from a judgment of the circuit court entered on a jury verdict in favor of plaintiffs on their claims for trespass and trespass-nuisance. We affirm.

Plaintiffs owned a store in the City of Detroit known as Concord Market. The store suffered substantial damage in a fire on September 11, 1998. Although plaintiffs received an insurance settlement, the property remained unrepaired and unoccupied. After complaints to the city, a building inspector in July 2000 determined that the building needed to be demolished under the Dangerous Building Ordinance. 1984 Detroit City Code, § 12-11-28.0 *et seq.* Defendant demolished the building in November 2000. Thereafter, plaintiffs instituted this action seeking damages, arguing that defendant acted unlawfully in demolishing the building. Plaintiffs claim alleged trespass and trespass-nuisance.¹ Defendant counterclaimed, seeking recovery of the demolition costs.

The trial court granted summary disposition to plaintiffs and denied summary disposition to defendant. This order was the subject of a prior appeal, which upheld the trial court's decision. *Jundy v Detroit*, unpublished opinion per curiam (No. 248389, issued July 27, 2004).

¹ There was also an additional claim of gross negligence. That claim, however, was dismissed and is not at issue on appeal.

Defendant raises issues related to liability that are not properly before this Court. Specifically, defendant argues that it is immune from suit for trespass and that it is not liable for a trespass-nuisance because the demolition was authorized by law. But this Court in a prior appeal from the trial court's grant of summary disposition to plaintiffs addressed these issues. Specifically, this Court held that there was no genuine issue of material fact that the city's action constituted trespass and trespass-nuisance. *Jundy, supra, slip op* at 9. Moreover, another issue defendant attempts to raise on this appeal, whether it is entitled to recover the costs of demolition, was also decided in the prior appeal. This Court specifically stated that because "defendant lacked proper lawful authority to demolish plaintiff's market, there is no basis for defendant to recover its demolition costs as requested in the counterclaim, and that claim was properly dismissed." *Id.* at 10.

Because the issues of the lawfulness of the demolition and defendant's liability for unlawfully demolishing the building were determined in the prior appeal, those issues will not be decided differently on this appeal. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000). Further, we are not persuaded by defendant's arguments that we should decline to apply the law of the case doctrine.

The only issue before the trial court on remand and, therefore, the only issue before us in this appeal, is the determination of damages. The jury's verdict awarded damages in three areas: \$40,000 for the value of the contents of the building, \$79,000 for lost income, and \$389,816 for the loss of the building.

With respect to both the contents and lost income claims, we first consider defendant's argument that plaintiffs did not themselves suffer damages on these items. Specifically, defendant argues that damages were not properly awardable for these items because the corporation that occupied the premises, not plaintiffs, suffered any loss in this respect. Plaintiffs individually owned the real estate, but a separate legal entity, Concord Market, Inc., of which plaintiffs were the shareholders, conducted the business of the store and acted as tenants of the building. While this is a potentially meritorious argument, see *Environair v Steelcase, Inc*, 190 Mich App 289, 292; 475 NW2d 366 (1991), overruled in part on other grounds in *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83; 706 NW2d 843 (2005), we agree with the trial court that it was inapplicable here. When the issue was raised in the trial court, the trial court indicated that it did not believe that it was an issue, but would grant plaintiffs the opportunity to amend and add the corporation as a party if it were. Thus, even if the trial court erred in concluding that it was not an issue, that error would be harmless as the trial court would merely allow the corporation to be added as a party.

Moreover, we are not persuaded that the trial court erred. Plaintiff Safa Jundy testified that the corporation was dissolved at some point after the fire. Therefore, ownership of the contents of the building passed from the corporation to plaintiffs. With respect to the loss of income issue, defense counsel conceded in the trial court that, because this case involved a subchapter S corporation, the income passed through to plaintiffs and, therefore, plaintiffs suffered any loss of income.

Next, defendant argues that the trial court erred in denying its motion for judgment NOV or new trial because the verdict was against the great weight of the evidence. We review the denial of the motion for a judgment NOV de novo. *Wiley v Henry Ford Cottage Hosp*, 257 Mich

App 488, 491-492; 668 NW2d 402 (2003). Judgment NOV should be granted only if the evidence fails to establish the claim as a matter of law. *Id.* at 492. Further, we review the trial court's decision on the motion for new trial for an abuse of discretion. *Id.* at 498. Where the claim is that the jury verdict is against the great weight of the evidence, the verdict may be overturned only if it is manifestly against the great weight of the evidence. *Id.* The verdict should not be overturned if there is competent evidence to support it. *Id.*

We are not persuaded that the trial court erred in denying judgment NOV and the motion for new trial. First, defendant argues that the award of \$40,000 for the contents was clearly excessive because plaintiffs' own expert testified that the value of the contents was only \$20,087.50. That, however, only referred to the value of equipment in the building. Plaintiff Safa Jundy also testified that there was between \$25,000 and \$30,000 in undamaged inventory stored in the building. Accordingly, the jury's award of \$40,000 was within the amount supported by the testimony.

With respect to the issue of lost income, defendant argues that the demolition could not have caused lost income because the business had been closed for two years between the fire and the demolition. Plaintiffs requested damages for lost income commencing one year after the demolition, to reflect the estimated time that it would have taken to renovate the building and resume the business. Further, plaintiffs presented evidence that the annual lost income was \$24,000 and they requested that lost profits be awarded for a four-year period. The jury's award of \$79,000 on this item is less than requested by plaintiffs.

Furthermore, defendant's argument on appeal does not dispute the amount of the lost profits, only whether there were any lost profits attributable to the demolition. With respect to this issue, plaintiffs offered testimony regarding why the business remained closed for two years after the fire and as to their future plans. Specifically, Safa Jundy testified that the insurance payment was not settled until approximately a year after the fire. Furthermore, plaintiffs explored their options regarding repairing versus replacing the building as well as purchasing neighboring vacant lots from the city to expand their operation, which apparently would require rezoning. Moreover, Safa Jundy testified that they had received bids from a contractor the month before the demolition. Indeed, a site plan was submitted to defendant's planning department approximately one month before the demolition. Accordingly, a jury could reasonably conclude that plaintiffs were going to reopen their business and that the city's demolition of the building interrupted that process. Therefore, such a conclusion was not against the great weight of the evidence.

Next, defendant argues that the verdict awarding \$389,816 was excessive and against the great weight of the evidence. In this respect, defendant's argument is without merit because that award was supported by the testimony of plaintiff's expert. Defendant objects to the method employed by plaintiffs' expert in reaching the valuation. We, however, believe that the expert's approach was an acceptable method.

The measure of plaintiffs' damages is the fair market value of the building before demolition. See *Strzelecki v Blaser's Lakeside Industries of Rice Lake, Inc*, 133 Mich App 191, 193-194; 348 NW2d 311 (1984). In *Strzelecki*, the Court noted that the settled rule of law is that the measure of damages to real estate where the property is irreparable is the difference in market value before and after the damage. If the damage is repairable, the damages are the cost of repair

unless the cost of repair exceeds the market value. Here, obviously the damage is irreparable because the building was demolished. The challenge lies in establishing the market value. Because the building was uninhabitable at the time of its demolition, it is not simply a matter of finding comparable buildings with recent sales to establish value. Rather, we believe that the value of the building is how much it would save in building costs to repair the damaged building versus constructing a new one. That is, plaintiffs' damages are how much more it will cost them to replace the demolished building than it would have cost them to repair the damaged building.²

While we would not necessarily approach the question in the same manner that plaintiffs' expert did, we believe that he essentially sought to answer the question how much the damaged building would have saved plaintiffs by allowing repair instead of replacement and the expert reached an appropriate end result. The expert took the replacement cost of the building (i.e., the cost of building a new structure comparable to the existing structure) and reduced it by a depreciation factor. The expert then reduced that figure by what it would have cost to repair the old structure, reaching a value of almost \$390,000. If anything, plaintiffs' expert's approach was more favorable to defendant than necessary. Based upon the expert's figures, it will cost plaintiffs considerably more than an additional \$390,000 to build a new building than it would have cost to repair the damaged building. Specifically, the expert testified that the cost of replacing the demolished building with one of the same size would be approximately \$753,000, while the cost of repairing the damaged building would have been \$175,000. Thus, plaintiffs would have to spend an additional \$578,000 more to replace the building than it would have cost to merely repair it. While it could be argued that that represents the full measure of plaintiffs' damages, the \$188,000 difference (\$578,000 minus \$390,000) does reflect the fact that a repaired building, because part of the structure would be older, would presumably be less valuable than a completely new building and plaintiffs would enjoy that enhanced value.

Defendant's expert opined that the building had only minimal value—\$800. This essentially concludes that the cost of repair would exceed the value of the repaired building. As the Court in *Strzelecki, supra* at 196-198, pointed out, methods other than replacement cost less depreciation may be applied and defendant was free to argue that its expert's approach was the better one. But the jury was certainly not compelled to accept defendant's approach. It was reasonable for the jury to accept the replacement cost less depreciation method employed by plaintiffs' expert and we decline to substitute our judgment for that of the jury.

Defendant also argues that plaintiffs' expert should not have been permitted to testify because he did not rely upon relevant market information. Defendant relies upon an unpublished opinion of this Court in support of his argument. Not only does that opinion lack authority because it is unpublished, but the question posed in that case is not even remotely relevant to the issue present here. In the unpublished case, the Court dealt with the opinion of an appraiser who admitted that he employed no market data in arriving at an appraisal of the market value of the

² Of course, depending upon the condition of the building, it is conceivable that it was not economically feasible to repair. That, however, presents a question of fact and plaintiffs' expert was of the view that the building was repairable.

home. In the case at bar, the expert utilized a construction cost approach. This did not require an analysis of market data, but an analysis of construction cost. And the fact that plaintiffs' expert was a builder certainly provided a basis for the trial court to admit his testimony.

Finally, defendant challenges the award of mediation sanctions. Specifically, defendant argues that the trial court erred in awarding sanctions at the billing rate of \$300 per hour. Plaintiffs are entitled to receive sanctions based upon a reasonable hourly rate. *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002). A reasonable fee is not equivalent to the actual fee charged. *Id.* In fact, this Court has even held that a reasonable fee may even be greater than the billing rate actually charged. *Cleary v The Turning Point*, 203 Mich App 208, 211-212; 512 NW2d 9 (1993). Defendant's only argument in support of its position is that the hourly rate granted by the trial court exceeds the state-wide median billing rate for full-time attorneys of \$175, along with the unsupported assertion that it is defendant's position that the case does not merit an hourly billing rate above the state-wide median rate. The trial court's decision on what constitutes a reasonable hourly rate is reviewed for an abuse of discretion. *Zdrojewski, supra* at 73. We are not persuaded that the trial court abused its discretion.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio