

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

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KAREN SEDLOW and GARY HOYLE,

Plaintiffs-Appellants,

v

JEFF BAILEY and GINA BAILEY,

Defendants-Appellees.

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UNPUBLISHED

May 17, 2002

No. 229319

Genesee Circuit Court

LC No. 98-062197-CZ

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

A jury returned a verdict in defendants' favor on plaintiffs' claims for trespass and nuisance. Plaintiffs brought a motion for judgment notwithstanding the verdict, which was denied. Plaintiffs appeal as of right, and we affirm.

This case involves a dispute between neighboring property owners over the placement and use of a swimming pool and other structures in defendants' backyard. At trial, plaintiffs alleged that defendants were liable for trespass because defendants placed their garden, swing set, sand box, outdoor lighting and pool filter on or too close to plaintiffs' property. Regarding nuisance, plaintiffs asserted that defendants' pool filter was excessively loud; that defendants allowed the pool filter to run after 10:00 p.m., in violation of a local noise ordinance; that the filter was placed too close to the property line, in violation of the setback requirement; and that a large oak tree on defendants' property was a nuisance because of disease and falling limbs.

On appeal, plaintiffs argue that the trial court erred in denying their motion for judgment notwithstanding the verdict (JNOV). We review the trial court's decision de novo by viewing the evidence in the light most favorable to the nonmoving party, in this case defendants, to determine whether plaintiffs established their claim as a matter of law. See *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). If reasonable jurors honestly could have reached different conclusions based on the evidence, neither the trial court nor this Court may substitute its judgment for that of the jury. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

Plaintiffs first argue that the trial court erred in denying their motion for JNOV on their trespass claim. We disagree. The evidence presented at trial raised questions regarding the actual location of the property line. No survey or surveyor testimony was introduced into

evidence. The jury was obliged to accept plaintiffs' contention that the fence was built inside the true property line. Plaintiffs correctly assert that there was uncontradicted testimony that defendants placed lights on plaintiffs' fence for a party without permission, and that defendants' child kicked off the fence when using the swing set. Plaintiffs argue that once a trespass is proven, the plaintiff is at least presumptively entitled to nominal damages, relying on *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). However, while plaintiffs made this argument in their motion for JNOV, they did not seek jury instructions to this effect, and did not argue the trespass claim to the jury, even in the alternative, based on nominal damages for trespass to the fence. Further, although nominal damages are recognized where a plaintiff has established a trespass, even where there are no actual damages, the trespass itself must be based on an *appreciable* intrusion onto land in violation of the plaintiff's right to exclude. *Adams, supra* at 72. We cannot say that the temporary lights and the kicking while swinging were appreciable intrusions as a matter of law so as to entitle plaintiffs to a JNOV.

Plaintiffs also argue that the trial court erred in denying their motion for JNOV on their nuisance claim. We disagree.

Initially, we note that plaintiffs did not seek jury instructions addressing the claim that the placement of the pool filter in the setback area was a nuisance per se and the trial court did not instruct on that theory. Because plaintiffs did not seek a verdict on this theory, we need not consider it on appeal.

Further, plaintiffs did not establish as a matter of undisputed fact and law that the pool pump was a private nuisance. A claim for nuisance requires a showing of a substantial and unreasonable interference with plaintiff's right to quiet enjoyment. *Id.* Here, there was conflicting evidence regarding the actual noise level of the pool pump and whether the noise generated by the pool pump was unreasonably loud or intrusive. On this record, the jury could reasonably have found for defendants.

With regard to the oak tree, the evidence indicated that the tree was on defendants' property, that none of the branches had fallen onto plaintiffs' property, and that no disease had spread to plaintiffs' trees. Thus, the evidence failed to demonstrate that the tree caused significant harm to plaintiffs' property, and it was merely speculation whether the tree would pose a threat to plaintiffs' property at some undetermined time in the future. The trial court did not err in denying plaintiffs' motion for JNOV with respect to the nuisance claim.

Plaintiffs further argue that the trial court erred in denying their motion in limine to preclude defendants from presenting evidence about plaintiffs' conduct in spraying defendants with water, taking pictures of defendants in their home, and maliciously contacting local government and law enforcement officials to make complaints about defendants.

A trial court's decision to admit evidence will not be disturbed absent an abuse of discretion. *Cole v Eckstein*, 202 Mich App 111, 113; 507 NW2d 792 (1993). This Court, in reviewing a trial court's decision to admit evidence, will not assess the weight or value of the evidence, but only determine whether the evidence was the kind properly considered by the jury. *Id.* at 113-114. An abuse of discretion exists only when an unprejudiced person, considering the

facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Cleary v The Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1993).

The evidence in question was relevant to plaintiffs' credibility and motivation in bringing their claims. MRE 401, 402; *McDonald v Stroh Brewery Co*, 191 Mich App 601, 605; 478 NW2d 669 (1991). Also, plaintiffs have not shown that the evidence was offered for an improper character purpose under MRE 404. Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403; *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361-362; 533 NW2d 373 (1995). The trial court did not abuse its discretion.

Affirmed.

/s/ Michael R. Smolenski

/s/ Janet T. Neff

/s/ Helene N. White