

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

KEE NEE MOO SHA, INC., Appellant,

v.

BAPTIST MISSIONS OF MINNESOTA-PLYMOUTH POINT BIBLE CAMP, et al., Respondents.

No. C4-90-1167.

Dec. 31, 1990.

Appeal from Cass County District Court, Cass County; William E. Kalar, Judge.

Considered and decided by GARDEBRING, P.J., and DAVIES and NIERENGARTEN, [FN*] JJ.

UNPUBLISHED OPINION

DAVIES, Judge.

*1 The trial court granted appellant Kee Nee Moo Sha, Inc., damages for trespass and an injunction against further trespass by respondents. Nonetheless Kee Nee Moo Sha appealed, seeking use of another and higher measure of damages, a more extensive permanent injunction, and costs, disbursements and attorney fees. We affirm.

FACTS

Appellant Kee Nee Moo Sha, Inc., is a family-owned corporation organized for the purpose of holding more than 100 acres of forested real estate near Hackensack, Minnesota. There is a resort on the southern end of the property. Respondents' trespass along the northern boundary of the property is the subject of this litigation.

In late 1976, in connection with the transfer of the respondent church's property to another church unit, a surveyor was hired to survey and mark the boundary between the appellant's and respondents' property. Shortly after the survey was completed, and while the brush was all cleared and orange flags marked the line, the surveyor walked the boundary line with, among others, Roland Reed, one of the church's pastors, pointing out in detail the location of the boundary.

About four years later, because Mr. Reed wanted to build more camp buildings as inexpensively as possible, he arranged for a local logger to cut about 100 pine trees in and near the main camp buildings. While most of the timber was cut on church property, 26 pines were cut on appellant's property. In addition, Mr. Reed asked the logger to clear cut nearly 100 birch and aspen from that same area

of appellant's property. Some 1,600 cubic yards of sand were also removed from the area, apparently for use in a drain field near the building project. These were the most substantial of numerous indications of trespass in the area of the boundary.

DECISION

I.

There are several possible measures of damages which can be used when trespass to property involves the taking of timber. One of the oldest is the "enhanced value" of the timber after being sawed and transported to the place of sale or transfer. See, *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491, 492-93 (1875). This measure is to be used when the trespass is willful. *Mississippi River Logging Co. v. Page*, 68 Minn. 269, 270, 71 N.W. 4, 5 (1897). The presumption in trespass cases where timber is cut is that the trespass is willful. *Id.* The burden of proof is upon respondents to show otherwise. *Id.* The trial court found it could not use the "enhanced value" measure, however, saying "Unfortunately, no evidence was introduced which would permit the Court to determine the value of the processed lumber." Consequently, the trial court used the stumpage value presented by respondents to set compensatory damages, and awarded punitive damages in addition to arrive at a fair award. The trial court, passing up statutorily authorized treble damages, chose to award punitive damages because even an award of treble damages for that taking would not adequately punish [respondents] or compensate [appellant] for the willful trespass which has occurred.

*2 We hold that this was justifiable under *Rector v. McCrossan*, 306 Minn. 143, 150, 235 N.W.2d 609, 613 (Minn.1975), and under the punitive damages statute, Minn.Stat. § 549.20 (1988).

McCrossan, while referring to various measures of damages, does not refer directly to punitive damages. Punitive damages may be awarded, however, when "the acts of the defendant show a willful indifference to the rights or safety of others." Minn.Stat. § 549.20, subd. 1. The trial court found that respondent's behavior was willful. This findings is supported by the evidence.

Minnesota Statutes provides:

Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including * * * the profitability of the misconduct to the defendant, * * * the attitude and conduct of the defendant upon discovery of the misconduct, * * * and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards.

Minn.Stat. § 549.20, subd. 3. The respondent cut the timber and removed the sand to obtain cheap building materials for the camp. Mr. Reed continued to deny any willful misconduct throughout the trial despite proof, and his ultimate admission, that he had been shown a clearly marked boundary prior to these takings. We hold that a just result was obtained by the trial court finding that treble damages would not be adequate, awarding compensatory damages plus punitive damages, and taking into account the total effect of these awards.

Appellant argues this was insufficient and asks for use of the "replacement value" measure of damages also authorized by McCrossan. But that measure of damages is applicable in certain instances where trees and shrubbery have aesthetic value to the owner as ornamental and shade trees or for purposes of screening sound and providing privacy.

McCrossan, 306 Minn. at 146, 235 N.W.2d at 611. Further, the supreme court qualified the use of that measure of damages by saying:

In instances where the cost of replacement is unreasonable or excessive in relation to the damage to the land itself, the court will, in its discretion, allow the jury to consider more than one measure of damages in order to permit flexibility and achieve a just and reasonable result.

Id. at 150, 235 N.W.2d at 613. The trial court indicated that the replacement value suggested by appellant was unreasonable. We agree.

II.

As to appellant's request for further injunctive relief:

The granting of an injunction generally rests within the sound discretion of the trial court, and its action will not be disturbed on appeal unless, based upon the whole record, it appears that there has been an abuse of such discretion.

Cherne Industrial, Inc. v. Grounds & Associates, Inc., 278 N.W.2d 81, 91 (Minn.1979). We do not find an abuse of discretion by the trial court. Without expressing an opinion on the issue, we also interpret the trial court decision as leaving open the question of adverse possession.

III.

*3 Finally, an award of attorney fees under Minn.Stat. § 549.21 "can only be upset upon a finding of abuse of discretion by the trial court." Gary Builders Supply, Inc. v. Menard, Inc., 378 N.W.2d 98, 101 (Minn.App.1985). While the only evidence presented by respondent suggesting there was no trespass were uncorroborated and conflicting statements by Mr. Reed, the proper measure of damages was disputed. In fact, respondents' measure of damages was adopted in part by the trial court. Where the record fails to show bad faith litigation and there were "bona fide issues to decide," refusal to grant attorney fees is not an abuse of discretion. Application of Hofstad, 376 N.W.2d 698, 702 (Minn.App.1985). We do not find an abuse of discretion.

Affirmed.

FN* Wm. J. Nierengarten, retired judge of the district court, acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

Not Reported in N.W.2d, 1990 WL 212222 (Minn.App.)