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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1742**

Richard Theusch,
Appellant,
Sharon Theusch,
Appellant,

vs.

Tad Berg, et al.,
Respondents.

**Filed April 27, 2010
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge**

Todd County District Court
File No. 77C305000492

Richard and Sharon Theusch, Osakis, Minnesota (pro se appellants)

Gordon H. Hansmeier, Gregory J. Hauptert, Rajkowski Hansmeier Ltd., St. Cloud, Minnesota (for respondents)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

In a prior appeal in this matter, this court reversed an award of damages to appellants, holding that Minn. Stat. § 160.22 (2008) (requiring a road authority to give notice to the owners of abutting land before cutting trees) does not provide for a private

cause of action, but the matter was remanded for consideration of appellants' claim under Minn. Stat. § 561.04 (2008) (prescribing damages for trespass to trees). Appellants now challenge the district court's decision on remand that denied them treble damages under the trespass-to-trees statute and that valued the trees based on the testimony of respondent township's witness. The record supports the district court's determination of the value of the trees, but based on this court's prior determination that the trees were cut without lawful authority, we reverse the district court's conclusion that the township is not liable for treble damages and remand for entry of judgment awarding treble damages to appellants against the township.

FACTS

The underlying facts of this more-than-six-year dispute between appellants Richard and Sharon Theusch and respondent Leslie Township over the cutting of trees on Theusch property in the township's road easement are set out fully in our first decision in this matter. *Theusch v. Berg*, No. A07-848, 2008 WL 1972487 (Minn. App. May 6, 2008), *review denied* (Minn. July 15, 2008). Briefly, in 2003, the township hired respondents Tad and Everett Berg to clear brush along Gateway Drive, which, in part, is located on an easement over Theusch property. *Id.* at *1. Bergs removed approximately 135 trees from Theusch property within 25 feet of Gateway Drive's centerline. *Id.* The township gave no notice to Theusches of its plan to remove the trees. *Id.* Theusches sued the township and Bergs. *Id.* The district court, in relevant part, concluded that although the removal of trees occurred within the township's right-of-way for Gateway Drive, the township's failure to give notice of the tree removal required by Minn. Stat.

§ 160.22 entitled Theusches to damages in the amount of \$5,600 for diminution in value of their property caused by the tree removal. *Id.*

On appeal, this court concluded that because Minn. Stat. § 561.04 (trespass to trees) expressly provides a private cause of action for a violation of section 160.22, it is unnecessary to imply a private cause of action under section 160.22. *Id.* at *6. We held that the township violated section 160.22 and was “without lawful authority” to cut the trees but reversed the award of damages entered and remanded for reconsideration of Theusches’ claims under section 561.04, which provides for treble damages ““unless upon the trial it appears that the trespass was casual or involuntary.”” *Id.* (quoting Minn. Stat. § 561.04).

On remand, Theusches attempted to relitigate matters decided in the first appeal and did not present any new evidence regarding the measure of damages for the removed trees. They introduced copies of damages estimates by James Mohler and Carl Vogt, who testified in the original trial, but the district court received these estimates for the limited purpose of providing a summary of Mohler’s and Vogt’s prior trial testimony. And the district court stated that it would rely on the testimony of witnesses who appeared in the second trial to determine damages because Mohler and Vogt were not present to be cross-examined.

The township and Bergs called two witnesses to testify about the value of the cut trees. One testified that the value of the trees was \$1,430; the other, relying on a guidebook “customarily relied on by appraisers,” valued the trees at \$5,213.

The district court found that the value of the trees was \$5,213, noting that it had considered but rejected the values testified to by one of the township's and Bergs' witnesses and contained in the reports offered by Theusches. The district court concluded that Bergs had acted in good faith in cutting the trees at the township's request such that Theusches were entitled only to single damages under section 561.04. This appeal followed.

D E C I S I O N

I. Replacement value of the trees

This court reviews a district court's award of damages for abuse of discretion. *Gabler v. Fedoruk*, 756 N.W.2d 725, 734 (Minn. App. 2008). Theusches do not challenge the district court's conclusion that the proper measure of damages is the replacement cost of the trees. *See Rector, Wardens & Vestry of St. Christopher's Episcopal Church v. C.S. McCrossan, Inc.*, 306 Minn. 143, 144–46, 235 N.W.2d 609, 610–11 (1975) (stating that in determining damages for wrongful removal of trees, the better rule is that where the trees have aesthetic value to the owner as ornamental and shade trees or to screen for sound or privacy, "replacement cost may be considered to the extent that the cost is reasonable and practical"). But Theusches argue that the district court should have found Vogt's valuation more credible than the testimony of the township's and Bergs' witness. Because this court defers to the district court's credibility determinations, we cannot conclude that the district court abused its discretion in determining the replacement value of the trees. *See* Minn. R. Civ. P. 52.01 (stating that this court gives due regard to the district court's opportunity to judge credibility of the

witnesses); *Citizens Nat'l Bank of Madelia v. Mankato Implement, Inc.*, 441 N.W.2d 483, 485 (Minn. 1989) (stating that credibility determinations are “the sole province of the finder of fact”).

II. Treble-damages provision of section 561.04

Theusches also argue that the district court erred by failing to award treble damages because Bergs entered their property without a legitimate reason and cut the trees in bad faith. Treble damages are appropriate under section 561.04 “unless upon the trial it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was the defendant’s, or that the person in whose service or by whose direction the act was done.” Minn. Stat. § 561.04. The statute is penal in character and must be strictly construed. *Helppie v. Nw. Drainage Co.*, 127 Minn. 360, 363, 149 N.W. 461, 462 (1914).

The township and Bergs assert their lawful authority to remove the trees, their reasonable belief in lawful authority, the involuntariness of trespass because the cutting was done for a legitimate purpose, and the existence of probable cause to believe that the removed trees were within the township’s right of way. But this court held in the first appeal that the township did not act with lawful authority in cutting the trees due to the township’s violation of section 160.22, so the first argument that the township or Bergs had lawful authority to remove the trees is without merit. *See Theusch*, 2008 WL 1972487, at *6.

Additionally, this court held that the width of the dedicated road is 25 feet to either side of the centerline and implicitly held that Theusches own fee title to the property from

which the trees were taken. *See id.* (holding that Theusches had a cause of action under section 561.04 for removal of trees from their property). That Theusches owned the property is the law of the case. *See Lange v. Nelson-Ryan Flight Serv., Inc.*, 263 Minn. 152, 155, 116 N.W.2d 266, 269 (1962) (stating that issues considered and adjudicated on a first appeal will not be reexamined or readjudicated on a second appeal of the same case). Although Bergs may have reasonably believed that the trees removed were within the right-of-way, there is nothing in the record that would support a reasonable belief by the township or Bergs that the township owned the land. We conclude that the district court's finding that Bergs had probable cause to believe that the land was owned by the township or the county is clearly erroneous.

Proof that the trespass was "casual or involuntary" is the only possible defense against imposition of treble damages in this case. Whether a trespass is the result of inadvertence or mistake is a question of fact. *Lawrenz v. Langford Elec. Co.*, 206 Minn. 315, 324, 288 N.W. 727, 731 (1939); *see Helppie*, 127 Minn. at 363, 149 N.W. at 462 (stating that whether cutting of trees was the result of an honest mistake is a question of fact).

Caselaw holds that a trespass to trees may be "casual or involuntary" even where the trees are purposefully cut. *See Helppie*, 127 Minn. at 363, 149 N.W. at 462 (concluding that if a contractor's foreman "in good faith" arranged with the owner of some trees to cut them but "through ignorance or mistake" cut trees from the wrong land while "honestly believing" that he was cutting the trees for which he had permission, "the trespass would be casual or involuntary"). And caselaw prohibits the award of treble

damages for trespass to trees where the trespasser acts in good faith, as opposed to willfully or with malice. See *Lawrenz*, 206 Minn. at 324, 288 N.W. at 731 (concluding that treble damages are allowed when a cutting of trees is not “inadvertent, or the result of an honest mistake”); *Helppie*, 127 Minn. at 363, 149 N.W. at 462 (stating that a trespass is “casual or involuntary” when it is not “willful” and not “intentionally and knowingly done against plaintiff’s property rights”); *Pluntz v. Farmington Ford-Mercury, Inc.*, 470 N.W.2d 709, 711–12 (Minn. App. 1992) (holding that single damages were appropriate where injury to trees was not malicious or intentional), *review denied* (Minn. July 24, 1991).

Here, the district court found that Bergs acted in good faith. The record supports the district court’s finding that Bergs acted in good faith and this finding supports a conclusion that their trespass was casual or involuntary. We therefore affirm the district court’s holding that Bergs are not liable to Theusches for treble damages.

The district court awarded single damages against Bergs as employees or subcontractors of the township but failed to address the township’s liability for having caused the removal of the trees. See *Lawrenz*, 206 Minn. at 320, 288 N.W. at 730 (stating that all persons participating in a tort are liable as tortfeasors); *Sandborn v. Sturtevant*, 17 Minn. 200, 205, 17 Gil. 174, 179 (1871) (stating that a person who requests the commission of a trespass is liable as a trespasser). Generally, we will not consider matters not decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But the township’s liability was argued to the district court, and we conclude that the holding in the prior appeal makes it unnecessary to remand this issue to

the district court. The township never asserted that it casually or involuntarily caused the trespass to trees; the township only asserted its authority to remove the trees. But we previously held that the township was without authority to remove the trees because they were removed in violation of section 160.22. Therefore, we conclude that the township is liable for treble damages for the trespass as a matter of law. We reverse the district court's determination that Theusches are not entitled to treble damages against the township and remand for entry of judgment consistent with this opinion.

III. Other issues raised by Theusches

We conclude that the district court properly declined to address additional issues raised by Theusches on remand in an attempt to relitigate issues that were determined in the first appeal and became conclusive on July 15, 2008, when the Minnesota Supreme Court denied Theusches' petition for further review. *See* Minn. R. Civ. App. P. 136.02 (stating that judgment shall be entered immediately upon the Minnesota Supreme Court's denial of a petition for review); *see also Hoyt Inv. Co. v. Bloomington Comm. & Trade Ctr. Assocs.*, 418 N.W.2d 173, 176 (Minn. 1988) (holding, in a civil case, that a decision of this court became final upon the Minnesota Supreme Court's denial of the petition for further review). For the same reason, we do not reach those arguments in this appeal.

Theusches also assert on appeal that they "were not given notice of Respondent's production of witnesses." But this argument has not been adequately briefed to permit meaningful review, and Theusches have not established any obvious prejudice because the same witnesses testified in the first trial. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that an assignment of error based on mere

assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection). Similarly, Theusches' assertions that Sharon Theusch was "intimidated" at a deposition by respondents' counsel; that the district court was biased; that they were denied "an opportunity for a jury"; and that they are the victims of "property fraud . . . and a combined effort to deprive them of their Constitutional and Civil Rights" are deemed waived because of inadequate briefing.

Affirmed in part, reversed in part, and remanded.