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DISTRICT IV

May 21, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP1446

Barbara Warthen v. David C. Kelly (L.C. # 2011CV328)

Before Lundsten, Higginbotham and Sherman, JJ.

Barbara Warthen appeals a judgment awarding her money damages for the destruction of two old oak trees on her property. She argues that the circuit court should have granted her motion for additur because the jury awarded substantially less than the amount calculated by the expert witnesses, showing that the jury determined the damages by speculation or guesswork. Upon our review of the parties' briefs and the record, we conclude at conference that the judgment should be summarily affirmed.

Warthen challenges two of the answers in the special verdict. First, she argues that the replacement cost of the large, living trees was \$152,534.88 as calculated by her expert witness, John Correll. Correll calculated this amount by determining the largest tree that could be moved to the location, assigning a dollar value to the tree including its installation and warranty, dividing the dollar value by the number of square inches in the tree, and multiplying the total square inches of the trees that were cut down. The jury awarded \$2575 to replace the trees.

Warthen's second challenge relates to the jury's award of \$8520 to restore her property. Her expert witness, Steven Apfelbaum testified that it would cost \$39,000 to restore the ecological health of the system, stabilize the soils and bring the site back to health, and another \$9000 for compliance reporting. He proposed planting ten trees at a cost of \$2500 each to restore the canopy. The remaining expenses were for clearing and grubbing, temporary erosion control measures, herbicide treatment for weed control, and herbaceous plants. Because the defense called no expert witnesses to contradict Correll's and Apfelbaum's testimony, Warthen argues that the jury was required to accept their estimated measure of damages.

Whether the circuit court should grant a motion for additur is discretionary. *Martz v. Trecker*, 193 Wis. 2d 588, 594, 535 N.W.2d 57 (Ct. App. 1995). When the circuit court has analyzed the evidence and approved the jury's damage award, this court will review the evidence only to the extent necessary to determine whether the circuit court improperly exercised its discretion. *Koele v. Radue*, 81 Wis. 2d 583, 587, 260 N.W.2d 766 (1978). We must affirm the circuit court's ruling if there is any credible evidence, which under any reasonable view supports the jury's finding. *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 96 Wis. 2d 314, 340, 291 N.W.2d 825 (1980). In reviewing the evidence to determine whether the

damages are inadequate, this court views the evidence in the light most favorable to the defendants. *Helleckson v. Loisselle*, 37 Wis. 2d 423, 427, 155 N.W.2d 45 (1967).

The jury was not required to accept the expert witnesses' computation of damages. See *Geise v. American Transmission Co. LLC*, 2014 WI App 72, ¶¶13-14, 355 Wis. 2d 454, 853 N.W.2d 564. Rather, the jury was free to weigh all of the evidence, consider the foundation for the experts' opinions, and accord to those opinions such weight as the jury deemed appropriate. *Id.* at ¶15. The jury could weigh the evidence, taking into account matters of common knowledge and observations of the experiences and affairs of life. *Id.* at ¶17.

The jury's rejection of Correll's and Apfelbaum's calculations does not indicate that its verdict was based on mere speculation or guesswork. Regarding the replacement value of the trees, Correll testified that \$2575 would replace the trees. The amount Warthen requested was more than fifty times the value of an entire acre of similar trees according to John Macke's testimony. Regarding the restoration costs, the jury's award of \$8520 is consistent with the cost of clearing and grubbing the land and applying one year of herbicide treatment. The jury could reasonably reject the estimate for planting ten trees, applying herbicide for three years and appropriating funds for monitoring and compliance. The jury followed its instruction to award Warthen compensatory damages that would *reasonably* compensate her for the tree destruction.

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21. (2013-14).

Diane M. Fremgen
Clerk of Court of Appeals