

¶ 3

BACKGROUND

¶ 4 On December 1, 2009, the trial court conducted a bench trial on the plaintiff's amended complaint. The land trust alleged that the parties are adjoining property owners and that the plaintiff and the defendants each own a portion of a body of water ("the strip mine pit" or "the pit") situated between their respective parcels. The land trust alleged that the strip mine pit is a lake, subject to the riparian rights of the owners, and that the defendants had wrongfully erected a fence across the pit, which interfered with the riparian rights of the land trust. The land trust also alleged that it was entitled to damages because the defendants wrongfully cut down a substantial number of trees on their property and failed to remove the debris. The following factual background was presented at the bench trial.

¶ 5 Leslee Werner testified that he grew up in the general location of this dispute. In the 1940s, the area consisted of farmland and houses. In late 1959, Morgan Coal Company (the mining company) began strip-mining the area. Before it began strip-mining, Leslee's father owned the land north of the disputed strip mine pit. The mining company made an agreement with Leslee's father that it could conduct a strip-mining operation on his property in exchange for a deed to the property located to the southeast of his property, which includes the property now owned by the land trust. In late 1961, the mining company ceased operating a strip mine in the area, leaving behind a pit that filled with water over the course of the next 10 years, forming the several-acre pit that is now in dispute. The strip mine pit is narrow, is roughly rectangular in shape, and is situated along a southwest to northeast diagonal line. Although most of the pit is located on the land owned by the defendants, it is undisputed that a portion of the pit is owned by the land trust.

¶ 6 Leslee testified that the water in this area has always flowed from the northwest to the southeast, from property that he currently owns toward and through property now owned by the land trust. After the strip mine pit filled with water, it overflowed its banks often enough

that Leslee's father built a drainage ditch from the pit to the southeast to "alleviate the flooding." That drainage ditch is on property now owned by the land trust. Leslee acquired his property from his father in 2003, and his brother, Louis, acquired the southeast section after their father's death. In 2007, Louis sold his tract to the land trust. Leslee testified that the pit has been in substantially the same condition for the past 50 years.

¶ 7 Brad Schaller testified that he has been a resident of the area since childhood and that he remembers swimming and fishing in the pit with his friends and relatives in the 1970s. Leslee acknowledged that people had used the pit for recreational purposes since it formed, but he stated that no one besides his family used it and that their use was minimal. Leslee recalled that his father had stocked the lake with fish. Leslee's niece, Sharon Knysak, owns land that includes a small portion of the southwest area of the pit, and he allowed her to fish and paddle-boat on the pit because she was his relative. Leslee used the strip mine pit as a source of water for his cattle.

¶ 8 Brad testified, and Leslee acknowledged, that the flow of water from the defendants' property is the same as it has always been. Brad described the watercourse as flowing from the defendants' property into the strip mine pit. When the pit overflows, water flows through the drainage ditch on the property of the land trust to another lake located to the southeast. From the overflow on that lake, water flows through a series of ditches and creeks to Richland Creek and eventually into the Mississippi River. Brad identified multiple photos, which were introduced into evidence and which revealed significant amounts of water flowing out of the pit and across the plaintiff's property. He also identified multiple photos showing the trees that had been cut down on his property and the debris that was left when Leslee installed the fence in question.

¶ 9 Leslee acknowledged that, immediately after the plaintiff purchased the adjoining property, he began clearing trees and brush from the area between the two parcels and

eventually erected a fence along the property line and across the strip mine pit, which prevented access to the portion of the pit located on the defendants' property. Leslee testified that he removed the trees and undergrowth and erected the fence to keep his cattle off the plaintiff's property. Instead of placing the fence where it would keep the cattle on his property but allow access to the strip mine pit, Leslee placed the fence along the boundary line and across the pit, so that it prevented all access to the remainder of the pit from the plaintiff's property. After he erected the fence, Leslee cleaned up the fallen trees and debris from his side of the property but left them on the plaintiff's side.

¶ 10 Roger Veile, a civil engineer with experience in hydrology and water resources, testified for the plaintiff and prepared a written report that was admitted into evidence. Veile testified about the amount of water that flows into the strip mine pit from the defendant's property, given various amounts of rainfall. For example, according to Veile, during a two-year storm event, 43.2 cubic feet of water per second flows into the pit. Veile translated that calculation to 323.1 gallons per second or 19,388 gallons per minute. He stated that the amount of water that leaves the pit would have to be significant. Based upon the slope, the agricultural use of the land northwest of the pit on the defendants' side, and other information from the United States Geological Survey, Veile concluded that the direction of the flow of the water into and out of the pit was the same in 2009 as it had been before the pit was formed. He noted that the area's average rainfall was slightly higher than its average evaporation. Thus, Veile testified that in the absence of the natural runoff of water from the defendants' property the pit would not fill, but it would not completely dry up.

¶ 11 A written estimate from Hudson Tree Service for the removal of the fallen trees and debris left on the plaintiff's property after Leslee erected the fence was admitted into evidence by the plaintiff without objection. In that estimate, Gene Joshu, the owner of Hudson Tree Service, stated that he had made a site visit and had observed a number of trees

and shrubs cut down on the plaintiff's side of the fence and also some which had originally been on Leslee's side of the fence but which had been cut down and left on the plaintiff's side. He estimated the cost of removing the trees and shrubs to be "\$4,500 under dry conditions." He determined that the total value of the black willow trees and the honeysuckle bushes that had been cut down on the plaintiff's property was between \$500 and \$1,000.

¶ 12 The defendants called William A. Calvert, a consulting forester, to testify about the plaintiff's alleged damages. Calvert also submitted a written report with his calculations and conclusions. Calvert found that four elm trees and one eastern redbud tree had been cut down and that the total landscape value of those trees before their removal was \$120. He estimated that it would take three hours at a rate of \$50 per hour to clean up the debris left on the plaintiff's property from those five trees. Calvert testified that he calculated the value of the trees based on the stumps that Leslee showed him on the defendants' side of the property line. Calvert did not calculate the value of any trees removed from the plaintiff's property.

¶ 13 At the conclusion of the bench trial the trial court took the matter under advisement. On January 28, 2010, the court entered an order finding that the strip mine pit partially located on both parties' property is a lake as defined by Illinois law and has riparian rights attached to it and that the defendants are thereby prohibited from erecting a fence across the lake. The court adopted the definition of the term "lake" from *Nottolini v. La Salle National Bank*, 335 Ill. App. 3d 1015, 1018 (2003) (quoting 78 Am. Jur. 2d *Waters* § 108 (2002)): "a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, if both depression and body of water are of natural origin or a part of a watercourse."

¶ 14 The trial court reasoned as follows:

"The testimony of Veile, Schaller, and Werner indicate that as water accumulates on the Werner property it flows south and east on the Werner property

and into the body of water in question. The water then flows out of the body of water and through a ditch which was dug by Werner's father in order to control the flow. The water continues to flow to another lake and eventually to *** the Mississippi River. It was further acknowledged by Veile, Schaller and Werner that this path of water is essentially the same path that the water traveled prior to the mining, and that the only difference in flow is that the water now travels through the body of water in question. Pictures shown during Schaller's testimony showed this path of water and how the water flows through the lake and ditches."

¶ 15 Based on all the testimony, the court found that the body of water is a lake as defined by Illinois law because it is part of a watercourse. The court also agreed with the plaintiff's alternative argument that the strip mine pit is a lake with riparian rights attached to it pursuant to the "artificial-becomes-natural" rule outlined in *Alderson v. Fatlan*, 231 Ill. 2d 311 (2008).

¶ 16 The court enjoined the defendants from erecting a fence across the lake or from otherwise blocking the plaintiff's access to the use or enjoyment of the lake. The court found that it was uncontested that Leslee removed trees from the plaintiff's property while erecting the boundary fence, and the court awarded the plaintiff \$6,000 in damages. The court determined that the \$4,500 estimate from Hudson Tree Service more accurately stated the cost of removing the debris from the property than Calvert's \$150 estimate. The court found the value of the trees removed from the plaintiff's property to be \$500 and awarded treble damages for their removal pursuant to section 2 of the Wrongful Tree Removal Act (740 ILCS 185/2 (West 2010)).

¶ 17 A timely appeal followed.

¶ 18 ANALYSIS

¶ 19 On appeal, the defendants argue that the trial court's order is against the manifest

weight of the evidence.

"A trial court's judgment following a bench trial will not be disturbed unless it is against the manifest weight of the evidence. [Citation.] A decision is against the manifest weight of the evidence where 'all reasonable people would find the opposite conclusion is clearly apparent' [citation] or where the finding is unreasonable, arbitrary, or not based on the evidence presented [citation]. 'Where there are different ways to view the evidence, or alternative inferences to be drawn from it, we accept the view of the trier of fact as long as it is reasonable.' [Citation.]" *Bohne v. La Salle National Bank*, 399 Ill. App. 3d 485, 494 (2010).

¶ 20 The resolution of this appeal turns on whether there is sufficient evidence in the record to support the trial court's determination that the strip mine pit is a lake as defined by Illinois law. Both parties agree that the trial court correctly adopted the definition of a lake as set forth in the *Nottolini* case: "'a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, if both the depression and body of water are of natural origin or a part of a watercourse.'" *Nottolini*, 335 Ill. App. 3d at 1018 (quoting 78 Am. Jur. 2d *Waters* § 108 (2002)). If the strip mine pit was properly determined to be a lake, it has riparian rights attached to it. The term "riparian rights" refers to the right of an owner of land that borders a body of water or watercourse to the use of the entire body of water, not by grant but by operation of law, solely due to the ownership of the land abutting the body of water. *Alderson*, 231 Ill. 2d at 318. In Illinois, "where there are multiple owners of the bed of a private, nonnavigable lake, such owners and their licensees have the right to the reasonable use and enjoyment of the surface waters of the entire lake provided they do not unduly interfere with the reasonable use of the waters by other owners and their licensees." *Beacham v. Lake Zurich Property Owners Ass'n*, 123 Ill. 2d 227, 232 (1988). Riparian or littoral rights do not extend to an artificial body of water, such as a man-made lake, unless

it is part of a watercourse. *Nottolini*, 335 Ill. App. 3d at 1018-19 (the court found that a water-filled quarry was entirely man-made and did not meet the definition of a lake to which riparian rights attached).

¶ 21 The plaintiff advanced two alternative theories to support a finding that the strip mine pit is a lake. First, it argued that the pit is a lake because, although it was man-made, it is part of a watercourse. Second, it argued that although the pit was originally man-made, it should be considered a lake under the "artificial-becomes-natural" rule. Sufficient evidence to support either argument requires us to sustain the trial court's judgment. We need only examine the plaintiff's first contention.

¶ 22 The defendants claim that the evidence showed that the strip mine pit was entirely man-made and that no evidence proved a sufficient water flow to constitute a watercourse. The plaintiff argues that the evidence supports the trial court's finding that the body of water is a lake because, although originally man-made, it is both reasonably permanent and part of a watercourse. Veile, Schaller, and Werner all testified that water flows into the lake from the northwest and runs out toward the southeast, from the area of the defendants' property, through the lake, across the plaintiff's property, and ultimately into the Mississippi River. Leslee testified that the water flows in the same general direction as before the strip-mining began and that the lake has been in the same condition for the past 50 years. Veile testified and submitted a detailed report of his conclusions that the waterflow through the lake was significant. We agree with the plaintiff that the evidence supports a finding that the strip mine pit meets the definition of a lake set forth in the *Nottolini* case because it is reasonably permanent, it is substantially at rest in a depression in the earth, and it is part of a watercourse. Thus, the plaintiff is entitled to the use of the surface of the entire lake and the trial court properly granted injunctive relief. Accordingly, we affirm the trial court's ruling enjoining the defendants from erecting a fence across the lake or from otherwise blocking

the plaintiff's reasonable use of and access to the lake. Having made that determination, we need not consider whether the evidence supports a finding that the pit is a lake under the "artificial-becomes-natural" rule.

¶ 23 The defendants next argue that the trial court's award of damages is against the manifest weight of the evidence. In support of this argument, the defendants contend only that the trial court should have accepted their expert's valuation of the cost of replacing the trees and removing the debris over the valuation submitted by the plaintiff. We disagree. The plaintiff submitted an estimate from Hudson Tree Service for \$4,500 for the removal of the debris and listing the value of the black willow trees and honeysuckle bushes at \$500 to \$1,000. The plaintiff submitted four sets of photographs, a total of 95 photographs, depicting the fence and the surrounding area with various amounts of rainfall. Brad identified the photographs and explained their significance. Leslee testified that the terrain in the area of the fence is very rough because the mining company did nothing to reclaim or level the land after completing its mining activity. Additionally, the aerial photographs of the vicinity show no roads leading to the lake, which means that any equipment used to remove the debris will have to be brought to the area on foot or by an all-terrain vehicle. There was ample evidence to support the trial court's ruling that \$4,500 was a more realistic assessment of the cost of cleaning up the debris than the \$150 assessment provided by the defendants' expert.

¶ 24 Finally, the defendants admit that their expert did not provide a reliable estimate of the value of the trees cut down because he estimated only the value of the trees cut down on the defendants' property but did not express an opinion about the value of the trees cut down on the plaintiff's side of the fence. The trial court correctly found that the defendants had wrongfully cut down trees from the plaintiff's property. Under the Wrongful Tree Cutting Act, the plaintiff was entitled to treble damages. 740 ILCS 185/2 (West 2010). The trial court awarded \$500 as the value of the trees removed, the lower end of the valuation

according to the plaintiff's estimate, tripled that amount as provided by the statute, and awarded \$1,500 for the defendants' wrongful removal of the plaintiff's trees. The award of damages is not against the manifest weight of the evidence.

¶ 25

CONCLUSION

¶ 26 For all the reasons stated, we affirm the trial court's order enjoining the defendants from erecting a fence across the lake or otherwise blocking the plaintiff's reasonable access to and use of the lake, and we affirm the \$6,000 judgment in favor of the plaintiff and against the defendants.

¶ 27 Affirmed.