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2012 IL App (3d) 100848-U

Order filed January 11, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

DOUGLAS J. SCHAUB and CRYSTAL J. SCHAUB,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiffs-Appellees,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-10-0848
)	Circuit No. 08-CH-507
THOMAS D. HARDING,)	
)	Honorable
Defendant-Appellant.)	Stephen Kouri,
)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Presiding Justice Schmidt concurred in part and dissented in part.

ORDER

- ¶ 1 *Held:* A trial court judgment entered upon a jury verdict in favor of property owners on a claim of intentional infliction of emotion distress was reversed because there was a lack of evidence that an adjacent property owner's conduct in response to repeated trespassing on his property was either extreme or outrageous.
- ¶ 2 The plaintiffs, Douglas J. and Crystal J. Schaub, filed a complaint alleging intentional infliction of emotional distress as to both Schaub's by an adjacent property owner, the defendant, Thomas D. Harding. The complaint also alleged that Harding assaulted Douglas. The jury

found in favor of both Schaub's on their claims of intentional infliction of emotional distress, and but only awarded money damages in favor of Crystal. Also, the trial court permanently enjoined Harding from initiating contact with the Schaub's, from being within 50 yards of the Schaub's, and from possessing a firearm. Harding filed a motion for a judgment notwithstanding the verdict (*n.o.v.*), arguing that the evidence was so overwhelming in his favor on the claims of intentional infliction of emotional distress that no contrary verdict could stand. Harding also asked the trial court to vacate the permanent injunction order and deny the Schaub's' claim for injunctive relief. The trial court vacated the intentional infliction of emotional distress verdict in favor of Douglas, but denied the remainder of the motion. Harding appealed, and we reverse and remand.

¶ 3

FACTS

¶ 4 Harding's property was located directly to the north of the property that the Schaub's purchased in September 2004. When the Schaub's first purchased the property, they used the Windish easement, which was a 30 to 32 foot wide roadway easement located entirely on Harding's property, to remove cars and clean up their new property. Harding testified that he gave Douglas permission to use the easement for cleaning up; Douglas testified that he had never asked for nor had been given permission to use the easement. Douglas thought he had the right to use the easement.

¶ 5 Where the Windish easement travels east and west, it borders the northern boundary of the Schaub property, and passes 60 feet from their front door. Harding testified that, in April 2007, he informed Douglas that the Schaub's would not be able to use the Windish easement to build a new home. Douglas agreed that Harding told him that, but Douglas thought he had the

right to use the easement, and he went ahead with the home construction. Douglas testified that this agitated Harding, and Harding would show up and take pictures of the construction workers.

¶ 6 Douglas testified that on July 15, 2007, Harding pulled up in his truck on the Windish easement, and Douglas walked over to Harding's truck. Both men were on their own property. Harding was very angry and yelling that "[he's] going to end this shit back here. This is bullshit, and you do not have the right to be back here." Douglas testified that he could see a shotgun or rifle in the bed of Harding's truck, and when Harding brought his hands down on the truck, one hand was near the gun. Douglas testified that Harding made eye contact, indicating that he knew that Douglas had seen the gun. Douglas was upset and scared by the incident, but he did not call the police. Approximately two times after that, Douglas drove his service truck past Harding in his smaller pickup truck, and stopped to talk to Harding about the easement. Harding was again angry and repeated that Douglas did not have the right to use the easement. Douglas could see Harding's gun in the back of his pickup truck.

¶ 7 As part of the construction of the Schaub home, a meter pole was placed on Harding's property for the purpose of providing temporary construction power to the site. Harding testified that Douglas had informed him that CILCO, the electrical provider, would be out to provide power, and Harding had informed Douglas that CILCO should contact Harding first because Harding did not want buried electrical lines on his property. CILCO did not contact Harding before placing the meter pole. According to Michael Welch, a representative of CILCO, the meter pole was removed from Harding's property because Harding wanted it removed and CILCO did not have a legal right to be on Harding's property.

¶ 8 In September 2007, Douglas found barbed wire stretched along the property line between

the Harding and Schaub properties. Douglas put down plywood so that the construction vehicles could cross to his property, and he called the police. The police talked to both men, and took the paperwork regarding the rights to the Windish easement. Douglas testified that he and Crystal moved into their home in January 2008. Thereafter, Harding drove by every day, parking on the road (on the Windish easement, on his own property) and watching the Schaub house, until August 2008. Douglas testified that he told Crystal about all of his altercations with Harding.

¶ 9 Douglas testified that he was afraid that his dogs would be shot or poisoned. However, there was no evidence that anyone had ever threatened his dogs. Douglas never consulted any kind of health professional, including his own doctor, about anxiety, stress, or depression resulting from his altercations with Harding.

¶ 10 Crystal testified that she had designed her home with a nursery, but she didn't want children because of the tension with Harding. She also stated that she was afraid that her dogs would be killed or hurt if she let them out. She and Douglas had marital problems because Crystal wanted to move, and Douglas wanted to stay. Crystal testified that Douglas told her about all of his interactions with Harding, and she was frightened by Harding driving back and forth and stopping in front of their house. It caused her a lot of anxiety, and she had stomachaches, headaches, and sleeplessness. She also missed some work. However, Crystal also never sought treatment from a mental health professional. Crystal testified that from January until August 11, 2008, Harding would drive by almost every day, and stop his truck and stare at her house. Sometimes, Crystal was home alone. Harding would sit there for five to ten minutes, never getting out of the truck and always on his own property. Crystal never saw Harding with a gun, she never saw any of the incidents between Douglas and Harding, and

Harding never threatened the dogs. In fact, Crystal never had a conversation with Harding.

¶ 11 The Schaub family filed a complaint against Harding, seeking a permanent injunction against Harding, alleging assault of Douglas, and alleging intentional infliction of emotional distress as to both Schaub family members. During the proceedings, on November 3, 2008, the trial court entered an order permanently enjoining the Schaub family from using the Windish easement, finding that they had no right to use the easement.

¶ 12 The jury answered interrogatories, finding that Harding threatened force against Douglas on July 15, 2007, but that Harding did not have the present ability to engage in such force on that date and a well-founded fear of imminent peril was not created in Douglas. The jury found that Harding drove in front of the Schaub house and parked in front of the Schaub house on more than 100 occasions and laid barbed wire in front of the Schaub family's house. The jury found that this conduct was extreme and outrageous, and that the Schaub family suffered severe emotional distress as a result of the conduct. The jury also found that Harding intended his conduct to inflict severe emotional distress or that he knew that there was a high probability that it would do so. The jury awarded Crystal \$30,000 for emotional distress, but awarded Douglas no recovery. Upon Harding's posttrial motion, the trial court vacated the verdict rendered in favor of Douglas.

¶ 13 The trial court granted the Schaub family's request for a permanent injunction. The trial court found that the Schaub family had a right in need of protection, that Harding had repeatedly interfered with the Schaub family's enjoyment of their property, the Schaub family had no adequate remedy at law, and the interference seemingly ceased once the preliminary injunction was entered in October 2008. Thus, the trial court enjoined Harding from being within 50 yards of the Schaub family and enjoined Harding from possessing any firearms. Harding appealed.

¶ 14

ANALYSIS

¶ 15 To establish a claim for intentional infliction of emotional distress, a plaintiff must show: (1) extreme and outrageous conduct; (2) that the actor either intended his conduct to cause severe distress or knew that there was a high probability it would cause such distress; and, (3) that the conduct in fact caused severe emotional distress. *Schiller v. Mitchell*, 357 Ill. App. 3d 435 (2005). Both parties argue with respect to all three elements of the tort; Harding claiming that Crystal did not prove any of them and Crystal arguing that she did. Harding, however, seeks a judgment in his favor, not a new trial. Thus, we must affirm unless we find that the evidence so overwhelmingly favors Harding that the verdict cannot stand, not just that the verdict was against the manifest weight of the evidence. See *Maple v. Gustafson*, 151 Ill. 2d 445. Crystal testified that Harding intended to cause her distress and that the conduct did cause her emotional distress, so it is unlikely that Harding can prevail on a claim that the evidence overwhelmingly favored him on those two issues. The critical issue for review is, then, whether Harding's conduct was extreme and outrageous.

¶ 16 Whether conduct is extreme and outrageous is judged by an objective standard. *Rekosh v. Parks*, 316 Ill. App. 3d 58 (2000). The conduct must be so outrageous and extreme that it goes beyond all bounds of decency. *Public Finance Corp. v. Davis*, 66 Ill. 2d 85 (1976). The tort does not include conduct that amounts to mere insults, indignities, threats, annoyances, or petty oppressions. *McGrath v. Fahey*, 126 Ill. 2d 78 (1988) (citing Restatement (Second) of Torts § 46, comment d, at 73 (1965)). "The outrageousness of a defendant's conduct must be determined in view of all the facts and circumstances pleaded and proved in a particular case." *McGrath*, 126 Ill. 2d at 90.

¶ 17 The jury specifically found that Crystal's emotional distress was caused by Harding driving by and parking in front of the Schaub house on more than 100 occasions and laying barbed wire in front of the Schaub's house. Even viewing the evidence most favorably to Crystal, under an objective standard, Harding's conduct was not extreme and outrageous. This case is similar to *Schiller v. Mitchell*, 357 Ill. App. 3d 435 (2005), which also involved a neighbor dispute. In *Schiller*, the defendant installed a surveillance camera aimed at the plaintiffs' home and repeatedly stared at the plaintiffs. The trial court determined that the surveillance behavior was annoying, but did not amount to stalking, and it was not extreme and outrageous. Without weighing the evidence or ruling on the credibility of the witnesses, which is not our role on this appeal, see *Maple*, 151 Ill. 2d at 453, Harding's conduct was similarly not extreme and outrageous. Harding never exited his vehicle, he never went on the Schaub's property, and Crystal never made eye contact with Harding. In fact, Crystal testified that she never even spoke to Harding. In addition, there was no evidence offered in support of Crystal's testimony that she feared for her dogs' safety. Since the evidence presented did not demonstrate extreme or outrageous conduct, we conclude that the verdict in favor of Crystal on her claim of intentional infliction of emotional distress cannot stand. The trial court erred in not granting a judgment *n.o.v.* in favor of Harding on that claim.

¶ 18 The trial court enjoined Harding from being within 50 yards of the Schaub and enjoined Harding from possessing any firearms. Harding argues that the 50-yard exclusion area described in the injunction order includes Harding's home when the Schaub pass by on their new road. Harding contends that the permanent injunction order should be vacated because there was no need for the permanent injunction and that the trial court was wrong in finding that the

preliminary injunction was the basis for peace between the parties. Harding points out that he stopped watching the Schaub's in August 2008, two months before the preliminary injunction was entered, and, more importantly, the Schaub's stopped trespassing in November 2008 when the trial court barred them from using the Windish easement.

¶ 19 A party seeking a permanent injunction, must show that he has a clear and ascertainable right that needs protection, there is no adequate remedy at law, and he will suffer irreparable harm if injunctive relief is not granted. *Helping Others Maintain Env'tl. Stds. v. Bos*, 406 Ill. App. 3d 669 (2010). A permanent injunction is against the manifest weight of the evidence if the opposite is clearly evident. *Hasselbring v. Lizzio*, 332 Ill. App. 3d 700, 704-05 (2002).

¶ 20 In this case, the trial court found that the Schaub's' clear and ascertainable right was their right to be free from threats, intimidation or harassment, and that they would suffer irreparable harm to their quiet enjoyment of their home. However, the evidence showed that Harding had ceased watching the Schaub's, even prior to the entry of the preliminary injunction. More importantly, however, the jury found that the Schaub's had repeatedly trespassed over Harding's land. Thus, when the Schaub's were permanently enjoined from trespassing on the Windish easement, Harding's conduct against the Schaub's ceased. We conclude that the trial court should have vacated the permanent injunction because the finding that the Schaub's would suffer irreparable harm was against the manifest weight of the evidence .

¶ 21

CONCLUSION

¶ 22 The judgment of the circuit court of Peoria County is reversed and the cause remanded to the trial court with directions to enter judgment in favor of Harding.

¶ 23 Reversed and remanded.

¶ 24 PRESIDING JUSTICE SCHMIDT, concurring in part and dissenting in part:

¶ 25 I concur with the majority's decision to reversing the trial court's order which enjoined Harding from being within 50 yards of the Schaub's and possessing any firearms. I dissent, however, from the majority's decision to reverse the monetary judgment entered against Harding.

¶ 26 Had I been a juror, it is highly unlikely that I would have agreed with this jury. That, of course, is irrelevant. Our supreme court clarified the *Pedrick* standard in *Maple v. Gustafson*, 151 Ill. 2d 445 (1992), noting, "Unquestionably, it is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony." *Id.* at 452. A trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusion. *Id.* Nor should it set aside the verdict if it feels that other results are more reasonable. *Id.* "Likewise, the appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way. *** In ruling on a motion for a judgment *n.o.v.*, a court does not weigh the evidence, nor is it concerned with the credibility of the witnesses; rather it may only consider evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion." *Id.* at 452-53.

¶ 27 The majority's reversal of the judgment against defendant appears to be an impermissible reweighing of evidence presented at trial. Our supreme court noted in *Pedrick* that the fundamental principle which guides our jurisprudence and allows a court to take away a jury verdict was best summarized by Justice Butler in *Company of Carpenters v. Hayward*, "Whether

there be any evidence, is a question for the Judge. Whether sufficient evidence, is for the jury." (Internal quotation marks omitted.) *Pedrick*, 37 Ill. 2d 494 (citing *Company of Carpenters v. Hayward*, 1 Dougl. 374, 99 Eng. Rep. 249 (King's Bench, 1780)).

¶ 28 Moreover, I find the majority not only reweighs the evidence in this matter, but mischaracterizes it as well and fails to view it in the light most favorable to the Schaub. The majority states the "jury specifically found that Crystal's emotional distress was caused by Harding driving by and parking in front of the Schaub house on more than 100 occasions and laying barbed wire in front of the Schaub's house." *Supra* ¶ 17. It appears this statement is based upon special interrogatories that were submitted to the jury and that the majority concludes this was the *only* evidence of outrageous conduct.

¶ 29 Those interrogatories read, in pertinent part, as follows:

- "Did Defendant Tom Harding drive a truck up and down in front of Plaintiffs Douglas Schaub and Crystal Schaub's home; park in front of Plaintiffs' home on more than 100 occasions, and lay barbed wire in front of Plaintiffs' home? Yes.
- Was Defendant Tom Harding's conduct as to this Count II extreme and outrageous? Yes.
- Did the Plaintiffs suffer severe emotional distress as a result of Defendant Tom Harding's conduct? Yes.
- Did Defendant Tom Harding intend that his conduct inflict severe emotional distress on Plaintiffs, or did he know that there was a high probability that his conduct would cause severe emotional distress? Yes.
- Did Plaintiff Douglas Schaub continually trespass on the property of Defendant

Tom Harding prior to July 15, 2007? Yes.

•Did Defendant Tom Harding demand that Plaintiff discontinue his continual trespasses prior to July 15, 2007? Yes.

•Were the acts and conduct of Defendant Tom Harding in attempting to prevent the continuing trespasses reasonable under the circumstances? No.

•Did Defendant Tom Harding, on or about July 15, 2007 offer to use force against Plaintiff Doug Schaub? Yes.

•Did Defendant Tom Harding, on or about July 15, 2007 have the present ability to engage in the force he offered to use against Plaintiff Douglas Schaub? No.

•Did Defendant Tom Harding's offer of the use of force create a well-founded fear of imminent peril in Plaintiff Douglas Schaub? No."

¶ 30 The special interrogatories do not state that the only evidence of extreme or outrageous conduct was the driving by the house and placement of the barbed wire. Evidence indicated that Douglas told Crystal about the threats made by Harding. The jury specifically found these threats were made. The fact that the jury also found Douglas was not in imminent danger and did not fear for his safety does not negate the fact that Harding threatened Douglas and Crystal knew about the threat.

¶ 31 What are the reasonable inferences to be drawn from the fact that a man who had threatened Crystal's husband stopped that truck 60 feet away from Crystal Schaub's front door over 100 times for five minutes at a time? Evidence established that Harding would park his truck and watch the Schaub's house at times when he knew Douglas had gone to work and Crystal was the only one home. If Harding's intent was not to terrify Crystal, what was his

intent? What could the jury have reasonably inferred from that evidence?

¶ 32 The jury specifically found Harding "offer[ed] to use force" against Doug. Evidence indicated Crystal was aware of the offer to use force. Our standard of review mandates that we consider the evidence in the light most favorable to the Schaub's. I cannot say that the evidence in this matter so overwhelmingly favors Harding that no contrary verdict based on that evidence could ever stand.

¶ 33 Finally, I am not as convinced of the relevance of the *Schiller* decision as is the majority. The 24-hour video surveillance camera pointed at the Schiller's residence never threatened the Schillers. It was incapable of attacking Mrs. Schiller while her husband was away. Therefore, unlike Mrs. Schaub, Mrs. Schiller had no reason to be terrified by defendant's conduct.