2015 IL App (5th) 140071-U

NO. 5-14-0071

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FRED STEINKUEHLER and JAUNITA STEINKUEHLER,	)	Appeal from the Circuit Court of Madison County.
Plaintiffs-Appellees and Cross-Appellants,	)	
v.	)	No. 10-CH-975
THIEMS CONSTRUCTION COMPANY, INC., and FOX CREEK II LAND TRUST,	)	
Defendants-Appellants and Cross-Appellees.	)	Honorable Barbara Crowder, Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Welch and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's entry of judgment on the jury's verdict for the plaintiffs is affirmed. The court did not err in submitting the punitive damages issue to the jury or in denying the defendant's motions for directed verdict, judgment *n.o.v.*, or a new trial on the punitive damages issue. The court did not abuse its discretion in denying the defendants' motion for a new trial or for a remittitur on the compensatory damages issue. The court did not err in denying the plaintiffs' motion for judgment *n.o.v.* on the ordinance violation issue.

¶ 2 The defendants, Thiems Construction Company, Inc. (Thiems), and Fox Creek II Land Trust, appeal the judgment entered on a jury's verdict in favor of the plaintiffs, Fred

and Juanita Steinkuehler, on their cause of action for trespass and nuisance. In their complaint, the plaintiffs alleged that, during and after excavation work on adjoining property, the defendants failed to take adequate measures to prevent excessive runoff of muddy stormwater onto the plaintiffs' land, resulting in the accumulation of greater-than-normal amounts of silt in their lake. The jury awarded the plaintiffs $765,000 in compensatory damages against both defendants and $765,000 in punitive damages against Thiems. The plaintiffs also alleged that Thiems violated section 600 of the Edwardsville Land Development Code in that their detention basins failed to incorporate design features to capture stormwater runoff pollutants. The plaintiffs brought this claim because they thought they would be entitled to attorney fees if the jury found that Thiems violated that ordinance, but the jury found no violation of the ordinance. On appeal, the defendants argue that (1) the trial court erred in submitting the punitive damages issue to the jury and in denying Thiems' motions for directed verdict, judgment *n.o.v.*, and a new trial on the punitive damages issue because (a) as a matter of law, Thiems' conduct was not sufficiently culpable to support a punitive damages award; (b) the punitive damages award was against the manifest weight of the evidence; and (c) the punitive damages award was excessive and unconstitutional; and (2) the trial court erred in refusing to grant a new trial on damages or a remittitur where the jury awarded compensatory damages based on the cost of removing all of the silt from the plaintiffs' lake when the plaintiffs' own evidence showed that the stormwater runoff from the adjacent land during the relevant period was responsible for only approximately half of the sediment in the lake. The plaintiffs cross-appeal, arguing that the trial court erred in denying their motion for

judgment *n.o.v.* on the ordinance violation issue. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 In 1988, the plaintiffs purchased residential property in Madison County on State Route 159 just north of Edwardsville, originally comprising 17 acres. The property includes a house, outbuildings, and an approximately four-acre lake. The plaintiffs and their family, friends, and neighbors have used the lake, which was built in the mid-50s, for family and recreational purposes, primarily fishing.

¶ 5 In early 2006, brothers Tad and Terry Thiems purchased a 90-acre tract of farmland adjoining the plaintiffs' property to the east. Their plan was, and is, to develop a residential subdivision known as Fox Creek No. 2 (the subdivision). They placed the land in the name of Fox Creek II Land Trust (Fox Creek II). Part of the watershed on the land, approximately 22 to 23 acres, goes in the direction of the plaintiffs' lake.

¶ 6 Thiems, a Madison County contractor that has been in the paving and excavating business for 41 years, is the primary contractor and did the ground work on the Fox Creek II property. Over the years, Thiems has done the work on approximately one dozen subdivisions. Tad and Terry Thiems' father, Gary Thiems, has been Thiems' president for all of its 41 years. Tad, who has been an equipment operator for Thiems for 31 years, oversees the outside work, including the ground work on the Fox Creek II property.

¶ 7 Before beginning the ground work, the Thiems had to get approval from Madison County and the City of Edwardsville. In 2006, the Thiems met on-site with Rick Macho, who is with the Madison County Soil and Water Conservation District, and they

discussed what needed to be in the permit before starting construction. Macho is a certified erosion and sediment control professional and a certified erosion, sediment, and stormwater inspector. Macho's office has a contract with the Illinois Environmental Protection Agency (IEPA) and does all of its stormwater inspections on permitted sites.

¶ 8 According to Macho, the way the IEPA stormwater permitting process works is that the developer will hire a professional engineering firm to prepare a stormwater plan, and the contractor is in charge of implementing the plan. Pat Netemeyer of Netemeyer Engineering Associates was hired to prepare the plans for the subdivision in this case.

¶ 9 On March 21, 2006, Macho sent a letter to Clifford Huelsmann of Netemeyer Engineering (with a copy to Gary Thiems), indicating that he had reviewed the preliminary plat submitted for the subdivision. The letter notes that most of the site is located on rolling topography where soil erosion and sediment control will be important measures. A soil map and soil descriptions are attached to the letter.

¶ 10 The letter also notes that the site will need an IEPA National Pollution Discharge Elimination System (NPDES) stormwater permit before construction starts and outlines certain measures that will be necessary when the Stormwater Pollution Protection Plan (SPPP) is developed. Among other things, the letter notes that "[a]ny area that will be disturbed and left bare of any vegetative cover for more than 21 days will need to be seeded with a temporary seeding" and that "[t]he site should not be mass graded and left bare [for] any length of time." The letter notes that "[t]here will be several areas within the site where runoff will be concentrated into gullies" and that "[p]roper grade control devices should be installed along those gullies." The letter notes that "[t]riangular ditch

control products or other suitable devices should be planned" and that "[s]traw bales and silt fence should *not* be used in areas where concentrated runoff will occur." (Emphasis in original.) The letter also notes that "[s]ediment detention basins will need to be designed and installed prior to construction starting" and that the basins should be located "at all of the points where runoff will leave the site." The letter notes that "[t]he sediment basins should have rock dams or other similar devices designed to catch and hold sediment" and that "[t]hey will need to be cleaned on a regular basis." The letter notes that "[t]he sediment basins can be removed when construction on the site is completed." The letter also notes that there are three "permanent stormwater basins on the site plans" and that two of those basins "appear to be too small to handle the expected increase in runoff that will occur when this site is developed at this proposed intensity."

¶ 11 It took two years to get final engineering approval of the subdivision plans. During that time, the Fox Creek II land continued to be farmed.

¶ 12 The subdivision plans include an SPPP, with construction notes. Note 3 provides that the "[c]ontractor shall provide siltation control, as needed to prevent siltation of offsite properties, until the pavement surface has been installed and vegetation in all disturbed areas has been established." Note 12 requires that (1) "[d]uring the construction phases of the project, the contractor *** take reasonable precaution to [e]nsure that off-site sedimentation damage will not occur"; (2) the contractor "restrict the amount of land graded at any one time to a minimum"; (3) "during and after grading a temporary vegetative cover be planted to protect the bare soil surface"; (4) "until vegetation can be established, straw bale ditch-checks *** be placed *** at locations that

will prevent offsite sedimentation"; and (5) "[a]ll erosion control practices *** be constructed in accordance with the standard specifications for soil erosion as contained in IEPA-WPC-87-012 or current edition." Note 14 provides that "[a]ll work *** shall be performed in accordance with the Storm Water Pollution Prevention Plan and Specifications for Soil Erosion and Sediment Control, Illinois Environmental Protection Agency, Current Edition" (commonly known as the Illinois Urban Manual). Note 16 provides that "[a]reas to remain disturbed for greater than 30 days shall be temporarily seeded." Note 19 provides that "[s]ilt fences shall be inspected immediately after each rainfall, and at least daily during prolonged rainfall," and that "[a]ny required repairs" are to be made "immediately." Note 21 provides that "[s]ediment deposits should be removed after each storm event" and that such deposits "must be removed when deposits reach half the barrier height."

¶ 13 Thiems began work on the site in the spring of 2009. Thiems put silt fences around the perimeter of the site and built two detention basins, in accordance with the plans, to capture the water and allow some of the sediment to settle to the bottom. It also put silt fences in the ravines about 10 feet apart, all the way up the valley in both ravines.

¶ 14 During the process of preparing the ground for streets, houses, and utilities, it is necessary to remove some of the topsoil. In 2009, Thiems removed the topsoil from 40 acres of the Fox Creek II land. Thiems used some of the topsoil to make berms along Route 159 and placed some of it elsewhere on the property, to be replaced at the end of the project. This left the 40 acres bare, and bare ground does not take rain well.

¶ 15 During 2009 and 2010, Madison County experienced an unusual amount of

rainfall. In fact, 2009 was the wettest year in 18 years, with 63 inches of rainfall. The rainfall in 2010 was 43 inches, compared to average rainfall of 38.5 inches per year.

¶ 16 It is undisputed that the detention basins and other stormwater control devices Thiems built were insufficient to prevent an above-normal amount of runoff during the relevant time. Fred Steinkuehler first complained directly to Gary Thiems about the excessive amount of sediment washing into his lake from the Fox Creek II land. When he got no results from Thiems, he complained to Macho.

¶ 17 On July 22, 2009, pursuant to Steinkuehler's complaint, Macho met with Gary Thiems. Macho wrote a letter to Gary Thiems, summarizing their discussion. The letter notes that Steinkuehler's complaint involved an excessive amount of sediment leaving the Fox Creek II site and being deposited in his lake. Macho and Gary Thiems agreed to certain remedial measures that needed to be implemented to address the sediment issue and bring the site into compliance with the NPDES stormwater permit. Those remedial measures included: seeding all graded areas as soon as possible; cleaning and resetting the silt fence along the periphery of the site as needed; and removing sediment from the sediment basins "to reestablish their ability to catch sediment."

¶ 18 At Macho's request, a meeting was held at the subdivision site on November 23, 2009. Macho wrote a letter to Gary Thiems, summarizing that meeting. Those present at the meeting were Gary and Tad Thiems, Netemeyer, Fred Steinkuehler, Fred Steinkuehler, Jr., and Macho. The letter notes that much of the site had been graded and seeded earlier that year and that the seeding had provided some erosion control where it had established. The letter also notes that the northern part of the site that was not graded

had a stand of weeds and grass that was providing some erosion control. The letter also notes, however, that there were several steeper areas that were "bare of any vegetation" and that were "eroding at very high rates." After discussing these areas, additional remedial measures were agreed upon. Those remedial measures included: grading and preparing an adequate seed bed in areas experiencing gully erosion; applying temporary and permanent seed mixtures as specified on the construction notes; applying a thick layer of straw mulch; and anchoring the straw by running over it with a disc. Those measures were to be completed as soon as site conditions allow. The letter notes that by applying the seed and straw in December/January, the seed would remain dormant until the following spring, and the straw mulch would provide immediate erosion control during the winter. Other agreed-upon remedial measures included: keeping the sediment basins clean of sediment; reshaping and reseeding the drainage swale south of the driveway; installing fabric ditch checks to control the channel from further downcutting; and lining the swale with rolled erosion control blankets. The letter concludes that "[w]hen these measures are completed, this site will be in compliance with current NPDES stormwater regulations and the Madison County stormwater ordinance."

¶ 19 On April 13, 2010, Macho sent Gary Thiems a letter, indicating that he had done a follow-up site visit on December 7, 2009, and that all of the measures they had discussed at the November 23, 2009, meeting had been installed. The letter also notes that on April 12, 2010, Macho evaluated the conditions of the measures applied in December. The letter notes that there had been some erosion and sedimentation damage during the winter and that certain remedial measures needed to be taken. The dam at the sediment basin

that drains into the plaintiffs' lake had breached and needed to be repaired. Runoff was running through the dam and not through the rock check dam. In addition, all of the sediment basins needed to be cleaned of sediment. Several silt fence barriers in the draws above the sediment basins had gullies underneath them. Those silt fence barriers needed to be reset and the gullies repaired. Several areas of silt fence lines were full of sediment and needed to be cleaned and reset. Several areas had formed gullies due to runoff on some of the steeper slopes. Those gullies needed to be reshaped, reseeded, and mulched. The letter concludes that "[w]hen these items are addressed, this site will be in compliance with current NPDES stormwater regulations."

¶ 20 On April 10, 2010, Fred Steinkuehler and his son made a video of the aftermath of a regular rainfall event after the dam had breached, as noted in Macho's April 13, 2010, letter. The video was played several times at trial. Several witnesses, including Macho and Gary and Tad Thiems, viewed the video and testified as to their opinions regarding what was shown on the video. That testimony is summarized later in this decision.

¶ 21 On June 30, 2010, the plaintiffs' expert, Bryan Martindale of Hoelscher Engineering, P.C., completed a site visit of the plaintiffs' lake to observe the sediment levels that were accumulating in the lake as well as the ground surface characteristics and conditions of the portion of the Fox Creek II property adjacent and tributary to the lake. Martindale concluded that (1) there was a general lack of an adequate and proper vegetative cover on large portions of the Fox Creek II property; (2) severe erosion of the ground surface was prevalent, especially in the areas graded to act as drainage swales; (3) almost all erosion control measures had failed or were in an improperly maintained

condition; (4) the sediment basins and detention structures were poorly constructed and maintained; (5) the sediment accumulation in the lake had filled substantial portions of the fingers of the lake located downstream of the Fox Creek II land, and the water depth had been severely reduced or eliminated; and (6) secondary attempts to remediate failed erosion countermeasures were poorly constructed.

¶ 22 Martindale noted that the major type of erosion countermeasure used on the site was silt fence and that the Illinois Urban Manual provides standards regarding the use of silt fence as an erosion countermeasure practice. Silt fence had been placed in areas of concentrated flow, which was contrary to the recommended practice for silt fence in the Illinois Urban Manual, which indicates that silt fence should not be used in areas of concentrated flow. Instead, it should only be used in areas of sheet erosion.

¶ 23 Martindale concluded that, during periods of precipitation, a significant amount of eroded sediment had been transported to areas downstream of the Fox Creek II property and deposited into the plaintiffs' lake. Based on the estimated amount of material eroded and the relatively small size of the sediment basins, Martindale concluded that a significant portion of the eroded sediment had by-passed the sediment basins and had been deposited into the lake. The two main fingers of the lake exhibited significant sediment such that one could easily observe the extent of the deposited sediment.

¶ 24 After a review of the documentation related to the SPPP incorporated into the NPDES stormwater permit and the Madison County ordinance related to soil erosion and sediment control, Martindale concluded that there was a general lack of compliance with the mandated temporary and permanent stabilization practices listed on page two of the

SPPP. In addition, on page three of the SPPP, there are eight maintenance and inspection procedures enumerated with specific discussion of requisite criteria to ensure control of erosion and sedimentation. Based on his visual observations of the site, it appeared to Martindale that six of the eight procedures had not been followed, which demonstrated significant noncompliance with the permit and acceptable standard practices.

¶ 25 Martindale concluded that the sediment deposition in the plaintiffs' lake was directly correlated to: (1) the lack of a proper vegetative cover on the previously graded Fox Creek II ground; (2) the improper use of silt fence as an erosion and sediment transport countermeasure for an area of concentrated flow; (3) the improper maintenance of the installed silt fence; and (4) the failure of the sediment basin dams to adequately control sediment transport caused by the severe erosion of the Fox Creek II ground.

¶ 26 On August 10, 2010, the plaintiffs filed this lawsuit on trespass and nuisance theories for injunctive relief and damages. The plaintiffs' prayer for injunctive relief immediately triggered a series of meetings and court-assisted conferences. The remediation meetings between Macho, the parties, and their lawyers and engineers resulted in a series of agreed orders specifying in detail the steps the defendants were to take to try to reduce the silt-bearing runoff.

¶ 27 Pursuant to the first agreed order, dated September 3, 2010, the defendants were to clean the sediment basins within 14 days and maintain them pursuant to the SPPP. They were also to perform additional engineering calculations to determine appropriate sizes for the detention basins. They were also to regrade badly eroded areas in the center of the concentrated flow areas and areas lacking vegetative cover and fertilize, reseed, and

mulch such areas with rolled erosion control blankets in accordance with the requirements of the SPPP. Areas identified as concentrated flow were to have silt fences replaced with triangular styrofoam check dam structures that were to be properly designed and installed in accordance with the Illinois Urban Manual provisions regarding ditch checks. On the north side of the access driveway, they were to redesign and reinstall an adequate spillway structure (with rock) across the gullied area above the second sediment basin on the north in accordance with the Illinois Urban Manual to allow proper overflow. They were also to regrade and reseed the badly gullied areas in concentrated flow areas and mulch with rolled erosion control blankets after preparing an adequate seed bed and fertilizing. Areas that were previously disced were to be stabilized with reseeding and a light fertilizer. Areas with sparse volunteer vegetation were to be mowed and overseeded with a permanent mix of seeds in accordance with the SPPP. The line of silt fence on the corner of the property was to be cleaned within 14 days and maintained or replaced if necessary with additional sediment control measures. They were to refrain from disturbing the adequately vegetated areas on the west section of the site. The defendants were to have a qualified individual perform inspections, record keeping, and maintenance of all erosion control measures. They were also to properly design and reconstruct the sediment basins to effectively provide sediment control consistent with the Madison County stormwater ordinance and the SPPP and to finalize and implement the work on the sediment basins within 27 days of the order.

¶ 28 On October 7, 2010, Macho sent a letter to the plaintiffs' counsel, noting that he had visited the site on that date to evaluate what additional erosion and sediment control

practices were needed to minimize sediment leaving the site. The letter describes numerous remediation measures the defendants had recently implemented and recommends three additional measures to minimize sediment leaving the site. The letter concludes that "this site is currently in compliance with the NPDES stormwater permit."

¶ 29 A second agreed order was entered on October 8, 2010. After noting that the defendants had performed several items of work pursuant to the earlier order, this order provides that they were to perform additional work by October 22, 2010. They were to lengthen the installed triangular grade control devices to go further up the side banks to allow runoff water to top the device instead of going around the sides. They were also to monitor the sediment basins and clean them as needed to function properly, especially after heavy rain or runoff events. They were to make repairs to the uppermost line of silt fence on the south concentrated flow area as runoff was going around this device. They were given until October 22, 2010, to provide calculations to Macho and the plaintiffs in order for the defendants to properly design and reconstruct the sediment basins to effectively provide sediment control. They had been previously ordered to provide these calculations but had failed to do so. They were to complete the redesign and construction by November 12, 2010. They were also to provide the plaintiffs weekly inspection reports, required by the NPDES stormwater permit, until further order of the court.

¶ 30 On October 25, 2010, Macho wrote a letter to plaintiffs' counsel, describing another follow-up inspection on that date. The letter notes that since his last site visit, no major runoff event had occurred and that he had no recommendations at that time to further reduce the amount of sediment leaving the site.

¶ 31 A third agreed order was entered on November 12, 2010. That order notes that, on November 10, 2010, the defendants had submitted a report dated 2006 that purported to be calculations in a 357-page report from 2006. The first 26 pages of the report, which describe predevelopment conditions, were missing, and the defendants agreed to provide the missing pages as soon as possible. However, the plaintiffs represented that the 2006 calculations were for stormwater, not sediment. The plaintiffs' engineer could not perform a proper review with the prior-conditions data missing; nor was the design related to sediment control. In addition, "as built" data was not provided to see if the detention basins were built as designed for stormwater. In the opinion of the plaintiffs' engineer, the 2006 calculations were not the calculations needed and ordered to be provided. The plaintiffs again urged the defendants to hire a qualified engineer to perform proper calculations and "as built" design data. The plaintiffs advised the court of their intent to file a petition for adjudication of indirect civil contempt if the defendants did not make progress toward compliance within the next 21 to 30 days.

¶ 32 The defendants then hired an engineer, Robert Dalton of Vasconcelles Engineering, to work with the plaintiffs' engineer, Martindale. The two engineers met on December 4, 2010, to discuss Martindale's concerns and to formulate a plan to resolve the concerns. A memorandum of study and analysis plan was prepared. It details specific items to be addressed and a timetable, based on the November 12, 2010, agreed order. The plan notes that, based on the plaintiffs' complaint, the primary points of contention were the transmittal of sediment from the Fox Creek II property to the plaintiffs' property and the potential need to modify the detention basins on the Fox Creek II property "to

meet acceptable engineering standards." The plan notes that Dalton needed to "[p]erform additional engineering calculations to determine the appropriate sizes for the detention basins at this stage of the development" and perform "[c]alculations to properly design and reconstruct the sediment basins to effectively provide sediment control."

¶ 33 A fourth agreed order was entered on January 7, 2011. That order notes that the defendants had hired a qualified engineer to perform proper calculations as previously ordered. The order notes that, while previous time frames for such calculations had not been met, the plaintiffs were hopeful for progress toward proper detention basin sizing and other issues before spring rains. The memorandum of study and analysis plan was attached to the order.

¶ 34 A fifth agreed order was entered on March 18, 2011. That order notes that the parties were working together on erosion control measures and other issues.

¶ 35 A sixth agreed order was entered on April 29, 2011. That order notes that the parties had reached an impasse on implementation issues and that the defendants were to provide final design support documentation for the sediment/detention basins with a plan for implementation at the next hearing.

¶ 36 A seventh agreed order was entered on May 25, 2011. That order notes that the defendants had provided drainage analysis and calculations on May 23, 2011, which the plaintiffs had accepted as complete and appropriate. The order also notes that the defendants had also provided construction plans for sediment/detention basins, which were to be implemented no later than July 25, 2011. The defendants were to notify the plaintiffs when basin construction was complete. They were also to perform an "as built"

survey within two weeks of completion. The order notes that the plaintiffs had represented that the defendants had failed to submit previously ordered inspection reports and had failed to maintain previously ordered erosion control measures. The defendants were to immediately seed all bare areas previously identified as requiring vegetative cover, replace silt fences, and perform whatever erosion control measures were required by Macho. The order notes that when half of the wet storage of the sediment detention basins was full, the basins were to be properly dredged to return capacity and function. Regular inspections were to be performed to determine when dredging was required.

¶ 37 An eighth agreed order was entered on July 29, 2011. That order notes that the defendants had completed proper construction of two sediment basins with an "as built" survey showing compliance with the calculations and plans.

¶ 38 A ninth, and final, agreed order was entered on September 23, 2011. That order notes that the preliminary injunction issues had been completed.

¶ 39 According to Macho and Martindale, the original detention basins were obviously too small for the size of the watershed. In fact, the two detention basins built in July 2011 were four or five times larger than the original detention basins. Each of the new detention basins took about two weeks to build. It is undisputed that the new detention basins are properly designed and effective.

¶ 40 By the time of trial, the parties agreed that the injunction remedy was no longer needed. At trial, apart from the liability issue, the main issues were: (1) how much of the accumulated silt was the defendants' responsibility; (2) how the silt would be removed from the lake; (3) how much it would cost; (4) whether punitive damages were

appropriate; and (5) whether Thiems had violated the ordinance.

¶ 41 At trial, Fred Steinkuehler testified that he and his son made a video of the aftermath of a regular rainfall (1.5") event on April 10, 2010, approximately a year after Thiems began work on the site. His testimony as to what was shown on the video is as follows. The video first showed the outlets going directly from the Fox Creek II detention basin into the north cove of his lake. There was a large volume of muddy water filled with silt. The video then showed the rock dam and detention basin. The water going through the rocks and into the lake looked just as muddy as the water on the other side. At some places, water was flowing over the top of silt fences. At other places, water was going underneath silt fences. The video then showed the water going into the south cove of the lake. The water was coming off the hills washing gullies into the side of the hill. The water was not going into the detention basin at all; instead, it was going around the detention basin and directly into the lake.

¶ 42 Steinkuehler testified that the north and south coves of the lake were cleaned out in 1990. From 1990 until 2008, the coves were approximately five feet deep. At the time of trial, the coves were approximately six inches deep.

¶ 43 Macho testified that, since 2004, he had conducted 335 inspections on permitted sites. He had never had to send as many letters as he had on this site.

¶ 44 As Macho watched the April 10, 2010, video, he described what he saw, testifying as follows. Initially, he saw many suspended sediments resulting from erosion that occurred from the bare ground in the watershed of the lake, which was the Fox Creek II land. He explained that that would not necessarily be a violation of the permit though

because the NPDES stormwater permit requires the developer and his engineer to develop a plan to minimize the amount of sediment leaving the site, not completely eliminate it. He testified that the soils on the Fox Creek II land are very high in clay, which is a very small particle size and, even under the best circumstances, will not settle out in a sediment basin. The sediment, or larger soil particles, will settle out in the sediment basin, but the clay, which is what he was seeing on the video, gets in suspension and goes right into the lake.

¶ 45 Macho testified that the water was coming out of a relatively small sediment basin and that the spillway of the basin was discharging through the pipes like it was supposed to. He explained that the purpose of a sediment basin is to catch runoff, temporarily hold it, let gravity deposit the sediments to the bottom, and then let cleaner water go out the pipes. The sediment basin was full and was probably catching a lot of the silt fraction of the soil. The finer silts and clays were passing through because the water was not staying in the basin long enough for them to settle out. The larger the sediment basin, the more time there is for the sediment to settle out. Here, there is a large watershed and a small basin. Therefore, there is very little retention. Ideally, it would be the other way around. You should have a small drainage area and a large basin to get as much silt as you can.

¶ 46 Macho described the introduction to the Illinois Urban Manual as "a basic erosion control 101 lesson." He testified that the Illinois Urban Manual provides the current standards for the use of silt fence; a temporary sediment trap, which would be similar to the original sediment basins in this case; a rock check dam, which is a grade control measure put in a concentrated flow channel to prevent it from cutting down; sodding; and

rock outlet protection. He testified that all of these standards would be applicable in this case but that they were not the only choices that could have been used. He testified that if the engineer's SPPP indicates that those erosion or sediment control measures are planned, contractors should know how to install them.

¶ 47 Macho noted that there was water running underneath a silt fence, which was a violation of the permit. He testified that when he saw issues like this, he made a judgment call. Thiems was technically in violation of the permit, but when he spoke with the Thiemses, he would tell them what they needed to do, and they would make some progress. If they were "not just completely blowing it off," he tried to help them stay in compliance. His goal was to get the proper conservation and erosion control measures on the site, not to write violation letters.

¶ 48 Macho testified that, during the past year, neither he nor his employer had issued any notices of violation. In fact, he testified that, in the past five years, he had issued no violations to the IEPA saying that a site was in violation of their permit.

¶ 49 According to Macho, when doing stormwater management, catching sediment should be the last thing you do. The first thing you should do is try to prevent soil erosion in the first place. The best way to do that is with vegetation. Many of the conversations he had with the Thiemses was to get the vegetation established. In the video, he could see some vegetation growing, but in other areas, the ground was bare. He noted that there was a "tremendous amount of erosion" and that he could see how brown the water was. Most of the sediment was coming from the bare areas.

¶ 50 Macho testified that on the site, most of the topsoil had been washed away, the

ground had been compacted, and they were trying to get a stand of vegetation established on hard, compacted clay ground. According to Macho, just scattering wheat or seed on the ground will most likely not be successful. He stated that, when they discussed doing a seeding, they discussed doing a proper seeding: grading the ground, discing it, fertilizing it, planting seed, and mulching it—not just throwing seed on the ground. According to Macho, sometimes proper seeding did not occur in this case.

¶ 51 Macho testified that, on the video, he saw concentrated runoff running underneath silt fence. In other areas of concentrated flow, he saw that water had totally inundated the silt fence, knocked it down, and was going over it. He testified that it was not proper to use silt fence in areas of concentrated flow. Instead, rock checks or triangular grade control devices would be appropriate in those areas.

¶ 52 According to Macho, in the video, water was going around the second sediment basin. The water was going around the side of the rock dam and not through it. Therefore, the water was running unobstructed into the plaintiffs' lake.

¶ 53 Gary Thiems testified that he reviewed and followed the erosion control measures on the subdivision plans. He stated that he had training and experience in erosion control measures but that he did not know the difference between sheet flow and channelized flow and that he did not know what the Illinois Urban Manual was. He was aware that there are regulations that cover erosion and sediment control, but he did not know what they are. According to Gary, engineers usually put that information on the specifications and plans, which he uses to bid jobs. He stated that he had never read the local stormwater and erosion control ordinances.

¶ 54 Gary testified that he thought that the original sediment basins had done what they were supposed to do, which was to keep mud from washing off site. He did not think that any sediment left the Fox Creek II property while the original sediment basins were in place. He stated that the water that went from the property into the plaintiffs' lake might have been stained or tinted but that it was not silt or wet mud. He testified that the original sediment basins had been cleaned out at some point, but he did not know when or how many times that was done.

¶ 55 Gary also stated that no water went around the sediment basins. Later, he was confronted with the April 13, 2010, letter from Macho indicating that the dam at the sediment basin draining into the plaintiffs' lake had breached, that runoff was running through the dam and not through the rock check dam, and that it needed to be repaired. He acknowledged that if Macho said it happened, then it probably did happen.

¶ 56 Gary also acknowledged that construction note 14 on the site plans requires that all work be performed in accordance with the Illinois Urban Manual. He testified that, although he had never read it, he thought Thiems's work on the site met the specifications for soil erosion and sediment control found in the Illinois Urban Manual.

¶ 57 Gary also acknowledged that construction note 16 requires that areas that are to remain disturbed for more than 30 days be temporarily seeded and that this was important to prevent wind and water taking the soil away. He testified that he could not remember if much of the 40 acres adjoining the plaintiffs' property was bare during 2009. He stated that, at some point, Thiems seeded it, strawed it, and punched it in, but he acknowledged that the seed did not always start growing. He testified that sometimes it was too dry and

sometimes it was too wet and the seed washed away.

¶ 58 Gary also acknowledged that construction note 19 requires that silt fences be inspected immediately after each rainfall and at least daily during prolonged rainfall and that all repairs be made immediately. He testified that he thought this was done in 2009 and 2010, but he was not sure. He explained that he lived across the street from the site and could have checked the silt fences every day, but he did not know if he did.

¶ 59 Gary also acknowledged that construction note 21 states that sediment deposits should be removed after each storm event. He testified that he thought that had been done, but he acknowledged that he had seen silt fences full of silt on the site.

¶ 60 Gary also testified that he thought the silt fences were doing their job even though gullies were running underneath them. He stated that he thought much more dirt went into the plaintiffs' lake when the property was farmland than after the dirt work was done.

¶ 61 Gary testified that the NPDES stormwater permit was never revoked, and the defendants were never cited or fined. He stated that Thiems followed the plans prepared by Netemeyer and approved by the city and county. He also testified that Thiems worked with Macho and followed his recommendations.

¶ 62 Tad Thiems testified that he read and followed the site plans, but he did not know if the plans required him to comply with the Illinois Urban Manual. He stated that he was familiar with the Illinois Urban Manual but that he had never read it.

¶ 63 Tad testified that he had on-the-job experience in erosion control but had not had any formal erosion control training. He stated that he was familiar with the use of silt fence for sheet flow versus channelized flow and that silt fence was used to stop sheet

flow, which flows over a large area of land uniformly. However, he testified that silt fence had also been used in channelized flow. He did not know whether that was consistent with the Illinois Urban Manual.

¶ 64 Tad testified that he had never read the local stormwater management or soil and erosion control ordinances. He explained that Thiems does quite a bit of work with the State and county and that their resident engineer tells him where to put the soil erosion measures. He stated that, in this case, Macho provided him recommendations for erosion control measures, which he implemented.

¶ 65 When asked if he put vegetative cover on the dirt he excavated, he responded that it depends on whether he was done with it. He acknowledged that Macho had stated in one of his letters that it looked like bare seed had been thrown onto the ground without being worked in. He acknowledged that that had occurred but testified "[t]hat was just in small areas where we would come back over probably and rake it in."

¶ 66 Tad also acknowledged that there was a severe erosion control problem on the site and stated that he was usually the one implementing the solutions to the problem. He testified that they tried everything to stop the erosion but had trouble controlling it because the soil seemed very depleted. It was very silty clay. In addition, the weather went from extreme wet to extreme heat and dry.

¶ 67 Tad testified that he thought the erosion was being controlled in the April 10, 2010, video. When asked if he saw the water going around the check dam, he responded that the water was doing what it was supposed to do.

¶ 68 Tad also testified that he thought the original detention basins were the right size.

When asked if the new basins were five times larger than the original ones, he responded, "I don't remember." However, he acknowledged that he had built them and that they were "a lot bigger."

¶ 69 Tad testified that he was in charge of inspections under the court orders. When asked how many times he inspected the erosion control measures in 2010 and made a report, he responded, "Probably not enough." When asked the same question about 2011, he responded, "Same thing." He stated that he did inspections whenever he had time. He acknowledged that the site was on his way home and that if it rained he could stop on his way home. He testified that he did that most of the time. He acknowledged that he had seen silt fences down or erosion control measures not functioning properly and that he probably did not fix them immediately.

¶ 70 Tad testified that he had submitted inspection reports to the lawyers, but he could not recall how many. He identified an inspection report for the one-month period from October 22 to November 22, 2010. That inspection report lists dates and gives temperature and precipitation information as well as a few notes about the condition of erosion control measures and erosion control work that had been done. He also identified another document, which was apparently sent to the plaintiffs' counsel on September 13, 2012, as his inspection report for the 21-month period from November 24, 2010, to August 31, 2012. It is a list of 44 dates with the type and amount of precipitation and description of how wet or frozen the ground was on those dates. It says nothing about inspections or repairs of erosion control measures. He acknowledged that these inspection reports were obviously not reported weekly as ordered by the court.

¶ 71 Tad testified that, according to their expert, the defendants were responsible for only 1,650 cubic yards of the sediment in the plaintiffs' lake. Therefore, they were willing to allow 1,650 cubic yards of the sediment to be put back onto the Fox Creek II land, but they were not willing to allow more than that.

¶ 72 The experts' estimates differed as to the amount of silt that accumulated in the lake from the time Thiems began work on the property in the spring of 2009 until the excessive silt runoff was abated in July 2011. The plaintiffs' expert, Martindale, opined that there were 14,400 cubic yards of silt in the plaintiffs' lake from all sources and that the defendants were responsible for approximately 7,900 cubic yards of that amount. Another expert estimated that the total amount of sediment in the lake was 14,000 cubic yards. The defendants' expert, Doug Gaines, estimated that their contribution was 1,650 cubic yards. Because this is an appeal from a jury verdict in favor of the plaintiffs, we will assume for purposes of this appeal that the jury found Thiems responsible for 7,900 cubic yards, as estimated by the plaintiffs' expert.

¶ 73 The plaintiffs' expert on the sediment removal process and cost issues was Bradley Bickhaus, an estimator and project manager for Keller Construction. He described the two possible methods for removing the silt from the lake, mechanical dredging and hydraulic dredging.

¶ 74 Bickhaus testified that in hydraulic dredging, the lake is not drained. A small barge or flotation device is floated in the lake; it has a head that goes down into the lake and a long tube with a propeller on it. The sediment is suctioned out through the tube and pumped to a disposal site. Hydraulic dredging is not an option in this case because there

is no place to pump the 7,900 cubic yards of sediment determined to be attributable to the defendants' excavation activities. No location on or near the plaintiffs' property exists to take the sediment, and the defendants will not allow the 7,900 cubic yards of sludge to be pumped onto the Fox Creek II property.

¶ 75 Bickhaus testified that mechanical dredging requires that the lake be drained completely; the water is pumped out and released into its natural watershed. After the silt has dried sufficiently, the contractor goes in with bucket loaders or high lifts, scoops up the silt, and dumps it in trucks, which haul it off-site. He testified that mechanical dredging optimally requires that all of the silt be removed from the lake–in this case, all 14,400 cubic yards−not just the part for which the defendants were responsible. He acknowledged that it might be possible to remove just half the silt, but he testified that it did not make any sense. He explained that he needed to be able to drive on the "hardpan," the original clay surface where the lake was created.

¶ 76 Bickhaus's April 2013 bid to remove 14,000 cubic yards of silt by the mechanical dredging process was $460,000. He estimated that it would be 5% more, or $479,854, after July 31, 2013.

¶ 77 The defendants' dredging expert, Daniel McDougal, testified that hydraulic dredging is much less invasive than mechanical dredging, and in this case, the latter would be more expensive. With hydraulic dredging, you can pinpoint the areas where you want to remove the silt, and you can take out part of it; you do not have to remove it all. In his report and testimony, McDougal described the process he would use to dredge the lake hydraulically, pumping the material from the lake to the Fox Creek II property.

¶ 78 McDougal estimated that it would cost approximately $118,000 to remove 2,000 cubic yards of sediment, $158,000 to remove 4,100 cubic yards of sediment, and $165,000 to remove 8,000 cubic yards of sediment, plus $35,000 for the basin where the slurry would be deposited. He testified that by the time of trial, the costs might be 10% more. Unfortunately, these cost estimates proved to be irrelevant because the defendants refused to take 7,900 cubic yards of sediment onto the Fox Creek II land.

¶ 79 McDougal agreed with the plaintiffs' expert that for mechanical dredging, all of the sediment needed to be removed to get to the "deadpan," the bottom of the lake bed. He explained that "[i]t's like if you have snow in your driveway you can't walk on top of the snow, you've got to walk on your driveway, so you've got to remove the material in front of you to get out further as you go."

¶ 80 The defendants' motions for directed verdicts were denied. The court permitted the punitive damages issue to go forward against Thiems. The jury returned a verdict for the plaintiffs against both defendants for $765,000 in compensatory damages ($440,000 for mechanical dredging and $325,000 for loss of enjoyment of the property) and against Thiems for $765,000 in punitive damages. The jury found, however, that Thiems did not violate section 600 of the Edwardsville Land Development Code. Judgment was entered on the verdict. Both parties filed posttrial motions, which were denied.

¶ 81 The defendants filed a timely notice of appeal. The plaintiffs filed a timely cross-appeal on the ordinance violation issue.

¶ 82 ANALYSIS

¶ 83 On appeal, the defendants first argue that the trial court erred in submitting the

punitive damages issue to the jury and in denying Thiems's motions for directed verdict, judgment *n.o.v.*, and a new trial on the punitive damages issue because (a) as a matter of law, Thiems's conduct was not sufficiently culpable to support a punitive damages award; (b) the punitive damages award was against the manifest weight of the evidence; and (c) the punitive damages award was excessive and unconstitutional. We disagree.

¶ 84 "[I]t 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." *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). "A trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court 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." *Id.* at 452-53.

¶ 85 "A directed verdict or a judgment *n.o.v.* is properly entered in those limited cases where 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Id.* at 453 (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). "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 the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion." *Id.* "[A] judgment *n.o.v.* may not be granted merely because

a verdict is against the manifest weight of the evidence." *Id.* "The court has no right to enter a judgment *n.o.v.* if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Id.* at 454. We review *de novo* the trial court's ruling on a motion for directed verdict or for judgment *n.o.v.* *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37.

¶ 86 Alternatively, on a motion for a new trial, a trial court will weigh the evidence and set aside the jury's verdict and order a new trial if the verdict is against the manifest weight of the evidence. *Maple*, 151 Ill. 2d at 454. "A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence." (Internal quotation marks omitted.) *Id.* A trial court's denial of a motion for a new trial will not be reversed absent a clear abuse of discretion. *Id.* at 455. The abuse-of-discretion standard applies because the trial judge had the benefit of her previous observation of the appearance of the witnesses, their manner in testifying, and the circumstances aiding in the determination of credibility. *Id.* at 456.

¶ 87 "It has long been established in this State that punitive *** damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, *** or with such gross negligence as to indicate a wanton disregard of the rights of others." *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186 (1978). The purpose of punitive damages is to punish the wrongdoer and to deter the defendants, and others,

from committing similar wrongs in the future. *In re Estate of Wernick*, 127 Ill. 2d 61, 83 (1989).

¶ 88 "The determination [of] whether to impose punitive damages requires a two-step process." *Id.* at 84. "The trial court must initially decide whether the cause of action in general and the facts of the particular case provide sufficient proof of aggravated circumstances to warrant submitting the issue to the trier of fact." *Id.* "This determination is a matter of law." *Id.* "If the facts of the case legally justify an award of punitive damages, the issue is then submitted to the trier of fact." *Id.*

¶ 89 Initially, we note that punitive damages are available for a cause of action for trespass. See *Rodrian v. Seiber*, 194 Ill. App. 3d 504, 509-10 (1990). Punitive damages are also available for a cause of action for nuisance. See *Statler v. Catalano*, 167 Ill. App. 3d 397, 406 (1988).

¶ 90 In addition, after a careful review of the record, we conclude that there is ample evidence to support the trial court's decision to submit the punitive damages issue to the jury and the jury's decision to award punitive damages. The defendants argue that they relied on their engineer to know the requirements of the applicable ordinances and the Illinois Urban Manual and to put those requirements in the subdivision plans. They argue that they followed the subdivision plans, which were prepared by the engineer and approved by the city and county, and that they tried to follow Macho's recommendations and the court's orders. The evidence shows otherwise.

¶ 91 The evidence shows that Thiems had been in the construction business for 41 years. Thiems was very experienced in excavation work and work on subdivisions, and

the jury could reasonably have concluded that Thiems knew what it was supposed to do to minimize the amount of sediment that went from its work site onto the plaintiffs' land. In addition, Macho's 2006 preconstruction letter to Thiems's engineer (with a copy to Gary Thiems) regarding what erosion and sediment control measures needed to be in the subdivision plans, as well as the construction notes in the subdivision plans themselves, made Thiems's obligations clear. Despite the defendants' claims to the contrary, the evidence shows that the defendants did not follow Macho's recommendations in the 2006 letter or the construction notes in the subdivision plans.

¶ 92 Macho's 2006 preconstruction letter advised Thiems's engineer (with a copy to Gary Thiems) that the site should not be mass graded and left bare for any period of time. Nevertheless, in the spring of 2009, Thiems removed the topsoil from 40 acres of the land and left it bare for an extended period of time. While the Thiemses testified that they tried everything to get seed to take but that it was either too hot or too cold or it rained too much, other evidence supports the jury's inference that the Thiemses were less than credible in this regard. Fred Steinkuehler testified that the 40 acres was left bare for all of 2009. Other evidence shows that much of the 40 acres was also bare throughout 2010. In addition, Macho testified, and Tad Thiems acknowledged, that there were times when Thiems just threw seed onto the ground.

¶ 93 Moreover, the evidence shows that Thiems used silt fencing in areas of concentrated flow, which is not in accordance with the Illinois Urban Manual. The construction notes require that all work be done in accordance with the Illinois Urban Manual, which both Gary and Tad Thiems testified they had never even read. In

addition, in his 2006 preconstruction letter, Macho specifically instructed Thiems's engineer (with a copy to Gary Thiems) that silt fence should not be used in areas of concentrated flow.

¶ 94 Moreover, the evidence shows that the sediment that built up behind the silt fencing and in the sediment basins was not cleaned out regularly as required by the construction notes and court orders. Instead, the evidence tends to show that the sediment was cleaned out only in response to Macho's letters or court orders. Thiems was supposed to be inspecting these sediment control measures regularly, cleaning them out regularly, and maintaining them regularly, but the evidence shows that it did not do so. When the plaintiffs complained about the problems, Thiems did only what it had to do to satisfy Macho; then, it was back to doing nothing. This happened repeatedly.

¶ 95 In addition, the October 8, 2010, agreed order required the defendants to provide the plaintiffs with weekly inspection reports until further order of the court. We have already noted the inadequacies of the two "inspection reports" that were submitted and will not repeat them here. The evidence is clear that the defendants failed to comply with the agreed order requiring them to provide the plaintiffs with weekly inspection reports.

¶ 96 Similarly, the evidence is clear that the defendants repeatedly failed to comply with the agreed orders requiring them to perform additional engineering calculations to determine appropriate sizes for the detention basins, properly design and reconstruct the detention basins to effectively provide sediment control, and finalize and implement the work on the detention basins. Only after the plaintiffs threatened to file contempt proceedings against them did the defendants finally hire a competent engineer and

comply with those orders, which finally resolved the continuing problem of excessive silt running from the Fox Creek II property into the plaintiffs' lake.

¶ 97 The evidence in this case amply demonstrates that Thiems acted with a conscious disregard of the plaintiffs' rights. Accordingly, the evidence supports the trial court's decision to submit the punitive damages issue to the jury and the jury's decision to award punitive damages.

¶ 98 We turn then to the defendants' argument that the punitive damages award is constitutionally excessive. The issue of whether a punitive damages award is constitutionally excessive is reviewed *de novo*. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003).

¶ 99 "The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." (Internal quotation marks omitted.) *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996). In *Gore*, the Court developed three guideposts for determining whether a punitive damages award violates due process: (1) the degree of reprehensibility of the defendants' misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiffs and the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *Id.* at 575.

¶ 100 In *Gore*, the Court stated that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* In determining reprehensibility, courts are to consider the following factors: (1) whether the harm caused was physical as opposed to economic; (2)

whether the tortious conduct evinced an indifference to or a reckless disregard for the health and safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Campbell*, 538 U.S. at 419. "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.* "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.*

¶ 101 The first three reprehensibility factors are not present in this case. Although the harm was physical in the sense that the lake was physically damaged, the harm to the plaintiffs was more akin to economic harm. In addition, the tortious conduct did not evince an indifference to or a reckless disregard for the health and safety of others. Finally, there was no evidence presented as to whether the targets of the conduct, the plaintiffs, were financially vulnerable, although we do note that they are a retired couple. However, the other two factors support a finding of reprehensibility. Thiems's conduct involved repeated actions over a two-year period, not an isolated incident. In addition, although there was no evidence of intentional malice, trickery, or deceit on the part of Thiems, there was ample evidence that the harm to the plaintiffs was no "mere accident." Therefore, the reprehensibility factor points in favor of the punitive damages award.

¶ 102 As to the disparity between the actual or potential harm suffered by the plaintiffs and the punitive damages award, the punitive damages in this case equal the compensatory damages. The Court has consistently declined to impose on the states a bright-line ratio that a punitive damages award cannot exceed. *Campbell*, 538 U.S. at 425. Nevertheless, the Court has suggested that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* The Court has also stated that a punitive damages award of " 'more than 4 times the amount of compensatory damages' might be 'close to the line.' " *Gore*, 517 U.S. at 581 (quoting *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23 (1991)). The Court has, however, recognized that because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those it has previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. *Campbell*, 538 U.S. at 425. A ratio between punitive and compensatory damages of 1:1, as in this case, is not excessive, and this factor points in favor of the punitive damages award.

¶ 103 Finally, as to the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases, this factor also points in favor of the punitive damages award. For example, section 42(b)(1) of the Illinois Environmental Protection Act (415 ILCS 5/42(b)(1) (West 2012)) allows a civil penalty of up to $10,000 per day of violation for violations of any NPDES stormwater permit. The defendants' conduct that caused harm in this case lasted over two years. A civil penalty of $10,000 per day for two years would equal $7.3 million, as compared to the

$765,000 punitive damages award in this case. The punitive damages award in this case does not constitute a grossly excessive or arbitrary punishment and, thus, does not violate Thiems' due process rights.

¶ 104 The defendants also argue that the punitive damages award is excessive as a matter of Illinois common law. "[T]o determine whether an award is excessive in a given case, Illinois courts look to a fact-specific set of relevant circumstances, including the following: (1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant." *Turner v. Firstar Bank, N.A.*, 363 Ill. App. 3d 1150, 1161 (2006). "The highly factual nature of the assessment of punitive damages dictates that a great amount of deference should be afforded the determination made at the trial court level, and to reflect that deference and the highly factual nature of the determination, we review the assessment of punitive damages on a manifest-weight-of-the-evidence standard." *Id.* at 1161-62. "A jury's assessment of punitive damages will not be reversed unless the manifest weight of the evidence shows that the assessment was so excessive that it demonstrated passion, partiality, or corruption on the part of the jury." *Id.* at 1162.

¶ 105 Given Thiems's deliberate indifference to the plaintiffs' rights, the extensive damage to the plaintiffs' lake over a two-year period, and the punitive damages award equal to compensatory damages, we cannot say that the manifest weight of the evidence shows that the assessment was so excessive that it demonstrated passion, partiality, or corruption on the part of the jury. In so holding, we recognize that there was no evidence presented in this case as to Thiems's financial status. However, the absence of evidence

of the defendant's financial status does not mandate that the punitive damages award be overturned. *Deal v. Byford*, 127 Ill. 2d 192, 204-05 (1989). Financial status is but one factor for the jury to consider. *Id.* "If a defendant facing a punitive damages claim realizes that the plaintiffs are not presenting what would clearly be relevant financial-status evidence, the defendant bears the burden of putting on that evidence." *Ford v. Herman*, 316 Ill. App. 3d 726, 734 (2000).

¶ 106 We turn then to the defendants' argument that the trial court erred in refusing to grant a new trial on compensatory damages or a remittitur where the jury awarded compensatory damages based on the cost of removing all of the silt from the lake when the plaintiffs' own evidence showed that the stormwater runoff from the Fox Creek II land during the relevant period was responsible for only approximately half of the sediment in the lake. We find this argument to be without merit.

¶ 107 On a motion for a new trial, a trial court will weigh the evidence and set aside the jury's verdict and order a new trial if the verdict is against the manifest weight of the evidence. *Maple*, 151 Ill. 2d at 454. "A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence." (Internal quotation marks omitted.) *Id.* A trial court's denial of a motion for a new trial will not be reversed absent a clear abuse of discretion. *Id.* at 455.

¶ 108 The standard of review of the denial of a remittitur is also whether the trial court abused its discretion. *Blackburn v. Illinois Central R.R. Co.*, 379 Ill. App. 3d 426, 430 (2008).

¶ 109 The jury in this case was instructed that it could award damages "for any of the following elements of damages proved by the evidence to have resulted from the wrongful conduct of the defendants, taking into consideration the nature, extent and duration of the damage." The elements of damages were stated as: "The damage to real property, determined by the reasonable expense of necessary repairs to the property which was damaged and the value of loss of the use of the property for the time reasonably required for the repair."

¶ 110 The defendants argue that the jury was authorized to award compensation only for those damages that resulted from the wrongful conduct of the defendants, which does not include all of the silt in the lake. The defendants argue that the plaintiffs are not entitled to damages sufficient to give them a brand-new lake and that they should share in the cost of removal if they want to have a lake that is totally silt-free. The defendants argue that the jury awarded the plaintiffs a windfall. We disagree.

¶ 111 The plaintiffs want their lake to be brought back to the use they had before the excessive sedimentation caused by the defendants' conduct. Because of the defendants' refusal to allow more than 1,650 cubic yards of sludge to be pumped onto the Fox Creek II land, hydraulic dredging was not an option in this case. Therefore, the only option for removing the silt from the plaintiffs' lake was mechanical dredging. The testimony of both parties' experts demonstrates that, with mechanical dredging, you need to take all of the silt out. Therefore, the jury's award of $440,000 for removing all of the silt was not against the manifest weight of the evidence, and the trial court did not abuse its discretion in denying the defendants' motion for a new trial or for remittitur.

¶ 112 On cross-appeal, the plaintiffs argue that the trial court erred in denying their motion for judgment *n.o.v.* on the ordinance violation issue because the jury's finding that Thiems did not violate the ordinance was "against the manifest weight of the evidence." That is not the proper standard for a judgment *n.o.v.*

¶ 113 As we noted earlier, "a judgment *n.o.v.* is properly entered in those limited cases where 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Maple*, 151 Ill. 2d at 453 (quoting *Pedrick*, 37 Ill. 2d at 510). "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 the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion." *Id.* "[A] judgment *n.o.v.* may not be granted merely because a verdict is against the manifest weight of the evidence." *Id.* "The court has no right to enter a judgment *n.o.v.* if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Id.* at 454. We review *de novo* the trial court's ruling on a motion for judgment *n.o.v.* *Lawlor*, 2012 IL 112530, ¶ 37.

¶ 114 Section 600 of the Edwardsville Land Development Code provides, in pertinent part, as follows: "Detention basins shall incorporate design features to capture stormwater runoff pollutants." Accordingly, the jury was instructed as follows: "If you find that Defendant, Thiems Construction Company, Inc., failed to incorporate design features to

capture stormwater runoff pollutants as required by section 600 of the Land Development Code of the City of Edwardsville, you must find that they violated that Section of the Code." The jury was then asked, "Do you find that the Defendants violated this Edwardsville City Ordinance?" The jury answered, "no."

¶ 115 The evidence amply supports the jury's finding that the defendants' original detention basins did "incorporate design features to capture stormwater runoff pollutants as required by section 600 of the Land Development Code of the City of Edwardsville." Although the original detention basins proved to be much too small, the evidence demonstrates that they were designed "to capture stormwater runoff pollutants." Thus, the jury's finding that Thiems did not violate the ordinance was amply supported by the evidence.

¶ 116 CONCLUSION

¶ 117 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 118 Affirmed.