2016 IL App (1st) 15-1711-U

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THIRD DIVISION
August 10, 2016

No. 1-15-1711

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CHICAGO TITLE LAND TRUST, as Trustee, under Trust Agreement dated March 8, 2011, and known as trust number 8002356715, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division.
v.	)	No. 12 CH 16804
ROBERT and ELLEN CAPLIN, Defendants-Appellants.	)	The Honorable Kathleen M. Pantle, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's finding, after a bench trial, that the defendants had trespassed on the plaintiff's property by building a fence on the easement in contravention of the parties' easement agreement was not against the manifest weight of the evidence. The circuit court further properly awarded the plaintiff $20,000 in punitive damages, after finding that the defendants' conduct was willful and contumacious. The award was not excessive in light of the defendants' conduct and it served the proper purpose of both punishing the defendants and deterring similar conduct in the future.

¶ 2 The defendants, Robert and Ellen Caplin, appeal from the circuit court's order, after a bench trial, finding that they had trespassed on the plaintiff's property by placing and maintaining a fence on a portion of that property to which the plaintiff had granted them an easement, and

ordering them to remove the fence. The defendants assert that the trial court erred: (1) in holding that the easement agreement between the parties did not allow for a fence on the easement parcel; and (2) awarding the plaintiff $100 in compensatory and $20,000 in punitive damages. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record below reveals the following relevant facts and procedural history. The plaintiff, Chicago Title Land Trust Company, a trustee under the trust agreement dated March 8, 2011, known as trust number 8002356715 (hereinafter the land trustee), owns the property at 458 Lakeside Terrace, Glencoe, Illinois (hereinafter the plaintiff's property), for the benefit of Robert Grason (hereinafter Grason). The property was purchased in April 2011 from 458 Lakeside, L.L.C. (hereinafter the L.L.C.), whose sole purpose was to own the property until it was developed by a development company, Tara Designer Homes (hereinafter Tara), and sold. At all relevant times to this appeal, both Tara and the L.L.C. were owned, operated and managed by brothers Anthony and Adel Tarakdjian.

¶ 5 The defendants, husband and wife Robert and Emily Caplin, own the neighboring property at 444 Lakeside Terrace, Glencoe, Illinois (hereinafter the defendants' property). This property is located south of and immediately adjacent to the plaintiff's property. The defendants have owned their property, which includes a single family home, since 1998. The two properties share a property boundary line.

¶ 6 Before the plaintiff purchased the property, Adel Tarakdjian (on behalf of the L.L.C.) entered into an easement agreement with the defendants. The rather inartfully written agreement grants the defendants two types of easements over a triangular portion of the plaintiff's property near the southwest corner of the properties' boundary line (hereinafter the easement area). The

easement agreement describes the easement parcel by way of an attached land survey depicting a triangular easement area, with the northeastern border of the easement marked as Boundary A, and the other boundary unmarked. According to the easement agreement, the defendants were granted "a non-exclusive easement for light, air and view over" the easement area, and the developer and his successors and assigns in interest promised not to construct or install any structures, improvements or landscaping within the easement area. In addition, the defendants were granted "a non-exclusive easement for access over and across the easement area for the purpose of:" (1) connecting the east portion of the defendants' property to the west portion of their property via the northerly portion of their property; and (2) "maintenance and replacement of the landscaping and related improvements in the easement area, as provided in Section 2 below." Section 2 of the easement agreement specifies that the parties agree that:

> "Boundary A *** [of the easement area] is formed *** by a row of evergreens on the northerly side of Boundary A and by and (*sic*) row of lilac bushes on the southerly side of Boundary A. [The defendants], at [their] sole cost, shall maintain and replace, as necessary, all landscaping and related improvements within the easement area including, without limitation, the lilac bushes on the southerly side of Boundary A. [The developer], at its sole cost, shall maintain and replace, as necessary, the row of evergreens on the northerly side of Boundary A. [The developer and the defendants], each acting reasonably, shall cooperating when replacing or modifying landscaping and related improvements to preserve the intent to this grant of easement."

¶ 7 The agreement is silent as to what the defendants agreed to give in exchange for the grant of easement.

¶ 8 The easement agreement was executed on September 30, 2009, and recorded on January 5,

2010. The defendants signed the agreement on September 30, 2009, and Adel Tarakdjian signed it on behalf of the L.L.C. on October 27, 2009.

¶ 9 It is undisputed that the defendants constructed a wooden fence along the easement area sometime in spring or summer of 2010, and that the plaintiff purchased the property with knowledge of the fence.

¶ 10 After the property was purchased, Grason, who moved onto the property as a beneficiary of the land trust, asked the defendants to remove the fence from the easement area. The defendants refused, and on May 4, 2012, the plaintiff (on behalf of Grason) filed a two-count complaint for trespass (Count I) and declaratory judgment (Count II) against the defendants. The plaintiff asserted that the defendants knowingly, intentionally and without authorization, erected a fence that extended onto and encroached on the plaintiff's property. The plaintiff argued that the fence was visible and prevented Grason from both possessing and using his property. Accordingly, the plaintiff sought: (1) a declaration that any purported easement over the property was null and void for, *inter alia*, lack of consideration; (2) an affirmative injunction ordering the defendants to remove the fence from the plaintiff's property; and (3) both compensatory and punitive damages.

¶ 11 In response, the defendants asserted, *inter alia*, that under the express terms of the easement agreement they had made with the developer, they had the right to maintain the fence as an improvement within the easement area. The defendants alleged that as early as 1998, when they acquired title to their property, there was a wooden fence in place in the easement area as an improvement. In support of this assertion, the defendants produced a fence permit issued by the Village of Glencoe in 1967, as well as a survey from 1987 showing the existence of a fence. The defendants further asserted that at the time the easement agreement was recorded in January

2010, a fence existed on the easement parcel. Moreover, the defendants subsequently filed a counterclaim alleging adverse possession of the easement.

¶ 12 After the parties filed cross-motions for summary judgment, the circuit court *sua sponte* found that the language of the easement agreement was ambiguous as to the intent of the parties. The court found it unclear from the plain language of that agreement whether the terms "improvement" or "landscaping" referred to a fence. The court also found there remained a genuine issue of material fact as to the history of the fence, particularly since the plaintiff had alleged that the fence was taken down in 2009 and then put back up by the defendants without authorization in 2010, after the easement agreement was signed. Accordingly, the trial court denied summary judgment and set the matter for a bench trial.

¶ 13 On January 12, and 13, 2015, the trial court conducted a bench trial at which the following evidence was adduced. Adel Tarakdjian[1] first testified that together with his brother Anthony he developed the single family home that is presently located on the plaintiff's property. Adel was personally involved with the development and construction of the property from 2008 through its sale to the plaintiff in 2011. Adel owned Tara, which was responsible for building the house, and the title to the property was held by the L.L.C.

¶ 14 Adel testified that near the end of May 2009, Tara was ready to begin landscaping on the

[1] We note that Adel's testimony was made part of the trial record by way of an evidence deposition which was conducted by telephone on October 7, 2014, because, at the time of trial, Adel was a resident of Egypt and had no plans to be in Cook County, Illinois on the dates set for trial.

property. While studying the property survey, at that time, Adel noticed a fence on the plaintiff's property where the easement now is. He therefore sent a letter dated June 1, 2009, to the defendants, specifically Robert, as well as to John Houde, a village manager in Glencoe, informing the defendants that they were "occupying an area" of his land and asking them to remove all personal property from that area. Adel testified that when he said "personal property" he meant the fence. Adel admitted that there were also some planters and "other things" inside the fence on the plaintiff's property. The letter attached the land survey, indicating the portion of the property Adel had referred to as being "occupied."

¶ 15 According to Adel, shortly thereafter, he and Robert met to discuss the landscaping plans for the area. Adel's only demand was that the fence be removed, and that a fence never be placed again in that area. Adel stated that he was willing to landscape the area with trees to give the defendants privacy and that he agreed to pay the entire cost of such landscaping for the defendants. According to Adel, Robert agreed.

¶ 16 Soon thereafter, in early August 2009, Adel removed the fence and planted pine trees in the area where the fence had been. On August 27, 2009, Adel emailed his then-attorney, Barry Rosenbloom (hereinafter Rosenbloom) to advise him that he had removed the fence and that the fence had been replaced by trees. That email was admitted into evidence.

¶ 17 Adel next acknowledged that after the fence was removed, he and the defendants entered into an easement agreement. Adel stated that the sole purpose of the easement agreement was to have the defendants remove the fence. According to Adel, the agreement was supposed to ensure that there would never be a fence in the easement area again (built by either party) and that the area would only be landscaped, with Adel responsible for the cost of the landscaping.

Adel testified that his then-attorney, Rosenbloom, assured him that the easement agreement would resolve the matter.

¶ 18 Adel therefore testified that when in July 2010, he saw a new fence on his property, in the same place where the old fence had been, he was surprised and immediately asked his brother to contact Rosenbloom. Adel explained that he had spent a lot of money and effort to resolve the matter and make an agreement with the defendants and was therefore surprised when that agreement was "broken without a word," and "without any notice" from the defendants. Adel clarified that neither he, nor the L.L.C. ever gave the defendants permission to construct the new fence on the easement parcel.

¶ 19 On cross-examination, Adel admitted that there was never any written agreement that permitted him to remove the old fence. On redirect, Adel testified that the easement area is not suitable for any improvements, such as buildings, but that it is suitable for improvements like trellises, pavers and a bed of plants.

¶ 20 Ronald Grason (hereinafter Grason) next testified that in anticipation of purchasing the property from Adel, on March 8, 2011, he set up an Illinois land trust (the instant plaintiff), with himself and his wife as the only beneficiaries. The property was closed on April 1, 2011, and purchased for approximately $3.7 million. Since then, as a result of a divorce, Grason has been the sole beneficiary of the land trust.

¶ 21 Grason admitted that before closing, he walked around the property and saw a fence near the boundary line with the defendants' property. Grason averred, however, that he did not realize that the fence was on his property until the date of closing, when his attorney was given the easement agreement and a survey with the easement identified on it. Grason stated that because

he did not fully understand the nature of the dispute, at that time, he believed any issues could be resolved at a later date. He therefore went forward with the closing.

¶ 22 Soon after moving into his new home, Grason reached out to his attorney as well as to Adel to discuss the easement and the fence. Adel told Grason that he granted the easement to the defendants "to be a good neighbor," and that there had been a fence on the easement that he had previously torn down. Adel also told Grason that if Grason wanted to take down the current fence, he could do it for him. In August 2011, Grason reached out to the defendants to discuss the fence. Grason testified that he offered to plant, *inter alia*, an "8-10 foot arborvitae down the entire property line though the easement," thereby offering the defendants a living fence with privacy at the rear of their house. Grason averred that the defendants refused to meet in person and discuss the issue. After a continued email exchange and a telephone call no agreement could be reached.

¶ 23 Grason testified that the fence at issue is still on his property and that it essentially excludes him from the easement area. Grason stated that he is not aware of any gate in that fence, which would permit him entry into the easement area.

¶ 24 Grason also testified that up until the date of the trial, he had spent in excess of $20,000 in attorneys' fees in connection with the lawsuit.

¶ 25 The defendant, Robert Caplin, next testified that he has lived at 444 Lakeside Terrace, a property adjacent to the plaintiff's property, since January 1998. Robert explained that in all that time there have been only two wooden fences on the plaintiff's property. According to Robert, the original wood fence was there when Robert and his wife purchased the property in 1998, and

it was torn down at around the same time the easement agreement was negotiated.[2] He claimed that this agreement was negotiated sometime in the summer or fall of 2009. The new wooden fence (at dispute in this litigation) was put up by the defendants soon thereafter, sometime in April 2010.

¶ 26 Robert testified inconsistently as to when the original fence was torn down. He initially claimed that the original fence was torn down after the easement agreement with Adel was executed. However, he later admitted that according to an email from Adel to Adel's attorney the fence must have been torn down before that (in August 2009). Nevertheless, Robert then claimed that he remembered that the swimming pool that he has on his property was open between August and October 2009, and that he would never have allowed the pool to remain open without a fence, as this is not allowed under the Glencoe Village Ordinance. Adel therefore claimed that the email from Adel stating the fence was torn down in August 2009 must have been incorrect. Robert finally acknowledged that he had no personal knowledge of when the fence was torn down or who tore it down because one day he "just came home to see that it was gone."

¶ 27 Robert admitted on cross-examination that when he came home and found that the fence was gone he did not call the police, his lawyer or anyone else even though he thought the easement agreement had been breached. Instead, he just put up a new fence in the same spot.

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[2] Robert testified that he had no knowledge of when the original fence was built or whether there was an agreement with the prior owners to the two properties to permit that fence to encroach on the plaintiff's property. Nevertheless, he claimed that there were two surveys that he had seen (from 1987 and 1999) and which preceded his purchase of the adjacent property, both of which indicated a fence in the same place.

¶ 28 Robert averred that it was his understanding that the primary purpose for obtaining the easement onto the plaintiff's property was to maintain the *status quo*—*i.e.* keep the area fenced in with a wooden fence and maintain the landscape (with lilac bushes) just as the area had been since the defendants' purchased their property. Robert testified that at the time the easement agreement was being negotiated, he and his wife believed that they actually owned the land contained in the easement area. Accordingly, they agreed to forego any adverse possession litigation in exchange for obtaining the easement. In addition, Robert believed that the language of the easement agreement granting the defendants "access" for the purpose of "maintenance and replacement of the landscaping and related improvements" expressly permitted him and his wife to maintain the fence as a "related improvement."

¶ 29 Robert testified, contrary to Grason, that there is a gate on the western-most-part of the fence in the easement area. That gate, however, was not part of the fence when Robert purchased the property. On cross-examination, Robert admitted that to access that gate, a person would have to walk through a ravine on the plaintiff's property.

¶ 30 On cross-examination, Robert also admitted that he has never actually read or consulted the Glencoe Village Ordinance and therefore just assumed, based on his knowledge of other municipality codes, that the pool located on his property had to be fenced in by at least a 4 foot fence. Robert also admitted that there was nothing in the topography of his property that would prevent him from building a fence around the pool that did not extend the fence onto the plaintiff's property. Robert also acknowledged that he has pipes installed along his property line marking the exact location of the property line and that he could have built a fence right along that same pipe line but did not.

¶ 31 On cross-examination, Robert further acknowledged that his master bedroom looks out

directly onto the plaintiff's property and that, without the easement, someone could stand seven feet away and look directly into that master bedroom. Robert admitted that in that respect the easement agreement refers to "air, light and view over the easement area."

¶ 32 The defendant, Ellen Caplin, next testified consistently with her husband, Robert. According to Ellen, when she and Robert moved onto their property in 1998 there was a solid wooden fence across the easement parcel and in the same place as the new fence that they later built.

¶ 33 Similarly to Robert, Ellen could not state with certainty when the old wooden fence was removed. She stated that she believed that the removal occurred during the time she and her husband took a trip to visit family for Passover in April 2010. She stated that the day before her testimony, she was reviewing a calendar from 2010 for purposes of litigation, and based on this calendar recalled the date. Ellen averred that when she and Robert returned from their trip, the fence was gone. Like Robert, Ellen admitted she never called the police or Adel, nor her own attorney when she saw the fence was missing. Instead, Ellen hired Breckenridge Fence Company to construct a new fence. Ellen identified a contract she signed with Breckenridge Fence Company on April 22, 2010, for the construction of a new slatted wooden fence. Although she could not recall any exact dates, Ellen testified that construction of the new fence must have been completed soon thereafter.

¶ 34 Ellen acknowledged that she did not ask Adel or anyone on the plaintiff's property for permission to construct the new fence. Ellen also did not obtain a fence permit from the Village of Glencoe and she did not pay any Village fees for this construction. Also, no one from the Village ever came to inspect the fence.

¶ 35 Ellen also testified consistently with Robert that they have a swimming pool on their property

and that the Village of Glencoe requires a fence around a pool. In addition, Ellen averred that even if a fence were not required by the Village ordinance, she would always put a fence around a pool because she knew a child who died of drowning in a swimming pool.

¶ 36 Attorney Barry Rosenbloom (hereinafter Rosenbloom) next testified about his involvement in this case. Rosenbloom initially represented the developer (Adel), in the negotiation of the easement agreement with the defendants. According to Rosenbloom, the easement agreement was negotiated in the fall of 2009, drafted by the defendants' attorney, Glen Cornblath (hereinafter Cornblath,) and recorded on January 5, 2010.

¶ 37 Rosenbloom identified several emails that were exchanged as part of this negotiation between himself and Cornblath. On August 26, 2009, Cornblath wrote to Rosenbloom stating: "[Robert] told me that we are ready to document the deal. He and Adel have agreed on the landscape plan, and Adel has installed the landscape. They also agreed that [Robert] will maintain his side, meaning the area within the old triangle form of the fence, and Adel would maintain his side." Rosenbloom forwarded this email to Adel, and received a response from Adel on August 27, 2009, stating, "We did remove the wood fence. It was replaced by trees. I need to meet Bob one more time for the replacement of the metal fence[3]. [] And then our agreement is fine."

¶ 38 After the easement agreement was entered into, Rosenbloom continued to represent Adel. Rosenbloom testified that about 10 months later, he was contacted by Adel and asked to write a letter to defendants' attorney inquiring about why they had built a new fence on the easement parcel. Rosenbloom explained that, at that time, he believed that the defendants did not have a right to rebuild a new fence on the easement. Accordingly, on July 19, 2010, he wrote a letter to

[3] We note that the parties agree that there is no dispute about the metal fence.

Cornblath inquiring about the fence. Cornblath responded by email indicating that the fence was not a violation of the easement agreement because that agreement gave the defendants the right to maintain and replace "the landscaping and related improvements" on the easement. According to Cornblath, the fence was an improvement. Cornblath explained that the new fence was in the same location as the original fence, and that it was the same length and same height. In addition, the new wood fence was open-slatted, and therefore see-through rather than solid wood like the old one had been, and therefore, according to Cornblath, an improvement.

¶ 39 Rosenbloom testified that after reading Cornblath's email he reviewed the easement agreement and came to the conclusion that Cornblath was correct, and that the defendants had a right to maintain a fence on the easement parcel. Rosenbloom opined that there would have been absolutely no reason to write an easement agreement in the absence of the fence. He explained that as consideration for the easement agreement the defendants had agreed not to pursue an adverse possession lawsuit against the developer. According to Rosenbloom, without the fence on the easement parcel, there was no realistic threat of adverse possession, since landscaping (which was on the parcel aside from the fence) could easily have been removed. As Rosenbloom testified, to succeed on an adverse possession claim the defendants would have needed to prove sole and exclusive possession, and without a fence that would have been very difficult. Accordingly, Rosenbloom decided not to respond to Cornblath's email.

¶ 40 Rosenbloom averred that he continued to represent the developer (Adel) in the sale of the property to the plaintiff. According to Rosenbloom, at the closing, the plaintiff's attorney was shown and reviewed the easement agreement in conjunction with the land survey, which showed a fence. Rosenbloom could not recall whether there was ever specifically a discussion about the fence but testified that the easement was discussed.

¶ 41 After the property was sold to the plaintiff, Rosenbloom was hired by the defendants to represent them in the instant litigation against the plaintiff. Rosenbloom withdrew his representation of the defendants in October 2014 prior to his testimony at trial.

¶ 42 On cross-examination, Rosenbloom admitted that there is no mention of a fence in the easement agreement, and that the word "fence" appears nowhere in that agreement. In fact, the stated purpose of the easement agreement is the maintaining of "air, light and view" over the easement area, and nowhere mentions the defendants' right to maintain a fence.

¶ 43 On cross-examination, Rosenbloom also acknowledged that Adel wrote him an email before the easement agreement was recorded, indicating that the wooden fence had already been torn down as per that agreement. Rosenbloom nevertheless testified that he does not believe Adel's email referenced the wood fence on the easement area, but rather another wood fence that ran along the perimeter of the parties' property boundary line.

¶ 44 At trial, the court next admitted the evidence depositions of Joel Chez, the owner of the plaintiff's property before Adel's L.L.C.[4] In his deposition, Chez averred that he owned and lived at the property since the early 1980s. Chez knew the defendants as neighbors, but only casually. He admitted in the 20 years that he owned the property, there was always an old wooden fence located at the same place as the fence in dispute in the current litigation. He admitted that the fence was on his property and that its location never changed--it was never moved, destroyed or relocated.

¶ 45 Chez testified that about a year or two after the defendants moved in next door, Robert

[4] Chez was unavailable to testify at trial because he lives in Florida.

contacted him by telephone and asked if Chez was aware that the wooden fence was encroaching on Chez's property. Chez told Robert that he was not aware of the encroachment. Robert asked if Chez would be willing to exchange a portion of his property, including the area containing the fence, for a portion of Robert's land (at the front of the defendants' property). Chez responded that he did not want to change anything because "it was not affecting him." Chez explained that he did not care, because the fence was "way in the back" and it was "meaningless" to him. Chez thanked Robert but told him that it was "not an issue."

¶ 46 Chez also acknowledged that the fence never prevented him from using his property or gaining access to any portion of his property.

¶ 47 After hearing all the evidence, and closing arguments, in a written order the trial court ruled in favor of the plaintiff and against the defendants on the trespass count. In doing so, the court found credible Adel's testimony that the intent of the parties in writing the easement agreement was to remove the fence from the easement parcel. The court noted that Adel's actions were understandable, since he was "developing a property for sale" and "wanted to remove any encroachments" on the property before selling it. The court also found credible Adel's testimony that Robert agreed to the removal of the fence before the easement agreement was signed, particularly in light of Adel's August 27, 2009, email corroborating that testimony. On the other hand, the court was "troubled by the vague testimony" of the defendants regarding the timing of the removal of the wooden fence, as well as the fact that after that fence was removed they made no inquiry regarding the removal. As the court noted:

> "Had they really believed that the easement agreement allowed for the maintenance of the fence, they would have, at the very least, inquired of Adel if Adel had removed the fence,

> and if he had, they would have asked him why the fence was removed. They also would have demanded that he pay for the replacement of the fence."

The court also rejected Rosenbloom's opinion that the easement agreement contemplated the existence of the fence because there would not have been a realistic threat of adverse possession without such a fence. The trial court indicated the Rosenbloom's opinion was "wrong" and cited to case law according to which landscaping is a threat under adverse possession.

¶ 48 The court further found that the phrase "related improvements" in the easement agreement was unambiguous and referred to improvements related to landscaping, which does not include a fence. Accordingly, the court found that the new fence constituted trespass. The court also held that the trespass was willfully done since Robert had reached an agreement with Adel about the removal of the fence, but then together with his wife installed a new fence despite that agreement and despite the terms of the parties' mutually agreed upon easement agreement.

¶ 49 Accordingly, the court ordered that the defendants remove the fence from the easement area within 30 days and enjoined them from erecting any new fences there. The court also awarded the plaintiff $100 in nominal damages and $20,000 in punitive damages.

¶ 50 As to the plaintiff's declaratory judgment action, the court ruled against the plaintiff, finding that the easement was supported by consideration and was therefore valid. The court also ruled against the defendants on their adverse possession counterclaim. The defendants now solely appeal the court's decision with respect to the plaintiff's trespass claim.

¶ 51 II. ANALYSIS

¶ 52 On appeal, the defendants contend that the trial court erred in concluding that the easement

agreement does not permit a fence on the easement area, so as to have supported a finding in favor of the plaintiff on the trespass count. In the alternative, the defendants argue that even if the plaintiff's were to succeed on trespass, the court should not have awarded punitive damages where the finding of willfulness was against the manifest weight of the evidence. At the very least, the defendants urge that we find that the award of punitive damages was excessive and that we order it be remitted. We will address each contention in turn.

¶ 53 Before addressing the merits of the defendants' arguments, at the outset, we note that we review a trial court's judgment after a bench trial under the manifest weight of the evidence standard. *Northwestern Mem'l Hops. v. Sharif*, 2014 IL App (1st) 133008, ¶ 25. "A judgment is against the manifest weight of the evidence only if the opposite conclusion is apparent or when the trial court's findings appear to be arbitrary, unreasonable, or not based on the evidence." *Wiczer v. Wojciak,* 2015 IL App (1st) 123753, ¶ 33. On review, we will not disturb the trial court's judgment as long as there is evidence to support that judgment. *Wiczer,* 2015 IL App (1st) 123753, ¶ 33 (citing *Wilmette Partners v. Hamel*, 230 Ill. App. 3d 248, 256 (1992)); see also *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008) (the " appellate court will not disturb the trial court's factual findings *** unless a contrary finding is clearly apparent."). In addition, we may affirm on any basis in the record, regardless of whether the trial court relied upon that basis or whether the trial reasoning was correct. See *Wiczer,* 2015 IL App (1st) 123753, ¶ 33.

¶ 54 A. The Easement Agreement

¶ 55 The defendants first argue that the trial court erred in concluding that the intent of the easement agreement was to prohibit the defendants from maintaining a fence on the plaintiff's property. They contend that because the easement agreement was ambiguous, the trial court

properly considered parole evidence, but nonetheless assert that contrary to the trial's ruling, the parole evidence (including the opinions of the attorneys responsible for drafting the easement agreement, and the testimony of the defendants) established that the defendants continue to maintain a fence on the easement parcel. For the reasons that follow, we disagree.

¶ 56 It is axiomatic that a court's primary objective in interpreting a contract is to give effect to the parties' intent. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011); see also *Gomez v. Bovis Lend Lease, Inc*., 2013 IL App (1st) 130568, ¶13 (citing *Gallagher v. Lenard*, 226 Ill. 2d 209, 232-33 (2007)). In doing so, the court must first look to the plain language of the agreement to determine the parties' intent. *Gallagher*, 226 Ill. 2d at 233; *Thompson*, 241 Ill. 2d at 441. If the words in the contract are clear and unambiguous, the court must give them their plain, ordinary and popular meaning. *Thompson*, 241 Ill. 2d at 442 (citing *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004)). However, if the language of the contract is ambiguous, the court may look to extrinsic or parole evidence to determine the parties' intent. *Thompson*, 241 Ill. 2d at 442; *Gallagher*, 226 Ill. 2d at 233. Language in a contract is ambiguous only if it is "susceptible to more than one meaning." *Thompson*, 241 Ill. 2d at 442.

¶ 57 While the interpretation of a contract is generally subject to a *de novo* standard of review, that standard "is appropriate when the contract is clear and unambiguous as to the parties' intent." See *Battaglia v. 736 N. Clark Corp.,* 2015 IL App (1st) 142437, ¶ 2. Where, however, the trial court finds an ambiguity "the trial court's subsequent construction of the contract will not be disturbed by a reviewing court, unless it is against the manifest weight of the evidence." *Battaglia v. 736 N. Clark Corp.,* 2015 IL App (1st) 142437, ¶ 2 (citing *Dow v. Columbus-Cabrini Medical Center*, 274 Ill. App. 3d 653, 659 (1995)); see also *Asset Recovery Contracting LLC v. Walsh Const. Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 74 (Noting that while "[t]he

interpretation of contracts generally is subject to a *de novo* standard of review *** the factual findings that inform the interpretation are given deference on review and are to be reversed only where they are against the manifest weight of the evidence").

¶ 58 In the present case, for the reasons that follow, we find that the language of the easement agreement as to whether or not the defendants could maintain a fence on the easement parcel was ambiguous, so that the trial court properly considered parole evidence at trial.

¶ 59 In that respect, we begin by noting that the word "fence" is not mentioned anywhere anywhere in the easement agreement. Although the defendants point out on appeal that there is a handwritten notation next to the unnamed southeastern border of the easement area with the word "FENCE," underneath it, in an attempt to argue that "fence" was actually included in the easement agreement, we find little merit in this contention. First, the defendants make this argument for the first time on appeal. An issue raised for the first time on appeal is waived. *Hamilton v. Conley*, 365 Ill. App. 3d 1048, 1053 (2995) ("Issues not raised in the trial court generally are waived and may not be raised for the first time on appeal."). Moreover, both at the pleading stage and during discovery the defendants repeatedly, through their then-counsel, Rosenbloom, stipulated to the fact that the word "fence" is nowhere in the agreement. In addition, at trial, Rosenbloom, who no longer represented the defendants but was called as their expert witness, again testified that the word "fence" is not in the agreement. Our supreme court has long held that " '[g]enerally speaking, a [party] is precluded from attacking or otherwise contradicting any facts to which he or she stipulated.' " *Wisam 1, Inc. v. Illinois Liquor Control Com'n*, 2014 IL 116173, ¶ 41 (quoting *People v. Woods*, 214 Ill. 2d 455, 468-69 (2005)). The rationale behind this rule is that a stipulation is, by definition, an agreement by the parties or their attorneys with respect to an issue before the court, which is "conclusive as to all matters"

and requires "no proof of facts," thereby promoting "disposition of cases, simplification of issues, and the saving of expense to litigants." *Woods*, 214 Ill. 2d at 468-69. As such, the defendants are precluded from attacking or otherwise contradicting the fact that the word "FENCE" was not in the agreement. See *e.g.*, *Wisam 1, Inc.*, 2014 IL 116173, ¶ 41 (holding that a party was precluded from making an argument on appeal based on antithetical facts that it had already stipulated to before the trial court). Finally, even if we were to hold that no such stipulation was binding on the defendants here, after a review of the record, and particularly the page of the trial exhibit to which the defendants cite, we are unable to legibly read any word next to the border referred by the defendants, let alone the word "FENCE." Accordingly, we are compelled to proceed, just as the trial court did, with the assumption that the easement agreement does not contain the word "fence."

¶ 60 Moreover, the easement agreement is unclear as to both intent and scope. The easement agreement first states that the purpose of the agreement is the "desire" of the plaintiff to grant to the defendants an "easement for light and air," over the easement area. However, the agreement then sets forth two very distinct types of easements over the easement area, one of which appears to include much more than just "light and air." Specifically, the easement agreement first grants the defendants "a non-exclusive easement for light, air and view" over the easement area, and requires that the plaintiff not "construct or install any structures, improvements or landscaping" within that area. In addition, however, the easement agreement grants the defendants "a non-exclusive easement for *access* over and *across* the easement area" for the purposes of, i*nter alia*, "(i) maintenance and replacement of the landscaping and related improvements in the easement area," as defined in section 2 of the agreement.

¶ 61 Section 2 defines "Maintenance" in the following manner. The parties agree that "Boundary

A, as depicted on the attached survey is formed, as of the date hereof, by a row of evergreens on the northerly side of Boundary A and by and row of lilac bushes on the southerly side of Boundary A." The agreement requires the defendants to maintain and replace at their own cost "all landscaping and related improvements within the easement area, including, without limitation, the lilac bushes on the southerly side of Boundary A." The plaintiff on the other hand is required to "maintain and replace *** the row of evergreens on the northerly side of Boundary A." Both parties agree that "each, acting reasonably," will "cooperate when replacing or modifying landscaping and related improvements to preserve the intent of this grant of easement."

¶ 62 The easement area, depicted by way of a survey attached to the agreement, is triangular in shape with two borders of the triangle crossing onto the plaintiff's property. While the northeastern border of the easement is marked as Boundary A, the southeastern border is, for inexplicable reasons, unmarked. In addition, the southeastern border of the easement area is not described in section 2 as to what was located there at the time the agreement was entered into and what obligations the parties' had with respect to that boundary. In fact, the southeastern border is not mentioned anywhere in section 2 defining the grant of "access over" and "across the easement," for purposes of "maintenance and replacement of the landscaping and related improvements."

¶ 63 More importantly, the easement agreement nowhere defines the terms "landscaping," "improvements" or "related improvements." Rather, the easement agreement only refers to a non-exhaustive list of "landscaping and related improvements," including "lilac bushes," which the defendants are permitted to maintain in one marked portion of the easement area. While the plaintiff argues that a "fence" by very definition cannot be an improvement related to

landscaping because it is a "structure serving as an enclosure, barrier, or boundary, usually made of posts, boards, wire, or rails" (American Heritage Dictionary (2nd College Ed.) p. 497), we find the distinction weak, since a live fence (as the evergreen one described in section 2) can be used to exclude from property as much as a fence made out of wood. In addition, it is not far reaching to think of a decorative "fence" as part of "landscaping." What is more, the defendants cite to caselaw recognizing a fence as an "improvement" to real property. See *e.g.*, *Craven v. Craven*, 407 Ill. 252, 257 (1950) (noting a fence as an improvement to real estate); see also *St. Louis v. Rockwell Graphic Systems, Inc.,* 153 Ill. 2d 1, 3-4 (1992) (holding that "[r]elevant criteria for determining what constitutes an 'improvement to real property' include: whether the addition was meant to be permanent or temporary, whether it became an integral component of the overall system, whether the value of the property was increased, and whether the use of the property was enhanced."); see also Black's Law Dictionary 773 (8th ed. 2004) (defining "improvement" to property as "[a]n addition to real property, *whether permanent or not*; esp., one that increases its value or utility or that enhances its appearance." (Emphasis added)).

¶ 64 As such, we are compelled to conclude that under the plain language of the agreement, as written by the parties, there remained an ambiguity as to whether a "fence" was contemplated as an "improvement related to landscaping." In addition, since the parties' disagreed (and continue to disagree on appeal) as to whether the fence was removed from the easement area before or after the easement agreement was entered into, the question of what Boundary A looked like at the time the agreement was entered into (and what each parties' obligations were as to that boundary) necessitated parole evidence. Accordingly, the trial court properly considered parole evidence in determining the parties' intent at trial. See *Thompson*, 241 Ill. 2d at 442; *Gallagher*, 226 Ill. 2d at 233.

¶ 65 The defendants, nonetheless assert that the parole evidence presented at trial supported a finding in their favor. Specifically, they argue that the court improperly concluded that the easement agreement was entered into after the fence had been torn down, and after Adel and Robert had agreed that it be torn down. In addition, they assert that their testimony and that of Rosenbloom established that the easement agreement contemplated a fence on the easement parcel. We disagree.

¶ 66 The trial court found credible Adel's testimony that Robert had agreed to the removal of the fence before the easement agreement was signed. The court explained that Adel's testimony made sense because Adel was developing a property for sale and would have wanted to remove any encroachments to the property before developing and selling it. The court further stated that Adel's testimony was corroborated by the contemporaneous email he sent to his then-attorney, Rosenbloom, on August 17, 2009, in which, he *inter alia*, stated "We did remove the wooden fence, and it was replaced by trees." In addition, the court found believable Adel's testimony that his primary reason for the easement agreement was to insure that no fence remain on his property, in exchange for which he agreed to plant evergreens on his side of the easement area. On the other hand, the court explicitly found the testimony of the defendants "troubling," because they were "vague" as to when the fence was removed, and admittedly made no inquiries regarding the removal of the fence once they saw it was gone. The court further discounted Rosenbloom's testimony noting that his interpretation of adverse possession law was "wrong." After a review of the record, we find nothing manifestly erroneous in the court's findings. In that respect, it is well-established that "[a]s the trier of fact in a bench trial, the court is in a superior position to observe the demeanor of the witnesses while testifying, to judge their credibility and to determine the weight their testimony and the other trial evidence should

receive." *In re Estate of Bennoon*, 2014 IL App (1st) 122224, ¶¶ 70-72; see also *Chicago Title Land Trust Co. v. JS II, L.L.C.*, 2012 IL App (1stF) 963420, ¶ 31 (It is well recognized that the trial judge as the trier of fact is "in a position superior to a court of review to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof."). Accordingly, deferring to the court's credibility determinations, and the weight it gave to the contradictory evidence presented at trial, we find that the court properly concluded that the easement agreement did not contemplate a new fence being built on the easement parcel. See *Cook ex rel. Cook v. AAA Life Ins. Co*., 2014 IL App (1st) 123700, ¶ 51. As such, the trial court further properly concluded that the defendants' act of constructing a new fence on the easement parcel after the old one was torn down and in contravention of the easement agreement, constituted trespass. See *e.g*., *Duresa v. Commonwealth Edison Co*., 348 Ill. App. 3d 90, 101-02 (2004). ("Where the extent of an easement is exceeded or misused, the [party misusing the easement] becomes a trespasser [citations] and liable for damages resulting from the improper use [citations].")

¶ 67 B. Punitive Damages

¶ 68 The defendants next assert that even if we conclude that the defendants trespassed on the plaintiff's property by building a fence on the easement parcel, we should nonetheless find that the trial court erred in granting the plaintiff punitive damages. It is well settled that in reviewing a trial court's decision to award punitive damages, we use a three-step approach, taking into consideration: (1) "whether punitive damages are available for the particular cause of action, using a *de novo* standard"; (2) whether, under a manifest weight of the evidence standard, the defendants acted maliciously, willfully or in a manner that warrants such damages; and (3) whether the trial court abused its discretion in imposing punitive damages. (Internal quotation

marks omitted.) *Dubey v. Public Storage, Inc.,* 395 Ill. App. 3d 342, 355; see also *Caparos v. Morton*, 364 Ill. App. 3d 159, 178 (2006). In the present case, the trial court awarded the plaintiff $20,000 punitive damages pursuant to his trespass claim.

¶ 69 As to the first consideration, the defendants concede that punitive damages are available for trespass, where the act is accompanied by "willfulness, wantonness, malice or oppression ." *Rodrian v. Seiber*, 194 Ill. App. 3d 504, 509-10 (1990) (an intentional trespass, under a mistaken claim of right, does not entitle the landowner to punitive damages; however, when a wrongful act is accompanied by aggravating circumstances such as willfulness, wantonness, malice or oppression, punitive damages are recoverable); see also *Kelsay v. Motorola*, 74 Ill. 2d 172, 186 (1978).

¶ 70 As to the second prong, however, the defendants argue that the trial court's finding that the defendants acted "willfully" in installing the fence in April 2010 was against the manifest weight of the evidence. We disagree.

¶ 71 " Willful and wanton misconduct is that act intentionally done or that act taken, under the circumstances known, in reckless or conscious disregard of probable injurious consequences." *Rodrian*, 194 Ill. App. 3d at 509-10 (citing *Albers v. Community Consolidated No. 204 School*, 155 Ill. App. 3d 1083, 1085 (1987)). Here, the trial court found that Robert and Adel had reached an agreement about the removal of the fence, and subsequently entered into an easement agreement to make sure that a new fence would never be installed on the easement parcel. In contravention of both the agreement between Robert and Adel to remove the fence, and the subsequent easement agreement, the defendants deliberately installed a new fence on the parcel, without notice to anyone. The court found that in doing so the defendants knowingly and purposely seized property from their neighbors for their own exclusive benefit. The court

dismissed the defendants' assertion that they were mistaken about their right to the parcel, noting that they had admitted at trial that they agreed to release any adverse possession claim they may have possessed as to it. After a review of the record we find nothing manifestly erroneous in the trial court's finding.

¶ 72 Lastly, under the third step, we reject the defendants' contention that the trial court abused its discretion in assessing punitive damages. "A trial court does not abuse its discretion unless no reasonable person could assume its view." *Dubey*, 395 Ill. App. 3d at 356. In the present case, we find that a reasonable person could find that the plaintiff deserved an award of punitive damages on the trespass claim. *Dubey*, 395 Ill. App. 3d at 356.

¶ 73 The defendants nonetheless argue that even if we find that punitive damages were appropriate, the amount of the damages was too excessive and should be remitted. In that respect, they point out that the punitive damages were over ten times greater than the nominal damages awarded to the plaintiff, and that the trial court granted them only so as to permit the plaintiff to recover his attorneys' fees, although he had not pled any attorneys' fees in his complaint. We disagree.

¶ 74 In determining whether an award is excessive in a given case, Illinois courts look to a fact-specific set of relevant circumstances including: "(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); see also *Slovinski v. Elliot*, 237 Ill. 2d 51, 58 (2010) ("To determine whether punitive damages are appropriate, 'the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.' " (quoting Restatement (Second) of Torts § 908(2) (1990)) "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." *Turner*, 363 Ill. App. 3d at 1161-62. "A judge's or jury's assessment of punitive damages will not be reversed unless the manifest weight of the evidence shows that the assessment was so excessive as to demonstrate passion, partiality, or corruption on the part of the decision-maker." *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1145 (2004).

¶ 75 In the present case, after a review of the record we find that the award of punitive damages was not against the manifest weight of the evidence. "The award is certainly not so high that it indicates passion, partiality, or corruption" on the part of the trial judge. *Deal v. Byford*, 127 Ill. 2d 192, 204 (1989). The evidence at trial showed that the defendants purposely built a new fence and took possession of and excluded the plaintiff from his property. They did so in utter disregard of the agreement they had entered into with the prior owner to have the fence removed from the property so to eradicate any encroachments, in exchange for which they were expressly granted an easement for light, air, view and access to the parcel. In addition, contrary to the defendants' position, "[t]here is no requirement that the amount of punitive damages imposed on a defendant bear any particular proportion to the size of the plaintiff's compensatory recovery." *Deal v. Byford*, 127 Ill. 2d 192, 204 (1989). What is more, the nominal damages awarded here in the amount of $100, do not take into account the financial value of the mandatory injunction ordering the defendants to tear down the fence at their own expense.

¶ 76 Similarly, the absence of any evidence regarding the defendant's financial status does not

mean that the court's award must be set aside. See *Deal*, 127 Ill. 2d at 204-205. Our supreme court has made clear that "[e]vidence regarding the financial status of a defendant is simply one relevant consideration to be weighed by the judge or jury in determining an appropriate award of punitive damages." *Deal*, 127 Ill. 2d at 204. Accordingly, the plaintiff is not required to present such evidence, and since the defendants, themselves, made no attempt to do so (so as to show the punitive damages would have been detrimental considering their finances), they "cannot now complain of its absence." *Deal*, 127 Ill. 2d at 205. Moreover, in this particular case, the court could have reasonably inferred that $20,000 would not be an excessive amount in light of the sale price of the property in question ($3.7 million).

¶ 77 Finally, contrary to what the defendants would have us believe, the award of punitive damages is not an award of attorneys' fees. Since Grason specifically testified that the approximate amount of legal fees he incurred in connection with removing the fence was in excess of $20,000, the award was less than those fees. The defendants forced the matter through expensive litigation and refused to abide by the terms of the easement agreement they themselves had drafted by building a fence on someone else's property. They persisted in pursuing the matter even after Grason approached them to resolve the issue outside of the purview of the courts, and offered to build, at his own expense, another live fence (with trees) in the same spot as the one planted by Adel. Under this record, the trial court properly concluded that the award of $20,000 would serve both functions of punitive damages by punishing the defendants for their conduct and by deterring them, and others, from similar conduct in the future. *Deal*, 127 Ill. 2d at 205; see also *Franz*, 352 Ill. App. 3d at 1137 ("The purposes of punitive damages are punishment of a specific defendant and both general and specific deterrence").

¶ 78 III. CONCLUSION

¶ 79 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 80 Affirmed.