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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1272**

David D. John, et al.,
Respondents,

vs.

Lake States Tree Service, Inc.,
Appellant.

**Filed June 4, 2012
Affirmed
Wright, Judge**

Carlton County District Court
File No. 09-CV-09-3246

Randy R. Moder, Moder Legal Services, Moose Lake, Minnesota (for respondents)

John D. Kelly, Scott A. Witty, Hanft Fride, P.A., Duluth, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Johnson, Chief Judge; and Crippen, Judge.*

UNPUBLISHED OPINION

WRIGHT, Judge

In this trespass-to-trees action, appellant challenges the district court's denial of its motions for judgment as a matter of law and for a new trial, arguing that the record does

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

not support the district court's decision to order treble damages and that the jury's special verdict answers are irreconcilable. We affirm.

FACTS

Respondents David D. John and Marilyn John purchased land in Kettle River in 1996. They planted trees on their property every year thereafter. In July 1999, the Johns signed a right-of-way easement agreement with Lake Country Power cooperative (the power cooperative) to extend electricity service to their newly constructed home from a power line that ran along the northern boundary of their property. Shortly thereafter, in October 1999, the power cooperative constructed a power line that ran along the eastern boundary of the Johns' property. Some of the trees planted by the Johns were within 15 feet of the eastern power line.

On February 13, 2009, the general manager of appellant Lake States Tree Service, Inc. (Lake States), signed a bid contract for Lake States to perform right-of-way clearing under the power cooperative's power lines during 2009. By its terms, the bid contract takes effect when it is accepted by the power cooperative. In late February 2009, several weeks before the power cooperative accepted Lake States's bid contract, an employee of Lake States met with David John at his residence to discuss the conifer trees near the power lines on the property. According to the Lake States employee, he explained to David John that Lake States intended to "cut out all the brush and trees within the right-of-way of the power lines and remove any dead, dying or excessively leaning trees along the edge of the power lines on both the north line and also along the east line." During the meeting, David John signed a document indicating that he had spoken with the Lake

Lake States employee and granted Lake States permission to perform right-of-way clearing. The document, however, does not address the scope of the right-of-way clearing. Evidence regarding the scope of David John's consent is controverted. The Lake States employee testified that David John agreed and instructed him to "just leave a few on the outside edge." By contrast, David John testified that he agreed to permit Lake States to remove "a couple" of conifer trees and clear the brush around the power line. Shortly after this meeting, in February 2009, Lake States cleared trees and brush beneath the northern and eastern power lines on the Johns' property, creating a corridor measuring approximately 320 feet long and between 36 and 60 feet wide.

The Johns commenced this action against Lake States to recover damages for the unlawful removal of trees from their property. At the jury trial that followed, both parties presented expert appraisers, who agreed that the replacement value for each conifer tree is approximately \$557. The Johns' appraiser testified that 68 conifer trees had been removed beneath the power line and reported the value of those trees as \$37,876. Although he observed some non-conifer trees that had been removed, he did not provide a valuation of those trees. By contrast, Lake States's appraiser only assessed the value of those trees that had been removed *outside* the 40-foot-wide right-of-way corridor. His valuation was based on 11 conifer trees removed outside the right-of-way corridor of the eastern power line, for a total value of \$6,127, and 28 non-conifer trees removed outside the right-of-way corridor of the northern power line, for a total value of \$133. He did not provide a valuation of any non-conifer trees removed near the northern power line that were less than six inches in diameter because they lacked commercial value.

At the close of the evidence, Lake States moved for judgment as a matter of law on the issues of treble damages¹ and Lake States's authority to access the property. The district court denied the motion, and these issues were submitted to the jury. The jury returned special verdict findings as follows: (1) without lawful authority, Lake States cut and removed trees with a total value of \$16,127 from the Johns' property; (2) in a casual or involuntary manner, Lake States also cut and removed trees with a total value of \$0 without lawful authority; and (3) the Johns should not be estopped from recovering damages from Lake States for any trees that were cut and removed without lawful authority. Based on the jury's findings, the district court awarded treble damages for the trees taken without lawful authority pursuant to Minn. Stat. § 561.04 (2010).

Lake States renewed its motion for judgment as a matter of law, arguing that treble damages are unwarranted because the evidence establishes that Lake States's actions were "casual or involuntary." Lake States also moved for a new trial on the ground that the special verdict answers are irreconcilable. The district court disagreed, concluding that, in light of the verdict, treble damages are appropriate because Lake States knew or should have known that its contract with the power cooperative was not valid when the trees were removed and Lake States failed to meet its burden of proving the value of any trees removed in a casual or involuntary manner. The district court also held that, because "[t]he jury reasonably could have determined that the non-conifer trees were taken in a casual or involuntary manner due to their close proximity to the conifer trees"

¹ The term "treble damages" is defined as "[d]amages that, by statute, are three times the amount that the fact-finder determines is owed." *Black's Law Dictionary*, 419 (8th ed. 2004).

that were the object of Lake States's removal efforts, the jury's special verdict answers are not irreconcilable. This appeal followed.

DECISION

I.

We first address Lake States's challenge to the treble damages. Treble damages for the unlawful cutting of trees are appropriate "unless upon the trial it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's, or that of the person in whose service or by whose direction the act was done." Minn. Stat. § 561.04. The statute is penal in nature and must be strictly construed. *Helppie v. Nw. Drainage Co.*, 127 Minn. 360, 362, 149 N.W. 461, 462 (1914). And "[t]he facts upon which the question of treble damages depends must be passed upon by the jury and not by the court." *Id.* at 363, 149 N.W.2d at 462 (quotation omitted).

Lake States argues that its removal of the Johns' trees was casual and involuntary because it believed in good faith that it had the authority to remove trees from the Johns' property. Therefore, it argues, the award of treble damages was legal error. In a trespass-to-trees action, whether treble damages should be awarded is governed by the jury's factual findings as to whether the trespass was casual or involuntary. *Id.* In *Helppie*, the Minnesota Supreme Court reversed the district court's denial of a new trial in a trespass-to-trees action, observing that the evidence of the defendant's involuntariness should have been received and the jury should have been permitted to determine whether the defendant's trespass was "intentionally and knowingly done against plaintiff's property

rights.” *Id.* Similarly, in *Lawrenz v. Langford Elec. Co.*, the Minnesota Supreme Court observed that inadvertence is a fact issue that “is not, as a matter of law, established.” 206 Minn. 315, 323, 288 N.W. 727, 731 (1939).

Here, the district court reasoned that the record contains evidence on which a jury could rely to determine that Lake States’s trespass was not in good faith, namely, that Lake States knew or should have known that its bid contract had not been consummated. We agree. The contract clearly states that it is not effective until it is accepted by the power cooperative. The power cooperative’s general manager accepted Lake States’s bid contract on March 22, 2009—several weeks *after* Lake States removed the Johns’ trees. The jury reasonably could have found that Lake States’s tree removal without contractual authority was not unforeseen or unexpected by Lake States. *See id.* at 323, 288 N.W. at 731 (defining “casual” to mean “coming to pass without design, and without being foreseen or expected; coming by chance” (quotation omitted)). Accordingly, Lake States’s only legal authority to remove trees from the Johns’ property arose from the conversation between David John and a Lake States employee in February 2009. And that authority was limited to, at most, “all the brush and trees within the right-of-way of the power lines.” But, according to Lake States’s appraiser, 11 conifer trees and 28 non-conifer trees outside the right-of-way were removed. And Lake States admitted that it “excessively mow[ed] the power line Right-of-Way.”

In sum, the record amply sustains the jury’s special-verdict finding that Lake States removed trees from the Johns’ property without lawful authority in a manner that

was not casual or involuntary. Accordingly, the district court did not err by ordering treble damages and denying Lake States's motion for judgment as a matter of law.

II.

Lake States also argues that it is entitled to a new trial because the jury's special verdict answers are irreconcilable. We "will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Washington Cnty. Schs.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotations omitted). If the jury's answers can be reconciled on any theory, the verdict should stand. *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999).

The jury found that some trees—valued at \$16,127—were removed unlawfully, and that a smaller subset of those trees—valued at \$0—were removed in a casual or involuntary manner. Lake States contends that some value greater than \$0 must be attributed to the jury's finding of casual or involuntary tree removal. The district court concluded that the jury reasonably could have determined that non-conifer trees, which had no appraisal value, were removed in a casual or involuntary manner because they were in close proximity to valuable conifer trees that were intentionally targeted for removal. Both appraisers testified that they observed small non-conifer trees with no appraisal value that had been removed. Thus, the evidence supports the jury's conclusion that Lake States removed some trees of no value.

Lake States argues that the evidence does not establish that non-conifer trees were in close proximity to conifer trees. But this argument is unavailing. The Lake States

employee who performed the tree removal testified that the area he cut was “thick . . . [w]ith all kinds of trees. There [were] poplars, there [were] a few pines and there was brush.” The Lake States employee used a machine with an 8.5-foot cutting deck, which is wide enough to have inadvertently removed smaller non-conifer trees. The evidence also contains photographs of the area that depict, among the remaining trees, non-conifer trees in close proximity to the stumps of trees removed by Lake States and in close proximity to the remaining conifer trees. On this record, the jury reasonably could have concluded that Lake States removed small non-conifer trees with no value that were in close proximity to the conifer trees and were removed in a casual or involuntary manner.

Lake States also argues that the evidence does not establish that the conifer trees were the target of its removal efforts. The Lake States foreman testified about his concern for the threat posed by the conifer trees in particular. Lake States’s employees also testified about the need to remove trees endangering the power line. And the evidence demonstrates the height of the power lines and the conifer trees. But the record is silent regarding the height of other removed trees. Moreover, Lake States removed 28 non-conifer trees that were larger than six inches in diameter, in contrast to the 68 conifer trees that Lake States removed. Thus, the jury reasonably could have concluded that the conifer trees were the “object” of Lake States’s removal efforts.

We are mindful that the jury’s verdict is entitled to great deference, *Navarre*, 652 N.W.2d at 21, and “the assessment of damages is the peculiar province of the jury,” *Schindele v. Ulrich*, 268 N.W.2d 547, 552 (Minn. 1978); accord *MacIllravige v. St. Barnabas Hosp.*, 231 Minn. 384, 387, 43 N.W.2d 221, 223 (1950). Indeed, generally

a new trial on damages will be granted only when “the verdict is so inadequate or excessive that it could only have been rendered on account of passion or prejudice.” *Rush v. Jostock*, 710 N.W.2d 570, 577 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. May 24, 2006). That standard has not been met here. On the record before us, the jury reasonably could have concluded that Lake States unlawfully removed large valuable conifer trees intentionally and unlawfully removed small non-conifer trees of no value in a casual or involuntary manner because they were in close proximity to the larger trees. Moreover, because the jury exercised its broad discretion when assessing damages that are sustained by evidence in the record, Lake States has not demonstrated that the jury’s damages determination was the product of passion or prejudice.

Accordingly, the district court did not err, and a new trial is not warranted.

Affirmed.