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STATE OF MICHIGAN

COURT OF APPEALS

SHERILYN HART,

Plaintiff-Appellee,

and

ANTHONY MCCARTY,

Plaintiff,

v

NORTH WAVERLY LLC,

Defendant-Appellant.

UNPUBLISHED
November 05, 2026
10:37 AM

No. 373806
Ingham Circuit Court
LC No. 22-000089-CH

Before: WALLACE, P.J., and CAMERON and KOROBKIN, JJ.

PER CURIAM.

This action arises from a property dispute between adjoining residential and commercial properties. Plaintiffs, Sherilyn Hart and her husband Anthony McCarty, with Hart having title to a residential property (1324 Property) they were endeavoring to rehabilitate and rent, brought claims for trespass, nuisance in fact, nuisance per se, and to quiet title against defendant, North Waverly LLC, the owner of the commercial property next door to the south (1300 Property). Plaintiffs' complaint contended that defendant altered the drainage of its property to unnaturally increase and concentrate the flow of such drainage onto their neighboring property, which increase in volume and velocity of water caused them and their property significant damages, including significantly interfering with their right to the use and quiet enjoyment of their property. The complaint likewise contended that defendant, by way of its employees and agents, entered onto the 1324 Property and constructed and altered certain landscaping at the property line between their two parcels (a border and retaining wall comprised variously of poured concrete, cinder block and railroad ties) that intrudes and encroaches onto the 1324 Property. Defendant, in turn, filed a counterclaim to quiet title based upon adverse possession as to that portion of property where the retaining wall is constructed and located to the extent it intrudes upon the 1324 Property.

The trial court held a four-day bench trial during which it granted defendant's motion to dismiss Anthony McCarty, based upon lack of standing because he was not a record title holder or a person in possession of the property (e.g., a tenant).[1] The trial court entered a judgment and order finding for plaintiff on her trespass and nuisance claims and dismissing defendant's quiet title claim.[2] It awarded "[a]ctual damages consisting of the reasonable expenses of necessary repairs to the property and remediation of the retainer wall for $150,000; noneconomic damages for emotional distress and mental anguish awarded in the amount of $50,000; and attorney fees of $40,000 for a total award of $240,000."

The trial court then denied in part and granted in part defendant's subsequent motion to amend judgment and for new trial. It granted the motion as to its award of attorney fees, vacating that award, and, based on its finding that defendant was 80% responsible for those damages under the doctrine of comparative negligence, it reduced its award of economic damages by 20%, resulting in an amended judgment of $170,000.

Defendant then brought this timely appeal of right. For the reasons set forth herein, we affirm in part, reverse in part, and remand for the trial court's entry of an amended judgment modifying its award of economic damages and clarifying its equitable award of nuisance abatement as set forth herein.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Hart and McCarty, husband and wife, purchased the property at 1324 N. Waverly Rd. in 2013, intending to rehabilitate and make use of it as a rental property. Their primary residence is located next door to the north at 1400 N. Waverly Road. Both the 1324 Property and their primary residence are marital assets, but only Hart's name is on the title for the 1324 Property. Defendant, North Waverly, purchased the commercial property next door to the south of the 1324 Property at 1300 N. Waverly Rd. in March 2015. Hart and McCarty's trial testimony was that there was no water damage to the 1324 Property when they purchased it in 2013 and they had no water damage or problems with excess water run-off or flooding on the 1324 Property in 2014-2015.[3] Plaintiff and McCarty each testified that they first noticed excess water drainage in mid-May 2016. Starting at that time, they noticed the grass and soil was very wet and saturated with water and it was more difficult to mow the lawn with their tractor in the section of the back and side yard next to the 1300 Property.

McCarty went over to meet with the managing member and an owner of North Waverly, Eric Stevenson, for the first time on June 1, 2016 to address a truckload of asphalt and broken up

[1] In light of this dismissal, unless otherwise noted, hereafter, references to "plaintiff" in this opinion will be to Sherilyn Hart.

[2] The trial court made no express ruling as to plaintiff's quiet title claim, which is likewise not addressed on appeal.

[3] McCarty testified that he mowed the backyard to the 1324 Property in 2011-2012 while it was bank-owned and was very familiar with it and likewise noticed no water damage or issues with excess water drainage during that time.

concrete that contractors for the 1300 Property left in the middle of the 1324 Property driveway, and noticed black plastic corrugated piping[4] running over the ground up to and over the 1300 Property's property line and retaining wall with the 1324 Property at that time.

McCarty and plaintiff each testified that, in mid-May of 2016, North Waverly made changes to the drainage from the downspouts on the 1300 Property, removing their extensions and causing them to "plug into" one of two long pieces of uncapped black plastic corrugated pipe. The collector pipe from the front downspouts laid over the retaining wall between the 1300 Property and 1324 Property and emptied onto the 1324 Property. There were two such collector pipes and the "back one" (to which the black corrugated pipes at the end of the back downspouts connected) "came all the way to the property line where they dug a small hole" and stuck the uncapped end of the black plastic corrugated pipe into the hole "[s]o it's just under the surface of the ground, just across the property line" onto the 1324 Property.

While talking to Stevenson and his "real estate partner" on June 1, 2016, McCarty asked about the front collector pipe he observed running up to and over the retaining wall between their properties. Stevenson said that it was just there temporarily while they were having the parking lot worked on and that it was going to run under the parking lot. McCarty said, "Okay, if you're sure that's what's going on because if it rains, there is going to be a lot of water here." Until then, McCarty had no idea that this was reason that the grass and soil in the back and side yard of the 1324 Property had been so wet and saturated starting in mid-May 2016.

McCarty testified that that front collector pipe Stevenson said was "temporary" remained in its place there for nearly six years, until 2021. He testified that, after those two collector drains were put in place, because the back collector drain was "slipped just under the surface of the dirt," water "would back flow out from where it was plugged in the ground, . . . bubble up at the top and spill over," onto the 1324 Property and "flow[] and pool[] all at the back of the house on the east wall of the house. Because the front collector drain "was just a big black pipe that emptied right onto" the 1324 Property, that drainage water "ran down and flowed into the garage, around the garage," and if it was a really big rain it would flow through the garage and reach the house.

McCarty testified that he informed Stevenson that his changes to the 1300 Property drainage system caused concentrated, excessive water drainage onto the 1324 Property if it rained, and he repeatedly called Stevenson to find out when the two collector pipes draining at and over the retaining wall between their two properties would be removed. Stevenson gave McCarty multiple stories as to what was going on, the last of which was "that pipe [was] in the ground, and that no more water should come from it," and he stopped taking McCarty's calls in the Fall of 2016.

[4] This piping was also referred to as "black plastic drain tile" at trial due to it being perforated for drainage purposes. While plaintiff contested that there was never any evidence at trial that the black plastic corrugated piping was perforated, McCarty later testified in the context of his capping the collector pipes: "These pipes have tiny, tiny little holes in them ever so often. So that if you cap it, and it's holding water in there, it's what's called seep holes. It'll slowly allow that water to seep out under the ground. That's how it's designed to work."

At some point starting in June 2021, defendant rebuilt the eastern portion of the retaining wall between the 1324 Property and 1300 Property. Constructed of stacked railroad ties, it was reset further south by defendant (but still over the property line onto the 1324 Property), and the front black plastic corrugated collector pipe was buried in the ground behind the railroad tie retaining wall with pea gravel at the same east-west location along the retaining wall where it terminated previously. But this action did not resolve the problem with the focused excessive water draining onto the 1324 Property. A Summer 2021 video taken after this work was performed was shown at trial depicting water pouring out of a hole at the base of the railroad tie retaining wall where the front collector pipe was buried, causing the pea gravel to wash out along with the water onto the 1324 Property and onto its driveway 100 feet from the border between the two properties. That same video likewise depicts water seeping through the soil where the black plastic corrugated collector pipe was buried in the ground with pea gravel, right at the property line between the 1300 Property and the 1324 Property, and is actively streaming out of the soil onto the 1324 Property. Prior to 2021, plaintiff testified that this back collector pipe was not even buried.

Prior to filing this lawsuit, McCarty had many conversations (and many attempts at conversations) with Stevenson regarding the concentrated, increased water drainage from the 1300 Property, called the Township and County many times, and testified that he contacted the EPA in 2019. McCarty testified that, in 2018, he rented earth-moving machinery, dug a trench, installed a larger sump line, and bought and installed a large sump pump meant for commercial buildings to pump away the water seeping into their basement from the 1300 Property. He also employed this rented earth-moving machinery to shave down portions of the backyard so that some of the concentrated water drainage from the 1300 Property's collector pipes would drain around the house and garage rather than down to them.

In June 2020, McCarty testified that he capped the ends of the front and back black plastic corrugated collector pipes when: the property was already saturated, the 1324 Property's basement had previously and repeatedly flooded, a significant rainstorm was forecast, he and his wife could not find an attorney to take on this case, and they were "fed up." The caps remained in place for approximately 11 months, and McCarty testified that, after he capped them, the saturated soil in the back and side of the 1324 Property near its border with the 1300 property began to noticeably dry out over time. McCarty later noticed that the caps were removed and "thrown onto his yard."

As already noted, commencing around mid-June 2021, defendant performed work on the railroad tie portion of the retaining wall, rebuilding and resetting it further south (closer to but still encroaching over the 1324 Property's property line), buried the front collector pipe with pea gravel just behind the railroad tie wall, and likewise buried the back collector pipe with pea gravel right at the property line with the 1300 Property. As a result, plaintiff called the police and Township and, when they arrived, she asked the Township representative why they had not issued a violation to defendant for increasing and focusing the rainwater drainage onto the 1324 Property after their repeated complaints. Plaintiff was then told for the first time that the Township required video proof of the drainage issue, whereupon plaintiff promptly sent one of the videos of water gushing out of a hole toward the bottom of the retaining wall where the front collector pipe was buried and the Township finally issued the violation. Around June or July of 2021, based upon plaintiff's reporting, the Township issued a code violation to defendant for the state of disrepair of the retaining wall and the focused water discharge onto the 1324 Property.

Plaintiff emailed the Township representative on October 27, 2021 inquiring whether defendant had submitted a corrective action plan to address the violation (because she had never seen any action taken by defendant actually correcting the code violations). The representative's November 2, 2021 response was that the property manager for the 1300 Property did provide a corrective action plan as well as documentation that the plan was in place, and that if plaintiff was still having issues with water run-off, she may need to contact a design professional for her property.

After the caps to the collector pipes were removed, in September 2021, McCarty designed and installed a water return system that collected the water draining from the black plastic corrugated collector pipes into a sump pump crock, where it would then be pumped through a PVC pipe with an elbow extending over the retaining wall onto the1300 Property parking lot and would run directly into the storm drain. For 90 days this system worked effectively and the saturated soil on the back and side of the 1324 Property next to the 1300 Property began to dry out within approximately one week, comparable to when McCarty capped the collector pipes, but McCarty acknowledged that this was not a long-term solution and described it as "very ugly." Plaintiff then received a violation notice from the Township regarding the water return system and removed it at the beginning of December 2021.

McCarty testified that, from mid-2016 through 2023, except when the two collector pipes were capped or the water return system was operating, whenever there was a heavy rain, the water was flowing from the 1300 Property drainage system that resulted in water pooling next to the garage and on the east wall of the 1324 Property. This situation resulted in extensive damage to the garage and house including to the garage insulation, sheathing board and siding. The east wall of the basement began to bow inward in its middle, beginning in November-December 2016, until it eventually slid off its sill, necessitating that the house be jacked up so that wall could be replaced (with repairs to the north and south basement walls also being required to reincorporate the new east wall). The replacement of the foundation wall occurred in March 2021. Jacking the house up in turn cracked the plaster throughout the house and caused the roof to begin leaking requiring the house to be dry-walled and reroofed. The concrete driveway also suffered damage from the constant puddling and flow of water, including a cement pad actually floating up and out of place, necessitating it to be reset in place with a skid steer. A brand-new furnace and central air conditioning unit and gas water heater were ruined by flooding in the basement. None of this damage was covered by plaintiff's homeowner's insurance. Additionally, the basement sump pump would run constantly until its motor would burn out, and plaintiff went through five sump pump motors throughout this ordeal from mid-2016 through 2023. Whenever a sump pump motor would burn out, the basement would flood (whereas there was never water damage or water in the 1324 Property basement prior to 2016, when the collector pipes were capped, or when the water return system was operating).

McCarty estimated that approximately $60,000 to $65,000 was spent on repairs to the house resulting from the damage caused by the excess, focused water drainage from the 1300 Property, but that this figure did not include repairs to the garage, with the exception of its roof, which was replaced. Various receipts were admitted at trial including: for equipment to cap the collector pipes and construct the water return system totaling $314.46, plus an additional receipt for purchase of additional materials for this; rental of a dumpster for the plaster and insulation removed from the house; replacement of the basement wall and some changes to the main sewer

and septic lines totaling $21,238; replacement of the house and garage roofs totaling $8,000; rental of a skid steer totaling $1,266; purchase of string to mark the property border and landscaping block; purchase of two sump pumps for the water return system totaling $700, as well as five sump pumps for the basement; drywall ceilings and insulation labor totaling $1,500; drywall tape and mud totaling $1,181.41; insulation batting totaling $458; and the actual drywall sheeting totaling $1,400. This is only a partial list of what could be discerned from the trial transcript, however, because defendant failed to file the trial exhibits in its possession with the trial court clerk (or this Court).[5] MCR 7.210(C). McCarty testified at trial that the drywall has not yet been painted so there were additional costs for that material and labor, plus additional costs for finishing the house, repairing the damage to the garage, and repairing the driveway.

Plaintiff testified that the entirety of the materials and labor for tearing out and replacing the drywall in the house cost approximately $7,000. She also testified that the cost for replacing the water heater was $1,330 or $1,500. She further indicated that the replacement of the sewer line with a larger pipe was something they did themselves, required renting two different size trenchers and that the equipment and materials cost up to $500. She also indicated that the cost of the property survey they obtained was approximately $750.

In the Summer of 2023, defendant "remediated" the terminus of the 1300 Property drainage system, where the black plastic corrugated collector pipes are now buried approximately four feet south of the property line with the 1324 Property in a "French drain."[6] Plaintiff's engineering expert testified that because the soil in the area of the 1300 Property is not sufficiently absorptive, French drains are ineffective and are more like a bathtub filled with pea gravel that, with enough water, will simply overflow the hole and run across the surface. Although defendant's engineering expert disagreed that the soil in the area was so non-absorptive that there would be overflow, he agreed that the terminus of the collector pipes were placed in what he termed a French detention or containment rather than a French drain:

> A [F]rench drain, just to clarify, a trench drain is truly used to divert water, same as a pipe would. Where this case, we're not diverting the water. We are containing it. Like [plaintiff's expert] had mentioned, like a bathtub, you dig the hole, you fill it with pea stone, crushed concrete to create enough voids to fill the water.

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[5] We note that appellant attached documents to his appendix that he purports to be some of the trial exhibits, which are unmarked, but he did not attach all of the marked trial exhibits, leaving this Court to speculate as to what was omitted.

[6] A "French drain" is "a drain consisting of an underground passage made by filling a trench with loose stones and covering with earth." Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/French%20drain> (accessed August 20, 2026). In his trial testimony, Stevens described a French drain as "a method of water distribution, basically, to where you dig a hole that's roughly 2-foot diameter, four to six feet in the ground. You fill it with pea stone. A drain tile is then put into that hole. So that when the water . . . goes through the pea stone and it settles back out in the ground on a four- to six-feet, a little grade."

McCarty testified that since defendant performed this remediation of the drainage system in 2023, it has resulted in less water draining onto the 1324 Property in the back of the property, i.e., "[i]t's not as bad as it was," there have been no further drainage issues in the area of the front collector pipe, and "[i]t made a difference getting [the terminus of the collector pipes] off the property line." Notably, Stevenson contrarily claims that this remediation was done in 2021 in response to the Township code violation that defendant received.

Plaintiff testified at trial that she and her husband have done no further repair work on the 1324 Property in the last year toward their goal of having it in a rentable condition for a prospective tenant. She testified that they felt exhausted and their motivation to pursue this project had been drained from them:

> We did not feel heard by the Township, or . . . we didn't have any cooperation from North Waverly to help remediate it. We were ignored. The Township said everything was good with the corrective action plan, but never inspected, personally, in person. And we just felt like there was no remediation [sic: remedy] for us, other than to have to go to court.

As noted, Hart and McCarty filed a complaint against defendant for trespass, nuisance, and to quiet title, and defendant brought a counterclaim to quiet title based on adverse possession. Following a four-day bench trial, the trial court entered a judgment and order noting its earlier grant of defendant's motion to dismiss McCarty, which it brought during the trial, based upon McCarty's lack of standing due to his not being a record title holder or a person in possession of the property (i.e., a tenant). The judgment and order further found that:

- Notwithstanding that all the experts in the case agreed that some amount of water flowed from the north, south, and east properties onto the 1324 Property, the trial court found McCarty's testimony credible and the undisputed fact that no excessive yard saturation or flooding to the 1324 Property occurred during two-and-a-half years prior to the defendant installing the black plastic corrugated pipe drainage system from the 1300 Property downspouts to the point of discharge from the two collector pipes at and over the edge of its boundary with the 1324 Property compelling as to causation;

- starting by the spring of 2016 at latest, defendant's modifications to the drainage on its property created an unnatural and excessive flow of drainage water from the 1300 Property onto the 1324 Property, constituting a trespass and nuisance;

- this increase in water flow caused substantial water damage to the 1324 Property, including the basement and garage, remediation of which resulting in plaintiff incurring substantial economic damages;

- "the retaining wall portion of the drainage system on [d]efendant's property constitutes a nuisance" and defendant must replace the deteriorated railroad ties and gaps in the retaining wall within six months in abatement of this nuisance;

- defendant's adverse possession counterclaim fails because the fifteen-year statutory period for such claim is not satisfied where it commenced upon defendant's purchase of the 1300 property in 2015 and this lawsuit commenced in 2022;

- plaintiff is "entitled to actual damages including noneconomic damages such as emotional distress and mental anguish" and costs incurred in her efforts to abate the damages caused by the defendant's modifications to the drainage on the 1300 Property, due to plaintiff's trespass and nuisance tort claims sounding in tort; and

- defendant's efforts to assist in diversion of water away from the 1324 Property demonstrate the intrusion was involuntary and unintentional such that trebling of the trespass damages pursuant to MCL 600. 2919(1) is not appropriate.

The judgment and order awarded "[a]ctual damages consisting of the reasonable expenses of necessary repairs to the property and remediation of the retainer wall for $150,000; noneconomic damages for emotional distress and mental anguish awarded in the amount of $50,000; and attorney fees of $40,000 for a total award of $240,000," and dismissed defendant's adverse possession counterclaim.

Defendant then filed a motion to amend judgment and for new trial, which the trial court denied in part and granted in part. The court denied the motion with regard to its award of noneconomic damages, finding them recoverable on the trespass and nuisance claims. However, it granted the motion with regard to its award of attorney fees, finding that no statute, court rule or case law providing an exception to the common-law rule that they are not ordinarily recoverable applied.

Next, it rejected defendant's arguments that plaintiff failed to establish causation of its damages due to the excess drainage from the 1300 Property and that those damages were not proven with reasonable certainty. Defendant relied upon *Craig v Oakwood Hosp*, 471 Mich 67, 93; 684 NW2d 296 (2004), to argue plaintiff failed to establish causation. The Court in *Craig* found an "absence of testimony on causation" in that medical malpractice case. But the trial court in the present case found that defendant's reliance upon *Craig* failed because plaintiff's credible evidence at trial established that defendant's "work on the downspouts and drainage tile" on the 1300 Property resulted in and was the primary cause of excessive water running onto and damaging plaintiff's property. The court noted that plaintiff testified as to the natural water flow experienced for more than two years before defendant's conduct, and it was not until the defendant's unilateral conduct in early 2016 that this excessive, property-damaging water flow became clearly evident and continued. Further, McCarty's affidavit and plaintiff's expert testimony confirmed the excessive waterflow from the 1300 Property was a significant cause of the water damages to the 1324 Property.

Addressing plaintiff's argument that it failed to apply comparative fault principles, the trial court found that the evidence did not establish plaintiff was more than 50% at fault, such that she was entitled to noneconomic damages; and defendant was at least 80% responsible for the economic damages to the 1324 Property, necessitating a 20% reduction in the amount of that award in its judgment and order.

Next, the trial court denied the motion to amend judgment or for new trial with regard to its equitable award of defendant's abatement of its nuisance as to the retaining wall. Finally, the trial court affirmed the dismissal of the adverse possession counterclaim, finding its claim for tacking was moot where it "did not maintain exclusive control over the piece of property in question."

Based on these rulings setting aside the award of attorney fees and reducing the economic damages award, the trial court amended and reduced its initial judgment from $240,000 to $170,000.

Defendant filed a timely claim of appeal from this final order. Plaintiff, whose trial counsel was permitted to withdraw following the motion to amend judgment and for new trial, is *in propia persona* and has filed no appearance or brief in this appeal.

II. STANDARD OF REVIEW

"This Court reviews a trial court's findings of fact following a bench trial for clear error and reviews de novo the trial court's conclusions of law." *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011). See also MCR 2.613(C) ("Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."). "A finding is clearly erroneous when, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Save Our Downtown v Traverse City*, 343 Mich App 523, 543; 997 NW2d 498 (2022)

This Court reviews a trial court's equitable decisions de novo, but again, the court's findings of fact in support of that decision are reviewed for clear error. *Id*.

III. DEFENDANT'S FAILURE TO FILE TRIAL EXHIBITS

Notably, pursuant to MCR 7.210(C):

> Within 21 days after the claim of appeal is filed, a party possessing any exhibits offered in evidence, whether admitted or not, must file them with the trial court or tribunal clerk, unless by stipulation of the parties or order of the trial court or tribunal they are not to be sent, or copies, summaries, or excerpts are to be sent.

However, the lower court record does not contain any trial exhibits and it thereby appears that defendant has failed to ensure the trial exhibits in its possession (i.e., all of them) are before this Court. Defendant cannot benefit from this violation of MCR 7.210(C). *Waterford Sand and Gravel Co v Oakland Disposal, Inc*, 194 Mich App 571, 572; 487 NW2d 511 (1992) (finding that the parties abandoned issues raised on appeal where they failed to provide the required record of the proceedings in the trial court); *Baker v Wayne Co Bd of Rd Comm'rs*, 185 Mich App 82, 89; 460 NW2d 566 (1990) (finding defendant waived issue of whether grant of summary disposition was proper by failing to provide a record of the hearing); *People v Thompson*, unpublished opinion per curiam, issue June 10, 2010 (Docket No. 289033), p 1 (finding defendant waived issue regarding whether the trial court abused its discretion in admitting inflammatory photographs based the lack of relevance and MRE 403 where he failed to file the photographs with the trial

court clerk or otherwise provide them); *Pellerito v Pellerito*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 1997 (Docket No. 182442), p 1 (finding appellant waived issue that evidence was insufficient to support contention that appellee concealed assets "by failing to provide this Court with a complete lower court record," including certain trial exhibits).

IV. AWARD OF NONECONOMIC DAMAGES ON CLAIMS OF TRESPASS AND NUISANCE

Defendant contends that the trial court erred in awarding noneconomic damages on plaintiff's claims of trespass and nuisance. We agree with defendant regarding trespass, but disagree regarding nuisance.

Defendant notes that this Court recently found that the holding in *Price v High Pointe Oil*, 493 Mich 238; 828 NW2d 660 (2013), that noneconomic damages are unavailable for claims involving negligent destruction of property, likewise applies to claims of trespass. In *Mack v Natural Way, Inc*, ___ Mich App ___; ___ NW3d ___ (2025) (Docket No. 367998), the plaintiff filed claims for trespass and negligence arising from the defendants mistakenly applying chemicals, insecticides, and herbicides to the wrong property, which property the plaintiff assiduously maintained as an organic yard, free of such chemical deluge. The matter proceeded to jury trial where the jury awarded economic damages for "negligence, and/or trespass," as well as noneconomic damages based only upon the defendants' trespass. On appeal the defendants contended the trial court abused its discretion in denying their motion in limine and granting the plaintiff's motion in limine and thereby allowing the plaintiff to present evidence of her noneconomic damages. This Court agreed because the trial court's ruling "enabled plaintiff to present evidence of mental anguish for property destruction" which our Supreme Court barred in *Price*. *Id*. at __; slip op at 6.

In likewise applying *Price*'s holding barring noneconomic damages for negligent destruction of property to the plaintiff's trespass claim, *Mack* observed *Price*'s heavy reliance on *O'Donnell v Oliver Iron Mining Co*, 262 Mich 470; 247 NW 720 (1933). *Mack*, ___ Mich App at ___; slip op at 7. *Mack* then further noted our Supreme Court's later citation of *O'Donnell* for the principle that "where the wrong consists of a trespass to property resulting in an injury to land, the general measure of damages is the diminution in value of the property if the injury is permanent or irreparable, or cost of restoration of the property to its original condition, if less than the value of the property before the injury if the injury is reparable or temporary." *Id*. (quotation marks, citation, and brackets omitted), quoting *Kratze v Indep Order of Oddfellows, Garden City Lodge No 11*, 442 Mich 136, 149; 500 NW2d 115 (1993). However, that later Supreme Court decision explained that the principle is "flexible in its application, that the ultimate goal is compensation for the harm or damage done, and that whatever method is most appropriate to compensate a plaintiff for the loss may be used." *Mack*, ___ Mich App at ___; slip op at 7 (quotation marks, citation, and brackets omitted), quoting *Kratze*, 442 Mich at 149.

Mack acknowledged that this Court has permitted noneconomic damages for property-related claims, citing two unpublished decisions involving "trespass-nuisance" where: raw sewage backed up into the plaintiffs' homes due to the failure of the defendant's sewer system; and contaminated water entered the plaintiffs' property from the defendant's landfill. *Mack*, ___ Mich App at ___; slip op at 7, citing *Stevens v Flint*, unpublished per curiam opinion of the Court of

Appeals, issued December 20, 2007 (Docket No. 272329), and *Bielat v South Macomb Disposal Auth*, unpublished per curiam opinion of the Court of Appeals, issued November 4, 2004 (Docket No. 249147). *Mack* further acknowledged that, in the sewer case, this Court observed that "trespass-nuisance is a tort, and that emotional damages are recoverable in tort claims." *Mack*, ___ Mich App at ___; slip op at 7 (quotation marks, citation and brackets omitted), citing *Stevens*, unpub op at 3.

Mack then noted that its plaintiff "did not assert a claim for nuisance or trespass-nuisance," but rather, trespass and negligence claims, and that a trespass claim addresses " 'an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it.' " *Mack*, ___ Mich App at ___ & n 4; slip op at 7 & n 4, quoting *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 344-345; 568 NW2d 847 (1997).[7]

In both the trespass and negligence counts in *Mack*, the plaintiff "sought noneconomic damages for, among other things, the emotional distress and anxiety resulting from the damage to her property." The plaintiff's amended complaint made clear that "it was the destruction of her property—coupled with the potential impact on her husband's health—that caused her mental anguish," and the trial court ruled that "it would allow noneconomic damages and compared the situation to one in which an insurance company reimbursed someone for something that happened, but the reimbursement did not cover the aggravation the injured party felt" and it would allow plaintiff to "ask for a price tag on [her] aggravation" for the property destruction. *Mack*, ___ Mich App at ___; slip op at 7-8. *Mack* found allowing noneconomic damages on a trespass claim on such grounds was "incongruent with the reasons provided in *Price*" for barring such damages in the case of negligent destruction of property, i.e., that noneconomic damages (1) are not "easily verifiable, quantifiable, and measurable," (2) "would engender disparity in awards of damages verdicts because other property owners would not suffer the acute aggravation and stress described by plaintiff in the instant case," and (3) would deprive defendants of a "reasonable level of certainty about the scope of . . . liability for the accident resulting from . . . negligent conduct." *Id.* at 8.

[7] "Trespassory nuisance," also referred to as "trespass-nuisance" is a cause of action "where a plaintiff shows condition (nuisance or trespass), cause (physical intrusion), and causation or control by the defendant." *Traver Lakes*, 224 Mich App at 345. "Trespass-nuisance shall be defined as a direct trespass upon, or the interference with the use or enjoyment of, land that results from a physical intrusion caused by, or under the control of, a governmental entity. Damages may be awarded for injury to person or property." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 145; 422 NW2d 205 (1988), overruled on other grounds by *Pohutski v City of Allen Park*, 465 Mich 675, 678-679, 685-686 (2002). Illustratively, in *Hadfield*, a claim was found to sound in trespassory nuisance where "ineffective county drains filled with mud and overflowed, flooding the plaintiff's farm fields" and in *Traver Lakes* where the plaintiff alleged the defendants "installed ineffective soil erosion controls during construction of the apartment complex, resulting in excess silt flowing into plaintiff's pond system," i.e., the factual allegations include "elements of both a trespass and a private nuisance." *Traver Lakes*, 224 Mich App at 345.

In light of *Mack*'s binding precedent, plaintiff's cause of action for trespass does not support the trial court's award of noneconomic damages in the present case. However, plaintiff's complaint likewise asserted private nuisance causes of action for nuisance in fact and nuisance per se. The trial court's order denying in part and granting in part defendant's motion to amend judgment or for new trial specifically stated that "noneconomic damages are awarded based in trespass *and nuisance*" and that awarding noneconomic damages for mental anguish and emotional distress for claims for trespass *and nuisance* is appropriate. (Emphasis added.)

No claim of private nuisance seeking noneconomic damages such as mental anguish or emotional distress arising from an individual's deprivation of the use and enjoyment of their property was asserted in *Mack*, and it expressly distinguished claims of nuisance or trespassory-nuisance from its holding. *Mack* nonetheless remarked regarding trespass-nuisance claims in dicta[8] that:

> In deciding that plaintiff is not entitled to noneconomic damages, we recognize the logical inconsistency in the law. It makes little sense to permit noneconomic damages in cases involving trespass-nuisance claims based on the mental anguish associated with deprivation of the use and enjoyment of property, but to bar noneconomic damages in cases where the property is negligently damaged or destroyed. But our Supreme Court has determined that noneconomic damages are not recoverable on negligence or trespass claims, which is enough to resolve this appeal by reversing the award of noneconomic damages to plaintiff. [*Id*. at 9.]

"Nuisance-abatement proceedings brought in the circuit court are generally equitable in nature." *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 430; 770 NW2d 105 (2009), citing MCL 600.2940(5). Such cause of action accordingly arises under "the broad doctrine that equity regards and treats as done what in good conscience ought to be done." *Allard v Allard*, 318 Mich App 583, 597; 899 NW2d 420 (2017). Because the award of noneconomic damages here is made in equity, it does not implicate or offend the reasons set forth in *Price* and *Mack* for finding such damages are not permitted in the context of legal claims for negligent destruction of property or trespass.

> Primarily, nuisance is a condition. Liability is not predicated on tortious conduct through action or inaction on the part of those responsible for the condition. Nuisance may result from want of due care (like a hole in a highway), but may still exist as a dangerous, offensive, or hazardous condition even with the best of care. [*Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630, 636; 178 NW2d 476 (1970).]

Nuisances are dangerous, offensive, or hazardous conditions and a nuisance action seeks to redress interference with an owner's reasonable use and enjoyment of their property. *Id*. at 635-636; *Hadfield*, 430 Mich at 151. A nuisance per se is an act, occupation, or structure that is a

[8] "Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, 'lack the force of an adjudication.' " *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011).

nuisance at all times and under any circumstances regardless of location or surroundings. *Bluemer v Saginaw Cent Oil & Gas Serv, Inc,* 356 Mich 399; 97 NW2d 90 (1959). "Nuisances in fact are those which become nuisances by reason of circumstances and surroundings, and an act may be found to be a nuisance as a matter of fact where the natural tendency of the act is to create danger and inflict injury on person or property." *Radloff v Michigan*, 116 Mich App 745, 756; 323 NW2d 541 (1982), remanded 417 Mich 894 (1983).

Defendant's actions in consolidating the flows from the downspouts on the commercial building on the 1300 Property into two separate collector pipes and placing the terminus of those pipes at and over the retaining wall and east-west property line with the 1324 Property, which is at a notable lower elevation than the 1300 Property, had the natural tendency to focus and increase the volume and flow of the water drainage from the 1300 Property onto the 1324 Property. This offensive condition, in turn, would have a natural tendency to inflict injury on the 1324 Property and its owner. Stevenson was aware of this problem from the outset when McCarty inquired after the front collector pipe in mid-May 2016. Stevenson stated that it was only there temporarily and McCarty responded "Okay, if you're sure that's what's going on because if it rains, there is going to be a lot of water here." McCarty testified that that front collector pipe Stevenson said was "temporary" remained there for nearly six years, until 2021. Further, McCarty and plaintiff repeatedly complained to Stevenson and the Township about the two collector pipes' water drainage negative effect on their use and enjoyment of the 1324 Property without adequate remedy and subsequently filed suit in 2022.

Defendant's brief on appeal, citing *Boylan v Fifty Eight Ltd Liability Co*, 289 Mich App 709, 725; 808 NW2d 277 (2010), and MCL 600.2919(1), quotes the trial court's finding that an award of treble damages for trespass was inappropriate because Stevenson's testimony "regarding his effort to assist in the diversion of water away from the [1324] Property credible, and thus the intrusion was involuntary." Defendant then contends: "On the face of this factual conclusion, there can be no finding of either negligence [sic: nuisance] per se or negligence [sic: nuisance] in fact and as a result, the noneconomic damages award cannot be supported under that theory either, as a matter of law." However, defendant cites no authority barring plaintiff's recovery of noneconomic damages for nuisance in fact where "the intrusion was involuntary," such that we need not address whether such a factual finding was clearly erroneous.

Turning to the amount of noneconomic damages awarded, we note that

> [t]he law does not require impossibilities and does not require a higher degree of certainty than the nature of the case permits. There, when the nature of a case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the jury all the facts and circumstances which have a tendency to show their probable amount. [*Body Rustproofing, Inc v Michigan Bell Tel Co*, 149 Mich App 385, 390-391; 385 NW2d 797 (1986) (quotation marks and citations omitted) (alteration in original).]

An award of damages or part of the damages is then properly made therefrom by the fact-finder "in the exercise of good sense and sound discretion." *Id*. at 391.

Unlike a separate cause of action for intentional infliction of emotional distress, noneconomic damages for mental anguish and emotional distress do not require a showing of physically-manifested injury and are "damages for mental pain and anxiety which naturally flow from the injury." *Ledbetter v Brown City Savings Bank*, 141 Mich App 692, 703-704; 368 NW2d 257 (1985).

The evidence at trial supported the finding that plaintiff has been deprived of the use and enjoyment of her property and her ability to establish it as a rental property for nearly seven years. As she testified, this was an ongoing ordeal and conflict with defendant through which she suffered mental anguish and emotional distress to the point where she became exhausted and lost hope and motivation to continue with efforts to rehabilitate the house and make it a viable rental property. Based on this evidence, we find the trial court's award of noneconomic damages under plaintiff's nuisance in fact cause of action was not clearly erroneous.[9]

V. EVIDENCE OF CAUSATION OF ECONOMIC DAMAGES

Defendant contends that the trial court erred in awarding economic damages on plaintiff's claims because "there was no evidence of causation," only evidence of correlation, i.e., "the timing between the alleged intrusion of water on the [1324 Property] and the acts of the [defendant] in attempting to regulate the water flow on the [1300 Property]." We disagree.

Defendant correctly notes that the trial court erred in relying upon plaintiff's engineering expert's testimony that "the water flow onto the 1324 [P]roperty was increased by over 'five times the normal runoff quantity' caused by [defendant's] unilateral drain system modifications."[10] However, this clearly erroneous factual finding does not negate the trial court's finding that that system "force[d] additional run-off onto [plaintiff's] 1324 Property" resulting in that property being "inundated with an excessive amount of water that the land cannot absorb resulting in

[9] While the trial court's judgment and order (in light of the analysis in this Court's subsequent decision in *Mack*) incorrectly indicated that noneconomic damages could be awarded as it pertained to plaintiff's trespass claim, it nonetheless properly held that noneconomic damages could be awarded as to plaintiff's nuisance claim. This Court has previously held that a "trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Michigan Dept of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003). Similarly, here, although the trial court was wrong to reference plaintiff's trespass claim when it awarded noneconomic damages to plaintiff, it still reached the right result because it also held plaintiff could recover noneconomic damages arising out of her nuisance claim.

[10] Defendant correctly notes that plaintiff's engineering expert's "five times" testimony was not an estimate of the increase in water flow on to the 1324 Property from the 1300 Property based upon its modifications of its drainage system including its placement of the two collector pipes. Rather, he estimated that the storm water runoff from the defendant's developed property would be five times that of an undeveloped piece of property; and he admitted on cross-examination that this calculation was inaccurate, did not consider the use of downspouts, the parking lot drain basin, French drains or containment, etc.; and further admitted and that the "run-off co-efficient" for that commercial development would be virtually the same as that of a residential development.

basement flooding, puddling around the garage, and the saturated soil in the yard around the house" based upon the testimony of plaintiff, McCarty, plaintiff's engineering expert, and as corroborated by the photographs and video introduced into evidence.

As already noted, plaintiff and McCarty testified that they had no issues with water damage or problems with excess water run-off from the 1300 Property (onto the 1324 Property) from as early as 2011 when Hart was mowing the backyard, while it was bank-owned, through their purchase of the 1324 Property, until mid-May 2016. It was not until then that they first noticed excess water and soil saturation of the back and side yard, next to the 1300 Property, and McCarty first observed defendant's purportedly temporary placement of the front collector pipe at the retaining wall on the east-west border. McCarty testified that he observed drainage water from the collector pipes originating on the 1300 Property welling up out of the soil where the end of the back pipe was buried (on the 1324 Property) under a thin layer of dirt, as well as pouring over the top of the retaining wall from the front pipe. Later, in 2021, he observed the water coming out of a hole at the base of railroad tie retaining wall from the end of the front collector pipe. Again, as noted above, McCarty also testified that, from mid-2016 through 2023, except when the two collector pipes were capped or the water return system was operating, whenever there was a heavy rain, the water was flowing from the 1300 Property drainage system that resulted in water pooling next to the garage and on the east wall of the 1324 Property. Plaintiff further testified that the water "flooding into the 1324 [P]roperty was related to water directed from" the 1300 Property because she "could visibly see the water coming from the 1300 property to the garage and house" and "a trail of pea rock" from the hill, whereas she never saw water running off the hill from the Willow Street property directly south of the 1300 property. When McCarty capped the collector pipes, and when he thereafter constructed his water return system, the 1324 Property sustained no further water damage and the saturated soil in the back and side yard next to the 1300 Property began to dry out within approximately one week. Plaintiff's engineering expert observed that the roof drains on the east side of the commercial building on the 1300 Property were all connected by a common header and there was a wash-out and soil erosion evidence at its terminus close to the retaining wall between the 1300 Property and the 1324 Property and "soils and stone coming out from behind that retaining wall," from which he concluded "there is additional water being contributed to the property to the north in a point-source discharge." Throughout the foregoing summarized trial testimony photographic and video evidence was referenced in support thereof. As already noted, defendant, having failed to file the trial exhibits with the trial court clerk in violation of MCR 7.210(C) or with this Court, has waived any argument that such evidence was insufficient to support these contentions.

We find that this evidence was sufficient to demonstrate that focused excessive water drainage from the 1300 Property onto the 1324 Property was a cause of the resultant damages plaintiff suffered. *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004).

VI. PROOF OF ECONOMIC DAMAGES WITH REASONABLE CERTAINTY

Defendant also contests the amount of economic damages awarded by the trial court. Damages that are "remote, contingent, and speculative" cannot be recovered in a tort action. *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). "A plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable."

Id. However, likewise, as previously noted, "when the nature of a case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the jury all the facts and circumstances which have a tendency to show their probable amount." *Body Rustproofing*, 149 Mich App at 391. "Furthermore, the certainty requirement is relaxed where damages have been established but the amount of damages remains an open question." *Health Call*, 268 Mich App at 96. "[Q]uestions of what damages might be reasonably anticipated is a question better left to the fact finder." *Wendt v Auto Owners Ins Co*, 156 Mich App 19, 26; 401 NW2d 375 (1986).

We find that the trial court clearly erred when it found that McCarty testified that he spent between $60,000 and $65,000 to repair the garage. McCarty's actual trial testimony was that this amount was spent on repairs to the house, but that it *did not* include the garage, with the exception of the roof. Defendant claims, "[l]ooking to the receipts that were admitted to support damages claims, they total less than $35,000." However, again, defendant has failed to file the trial exhibits with the trial court clerk in violation of MCR 7.210(C), has failed to file them with this Court, and has waived any argument that such evidence was insufficient to support McCarty's contentions. That said, we agree with the defendant's argument that "the various amounts identified in the listing of damages" following its erroneous declaration that McCarty spent up to $65,000 to repair the garage readily appear to be the individual amounts making up the $65,000 to repair the house, and "the trial court's award effectively awards those amounts twice."

We find McCarty's testimony that it cost up to $65,000 to repair the house to be a fair estimation of economic damages looking to the totality of the record before us. *Body Rustproofing*, 149 Mich App at 391. Reducing that amount by 20% based on the trial court's determination of comparative negligence in its order on defendant's motion to amend judgment or for new trial, leaves an economic damages award of $52,000.

VII. DISMISSAL OF DEFENDANT'S COUNTERCLAIM TO QUIET TITLE ON AN ADVERSE POSSESSION THEORY

Defendant contends the trial court erred in its application of "tacking principles" in concluding that it failed to establish the fifteen-year statutory period for adverse possession in support of its counterclaim to quiet title as to the "few inches of the concrete portion [of the retaining wall] extending onto" the 1324 Property, when it is "undisputed that the retaining wall was built in 1971 when the commercial building was erected on" the 1300 Property. We disagree.

To quiet title to an interest in real property on the basis of adverse possession, a plaintiff must demonstrate "by clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of 15 years, hostile and under cover of a claim of right." *McQueen v Black*, 168 Mich App 641, 643; 425 NW2d 203 (1988) (quotation marks and citation omitted). See also *Houston v Mint Group, LLC*, 335 Mich App 545, 558-560; 968 NW2d 9 (2021). If the plaintiff only intended to hold to the true property line, such that a mistake regarding that line does not demonstrate the requisite element of hostility, this provides a defense to a claim to quiet title based on adverse possession. *McQueen*, 168 Mich App at 643-644.

Sequential owners are permitted to tack the adverse possession of prior owners to their own to meet 15-year statutory period to establish and quiet title to a property interest if they can prove

privity of estate with the prior owner. *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001). A claimant may prove such a tacking claim by "(1) including a description of the disputed acreage in the deed, or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance." *Id*. (citations omitted). Such tacking may also be permitted when the parties are "well acquainted" and there was no basis to doubt that a transfer of the subject property interest was intended. *Matthews v Dep't of Natural Resources*, 288 Mich App 23, 40; 792 NW2d 40 (2010).

Here, we agree with the trial court that defendant failed to demonstrate a basis for tacking the prior owner of the 1300 Property's purported adverse possession of the disputed portion of the 1300 Property's retaining wall extending onto the 1324 Property. Defendant became the titled owner to the 1300 Property in 2015. Defendant's counterclaim purports to provide the legal description of the 1300 Property, but a copy of the deed is not provided as an exhibit to that counterclaim and it does not appear to be in the trial court record.[11] Defendant further does not contend that the purported legal description of the 1300 Property contained in the counterclaim is from the deed, and it does not contend that that legal description includes the disputed portion of the 1300 Property's retaining wall extending onto the 1324 Property. There is likewise no evidence in the record of the "actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance" or that the parties are "well acquainted" and there was no basis to doubt that a transfer of the subject property interest was intended. *Killips*, 244 Mich App at 259; *Matthews*, 288 Mich App at 40.

Defendant contends it is "undisputed that the retaining wall was built in 1971 when the commercial building was erected on the [1324 Property and] has existed there ever since." The defendant's brief on appeal cites a trial exhibit that purports to be the site plan depicting the retaining wall in support of this contention, but this exhibit is not in the record before us. Defendant also cites Stevenson's trial testimony that he was provided this 1971 site plan when he purchased the property and that "based on [his] knowledge of the property that exists today, [it] depict[s] where the retaining wall is today." However, this evidence does not constitute "a description of the disputed property in the deed" and there is no indication that the location of the retaining wall in the site plan depicts the "few inches of the concrete portion [of the retaining wall] extending onto" the 1324 Property. Finally, we see no evidence in the record of the requisite element of hostility in the prior owner's placement of the concrete portion of the retaining wall a few inches onto the 1324 Property, as opposed to that prior owner only intending to hold to the true property line and making a mistake as to its placement. *McQueen*, 168 Mich App at 643-644.

For these reasons we find the trial court did not err when it found that defendant was not entitled to tack the prior owner of the 1300 Property's purported adverse possession of the at-issue property. Defendant became the titled owner to the 1300 Property in 2015 and plaintiff initiated this lawsuit to, in part, quiet title to the disputed portion of the border between the 1324 Property and 1300 Property approximately 7 years later in 2022. Defendant cannot establish the requisite

[11] While defendant failed to file the trial exhibits with the trial court clerk or this Court, the deed to the 1324 Property does not appeal to be among the exhibits that were introduced at trial.

15-year statutory period for an adverse possession claim and for this reason the trial court properly dismissed defendant's quiet title counterclaim.

VIII. TRIAL COURT'S AWARD OF EQUITABLE RELIEF IN THE FORM OF ABATEMENT ON PLAINTIFF'S NUISANCE CLAIM

Finally, defendant contends that the trial court's conclusion in its judgment and order that "the retaining wall portion of the drainage system on Defendant's property constitutes a nuisance, however, the credible testimony from Defendant's expert demonstrates that the system is constructed to actually reduce the amount of run-off water that could have concentrated at the 1324 Property" is contradictory. It further notes that the judgment and order refers to a video depicting water pouring through open spaces in the railroad tie retaining wall and deteriorated railroad ties that was taken before defendant made repairs before holding that: "To improve the aesthetics and effectiveness of the retaining wall, Defendant is ordered to replace the rotting railroad ties and the holes in the retaining wall within 6 months of this Order." Defendant contends that the trial court has no basis to find a nuisance and order its abatement solely based upon a condition on an adjoining property being "ugly" or "aesthetically unpleasant" and that the trial court's ruling ignores the testimony that the railroad tie portion of the retaining wall was reconstructed and that "as of the summer of 2023, the wall had been 'remediated' and the [1324 Property] received no water from the retaining wall." Defendant also contends that plaintiff admitted "there is nothing left to abate," without providing a supporting citation to the record to support that factual contention.

We agree that the trial court judgment and order, with regard to its award of equitable relief in the form of abatement on plaintiff's nuisance claim, does not appear to adequately account for the fact that the railroad tie portion of the retaining was rebuilt beginning in the summer of 2021, that the terminus of the two black plastic corrugated collector pipes were moved approximately four feet south of the 1300 Property's property line with the 1324 Property line, and that drainage water from those collector pipes no longer pours through the open spaces of deteriorated railroad ties comprising that portion of the wall, i.e., it is no longer saturating the grass and soil on the back and side portions of the 1324 Property next to the 1300 Property or causing damage to the house, garage, and other portions of the 1324 Property. We also agree that mere unappealing aesthetics of the railroad tie portion of the retaining wall would not constitute a private nuisance in fact for which the trial court can award abatement unless it constitutes "a dangerous, offensive, or hazardous condition" interfering with an owner's reasonable use and enjoyment of their property. *Buckeye Union*, 383 Mich at 635; *Hadfield*, 430 Mich at 151. However, defendant fails to account for the trial court's finding that:

> The retaining wall encroaches onto the 1324 Property based on all experts and the physical evidence, however, the Court finds its complete removal an unnecessary abatement as noted in paragraph 6 [sic: paragraph 5].

We find that the trial court's award of nuisance abatement applies to and requires remediation of the railroad tie portion of the retaining wall to the extent it still encroaches upon the 1324 Property.

IX. CONCLUSION

The trial court's judgment in plaintiff's favor on her trespass and nuisance in fact claims is affirmed. The award of noneconomic damages on plaintiff's trespass claim is reversed, but its award of $50,000 in noneconomic damages for plaintiff's nuisance in fact claim is affirmed. The trial court's award of economic damages on plaintiff's trespass and nuisance in fact claims (reflecting defendant's 80% responsibility for those damages under the doctrine of comparative negligence) is affirmed as modified herein and we remand to the trial court for entry of an amended judgment to that effect. The trial court's equitable award of nuisance abatement is affirmed to the extent remediation of the railroad tie portion of the retaining wall continues to encroach upon the 1324 Property. The remainder of the court's equitable award is vacated and we remand to the trial court for entry of an amended judgment consistent with this opinion. Finally, the trial court's dismissal of defendant's quiet title counterclaim is affirmed. We do not retain jurisdiction.

/s/ Randy J. Wallace
/s/ Thomas C. Cameron
/s/ Daniel S. Korobkin