

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

GUY F. PEASLEE,)	
)	
Plaintiff)	
)	
v.)	Civil No. 91-389 P
)	
UNITED STATES OF AMERICA,)	
)	
Defendant)	

MEMORANDUM DECISION ¹

I. INTRODUCTION

In this Federal Tort Claims Act case,² the plaintiff seeks recovery for damage sustained to his land as a result of activities of United States Navy personnel following a helicopter crash. Specifically, he seeks compensation based on the cost of restoration of his property and treble damages, attorney fees and professional fees, all pursuant to 14 M.R.S.A. 7552. A bench trial was held before me on January 27-28, 1993. Findings of fact and conclusions of law follow.

¹ Pursuant to 28 U.S.C. 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

² 28 U.S.C. 2671-80.

II. FINDINGS OF FACT

The plaintiff, a resident of Boothbay, Maine, has been in the construction business in Lincoln County for more than sixteen years doing residential development work which includes installation of roads, driveways and septic systems and landscaping. In the spring of 1988 the estate-owner of a sixty-acre parcel of land adjacent to the River Road in Boothbay offered to sell the parcel to the plaintiff for \$100,000. He declined, but that summer, after consulting and walking the land with civil engineer John Brochu, who performed a preliminary investigation of the property's development potential in 1987, and having Brochu do some on-site soils analysis, the plaintiff entered into a contract to purchase the property for \$55,000. The closing took place on November 21, 1988.

The property has about 800 feet of frontage on the River Road, a rear width of about 780 feet and a depth of approximately 3,500 feet. At the time of the plaintiff's acquisition it was unimproved and, having been clear-cut just two years earlier, sported only young growth. There was a skid road (logging road) running from a point near the River Road along the property's northeasterly side toward its rear. The road was grassed over and unrutted. Because the plaintiff's interest in the property was in developing it as a residential subdivision, after going to contract but before closing he engaged Brochu to do a full soils analysis and determine the property's development potential consistent with the requirements of the state plumbing code. By December 14, 1988, some three weeks after the closing, Brochu had flagged areas suitable for septic systems³ and was in the process of laying out an entire subdivision.

On December 14, 1988 an airborne U.S. Navy helicopter experienced a mechanical failure causing its crew to make a forced landing. Because the plaintiff's property appeared as a cleared parcel, it was chosen as a landing site. Upon impact, the helicopter turned onto its side and suffered

³ The area is not served by sewers.

substantial damage. The plaintiff heard about the crash landing shortly after it occurred and drove immediately to the property. When he arrived, he identified himself as its owner to the Navy personnel stationed at the entrance but was refused entry. When he asked for information, Cmdr. Freeman, who was then at the crash site, was summoned. Freeman explained to the plaintiff that a helicopter had gone down and the Navy was in the process of removing some items from it. Freeman then asked for permission to take a four-wheel drive vehicle to the crash site, which was not immediately accessible from the skid road. The plaintiff agreed and then asked how the Navy was going to remove the helicopter. Freeman stated that they did not yet know. When the plaintiff speculated that they would "skyjack it out of there," Freeman reiterated that the Navy did not know and indicated that they might have to build a road. He assured the plaintiff that he would keep him informed and told him that a Lt. Roecker would be in touch with him. There was at that time no alteration of the land observable by the plaintiff.

That afternoon the plaintiff made arrangements with Lt. Roecker to meet at the property the next day, December 15. When he arrived shortly after noon, the plaintiff discovered that the Navy had already bulldozed from the River Road, over parts of the skid road, to the crash area using a so-called D-8 dozer weighing approximately 30 to 35 tons with a blade measuring ten to twelve feet in width and three to four feet in height. The plaintiff told the on-duty Navy personnel, "I don't know what the hell's taking place here, but I sure didn't authorize any of this dozing" Cmdr. Freeman was again summoned. When asked by the plaintiff why he did not inform him about this work, Freeman explained that the operator of the bulldozer was only supposed to smooth out ruts in the skid road but was inexperienced and got carried away. He assured the plaintiff that the Navy would take care of any damages. Freeman insisted, when pressed by the plaintiff, that the Navy still did not know how it was going to remove the helicopter. At the time there were several vehicles on the plaintiff's property near the helicopter site. The plaintiff informed Freeman that the Navy had bulldozed an area laid out for septic fields.

Following his encounter with Freeman, the plaintiff then described to Lt. Roecker, who had accompanied him to the crash site, the condition of the property before the Navy entered upon it, and the nature of the permission granted. Roecker acknowledged the substantial excavation done by the Navy and assured the plaintiff that the Navy would cover any resulting damages. With that assurance and the understanding that no further bulldozing was to be done, the plaintiff then gave permission for the Navy to smooth out its road so that it could get a flatbed vehicle to the crash site in order to haul out the helicopter.

I specifically find that the only Navy activity approved by the plaintiff in advance of its occurrence was the requested use of a four-wheel drive vehicle to access the crash site area and that the only other permission granted by the plaintiff was that given on December 15, 1988 to smooth out the road the Navy had already roughly excavated so that it could be used to remove the helicopter. The latter permission was given only after both Cmdr. Freeman and Lt. Roecker assured the plaintiff that the Navy would take care of any damage.⁴

The Navy left approximately four days later, having widened the skid road from its original

⁴ The government introduced in evidence a letter dated September 29, 1989 from the plaintiff to the Navy the first two paragraphs of which read as follows:

On December 14, 1988 a Navy helicopter crashed on my property on the River Road in Boothbay, Maine.

Also on December 14th, I spoke to Commander Freeman concerning road and other excavation needed to remove the helicopter. At that time, Commander Freeman told me that the Navy was not sure whether or not they would sky-jack the helicopter out or build a road to carry it out. At that time he told me that the Navy would reimburse me for the damages caused by the crash and other damages resulting from the helicopter removal. *I gave immediate approval to do whatever additional work that [sic] was needed (they had already roughed a road in).*

(Emphasis added.) In context, the letter appears to indicate that approval to do additional work was given on December 14, the crash date. However, it is evident that, consistent with the plaintiff's trial testimony, the referenced approval was not given until the next day, December 15, after the plaintiff had been assured of the Navy's acceptance of responsibility for damages, inasmuch as the letter contains a tie-in reference to the fact that the road had already been roughed in, an event which the plaintiff did not discover until December 15.

10 to 12 feet in width to an average width of 16 feet. The Navy had cut into hills and grades in order to obtain dirt to build the road, but did nothing to control erosion or stabilize the areas that had been affected. Bulldozing had occurred at the crash site staging area as well. At some time subsequent to the crash and removal operations, the plaintiff constructed his own road toward the back of his property where he now has a storage site. A portion of this road is adjacent to the Navy road, occasionally overlapping it. The plaintiff installed a culvert to control water, but has taken no other action to control erosion caused by the Navy's activities.

At the plaintiff's request, John Brochu estimated the cost of restoring the property along the skid road and in the crash site area not to its original condition but to a lesser but functional equivalent.⁵ Brochu calculated that 23,694 square feet had been damaged in the road area and 27,855 square feet in the crash site staging area. The area that Brochu had flagged previously for underground septic systems meeting state plumbing code requirements had been rendered unsuitable for that purpose by the Navy's excavation. The bulldozing had flattened the knoll that comprised the septic field area, removing a large amount of topsoil.⁶ Along the road, bedrock had been exposed in places and erosion had occurred along the sloped edges, all as a consequence of the Navy's activities. Erosion ruts beside the road were one to two feet deep. Brochu proposes to restore the land at the crash site staging area by bringing in suitable topsoil consisting of fine gravel or sandy loam, by removing debris and providing erosion control and by mulching and seeding. According to Brochu, the property would then be capable of supporting 40 to 45 homesites connected to a major underground leaching field. The road would be restored by adding topsoil and seeding. Brochu's cost estimate for this restoration is \$89,185.

⁵ In the case of the skid road, Brochu figured the cost of grading necessary to fix eroded areas of the road and of grass seeding to stabilize the area and prevent further erosion. In the case of the crash site area, he calculated the cost of minimal soils restoration that would satisfy the state plumbing code requirements for its use as a large leaching field.

⁶ There exists in this particular Maine coastal area a relative scarcity of soils suitable for subsurface waste disposal. Generally, the plaintiff's lot is no exception. However, Brochu determined the knoll area to be an appropriate site for a large leaching field.

I find Brochu well qualified by training and experience to determine the residential development potential (in terms of number of homesites) of the plaintiff's land in the condition in which it was when acquired, taking into account Maine state plumbing code requirements for subsurface waste disposal and other approval requirements, to assess the damage caused by the Navy's excavation and to determine the minimal cost of restoration necessary to enable the land to be so developed. I also find his testimony on these issues credible and accordingly accept it. I correspondingly reject the government's alternative restoration plan, carrying a \$7,300 price tag, as inadequate since it provides only for some grading, limited top-dressing, seeding and mulching of the affected areas, and thus does not adequately address and correct for erosion and other damage to the road or the removal of large quantities of topsoil in the knoll area designated by the plaintiff for large scale subsurface waste disposal.

Because the plaintiff did not have any of the approvals necessary for a subdivision of this or any other scope at the time of the Navy's activities on his land between December 14 and 18, 1988, some three to four weeks after he purchased it, I find that the Navy's excavation did not measurably affect the fair market value of the land in its undeveloped state. I also find that the \$55,000 purchase price, negotiated in an arms length transaction, fairly represents the property's fair market value just prior to the crash. This said, I do not find that there existed in December 1988 any condition, including the six-month building moratorium then in effect in Boothbay, rendering the plaintiff's contemplated subdivision unachievable over time or economically unfeasible, or that any such condition existed as of the trial date.⁷

III. DISCUSSION AND CONCLUSIONS OF LAW

⁷ Boothbay is located near the popular communities of Boothbay Harbor and Damariscotta. At the time of the plaintiff's purchase, it experienced substantial residential growth which included the creation of several approved subdivisions. In fact, growth was so rapid that it precipitated the six-month moratorium enacted in November 1988. Although the area has since experienced a downturn in development, as has the northeast generally, there is no reason to believe that it will not regain its vitality. The plaintiff did obtain approval in 1991 for a four lot subdivision involving a small portion of his lot fronting on the River Road.

A. Liability

The Federal Tort Claims Act provides, as to claims brought thereunder, that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. 2674. The plaintiff contends that in this case the government's liability is determined by 14 M.R.S.A. 7552 which addresses injury to lands and property. The statute provides, in relevant part:

Whoever cuts down, destroys, injures or carries away any . . . agricultural product, timber, wood, underwood, stones, gravel, ore, goods or property of any kind from land not that person's own, *without license of the owner*, . . . is liable in damages to the owner in a civil action. If such an act or such acts are committed *willfully or knowingly*, the defendant is liable to the owner in treble damages and, in addition, for the cost of any professional services necessary for the determination of damages, for attorney's fees, and for court costs.

14 M.R.S.A. 7552 (emphasis added).

Although the government has agreed not to contest liability for any property damage resulting from the helicopter's forced landing, *see* Report of Final Pretrial Conference and Order ("Report") 7 (Docket No. 19), it asserts that section 7552 is inapplicable here for two reasons. First, characterizing it as a trespass statute, the government argues that the emergency circumstances surrounding the forced landing "do not lend themselves to a trespass by the United States Navy." United States' Findings of Fact and Conclusions of Law at 9 (Docket No. 28). This statement ignores the fact that the helicopter pilot's entry upon the plaintiff's land was intentional inasmuch as he chose it as the site on which to put down his disabled craft. Under Maine law, an intentional but unauthorized entry upon another's property is a trespass. *Hayes v. Bushey*, 160 Me.

14, 17 (1964); *Foley v. H. F. Farnum Co.*, 135 Me. 29, 34 (1936). In any event, the plaintiff's damage claim results not from the crash itself but the Navy's subsequent, intentional entry upon the plaintiff's land and resultant bulldozing activities. Second, the government argues that prior to any removal action the plaintiff consented to the Navy's presence on his land for the purpose of removing the helicopter and thereby licensed it to do what it did.

A license is a revocable personal privilege to do an act or acts in relation to the land of another. *Reed v. A. C. McLoon & Co.*, 311 A.2d 548, 552 (Me. 1973). At the final pretrial conference the plaintiff stipulated that, following the crash, he granted permission to the defendant to enter his premises for the purpose of removing the helicopter. Report 7. The stipulation, however, does not speak to the manner of removal. I have already determined that the plaintiff did not give the Navy blanket prospective authority to use "any" method of removal, that at the time of his first site visit (on the day of the crash) he made clear his concern as to how the Navy proposed to remove the helicopter and that his eventual approval of an over-the-road removal occurred on December 15 only after the majority of the excavation work had been done and he had been assured by Cmdr. Freeman and Lt. Roecker of the Navy's acceptance of responsibility for damages.

In short, most, if not all, of the damage to the plaintiff's land took place without license of the owner. Given that damage consisted of the destruction of or injury to items of property on the plaintiff's land, section 7552 applies by its terms and establishes the government's liability.⁸

B. Measure of Damages

Plaintiff seeks compensatory damages based on the restoration plan recommended by Brochu and calculated by him to cost \$89,185. The government argues that, assuming liability, damages are limited to the difference in the market value of the plaintiff's land before and after the

⁸ Of course, to the extent any of the damage occurred after the plaintiff granted the permission he did, the government has acknowledged liability for it.

events in question, which it asserts is zero.

Although there is a line of Maine tree removal cases seemingly limiting the owner to a recovery based on the diminution in value of the land or, treating the timber as personal property, the value of the severed trees, *see Nyzio v. Vaillancourt*, 382 A.2d 856, 861 (Me. 1978); *Boucher v. Paradis*, 244 A.2d 69, 70-71 (Me. 1968); *Pettengill v. Turo*, 159 Me. 350, 358 (1963), more recent authority makes clear that these damage evaluation methods are not exclusive. In *Leavitt v. Continental Tel. Co. of Maine*, 559 A.2d 786 (Me. 1989), the court unequivocally recognized restoration costs as an appropriate, if not exclusive, remedy for injury to real property. *Id.* at 788.

In doing so, it adopted the following Restatement formulation:

(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

(a) the difference between the value of the land before the harm and the value after the harm, *or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,*

(b) the loss of use of the land, and

(c) discomfort and annoyance to him as a occupant.

(2) If a thing attached to the land but severable from it is damaged, he may at his election recover the loss in value to the thing instead of the damage to the land as a whole.

Restatement (Second) of Torts 929 (1979) (emphasis supplied).

Comment ``b" to this section states:

Even in the absence of value arising from personal use, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery. . . . If, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm.

Notably, the plaintiff does not seek to restore the land to its original condition. Rather, he seeks only that level of restoration necessary to permit the land to be developed for the purpose for which he purchased it in the first place, namely a residential subdivision. As previously detailed, the plaintiff took steps before he entered into a purchase agreement and additional steps before he closed on the transaction to satisfy himself of the property's homesite development potential. In the brief period between the closing and the Navy's forced landing on the property, Brochu, the plaintiff's agent, flagged areas suitable for septic systems and was otherwise busily engaged in laying out an entire subdivision. Because of the general condition of the soils on this parcel and the absence of sewers, the plaintiff's only realistic chance of accomplishing his objective is tied to his ability to use the crash site area for subsurface waste disposal serving the larger tract. I find that these circumstances satisfy the "reason personal to the owner" requirement of comment "b" and conclude, on the basis of these and the other facts I have found, that this is an appropriate case for application of the cost of restoration as the measure of damages. I have already found that Brochu's \$89,185 calculation fairly and reasonably represents the cost of necessary restoration.⁹

C. Mitigation

The government asserts that the plaintiff's failure to mitigate erosion damage resulting from the Navy's road work should serve to reduce any damage award. Plaintiff denies any responsibility to mitigate in the circumstances of the case.

Generally under Maine law the plaintiff has a duty to use reasonable efforts to mitigate damages. *Lindsey v. Mitchell*, 544 A.2d 1298, 1301 (Me. 1988). Mitigation is an affirmative

⁹ The government emphasizes the comparatively minuscule portion of the plaintiff's land which was actually damaged, 1.2 acres, and claims that the cost of Brochu's restoration plan exceeds \$74,000 per acre or an 8,142 percent increase to return the land to its original \$901.64 per acre purchase price condition. This exercise obscures the real issue because it fails to recognize that development of the entire parcel is critically affected by the damage resulting from the Navy's activities on that relatively small portion.

defense, and the defendant has the burden of showing that mitigation was feasible. *Id.* However, "the touchstone of the duty to mitigate is reasonableness. The nonbreaching party need only take reasonable steps to minimize his losses; he is not required to unreasonably expose himself to risk, humiliation or expense." *Schiavi Mobile Homes, Inc. v. Girona*, 463 A.2d 722, 725 (Me. 1983).

Brochu's testimony suggests that stabilizing the land to prevent erosion would have involved the movement of a large amount of material and significant expense. The government implies that the plaintiff should have repaired the damage caused by the Navy because he could afford to spend the time and money to do so. As noted, the law does not require one in the plaintiff's position to expend considerable resources in mitigation of damages caused by others. Indeed, the extent of the plaintiff's wealth is entirely speculative. Although he has more recently constructed a new roadway on the property, he did so largely through a barter arrangement. Fortuitously, construction of the new road has had the salutary effect of minimizing the erosion caused by the Navy's bulldozing. There has been no demonstration that the plaintiff has in any way aggravated the harm. I conclude that the plaintiff should not suffer any reduction in damages as a consequence of his failure to expend the significant resources required to mitigate damage caused by the Navy.

D. Treble Damages and Professional Fees

The plaintiff asserts that he is entitled to treble damages and professional fees as provided in 14 M.R.S.A. 7552 for acts of injury to or destruction of property that are committed "willfully or knowingly." In order for an act to be committed "knowingly" within the meaning of the statute, the defendant must be subjectively aware that his action is improperly taking place on another's land. *Bonk v. McPherson*, 605 A.2d 74, 77 (Me. 1992); *see also Grant v. Warren Bros. Co.*, 405 A.2d 213, 218-19 (Me. 1979). "Willfully," as used in section 7552, requires a lesser degree of

culpability than "knowingly;" it covers conduct that "displays an utter and complete indifference to and disregard for the rights of others." *Bonk*, 605 A.2d at 77; *Nyzio*, 382 A.2d at 863. The evidence indicates that the Navy has at least acted willfully inasmuch as it proceeded to move heavy equipment onto the plaintiff's land and significantly disturb its condition through large-scale bulldozing activities without first consulting him and obtaining his consent, all in circumstances where the plaintiff had made clear his concern as to how the Navy planned to remove the helicopter, and was assured that no plan had yet been devised and that he would be kept informed.

However, the larger question is whether the plaintiff is entitled to recover treble damages and professional fees under section 7552 in a Federal Tort Claims Act ("FTCA") case. Section 2674 of the FTCA provides, in relevant part:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. 2674. Although the extent of the United States' liability under the FTCA is generally determined by reference to state law, the meaning of the term "punitive damages," as used in section 2674, is peculiarly a federal question. *Molzof v. United States*, 112 S. Ct. 711, 714-15 (1992). This court, then, must determine whether the treble damages and professional fees provided for in section 7552 constitute punitive damages. The Law Court's characterization of them as remedial, rather than penal, *see Auburn Harpswell Ass'n v. Day*, 438 A.2d 234, 237 (Me. 1981), is not controlling.

The key to whether damages are punitive or compensatory for purposes of the FTCA is whether they are based on the degree of the defendant's culpability. *Molzof*, 112 S. Ct. at 715. Thus, "[t]he term 'punitive damages' . . . embodies an element of the defendant's conduct that must be proved before such damages are awarded." *Id.* at 716. The treble damages and professional fees available under the Maine statute are contingent upon proof of the defendant's "willful" or

``knowing" conduct. Therefore, they are punitive in nature and precluded by section 2674 of the FTCA.

IV. ORDER

Judgment shall be entered in favor of the plaintiff in the amount of \$89,185 together with post-judgment interest and costs.

Dated at Portland, Maine this 26th day of May, 1993.

David M. Cohen
United States Magistrate Judge