

The Right to Exclude

Jacque v. Steenberg Homes, Inc.

563 N.W.2d 154 (Wis. 1997)

WILLIAM A. BABLITCH, Justice.

Plaintiffs, Lois and Harvey Jacques, are an elderly couple, now retired from farming, who own roughly 170 acres near Wilke's Lake in the town of Schleswig. The defendant, Steenberg Homes, Inc. (Steenberg), is in the business of selling mobile homes. In the fall of 1993, a neighbor of the Jacques purchased a mobile home from Steenberg. Delivery of the mobile home was included in the sales price.

Steenberg determined that the easiest route to deliver the mobile home was across the Jacques' land ... because the only alternative was a private road which was covered in up to seven feet of snow and contained a sharp curve which would require sets of "rollers" to be used when maneuvering the home around the curve. Steenberg asked the Jacques on several separate occasions whether it could move the home across the Jacques' farm field. The Jacques refused. ... On the morning of delivery, ... the assistant manager asked Mr. Jacque how much money it would take to get permission. Mr. Jacque responded that it was not a question of money; the Jacques just did not want Steenberg to cross their land. ...

At trial, one of Steenberg's employees testified that, upon coming out of the Jacques' home, the assistant manager stated: "I don't give a ---- what [Mr. Jacque] said, just get the home in there any way you can." ... The employees, after beginning down the private road, ultimately used a "bobcat" to cut a path through the Jacques' snow-covered field and hauled the home across the Jacques' land to the neighbor's lot. ... Mr. Jacque called the Manitowoc County Sheriff's Department. After interviewing the parties and observing the scene, an officer from the sheriff's department issued a \$30 citation to Steenberg's assistant manager.

The Jacques commenced an intentional tort action in Manitowoc County Circuit Court, Judge Allan J. Deehr presiding, seeking compensatory and punitive damages from Steenberg. ...[Q]uestions of punitive and compensatory damages were submitted to the jury. The jury awarded the Jacques \$1 nominal damages and \$100,000 punitive damages. Steenberg filed post-verdict motions claiming that the punitive damage award must be set aside because Wisconsin law did not allow a punitive damage award unless the jury also awarded compensatory damages. Alternatively, Steenberg asked the circuit court to remit the punitive

damage award. The circuit court granted Steenberg's motion to set aside the award. Consequently, it did not reach Steenberg's motion for remittitur....

II.

... Steenberg argues that, as a matter of law, punitive damages could not be awarded by the jury because punitive damages must be supported by an award of compensatory damages and here the jury awarded only nominal and punitive damages. The Jacques contend that the rationale supporting the compensatory damage award requirement is inapposite when the wrongful act is an intentional trespass to land. We agree with the Jacques.

...The rationale for the compensatory damage requirement is that if the individual cannot show actual harm, he or she has but a nominal interest, hence, society has little interest in having the unlawful, but otherwise harmless, conduct deterred, therefore, punitive damages are inappropriate. ... The Jacques argue that both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results. We agree with the Jacques....

We turn first to the individual landowner's interest in protecting his or her land from trespass. The United States Supreme Court has recognized that the private landowner's right to exclude others from his or her land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994). This court has long recognized "[e]very person[s] constitutional right to the exclusive enjoyment of his own property for any purpose which does not invade the rights of another person." *Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 59, 89 N.W. 880 (1902) (holding that the victim of an intentional trespass should have been allowed to take judgment for nominal damages and costs). Thus, both this court and the Supreme Court recognize the individual's legal right to exclude others from private property.

Yet a right is hollow if the legal system provides insufficient means to protect it. Felix Cohen offers the following analysis summarizing the relationship between the individual and the state regarding property rights:

[T]hat is property to which the following label can be attached:

To the world:

Keep off X unless you have my permission, which I may grant or withhold.

Signed: Private Citizen

Endorsed: The state

Felix S. Cohen, *Dialogue on Private Property*, IX Rutgers Law Review 357, 374 (1954). Harvey and Lois Jacque have the right to tell Steenberg Homes and any other trespasser, “No, you cannot cross our land.” But that right has no practical meaning unless protected by the State....

The nature of the nominal damage award in an intentional trespass to land case further supports an exception to [the compensatory damage requirement]. Because a legal right is involved, the law recognizes that actual harm occurs in every trespass. The action for intentional trespass to land is directed at vindication of the legal right. ... Thus, in the case of intentional trespass to land, the nominal damage award represents the recognition that, although immeasurable in mere dollars, actual harm has occurred.

The potential for harm resulting from intentional trespass also supports an exception to [the compensatory damage requirement]. A series of intentional trespasses, as the Jacques had the misfortune to discover in an unrelated action, can threaten the individual’s very ownership of the land. The conduct of an intentional trespasser, if repeated, might ripen into prescription or adverse possession and, as a consequence, the individual landowner can lose his or her property rights to the trespasser.

In sum, the individual has a strong interest in excluding trespassers from his or her land. Although only nominal damages were awarded to the Jacques, Steenberg’s intentional trespass caused actual harm. We turn next to society’s interest in protecting private property from the intentional trespasser.

Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to “self-help” remedies. ... [O]ne can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like Steenberg, who refuses to heed no trespass warnings.

People expect wrongdoers to be appropriately punished. Punitive damages have the effect of bringing to punishment types of conduct that, though oppressive and hurtful to the individual, almost invariably go unpunished by the public prosecutor. ... If punitive damages are not allowed in a situation like this, what punishment will prohibit the intentional trespass to land? Moreover, what is to stop Steenberg Homes from concluding, in the future, that delivering its mobile homes via an intentional trespass and paying the resulting [\$30] forfeiture, is not more profitable than obeying the law? Steenberg Homes plowed a path across the Jacques’ land and

dragged the mobile home across that path, in the face of the Jacques' adamant refusal. A \$30 forfeiture and a \$1 nominal damage award are unlikely to restrain Steenberg Homes from similar conduct in the future. An appropriate punitive damage award probably will.

In sum, as the court of appeals noted, the [compensatory damage] rule sends the wrong message to Steenberg Homes and any others who contemplate trespassing on the land of another. It implicitly tells them that they are free to go where they please, regardless of the landowner's wishes. As long as they cause no compensable harm, the only deterrent intentional trespassers face is the nominal damage award of \$1 ... and the possibility of a Class B forfeiture under Wis. Stat. § 943.13. We conclude that both the private landowner and society have much more than a nominal interest in excluding others from private land. Intentional trespass to land causes actual harm to the individual, regardless of whether that harm can be measured in mere dollars. Consequently, the [compensatory damage] rationale will not support a refusal to allow punitive damages when the tort involved is an intentional trespass to land. Accordingly, assuming that the other requirements for punitive damages have been met, we hold that nominal damages may support a punitive damage award in an action for intentional trespass to land. ... Accordingly, we reverse and remand to the circuit court for reinstatement of the punitive damage award.

Reversed and remanded with directions.

Notes and Questions

1. The right to exclude is often considered one of the most important and most absolute aspects of property ownership. For example, Blackstone, the great eighteenth-century English legal scholar described property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."
2. Would (or should) the result in *Jacque* have been different if, instead of a mobile home seller making a scheduled delivery to a customer, the defendant had been an ambulance company responding to a call reporting a suspected heart attack? a broken leg?
3. Would the result in *Jacque* have been different if the snow-covered private road had instead been a recently collapsed bridge?
4. Would the result in *Jacque* have been different if Steenberg had tried to take the private road, and the truck had accidentally tipped and fallen onto the Jacques' land?
5. Would it matter if Steenberg were Jewish, Jacques were an anti-Semite, and Jacques' refusal to allow Steenberg to use the road was motivated by his anti-semitism?

6. Suppose, it would cost Steenberg \$20,000 more to use the private road than to bring the mobile home over Jaque's property, and suppose Steenberg had said Jaque could bring the mobile home over his property if Steenberg paid \$19,999. Would that change the outcome of the case?
7. Suppose Jaque had told Steenberg that he could bring the mobile home over his property if Steenberg paid \$500,000? Would that change the outcome of the case? Suppose the amount demanded was \$2,000,000. Does the amount matter?
8. Suppose Steenberg owned a large container ship, and Jaque owned the only dock within fifty miles large enough for the ship to dock at. An unexpected storm endangered the boat. Steenberg and his crew could save their lives by using lifeboats to get ashore, but the ship (worth \$50 million) and \$50 million in cargo would be lost unless it could use Jaque's dock. Can Steenberg use Jaque's dock? If Steenberg does so without permission, and Jaque sues Steenberg for trespass, what should the court (and jury) decide? Does it matter if Steenberg had a radio or phone with which he could contact Jaque beforehand? Does it matter if Steenberg reached Jaque on the radio, and Jaque said Steenberg could use the dock only if he paid \$99 million, and Jaque refused to pay? Does it matter if Jaque stood on the dock and used a bullhorn to announce that Steenberg did not have permission to dock? What if Steenberg had no way of reaching Jaque, and Jaque did not notice that the ship had docked until the storm cleared the next day?
9. Suppose Jaque owned a restaurant that refused to serve African Americans, and suppose Steenberg was one of a dozen African-American students who, in 1960, participated in a "sit-in" demonstration against Jaque's discriminatory policy. Jaque called the police, who arrested Steenberg for trespass. Is the conviction an appropriate enforcement of the right to exclude? If, instead of having Steenberg arrested, Jaque sued him in civil court for damages, how do you think a judge and jury would decide? Would it matter if Jaque was himself not a racist, but excluded African-Americans only because serving them would have led to a boycott by white customers that would have driven him out of business? Would it matter if Jaque's African-American employees agreed with the exclusion of African-American customers, because they were afraid that a white boycott would lead to the closing of the restaurant and the loss of their jobs? If you think that Steenberg should not be criminally or civilly liable, do you think that outcome should be based on modification of the common-law right to exclude, a statute banning discrimination, or interpretation of the U.S. Constitution?

10. Suppose Jacques owned a shopping mall, and Steenberg solicited signatures in the mall for a California ballot proposition relating to the sale of horse meat. Jacques had Steenberg arrested for trespass. Should that be part of an owner's right to exclude?
11. Suppose Jacques owns a large farm. Most workers on the farm are migrants who, during harvest season, live on the farm. Steenberg is a lawyer with a legal aid clinic that serves migrant farmers. Steenberg asked Jacques for permission to enter the farm to speak to farm workers about their rights, but Jacques denied Steenberg permission. Steenberg entered anyway, and Jacques had Steenberg arrested for trespass. Should Jacques be able to use the law of trespass to exclude Steenberg from his property? Would it matter if, instead of being a legal aid lawyer, Steenberg were a representative of a charitable group? A friend of a migrant worker who wanted to visit for social purposes? A member of the press?
12. In addition to the right to exclude, owners also usually have the right to destroy their property. Suppose Jacques owned a house in a historic district and, in his will, directed his executor to destroy the house and sell the land. After Jacques's death, the neighbors sued to prevent destruction of the home. Who should win and why?
13. In addition to the right to exclude, owners usually have the right to sell. Statutes bar individuals from selling their body parts, including kidneys. Most people have two kidneys, but only need one, so they can donate one kidney without adverse health effects. Those in favor of allowing the sale of kidneys point out that kidneys are often in short supply, and, as a result, many people who need transplants die because there is no kidney available. Allowing sales, they argue, would increase the supply of kidneys and save lives. Opponents argue that allowing the sale of kidneys would, de facto, coerce poor people into selling their organs, degrade the sanctity of human life by creating a market in human organs, and result in lower quality organs for transplant, because healthy volunteer donors would be replaced by desperate drug addicts and other unhealthy people giving up a kidney for short-term monetary gain. Do you think sales of kidneys and other organs should be allowed?