Ron C. ANDERSEN, d/b/a J & R Enterprises, Lynn Cluff and Eugene Heyworth, all the named defendants d/b/a Wrangell Mountain Enterprises, Appellants,

v.

James H. EDWARDS and Maxine D. Edwards, Appellees.

No. 4586.

Supreme Court of Alaska.

Jan. 30, 1981.

Development corporation appealed from an adverse judgment on jury verdict in the Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., for wrongful cutting of trees beyond amount reasonably necessary to construct roadway. The Supreme Court, Connor, J., held that: (1) express language of statutory dedication of land for roadway purposes suggested that legislature intended only that amount of land reasonably necessary for use as public highway be dedicated, and development corporation therefore was entitled to make only reasonable use of right-of-way; (2) jury instruction placing on development corporation burden of establishing all facts necessary to prove reasonableness of cutting was erroneous; (3) diminution in value of property or economic value of timber cut was appropriate measure of damages; (4) treble damages were appropriate even though not based on lumber or timber value of trees cut; (5) prejudgment interest could be awarded only on compensatory portion of award but not on punitive portion; and (6) sufficient evidence was presented to create jury question and prevent directed verdict regarding validity of assignment of cause of action by owners of other affected property.

Reversed and remanded.

1. Easements ⇐1

Language in contracts for sale of parcels of land from state reserving 100-foot right-of-way along section line between parcels was clearly indicative of easements and not fee.

2. Appeal and Error ⇐878(2)

Supreme Court would refuse to consider appellees' argument that partial directed verdict was erroneous in that such argument was not properly raised by filing of cross appeal or cross statement of points in appellant's appeal. Rules of Appellate Procedure, Rule 9(e).

3. Easements ⇐44(2)

Where width, length and location of easement for ingress and egress have been expressly set forth in instrument, easement is specific and definite, expressed terms of grant or reservation are controlling, and consideration of what may be necessary or reasonable to present use of dominant estate are not controlling; if, however width, length, and location are not fixed by terms of grant or reservation, dominant estate is ordinarily entitled to way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress.

4. Easements ⇐44(2)

To sustain contention that easement grants right to use any and all of strip of land, plaintiff must point to language in deed which clearly and definitely fixes width of right-of-way.

5. Easements ⇐44(2)

Grant or reservation of right-of-way over particular area, strip, or parcel of ground is not ordinarily to be construed as providing for way as broad as ground referred to.

6. Easements ⇐44(1)

Where statutory dedication stated that 100-foot-wide tracts were "dedicated for use as public highways," reference to width in reservation clause was ambiguous as to whether it referred to width of the way or was merely descriptive of property over which grantee may have such way as may be reasonably necessary; thus, development corporation which constructed road along such easements was entitled to make only reasonable use of such right-of-way. AS 19.10.010.

7. Easements ⇐44(1)

Allowing only "reasonable" use of right-of-way where dedication of land for use as public highways is ambiguous as to whether reference in width in grant refers to width of way or is merely descriptive of property over which reasonably necessary way may be made would avoid construction of grant of right-of-way on and over parcel of land that would unduly restrict its use and would insure that construction of roadways will be accomplished with care.

8. Trespass ⇐68(2)

Jury instruction, in action for wrongfully cutting trees, that defendants had burden of establishing by preponderance of evidence all facts necessary to prove that they cleared away only such trees as were reasonable and necessary for construction of roadway imposed on defendants burden of proof or persuasion to establish reasonableness of cutting and clearing, and was erroneous.

9. Torts ⇐27

Plaintiff in tort action has burden, throughout trial, of proving nature of harm, defendant's share in causing harm, injuries from harm, and damages suffered.

10. Trespass ⇐44

Burden was on plaintiff in action against development corporation for wrongfully cutting trees beyond amount reasonably necessary to construct roadway to show that development corporation committed alleged acts without lawful authority; such burden did not shift to development corporation.

11. Trespass ⇐68(2)

Jury instruction, in action against development corporation for wrongful cutting of trees to construct roadway, that landowner had burden to show that development corporation wrongfully cut and removed timber was correct.

12. Trial ⇐3(5)

In action for wrongful cutting of trees to make roadway, damages could not be calculated without determining what clearing was reasonable and necessary; thus, liability and damage issues could not be determined separately.

13. Trespass ⇐52

In action for wrongful cutting of trees to construct roadway, trial court erred in using cost of restoration as measure of damages.

14. Trespass ⇐50

If cost of restoring land to its original condition is disproportionate to diminution in value of land caused by trespass, restoration measure of damages is inappropriate unless there is reason personal to owner for restoring original condition.

15. Trespass ⇐52

In action for wrongful cutting of trees for construction of roadway, recovery of cost of restoration for damage done to landowners' property was not appropriate where beauty, location, quality, size or other particular features of severed trees did not render them of particular value to landowner, they were not akin to ornamental trees, they were without special value beyond fact that they were located on landowner's property, and there was not reasonable likelihood that they would be restored; thus, diminution in value of property or economic value of timber cut was appropriate measure of damages.

16. Trespass ⇐61

Treble damages for cutting timber without lawful authority would appropriately be assessed on bases other than lumber or timber value of trees cut. AS 09.45.730.

17. Trespass ⇐61

Damages under statute providing treble damages for cutting timber without lawful authority represent not merely value of timber cut but damages to freehold as well. AS 09.45.730.

18. Trespass ⇐50

Damages in trespass to land are measured by difference between value of land before harm and value after harm, but there is no fixed, inflexible rule for determining, with mathematical certainty, what

sum shall compensate for invasion of interests of owner and whatever approach is most appropriate to compensate him for his loss in particular case should be adopted.

19. **Damages** ⇐89(1)
Interest ⇐39(2)

Punitive damages are not compensation for actual physical harm, and prejudgment interest is generally not awarded on punitive damages.

20. **Interest** ⇐1

Actual damages are compensatory and interest on such award is of same character.

21. **Interest** ⇐1

To refuse interest on compensatory portion of damages award would be unfair to injured party.

22. **Interest** ⇐1

In action for wrongfully cutting trees beyond amount reasonably necessary to construct roadway, prejudgment interest could be awarded on compensatory portion of award but not on punitive portion. AS 09.45.730.

23. **Assignments** ⇐24(1)

Assignment may be made of cause or right of action for trespass on, or injury to, land, including cause of action for unlawful cutting and removal of timber, and such claims for damages to real property may be assigned without assigning or transferring title or possession of the property.

24. **Assignments** ⇐24(1)

Cause of action for unlawful cutting of timber could be assigned even though owners of parcel did not transfer any interest or possession in land to assignee who subsequently brought suit.

25. **Assignments** ⇐137

In action for unlawful cutting of timber beyond amount reasonably necessary to construct roadway, sufficient evidence was presented to create jury question regarding assignment of cause of action by owners of other affected property.

Keith A. Christenson, Johnson, Christenson & Associates, Anchorage, for appellants.

Olof K. Hellen, Hellen & Partnow, Anchorage, for appellees.

Before RABINOWITZ, C. J., and CONNOR, BURKE and MATTHEWS, JJ.

OPINION

CONNOR, Justice.

Wrangell Mountain Enterprises [hereinafter Wrangell] appeals a jury verdict against it for wrongfully cutting trees beyond the amount reasonably necessary to construct a roadway within a state reserved section line easement. Numerous points are raised on appeal, several of which we find meritorious. Consequently, we reverse the judgment.

[1] In May, 1975, Wrangell, a development partnership, acquired property in the vicinity of McCarthy, Alaska, adjacent to property owned by appellees [hereinafter the Edwardses]. Included in the development plans was the construction of a three mile public road running partially along a section line easement, through property owned by the Edwardses and an adjacent parcel of land jointly owned by Mr. Woods, the Schneiders, and Lovernes [hereinafter referred to as the Schneider parcel]. Both parcels were obtained through a conveyance from the state. In the contracts for sale of these parcels, the state reserved for "itself, its successors and assigns a 100 foot right-of-way along [the] section line" between the two parcels.[1] Pursuant to AS 19.10.010, the

1. The Edwardses do not challenge appellants' characterization of the interest created as an easement. We think this characterization is correct. The language in the conveyance from the state is clearly indicative of an easement and not a fee. *See* 3 R. Powell, Real Property ¶ 407, at 34–35 (Rev. ed. 1979). In *Wessells v. State*, 562 P.2d 1042, 1046 n.5 (Alaska 1977), we noted that "[a] 'right of way' is generally considered to be a class of easement." (citations omitted). In *Wessells*, we also recognized the state's authority to reserve the right to create such easements. *Id.* at 1046 n.6.

100-foot tract was dedicated for use as a public highway.[2]

Before construction began, Wrangell obtained a letter from the Alaska Department of Natural Resources, Division of Lands, verifying the width of the easement as a maximum of fifty feet on either side of the section line. Additionally, Wrangell received a letter from the Alaska Department of Highways stating that it had "no objection to the use of [the] subject section line reservation . . . to construct a public access roadway." The letter also stated, however, that the state assumed no liability or responsibility for any damages resulting from the construction and use of an access road. Also, before construction began, Mr. Edwards expressed his concern to Wrangell regarding the impact of the roadway on his property. Wrangell assured him that it "would do as little damage to the area as possible."

In June or July, 1975, Wrangell constructed a roadway along the section line. Although the roadway itself measured approximately twenty-five feet in width, Wrangell cleared the easement to nearly the full 100-foot width.

The Edwardses filed a complaint alleging that Wrangell had wrongfully cut and carried away trees from the Edwardses' and Schneiders' parcels, depriving them of the economic and esthetic value of the trees and lowering the property value of the parcels. The complaint sought damages in excess of $25,000, as well as treble damages under AS 09.45.730.[3] Wrangell filed four counterclaims, two of which it dropped before jury deliberations.[4] The jury found the two other counterclaims nonmeritorious. The jury returned a verdict in favor of the Edwardses, awarding $25,000.00 in actual damages which was trebled under AS 09.45.730. This appeal followed.

I. AUTHORITY TO CONSTRUCT THE ROADWAY

[2] The trial court granted a partial directed verdict holding that, as a matter of law, Wrangell possessed the authority to construct the section line roadway. The Edwardses contend in their appellees' brief that this ruling was an error. They did not, however, file a cross-appeal. We refuse to consider appellees' argument since it was not properly raised.[5] *Alaska Brick Co. v. McCoy*, 400 P.2d 454, 457 (Alaska 1965), compels this conclusion. In *McCoy*, appellee in its brief sought a modification of the judgment increasing the attorney's fee award. Appellee neither filed a cross-appeal nor a cross-statement of points in appellant's appeal. We held: "Orderly procedure will not permit an appellee to attack a judgment for the first time in his brief in the appellant's appeal." *Id.* Similarly, we will not pass upon this question here.

II. THE SCOPE OF THE USE PERMITTED BY THE EASEMENT

Wrangell contends that the trial court erred in ruling that the state's express reservation permitted Wrangell to use the reservation to the extent necessary to construct a roadway and, thus, that it was a jury question whether the use of the ease-

2. AS 19.10.010 provides:
"*Dedication of land for public highways.* A tract 100 feet wide between each section of land owned by the state, or acquired from the state, and a tract four rods wide between all other sections in the state, is dedicated for use as public highways. The section line is the center of the dedicated right-of-way. If the highway is vacated, title to the strip inures to the owner of the tract of which it formed a part by the original survey."

3. AS 09.45.730 provides in part:
"*Trespass by cutting or injuring trees or shrubs.* A person who cuts down, girdles, or otherwise injures or carries off a tree, timber, or shrub on the land of another person or on the street or highway in front of a person's house . . . , without lawful authority is liable to the owner of that land . . . for treble the amount of damages which may be assessed in a civil action."

4. Ron Anderson, a partner in Wrangell, admitted that the two claims were petty and brought out of spite because of the original litigation.

5. Appellate Rule 9(e) provides that this "court will consider nothing but the points so stated [in the statement of points on appeal]."

ment was reasonable or excessive.[6] Wrangell maintains that "no such requirement of reasonableness exists where there is an expressly reserved and dedicated defined highway right-of-way...." Therefore, it asserts that there is an absolute right to clear the right-of-way within the 100-foot limit of the reservation. The Edwardses, on the other hand, argue that only the amount of trees reasonably necessary to construct the roadway may be cleared. We agree with the Edwardses and hold that the trial court did not commit error.

[3-5] The general rule regarding the scope of the use of a right-of-way easement was stated in *Aladdin Petroleum Corp. v. Gold Crown Properties*, 221 Kan. 579, 561 P.2d 818, 822 (1977):

> "The law appears to be settled that where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument the easement is specific and definite. The expressed terms of the grant or reservation are controlling in such case and consideration of what may be necessary or reasonable to the present use of the dominant estate are not controlling. If, however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress."[7]

"To sustain [a] contention [that an easement grants the right to use any and all of a strip of land], the plaintiff must point to language in the deed which clearly and definitely fixes the width of the right of way...." *Barton's Motel, Inc. v. Saymore Trophy Co.*, 113 N.H. 333, 306 A.2d 774, 775 (N.H.1973).[8] Moreover, it has been generally stated:

> "A grant or reservation of a right of way 'over' a particular area, strip, or parcel of ground is not ordinarily to be construed as providing for a way as broad as the ground referred to."

Annot., 28 A.L.R.2d 253, 265 (1953).

[6] In *Hyland v. Fonda*, 44 N.J.Super. 180, 129 A.2d 899 (N.J.App.Div.1957), the court considered whether the reservation in a deed entitled the grantor's assigns to use the entire reserved strip. The deed stated:

> "Reserving, however, unto the party of the first part [Scientific Research Corporation], its successors and assigns the right of ingress and egress for roadway purposes along a strip 25 feet in width along the entire northerly boundary for roadway purposes, together with the right to dedicate said strip, together with any additional land of the party of the first part for roadway purposes whenever a municipality shall accept the same as a public thoroughfare."

129 A.2d at 901. The court stated:

> "We cannot say there is no ambiguity on the face of the grant here involved concerning the matter of the physical area over which the defendants have *a present right* of roadway use. The language of the reservation does not specifically describe the intended *roadway* as 25 feet in width ... it provides a 'right of ingress and egress for roadway purposes along a strip 25 feet in width,' etc. This kind of ambiguity is frequently found...." (emphasis in original; citation omitted).

129 A.2d at 904. Similarly, here neither the reservation in the contract for sale nor the statutory dedication describe the intended roadway as 100 feet in width. In fact, the statutory dedication states that 100-foot-wide tracts are "dedicated for use as public highways." This is analogous to the grant in *Hyland* for a right-of-way "for roadway

6. The court instructed the jury:
> "The Court has determined as a matter of law that the defendants had the right to use the right of way to construct a public road, but that the reasonableness of that use is for determination by the jury."

7. *See Hyland v. Fonda*, 44 N.J.Super. 180, 129 A.2d 899, 903-04 (N.J.App.Div.1957); *Barton's Motel, Inc. v. Saymore Trophy Co.*, 113 N.H. 333, 306 A.2d 774, 775-76 (1973).

8. *Accord*, 3 Powell, Real Property 415, at 34-183 (Rev. ed. 1979).

purposes." The express language of the dedication suggests that the legislature intended only that the amount of land necessary for use as public highways be dedicated. Consequently, we believe that the reference to width in the reservation is ambiguous as to whether it refers "to the width of the way, or is merely descriptive of the property over which the grantee may have such a way as may be reasonably necessary." *Id.*[9] Consequently, Wrangell was entitled to make only reasonable use of the right-of-way.

[7] Although the result we reach may generate litigation because of disputes over what constitutes reasonable use, the "result will avoid a construction of the grant of a right of way on and over [a] parcel of land that would unduly restrict its use." *Alban v. R. K. Co.*, 15 Ohio St.2d 229, 239 N.E.2d 22, 25 (Ohio 1968). Moreover, this result will prevent needless destruction of property by insuring that the construction of roadways will be accomplished with care.[10]

III. THE BURDEN OF PROOF

[8] Wrangell contends that the trial court erred in giving instruction No. 14, which provides in part:

> "[T]he plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove [that] the defendants wrongfully cut trees and removed timber on plaintiff's property and the adjoining property.
>
> . . . . .
>
> The defendants have the burden of establishing by a preponderance of the evidence all of the facts necessary to prove [that] they cleared away only those trees that were reasonable and necessary for the construction of the roadway."

Wrangell argues that the court erred in imposing on it "the burden of proof or persuasion to establish the reasonableness of the cutting and clearing." We agree.

[9, 10] As a general rule, the plaintiff in a tort action has the burden, throughout the trial, of proving the nature of the harm, the defendant's share in causing the harm, the injuries from the harm, and the damages suffered. *See generally* J. Wigmore, Evidence § 2486, at 275–76 (3d ed. 1940); C. McCormick, Law of Evidence § 337, at 785–89 (2d ed. 1972). The Edwardses do not advance any reason, nor do we find any, for not following this rule in this case. Consequently, the burden was on the Edwardses to show that Wrangell committed the alleged acts "without lawful authority." This burden did not shift to Wrangell.[11]

[11] Instruction No. 14 is internally conflicting in this regard. The instruction initially advises the jury that the burden rests with the plaintiff to show that the defend-

9. *See Barton's Motel, Inc. v. Saymore Trophy Co.*, 113 N.H. 333, 306 A.2d 774, 775–76 (1973) ("the grant of 'a right to pass and repass on foot or by vehicle in common with others . . . along a strip of land fifty feet (50') in width' fixed the outward limits wherein the right of way was to be exercised, but is ambiguous as to whether the use of the whole 50-foot width was granted for this purpose"); *Alban v. R. K. Co.*, 15 Ohio St.2d 229, 239 N.E.2d 22, 24 (1968) (grant of "right of way on and over" a parcel of real property described by metes and bounds does not create a way over all of the property described); Annot., 28 A.L.R.2d 253, 265–67 (1953). *Contra Onorati v. O'Donnell*, 3 Mass. App. 739, 326 N.E.2d 367 (Mass.App.1975) (where description of easement is clear, explicit and free from ambiguity, it is inappropriate to restrict vehicular use to less than the full 20 feet granted).

10. *Cf. Wessells v. State Dept. of Highways*, 562 P.2d 1042, 1050 (Alaska 1977) (although grant of easement should be interpreted according to the reasonable expectation of the parties, it is not reasonable to think parties intended extensive destruction of the property.)

11. In *Judkins v. Carpenter*, 189 Colo. 95, 537 P.2d 737, 738 (1975), the court stated:

> "The burden of proof, which rests upon a party to establish the truth of a given proposition, never shifts. Once the person having the burden of proof has established a prima-facie case, the burden of going forward shifts to the other side. '[I]t then becomes the duty of the defendant to go forward with his testimony. But in no sense does such presumption cast a burden [of proof] on the defendant. . . . The burden to establish his case does not shift from the plaintiff to the defendant, but continues throughout the trial.' " (citation omitted).

415, at 34–