SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0207-15T4

EDWARD JODZIO,

Plaintiff-Respondent,

v.

ROBERT SLIWOWSKI,

Defendant-Appellant,

and

LINDA SAFIR-SLIWOWSKI,

Defendant.

Argued February 26, 2018 – Decided April 24, 2018

Before Judges Sabatino, Ostrer and Rose.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-3886-11.

William C. MacMillan argued the cause for appellant, (Law Offices of Igor Sturm, attorneys; William C. MacMillan, on the briefs).

Jeffrey I. Baron argued the cause for respondent (Baron & Brennan, PA, attorneys; Jeffrey I. Baron, of counsel; Jeffrey M. Brennan, on the briefs).

PER CURIAM

Defendant, Robert Sliwowski,[1] appeals from a July 28, 2015 Law Division judgment in favor of plaintiff, Edward Jodzio, for damages sustained to plaintiff's property by surface water runoff from improvements on defendant's property. At the conclusion of a twelve-day non-jury trial,[2] the judge rejected plaintiff's fraud and negligence theories, but determined defendant was liable under theories of private nuisance and trespass.[3] The judge also ordered injunctive relief, requiring defendant to modify or remove the conditions on his property that caused the flooding and created wetlands on plaintiff's property. We reverse and remand for the trial court primarily to determine the unresolved question of

[1] Defendant's wife, Linda Safir-Sliwowski, was also named as a defendant, but the trial judge dismissed all claims against her when rendering his decision. That ruling was not challenged on appeal. An issue not briefed is deemed waived on appeal. N.J. Dept. of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 505-06 n.2 (App. Div. 2015). We, therefore, refer to defendant in the singular.

[2] Trial was held between August 5, 2014 and October 21, 2014. The trial judge issued an oral decision on June 12, 2015, awarding plaintiff $233,425 in damages. The order was subsequently amended on July 8, 2015 to include $19,538 for counsel fees and costs, and on July 28, 2015 to include pre-judgment interest and costs for a total of $257,243.

[3] On appeal, plaintiff does not challenge the court's dismissal of his fraud and negligence counts, and defendant does not challenge the court's dismissal of his counterclaims for trespass, nuisance and negligence.

whether defendant's conduct was intentional and unreasonable pursuant to the common law, as guided by the Restatement (Second) of Torts, sections 821(A) to 831 (Am. Law Inst. 1979) ("Restatement").

I.

We provide a factual background, gleaned from the trial record, reciting only those facts relevant on remand. Both parties testified at trial. Plaintiff presented the testimony of his landscaper, David Griffith; former Township Engineer, Nancy Jamanow; Township Zoning Officer, Peter Clifford; wetlands expert, Michael Higgins; engineering expert, James A. Clancy; and real estate appraiser, Steven Bartelt. Defendant presented the testimony of his wetlands expert, Robert Smith; and engineering expert, Jack J. Gravlin. Among other documents received in evidence, the court viewed photographs depicting the condition of plaintiff's land after a storm. The judge also viewed a video of plaintiff's property, and made a site visit during trial.

In October 1993, plaintiff purchased property on Tom Brown Road in the Township of Moorestown, identified as Block 5500, Lots 20, 21, 22 and 23 on the Township's tax map. Plaintiff built a home on Lot 22, which became his residence in 1995. In 2006, construction was completed on a house on Lot 20 for his daughter. Plaintiff grew Christmas trees and installed an irrigation system

on Lot 23 to maintain the trees in the summer months. He intended to convey Lot 23 to his son to build a residence on that lot.

On July 17, 2003, defendant purchased property on Bridgeboro Road in Moorestown, identified as Block 5500, Lot 12 on the Township's tax map. The rear of defendant's property abuts the rear of Lots 22 and 23. Defendant's land also abuts Block 5500, Lot 13, which is occupied by the Flying Feather Farm.

In Spring 2004, defendant began construction of his residence and a pond on his lot. In an effort to block dust blowing from the farm to his property, and for privacy purposes, defendant utilized soil from the excavation of the pond, and built a berm along the property line with Lot 13. The Township's zoning officer was on site nearly daily during construction. According to defendant, the zoning officer advised that a permit was unnecessary to construct the pond or the berm, which were both completed in April 2004.

By correspondence dated November 12, 2004, the Township's then-engineers, Pennoni Associates, Inc., notified defendant that the berm was blocking drainage and causing ponding of water on the Flying Feather Farm. When defendant's initial attempts to remedy the problem by removing part of the berm failed, he hired Gravlin. Pennoni assisted Gravlin in designing a plan to relieve the ponding on the farm.

Among other things, Pennoni required defendant to remove part of the berm, dig a swale along the berm, and fortify the berm with boulders. Pennoni also required defendant to dig a deeper swale at the rear of the property, which emptied into an existing drainage ditch. According to Gravlin, thirty to forty feet of "the rear corner of the berm [was removed] to enable the swale to . . . turn the corner" and a spillway from the pond was installed. Completed in July or August 2005, the modifications were intended to accommodate a twenty-five-year storm.

However, by mid-July 2005, plaintiff experienced flooding of his property, evidenced by photographs taken on July 17, 2005. Clancy testified that, before construction of defendant's improvements, "[rain]water would sheet flow over the ground" from the Flying Feather Farm and across defendant's property before reaching plaintiff's property. After construction of the berm and pond, when it rained, a concentrated flow of water from the farm was pushed onto plaintiff's property, and the pond would also overflow onto plaintiff's property. When the water hit the berm, "it [would] run[] right towards [plaintiff's] property," first passing through Lot 22 and then onto Lot 23.

In September 2005, newly-appointed Township Engineer, Jamanow, rejected the design approved by Pennoni. Jamanow testified that she walked on plaintiff's property three to four

times during, or shortly after, rain events. The ground felt "spongy," and she saw water "jump[ing] out" of the swale onto plaintiff's property.

In correspondence dated January 20, 2006, Jamanow concluded the berm was causing flooding on plaintiff's property and the Flying Feather Farm. Defendant engaged Stout & Caldwell Engineers, LLC, to redesign the berm and swale to accommodate Jamanow's requirements for a one-hundred-year storm. Jamanow testified she believed defendant made the changes after she approved Stout's February 2008 revisions to the swale design. Specifically, the berm was cut down at the northwest corner to afford a smoother turn at the rear of the property, the swale was widened and deepened along the rear of the property, and riprap was installed.

However, Clancy testified that the existing swale between plaintiff's and defendants' properties did not conform to Stout's February 2008 plan. While the plan specified a depth of one foot to two feet, Clancy observed a depth of about six inches, but he did not measure the depth. Thus, plaintiff maintains the swale was not deep enough to contain the water. Even after defendant's modifications "anything more than a moderate rain would cause water to jump out of the swale and onto Lots 22 and 23."

In sum, plaintiff claims water intrusion has caused the loss of trees on Lots 22 and 23, and the creation of wetlands on Lot

23, rendering that lot undevelopable. Defendant conceded that prior to 2008, the improvements on his property caused flooding on plaintiff's property, while after 2008, he observed flooding on two occasions.

The trial judge found that neither the berm itself, nor the pond, caused flooding of plaintiff's property. Rather, "the berm necessitate[d] the need for the swale, and the swale [was] what experts on plaintiff's side say caused the problem." The judge found the Township mandated construction of the swale. The court also found the pond was not the source of flooding because, like the swale, it was completed in April 2004, and the first documentation of flooding was evidenced by plaintiff's photographs taken in July 2005.

Noting that the parties agreed with the wetlands delineation for Lot 23, but disputed causation, the judge determined the swale caused creation of wetlands and flooding on plaintiff's property. In reaching this conclusion, the judge cited: Gravlin's concession that funneling water increased the speed and volume, and that unfettered sheet flow had a better chance of being absorbed by the land; plaintiff's testimony that the land was dry before the improvements necessitating the installation of an irrigation system to grow Christmas trees; Jamanow's testimony that the water jumped the swale; and the photographs depicting flooding on

plaintiff's property. Further, while the judge generally found all witnesses credible, he specifically determined Higgins was more believable than Smith. Among other things, Higgins conducted a three-year study of the property, providing him with "much more information as to hydric soil" than Smith, who unlike Higgins, did not conduct the proper testing during the growing season.

In determining damages, the trial judge adjusted Bartelt's appraisal by disregarding the highest comparable sale, and noting defendant did not produce an expert to refute Bartelt's testimony. The judge, therefore, awarded $233,425 for the loss in value of the property, plus $4,250 for damage to trees.

In considering plaintiff's claim for an injunction, the trial judge concluded that removing the berm would not abate the flooding because the swale would remain and interrupt the sheet flow of water. Further, it would be inequitable to require defendant to fill the swale. Yet, he found there was "testimony from experts that the swale in its current condition [was] not as deep and as wide as . . . Jamanow wanted it to be." Thus, the judge granted plaintiff's request for an injunction, giving defendant the option, within 120 days, to either "widen and deepen [the] swale consistent with the plans and specifications as delineated by . . . Jamanow" or remove the berm and swale.

On appeal, defendant argues, pursuant to Ross v. Lowitz, 222

N.J. 494 (2015), the trial court erred in finding liability under nuisance and trespass theories because defendant did not intentionally or negligently invade plaintiff's land. He contends the trial court correctly found he did not act negligently, a finding not challenged by plaintiff on appeal. Therefore, under the Restatement, as cited in Ross, defendant is not liable because his conduct was not "intentional and unreasonable." Defendant maintains that, even if his conduct were construed as intentional, his conduct was not unreasonable because the Township mandated construction of the swale, which was designed by professional engineers.

Relying on the Court's earlier decisions in Armstrong v. Francis Corp., 20 N.J. 320, 327-30 (1956), and Russo Farms, Inc. v. Vineland Board of Education, 144 N.J. 84, 99 (1996), plaintiff counters the trial court correctly determined defendant was liable for trespass and nuisance under what is known as the "reasonable use rule." In his merits brief, plaintiff also cites section 821D of the Restatement to support his contention that the flooding initially constituted a trespass, but because it was of a long duration, it also constituted a nuisance.

Plaintiff further claims that an analysis of the factors identified by the Armstrong Court assessing reasonableness compels affirmance of the trial court's decision. Plaintiff claims

defendant's improvements are ornamental and lack utility in defendant's residential use of the property. Rather, the improvements have caused regular flooding on plaintiff's land, including the formation of wetlands, rendering Lot 23 completely inutile.

II.

A.

Our review of a judge's factual findings following a bench trial is limited. State v. Frank, 445 N.J. Super. 98, 105 (App. Div. 2016). "Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: 'we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (alteration in original) (quoting In re Tr. Created By Agreement Dated Dec. 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008)). "[W]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." Mountain Hill, LLC v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008) (quoting State v. Barone, 147 N.J. 599, 615 (1997)).

Further, "In reviewing the factual findings and conclusions of a trial judge, we are obliged to accord deference to the trial court's credibility determination[s] and the judge's 'feel of the case' based upon his or her opportunity to see and hear the witnesses." N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006) (citing Cesare v. Cesare, 154 N.J. 394, 411-13 (1998)). Our task is not to determine whether an alternative version of the facts has support in the record, but rather, whether "there is substantial evidence in support of the trial judge's findings and conclusions." Rova Farms Resort, Inc. v. Inv'r Ins. Co., 65 N.J. 474, 484 (1974); accord In re Tr. Created By Agreement, 194 N.J. at 284. Legal conclusions, however, are reviewed de novo. State v. Ghandi, 201 N.J. 161, 176 (2010); Manalapan Realty LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

B.

In deciding whether the record supports the trial court's determination that defendant is liable on nuisance and trespass theories, we are guided by established case law and the Restatement. See Perez v. Wyeth Labs., Inc. 161 N.J. 1, 14-15 (1999) (recognizing the complementary role of the Restatements of law with common law); see also Ross, 222 N.J. at 505, 510 ("Our courts have adopted the standard of Restatement section 822 to

assess liability for private nuisance[,] . . . and also apply the Restatement's standard of liability where a plaintiff pursues a trespass claim.").

"Trespass and private nuisance are alike in that each is a field of tort liability rather than a single type of tortious conduct. In each, liability may arise from an intentional or an unintentional invasion." Restatement § 821D cmt. d. Further, "the flooding of the plaintiff's land, which is a trespass, is also a nuisance if it is repeated or of long duration." Ibid.

Shortly after the trial court decided the present case, our Supreme Court issued its decision in Ross v. Lowitz, 222 N.J. 494 (2015). Relying on the Restatement, Ross did not enunciate a new rule of law that would require retroactivity analysis. See State v. Afanador, 151 N.J. 51, 57 (1997). In Ross, the plaintiffs asserted claims for private nuisance and trespass when heating oil leaked onto their residential property from a storage tank located on their neighbor's residential property. Ross, 222 N.J. at 497. In deciding Ross, the Court began its analysis of plaintiff's nuisance claim with the general rule set forth in section 822 of the Restatement:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's

> interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.
>
> [Id. at 505, (quoting Restatement § 822) (emphasis added).]

As the Ross Court explained, "an 'intentional but reasonable' or 'entirely accidental' invasion does not trigger liability under a private nuisance theory." Id. at 506 (quoting Restatement § 822 cmt. a). Rather, a claim of private nuisance is predicated on the unreasonable interference with the use and enjoyment of another's land. Id. at 505; Smith v. Jersey Cent. Power & Light Co., 421 N.J. Super. 374, 389 (App. Div. 2011). Thus, "'an actor is [not] liable for accidental interferences with the use and enjoyment of land but only for such interferences as are intentional and unreasonable or result from negligent, reckless or abnormally dangerous conduct.'" Id. at 506-07 (quoting Restatement § 822 cmt. b); see also Birchwood Lakes Colony Club, Inc. v. Medford Lakes, 90 N.J. 582, 591-92 (1982).

The Ross Court found, although the "[p]laintiffs' allegations present[ed] a sympathetic argument," Ross, 122 N.J. at 512, they did not demonstrate that their damages resulted from the

"negligent, reckless, or intentional and unreasonable conduct" of the defendant. Id. at 511. In upholding the trial court's granting of summary judgment, the Court found further there was no basis for a claim of private nuisance or trespass under the Restatement. Id. at 512, 515.

Plaintiff relies, as did the trial judge, on the Court's earlier decision in Armstrong v. Francis Corp., 20 N.J. 320, 327-30 (1956). The defendant in Armstrong was a commercial housing developer, which stripped one of its tracts of land and built 186 homes on that tract, and another fourteen homes on its adjacent tract. Id. at 322. To serve both developments, the defendant "constructed a drainage system of streets, pavements, gutters, ditches, culverts and catch basins." Ibid. That system emptied into a pipe that defendant built under a natural stream on its land. Ibid. After the drainage system was built, "[a]ll of the upstream rain water that used to be absorbed or held back [was] . . . channeled in undiminished volume and at great speed into [the] stream" resulting in flooding and erosion of the plaintiffs' property, along with discoloration and an "evil smell[]" to the stream. Id. at 323.

The Supreme Court certified the appeal on its own motion, id. at 322, to consider the question of whether the damage suffered by the plaintiffs was "merely the nonactionable consequences of

the privileged expulsion by [the defendant] of waters from its tract as an incident to the improvement thereof." Id. at 324-25. Noting the historic "common enemy" rule[4] was "purportedly applicable" in New Jersey, id. at 327, the Court observed that "our [courts] invariably refused to apply the rule according to its letter where it works injustice." Id. at 328.

After considering case law in our state and other jurisdictions, the Armstrong Court declared its adherence to the "reasonable use rule[, finding] . . . the Restatement [of] Torts sec[tion] 833 [1939], ha[d] adopted the reasonable use test as the rule actually prevailing."[5] Id. at 329-30. Specifically,

> [t]he issue of reasonableness or unreasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter.
>
> [Id. at 330.]

[4] Under the common enemy rule, "a possessor of land has an unlimited and unrestricted legal privilege to deal with the surface water on his land as he pleases, regardless of the harm which he may thereby cause others." Id. at 327-328 (citation omitted).

[5] Section 833 of the Restatement of Torts is substantially similar to section 833 of the Restatement (Second) of Torts. Both versions of the Restatement pertain to an invasion of an "interest in the use and enjoyment of land resulting from another's interference with the flow of surface water."

Discerning no reason that "the economic costs incident to the expulsion of surface waters in the transformation of the rural or semi-rural areas of our State into urban or suburban communities should be borne in every case by adjoining landowners rather than by those who engage in such projects for profit," the Court affirmed the trial court's decision. Ibid.

While the Armstrong Court embraced the Restatement's reliance on the reasonable use rule, it did not expressly discuss the element of intent. However, section 822 of the 1939 version of the Restatement of Torts, was published at the time of the Court's decision, and is substantially similar to the 1979 Restatement (Second) of Torts, which is applicable today.[6] Specifically, the 1939 version of section 822 provided that an

> actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if . . . the invasion is either (i) intentional and unreasonable; or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct.

Further, in describing the test to determine reasonableness, the Armstrong Court cited, among other factors, "whether the utility of the possessor's use of his land outweighs the gravity

[6] Section 822 has not been changed by the Restatement (Third) of Torts (2005). Ross, 222 N.J. at 505 n.7.

of the harm which results from his alteration of the flow of surface waters." Armstrong, 20 N.J. at 330. In recognizing the utility versus harm balancing analysis as a proper consideration in the test for reasonableness, the Court's decision aligns with then-published section 826 of the Restatement of Torts. That section provided, "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable under the rule stated in [section] 822, unless the utility of the actor's conduct outweighs the gravity of the harm." (Emphasis added). We construe the Armstrong Court's implied reference to section 826 of the Restatement of Torts (1939) to require not only that the actor act unreasonably but also intentionally to be liable under a nuisance theory.

Moreover, section 833 of the Restatement of Torts, cited in Armstrong, and section 822 of the Restatement, cited in Ross, both refer to section 825, which defines an intentional invasion of property as one where the actor "(a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct." However, comment (d) to section 825 of the Restatement explains that "the first invasion resulting from the actor's conduct may be either intentional or unintentional; but when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions

are intentional." (Emphasis added). See Smith, 421 N.J. Super. at 389; see also Restatement § 8A cmt. a ("intent" as used in the Restatement "has reference to the consequences of an act rather than the act itself").[7]

In this appeal, because the trial record supports a finding that defendant's initial surface water invasion of plaintiff's property was unintentional, the question of defendant's liability turns on his conduct after he was made aware of plaintiff's harm. See Restatement § 825. In rendering his decision the trial judge did not reference section 825 of the Restatement. At our invitation, the parties submitted supplemental briefs limited to the applicability of comment (d) to section 825, and whether the existing record was sufficient to apply that provision.

Plaintiff argues section 825 is satisfied by the facts here, citing illustrations three and four provided in the commentary where an actor dumped waste material on his property that seeped into his neighbor's well. The initial seepage was unknown to the

[7] Although section 821D of the Restatement does not cross-reference section 825, we discern no reason why an actor's intention should not be analyzed in the same manner for trespass as it is for nuisance, given the similarities between the theories as set forth in comment (d) to section 821D. While our discussion primarily concerns plaintiff's nuisance theory, it is, therefore, applicable to his trespass claim. However, unlike nuisance, reasonableness is not an element of trespass. See Restatement § 161; Ross, 122 N.J. at 510-11.

actor and the invasion was, therefore, unintentional. However, after the actor learned of the seepage, but continued to dump the waste material, the further contamination of his neighbor's well was considered intentional.

Plaintiff argues defendant admitted at trial that, by January 2006, he knew the improvements on his property were causing flooding on plaintiff's property. Despite defendant's knowledge of the harm, he allowed the surface water invasion to continue unabated.

Defendant counters that, because the trial judge found the swale caused plaintiff's damages, and the Township mandated construction of the swale, which was designed and constructed by others, he cannot be considered the "actor" under section 825. Nor was construction of the swale his "conduct." He also argues he could not reasonably have known the swale was causing the flooding, claiming plaintiff alleged several sources of flooding, including construction of defendant's house, pool, patio, garage, pond, and the installation of underground drains. Defendant contends that his knowledge of flooding after March 2006, when Higgins determined the wetlands on Lot 23 were created, is irrelevant because the damage had been incurred by that timeframe.

Both plaintiff and defendant maintain there is sufficient evidence in the record to resolve whether or not defendant's

conduct was intentional under section 825 of the Restatement. We disagree. In particular, the record is inconclusive as to whether defendant's conduct continued after he knew the flooding on plaintiff's property resulted from his conduct, or lack of conduct. See Restatement § 824 ("The conduct necessary to make the actor liable for a private nuisance may consist (a) of an act; or (b) a failure to act under circumstances in which the actor[8] is under a duty to take positive action to prevent or abate the interference . . . ."; see also Tiongco v. Sw. Energy Prod. Co., 214 F.Supp. 3d 279, 285 (M.D.Pa. 2016) (citing Smith, 421 N.J. Super. at 374) ("When a defendant begins a course of conduct without knowing that his conduct is invading another's use and enjoyment of land, but is subsequently put on notice that such an invasion is resulting and does not abate his activities, further invasions may be considered 'intentional.'").

The trial judge specifically found neither the berm nor the pond caused water infiltration on plaintiff's property. He also

[8] We reject defendant's argument that he is not the "actor" under section 825 because the Township directed certain measures after the berm he constructed caused flooding to the farm. See Restatement § 3 ("The word 'actor' is used throughout the Restatement . . . to designate . . . the person whose conduct is in question as subjecting him to liability toward another . . . ." Further, as set forth in comment (a) to section 3, "actor" "generally denotes the person who is the defendant in a litigated case." The Township's role, instead, is relevant to the reasonableness of defendant's actions.

determined that, because the berm created ponding on the farm, the berm necessitated the swale, which caused water infiltration to plaintiff's property, including the creation of wetlands on Lot 23. Although the trial court did not analyze plaintiff's nuisance theory in terms of intent, it is undisputed that defendant's "first invasion" of water infiltration onto plaintiff's land by building the swale (or the berm), was not intentional.

However, it is unclear from the record whether defendant's continued conduct, or lack thereof, could be deemed intentional pursuant to comment (d) to section 825 of the Restatement, thereby constituting a nuisance. In particular, the record does not specify when defendant knew plaintiff's flooding resulted from his construction of the swale, in relation to when he began to "abate his activities" by redesigning the swale pursuant to the requirements of two different Township engineers. The record is also unclear as to when defendant realized flooding continued on plaintiff's property after Stout's February 2008 plan was implemented. In sum, the trial judge did not determine the intentionality of defendant's conduct as defined in section 825 of the Restatement.

C.

On remand, if the trial court concludes defendant's conduct was "intentional," it must then determine whether his conduct also

was unreasonable in order for plaintiff to prevail under his nuisance theory.[9] Birchwood Lakes Colony Club, 90 N.J. at 592 (quoting Restatement § 826). While the trial judge cited Armstrong, which embraced the "reasonable use" test, the trial judge did not make any specific findings as to whether defendant's conduct was reasonable. Instead, the trial judge found "the facts in Armstrong are very similar to the facts [here]," but he also found "[t]here [is] no indication whatsoever that [defendant] built a swale without Government oversight. They [are] the ones that mandated it."

Although the water surface runoff issue in Armstrong is similar to the present case, the status of the parties, the circumstances that caused the runoff, and the penalty imposed are distinguishable. The defendant in Armstrong was a commercial housing developer, installing a drainage system on land that was improved for profit, and was ordered to pipe the remainder of the brook at its own cost. Conversely, in the present case, defendant is a residential owner of a single lot. To block dust from the adjacent farm, and for privacy reasons, defendant built a berm. His improvements were made for personal and not proprietary reasons. Further, regarding the berm, the trial judge "guess[ed

[9] As noted, supra, the same reasonableness analysis applies under a trespass theory.

it was built] somewhat for aesthetics and somewhat for functional [reasons] but not for any . . . water issues." No evidence was adduced, for example, as to whether there were alternatives to building the berm.

From this record, we cannot discern whether defendant's conduct was reasonable. Nor are we the trier of fact, which is normally entrusted to make such assessments of reasonableness. See, e.g., Hitesman v. Bridgeway, 218 N.J. 8, 31 (2014); Gudnestad v. Seaboard Coal Dock Co., 15 N.J. 210, 221 (1954). We are mindful this appeal followed a lengthy trial and the trial judge is now retired. Nonetheless, the critical question of reasonableness must be answered.

On remand, therefore, the trial court should consider the Armstrong factors in deciding whether defendant's conduct was reasonable, including "the amount of harm caused, the foreseeability of the harm which results, [and] the purpose or motive with which the possessor acted." Armstrong, 20 N.J. at 330. The court should also balance the utility of defendant's conduct with the resulting harm to plaintiff. Ibid.; Restatement § 825. As part of that balancing, the court may take into account the Township's role in the matter. The court and the parties should also explore whether more reasonable solutions, if the flooding problems still exist, are acceptable to the Township.

Because we find it necessary to remand for further proceedings, we do not reach defendant's remaining arguments challenging the trial judge's determinations regarding expert testimony, damages, and injunctive relief. However, in addressing those issues on remand, and resolving the critical disputed issues concerning intent and unreasonableness, the court may reopen fact and expert discovery. For example, in assessing the weight of the expert testimony already adduced at trial, the court may find that testimony is insufficient to determine defendant's intent and reasonableness. In that case, additional discovery and testimony may be necessary.

Further, if on remand, the trial court once again finds defendant is liable under nuisance or trespass theories, the ultimate remedies the court fashions should not be redundant. From the existing record we cannot tell, for example, whether: (1) the damages awarded by the original trial judge were solely for the wetlands created on plaintiff's property, and the injunction awarded was solely directed to the non-wetlands portion of the parcel; or (2) whether those remedies were, as defendant argues on appeal, redundant. Any redundancy of remedy must be avoided. See Del. River & Bay Auth. v. York Hunter Constr., Inc., 344 N.J. Super. 361, 364 (Ch. Div. 2001) (citations omitted).

In addressing the matters on remand, the trial court should conduct a case management conference within thirty days to set a schedule for any supplemental discovery and a new trial date. To avoid repetition and undue expense, the parties are encouraged to confer and reach stipulations as to the successor trial judge's ability to rely upon transcribed testimony from the first trial.

Finally, the injunctive relief granted by the initial trial judge is vacated without prejudice.

Reversed and remanded. We do not retain jurisdiction.