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COURT OF APPEAL, FOURTH APPELLATE DISTRICT  
DIVISION ONE

STATE OF CALIFORNIA

MELANIE HEISEY,

Plaintiff and Appellant,

v.

JEFF SHURE,

Defendant and Respondent.

D061586

(Super. Ct. No. 37-2010-00100447-  
CU-PO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Gonzalo P. Curiel, Judge. Affirmed.

Rupp Johnston & Lloyd and Andrew F. Lloyd for Plaintiff and Appellant.

Hollingshead & Associates and Janis L. Hulse for Defendant and Respondent.

The record in this trespass case shows that defendant and respondent Jeff Shure entered plaintiff and appellant Melanie Heisey's property twice: once to destroy a deck which was in disrepair and encroached over a neighbor's property and again later in order to shore up a stairway attached to Heisey's house. The jury found on substantial evidence that Heisey gave Shure permission to enter her property, and the trial court entered

judgment in Shure's favor.

On appeal, Heisey does not contest the jury's determination that Heisey gave Shure permission to destroy the deck. However, Heisey contends that because there is no dispute that *after* the deck was demolished Shure no longer had permission to enter her property, and he nonetheless did so in order to shore up the stairway, the verdict in Shure's favor on her trespass claim must be reversed.

We affirm the judgment. The record demonstrates Shure's second entry onto Heisey's property will not support more than an award of nominal damages. Thus, any error, if it occurred, is in the trial court's failure to award Heisey nominal damages. Where, as here, a complaint has been filed as an unlimited civil action, the failure to award nominal damages does not constitute reversible error.

#### FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises out of a dispute between Heisey and her neighbors Orlando B. Foote and Linda Foote. The Footes purchased the house at 3424 Hawk Street in San Diego in 1989; in 2001, Heisey purchased the house next door at 3418 Hawk Street. Both houses are located on steep canyon lots and are built on stilts. At the time Heisey purchased her home, a front deck extended from the north portion of her home to the south wall of the Footes' home, where it was attached to the Footes' garage.

In 2005, both Heisey and the Footes noticed that deteriorating conditions on the city street in front of their homes were causing erosion to the sidewalk, their homes and the deck. Because of the condition of the deck, Heisey conceded that she did not use the deck between 2005 and 2009 but that in 2009 she began entertaining on it again.

After erosion claims against the city were resolved, Heisey and the Footes agreed they would jointly repair the damage to the right of way in front of their homes as well as the deck. In 2007, Heisey and the Footes had plans for the repairs drawn up by a civil engineer and surveyor. The plans showed that the boundary line between the two homes ran through Heisey's deck and that the deck encroached on three feet of the Footes' property, albeit 10 feet above ground.

No joint repairs were performed and, in 2009, Heisey and the Footes agreed they would each perform repairs to their own property. The Footes retained Shure as a contractor for their repairs. Shure contacted Heisey in the spring of 2010 because he was about to obtain a permit for the work he planned to do on the Footes' side of the property line.

According to Shure, Heisey hired him to demolish the deck at the time he commenced work on the Footes' side of the property line. According to Heisey, she agreed to have Shure demolish the deck only if, prior to demolition: they executed a written contract; Shure provided Heisey with a "change of responsible party" form from the city which relieved her of responsibility for the work he was doing on behalf of the Footes; and Shure coordinated his work with the contractor she was going to use build a new deck on her side of the property line.

On May 24, 2010, Shure demolished Heisey's deck. At the time of the demolition, Heisey was not home and none of the conditions she believed she had required had been met. When she returned home, Heisey was angry and upset because she did not believe she had given Shure permission to demolish the deck. Heisey instructed Shure not to

enter her property again.

Following the demolition, Shure cut a board or beam which went from the Footes' property to the Heisey's property. According to Shure, he did not enter Shure's property to cut the connecting board.

However, Shure conceded that after demolishing the deck, he did enter Heisey's property on one occasion. According to Shure, when he cut the board which connected the two homes, a stairway that went from what had been Heisey's deck needed support; Shure testified that he entered Heisey's property and placed a board on the stairway to support it.

Heisey filed a complaint against the Footes and against Shure. She alleged claims for trespass, fraud, intentional infliction of emotional distress, negligence, and interference with an easement. In addition, as against the Footes, she alleged an action to quiet title over a prescriptive easement for the portion of the demolished deck that had encroached in the airspace above the Foote's property.

At trial, both the Footes and Shure prevailed. In particular, with respect to Shure, the jury determined Shure did not enter Heisey's property without her permission. The trial court denied Heisey's motions for a new trial and judgment notwithstanding the verdict and entered a judgment in favor of the Footes and Shure.

Heisey filed a timely notice of appeal. After Heisey filed her opening brief in this court, she and the Footes reached a settlement and she dismissed her appeal as to the judgment entered in their favor.

## DISCUSSION

The jury made a specific finding that Shure "intentionally or negligently" entered Melanie Heisey's property or "intentionally or negligently" caused another to enter the Heisey property. However, it further found Shure entered the property with Melanie Heisey's permission. It is unclear from the specific findings whether the permission the jury found pertained to both entries onto the property or only the first. There is no dispute in the record or on appeal that after Shure demolished the deck, Heisey revoked any permission she gave Shure. In any event, in light of Shure's concession about the second entry, Heisey contends the jury's determination that Shure entered her property with her permission was erroneous as a matter of law.

Even if error occurred, the difficulty with accepting Heisey's argument is that the record shows that in entering Heisey's property a second time to shore up the stairway, Shure did not cause any further damage to Heisey's property. Indeed, in providing support for the stairway, it can be argued that Shure actually improved the property and protected Heisey and others from the risk of injury. Thus, at most, Heisey was entitled to an award of nominal damages at trial. (See *Allen v. McMillion* (1978) 82 Cal.App.3d 211, 219-220.)

In general, a judgment will not be reversed for the trial court's failure to award nominal damages. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406.) Reversal is required only where, in addition to nominal damages, a plaintiff is entitled, as a matter of right, to an award of costs. (*Ibid.*) "Where there is no absolute entitlement to costs, the failure to award nominal damages is not reversible error." (*Ibid.*)

Before the unification of the superior and municipal courts, an award of costs in a superior court action was discretionary when the amount awarded to the plaintiff was less than the jurisdictional limit of the municipal court. (See *Staples v. Hoefke, supra*, 189 Cal.App.3d at p. 1406.) Following court unification, this principal was preserved in Code of Civil Procedure section 1033, subdivision (b), which makes an award of costs discretionary in unlimited civil cases when the amount awarded is less than what may be recovered in a limited civil case. (See *Carter v. Cohen* (2010) 188 Cal.App.4th 1038, 1053.)

Heisey filed this action as an unlimited civil case. Accordingly, any award to her of costs for the nominal damages she may have recovered for Shure's second entry onto her property would have been discretionary. Thus, the trial court's failure to award nominal damages is not reversible. (*Staples v. Hoefke, supra*, 189 Cal.App.3d at p. 1406.) Rather, we must apply the general rule that the failure to award nominal damages is not reversible.

#### DISPOSITION

The judgment is affirmed. Shure to recover his costs of appeal.

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BENKE, Acting P. J.

WE CONCUR:

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McINTYRE, J.

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IRION, J.