[Cite as *Ritchie v. Ohio Dept. of Transp.*, 2003-Ohio-3000.]

IN THE COURT OF CLAIMS OF OHIO

RONALD R. RITCHIE, et al.	:	
Plaintiffs	:	CASE NO. 2001-05961
v.	:	DECISION
DEPARTMENT OF TRANSPORTATION, et al.	:	Judge Everett Burton
Defendants	:	

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{¶1} This case came on for trial before Judge Leach in May 2002. In the intervening period between trial and the filing of any decision, Judge Leach died. Accordingly, this case was reassigned to another judge, whereupon the parties agreed that the case would be submitted to the court on the trial transcript and post-trial briefs. The matter is now before the court for determination on the merits.

{¶2} Plaintiffs filed this action against defendant, Ohio Department of Transportation (ODOT),[1] alleging that defendant's employee trespassed upon plaintiffs' property that abuts State Route 788 (SR 788) and thereafter damaged eight Colorado Blue Spruce trees by cutting the lower limbs, without privilege to do so. The limbs were cut by a side-mounted mower on a tractor, sometimes referred to as a "bush-hog" mower. Plaintiffs contend that the limbs will not regenerate and that the damage is

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[1] Although the Office of Risk Management was named as a defendant in the complaint, ODOT shall be referred to as the single defendant in this decision.

permanent. Plaintiffs seek damages for three times the replacement cost of eight mature trees under the treble damages provisions of R.C. 901.51.

{¶3} Defendant admits its employee trimmed vegetation and the tree branches along plaintiffs' property on June 18, 1999, however; defendant asserts that there was no trespass because the trees were planted within ODOT's easement for SR 788, which extends from the centerline of the roadway out to the abutting landowners' property for 30 feet in both directions. Defendant also argues that the branches were overhanging a ditch in the right-of-way adjacent to the roadway and limited the ability of motorists to see vehicles exiting plaintiffs' driveway. Thus, ODOT insists that it had a privilege to trim vegetation in the right-of-way pursuant to R.C. 5501.42 in order to maintain safety for the traveling public. Defendant also asserts that plaintiffs are not entitled to damages under Ohio law unless there was a complete removal of the trees. Defendant argues in the alternative that the measure of damages is limited to the difference in fair market value of the property before and after the injury, not the replacement cost of the trees.

{¶4} Plaintiffs claim that they were unaware that defendant possessed an easement. "An easement has been defined as an interest in the land of another which entitles the owner of the easement to a limited use of the land in which the interest exists." *Lakewood Homes, Inc. v. BP Oil, Inc.*, Hancock App. No. 5-98-29, 1999-Ohio-851. At trial and in the post-trial briefs, defendant acknowledged that it was unable to present documentary evidence verifying the easement. Defendant explained that before a county road could be accepted into the state system of roadways in the 1930s, the local county commissioners were required to obtain signed documents from every landowner whose property abutted the roadway, expressly granting the state an easement extending 30 feet

from the centerline in both directions. Evidence was presented at trial to show SR 788 was a local county road known as Jackson-Athens Road before it was taken over by the state and renamed SR 788. Defendant acknowledged that some records may have been destroyed by fires at the county courthouse. Evidence was presented to show express easements of 25 feet were granted for some properties located near plaintiffs along SR 788, but defendant insisted that this would be the minimum. Defendant also reasoned that the mere presence of a road adjacent to the property gave plaintiffs notice of an implied easement. The parties did not dispute that at least some portion of the tree trunks and all of the trimmed branches of the trees in question were located on plaintiffs' property within 25 feet from the centerline of SR 788.

{¶5} Based on a review of the evidence and testimony presented at trial, the court finds more likely than not that defendant was granted an easement before accepting the roadway into the state system and that such easement extended at least 25 feet from the centerline of SR 788 onto plaintiffs' property.

{¶6} A trespass upon real property occurs when a person, without authority or privilege to do so, physically invades or unlawfully enters the private premises of another and damages directly ensue. See *Linley v. DeMoss* (1992), 83 Ohio App.3d 594, 598. In *Blashinsky, et al. v. Topazio, et al.* (April 17, 1987), Lake App. No. 11-113, the Eleventh District Court of Appeals explained that "[t]he essential elements necessary to state a cause of action in trespass are: 1) venue, 2) an intentional act by defendant whereby defendant enters upon land in the possession of another or causes a thing or person so to do, 3) such act being unauthorized, the defendant having no express or implied permission to enter the property of the possessor, nor any easement, license,

right-of-way or other grant of ownership permitting the entrance in question."

{¶7} In the instant case, the court finds that even if an express easement did not exist, plaintiffs granted implied permission for defendant to enter the property inasmuch as plaintiffs permitted defendant to conduct regular mowing operations in the area located within the right-of-way.[2] Plaintiff, Sherry Ritchie, testified that it was not unusual for defendant to conduct mowing operations in the ditch area, which they in fact had done numerous times. Indeed, plaintiff testified she was quite accustomed to the sound of defendant's mowers operating on that portion of her property. For the foregoing reasons, the court concludes that defendant did not trespass upon plaintiffs' property during its mowing operations performed June 18, 1999.

{¶8} In their second cause of action, plaintiffs contend they are entitled to treble damages pursuant to R.C. 901.51[3] since defendant recklessly removed the tree branches when there was no need to do so. Plaintiffs testified that they were unaware of any problems motorists might experience in relation to traffic entering SR 788 from their driveway. Plaintiffs stated they were not aware of any complaints from neighbors or others that would justify the complete removal of the branches.

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[2] R.C.4511.01(UU)(2) defines "Right-of-way" as follows:
"A general term denoting land, property, or the interest therein, usually in the configuration of a strip, acquired for or devoted to transportation purposes. When used in this context, right-of-way includes the roadway, shoulders or berm, ditch, and slopes extending to the right-of-way limits under the control of the state or local authority."

[3] R.C.901.51 states as follows:
"No person, without privilege to do so, shall recklessly cut down, destroy, girdle, or otherwise injure a vine, bush, shrub, sapling, tree, or crop standing or growing on the land of another or upon public land.
"In addition to the penalty provided in section 901.99 of the Revised Code, whoever violates this section is liable in treble damages for the injury caused."

{¶9} Pursuant to R.C. 5501.11(A), ODOT is responsible to establish state highways on existing roads, streets, and new locations and to construct, reconstruct, widen, resurface, maintain, and repair the state system of highways and the bridges and culverts thereon. In carrying out its duty, the director of ODOT must assess the condition of the trees and shrubs on or near a state highway as set forth in R.C. 5501.42.[4] The director of ODOT is only empowered to cut, trim, or remove trees that are growing within the limits of the state highways when necessary to keep the highways safe for the traveling public. "Whether or not trees or vegetation should be removed from within a state highway is left to the discretion of the Director of the Ohio Department of Transportation." *Kocur v. Ohio Dept. of Transp.* (1993), 63 Ohio Misc.2d 342, citing *Rawlins v. State* (1980), Court of Claims No. 79-0171.

{¶10} Mike Kinnison, defendant's transportation administrator for Jackson County, testified that the work project in effect during 1999 included the cutting back of as much vegetation as possible along the edges of the roadway. Although plaintiff, Sherry Ritchie, testified that the trees are on a hill "up and away from traffic" and the court notes that the trees appear to be elevated well above the ditch and the driveway as depicted in the photographs labeled Defendants' Exhibits N and O, the court is unable to ascertain whether or not the branches had caused any obstruction to the sight distance of the motoring public in June 1999. In the instant case, although plaintiffs disputed the need to trim the branches, the court was not presented with any

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[4] R.C. 5501.42 states, in relevant part, that, "[t]he director may cut, trim, or remove any grass, shrubs, trees, or weeds growing or being within the limits of a state highway. The powers conferred by this section upon the director shall be exercised only when made necessary *** for the safety of the traveling public."

photographs of what the scene looked like before the cutting, and the court is unable to estimate the length or density of the evergreen branches that were removed. Moreover, none of the testimony or evidence presented suggested that defendant was reckless in performing its mowing operations. Therefore, based upon the discretionary authority granted defendant in its decision to remove the branches and, in the absence of sufficient proof to show that the trimming was not necessary, the court finds that plaintiffs are not entitled to treble damages pursuant to R.C. 901.51. See *Lamborn v. Wray* (Mar. 29, 1996), Clark App. No. 95-CA-0028.

{¶11} The question remains in this case whether the trimming of trees growing within the limits of the highway in front of the property of the landowner, where such trimming is necessary for the safety of the motoring public, constitutes a taking of property without compensation, contrary to Section 19, Article I, of the Ohio Constitution. Based upon a review of the relevant case law, the court concludes that while defendant had the authority to trim the branches, plaintiffs are nonetheless entitled to compensation for the loss of the branches and the subsequent diminution in the aesthetic value of their property. In *Rummell v. Ohio Dept. of Transportation* (1981), 3 Ohio App.3d 38, the Tenth District Court of Appeals stated that "[i]f removing is to be construed as a taking, the mere fact that the director has the power by statute to remove such trees does not give the director the right to do so without compensating the private property owner." Defendant argued that cases such as *Rummell* are distinguishable from this case because in those cases damages were premised upon the complete removal of trees. Plaintiffs suggest and the court agrees that the holding in *Rummell* should be extended to include the situation presented in the instant matter where a complete denuding of the

lower branches on one side of eight mature spruce trees has occurred.

{¶12} Plaintiffs testified that the trees were aesthetically beautiful and that the presence of the trees was a significant factor in plaintiffs' decision to purchase the property. Plaintiffs explained that the trees provided them some measure of privacy and also served to buffer winds and traffic noise. Plaintiffs described for the court their shock and dismay that the beauty and symmetry of the trees had been permanently destroyed by the crude manner used by defendant to sever all the lower limbs on the side of the trees facing SR 788. Plaintiffs submitted exhibits 3 and 4 that are photographs which depict both the damage to the trees caused by defendant's bush-hog mower, and the opposite side of those same trees with intact branches.

{¶13} Plaintiffs presented the testimony of a tree farmer, Tom Dishong, who established that restoration of the property would cost $28,000. Mr. Dishong testified that the damaged trees actually constituted a deficit to the property. The cost statement he prepared included removal of the eight damaged trees and replacement with eight mature Colorado Spruce trees. Defendant argued that the damages should be limited to the diminution, if any, in the fair market value of the property and, inasmuch as evidence was presented to show the property has appreciated in value since plaintiffs purchased it in 1995, defendant reasoned that plaintiffs have not incurred any loss.

{¶14} Though generally recoverable, restoration damages in Ohio have been limited to the reasonable cost to restore the property unless such cost exceeds the difference in fair market value of the real property before and after the injury occurred. See *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238. There are, however, exceptions to the general rule. See *Thatcher v. Lane*

Const. Co. (1970), 21 Ohio App.2d 41; *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136. In both of these cases the courts recognized that when ornamental or shade trees were used by the owners as sight or sound barriers, or for some purpose specific to the property, the damaged trees had a calculable value separate from the land.

{¶15} For the foregoing reasons, the court concludes that defendant is liable to plaintiffs for the taking of the branches and the diminished aesthetic value as a result of that taking. Therefore, judgment shall be rendered against defendant in the amount of $28,025, which includes reimbursement of the filing fee paid by plaintiffs in instituting this action.

{¶16} The issues of liability and damages were submitted to the court for determination based on the trial transcript and post-trial briefs. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is hereby rendered in favor of plaintiffs in the amount of $28,025 which includes the filing fee paid by plaintiffs. Court costs are assessed against defendants. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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EVERETT BURTON
Judge

Entry cc:

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