[Cite as *Tinney v. Tite*, 2012-Ohio-2347.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

Michael Tinney, et al.	Court of Appeals No. H-11-006
Appellants	Trial Court No. CVH 2009 0663
v.	
Robert M. Tite	**DECISION AND JUDGMENT**
Appellee	Decided: May 25, 2012

* * * * *

Curtis J. Koch, for appellants.

Reese M. Wineman, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellants Michael and Melissa Tinney appeal from a judgment of the Huron County Court of Common Pleas, where, after a bench trial, the trial court entered judgment in their favor in the amount of $3,410.00. Because we conclude that appellants

were not fully compensated for the trespass and damage to their property, we reverse, in part, and affirm, in part.

{¶ 2} On June 28, 2009, appellants heard a loud noise outside of their house. They looked out the window and saw appellee, Robert Tite, sitting in a bulldozer lodged against a sizeable black walnut tree in appellants' yard. In addition to cutting deep ruts into the yard, the bulldozer ran over two other smaller trees prior to hitting the black walnut. While appellants called the police, appellee drove his bulldozer back across the road and onto his own property.

{¶ 3} When the police interviewed appellee, they concluded appellee had been consuming alcohol prior to operating the bulldozer. He smelled of an alcoholic beverage, exhibited slurred speech, behaved aggressively, and staggered throughout the interview. Appellee refused to take either a field sobriety test or a breathalyzer test. He was subsequently arrested and taken into custody.

{¶ 4} Appellants filed a civil suit on July 13, 2009, for trespass and the reckless destruction of vegetation growing on their property pursuant to R.C. 901.51. The matter was tried to the bench on March 22, 2011. During the trial, appellants called two witnesses to discuss the extent of the damage to the large tree and the costs of cutting it down and replacing it.

{¶ 5} The first, a certified arborist, said that the damage caused by appellee encompassed approximately 25 to 30 percent of the circumference of the tree. He testified the extent of the damage "ruined" the tree because, although it would not kill the

tree immediately, it would result in "a slow decaying process" that would eventually compromise the structural integrity of the tree and cause it to become a hazard. The arborist was unsurprised that the tree was still producing leaves one year after the incident and that the wound to the tree was starting to develop a callus as the healing process proceeded; however, he stressed that with a wound of that nature and that size, the tree will "certainly" become weakened over time because the wound will not heal completely before decay sets in. He concluded by stating that the tree might not die from the wound, but he reiterated that the structural integrity of the tree is likely to become a dangerous factor in the future.

{¶ 6} The second witness, who had a degree in landscape horticulture, testified similarly to the arborist. Specifically, he said, "[T]he severity of the damage would probably stress the tree out and eventually, it would succumb to the injury." He testified that as the years progressed, appellants could expect to get decay in the tree and more and more branches showing signs of decline. Further, just as the arborist testified, he stressed that the tree declining and potentially dying was "not [an] immediate thing. It's going to take some time" because "[i]t's a long process for this tree to decline."

{¶ 7} Appellee's sister, Rita Lockhart, testified about the appearance of the large black walnut that had been damaged and brought in pictures taken in May 2010. Her testimony as a lay witness was that the tree looked "healthy, green, [and] alive" 11 months after the incident, despite the wound on the trunk.

{¶ 8} On March 31, 2011, the trial court entered judgment against the appellee. The court awarded $410.00 for the two small trees destroyed and $685.00 for miscellaneous necessary lawn work, and it trebled these damages pursuant to R.C. 901.51. It also awarded $125 for two repair estimates, resulting in a total judgment of $3,410.00. No damages were awarded for the injury to the large black walnut as the trial court found that awarding damages for the injury to that particular tree would be "speculative at best" since "its appearance remains the same."

{¶ 9} Appellants now appeal and ask this court to consider the following four assignments of error:

> 1. The Court's holding that the damage to the Black Walnut tree was speculative was against the manifest weight of the evidence.
>
> 2. The court applied the wrong standard when determining compensation for the damage to the Black Walnut tree.
>
> 3. The Trial Court erred when it failed to award attorney fees as compensation to the plaintiffs.
>
> 4. The court allowed a lay witness to testify as to her opinion as to the condition of the trees [sic].

{¶ 10} Appellants' first, second, and fourth assignments of error deal with the damages to the large black walnut tree, so we will address those together. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the

evidence." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), paragraph one of the syllabus. When reviewing a civil manifest weight claim, the appellate court has the obligation to presume the findings of the trier of fact are correct because the trial judge had the opportunity to assess the witnesses' demeanor and credibility. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. Therefore, "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 81, 461 N.E.2d 1273 (1984). *See also Payne v. Kerr*, 4th Dist. No. 1233, 1986 WL 11028 (Sept. 15, 1986). ("Where there is a conflict in the evidence we cannot substitute our view for that of the trier, except where the decision is completely wrong.") (Citation omitted.)

{¶ 11} The case law implicating R.C. 901.51 almost exclusively involves situations where trees have been completely cut down, making it considerably easier to determine the full extent of the damage to the plaintiffs' property. *See, e.g., Wooten v. Knisley*, 79 Ohio St.3d 282, 680 N.E.2d 1245 (1997); *Denoyer v. Lamb*, 22 Ohio App.3d 136, 490 N.E.2d 615 (1st Dist.1984). This case is somewhat different because the tree is still alive, even if not necessarily guaranteed to stay that way for decades to come. However, even temporary damages to vegetation are recoverable. *Squires v. Luckey Farmers, Inc.*, 6th Dist. No. OT-03-046, 2004-Ohio-4919 (holding that plaintiffs were

entitled to damages for both temporarily and permanently damaged vegetation). This is because "[a] fundamental rule of the law of damages is that the injured party shall be fully compensated." *Vanderbeck v. CSX RR.*, 6th Dist. No. H-90-45, 1992 WL 21234 (Feb. 7, 1992), citing *Brady v. Stafford*, 115 Ohio St. 67, 79, 152 N.E. 188 (1926).

{¶ 12} Accordingly, even when permanent damages are awarded for trees being cut down, temporary damages may still be awarded if the permanent damages alone do not fully compensate the plaintiff. *Id.* In *Vanderbeck*, several train cars carrying hydrochloric acid derailed and spilled into a nearby creek that ran through the plaintiffs' property. Without asking the plaintiffs' permission, the defendants entered the property to clean up the acid, cutting down 51 trees in the process. A jury awarded damages that included reasonable restoration costs to fix the permanent damage as well as an amount for the acid's temporary trespass onto the plaintiffs' property. This court affirmed that award, concluding that if the plaintiffs were compensated solely for the permanent damages to the trees, they would not be fully compensated because the permanent damages did not account for the temporary trespass of the acid in the creek.

{¶ 13} Here, the trial court awarded permanent damages for the two small trees cut down. However, it did not award any damages for the injury done to the large tree because it felt the damages to the large black walnut were potentially temporary and "speculative at best" since "the tree appears to be thriving" nearly a year later.

{¶ 14} Although the evidence and witnesses' testimony weighs heavily in favor of appellants, the standard of review does not permit us to disagree with the trial court's

findings regarding credibility of the witnesses. We are therefore forced to disregard that issue. However, determining whether the trial court applied an inappropriate legal standard for finding speculative damages *is* within the allowable scope of review. *See Seasons Coal Co.*, 10 Ohio St.3d at 81, 461 N.E.2d 1273. Accordingly, we turn to determining whether awarding damages for the injury to the large black walnut would have been too speculative.

{¶ 15} As a general rule, speculative damages are not recoverable. *E. Liverpool v. Buckeye Water Dist.*, 7th Dist. No. 08 CO 19, 2010-Ohio-3170, ¶ 72, citing *Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65, 68, 521 N.E.2d 814 (1988). Therefore, as explained in *Acme Co. v. Saunders & Sons Topsoil*, 7th Dist. No. 10 MA 93, 2011-Ohio-6423, ¶ 57:

> An award of damages must be shown with a reasonable degree of certainty and in some manner other than mere speculation, conjecture, or surmise. Damages are not speculative when they can be "computed to a fair degree of probability." However, if the appellant "establishes a right to damages, that right will not be denied because the damages cannot be calculated with mathematical certainty." (Citations omitted.)
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> *See also Townsend v. Dollar Gen. Corp.*, 6th Dist. No. E-09-067, 2010-Ohio-6523, ¶ 35-37.

{¶ 16} Both of appellants' witnesses testified it was reasonably certain that the tree was permanently damaged because it would not heal before decay set in. Appellants

furnished precise calculations on the reasonable restoration value of the property. Therefore, appellants' damages were not speculative.

{¶ 17} The plaintiffs have shown with a reasonable degree of certainty what would be required to reasonably restore their property. The damages to the tree must have had some value, but the plaintiffs were awarded nothing, even if just a nominal amount for the temporary trespass onto their property, similar to *Vanderbeck*. Accordingly, they have not been fully compensated, and appellants' first and second assignments of error are well-taken.

{¶ 18} With respect to appellants' fourth assignment of error, Rita Lockhart's testimony about the tree looking "green, healthy, [and] alive" was allowable lay testimony. Evid.R. 701 requires lay witness testimony to be "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Ms. Lockhart's testimony satisfies both. Her opinion was rationally based on the pictures she took of the tree 11 months after the incident. Further, it was helpful to determine a fact in issue, specifically, how damaged the tree was by appellee's actions. Therefore, her descriptions and the fact that she was not an expert witness simply go to the weight afforded her testimony, not its admissibility. Accordingly, appellants' fourth assignment of error is not well-taken.

{¶ 19} In their third assignment of error, appellants assert that they should have been awarded attorney fees because attorney fees are akin to punitive damages. Appellants rely on *Digital & Analog Design Corp. v. N. Supply Co.*, 63 Ohio St.3d 657,

590 N.E.2d 737 (1992); however, the relevant language in *Digital* was rejected as dicta in *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 557, 644 N.E.2d 397 (1994). Instead, the Ohio Supreme Court recognizes that "attorney-fee awards and punitive-damages awards are distinct." *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, ¶ 14-16. Punitive damages are intended to punish the tortfeasor for his malevolent acts and deter others from similar conduct. *Shanklin v. Lowman*, 3d Dist. No. 8-10-07, 2011-Ohio-255, ¶ 62; *Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St.3d 470, 473, 575 N.E.2d 416 (1991). In contrast, attorney fees are viewed by the Ohio Supreme Court as part of compensatory damages, not punishment. *Neal-Pettit* at ¶ 14.

{¶ 20} Further, "[w]hen considering an award of attorney fees, Ohio follows the 'American Rule,' under which a prevailing party may not generally recover attorney fees." *Hagans v. Habitat Condominium Owners' Assn.*, 166 Ohio App.3d 508, 2006-Ohio-1970, 851 N.E.2d 544, ¶ 42 (2d Dist.); *Sorin v. Bd. of Edn. of Warrensville Hts. School Dist.*, 46 Ohio St.2d 177, 179, 347 N.E.2d 527 (1976). Attorney fees may only be awarded if (1) a statute creates a duty, (2) an enforceable contract provision provides for an award of attorney fees, or (3) the losing party has acted in bad faith. *Nottingdale Homeowners' Assn., Inc. v. Darby*, 33 Ohio St.3d 32, 33-34, 514 N.E.2d 702 (1987); *Hagans* at ¶ 42. Because none of these three exceptions apply in this situation, an award for attorney fees would be inappropriate.

{¶ 21} Appellants additionally argue in their third assignment of error that the trial court improperly denied them punitive damages, asserting that punitive damages were

appropriate because appellee was reckless, specifically because he was drunk and operating heavy machinery. Despite appellants' contention, the treble damages authorized by R.C. 901.51 are distinct from punitive damages. *See, e.g., Shanklin* at ¶ 2; *Vanderbeck*, 1992 WL 21234. Further, "an award of punitive damages is within the discretion of the finder of fact. The award will not be overturned unless it bears no rational relationship or is grossly disproportionate to the award of compensatory damages." *Gollihue v. Consol. Rail Corp.*, 120 Ohio App.3d 378, 402, 697 N.E.2d 1109 (3d Dist.1997). The amount of damages initially awarded to appellants was not so high that failing to award punitive damages was grossly inappropriate. Accordingly, appellants' third assignment of error is not well-taken.

{¶ 22} With respect to the lack of compensatory damages for the injury to the large black walnut, appellants' first and second assignments of error are well-taken. Accordingly, the decision of the Huron County Court of Common Pleas is reversed and remanded with respect to those issues.

{¶ 23} With respect to Ms. Lockhart's testimony and awarding attorney fees, appellants' third and fourth assignments of error are not well-taken. Accordingly, the decision of the Huron County Court of Common Pleas is affirmed with respect to those issues.

{¶ 24} On consideration whereof, the judgment of the Huron County Court of Common Pleas is affirmed, in part, and reversed, in part. On remand, the trial court shall determine whether the large black walnut is reasonably certain to die or decline in the

future. If it finds this likely to occur, it shall award reasonable restoration costs for the replacement of the tree. If it finds this unlikely to occur, it shall award damages for the temporary damage to the tree, including the damages resulting from appellee's temporary trespass. This matter is remanded to said court for proceedings consistent with this decision. It is ordered that appellee pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J.
CONCUR. _____
JUDGE

Stephen A. Yarbrough, J., dissents.

YARBROUGH, J., dissenting.

{¶ 25} I respectfully dissent, and would affirm the judgment of the Huron County Court of Common Pleas in its entirety. Specifically, I disagree with the majority's conclusion that appellants' damages were not speculative.

{¶ 26} Here, it is beyond doubt that the black walnut tree was injured. However, the critical issue in this case is to what extent. Regarding this issue, the trial court found:

> Neither [of the expert witnesses] were certain that the tree would die. Both testified that the bulldozer caused a significant wound to the tree and that at some point the tree would die. When that might be they were unable to say. All trees will die at some point and no evidence was introduced to establish that this tree would die sooner than others of its kind. No evidence was offered to show how long a black walnut tree might typically be expected to live. The testimony did indicate that some slow decay was probable and a hole could develop in the tree. The Defendant introduced pictures of the tree taken nearly a year after the incident in which the tree appears to be thriving, the leaves are full and the area of the trunk which had been exposed is now covered with a callus growth. When asked whether the tree might heal [one of the expert witnesses] stated, "Time will tell." Thus, the testimony by Plaintiff's own witnesses fail to establish the necessity for removal of the tree at this time. The Court finds that it would be speculative at best to award damages based on the injury to the black walnut. At present the injury has not caused the tree to be of any less value to the Plaintiff as its appearance remains the same.

{¶ 27} A clear reading of this finding reveals that the trial court determined that appellants failed to prove the injury to the tree was permanent, thereby necessitating removal. The majority, although understandably disagreeing with this determination,

nonetheless applies the appropriate standard of review, and disregards the issue of whether the trial court's finding is against the manifest weight of the evidence.

{¶ 28} The majority next turns to the issue of whether the trial court applied the appropriate legal standard regarding speculative damages. It is here that I disagree with their analysis. The majority refers to the evidence presenting "precise calculations on the reasonable restoration value of the property," to support their conclusion that appellants' damages were not speculative. This evidence consisted of an appraisal by one of the expert witnesses calling for the replacement of the existing 18-inch diameter black walnut tree with three 6-inch diameter black walnut trees at a cost of $4,950.

{¶ 29} While I agree that this measure of damages is definite and non-speculative, I believe that it is irrelevant in the present case because it is premised on a finding that the black walnut tree is permanently damaged and needs to be replaced—a finding that the trial court did not make. It is incongruous for the majority to hold, on the one hand, that the trial court's determination that appellants failed to prove the tree was permanently injured was not against the manifest weight of the evidence, but then to hold, on the other hand, that the trial court should have awarded damages because appellants sufficiently proved the cost to replace the tree.

{¶ 30} The tree was injured. Appellants attempted to prove that the extent of the injury was permanent and that the tree must be taken down and replaced. The trial court found that appellants failed to meet their burden in proving this fact. Thus, the reasonable cost to replace the tree is not an appropriate measure of damages for the

injury. Since no other evidence was presented concerning the amount of damages for a temporary injury to the tree, or for the difference in value of the tree pre- and post-injury, any award of damages based on this injury would have been entirely speculative. Therefore, the judgment of the Huron County Court of Common Pleas should be affirmed.