[Cite as *Tinney v. Tite*, 2013-Ohio-3067.]

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

Michael Tinney, et al.	Court of Appeals No. H-12-018
Appellants	Trial Court No. CVH 2009 0663
v.	
Robert M. Tite	**DECISION AND JUDGMENT**
Appellee	Decided: July 12, 2013

* * * * *

Curtis J. Koch, for appellants.

Reese M. Wineman, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellants, Michael and Melissa Tinney, appeal the Huron County Court of Common Pleas July 6, 2012 judgment, following remand from this court, awarding one dollar for damages to their black walnut tree caused by appellee Robert Tite. For the following reasons, we affirm.

{¶ 2} This case stems from appellee's trespass onto his neighbors' yard while intoxicated and riding a bulldozer. Appellee ran over two crab-apple trees, cut ruts onto the property, and gouged a black walnut tree. On July 13, 2009, appellants commenced an action for damages against appellee. The matter proceeded to a bench trial and on March 31, 2011, the court awarded appellants $3,410 in damages.

{¶ 3} On appeal, this court found that the trial court failed to apply the proper legal standard for speculative or temporary damages regarding the damage to the black walnut tree. *See Tinney v. Tite*, 6th Dist. Huron No. H-11-006, 2012-Ohio-2347 ("*Tinney I*"). We remanded the matter for the court to consider whether the black walnut tree was "reasonably certain to die or decline in the future" and award reasonable restoration costs. If not, the court was instructed to award damages based on the "temporary damage to the tree" and damages resulting from appellee's trespass. *Id.* at ¶ 24.

{¶ 4} On remand, the court reviewed the testimony presented at the trial relative to the condition of the tree. Expert witness Dean Gierowski, from Liemeister Tree and Crane Service, testified that the gash in the tree would not necessarily kill the tree but that "the structural part of the tree [was] really ruined." He stated that the gash would shorten the life of the tree. After examining the tree in March 2010, Gierowski gave an $1800 estimate for its removal.

{¶ 5} During cross-examination, Gierowski was shown a photo of the tree approximately one year later. He acknowledged that the tree exhibited callous growth

around the wound and was healing. Gierowski admitted that the tree may not die from the wound but would weaken over time and become a safety hazard. Gierowski estimated that the weakening could take ten years.

{¶ 6} Next, Robert Barnes, from Barnes Nursery, testified that in July 2009, he observed the damaged tree and believed that the severity of the damage "would probably stress the tree out and eventually, it would succumb to the injury." Barnes reviewed the 2011 photos and stated that the tree would decline a percentage each year over several years. Barnes submitted an estimate to replace the large tree with three smaller trees at a cost of $4,950 plus tax.

{¶ 7} There was lay testimony from Rita Lockhart, appellee's sister. Lockhart stated that in the year following the incident she had regularly observed the tree and that it looked "healthy, green, alive." Lockhart also testified regarding photos she took on May 24, 2010. The parties also testified regarding their observations of the tree.

{¶ 8} In the trial court's July 6, 2012 judgment entry, it determined that Gierowski's testimony did not provide that the tree would die; rather, that time would tell as to the decay that would set in. As to Barnes, the court noted that he indicated that the decline of the tree would be a long process but he could give no indication of the time frame. Despite testimony to the contrary, the court specifically found that the experts appeared surprised at the recent photos of the tree. The court then concluded that the tree

was not likely to die as a result of the injury caused by the bulldozer. The court then proceeded to award a nominal sum based on its finding that no evidence was presented regarding temporary damage to the tree.

{¶ 9} This appeal followed with appellants raising two assignments of error for our review:

> Assignment of Error One: The decision of the Common Pleas Court of Huron County, Ohio, on remand that the black walnut tree is not likely to decline or die as a result of the injuries caused by the defendant's bulldozer is against the manifest weight of the evidence and this Court must weigh the evidence in the record and render judgment in the appellant's favor pursuant to App.R. 12(C).
>
> Assignment of Error Two: The plaintiff/appellants herein have proven by a preponderance of the evidence the black walnut tree was permanently damaged by the actions of the defendant and the trial court's ruling to the contrary has [sic] not supported by sufficient evidence.

{¶ 10} In appellants' first assignment of error, they argue that the trial court's decision awarding one dollar for damages to the black walnut tree based on its belief that the tree was not likely to die was against the weight of the evidence. As set forth in *Tinney I*:

> 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.) *Tinney* at ¶ 10.

{¶ 11} In its July 6, 2012 judgment entry, the court specifically found that the experts appeared surprised at the condition of the tree approximately one year after the incident. Both stated that the tree's health would decline over years or a decade. Neither Gierowski nor Barnes stated that the tree would die within a definite time period. The court then concluded that the experts, and their demeanor, did not convince the court that the tree would die or significantly decline as a result of the impact with the bulldozer.

{¶ 12} Again, as set forth above, the court was able to observe the witnesses and assess their credibility. Reviewing the expert opinions, we cannot say that the court was

"completely wrong" in determining that appellants failed to establish that the damage to the black walnut tree would cause its death or decline. Appellants' first assignment of error is not well-taken.

{¶ 13} In their second assignment of error, appellants argue that they supported their claim by a preponderance of the evidence that the black walnut tree would likely die or decline due to appellee's action. A sufficiency of the evidence review is much narrower than reviewing a verdict under a manifest weight claim. Such review is limited to whether the verdict is supported by the evidence; it is a test of adequacy. Further, a reviewing court must affirm a trial court's judgment where the evidence is legally sufficient to support the decision as a matter of law. *See Eastley v. Volkman,* 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517.

{¶ 14} As set forth above, the trial court determined that the quality of the evidence presented did not convince it that the tree suffered permanent damage. Further, awarding appellants a nominal sum, the court explained that only replacement costs were testified to, not costs related to temporary damages. We find that the court's judgment was supported by sufficient evidence. Appellants' second assignment of error is not well-taken.

{¶ 15} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Huron County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.