[Cite as *Selbee v. Van Buskirk*, 2018-Ohio-1262.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

ANTHONY R. SELBEE, ET AL.,	:	Case Nos. 16CA3777 16CA3780
Plaintiffs-Appellees,	:	
v.	:	DECISION AND JUDGMENT ENTRY
MARVIN L. VAN BUSKIRK, JR., ET AL.,	:	NUNC PRO TUNC TO 2/20/18
		RELEASED: 02/23/2018
Defendants-Appellants.	:	

APPEARANCES:

Stanley C. Bender, Law Offices of Stanley C. Bender, Portsmouth, Ohio, for appellants Marvin L. Van Buskirk Jr. and Eleanor Van Buskirk.

Joseph D. Kirby, Cole, Kirby & Associates, L.L.C., Jackson, Ohio, for appellant Robert Thornsberry Jr.

George L. Davis, IV, George L. Davis III Co., L.L.C., Portsmouth, Ohio, for appellees.

Harsha, J.

{¶1} Robert Thornsberry, Jr., agreed to harvest timber from the Van Buskirk property, but he mistakenly cut trees from the property of adjoining landowners the Selbees. Subsequently, the Selbees sued the Van Buskirks and Thornsberry for recklessly trespassing on their property and harvesting their trees. A jury returned verdicts in favor of the Selbees for $128,190 in compensatory damages. Based on the jury's finding that the defendants acted recklessly, the trial court awarded statutory damages in the amount of $384,570, after trebling the amount of compensatory damages.

{¶2} In their first assignments of error the Van Buskirks and Thornsberry assert that the jury award of $128,190 in compensatory damages is contrary to law and against

the manifest weight of the evidence. Thornsberry argues that there was no evidence of diminution in value of the Selbees' property resulting from the trespass and cutting of their trees. We reject this argument because in an action based on temporary injury to noncommercial real estate, a plaintiff need not prove diminution in the market value of the property in order to recover the reasonable costs of restoration.

{¶3} The Van Buskirks contend that the restoration measure of damages is inapplicable because the Selbees admitted that they had previously agreed to sell some trees, i.e., their property was commercial rather than noncommercial. However, the Van Buskirks forfeited this assertion by failing to raise it below; nor do they argue plain error. We also reject their assertion that the remote de minimis removal of four trees for sale changed the character of the Selbees' property to commercial in nature. And in any event, the distinction between commercial and noncommercial no longer is dispositive.

{¶4} The Van Buskirks and Thornsberry both assert that the Selbees could not recover the reasonable costs of restoration for the trees because restoration was impractical or impossible. However, there was competent, credible evidence that the Selbees' property could be restored close to its preexisting condition within a reasonable period of time. The Selbees testified that although it was not possible to replace the cut trees with the exact same trees, the replacement value that their experts testified to represented their true cost to replace the cut trees.

{¶5} Finally, the Van Buskirks and Thornsberry claim that the Selbees were not entitled to the restoration-cost method of damages because it was grossly disproportionate to the property's value. The appellants forfeited any potential error by not timely objecting to the Selbees' expert appraisal. And the parcel upon which the

defendants trespassed adjoined another parcel containing the Selbees' home. The evidence established that the Selbees used these parcels as one continuous piece of land. Therefore, the $128,190 in compensatory damages as restoration costs was not grossly disproportionate to the $82,580 value of the two contiguous parcels.

{¶6} We overrule the defendants' first assignments of error.

{¶7} In their second assignments of error the Van Buskirks and Thornsberry contend that the trial court erred in admitting the testimony of the Selbees' expert witnesses on the issue of damages. They contend the trial court erred in finding the witnesses were experts and that their testimony met the threshold test of scientific reliability.

{¶8} We reject the defendants' contention because the defendants forfeited all but plain error by failing to object to the qualifications and testimony of the experts during the trial. However, the defendants do not argue plain error on appeal. Likewise, they cannot establish plain error because the defendants did not object to the admission of the experts' appraisal report, which contained the evidence that the arborists were properly qualified as experts. We overrule the defendants' second assignments of error.

{¶9} In their third assignments of error the Van Buskirks and Thornsberry contend that the jury's finding that they acted recklessly was against the manifest weight of the evidence. Thornsberry, a third-generation, certified master logger who had never been previously sued for cutting timber from the wrong property, testified that the Van Buskirks' and the Selbees' properties were indistinguishable, which made it more difficult to locate the boundary. Nevertheless, he located a corner stone, with a post, where two fences came together, which provided the usual sign that this was the property line.

Although Thornsberry did not contact the Selbees and did not obtain a survey or tax map, he believed he had located the marker for the boundary and flagged it with orange markers. However, he was ultimately mistaken. At best, the evidence establishes negligence on the defendants' part, not a "perverse disregard" of a "known risk." We sustain their third assignment of error and reverse the judgment insofar as it includes a treble-damage award based on the jury's finding of recklessness. We affirm the award of compensatory damages.

I. FACTS

{¶10} Anthony and Cheryl Selbee filed a complaint for damages against Marvin and Eleanor Van Buskirk and several unnamed parties for trespassing and cutting timber on the Selbees' property. The Van Buskirks answered and filed a third-party complaint against Robert Thornsberry Jr., alleging that they had entered into a contract with Thornsberry for cutting timber on their property, but that Thornsberry may have harvested timber on the Selbees' property. The Van Buskirks claimed that Thornsberry acted as an independent contractor rather than as their agent and that he had agreed to indemnify them for any boundary line disputes or property damages he caused. Thornsberry answered the Van Buskirks' third-party complaint by claiming that he was not required to indemnify them.

{¶11} Subsequently, the Selbees filed an amended complaint naming only the Van Buskirks and Thornsberry for their trespass and unlawful harvest of trees. The defendants answered, and the case proceeded to a jury trial, where the Van Buskirks

dismissed their third-party complaint against Thornsberry; the defendants then submitted a joint defense against the Selbees' claims.

{¶12} According to the evidence, for over 35 years Anthony Selbee and his wife, Cheryl, have owned two adjacent tracts of land in Scioto County, one that includes their home, pool, barn, and gazebo on 1.3 acres, and a 9.344 acre tract in back of the home. The 1.3-acre lot was valued at $73,240, and the 9.344-acre lot was valued at $9,340. The Selbees treat the two tracts as one continuous piece of property, i.e., although they are technically located on two adjacent tracts, they use them as a single property.

{¶13} Before the incident the Selbees used the 9.344-acre tract, which was covered with many trees, for primarily noncommercial aesthetic purposes, i.e., the beautification of their property through the different seasons, a sound barrier from a road and train track that were near their property, and recreational pursuits like wildlife watching, tree climbing, sled riding, camping, and hunting. Mr. Selbee did sell four trees from the larger tract many years prior to this incident.

{¶14} Marvin Van Buskirk and his wife, Eleanor, have lived on property adjoining the Selbees' property for over 30 years. Mr. Van Buskirk entered into an agreement with Robert Thornsberry, Jr., to cut timber from several parcels of their property in exchange for a part of the proceeds Thornsberry received from selling logs and pulp wood. In accordance with their agreement, Thornsberry began timbering in July or August 2012 into September 2012.

{¶15} Mr. Van Buskirk went to New Mexico to bury his father and was there from early July until mid-September 2012. According to his testimony, as Thornsberry got closer to cutting trees near the Selbees' property, Mr. Van Buskirk instructed Thornsberry

by telephone to talk to Mr. Selbee about the boundary between their properties if he could not find the boundary pins. Mr. Van Buskirk admitted that he did not hire a surveyor or anyone else to confirm the boundary line between the parties' properties.

{¶16} Thornsberry is a certified, third-generation master logger who had never been previously sued for cutting timber from the wrong property. According to Thornsberry, the Van Buskirks' and the Selbees' properties appeared like they were part of the same tract of woods from the ground. For instance, there was no line fence between the two landowners. Likewise, both parcels had been logged before, resulting in the trees on both tracts being similar in their appearance. Therefore it was difficult to determine that they were different properties. He located a corner stone with a post, where two fences came together, which provided him with telltale signs that they represented the property line, but he was ultimately mistaken. Because of his reliance on the stone, post, and fences as markers of the boundary line, Thornsberry did not obtain a survey or tax map for the property before he removed trees because he felt "he had no need for one." And although he asked another adjacent landowner for the location of the boundary between that owner's property and the Van Buskirks' property, he did not ask the Selbees for the location of their boundary line.

{¶17} Thornsberry ended up trespassing on the Selbees' property and cutting down 187 trees from about half of the Selbees' 9.344-acre tract. Thornsberry used the proceeds from his sales of logs and pulp to pay the Van Buskirks $2,570.78.

{¶18} When Mr. Van Buskirk returned from New Mexico in mid-September 2012, he looked at the area that Thornsberry had cut and realized that Thornsberry trespassed on the Selbees' property. Both Van Buskirk and Thornsberry immediately agreed they

should notify the Selbees. Thornsberry met Mrs. Selbee at the school where she worked to advise her of the situation. Thornsberry admitted that he had mistakenly cut down trees from their property, and initially told her that he felt the trees he cut were worth $200, but offered her $500 to pay for the damages. Mrs. Selbee relayed the message to her husband who became upset and refused the offer after he looked at their property. Apparently the Selbees were unaware of the trespass until Thornsberry pointed it out. Thornsberry later realized he had cut more than he initially supposed and agreed the trees were worth somewhere around $6,000 at trial.

{¶19} Mr. Selbee contacted the Ohio Department of Natural Resources, which referred him to a forester named James Chattin to value their damages. Chattin examined the timber Thornsberry cut on the Selbees' property, located 350 stumps, and calculated a market value for the timber cut of $6,089.

{¶20} The Selbees believed that Chattin's valuation was too low, particularly because they did not want the trees to be cut, and instead enjoyed their aesthetic value, which was diminished by the defendants' conduct. They contacted certified, registered consulting arborists William Hanks and Jonathan Butcher, who identified 187 trees that the defendants had removed from the Selbees' property. The arborists used the "trunk formula method," which had been prepared by the Council of Tree and Landscape Appraisers, and approved and adopted by various arborist organizations, to appraise the restoration cost of the trees as $128,190. The defendants affirmatively stated that they did not object to the admission into evidence of Hanks's and Butcher's appraisal report, which included their valuation of restoration costs.

{¶21} The jury awarded the Selbees compensatory damages against the defendants in the amount of $128,190, and found that the defendants acted recklessly. Based on that finding the trial court entered judgment in favor of the Selbees and against the Van Buskirks and Thornsberry jointly and severally in the amount of $384,570, after trebling the $128,190 compensatory-damage figure under R.C. 901.51.

II. ASSIGNMENTS OF ERROR

{¶22} We consolidated the Van Buskirks' and Thornsberry's appeals for purposes of briefing, oral argument, and decision.

{¶23} The Van Buskirks assign the following errors for our review:

I. THE JURY'S AWARD OF COMPENSATORY DAMAGES IS CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF PLAINTIFFS' EXPERT WITNESSES ON THE ISSUE OF DAMAGES.

III. THE JURY'S FINDING THAT DEFENDANTS ACTED RECKLESSLY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶24} Thornsberry assigns the following errors for our review:

I. THE VALUATION OF THE LOSS OF TIMBER AT $128,190.00 IS NOT SUPPORTED BY REQUIRED EVIDENCE AND IS OTHERWISE IMPERMISSIBLE AS IT GROSSLY EXCEEDS THE VALUE OF THE PROPERTY UPON WHICH THE TIMBER WAS LOCATED.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE TESTIMONY OF APPELLEE[']S WITNESSES, WILLIAM HANKS AND JONATHAN BUTCHER, AS EXPERTS AS THEY FAILED TO MEET THE REQUIREMENTS FOR EXPERT WITNESSES AS ESTABLISHED BY OHIO RULES OF EVIDENCE AND CASE LAW.

III. THE TRIER OF FACT ERRED IN FINDING THAT THE APPELLANT ROBERT THORNSBERRY, JR. ACTED RECKLESSLY AND THEREBY AWARDING TREBLE DAMAGES.

III. LAW AND ANALYSIS

A. Compensatory Damages

{¶25} In their first assignments of error the Van Buskirks and Thornsberry assert that the jury award of $128,190 in compensatory damages is contrary to law and against the manifest weight of the evidence.

{¶26} When an appellate court reviews whether a trial court's decision is against the manifest weight of the evidence, the court weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that reversal of the judgment is necessary. *See Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17-20; *Wootten v. Culp*, 2017-Ohio-665, __ N.E.3d __, ¶ 19 (4th Dist.).

{¶27} Moreover, when reviewing the evidence under this standard, we are aware that the weight and credibility of the evidence are to be determined by the trier of fact; we thus defer to the trier of fact on these issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *See State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 132; *Wootten* at ¶ 20. The trier of fact is free is believe all, part, or none of any witness's testimony. *Id*. citing *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23.

{¶28} Ultimately, a reviewing court should find a trial court's decision is against the manifest weight of the evidence only in the exceptional case in which the evidence weighs heavily against the decision. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 330; *Wootten* at ¶ 2.

{¶29} "Normally, when assessing damages for a trespass that includes the cutting of trees, a property owner has three options for recovery: (1) diminution in fair market value of the property; (2) cost of restoring the property to its pre-trespass condition, so long as that value is not grossly disproportionate to the property's value; or (3) the stumpage value of trees that the trespasser has caused to be cut." *See Francis v. Wilson*, 4th Dist. Washington No. 97CA40, 1999 WL 33507, *7 (Jan. 25, 1999). "The damaged property owner is entitled to only one measure of damages and must elect which measure he or she seeks to recover." *Id.*

{¶30} The Selbees elected the restoration measure of damages and supported their selection with the testimony and appraisal of their expert witnesses, certified and registered arborists, Hanks and Butcher. Their experts concluded that the Selbees incurred $128,190 in compensatory damages for unauthorized harvest of their trees.

{¶31} Thornsberry argues that the jury award was against the manifest weight because there was no evidence of diminution in value of the Selbees' property as a result of the trespass and destruction of their trees. Previously, Ohio law required evidence of the diminution in value of property damaged in order to apply the restoration measure of damages. In practice "[i]f the injury is susceptible of repair, the measure of damages is the reasonable cost of restoration * * * unless the cost of restoration exceeds the difference in the market value of the property before and after the injury, in which case

the difference in market value becomes the measure." *Ohio Colleries Co. v. Cocke*, 107 Ohio St. 238, 248-249, 140 N.E. 356 (1923). Thus, evidence of diminution value had been necessary.

{¶32} However, the Supreme Court of Ohio limited this rule in several cases, ultimately holding that "[i]n an action based on temporary injury to noncommercial real estate, a plaintiff need not prove diminution in the market value of the property in order to recover the reasonable costs of restoration, but either party may offer evidence of diminution of the market value of the property as a factor bearing on the reasonableness of the cost of restoration." *Martin v. Design Constr. Servs., Inc.*, 121 Ohio St.3d 66, 2009-Ohio-1, 902 N.E.2d 10, syllabus. Based on this precedent, we reject Thornsberry's first argument.

{¶33} The Van Buskirks contend that the restoration measure of damages in *Martin* is inapplicable because the Selbees admitted that they had previously agreed to harvest some trees for money, i.e., their property was commercial instead of noncommercial. We reject this contention because the Van Buskirks forfeited it by failing to raise it during the proceedings in the trial court. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, quoting *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus ("It is a well-established rule that ' "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court" ' "); *see*

also State v. Rogers, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 21 ("In contrast to waiver, forfeiture is the failure to timely assert a right or object to an error").

{¶34} Nor do the Van Buskirks claim plain error, so we need not address it. *See Faulks v. Flynn*, 4th Dist. Scioto No. 13CA3568, 2014-Ohio- 1610, ¶ 35 (by not addressing the fact that she did not raise the issue in the trial court, appellant failed to present exceptional circumstances to justify finding of plain error).

{¶35} Moreover, "[i]n appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus; *Franchuk v. Franchuk*, 4th Dist. Washington No.16CA3, 2016-Ohio-7563, ¶ 22.

{¶36} Nonetheless the Van Buskirks' claim that the Selbees' property was commercial is based on Mr. Van Buskirk's testimony that about 25 years earlier he had sold four trees from his property. This remote de minimis activity does not transform the Selbees' entire property into commercial property. The uncontroverted evidence was that the Selbees had almost exclusively used their property for noncommercial purposes over the decades, i.e., the beautification of their property, a sound barrier for the road and train track that are near their property, and recreational pursuits like hunting, camping, and viewing wildlife.

{¶37} Moreover, appellate courts that have considered the issue have not limited the Supreme Court's holding in *Martin*, 121 Ohio St.3d 66, 2009-Ohio-1, 902 N.E.2d 10,

to noncommercial cases. *See B & B Contrs. & Developers, Inc. v. Olsavsky Jaminet Architects, Inc.*, 2012-Ohio-5981, 984 N.E.2d 419, ¶ 75, citing *Northpoint Properties v. Charter One Bank*, 8th Dist. Cuyahoga No. 94020, 2011-Ohio-2512, ¶ 31, 37; *Monroe v. Steen*, 9th Dist. Summit No. 24342, 2009-Ohio-5163, ¶ 22-23; and *Case Leasing & Rental, Inc. v. Ohio Dept. of Natural Resources*, 10th Dist. Franklin No. 09AP-498, 2009-Ohio-6573, ¶ 28, 41 ("After *Martin*, courts addressing the issue have concluded that there is no reason to distinguish between commercial and non-commercial property for purposes of proving that repair costs are reasonable and have thus refused to require diminution in value evidence as a mandatory element of damages for temporary damage to commercial realty"). We reject the Van Buskirks' first claim.

{¶38} Next the Van Buskirks and Thornsberry assert that the Selbees could not recover the reasonable costs of restoration because restoration was impractical or impossible. The Supreme Court of Ohio has "recognized that where restoration of the property was 'impracticable,' the measure of damages would be the 'difference between the reasonable value immediately before the damage and the reasonable value immediately afterwards.' " *Martin* at ¶ 20, quoting *Northwestern Ohio Natural Gas Co. v. First Congregational of Toledo*, 126 Ohio St. 140, 184 N.E. 512 (1933). The factfinder must consequently "determine whether repairs are 'practicable,' meaning 'reasonably capable of being accomplished.' " *Martin* at ¶ 20, quoting *Black's Law Dictionary* 1210 (8th Ed.2004).

{¶39} In a direct-trespass action the property owner may recover " 'the costs of reasonable restoration of his property to its preexisting condition or to a condition as close as reasonably feasible, without requiring grossly disproportionate expenditures and

with allowance for the natural processes of regeneration within a reasonable period of time.' " *Colegrove v. Fred A. Newman Co.*, 1st Dist. Hamilton No. C-140171, 2015-Ohio-533, ¶ 35, quoting *Denoyer v. Lamb*, 22 Ohio App.3d 136, 139, 490 N.E.2d 615 (1st Dist.1984); *Payne v. Kerr*, 4th Dist. Ross No. 1233, 1986 WL 11028, *2 (Sept. 15, 1986); *Fronsman v. Risaliti*, 5th Dist. Stark No. 200800028, 2008-Ohio-5074, ¶ 32; *Krofta v. Stallard*, 8th Dist. Cuyahoga No. 85369, 2005-Ohio-3720, ¶ 23.

{¶40} The defendants are correct that the Selbees testified that it was not possible to physically replace the harvested trees. But Mrs. Selbee testified that they were asking the jury to award them the replacement value of their destroyed trees and that if they were awarded that amount, they would use the money to clean up the area and then plant and replace the lost trees, allowing them to grow. And Mr. Selbee testified that the replacement value represented the amount of money it would take them to be able to put each one of the lost trees back into the ground with the appropriate adjustment, i.e., "[i]f you were to put the trees back individually that is the price that it would cost." This constituted competent, credible evidence for the jury to conclude that the Selbees' property could be restored to a condition as close to its preexisting condition as reasonably feasible with allowance for the natural processes of regeneration within a reasonable period of time. We reject the defendants' assertion.

{¶41} The Van Buskirks and Thornsberry finally claim that the Selbees were not entitled to the restoration-cost method of damages because the cost of restoring the property to its pre-trespass condition was grossly disproportionate to the property's value. However, by affirmatively stating to the trial court that they did not object to the admission of the Selbees' expert witnesses' appraisal report, which concluded that the appraised

value of the 187 trees was $128,190, the appellants invited any potential error by the jury's use of the Selbees' method of computing damages.

{¶42} " 'Under [the invited-error] doctrine, a party is not entitled to take advantage of an error that he himself invited or induced the court to make.' " *Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 2 (4th Dist.), quoting *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 494, 2002-Ohio-4849, 775 N.E.2d 517, ¶ 27. The Van Buskirks and Thornsberry could have raised their objection to the admission of appraisal, but instead affirmatively represented to the trial court that they had no objection to the jury considering that evidence in its determination of the amount of compensatory damages due to the Selbees from them.

{¶43} The appellants also contend the appropriate value to use for comparison with the damages awarded was limited to the value of the 9+ acre tract that held the trees, i.e. $9,340.00. However, the parcel that the defendants logged was contiguous with the parcel that contained the Selbees home. The evidence established that the Selbees use and enjoy the two adjacent parcels as one continuous piece of property. Mr. Selbee testified that although they are different parcels, he uses the property as one continuous piece of land. That is, they treat the 9.344-acre parcel as part of the adjacent 1.3-acre parcel valued at $73,240.00, on which the Selbees have their home. Both Mr. and Mrs. Selbee testified to the two adjacent tracts as being one unit, which included their house, a swimming pool, a barn, and a field that once included the wooded area.

{¶44} Under these circumstances, the $128,190 in compensatory damages was not grossly disproportionate to the $82,580 combined value of the Selbee's property. *Compare Wray v. Hart*, 4th Dist. Lawrence No. 91CA20, 1992 WL 208900, *13 (Aug. 13,

1992) ("generally, even if the owner's land is divided in such a manner as might otherwise raise an issue of separateness, if he is devoting the parts to a single use, and they lie in such proximity as to be united by that use into a single property, they will be regarded as a whole for the purpose of assessing compensation in an appropriation proceeding"). The mere fact that the compensatory damages awarded for restoration costs was 1.55 times the property's value did not make these costs unreasonable or grossly disproportionate to the property's value. *See Martin*, 121 Ohio St.3d 66, 2009-Ohio-1, 902 N.E.2d 10, at ¶ 21 ("*First Congregational* held that even in cases in which the property has no market value, damages could still be awarded based on the reasonable cost of restoration, with consideration of the property prior to the damage").

{¶45} The Van Buskirks' reliance on *Brewer v. Dick Lavy Farms, L.L.C.*, 2016-Ohio-4577, 67 N.E.3d 196 (2d Dist.), and *Dotson v. Village Reserve Development Co.*, 9th Dist. Lorain No. 98CA007066, 1999 WL 494068, is misplaced. In *Brewer*, the appellate court reversed a trial court's award of restoration costs as objectively unreasonable because the damage largely resulted from removing limbs that encroached upon a boundary line, not the removal of large trees. *Id.* at ¶ 47-49 ("In contrast * * * , Brewer testified that other than a few small saplings, he was not claiming that any large trees had been removed from the property"). And the landowner in *Brewer* testified that he used the property for hunting only about a half-dozen times a year and for family get-togethers only twice a year, and that the removal of branches from some of his trees had not impacted these activities. *Id.* at ¶ 50.

{¶46} Conversely, the defendants trespassed and cut down 187 trees on almost 4.5 acres of the Selbees' land. The Selbees testified that the trees had articulable but

intangible value to them. They used the trees for beautification and as a sound barrier; now they could hear the train and large vehicles after the defendants' removal of their trees. The Selbees can no longer see the trees from their gazebo, and according to Mr. Selbee, the wildlife has generally left their property so that his son had killed only one small deer while hunting after the defendants' trespass. Although the defendants claimed the trees had no unique or special value, the Selbees asserted special circumstances here.

{¶47} In *Dotson*, the appellate court affirmed the trial court's limitation on the measure of damages to diminution in value. In approving the trial court's rejection of the restoration-cost measure of damages, the court noted that method would provide an award between 18 and 25 times the cost for the property before the damage was incurred. There was no evidence in *Dotson* of any special circumstances or of an articulable but intangible value to the owners as the Selbees' claim here. Nor did the owners claim they used the parcel in conjunction with an adjoining parcel and treated it as one unit. And the restoration-cost measure here is only 1.55 times the value of the Selbees' property. Neither *Brewer* nor *Dotson* is controlling or persuasive in this case, which involves significantly disparate facts.

{¶48} Therefore, after weighing the evidence and all reasonable inferences, we find that the jury did not clearly lose its way and create such a manifest miscarriage of justice that we must reverse its judgment. We overrule the defendants' first assignments of error.

B. Expert Testimony

{¶49} In their second assignments of error the Van Buskirks and Thornsberry contend that the trial court erred in admitting the testimony of the Selbees' expert witnesses on the issue of damages. The Selbees presented the testimony of Hanks and Butcher, registered consulting and certified arborists, who testified that they applied the "trunk formula method" to appraise the 187 trees that the defendants cut while trespassing. They concluded that the appraisal value of the Selbees' trees for the restoration costs under this method was $128,190, which was the amount of compensatory damages the jury awarded the Selbees.

{¶50} "Pursuant to Evid.R. 702 a witness may testify as an expert when three criteria are satisfied." *State v. Crocker*, 2015-Ohio-2528, 38 N.E.3d 369, ¶ 52 (4th Dist.). First, the witness's testimony must "either relate[ ] to matters beyond the knowledge or experience possessed by lay persons or dispel[ ] a misconception common among lay persons." Evid.R. 702(A). Second, the witness must be "qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Evid.R. 702(B). Finally, the witness's testimony must be "based on reliable scientific, technical, or other specialized information." Evid.R. 702(C). The Van Buskirks assert that the Selbees' expert testimony was inadmissible because it was not "based on reliable scientific, technical, or other specialized information" under Evid.R. 702(C). Thornsberry reiterates the Evid.R. 702(C) claim, and adds that this testimony was inadmissible because the witnesses were not "qualified as experts by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony" under Evid.R. 702(B).

{¶51} We reject the defendants' contention for several reasons. First, they forfeited all but plain error by failing to timely raise these objections at trial. When the Selbees' experts testified at trial, Thornsberry did not make a timely objection. *See Barker v. McCoy*, 4th Dist. Pike No. 14CA849, 2015-Ohio-3127, ¶ 9 ("A party forfeits any error that arises during the trial court proceedings if that party fails to bring the error to the court's attention at a time when the trial court could avoid or correct the error"). And while the Van Buskirks did object when Hanks and Butcher were asked for their opinion about the valuation of the trees, they did not specify any ground for their objection, i.e., they did not raise their Evid.R. 702(C) objection that they now claim on appeal. *See State v. Lawson*, 4th Dist. Highland No. 14CA5, 2015-Ohio-189, ¶ 14, quoting *State v. Knott*, 4th Dist. Athens No. 03CA30, 2004-Ohio-5745, ¶ 9, and citing Evid.R. 103(A)(1) (" 'Because counsel's objection did not apprise the [trial] court of this specific argument, we believe a plain error analysis of the issue is appropriate' "). Similarly, in *State v. Williams*, 4th Dist. Ross No. 03CA2736, 2004-Ohio-1130, at ¶ 20, we held that an appellant waived his objection to expert testimony for failure to meet the threshold reliability requirements under Evid.R. 702(C) by failing to timely raise that specific objection when the testimony was introduced at trial.

{¶52} The appellants not only waited until after they cross-examined the experts, they waited until the Selbees testified and introduced their exhibits, which included their experts' appraisal report, to which the defendants affirmatively stated they had no objections. Only then did they move to strike the experts' testimony, arguing Hanks and Butcher had "no expertise," were not "licensed by the state," and the formula the experts used was "not peer reviewed."

{¶53} The objections raised in their motion to strike were not timely. Evid.R. 103(A)(1) requires that a party timely object when allegedly inadmissible evidence is introduced at trial; a timely objection permits the adverse party to take corrective action that would eliminate any basis for the complaint. *Hyams v. Cleveland Clinic Found.*, 2012-Ohio-3945, 976 N.E.2d 297, ¶ 17-18 (8th Dist.); Giannelli, *1 Baldwin's Oh. Prac. Evid.*, Section 103.6 (3d Ed.2016). A motion to strike testimony elicited on direct examination is generally untimely when it is made after the objecting party engaged in cross-examination. *Hyams* at ¶ 19-20; *Coe v. Young*, 145 Ohio App.3d 499, at 513, 763 N.E.2d 652 (11th Dist.2001) (Christley, J., concurring) ("in cases where cross-examination has been engaged in prior to an objection to the direct testimony, the rulings have been consistent that the objection has been waived"); *Amie v. General Motors Corp.*, 69 Ohio App.2d 11, 12-14, 429 N.E.2d 1079 (8th Dist.1980). The defendants' motion to strike the testimony was consequently untimely and they forfeited all but plain error on appeal.

{¶54} Second, because the defendants fail to claim plain error on appeal, we need not consider it. *See Faulks*, 2014-Ohio-1610, at ¶ 35.

{¶55} Third, they cannot establish plain error because the Selbees' appraisal report, which they affirmatively stated they had no objection to, contained the same types of evidence as the live testimony. *Id.* at ¶ 22, citing *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, ¶ 10 (even plain error is waived where error is invited).

{¶56} Importantly, if the defendants had timely raised these objections during the experts' testimony, the Selbees would have had the opportunity to remedy any purported

deficiencies in their methods by eliciting further testimony from Hanks and Butcher. By not doing so, the defendants foreclosed that possibility.

{¶57} Because the Van Buskirks and Thornsberry forfeited their claim contesting the Selbees' expert testimony by failing to timely raise specific objections at trial and by affirmatively stating they had no objection to the experts' appraisal report, we overrule their second assignment of error.[1]

C. Reckless Conduct

{¶58} In their third assignments of error the Van Buskirks and Thornsberry contend that the jury's finding that they acted recklessly was against the manifest weight of the evidence. We previously addressed the appropriate standard of review in addressing their first assignments of error. *See* ¶ 26-28.

{¶59} The jury returned a verdict finding that the defendants had acted recklessly. Based on R.C. 901.51 the trial court then trebled the jury's $128,190 compensatory damage award and entered judgment against the defendants jointly and severally in the sum of $384,570.

{¶60} R.C. 901.51 provides that "[n]o person, without privilege to do so, shall recklessly cut down, destroy, * * * or otherwise injure a * * * tree * * * standing or growing on the land of another * * *." Whoever violates R.C. 901.51 "is liable in treble damages for the injury caused." *Id.* A criminal conviction resulting from a violation of R.C. 901.51 is not a prerequisite to an award of treble damages in a civil action against a defendant

[1] By so holding, we do not address the viability of the trunk method of valuation in future cases involving the trespass and cutting of trees. If the defendants had timely raised their objections to the Selbees' expert testimony, we may have reached a different conclusion. For example, this evidence may not have "fit" the case, i.e., it may not have been sufficiently tied to the facts of the case to be relevant.

who has recklessly cut down or destroyed trees standing or growing on the land of another. *Wooten v. Knisley*, 79 Ohio St.3d 282, 680 N.E.2d 1245 (1997), syllabus.

{¶61} The term "recklessly" as used in R.C. 901.51 has the same meaning as it is defined in former R.C. 2901.22(C),[2] which provided:

> A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

{¶62} Under the applicable version of R.C. 2901.22(C), a person does not act recklessly in harvesting timber from the incorrect property if it was done "unknowingly." *Hardesty v. Baxter*, 4th Dist. Ross No. 01CA2637, 2002-Ohio-6159, ¶ 64.

{¶63} Although the record is replete with evidence that Thornsberry and the Van Buskirks were negligent in trespassing on and cutting down timber from the Selbees' similar-looking property, there is no credible evidence that they acted with *perverse disregard* of a *known* risk in doing so. Mr. Van Buskirk instructed Thornsberry to ask neighboring property owners for help locating the boundaries if he could not locate boundary markers. Thornsberry located what, based on his lengthy experience as a certified master logger, represented appropriate markers for the boundary line. And he testified that the property did not clearly show otherwise. There was no evidence that he knew that he was trespassing on the Selbees' property when he timbered it as the condition and nature of the trees was so similar that it appeared to both Thornsberry and

[2] Effective March 2015, R.C. 2901.22(C) was amended to require only a "substantial and unjustifiable" risk rather than a "known" risk for reckless conduct. 2014 Ohio Laws 194.

his partner that they were looking at one woodlot, not two. Likewise, the absence of any type of boundary line fence between the two landowners aided the misperception that they were working on one parcel of land. Finally the fact that Van Buskirk and Thornsberry immediately notified the Selbees of their mistake indicates they had negligently made a mistake, rather than acting in total disregard for the Selbees' rights.

{¶64} Under these circumstances, after weighing the evidence and all reasonable inferences, considering the credibility of the witnesses, we are persuaded that the jury clearly lost its way on the issue of recklessness and created such a manifest miscarriage of justice that the judgment must be reversed. We sustain the defendants' third assignment of error and reverse the judgment of the trial court trebling the award of damages based on the jury's finding that the defendants acted recklessly.

IV. CONCLUSION

{¶65} Having sustained the Van Buskirks' and Thornsberry's third assignments of error, we reverse the judgment awarding the Selbees treble damages in the sum of $384,570 against them. Having overruled their remaining assignments of error, we affirm the award of $128,190 in compensatory damages against them. We remand the cause for the entry of judgment consistent with our decision.

JUDGMENT AFFIRMED IN PART,
AND REVERSED IN PART,
AND CAUSE REMANDED.

Abele, J., concurring:

{¶66} Cases like this make me ashamed to be involved in this process. Fortunately, these types of cases occur infrequently. Unfortunately for Van Buskirk, a person who acted honestly and honorably throughout this ordeal, aberrant results sometimes occur.

{¶67} Here, the expert witnesses, arborists who had never testified in any other trial or legal proceeding, somehow arrived at $130,000 in damages for trees with a fair market value of $6,000 on 9 acres of property that cost $9,500. I recognize that the experts calculated restoration costs and used the "trunk formula," a method that landscape appraisers and arborists use. However, this method is misplaced and ill-suited for measuring damages for this small stand of run-of-the-mill trees on a rural woodlot in Scioto County, or in any other similar setting. This 9 acre woodlot is not a collection of rare, unusual or ornamental trees suitable for an arboretum.

{¶68} The vast majority of cases have outcomes that fall well within an acceptable range. Unfortunately, this case is not an example of such an outcome. It is unfortunate that this court cannot do more to correct this unfortunate result but, as the principal opinion points out, our reach is limited and dependent upon the contents of the record that we receive from a trial court.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART, REVERSED IN PART and that the CAUSE IS REMANDED. Appellants shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs with Concurring Opinion.
McFarland, J.: Concurs in Judgment Only as to A/E I and II; Dissents as to A/E III.
Harsha, J.: Concurs with Judge Abele's Concurring Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.