

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

J.S.F. PROPERTIES, LLC,)
Appellant,)
)
v.) Civ. No. 07A-03-001-JRJ
)
RICHARD S. McCANN AND)
SHARON McCANN,)
Appellees.)

Date Submitted: October 8, 2008
Date Decided: April 30, 2009

Upon Appeal of the Decision of the Court of Common Pleas – **AFFIRMED IN PART, MODIFIED IN PART.**

OPINION

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220 Continental Drive, Suite 215, Newark, DE 19713, attorney for Appellant.

Richard S. McCann and Sharon R. McCann,
19 Carriage Lane, Newark, DE 19711, Appellees, *pro se*.

Jurden, J.

I. INTRODUCTION

Defendant, J.S.F. Properties, LLC, (“Defendant”) appeals from an adverse judgment from a bench trial in the Court of Common Pleas, which awarded triple damages to Plaintiffs Richard and Sharon McCann (“Plaintiffs”) for timber trespass.¹ For the reasons discussed below, this Court **AFFIRMS IN PART, AND MODIFIES IN PART**, the decision of the Court of Common Pleas.

II. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs own three contiguous parcels of land on the south side of Carriage Lane in Covered Bridge Farms, an area located in New Castle County, north of the City of Newark, Delaware.² Plaintiffs live in a house located on one of the three contiguous parcels. The two other parcels owned by Plaintiffs were densely wooded and “maintained as a nature preserve” for their private, non-commercial use and privacy.³ Defendant purchased a vacant lot adjoining Plaintiffs’ southerly or rear property line in June 2004.⁴ After purchasing the property, Defendant admits that it “caused certain vegetation on the McCanns’ property to be destroyed.” The parties disagree on the extent of the destruction.⁵ James S. Fulghum (“Fulghum”), Defendant’s principal owner and operator, testified that he had his property surveyed, but did not place stakes to mark the survey results.

¹ *McCann v. J.S.F. Properties, LLC*, CA No. 05-06-411 (Del. Com. Pl. Feb. 16, 2007) (TRANSCRIPT) (“Tr. Trans.”).

² Plaintiffs-Appellees’ Opening Brief at 5, Docket Item (“D.I.”) 11.

³ *Id.*

⁴ Defendant-Appellant’s Opening Brief (“Def.’s Br.”) at 5, D.I. 9.

⁵ Def.’s Br. at 5.

Fulghum acknowledged that he knew of boundary stakes in the ground near where his property adjoins with Plaintiffs before he authorized the start of any construction or landscaping.⁶ Plaintiffs filed suit in the Court of Common Pleas seeking compensatory and exemplary damages pursuant to the Timber Trespass statute,⁷ for trees Defendant allegedly cut down on Plaintiffs' property without their permission.

The Court of Common Pleas found that trees were in fact removed from Plaintiffs' property and that Defendant is liable for the cost of replacing the trees – a sum of \$6,381.00. Because the trial court found that the trespass was “intentional” under 25 *Del. C.* § 1401(b), Plaintiffs were entitled to triple damages totaling \$19,143.00, plus litigation costs.⁸ Defendant timely appealed this ruling. On appeal, Defendant argues that the Court of Common Pleas incorrectly concluded that the trespass was intentional and miscalculated the measure of damages.

III. STANDARD AND SCOPE OF REVIEW

Statutory authority provides for appellate review by the Superior Court of decisions rendered by the Court of Common Pleas.⁹ Questions of law are

⁶ Tr. Trans. at 61.

⁷ 25 *Del. C.* § 1401.

⁸ Tr. Trans. at 103.

⁹ 11 *Del. C.* § 5301; *see also* DEL. CONST. art. IV, §28. In reviewing appeals from the Court of Common Pleas, this Court sits as an intermediate appellate Court. *Disabatino v. State*, 808 A.2d 1216, 1220 (Del. Super. 2002) (citing *State v. Richards*, 1998 WL 732960, at *1 (Del. Super. May 28, 1998)). Accordingly, its purpose reflects that of the Supreme Court. *Shipkowski v. State*, 1989 WL 89667, at *1 (Del. Super. July 28, 1989).

reviewed *de novo*, while factual findings are reviewed under a “clearly erroneous” standard.¹⁰ In other words, this Court’s role is to “correct errors of law and to review the factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.”¹¹ When a trial judge bases findings of fact on the credibility of witnesses, “the deference already required by the clearly erroneous standard of appellate review is enhanced.”¹²

IV. DISCUSSION

A. Intentional Trespass

The Court is satisfied that the trial court’s findings as to Defendant’s intentional or willful trespass are logically supported by the record. Defendant contends that Plaintiffs failed to establish the willful nature of Defendant’s trespass.¹³

According to the Timber Trespass Statute:

the Court shall have the authority to determine whether such trespass was unintentional or wilful and award damages accordingly. If the plaintiff shall satisfy the Court that the metes and bounds of his property at the place of the trespass were appropriately established and marked by reasonably permanent and visible markers, or establish that the trespasser was on notice that the rights of the plaintiff were in jeopardy, the Court shall find that the trespass was wilful and shall award exemplary damages equal to triple the fair value of the trees removed plus the cost of litigation.¹⁴

¹⁰ See e.g. *State v. Karg*, 2001 WL 660014, at *1 (Del. Super. May 31, 2001).

¹¹ *Disabatino*, 808 A.2d at 1220 (citing *Steelman v. State*, 2000 WL 972663, at *1 (Del. Super. May 30, 2000)).

¹² *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 492 (Del. 2000) (citing *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 575 (1985)).

¹³ Def.’s Br. at 8.

¹⁴ § 1401(b).

This statute distinguishes timber trespass from other types of trespass and, in doing so, adds an additional remedial tool for private landowners.¹⁵ The prospect of exemplary damages acts as an incentive for landowners to mark boundary-lines of their property and a deterrent to potential tree-poachers.

In the present case, Defendant admitted to trespassing on Plaintiffs' property, but denies that it was intentional or willful. Mrs. McCann testified that prior to the alleged trespass, Plaintiffs' property was surveyed and its boundaries were marked with pins and stakes.¹⁶ Fulghum admitted to seeing the boundary markers in the ground on Plaintiffs' property before Defendant's landscapers began their work.¹⁷ Mrs. McCann further testified to having a conversation with Fulghum shortly after he purchased his property, advising him that Plaintiffs' property extended beyond the creek behind their house and that he should be mindful of the property line.¹⁸ Defendant has no recollection of this conversation; however, on issues of credibility, the trial Court's findings are given great weight.¹⁹ The facts in the record firmly support a finding that Defendant knew where the Plaintiffs' property line was, and that Plaintiffs' property was "marked by reasonably permanent and visible markers." Given the testimony, the Court of

¹⁵ See *Vaughn v. Veasey*, 125 A.2d 251 (Del. Super. 1956).

¹⁶ Tr. Trans. at 9.

¹⁷ *Id.* at 61.

¹⁸ *Id.* at 17.

¹⁹ *Cede & Co.*, 758 A.2d at 492.

Common Pleas did not err in finding that Defendant's trespass was intentional or willful.²⁰ Plaintiff is therefore entitled to exemplary damages equal to triple the fair value of the trees removed plus the cost of litigation.²¹

B. Measure of Damages

In Delaware, damages for trespass to land are generally a calculation based on the difference between the value of the land before the trespass occurred and the value of the land after the trespass occurred.²² The Delaware General Assembly, in drafting the Timber Trespass Statute,²³ carved out an exception to the general rule by explicitly calling for damages to be calculated in terms of the "fair value of the trees removed."²⁴ An issue on appeal is whether the Court of Common Pleas was clearly erroneous in finding that the fair value of the trees Defendant allegedly removed from Plaintiffs' property is \$6,381.00.

While Defendant correctly notes that Plaintiffs bear the burden of proving damages, its reliance on *Acierno v. Goldstein*²⁵ is misplaced.²⁶ Plaintiffs established by a preponderance of the evidence through photographs and testimony that Defendant removed trees from their property without Plaintiffs' consent. Unlike *Acierno*, Plaintiffs' measure of damages is not based on "speculation or

²⁰ Tr. Trans. at 103.

²¹ 25 Del. C. § 1401(b).

²² *Farny v. Bestfield Builders, Inc.*, 391 A.2d 212, 213 (Del. Super. 1978).

²³ § 1401.

²⁴ § 1401(b).

²⁵ 2005 WL 3111993 (Del. Ch. Nov. 16, 2005).

²⁶ Def.'s Br. at 9.

conjecture[,]”²⁷ but rather based on an estimate of the cost of replanting trees to restore the property to its original condition.²⁸ The estimator, Mr. Vickers, is President of Delaware Lawn & Tree Services, Inc., a landscaping company, and is personally familiar with the condition of Plaintiffs’ property before and after Defendant’s trespass. Plaintiffs’ property was for personal, non-commercial use. It is unreasonable to expect Plaintiffs to have an exact inventory of every tree on their once heavily wooded property. Here, Plaintiffs submitted an estimate of the measure of damages based on the fair market cost of planting new trees. The Court of Common Pleas logically adjusted Mr. Vickers’ estimate to conform to factual findings based on the evidence and testimony. It does, however, appear that the Court of Common Pleas erred in its arithmetic.²⁹ The total sum of replacing the trees amounts to a total of \$5,550.00.³⁰

V. CONCLUSION

The measure of damages based on the fair value of the trees removed is \$5,550.00. Defendant’s trespass was intentional and it is therefore liable to Plaintiffs for triple damages totaling \$16,650.00, plus litigation costs.

²⁷ *Acierno*, 2005 WL 3111993, at *6.

²⁸ Pl.’s Ex. 2.

²⁹ *See id.*; the Court of Common Pleas’s calculation of damages was based on planting two dogwood trees at \$825.00 per tree, two maple trees at \$780.00 per tree, and three wild cherry trees at \$780.00 per tree. Tr. Trans. at 103.

³⁰ \$825.00 (dogwood tree) + \$825.00 (dogwood tree) + \$780.00 (maple tree) + \$780.00 (maple tree) + \$780.00 (wild cherry tree) + \$780.00 (wild cherry tree) + \$780.00 (wild cherry tree) = \$5,550.00. Pl.’s Ex. 2; Tr. Trans. at 103.

WHEREFORE, the decision of the Court of Common Pleas is hereby
AFFIRMED in part, and **MODIFIED** in part as noted above.

IT IS SO ORDERED.

Jan R. Jurden, Judge