

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001380-MR

DONIA S. DAY

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 09-CI-00223

LEVENIA ISON BAXTER;
ANTHONY BAXTER; AND
GENEVA TYLER ISON, WIDOW

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Donia S. Day appeals an award of damages for trespass to property arguing that the trial court applied the wrong legal standard by ordering her to pay the cost of repairing the property.

Levenia Ison Baxter, Anthony Baxter and Geneva Tyler Ison

(collectively the Baxters) own a parcel of land in Letcher County bordering the Kingdom Come Creek. Day owns the parcel of land directly across the creek.

On June 23, 2009, the Baxters filed a complaint for trespass claiming Day installed a bridge over the creek and onto their property to access a county road, Kingdom Come Road, and, in the process, diverted the creek and damaged the creek bank on the Baxters' property, causing it to flood. They sought an injunction and damages to compensate them for diminution in the fair market value of their land.

At a bench trial, the Baxters offered evidence of trespass and physical harm to their property. They provided evidence that the properties' common boundary was the center of the creek, Day's property did not adjoin the Kingdom Come Road right-of-way and Day's construction activities physically harmed their property and caused flooding. They also provided testimony as to the cost to repair the property and the diminution in value if the property was not repaired.

Day denied any trespass occurred. She provided evidence the creek bed was located within the county road right-of-way and that her actions had not physically harmed the Baxters' property.

On July 10, 2012, the circuit court made the following relevant factual findings and legal determinations: Day excavated the creek bed, taking soil and rock from the Baxters' property to her side of the creek and using this material to build up the bank on her side; Day placed structures from her property onto the

Baxters' property, including a steel structure and wooden walking bridges; the Baxters notified Day she was trespassing and asked her to cease, but she did not; Day's property does not adjoin the right-of-way to the Kingdom Come Road; each time Day and her tenants accessed her property from the road it constituted an intentional trespass; Day's actions and trespasses caused harm to the Baxters' property in the form of erosion and otherwise; and the cost to repair the land of \$10,460, as testified to by Don Ison, was the appropriate measure of damages as it did not exceed the diminution of the fair market value of the land of \$30,000, as testified to by Levenia Ison Baxter. The court awarded damages of \$10,460.

Day appealed from this damage award, arguing the circuit court erred as a matter of law when it based damages for trespass on the cost of repair, rather than following *Cary-Glendon Coal Co. v. Carmichael*, 258 Ky. 411, 80 S.W.2d 29 (1935) (*overruled in part on other grounds by Kentucky Mountain Coal Co. v. Hacker*, 412 S.W.2d 581, 583 (Ky. 1967)), and awarding damages for temporary trespass based upon the depreciation in the land's rental value over the period of the trespass.

Although Day frames her argument in terms of the trial court applying the incorrect legal standard, Day's argument depends upon the trial court's factual findings. The type of damages that can be properly awarded depend upon the facts determined at trial as to the type of injury that resulted from the trespass.

If the harm resulted from a temporary trespass, which did not cause physical injury to the property and only impaired the owner's right to exclusive possession

of the property, *Cary-Glendon* applies. “The measure of damages in such cases is the depreciation in the rental value of the land during the period of occupancy if it is rented out, but if occupied by the owner it is the diminution in the value of the use of the property.” *Id.* at 30.

If the harm is a physical injury to the property, *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66 (Ky. 2000), applies. Physical injury to property can be valued in two ways to determine the amount of damages that are appropriate: “(1) if the injury to the property is permanent, the amount by which the fair market value of the property decreased immediately prior to and after the trespass; but (2) if the injury to the property is temporary, the cost to return it to its original state.” *Id.* at 69 (footnotes omitted). Where the cost of returning property to its original state exceeds the diminution of the property’s value, reasonable restoration costs are not available. *Id.* at 70. Conversely, where the reasonable restoration costs are the lesser of the two costs, restoration costs are the appropriate measure of damages because they are the least expensive way to make injured property owners whole. *Id.*

The trial court awarded damages for the physical harm to the Baxters’ property caused by Day’s construction process. To make this award, the trial court found there was physical injury to the Baxters’ property, made findings as to diminution in value and restoration costs, then applied *Ellison* and awarded the lesser of these two amounts.

We review the trial court's factual findings from a bench trial under the clearly erroneous standard and will uphold them unless they are not supported by substantial evidence. *Patmon v. Hobbs*, 280 S.W.3d 589, 593 (Ky.App. 2009). The trial court's factual findings were supported by substantial evidence. The court found the Baxters' evidence as to physical injury to their property to be more credible than Day's denial of the same. The Baxters' evidence as to diminution of value and cost to restore the property provided a basis for damages. The correct legal standard was applied to this evidence in determining the proper measure of damages.

Accordingly, we affirm the Letcher Circuit Court's findings of fact, conclusions of law and judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Craft, II
Whitesburg, Kentucky

BRIEF FOR APPELLEES:

Gene Smallwood, Jr.
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