**[Cite as *Paradise Tree Farm, Inc. v. Ohio Dept. of Transp.*, 2008-Ohio-7059.]**

# Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

PARADISE TREE FARM, INC., et al.

Plaintiffs

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant
Case No. 2005-11167

Judge Clark B. Weaver Sr.

DECISION

**{¶ 1}** On July 23, 2008, the court rendered judgment in favor of plaintiffs. The court found that during the 2002-2003, 2003-2004, and 2004-2005 winter seasons, defendant's employees were negligent in the application of salt brine to roadways that bordered plaintiffs' property and that such negligence caused damage to plaintiffs' nursery stock. The court determined that defendant had discretion to implement salt brine pretreatment; however, defendant failed to ensure that an appropriate amount of product was deposited.[1] The case proceeded to trial on October 14, 2008, on the issue

[1]The court notes that subsequent to the events that form the basis of this case, R.C. 2743.02 was amended, as follows:

"(A)(3)(a) Except as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of

of damages. On October 24, 2008, plaintiffs filed a motion to substitute a more legible exhibit 11 for the one that had been offered at the damages trial. Upon review, the motion is GRANTED.

**{¶ 2}** Plaintiffs seek reimbursement for the fair market value of the trees that were planted in 2000 but were not available for sale in 2004 or 2005 due to salt brine damage. The excessive amounts of salt brine caused poor or stunted growth during the growing season, dieback and browning of leaves, and aberrant limb growth resulting in a deformed shape that was unsightly. Plaintiffs also request reimbursement for lost profits based upon the anticipated profits for the number of trees that would have been planted for resale in the affected acreage. Finally, plaintiffs seek to recoup the expenses that they allegedly incurred in an effort to mitigate the damage caused by the salt brine including irrigation and drainage, and the cost of erecting barrier walls on both properties.

**{¶ 3}** Defendant maintains that plaintiffs have failed to provide sufficient verification of the number of trees they claim were damaged and that they failed to provide sufficient evidence to base an award of future lost profits. Defendant next asserts that plaintiffs have a duty to mitigate their losses by selling those trees having minimal damage. In addition, defendant argues that there are different ways to calculate damages to nursery stock but that in no case should any award for damages grossly exceed the value of the property. Finally, defendant opposes any award for the construction of barrier walls as proposed by plaintiffs.

**{¶ 4}** At the damages trial, plaintiffs offered compelling and credible testimony detailing how the effect of salt brine mist caused permanent damage to hundreds of ornamental and shade trees that plaintiffs had intended to sell. Plaintiff, Joseph Demeter, testified that he operates Paradise Tree Farm (PTF), and that he grows shade and ornamental trees that he then sells at wholesale prices. Demeter stated that he counted the number of trees damaged and that the total reached 4,165. He further testified that the damaged trees could not be sold for landscaping purposes because

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an individual who is committed to the custody of the state." The amendment became effective March 31,

they were misshapen and deformed. According to Demeter, trees are evaluated on their aesthetics and appearance. Thus, he opined that neither residential nor commercial clients would choose to buy deformed nursery stock for planting. Demeter asserted that the trees were not saleable and that they had no salvage value, inasmuch as the cost to remove the trees from the ground negated any value in producing either firewood or mulch.

**{¶ 5}** In addition, Demeter stated that he has moved his tree farming plots farther inland and that he no longer can grow trees on approximately 18 acres of land that is situated closest to the interstate. Upon cross-examination, Demeter acknowledged that the land could support other crops such as corn or soybeans; however, he did not have the type of equipment necessary to plant and harvest crops. Indeed, the cost to convert the 18 acres for such use would be prohibitive. He admitted that if he could lease the land to a farmer, he would receive approximately $45 per acre.

**{¶ 6}** Mr. Jenkins testified that he operated Jenkins Maintenance Co., Inc. (Jenkins), that he had counted the number of damaged trees on his property, and that the total was 1,646. He stated that his trees were to be sold at retail rather than for wholesale prices. In addition, he stated that the fair market value of the trees at wholesale pricing was calculated at $141,850; however, he asserted that the trees, if healthy, could have been sold at retail for an amount that was 2-2.5 times higher than the wholesale figure. He opined that, once damaged, the trees were a total loss inasmuch as aesthetics accounted for the primary reason buyers purchased his trees. He concurred with Demeter that the trees could not be converted to firewood or mulch because the process was cost-prohibitive. Jenkins also relocated his tree planting plots farther away from the interstate, and he estimated that at least 18 acres of his land was similarly unusable for planting trees.

**{¶ 7}** "[A]n owner of either real or personal property is, by virtue of such ownership, competent to testify as to the market value of the property," *City of Cincinnati v. Banks* (2001), 143 Ohio App.3d 272, 291; and "the owner may establish

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the market value differential by offering an opinion of the value of the property both before and after the injury." *Rospert v. Old Fort Mills, Inc*. (1947), 81 Ohio App. 241. See also *Leppla v. Sprintcom Inc*., 156 Ohio App.3d 498, 509, 2004-Ohio-1309. As such, the court finds that plaintiffs are qualified to offer an opinion as to the value of the damaged trees. Plaintiffs' expert, Clifton McClintic, testified that he has worked for several years in the commercial nursery business, that he has acted as a purchasing agent for clients, and that he has extensive experience with both wholesale and retail pricing and purchasing. He testified that he had visited both properties several times and that he had observed the damage to plaintiffs' trees. He opined that plaintiffs' damaged trees have no value and that buyers have no interest in purchasing damaged trees even at a discounted price because buyers seek trees with an aesthetically pleasing shape in order to complement their landscaping projects. He further explained that market value calculations are based upon caliper measurements of the trunk and that as standard industry practice, each tree trunk is measured annually at "a point six inches" from base at the ground.

**{¶ 8}** According to McClintic, and based upon wholesale prices listed in standard nursery sale catalogues, shade trees have a value of $50-60 per caliper inch while ornamentals are priced at $40-50 per caliper inch. He opined that the total fair market value of the trees in 2004, if they had not been damaged, equaled $476,625 for PTF, and $141,850 for Jenkins. McClintic clarified that since Jenkins sold at retail level, the actual value was $283,700. Upon cross-examination, McClintic conceded that the wholesale prices fluctuate with the economy and with the housing market. He added that when the housing market declines, sellers tend to rely more on commercial clients.

**{¶ 9}** Upon review, the court makes the following determination. The court finds that plaintiffs provided sufficient credible evidence to support their calculation of the total number of damaged trees. Indeed, the court notes that the testimony offered by plaintiffs was presented quite candidly, and that they earnestly conveyed their opinions, based upon their experience in the tree-farming industry. The court rejects defendant's argument that the award should be limited by the value of plaintiffs' properties or the

income reflected from their tax returns. Rather, as testified to by plaintiffs and their expert, the court finds that the damages incurred by plaintiffs are more akin to the loss of a crop. The court therefore concludes that plaintiffs are each entitled to the fair market value of their damaged trees as verified by plaintiffs' expert and documented in Plaintiffs' Exhibit 1.

**{¶ 10}** In addition, the court does not find that plaintiffs are required to mitigate their damages by attempting to sell damaged trees, or even slightly damaged trees at a discounted price. Although defendant's expert, Dr. Funt, opined that some minimally damaged trees were saleable, the court recognizes that both plaintiffs have earned excellent professional reputations and that, therefore, any requirement that they sell damaged trees arguably damages their business relationships.

**{¶ 11}** A plaintiff bears the burden of proof on damages. *Henderson v. Spring Run Allotment* (1994), 99 Ohio App.3d 633, 641. Plaintiffs testified that they initially attempted to reduce the impact of the salt spray on their trees by altering their irrigation and drainage procedures. However, plaintiffs did not present invoices or receipts verifying the costs of such measures, nor did they specify either the dimensions of the areas irrigated or the dates that such work allegedly took place. Upon review of the testimony and evidence presented, the court finds that plaintiff failed to produce sufficient documentation for the court to conclude that the additional costs of irrigation and drainage were a proximate result of defendant's negligence.

**{¶ 12}** On the issue of future lost profits, the court again is limited to consideration of the damage caused in the three winter seasons that were the subject of plaintiffs' complaint. In determining liability, the court concluded that defendant has immunity with regard to the decision to use salt brine in place of or in conjunction with granular salt. *Reynolds v. State* (1984), 14 Ohio St.3d 68, 70. The court notes that the liability in this case arose from defendant's failure to follow its own guidelines or in some instances to implement guidelines to govern the reasonable application of salt brine during those winter months. "The issues of the existence of lost profits and the actual amount of the lost profits are factual issues for the trier of fact." *Royal Electric*

*Construction Corp. v. The Ohio State University* (Dec. 21, 1993), Franklin App. Nos. 93AP-399 and 93AP-424.

**{¶ 13}** The court finds that plaintiffs failed to provide adequate evidence to form the basis for calculating an award. Plaintiffs did not present sufficient detailed information to document the number of trees they would have planted in each season as other trees matured and were sold. In addition, the court was not provided with either an estimate or a formula to determine with reasonable certainty the percentage of planted trees projected to reach sufficient maturity to be sold for profit. "'[D]amages that result from an alleged wrong must be shown with reasonable certainty, and cannot be based upon mere speculation or conjecture, regardless of whether the action is contract or tort.'" *Henderson* at 642, quoting *Wagenheim v. Alexander Grant & Co.* (1983), 19 Ohio App.3d 7, 17. The court concludes that there are too many variables such as weather, disease, and potential fluctuations in the housing market for the court to calculate lost profit with any degree of certainty. "Without adequate proof of damages, an award of damages in any amount cannot be sustained." *Prince v. Jordan*, Lorain App. No. 04CA008423, 2004-Ohio-7184, ¶22, citing *Henderson,* supra.

**{¶ 14}** The court further finds that plaintiffs are not entitled to an award for construction of barrier walls. As explained above, the court is limited to consideration of damages proximately caused by defendant's failure to ensure the reasonable application of salt brine during three specific winter seasons. The state is immune from civil liability for the decision to use salt brine and has discretion to continue applying salt brine as a means of improving safety for the traveling public. In addition, defendant's Deputy Director Swearingen testified that defendant has instituted revised guidelines and procedures in an effort to control the application of salt brine. He added that the new training methods focus on operating tanker trucks at slower speeds and applying the brine directly to the pavement surface. The court finds that this witness was candid, credible, and knowledgeable concerning defendant's revised policies and practices. Accordingly, the court finds that plaintiffs failed to convince the court either that the

construction of barrier walls was necessary or that such cost should be borne by defendant.

**{¶ 15}** Based upon the testimony and evidence produced at trial, the court finds that plaintiffs have proven, by a preponderance of the evidence, that they are entitled to an award, for the value of the damaged trees, in the total amount of $760,350, apportioned as follows: $476,637.50 to PTF, and $283,712.50 to Jenkins, such amounts include proportionate reimbursement of the $25 filing fee.


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JUDGMENT ENTRY

This case was tried to the court on the issue of plaintiffs' damages. The court has considered the evidence and, for the reasons set forth in the decision filed

concurrently herewith, judgment is rendered in favor of plaintiff, Paradise Tree Farm, Inc., in the amount of $476,637.50 and judgment is rendered in favor of plaintiff, Jenkins Tree Farm, Inc., in the amount of $283,712.50 which includes the filing fee paid by plaintiffs. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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CLARK B. WEAVER SR.
Judge

cc:

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SJM/cmd
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