

[Cite as *Henderson v. Glancy*, 2011-Ohio-1152.]

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

WALTER HENDERSON, et al.

C.A. No. 10CA0017

Appellees

v.

BOB GLANCY

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 08-CV-0858

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 14, 2011

CARR, Judge.

{¶1} Appellant, Leslie “Bob” Glancy, appeals the judgment of the Wayne County Court of Common Pleas. This Court affirms.

I.

{¶2} On November 13, 2008, appellees, Walter and Amy Henderson, filed a complaint sounding in trespass against Mr. Glancy. The Hendersons alleged that Mr. Glancy entered upon their property and destroyed certain trees. The Hendersons sought treble damages pursuant to R.C. 901.51 for the destruction of timber. Mr. Glancy answered and entered general denials to the allegations. The matter proceeded to trial before the court on March 30, 2010. The trial court entered judgment in favor of the Hendersons, found that they were damaged in the amount of \$3,500.00, and that they were entitled to treble damages pursuant to R.C. 901.51. The trial court, therefore, awarded judgment to the Hendersons in the amount of \$10,500.00, plus post-

judgment interest and costs. Mr. Glancy filed a timely appeal, raising three assignments of error for review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT’S VERDICT, RENDERED IN ITS JUDGMENT ENTRY OF APRIL 1, 2010, IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE FOR THE REASON THAT HENDERSON FAILED TO CARRY HIS BURDEN OF PROOF WITH RESPECT TO THE ELEMENTS OF TRESPASS.”

{¶3} Mr. Glancy argues that the trial court’s judgment is against the weight of the evidence. This Court disagrees.

{¶4} In determining whether the trial court’s decision is or is not supported by the manifest weight of the evidence, this Court applies the civil manifest weight of the evidence standard set forth in *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, syllabus, which holds: “Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” The Ohio Supreme Court has clarified that:

“when reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81. This presumption arises because the trial judge had the opportunity ‘to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.’ *Id.* at 80. ‘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.’ *Id.* at 81.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24.

{¶5} The Hendersons brought their claim pursuant to R.C. 901.51, which states:

“No person, without privilege to do so, shall recklessly cut down, destroy, girdle, or otherwise injure a vine, bush, shrub, sapling, tree, or crop standing or growing on the land of another or upon public land. In addition to the penalty provided in section 901.99 of the Revised Code, whoever violates this section is liable in treble damages for the injury caused.”

{¶6} To prevail on a claim of civil trespass, the plaintiffs must establish that Mr. Glancy engaged in “(1) an unauthorized intentional act and (2) entry upon land in the possession of another.” *DiPasquale v. Costas*, 186 Ohio App.3d 121, 2010-Ohio-832, at ¶102, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 716.

{¶7} Mr. Glancy does not address the destruction of trees in his assignment of error. Rather, he merely argues that the Hendersons failed to present evidence that they possessed any of the land at issue because they failed to present a deed as to their ownership interest in the land and failed to offer evidence as to the location of the boundary line between the two properties.

{¶8} Mr. Henderson testified that he has owned the property known as 13172 Congress Road, in West Salem since 2001. He testified that, while walking with his dog in September 2008, he noticed that a large section of a boundary line fence between his property and a neighboring property was missing and a wooded area of his property measuring 100 feet long and varying from 10 to 25 feet wide had been destroyed, leaving nothing but dirt. Mr. Henderson testified that he reported the destruction to the Wayne County Sheriff’s Department and that a deputy learned that Mr. Glancy was involved in construction on the adjoining property.

{¶9} Mr. Henderson testified that Mr. Glancy, the deputy, and he discussed the matter. He testified that the deputy showed Mr. Glancy the property line marker. He testified that Mr. Glancy admitted that he knew the marker was there next to the fence.

{¶10} Mr. Henderson testified that he hired a tree expert to obtain a damages estimate. The expert, Joseph Gregory of Davey Tree Expert Co., testified that he insisted that Mr. Henderson first have his property surveyed and the boundary lines established before he would evaluate the damage. Mr. Henderson testified that he, therefore, had his property surveyed and that the surveyor used metal and wood stakes with pink ribbons to mark out the boundary line between his property and the neighboring property where Mr. Glancy had engaged in construction. Mr. Henderson submitted photographs he took after his property was surveyed, showing damaged areas on both his property and the adjoining property.

{¶11} Mr. Glancy testified that his wife owns the property where he was constructing a house. Mr. Glancy submitted certified copies of tax maps from the Wayne County Tax Map office on which he identified his wife's property and then identified the adjacent property as that belonging to Mr. Henderson. Mr. Glancy testified, upon being shown photographs of the stakes placed by the surveyor hired by Mr. Henderson, that he believed that those stakes accurately showed the property line between the two properties and that he was aware of that property line when he engaged in the construction on his property. Accordingly, Mr. Glancy admitted that the Hendersons possessed the property that they claimed they possessed and that they claimed Mr. Glancy damaged. Based on our review, there was competent, credible evidence to establish that the Hendersons possessed the property at issue.

{¶12} Furthermore, when presented with photographs of damage on the Hendersons' side of the property line, Mr. Glancy at first asserted that the damage was on his property, then claimed to be confused, then conceded that the damage was on the Hendersons' property, yet claimed that the damage must have been weather-related. Finally, while continuing to deny that he caused the extensive damage evidenced in photographs taken by Mr. Henderson, Mr. Glancy

conceded that he took down trees along the fence line between the two properties and that he “back dragged” the area with a bulldozer “[n]ot too far” onto the Hendersons’ property. Based on a review of the record, there was some competent, credible evidence going to all the essential elements of the claim. Accordingly, the trial court’s judgment was not against the manifest weight of the evidence. Mr. Glancy’s first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED IN GRANTING DAMAGES TO HENDERSON IN THE AMOUNT OF \$3500.00, AS HENDERSON FAILED TO ESTABLISH REQUISITE LOSS BY THE WEIGHT OF THE EVIDENCE.”

{¶13} Mr. Glancy argues that the trial court’s finding that the Hendersons were damaged in the amount of \$3,500.00 is against the manifest weight of the evidence. This Court disagrees.

{¶14} We have previously set out the standard by which this Court reviews a civil manifest weight of the evidence challenge.

{¶15} Mr. Henderson testified that his property constituted 14 ½ acres which consisted of his house and a large wooded area. He testified that he discovered that a large portion of his property along the border of Mrs. Glancy’s property had been destroyed by machinery around the same time that Mr. Glancy was constructing a home on the adjoining property. Mr. Henderson testified that trees in the area had been removed, leaving bare areas and broken trees alongside of the cleared area. Mr. Henderson submitted photographs he took shortly after the destruction, showing a wooded area, broken trees and brush, and then a cleared, scraped area devoid of trees and other vegetation. The trees that had been destroyed and cleared from his property were no longer on his property. Mr. Henderson hired an expert to estimate the value of his trees which had been destroyed and removed.

{¶16} Mr. Gregory testified that he is the manager of Davey Tree Expert Co. in Kent, Ohio; the coordinator of Urban Forestry Services; a certified arborist through the International Society of Arboriculture; and a municipal specialist in urban forestry. He testified that he has a degree in conservation science in addition to nine years of on-the-job experience regarding the valuation of trees.

{¶17} Mr. Gregory testified that Mr. Henderson hired him to value the trees which were destroyed and removed from his property. Mr. Gregory testified that he viewed the damage only after Mr. Henderson had had the property surveyed to establish the property line.

{¶18} Mr. Gregory testified that his goal was to calculate a price per square foot of the cleared area. He testified that, since the destroyed trees were gone, he sampled two separate areas of trees in the same area as the damaged area to determine a reasonable estimate of what had been there before the damage occurred. He testified that this is an accepted method of valuation among tree appraisers when the actual trees to be valued no longer exist.

{¶19} Mr. Gregory defined the damaged area as an area 100 feet long by 14 to 25 feet wide based on the visual damage/disturbed soil and established property line. A 12 to 14 foot wide lane ran through the entire length of the damaged property and Mr. Gregory testified that he took this into consideration and did not calculate a damages estimate for the area consumed by the lane. Mr. Gregory testified that the area supported a “regeneration woods” consisting of younger trees. He discussed the factors which are considered when valuing trees, including species and density. While Mr. Gregory testified that he based his assumption that there had been trees in the damaged area on what Mr. Henderson had told him, he personally viewed leaf litter and vegetation on the ground of the sampled areas and the unusual absence of such leaf litter and vegetation on the adjacent ground of the damaged area. He testified that, had the

damaged area been undisturbed, he would have expected to see leaf litter and understory vegetation in that area as well. Instead, he testified that he saw disturbed soil and roots sticking out of the ground, indicating the earlier presence of growth reasonably consistent with adjacent areas.

{¶20} Mr. Henderson submitted the expert's report into evidence. The expert valued the first sample area at approximately \$3,792 and the second at approximately \$3,210. By averaging the value of the two sample areas, Mr. Gregory testified that the value of the trees that had been removed from Mr. Henderson's property was approximately \$3,500.

{¶21} Mr. Glancy presented evidence from his own expert, Joel Berry, a forestry consultant who has conducted timber appraisals since 1974. Mr. Berry testified that he has a forestry degree from Ohio State University. He discussed the numerous factors he considers when assessing the value of trees.

{¶22} Mr. Berry testified that he did not measure or value any standing trees on either the Henderson property or the Glancy property. Instead, he testified that he assessed a value to felled trees that were stacked on Mrs. Glancy's property. Moreover, he testified that Mr. Glancy told him that all of the felled trees had been removed from Mrs. Glancy's property. Furthermore, Mr. Berry testified that he had no way of determining the site of origin of the felled trees he assessed and valued. He testified that he assessed a total value of \$2,488.78 to the felled trees of unknown origin.

{¶23} Based on a review of the record, this Court concludes that there was competent, credible evidence to support the trial court's finding that the Hendersons sustained damage to trees destroyed and removed by Mr. Glancy in the amount of \$3,500.00. Mr. Henderson testified that trees had been destroyed and removed from his property. Mr. Gregory testified that there

was evidence of prior growth in the disturbed area. Mr. Gregory sampled two adjacent areas of similar size to the damaged area and averaged their values to arrive at an estimate of damage, a method he testified was an accepted method among tree appraisers. Mr. Gregory's valuation was relevant to the Hendersons' property. Mr. Berry, on the other hand, estimated the value of felled trees which he understood to have no connection to the Henderson property because Mr. Glancy told him that they had been removed solely from Glancy property. Accordingly, the trial court's finding that the Hendersons sustained damage to trees removed from their property in the amount of \$3,500.00 was not against the manifest weight of the evidence. Mr. Glancy's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED IN APPLYING [R.C.] 901.51 AS A MEASURE IN HENDERSON'S DAMAGES, AS GLANCY'S CONDUCT WAS NOT RECKLESS AS DEFINED BY [R.C.] 2901.22.”

{¶24} Mr. Glancy argues in essence that the trial court's finding that he acted recklessly so that treble damages were appropriate was against the manifest weight of the evidence. This Court disagrees.

{¶25} The proper standard of review for a civil manifest weight of the evidence challenge is set forth in the first assignment of error.

{¶26} R.C. 901.51 requires a finding of the reckless destruction of trees on another's land before treble damages are warranted. In addition to treble damages, the penalty section of R.C. Chapter 901 states that a person who violates R.C. 901.51 is guilty of a misdemeanor of the fourth degree. R.C. 901.99. Mr. Glancy argues that the trial court must find that he acted recklessly as defined in R.C. 2901.22 before it may impose treble damages. Given that he might

also have been subject to criminal penalties, this Court agrees that it is appropriate to apply the definition of “recklessly” from the criminal code.

{¶27} Pursuant to R.C. 2901.22(C):

“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.”

{¶28} Mr. Glancy testified that Mr. Henderson’s property abutted his wife’s property on which he was constructing a house. Significantly, Mr. Glancy testified that he agreed that the photograph of the stakes placed by Mr. Henderson’s surveyor accurately evidenced the property line between the two properties. Furthermore, Mr. Glancy admitted that he was aware of that property line at the time he was engaged in the construction on his wife’s property. Moreover, he acknowledged that portions of the Henderson property exhibited damage in the form of removed and damaged trees. Although Mr. Glancy at first admitted to removing only trees along the fence line between the two properties, he later admitted that he “back dragged” the area where he had removed trees, entering “[n]ot too far” on the Henderson property. Based on a review of the record, there is competent, credible evidence that Mr. Glancy was aware of the property line between the two properties and that he used a bulldozer to “back drag” areas he acknowledged were on the Hendersons’ property. Furthermore, there was competent, credible evidence that Mr. Glancy only bulldozed the areas where he had previously removed trees. Accordingly, there is competent, credible that Mr. Glancy acted recklessly, i.e., proceeded with heedless indifference to the consequences by entering onto property he knew belonged to the Hendersons and removed trees on their property without privilege to do so, bulldozing the area

afterwards to fill in the holes. Therefore, the award of treble damages is not against the manifest weight of the evidence. Mr. Glancy's third assignment of error is overruled.

III.

{¶29} Mr. Glancy's assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

DAVID W. ZACOUR, Attorney at Law, for Appellant.

JASON M. STORCK, Attorney at Law, for Appellees.