

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs, February 26, 2009

**CLAYTON DYE, and wife, EVELYN DYE, v. HOWARD D. LIPPS, and
wife, MARGARET L. LIPPS, and WILLIAM E. PHILLIPS, TRUSTEE OF
A DEED OF TRUST SECURING THE CITIZENS BANK OF EAST
TENNESSEE**

**Direct Appeal from the Chancery Court for Washington County
No. 35197 Hon. G. Richard Johnson, Chancellor**

No. E2008-00891-COA-R3-CV - FILED APRIL 27, 2009

Plaintiffs brought an action alleging defendants had created a nuisance on their property which damages plaintiffs' adjoining property. Following an evidentiary hearing, the Trial Judge found a temporary nuisance existed and awarded damages to plaintiffs. Defendants appealed on the sole issue of the amount of damages. We affirm the Trial Court's Judgment.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Arthur M. Fowler, III., Johnson City, Tennessee, for appellants Howard D. Lipps and wife Margaret L. Lipps.

Timothy R. Wilkerson, Kingsport, Tennessee, for appellees, Clayton Dye and wife Evelyn Dye.

OPINION

Plaintiffs brought this action against the adjoining property owners, charging that defendants built a dam along the common property line in February of 2002, which restricted the natural flow of water and created a pond on the defendants' property. Plaintiffs alleged that the dam leaks and the leak created a swamp like condition on plaintiffs' land which did not exist prior to the

construction of the dam. Plaintiffs charged the dam created a nuisance which damaged their property. Defendants in their answer denied their dam leaked and/or caused swamp like conditions on plaintiffs' property. The issues were tried before the Chancellor who found that defendants created a temporary nuisance by construction of the dam on their property, and awarded a Judgment of \$5,000.00 against defendants, Lipps.

Defendants have appealed the Trial Court's ruling, but the Trial Court's findings of fact regarding the dam, the standing water or soggy ground caused by the dam's leakage and the legal conclusion that the dam and the pond constituted a temporary nuisance was not challenged on appeal. The only issue on appeal is whether the Trial Court employed the proper measure of damages in awarding damages.

Plaintiffs bear the burden of proving the existence of their damages in temporary nuisance cases, and the burden of proving their pecuniary losses. *Shearron v. The Tucker Corp.* No. M2004-02780-COA-R3-CV, 2006 WL 1082834 at * 5 (Tenn. Ct. App. Apr. 25, 2006)(citing *Jones v. Tenn. Central Rlwy. Co.*, 8 Tenn. App. 183 (Tenn. Ct. App.1928). The amount of damages to be awarded is a question of fact where appellate review is limited by Tennessee Rule of Appellate Procedure 13(d). In cases such as this, without a jury, this Court reviews the amount of damages awarded by the trial court with the presumption that it is correct, and will alter the amount of damages only if the trial court has adopted the wrong measure of damages or when the evidence preponderates against the amount of damages awarded. Tenn. R. App. P. 13(d).

Plaintiff, Clayton Dye, testified that the dam was constructed in February and March of 2002, and that the standing water on his property caused by the Lipps' dam and pond reduced the value of his property by \$16,900.00 if he were to sell it. He stated that the pond had overflowed three times since it was constructed and there was standing water on his property of about one and a half to one inch deep at other times because the dam has leaked continuously from its base since the pond was filled in May 2002. He testified that even when the standing water subsides, the ground remains soggy and wet. The area at issue is approximately fifty feet by seventy-five feet. He further testified that he never had standing water in that area during the two and a half years he lived there before the dam and pond were constructed.

He testified that he had cleared the underbrush and honeysuckle from the area where the standing water now is before the Lipps built the dam and pond, and that the cleared area looked "real nice" and "we would go down there and spend quite a bit of time down there." He also testified that since the leaking of the dam began, he had not been able to mow the wet section of his property because it remains swampy and soggy. He further testified that although that area of the property is cleared they could not use it for any purpose, due to the water. He testified that the standing water issue with the Lipps was a stressful situation and that the heavy equipment Mr. Lipps brought on his property left tire tracks, characterized as "cut up."

In *Clabo v. Great American Resorts, Inc.* 121 S.W.3d 668 (Tenn. Ct. App.,2003), we summarized the law regarding the measure of damages in temporary nuisance cases as follows:

“A nuisance has been defined as anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable.” *Id.* 671. *Clabo* at 671, and the opinion went on to state: “A temporary nuisance is defined as: [one] which can be corrected by the expenditure of labor or money. . . . Where the nuisance is temporary, damages to property affected by the nuisance are recurrent and may be recovered from time to time until the nuisance is abated. The measure of such damages [is] the injury to the value of the use and enjoyment of the property, which may be measured to a large extent by the rental value of the property, and extent that rental value is diminished.” This measure of damages is applicable during the time the nuisance exists. *Pate v. City of Martin*, 614 S.W.2d 46-47 (Tenn. 1981).

Defendants point to Dye’s testimony to the decreased sale value of his property but presented no evidence to prove the value of the loss of use and enjoyment of the property during the time the nuisance existed, and contend that the award of \$5,000.00 in damages was error and should be reduced to a nominal award of one dollar.

We cannot agree. A review of Tennessee cases demonstrate that the most widely employed method of proving damages resulting from a temporary nuisance is to present evidence of the diminution in the rental value of the affected property during the duration of the nuisance. *See Adair v. Scalf*, No. M2001-00677-COA-R3-CV, 2003 WL 261932 at * 5 (Tenn. Ct. App. Feb. 7, 2003). However, diminution in rental value is not the only method to establish a plaintiff’s damages in a temporary nuisance case. The Tennessee Supreme Court in *Lane v. W. J. Curry & Sons*, 92 S.W.3d 355 (Tenn. 2002) discussed alternative measures of damages as follows:

A party who has been subjected to a private nuisance may be entitled to several types of remedies. A plaintiff may be entitled to injunctive relief, especially where the nuisance is likely to continue. *Pate*, 614 S.W.2d at 48. Further, in cases involving a temporary private nuisance, which is one that can be corrected, damages may be awarded for the cost of restoring the property to its pre-nuisance condition, as well as damages for inconvenience, emotional distress, and injury to the use and enjoyment of the property. *Pryor v. Willoughby*, 36 S.W.3d 829, 831 (Tenn. Ct. App. 2000). The typical way of measuring injury to the use and enjoyment of the property is the decrease in rental value of the property while the nuisance existed. *Id.*; *see also Pate*, 614 S.W.2d at 48 (noting that the measure of damages is the “injury to the value of the use and enjoyment of the property, which is usually shown by evidence of the extent that the rental value of the property is diminished by the nuisance”). Accordingly, courts provide an appropriate remedy in the form of either damages or injunctive relief or both.

Lane at 365.

Here, the Trial Court correctly observed that a decrease in rental value due to the nuisance, is the most commonly used measure of damages, but not the only way to measure loss of use and enjoyment of the property in a temporary nuisance case. The Trial Court’s determination on

this issue is borne out by the Supreme Court's decision in *Lane* that held that diminution of rental value was not the exclusive measure of loss of use and enjoyment when it used the words "typical" and "usually" in the above referenced quotation from *Lane*. Additionally, this Court has repeatedly stated that diminution of rental value may be used to determine loss of use and enjoyment of the property, implying that there are other methods by which the court may measure the loss. See *Clabo v. Great American Resorts, Inc.*, 121 S.W.3d 668, p. 671 (Tenn. Ct. App. 2003). The Trial Court noted plaintiff's testimony that he could not mow the portion of his property effected by the dam's leakage and could not use that part of the property for any purpose, demonstrating that his use and enjoyment of his property had diminished significantly. We conclude the evidence does not preponderate against the Trial Court's finding as to his assigned value of \$5,000.00 of damages sustained by plaintiff. Tenn. R. App. P. 13(d). We review the amount of damages awarded by the trial court with the presumption that it is correct, and only alter the amount of damages when the trial court has adopted the wrong measure of damages or when the evidence preponderates against the amount of damages awarded. *Shearron v. The Tucker Corp.*, No. M2004-02780-COA-R3-CV, 2006 WL 1082834 at * 6 (Tenn. Ct. App. Apr. 25, 2006)(citing *Armstrong v. Hickman County Highway Dep't*, 743 S.W.2d 189, 195 (Tenn. Ct. App. 1987); *Beaty v. McGraw*, 15 S.W.3d 819, 829 (Tenn. Ct. App.1998); *Hall v. City of Gatlinburg*, No. E2001-01470-COA-R3-CV, 2002 WL 185479 (Tenn. Ct. App. Feb. 6, 2002)).

The Trial Court credited plaintiff's testimony that he was deprived of the use and enjoyment of that portion of his property for more than five and one half years because of the nuisance created by his neighbor is a significant loss to plaintiffs, and we find nothing in the record to preponderate against the Trial Judge's assessment of damages.

We affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Howard D. Lipps and Margaret L. Lipps.

HERSCHEL PICKENS FRANKS, P.J.