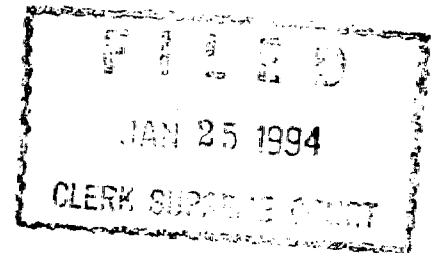


IN THE COURT OF APPEALS OF IOWA

No. 3-270 / 92-1511



IN THE MATTER OF THE ESTATE OF S. ELAINE POTTS, Deceased,
THE ESTATE OF S. ELAINE POTTS,

Appellant,

vs.

ROBERT REESE, d/b/a BOB'S PROFESSIONAL TREE SERVICE,

Appellee.

Appeal from the Iowa District Court for Keokuk County,
Phillip Collett, Judge.

Plaintiff appeals a district court judgment dismissing
plaintiff's action for treble damages for willful injury to
trees. **AFFIRMED.**

John C. Wagner of John C. Wagner Law Offices, P.C.,
Cedar Rapids, for appellant.

Victor H. Dietz, Sigourney, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab,
JJ.

000210

HAYDEN, J.

Duane Potts managed a farm owned by his mother, S. Elaine Potts. The Iowa Department of Transportation (DOT) obtained a right-of-way through a portion of the farmland containing four walnut trees. The department did not want the trees but required they be removed from the right-of-way.

Duane Potts contacted Bob's Professional Tree Service, owned by Robert Reese, about harvesting the four walnut trees. Potts allegedly told Reese to harvest "anything that was marketable." Potts gave Reese a map showing the location of the four trees. Reese was to get Potts' approval prior to harvesting the trees.

According to Reese, he was unable to reach Duane Potts, but did get some kind of approval from Elaine Potts. Reese then cut down ten of Potts' walnut trees and one of Potts' neighbor's.

Elaine Potts filed an action for damages, alleging Reese willfully injured the trees in violation of Iowa Code section 658.4. Elaine passed away during the pendency of this action and the estate of S. Elaine Potts was substituted as plaintiff.

The district court ruled plaintiff failed to demonstrate the willfulness required for an award of treble damages under section 658.4. The court determined the proper measure of damages was the market value of the trees as lumber, but emphasized plaintiff failed to establish damages under any measure. Plaintiff now appeals.

Our standard of review is for the correction of errors at law. Iowa R. App. P. 4.

I. Willful Injury.

Plaintiff contends the trial court erred in refusing to award treble damages for the alleged willful injury to trees under Iowa Code section 658.4. This section provides:

For willfully injuring any timber, tree, or shrub on the land of another, or in the street or highway in front of another's cultivated ground, yard, or city lot, or on the public grounds of any city, or any land held by the state for any purpose whatever, the perpetrator shall pay treble damages at the suit of any person entitled to protect or enjoy the property.

Iowa Code § 658.4 (1993). In the context of this statute, "willful" has been defined as an act done wantonly and without any reasonable excuse. Bangert v. Osceola County, 456 N.W.2d 183, 189 (Iowa 1990) (citations omitted).

Our own court once defined "willfulness," . . . as meaning "something more than mere oversight, carelessness, neglect, or even shiftlessness. . . ."

Clark v. Sherriff, 247 Iowa 509, 516, 74 N.W.2d 569, 573 (1956) (quoting Claus v. Chicago Great W. Ry., 136 Iowa 7, 11, 111 N.W. 15, 16 (1907)).

The trial court determined Reese's actions in harvesting the walnut trees did not constitute willful conduct as contemplated by section 658.4. We hold the trial court did not err. Reese's actions were not done wantonly without any reasonable excuse. We affirm on this issue.

II. Damages.

Our courts have recognized several measures in determining the amount of damages for the loss of trees. Bangert, 456 N.W.2d at 189 (citing Laube v. Estate of Thomas, 376 N.W.2d 108, 109 (Iowa 1985)); See Welter v. Humboldt County, 461 N.W.2d 335, 339 (Iowa App. 1990). The amount of damages may be the difference in the value of the realty before and after destruction of the trees, the commercial market value of the trees, or the replacement cost of the trees. Bangert, 456 N.W.2d at 189 (citing Laube, 376 N.W.2d at 109); Welter, 461 N.W.2d at 339. The trial court determined the proper measure of damages, if plaintiff had proven willfulness, would have been the commercial market value of the trees. The court concluded, however, plaintiff failed to provide sufficient evidence to establish the damages for the harvested trees no matter what method is used. We agree with the conclusions reached by the trial court.

The only evidence offered by plaintiff to establish damages was the amount of money received by Reese for the logs in question. Plaintiff also had his neighbor testify regarding the amount of compensation the neighbor received from the DOT for his walnut trees. The trial court stated this testimony was not helpful in determining the value of plaintiff's trees. The trial court stated plaintiff presented insufficient evidence regarding the difference in the value of the realty, the commercial market value of the

00-1223

walnut trees, or the replacement cost. Specifically, with regard to commercial value, plaintiff offered no expert testimony on value of the trees on the basis of their worth as lumber.

Our courts recognize the distinction between proof that damages have been sustained and proof of the amount of those damages. Bangert, 456 N.W.2d at 190 (citation omitted). Where some damages appear, recovery should not be denied merely because of difficulty in fixing an exact amount. Reed v. Chrysler Corp., 494 N.W.2d 224, 228 (Iowa 1992) (citing Bangert, 456 N.W.2d at 190).

The right to damages, however, must be proved by competent evidence. Benshoof v. Reese, 250 Iowa 868, 874, 97 N.W.2d 297, 301 (1959) (citation omitted). Our supreme court has stated:

In order to be entitled to an award of damages, the claiming party has the burden of proving the value of the damages as to each item with some reasonable measure of certainty. "The rule that uncertainty as to the amount of the damages will not prevent a recovery does not mean that there need be no proof of the amount of damage. . . . The damages must be susceptible of ascertainment in some manner other than by mere speculation, conjecture, or surmise, and by reference to some fairly definite standard, . . ."

B-W Acceptance Corp. v. Saluri, 258 Iowa 489, 497-98, 139 N.W.2d 399, 404 (1966) (quoting 22 Am. Jur. 2d Damages § 26 (current version at 22 Am. Jur. 2d Damages § 489 (1988))). Recovery is denied when there is no reasonable basis from which an amount of damages can be approximated. Larsen v. United Federal Sav. & Loan Ass'n, 300 N.W.2d 281, 288 (Iowa 1981) (citation omitted).

010114

Plaintiff is required to establish a claim of damages with some reasonable certainty, showing rational basis for ascertaining their amount. Conley v. Warne, 236 N.W.2d 682, 687 (Iowa 1975). There must be evidence some damages have been sustained. Dennett v. City of Des Moines, 347 N.W.2d 691, 693 (Iowa App. 1984) (citation omitted).

We determine the trial court properly concluded plaintiff failed to present evidence sufficient to establish a reasonable basis to approximate an amount of any damages sustained. We affirm the decision of the trial court.

Costs of this appeal are taxed to plaintiff.

AFFIRMED.