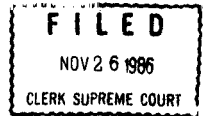


IN THE COURT OF APPEALS OF IOWA



SUSAN A. CAMPBELL,

)

Plaintiff-Appellant,

)

Filed November 26, 1986

57

vs.

)

MICHAEL T. NELSON and JANANNE
F. NELSON,

)

6-410
86-313

)

Defendants-Appellees.

Appeal from the Iowa District Court for Dubuque County (44681) - R.J.
Curnan, Judge.

Plaintiff filed this common law trespass suit to recover for damages
allegedly suffered when adjoining property owners cleared trees and shrubbery
from her land. **AFFIRMED.**

Arthur F. Gilloon and Matthew J. Devlin of Norman & Gilloon, Dubuque,
Iowa, for plaintiff-appellant.

Michael J. Coyle of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque,
Iowa, for defendants-appellees.

Considered by Donielson, P.J., Hayden, and Sackett, JJ.

HAYDEN, J.

Plaintiff has, since 1962, owned the residential property involved in this litigation, located in Dubuque, Iowa. Defendants purchased the residential property adjoining plaintiffs in December 1979. Plaintiff currently resides in Houston, Texas. She was reared in Dubuque and the pertinent property has been in her family for several generations. The house and the duplex located on the property are now rental units.

In May of 1983, defendant began a landscaping project that involved removing brush, shrubbery, and certain trees in a forty-five foot area west of his home, on plaintiff's property. Defendants graded the land, planted grass, and moved their utility shed onto plaintiff's property. Defendants obviously believed the land to be theirs, although they never attempted to verify the actual boundary line. Plaintiff heard about defendant's action and called defendants, telling them they were on her property, she would be in Dubuque in a few weeks, and they would discuss the problem then.

At a meeting of the parties, they agreed to have a survey done, with the loser paying for the survey. The survey reflected the fact defendant had encroached forty-five feet onto plaintiff's property; this fact is uncontested. Eight months after the survey the defendants removed the shed and the concrete foundation as a result of a "final demand" letter from plaintiff.

After the survey conclusively established the boundary, the defendants continued to mow the forty-five foot area until plaintiff erected a cyclone fence along the property line. This maintenance of the area was done by the defendant to keep the recently graded and seeded ground in an attractive condition.

Plaintiff filed this suit in June of 1984, requesting relief for actual and exemplary damages based upon a common law trespass theory. The district

court, as trier of fact, found for plaintiff, awarding her actual damages of \$300 and exemplary damages of \$930.91. Plaintiff appealed from this judgment, challenging the amounts of actual exemplary damages awarded.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact have the force of a special verdict and are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). This case is reviewed as tried in the court below. Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa 1979). We are not bound by the trial court's determination of law and are free to decide whether the court's findings were the result of legal error. Rouse v. State, 369 N.W.2d 811, 813 (Iowa 1985).

I.

Initially the plaintiff questions the court's award of actual damages. Specifically, she contends the following errors of law were made: the court failed to include the cost to plaintiff in the erection of the fence; failed to consider as an additional ground for damages the defendant's continued mowing; and applied an inappropriate standard in measuring the destruction of a flowering tree. In a more general allegation, plaintiff asserts the court's award of actual damages is not supported by substantial evidence.

There are certain general rules to follow when assessing damages for wrongful destruction of trees in a trespass. Where trees are used for a special purpose, as windbreaks, shade, or ornamental use, the measure of damages is generally the difference in the value of the realty before and after the destruction, the "diminution in value" rule. Laube v. Estate of Thomas, 376 N.W.2d 108, 109 (Iowa 1985); Walters v. Iowa Electric Co., 203 Iowa 471, 475, 212 N.W. 884, 886 (1927). An alternative measure of damages, where the "diminution in value" rule would unjustly deny the owner adequate compensation, is the reasonable cost of replacement. See Rector, Wardens, & Vestry of St.

Christopher's Episcopal Church v. C.S. McCrossan, Inc., 306 Minn. 143, 146, 235 N.W.2d 609, 611 (1975). On the other hand, where the trees have a value separate and distinct from the soil, the measure of damages for the cutting and taking of the trees is the fair market value. Grell v. Lumsden, 206 Iowa 166, 171, 220 N.W. 123, 126 (1928). See generally Restatement (Second) of Torts § 929 (1979).

Here the plaintiff brought an action based on common law negligence requesting actual damages, punitive damage and permanent injunction. The trial court considered both the "diminution in value" rule and the "replacement cost" rule and found no diminution in value to the land but awarded \$300 in damages. The court correctly utilized the rule that "cost of replacement" should not be used when the expense of replacement is greatly out of proportion to the actual damage to the real estate. See Bailion v. Carl Bolander & Sons Co., 306 Minn. 155, 157, 235 N.W.2d 613, 615 (1975). The trial court found the land suffered no loss, and may have actually increased in value. The majority of trees were found to be "junk" trees, the existence of a flowering tree and its destruction was shown but proof of its exact type was not made.

Without specifically addressing each of plaintiff's numerous contentions, we affirm. Upon an exhaustive review of the record and the applicable law, we find the court's facts supported by substantial evidence and no legal errors.

II.

Regarding the award of exemplary damages, plaintiff contends the court made three errors of law: mischaracterized the defendants' intrusion onto the plaintiff's property as negligence; ignored the established factors relevant to punitive damages; and failed to award damages against both defendants. Also plaintiff contends the award of exemplary damages is not supported by substantial evidence.

Punitive damages relate to punishment and are by definition in addition to actual damages and beyond the equivalent of harm done. Nelson v. Restaurants of Iowa, Inc., 338 N.W.2d 881, 885 (Iowa 1983). The court found defendants' actions of continuing to cut the grass, after the boundary was established, to go beyond negligence and evincing legal malice. Under our law an award of punitive damages should be made only on a finding of either legal or actual malice. West Des Moines State Bank v. Hawkeye Bankcorporation, 722 F.2d 411, 414 (8th Cir. 1983). The court based its award on the cost of the materials used by plaintiff in the construction of the cyclone fence. Punitive damages are not allowed as a matter of right, they are discretionary. Rowen v. LeMars Mutual Insurance Co. of Iowa, 282 N.W.2d 639, 661 (Iowa 1979). Amount of exemplary damages is a matter peculiarly within the discretion fo the trier of fact. Grefe v. Ross, 231 N.W.2d 863, 868 (Iowa 1975).

After a careful review of the record we affirm the trial court's award of punitive damages, finding it well within the court's discretion. We note defendants' actions justified punitive damages only with regard to their continued mowing of plaintiff's land. Defendants were at all times cooperative in their actions; this is evinced by their offer to build a cedar fence between the properties. Defendants breached a duty, as adjoining land owners, to plaintiff when they cleared and landscaped plaintiff's property. The trial court recognized this breach and awarded damages in conformity to such findings. We conclude the findings of the trial court are supported by substantial evidence and found upon correct principles of law.

AFFIRMED.