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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed November 20, 1983

MERLE J. LEIGH,

Plaintiff-Appellant,

vs.

MELVIN ERNZEN, JAMES DRISCOLL, MICHAEL DRISCOLL and MERLIN DRISCOLL,

Defendants-Appellees.

3-290
69468

Appeal from Dubuque District Court, Thomas H. Nelson, Judge.

Plaintiff brings a certified appeal from the trial court's judgment awarding him $400 for damages. AFFIRMED.

Michael G. Reilly of Perkins, Sacks and Hannan, Council Bluffs, for plaintiff-appellant.

Robert L. Sudmeier of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for defendant-appellee Melvin Ernzen.

Gary K. Norby and Chad C. Leitch of O'Connor, Thomas, Hammer, Bertsch & Norby, Dubuque, for defendant-appellee James Driscoll.

Rand S. Wonio of Lane & Waterman, Davenport, for defendant-appellee Michael Driscoll.

Joseph J. Bitter, Dubuque, for defendant-appellee Merlin Driscoll.

Heard by Oxberger, C.J., and Snell and Hayden, JJ.

OXBERGER, C.J.

Appellant, Merle J. Leigh, requests us to overturn Grell v. Lumsden, 206 Iowa 166, 220 N.W. 123 (1928) and adopt a new measure of damages similar to that established in Rector, Wardens & Vestry of St. Christopher's Episcopal Church v. C. S. McCrossan, 306 Minn. 143, 235 N.W.2d 609 (1975). We affirm.

Leigh is a contractor and owner of 20 acres of land. He has owned the land for 20 years. He uses 17 acres for a shop and storage area. An unused timber area of 2.97 acres is the focus of this appeal. The defendants negligently cut some of Leigh's trees for firewood. Leigh was granted permission to bring a certified appeal from the trial court's judgment awarding him $400 damages. Leigh claims the trial court erred in determining the only evidence of value of the trees was as firewood and in finding it would not be reasonable to use nursery trees with five-inch trunks as replacement for the trees that were lost.

Leigh contends that Iowa law does not recognize a right of an injured owner to recover loss of enjoyment of trees where such loss exceeds the reduction in fair market value of the property.

The court in Johnson v. Tyler, 277 N.W.2d 617, 619 (1979) recognized the right to recover "loss of enjoyment," but the issue of whether the recovery may exceed the diminution in fair market value was not before the court.

Leigh maintains that Grell limits "loss of enjoyment" to diminution of the fair market value. We do not decide this issue because we are of the opinion that even if the law would permit recovery in excess of diminution in fair market value, Leigh would not prevail.

In order for Leigh to be entitled to restoration of the trees to the condition they were prior to the severance, the occasion for the restoration must be reasonable. See Grell at 169, 220 N.W. at 125.

In Rector the Minnesota court adopted a flexible measure of damages combining the cost of replacement and the before and after value of the land itself. It did not abandon the diminution of land value measurement entirely. The court's goal was a fair and reasonable compensation to the injured land owner.

Even if we applied such a principle to this case, we would not find it reasonable to require replacement of the trees in this situation. Leigh's plans to use the land in question are speculative at most. He testified that during the 20 years he has owned the land he has taken no measures to put his "idea" into operation. He said, " . . . with economic times the way they are, I'm not going to do anything for awhile, that's for sure." Replacing the trees would cost approximately $29,000. Even limiting the recovery to the amount of the prayer, $10,000, is unreasonable in light of the property's before and after value of $10,000.

AFFIRMED.

All judges concur except Snell, J., who dissents.

SNELL, J. (dissenting)

I believe that plaintiff is not entitled to treble damages. In plaintiff's recast petition at law, no request was made for treble damages. In the court's order on pretrial conference, the court acknowledged that the plaintiff had advised the court that the plaintiff was not relying on intentional tort. Plaintiff's trial brief does not request treble damages. During the trial, defendant's attorney told the court that "the matter of punitive damages is not in the case." The treble damages of section 658.4 accomplish the same purpose as punitive damages. See Johnson v. Tyler, 277 N.W.2d 617, 618-19 (Iowa 1979). Thus, because plaintiff did not seek treble damages against defendant, the judgment tripling damages cannot stand. See Cozad v. Strack, 254 Iowa 734, 740, 119 N.W.2d 266, 270-71 (1963). The court lacked jurisdiction to make a finding of willfulness or to find that section 658.4 applies. The order granting treble damages under section 658.4 is void and should be vacated. Appellee does not need to cross-appeal to be entitled to vacation of this void judgment, particularly when it concerns only the amount of damages, which was the issue raised by appellant.

I would reverse the treble damage award.