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Alfred D. Pehrson And Rhea B. Pehrson v. Boyd C. Saderup, Madeline Saderup And Bruce Sader Up : Respondents' Brief

In The Supreme C
of the State of U

ALFRED D. PEHRSON and
RHEA B. PEHRSON,

Plaintiffs-Appe

vs.

BOYD C. SADERUP, MA
SADERUP and BRUCE
SADERUP,

Defendants-Re

RESPONDENT'S

Appeal from the Judg
District Court,
Allen B. Sore

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In The Supreme Court of the State of Utah

ALFRED D. PEHRSON and RHEA B. PEHRSON,

Plaintiffs-Appellants,

vs.

BOYD C. SADERUP, MADELINE SADERUP and BRUCE SADERUP,

Defendants-Respondents.

Case No. 12723

RESPONDENTS' BRIEF

STATEMENT OF THE NATURE OF CASE

This is an action to recover treble damages under Section 78-38-3, Utah Code Annotated, 1953, for injury to realty resulting from the cutting of lilac bushes growing thereon.

DISPOSITION IN LOWER COURT

The trial court awarded Plaintiffs nominal damages which it fixed at $50.00 and then trebled making

judgment for Plaintiffs and against Defendants for $150.00 and costs.

RELIEF SOUGHT ON APPEAL

Defendants seek affirmance of the judgment of the trial court except as to the trebling of damages, and on cross-appeal seek reversal of the judgment trebling damages.

STATEMENT OF FACTS

Defendants controvert the statement of facts set forth in Plaintiffs' Brief. The following statements made therein are inconsistent with the facts:

Plaintiffs' Brief states that the back yard of plaintiffs' property was *well* and *gracefully* landscaped. The record contains no evidence as to the quality of the landscaping.

Plaintiffs' Brief states that the lilacs were cut off at the ground. The record shows that the lilacs were cut approximately a foot from the ground (Transcript page 14, lines 4-5).

Plaintiffs' Brief states that the Defendant Bruce Saderup admitted cutting the lilacs without any verification as to the property line. The record shows that he measured the property (Transcript pages 49, lines 22-28), that he located a rebar which he believed marked

the property line (Transcript page 46, lines 21-25; page 48, lines 10-14), that the lilacs were growing on the west side of an irrigation ditch which appeared to be the property line (Transcript page 46, lines 4-13), that there was a fence on the east side of said ditch along the next lot south of plaintiffs' property (Transcript page 46, line 16-18 and line 29), and the lilacs were hanging over in defendants' parking lot (Transcript page 45, lines 29-30).

Plaintiffs' Brief states that the lilacs would replace themselves with common lilacs and not French hybrid lilacs. Plaintiffs' expert testified that he did not examine the lilacs closely enough to tell whether the new growth would be common lilacs or French hybrid lilacs (Transcript page 31, lines 3-11; page 32, lines 8-11).

Plaintiffs' Brief states that in addition to the cost of purchasing replacement lilacs it would cost $50.00 *each per clump* to prepare the soil and plant them. Plaintiffs' expert testified that it would cost $50.00 to do the entire job of preparing the soil and replanting (Transcript page 31, lines 25-27; page 36, lines 27 and following).

Plaintiffs' Brief states that before the trial the court indicated the case would be tried on the theory of *Brereton vs. Dixon.* This statement is not supported by the record. The Court did, however, call that case to the attention of counsel for their consideration as to its applicability.

Plaintiffs' Brief states that the evidence presented would sustain a judgment of actual damages of from $2,000.00 to $2,400.00. Plaintiffs' expert testified that he could not plant more than seven clumps of mature lilacs in the area damaged (Transcript page 34, lines 20-30; page 35, lines 9-12). Even at plaintiffs' values of $100.00 per clump and $50.00 for planting, Plaintiffs are far short of the amount stated.

Plaintiffs' Brief repeatedly refers to the lilacs as trees. Plaintiffs' expert testified that normally lilacs are considered shrubs (Transcript page 35, line 21-22, 28-30) and that in his literature they are classified as shrubs (Transcript page 36, lines 22-24).

Defendants agree with the statement of facts set forth in Plaintiffs' Brief insofar as it is there shown that Plaintiffs owned real property fronting on University Avenue and Defendants owned real property fronting on First West Street in Provo, Utah; that the west line of Plaintiffs' property and the east line of Defendants' property where their back yards came together were partially adjoining; and that on or near the adjoining property lines lilacs were growing across the west end of Plaintiffs' property which were approximately 15 feet high and probably 35 or 36 years old. Also, that for a distance of 42 feet across Plaintiffs' property (Transcript page 55, lines 8-12) the lilacs were cut approximately one foot from the ground by the defendant Bruce Saderup, acting as the agent

of the defendant Boyd C. Saderup. It is noted that plaintiff Alfred D. Pehrson testified that sixteen clumps of lilacs were cut, but that the photograph of the new growth on the lilacs (Defendants' exhibit no. 6) shows there were probably less than that number, perhaps seven clumps.

To the foregoing facts it should be added that the defendant Bruce Saderup believed the lilacs were on his father's property when he cut them (Transcript page 52, line 12-14), that he believed the irrigation ditch on the east side of the lilacs was the property line (Transcript page 46, line 4-13), that his observations of the physical characteristics of the rear yards led him to believe the ditch was the property line (Transcript page 46, lines 14-30), and that he believed he had located the property line by measurement (Transcript page 49, lines 22-28; page 50, lines 1-5). Also, it is to be noted that the lilacs were not destroyed, but had replaced themselves to the heighth of a man's head by the date of the trial (Transcript page 58, lines 13-23, and Defendants' exhibit no. 6); and that given time they would completely replace themselves (Transcript page 31, line 3; page 39, lines 5-7).

The testimony further shows that the Plaintiff Alfred D. Pehrson was a resident of Monticello, Utah (Transcript page 11, line 14) and had lived there most of his life (Transcript page 19, lines 2-5); that he acquired the Provo property for his children to live in

while attending the University because he could not rent units for them (Transcript page 23, lines 29-30; page 24, lines 1-3); that he did not intend to occupy the property as his residence (Transcript page 23, line 29); that at the time the lilacs were cut he was renting the property to college girls; that none of his family were living there at that time; and that none of his family had lived there since the injury (Transcript page 24, lines 19-26). The Plaintiff also testified that he came up to the property in Provo rather infrequently (Transcript page 13, lines 15-19; page 21, lines 9-13), that the property had not been kept up as well after he purchased it as it was before (Transcript page 24, lines 13-16), that he had done nothing since the lilacs were cut in July, 1970 to restore the privacy which was afforded the property by the lilacs (Transcript page 25, lines 21-30). Plaintiff was letting the lilacs grow back and replace themselves.

ARGUMENT

POINT I.

THE TRIAL COURT CORRECTLY HELD THAT THE MEASURE OF DAMAGES *IN THIS CASE* WAS THE DIFFERENCE IN THE VALUE OF THE REALTY JUST BEFORE AND JUST AFTER THE INJURY, AND THAT THERE WAS NO EVIDENCE

PRESENTED UPON WHICH THE COURT COULD APPLY THAT RULE.

By the great weight of authority, the proper measure of damages for the destruction of or injury to ornamental trees and shrubs is the difference in the value of the land just before and just after the injury. Although this rule is not exclusive, and the cases show an intention to give due regard to all the circumstances, most courts have decided that the before-and-after test usually best compensates an owner for his loss. The rationale for such decisions being that ornamental trees and shrubs generally have no separable and independent value apart from the land; and the value of such trees and shrubs results from their relation to the property to which they are connected and which they ornament. The many cases on this subject are brought together in the annotation: *Measure of damages for destruction or injury to trees and shrubbery,* 161 ALR 549, page 598 under heading V, "Shade and ornamental trees and shrubs"; the annotation supplemental thereto in 69 ALR 2d 1335, page 1366 under heading IV, "Shade and ornamental trees and shrubs"; the ALR 2d *Later Case Service* for 69 ALR 2d at pages 417-418, sections 15 and 16; and the 1971 pocket part thereto at page 110, section 15 and 16.

Under appropriate circumstances, such as where trees have a calculable value separate from the land,

some courts have held that the measure of damages can also be the value of the trees destroyed or injured. This rule was adopted and applied to economically productive fruit trees in the Utah case of *Brereton v. Dixon,* 20 Utah 2d 64, 433 P 2d 3. While fruit, nut and other productive trees may have a calculable value separate from the land, and while trees suitable for timber or nursery stock can have a market value; the ornamental lilac bushes in this case have no such calculable value or market value. The value of these shrubs results from the added value which they give to the realty of which they are a part, and such value is properly measured by the difference in the value of that realty just before and just after the injury.

Plaintiffs presented no evidence that the lilacs had a market value, they presented no evidence from which a value for the lilacs separate from the land could be calculated, and they presented no evidence as to the value of the realty before and after the injury. Plaintiffs' evidence attempted to show the cost of restoring the premises. The question, therefore, is whether or not *in this case* the cost of restoration is a proper measure of damages.

In a few cases, but again only under appropriate circumstances, the courts have held that where ornamental trees and shrubs had been injured or destroyed the injured party could recover the fair or reasonable cost of restoring the premises upon which they stood

to a reasonable approximation of the former condition. The circumstances under which the courts have deemed it appropriate to apply this measure of damages are those where it was shown by the evidence that the injured trees or shrubs had a peculiar value to the owner, that there were reasons personal to the owner for restoring the premises, and that restoration was necessary to the use or planned use of the property. The court found such circumstances to exist in the case of *Maloof v. U.S.* (D.C. Md) 242 F Supp 175, where there was damage to ornamental trees, shrubs and formal gardens. The evidence showed that there were reasons personal to the owner for restoring the property inasmuch as he had established a cultural center where artists could congregate and he could display art treasures and have a private museum, and that the plantings were of paramount importance to his plans. Again, in the case of *Huber v. Serpico,* 71 NJ Super 329, 176 A 2d 805, the court allowed as damages the fair cost of restoring the property to a reasonable approximation of its former condition where it found that the shade and ornamental trees had a peculiar value to the landowner. In this case the court found that the premises were occupied by the landowner as his residence and the wooded area injured possessed a peculiar aesthetic and ornamental quality insofar as plaintiff's enjoyment of it was concerned. The court arrived at a similar decision in the case of *Samson Construction Co. v. Brusowankin,* 218 Md 458,

147 A 2d 430, 69 ALR 2d 1326, which case also collects and cites a number of other cases relating to the same subject. In that case, lots which had been bought and held by plaintiffs' as sites for their homes because of the beautiful shade trees on them were injured by removal of the trees. The court found that the plaintiffs had reasons personal to them for restoring the lots as nearly as possible to their original condition, and that such restoration was necessary to plaintiffs' planned use of the property. In another case where the presence of trees was found to be essential to the planned use of the property for a homesite in accordance with the taste and wishes of the owners, the court stated that the owner could be awarded as damages the fair cost of restoring his land to a reasonable approximation of its former condition, if such restoration was practical. *Thatcher v. Lane Construction Co.,* 21 Ohio App 2d 41, 50 Ohio Ops 2d 95, 254 NE 2d 703.

In the instant case, the plaintiff Alfred D. Pehrson testified that he never intended to occupy the premises as his residence (Transcript page 23, line 29), that he purchased it so his children could have a place to live while attending the University in Provo because he could not rent units for them (Transcript page 23, lines 29-30; page 24, lines 1-3), that at the time of the injury the property was being rented to college girls (Transcript page 24, lines 20-22), that he resided in Monticello, Utah, and only came up occasionally to look after the

property (Transcript page 13, lines 15-19; page 21, lines 9-13), and that he had done nothing in over a year to restore the privacy which the lilacs afforded the property (Transcript page 25, lines 21-30). It appears that he was content to let the lilacs grow back and replace themselves. There is no evidence showing that plaintiffs had reasons personal to themselves for restoring the premises, or even that they intended to restore the same; no evidence that restoration was necessary to their use or any planned use of the property; and no evidence that the lilac bushes had any peculiar or unique value to the plaintiffs personally. On the other hand, the evidence shows that plaintiffs were absentee landlords who held the property as a rental unit at the time of the injury, and the record shows no intentions on the part of plaintiffs to change that use. The value of the property to the plaintiffs is basically economic. The property is an investment, an income producing asset. Under these circumstances, it is respectfully submitted that the measure of damages is not the cost of restoration, but rather the depreciation in the value of the realty caused by the injury; and that the depreciated value is properly measured by the difference in the value of the realty just before and just after the injury as was held by the trial court in this case.

Defendants acknowledge that where property has been injured or destroyed by a wrongful act, the desired objective is to ascertain as accurately as possible the

amount of money that will fairly and adequately compensate the owner for his loss. Nevertheless, this determination must be made pursuant to proper rules of law for measuring such damages, and upon proper facts pleaded and proved in the action. For the reasons stated above, the rule for measuring damages contended for by plaintiffs in this case is not applicable. The facts and circumstances under which the courts have awarded costs of restoration as damages in the few cases where that rule was found to be appropriate were neither alleged or proved by the plaintiffs in this case. And even were the rule applicable, the amount of damages sought would be unfair and unreasonable. Plaintiffs' expert clearly testified that no more than seven clumps of mature lilacs could be replaced in the area in which the lilacs were injured (Transcript page 34, lines 20-30; page 35, lines 9-12). And even at the replacement cost stated by plaintiffs' expert, the price of seven clumps of lilacs falls far short of the damages sought. Furthermore, the possibility of restoration using mature lilacs would appear impractical if not impossible. Plaintiffs' expert testified that in all his experience he had never purchased a lilac of the size needed, and in fact that he hadn't been able to (Transcript page 32, lines 27-28). He also stated that such lilacs were not grown by nurserymen or sold on the market, and would have to be acquired from some location such as plaintiffs' premises; presumably from someone who didn't want them

and was willing to sell. (Transcript page 33, lines 1-6). The likelihood of acquiring such lilacs appears extremely remote; and the cost of acquisition testified to by plaintiffs' expert was pure guesswork by his own admission (Transcript page 32, lines 24-26), the actual costs lying outside his experience and apparently outside his knowledge. An award of damages should not be based on this type of speculation or uncertainty.

Plaintiffs were afforded the opportunity to present their contentions to the trial court, and none of the evidence which they offered was excluded. They elected not to present evidence as to the value of the realty before and after the injury, and they offered no evidence that the lilacs had a market value or a value calculable separate and apart from the land. Plaintiffs further failed to establish by their evidence the circumstances required by the courts where restoration costs have been made a proper measure of damages, to-wit: that the injured shrubs had a peculiar or unique value to them, that they had personal reasons for wanting to restore the premises, and that restoration was necessary to their use or planned use of the property. Nor did plaintiffs show that it was practical or possible to restore the realty to a reasonable approximation of its former condition at a reasonable and fair cost, or establish the restoration costs with any degree of certainty. They should not now be heard to complain because the trial court award-

ed them only nominal damages. The judgment of the trial court on this point should be affirmed.

POINT II.

THE TRIAL COURT ERRED IN TREBLING THE AMOUNT OF DAMAGES ASSESSED IN THIS CASE.

Treble damages are highly penal, and even where provided for by statute should be awarded only where the wrongdoer intentionally acts wilfully, wantonly or maliciously. In this case the trial court found that there was no evidence that the cutting of the lilacs was wilfull, wanton or malicious (Findings of Fact No. 4); and that the Defendants' mistakenly thought said lilacs were growing on their property (Findings of Fact No. 5).

In discussing the question of a defendant's purpose or intent as effecting the recovery of multiple damages for trespassing, it is stated in 52 Am Jur 2d, Logs and Timber, section 136 at page 102, that "In a number of jurisdictions, although the statute contains no express provision, the courts have recognized that the cutting or carrying away of trees must contain an element of wilfullness to render the trespasser liable for increased damages or the prescribed penalty." The Arkansas court in construing that state's statute in *Callaway v. Perdue*, 238 Ark 652, 385 SW 2d 4, 13 ALR 3d 1300, at pages

1308-1309 of the ALR 3d report, stated that "It is true that our statutes relative to treble damages (the pertinent parts of which have already been quoted in Footnote 3) does not actually use any words which require the trespasser to hold an evil intent or act in bad faith before being liable for the penalty. Yet, our cases make clear that a necessary element to justify treble damages is intent of wrongdoing, though such intent may be inferred from the carelessness, recklessness, or negligence of the offending party."

Again, in 52 Am Jur 2d, Logs and Timber, section 137 at page 103, it is stated that "It is generally held that where timber is cut or carried away under a bona fide mistake of fact, as, for example, where the trespasser believes that he is on his own land or the lands of another upon which he is authorized to go, the penalty statutes do not apply, even though they contain no exculpatory provisions." Cases holding that where a trespass is the result of a bona fide mistake of fact the multiple damage and penalty statutes do not apply are collected in an annotation found in 111 ALR 79, under heading IV, subsection (a) at page 92 collecting cases under statutes containing no exculpatory provisions, and subsection (b) at page 94 collecting cases under statutes containing exculpatory provisions.

The evidence in this case showed no bad faith or evil intent on the part of the defendants in cutting the lilac bushes. On the other hand the evidence does show

that there was a mistake in concluding that an irrigation ditch was the boundary line between the parties' properties, and that the defendant Bruce Saderup thought the lilacs were growing on his father's property when he cut them. Defendants are aware that there are cases which have trebled damages where there was no showing of bad faith or evil intent. Nevertheless, defendants would urge the court to follow the rule requiring a showing of wilfulness, wantoness or maliciousness before the highly penal provisions of Section 78-38-3, Utah Code Annotated, 1953, are made applicable. Defendants would further urge the court to follow the rule making a defendant liable only for damages actually proved and not treble damages under the statute where the injury to trees results from a bona fide mistake of fact such as a mistake as to the position of the boundary line.

In addition to the foregoing, there is reason to believe that the statute trebling damages may not be applicable in this case if the lilacs are considered shrubs (which is their proper classification) and the statute is strictly construed because of its highly penal nature. The terms "wood" and "underwood" do not necessarily include shrubs when construed in the context of the statute. Section 78-38-3, Utah Code Annotated, 1953, would appear to be concerned primarily with trees as its heading indicates. The provisions of the statute first deal with the "cutting down" or "carrying off" of any

wood or underwood, tree or timber, and then cover the "girdling" or "otherwise injuring" of any tree or timber. The terms "girdling" or "otherwise injuring" are applicable only to trees or timber, while the term "cutting down" is made applicable to any wood or underwood, tree or timber; but "cutting down" would seem to relate to the destruction of the underwood, tree or timber rather than just injury to it. In this case the lilac bushes were severly pruned to within a foot of the ground, but were not destroyed. In time they would replace themselves, but trees obviously do not replace themselves when cut down. It is the term "otherwise injures" that is appropriate to the cutting of the lilacs in this case, but under the statute that term is applicable only to trees or timber and not to wood or underwood.

CONCLUSION

The trial court was correct in holding that *in this case* the proper measure of damages was the difference in the value of the realty just before and just after the injury, and that there was no evidence presented upon which the court could apply that rule. Plaintiffs having failed to prove the amount of their actual damages by proper evidence, the trial court properly awarded nominal damages to Plaintiffs. The judgment of the trial court in that respect should be affirmed.

The trebling of damages by the trial court under the provisions of Section 78-38-3, Utah Code Annotated,

1953, where there is reason to question the applicability of that statute to this case, where no evidence was shown that the cutting of the lilac bushes was wilfull, wanton or malicious, and where the defendants mistakenly though that the lilacs were growing on their property, was not proper. In that respect, the judgment of the trial court should be reversed.

Respectfully submitted,

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