STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Michael D. Dulaney and
Deborah H. Dulaney,
Plaintiffs Below, Petitioners

FILED
March 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 101412 (Hancock County 07-C-210)

Hus Drizake,
Defendant Below, Respondent

MEMORANDUM DECISION

This appeal arises from an order entered by the circuit court following a bench trial in this action seeking damages for the removal of trees from the property of petitioners, Michael Dulaney and his wife, Deborah Dulaney. The appeal was timely perfected by counsel and a portion of the record was designated for the purpose of the appeal. Respondent Hus Drizake has filed a timely response. Petitioners seek, *inter alia*, a ruling from this Court directing the circuit court to include the cost of replanting and nurturing the trees as a measure of damages so as to reflect their full value at the time they were cut down and to award treble damages on those amounts pursuant to West Virginia Code §61-3-48.

This Court has considered the parties' briefs and the record designated on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On March 29, 2007, respondent Hus Drizake cut down apple trees on property owned by the Dulaneys, which adjoined Mr. Drizake's property. The trees were growing near the boundary line between the two properties. The Dulaneys filed this action against Mr. Drizake seeking damages for the destruction of the apple trees and asserting that they had only given permission for the removal of one apple tree. The Dulaneys sought damages under

West Virginia Code §61-3-48, which makes it unlawful for a person to enter upon another person's property without written permission in order to cut down and remove trees.

A bench trial was held before the circuit court on March 4, 2010, during which the parties presented evidence, including both lay and expert testimony. Mr. Drizake testified that he had oral permission from Mr. Dulaney to cut down the trees at issue because they were rotten and not producing fruit.[1] Mr. Dulaney testified that he had only given oral permission for the removal of one tree. The circuit court concluded that the evidence was sufficient to prove that Mr. Drizake had cut down four apple trees belonging to the Dulaneys without their permission.

Turning to the compensation to the Dulaneys for the removal of the four trees, the circuit court, sitting as the trier of fact, found that Mr. Drizake's expert witness was more credible than the Dulaneys' expert, and that Mr. Drizake's expert opined that the cost to replace one of the apple trees was between $400 and $450. The circuit court found that there was no credible evidence submitted that would entitle the Dulaneys to any monetary damages beyond the average of $425 per tree[2] and awarded the Dulaneys $1,700. Regarding the request for treble damages under West Virginia Code §61-3-48, the circuit court reasoned that because Mr. Dulaney had given oral permission for Mr. Drizake to enter upon the Dulaneys' property and cut down at least one apple tree, the Dulaneys had waived any statutory requirement that Mr. Drizake have written permission before entering upon the Dulaneys' property.

"'In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.' Syllabus Point 1, *Public Citizen, Inc. v. First National Bank*, 198 W. Va. 329, 480 S.E.2d 538 (1996)." *Rosier v. Rosier*, No. 35522, 2010 WL 4781428, *12-13 (W.Va. Nov. 23, 2010) (*per curiam*).

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[1]While there was a dispute at trial as to the number of trees removed, the circuit court concluded that the total number of trees allegedly wrongfully cut down was four. There was also conflicting testimony as to the condition of the trees that were cut down in terms of assessing value.

[2] The Dulaneys argue that the circuit court failed to include the cost to deliver, plant, nurture, and replace the trees in place.

Applying this deferential standard of review, this Court cannot find clear error in the circuit court's factual findings, error in its legal conclusions, nor an abuse of discretion in its ultimate disposition. For these reasons, we affirm.

Affirmed.

ISSUED: March 11, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh