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IN THE SUPREME COURT OF THE STATE OF IDAHO

KENNETH J. GOOD and JILL GOOD,

Husband and wife,

Plaintiff - Respondents,

v.

LARRY W. SICHELSTIEL and MELANIE K. SICHELSTIEL, husband and wife,

Appellant - Defendants

DISTRICT COURT NO: CV 2010-1862

DOCKET NO.: 38997-2011

MAR - 8 2012

BRIEF OF THE APPELLANT

APPEARANCES

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AUTHORITIES ON APPEAL

1. Weitz v. Green, 148 Idaho 851, 230 P.3d 743 (Idaho Supreme Court 2010)
2. Threlfall v. Town of Muscoda, 190 Wisc. 2d 121, 527 N.W. 2d 367, 372 (Wisc. App. 1994)
3. Orndorff v. Christiana Community Builders, 217 Cal. App. 3d 683, 687, 266 Cal. Rptr. 193 (Cal. Ct. App. 1990)

FACTS ON APPEAL

The Plaintiff's expert witness, Mr. Paul L. Akker, a certified arborist, testified at length during the trial about the trees that Defendant Larry W. Sichelstiel cut down on the Plaintiff's property. Appeal Transcript, pp. 177-200, p. 181. Mr. Akker admitted that the trees that were cut down were wild trees, and it was undisputed throughout the trial that the trees were grown wild from seed, that nobody planted and were growing without any human intervention. Id. P. 197. Ll. 13-15. Akker admitted that most of the trees that were cut down were not trees that are typically used in landscaping. Id. P. 198, Ll. 6-10. Mr. Akker further admitted that the trees had little, if any economic value. Id. P. 198, Ll. 22-25. Mr. Akker testified that this wild stand of economically worthless trees were growing too close together. Id. P. 199, Ll. 3-16. Akker admitted that there would be no way of restoring these wild trees to the condition they were in prior to be cutting down. P. 199, Ll. 15-20. Many, if not most of the trees that Larry Sichelstiel cut down were already dead. Id. Pp. 217, Ll. 1-21. Mr. Sichelstiel scrupulously only cut down trees that he believed was on his side of the fence that he believed was the property line, demarcated by a fence that Goode's built, between the plaintiff's property and Mr. Sichelstiel's property. P. 219, Ll. 1-22. It was undisputed that Mr. Sichelstiel's purpose in cutting down the junk trees and unsightly underbrush on an isolated "triangle" of land was to build a horse corral. Id. P. 218, Ll. 20-25. 219, Ll. 1-8.

The District Court adopted the Findings of Fact and Conclusions of Law proposed by the Defendants, including the following paragraph:

10. The trees and vegetation maintained on the Property by the Goods did not have substantial timber value and the destruction of trees and vegetation by Defendant Larry Sichelstiel on the Property did not materially diminish the fair market value of the fifteen-acre homesight of the Goods.

Clerks Record on Appeal, P. 69.

Melanie Sichelstiel testified that the Plaintiff's predecessor in interest had built a fence that the Defendants had assumed was the property line and that the trees that Mr. Sichelstiel had cut down were on the Sichelstiel side of the property line. Id. P. 204. Ll. 1-25. Later on in the relationship between the Plaintiffs and Defendants, Defendant Larry Sichelstiel observed the Plaintiffs. Pp. 209, Ll. 1-25, 210, Ll. 1-25.

Following the Court trial, the District Court entered Judgment for the Plaintiffs in the amount requested of $49, 769.82 and attorney fees and costs in the amount of $21, 944.00. This appeal was timely filed, and this appeal follows.

LEGAL ANALYSIS

The District Court based its decision in awarding the costs of restoring under the mistaken authority of Weitz v. Green, 148 Idaho 851, 230 P.3d 743 (Idaho Supreme Court 2010). In Weitz, the issue centered around a disputed property line, where the Defendants, during *ongoing litigation specifically over the issue of the property line*, proceeded to cut down timber and build a fence in order to obtain an advantage in the litigation. 230 P.3d 755. Nothing in the record of the instant case is analogous to the Court's finding in Weitz that Defendant Larry Sichelstiel was "making a bold physical attempt to gain, or regain, possession or control of a real property interest, by demolishing or erecting gates or fences, bulldozing land, etc...." 230 P.3d

756. Here, there was no ongoing litigation regarding the property line between the Plaintiff's and the Defendant's property. And it is undisputed that there was no loss in value to the Plaintiff's property. Nor did Mr. Sichelstiel damage fences or gates. Here the District Court's Order granted a windfall financial boon to litigants who had done little work to maintain wild trees that were in essence, unsightly weeds, many of which were dying.

In Weitz, the Court carefully enumerated the types of trees that were eligible for cost of restoration, and limited it to "the wrongful destruction of ornamental or shade trees," neither of which would include the trees here that were cut down some distance from the Plaintiffs home and very close to the Defendants' home. 230 P.2d 757. The public policy behind factoring in the costs of replacement of restoration in calculating damages associated with the injury to the land, said the Weitz court, was as follows:

"An Owner of real estate has a right to enjoy it according to his own taste and wishes, and the arrangement of buildings, shade trees, fruit trees and the like may be very important to him….." Id., citing Threlfall v. Town of Muscoda, 190 Wisc. 2d 121, 527 N.W. 2d 367, 372 (Wisc. App. 1994). Here, the "arrangement" could be commonly meant to be where the owner had actively or purposely planted "shade trees or fruit trees," NOT the situation as here where wild and unsightly trees of no value had taken root, and which were not the type of trees that would be normally used for landscaping, according to the Plaintiff's own expert witness.

Furthermore, the Weitz court warned against precisely the outcome that was reached in this case:

"….*to the extent that a property owner is allowed to recover costs of restoration that are greater than the diminution in market value, there is the possibility that the owner will receive a*

monetary windfall by choosing not to restore the property and by selling it instead, profiting to the extent that restoration costs recovered exceed the diminution of market value." 230 P.2d 759. Here, it is undisputed that there was absolutely no loss in value of the land and the award and attorney fees granted were grossly in excess of the loss in market value, which here was zero.

Additionally, the Weitz court cited Orndorff v. Christiana Community Builders, 217 Cal. App. 3d 683, 687, 266 Cal. Rptr. 193 (Cal. Ct. App. 1990) for the proposition that restoration or repair costs may be awarded, even where they exceed the diminution of market value "if" there is a reason personal to the owner for restoring the original condition, or "where there is a reason to believe that the plaintiffs will, in fact, make the repairs." (quotation marks in original). Nothing in the record substantiates that the plaintiffs here were actually going to spend the money to restore these wild trees in the condition they were in at the time they were cut.

Finally, in Weitz, the Defendants were on constructive notice that the Plaintiffs intended to maintain the forest in substantially the same state due to the fact that restrictive covenants had been filed with the County, reading in important part as follows:

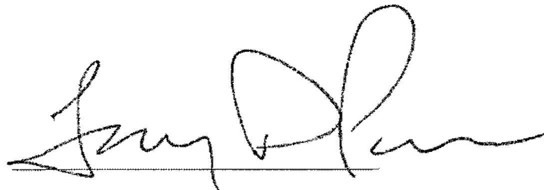
"retention of the existing forest is of vital importance to maintaining the natural environment of the area and is viewed as a primary objective of these Restrictive Covenants." Id., at 230 P. 3d 759.

No such covenants were in place to warn Larry Sichelstiel that the Plaintiff's primary objective with their property was the maintenance of a patch of wild and dying trees of no economic value.

CONCLUSION

The District Court's decision was based on an erroneous interpretation of Idaho law and granted to the Plaintiffs an excessive windfall precisely in opposition to the policies expressed under Idaho authority. For all of the reasons cited, this Court must REVERSE the order of the District Court and remand for further proceedings.

DATED this 15 day of February, 2012



LARRY D. PURVIANCE

ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served as follows on the 15th day of February, 2012, to the following:

Respondent's attorney
ROBERT E. COVINGTON
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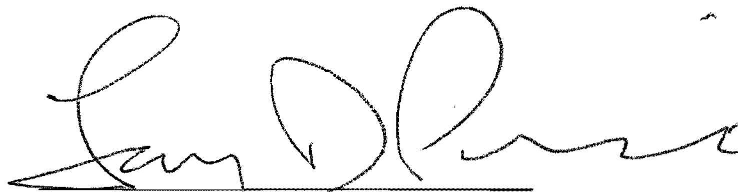

Larry D. Purviance