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Good v. Sichelstiel Respondent's Brief Dckt. 38997

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IN THE SUPREME COURT OF THE STATE OF IDAHO

KENNETH J. GOOD and JILL GOOD,)
husband and wife,)

Plaintiffs-Respondents,)

vs.)

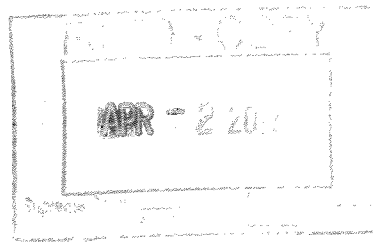
LARRY W. SICHELSTIEL and)
MELANIE K. SICHELSTIEL,)
husband and wife;)

Defendants-Appellants.)

RESPONDENTS' BRIEF

SUPREME COURT DOCKET NO.
38077-2011

District Court Docket No. CV 10-1862



Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Kootenai

Honorable John T. Mitchell
District Judge, Presiding

Robert Covington
8884 North Government Way
Suite A
Hayden, ID 83835
Tel. 208-762-4545
Fax: 208-762-4546
Attorney for Respondents

Larry D. Purviance
5920 N. Government Way, #4
Dalton Gardens, ID 83815
Tel: 208-635-5388
Fax: 208-635-5389
Attorney for Appellants

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STATEMENT OF THE CASE

1. Nature of the Case.

This appeal arises from a judgment by the district court in favor of the plaintiffs, Kenneth J. Good and Jennifer Jill Good, hereinafter ‘Goods’, in a trespass case brought under Idaho Code Section 6-202 against the defendants, Larry W. Sichelstiel and Melanie K. Sichelstiel, husband and wife, hereinafter “Sichelstiels”. Goods and Sichelstiels were and remain neighbors sharing a common boundary line in a rural area of Kootenai County. Goods claimed that Larry Sichelstiel intentionally and willfully trespassed upon their property on multiple occasions between June 25, 2009 and June 30, 2009. While trespassing, Larry Sichelstiel cut down not less than twenty-nine trees and other vegetative matter that had been growing on Goods’ property for many years and had provided to them an important visual and auditory barrier between themselves and Sichelstiels. The trial court found that Larry Sichelstiel trespassed and cut down trees and vegetative matter as claimed by Goods causing damage to Goods of \$16,589.84 as measured by the costs of restoring the trees and vegetation cut down by Sichelstiel. The trial court found that Sichelstiels’ conduct was willful, intentional and without permission or lawful authority and pursuant to I.C. 6-202 trebled the damage award. Attorney fees were awarded to Goods and judgment was then entered in the total amount of \$71,713.82.

2. Course of Proceedings Before the Trial Court.

On March 5, 2010, Goods filed suit against Sichelstiels in Kootenai County, Idaho, seeking to recover damages, trebled and attorney fees incurred in prosecuting the litigation arising from multiple trespasses, including timber trespass, by Larry Sichelstiel onto

Goods' property between June 25, 2009 and June 30, 2009, in violation of Idaho Code Section 6-202 and a certain judgment that had been entered in a prior trespass case between Goods and Sichelstiels known as Kootenai County Civil Case No. 07-5327, the terms of which prohibited trespass by Sichelstiels upon Goods' property. An answer was filed by Sichelstiels on May 27, 2010 denying the allegations of Goods' complaint. The case was tried before Honorable John T. Mitchell without a jury on June 20-21, 2011. Judge Mitchell entered Findings of Fact and Conclusions of Law on June 22, 2011 finding Sichelstiels liable to Goods for damages arising from Sichelstiels' trespasses upon Goods' land in violation of Idaho Code Section 6-202. Damages were trebled as authorized by 6-202 and attorney fees were awarded to Goods. On August 3, 2011, an Amended Judgment was entered awarding total damages to Goods against Sichelstiels in the amount of \$49,769.82 and attorney fees of \$21,944. An Amended Notice of Appeal was filed in this matter by Sichelstiels on August 8, 2011.

3. Statement of Facts.

Goods own and live upon a fifteen acre parcel of real property in Kootenai County at 6277 South Foxhaven Road, Coeur d'Alene, Idaho. Tr. , p. 78, ll. 7-8. Sichelstiels live on a twenty-nine acre parcel that is below and adjacent to the north boundary of Goods' parcel. In 1990 Sichelstiels sold the property occupied by Goods to Lockwoods, the immediate predecessors in interest of Goods. Goods purchased the property from Lockwoods in 1993 and constructed their residence on the parcel in 1996. Goods' parcel is accessed via a gravel roadway that passes through Sichelstiels' property, passing within one hundred feet of Sichelstiels' home. Sichelstiels granted an easement that ran with the

land over the roadway to Lockwoods. The landscape in the entire area is rural, partially wooded and partially pastured.

Since June, 2007, Goods have been engaged in efforts in and out of court to end trespasses upon their property and harassment of their persons by Sichelstiels. Prior to June, 2007, the Goods' travel route along the access road through Sichelstiels' property was never gated. In June, 2007, without notice or authorization, Sichelstiel erected two gates across the access road, one of which was in the vicinity of the Good/Sichelstiel boundary. The effect of the gates was to obstruct Goods' historic use of the access road and created a wintertime hazard as the roadway is very steep at that location. The gates served no reasonable purpose. On June 28, 2007, Goods consulted counsel and then sent a demand letter to Sichelstiel asking that the gates be removed and other trespasses by Sichelstiel cease. In the absence of a response from Sichelstiel, Goods filed suit against Sichelstiels in Kootenai County Civil Case Number 07-5327 seeking removal of the gates and an injunction against trespass by Sichelstiel. On September 12, 2008, Judge Haynes entered Judgment against Sichelstiel granting the requested relief and damages. Tr., p. 98, ll. 8. Promptly after service of the Judgment, Sichelstiel erected tall chain link fencing on both edges of the access road in the vicinity of the common boundary. The effect of the fencing was to inhibit Goods' use of the access road and, especially in wintertime, restrain snow removal and create a hazard to Goods. Goods brought a motion to enforce the judgment seeking an order in the case from Judge Haynes to remove the fencing. In December, 2008, in open court before Judge Haynes, Sichelstiels agreed to remove the fencing. On June 24, 2009, Judge Haynes entered an Order Enforcing Judgment requiring Sichelstiels to remove from Goods' property personal property that belonged to Sichelstiels

that had not been removed as required by the September 12, 2008 Judgment. Tr., p. 104, ll. 5. Sichelstiels were served with the Order Enforcing Judgment on or about June 25, 2009.

On June 26, 2009, Larry Sichelstiel trespassed onto Goods' property at a location near the access road and began to cut down trees, brush and all vegetation in a triangular shaped area approximately eighty feet long by an average of fifteen feet wide. Tr., p. 126, ll. 5-6. While Goods were traveling on the access road, they observed Larry Sichelstiel trespassing on their property and cutting down trees. Goods called the Kootenai County Sheriff who sent deputies out to the site to intervene. Tr., p. 107, ll. 14-22. On June 30, 2009, Goods again observed Larry Sichelstiel on their property cutting down their trees. Tr., p. 111, ll. 1-17. They again called the Kootenai County Sheriff who sent deputies out to the site to intervene. In November and December, 2009, Larry Sichelstiel continued to harass and threaten Goods and again erected fencing along one edge of the access road near the Good/Sichelstiel boundary which again restrained snow removal and created a wintertime hazard. Goods brought another motion to enforce the September 12, 2008 judgment against Sichelstiel. On August 5, 2010, Judge Haynes entered another Order Enforcing Judgment requiring Sichelstiel to remove the fencing that he installed in November, 2009.

Between June 25, 2009 and June 30, 2009, Larry Sichelstiel cut down and removed twenty-nine trees ranging in size from one to ten inches in diameter along with other vegetation on Goods' property. Tr., p. 184-185. The Goods maintained the trees and vegetation for aesthetic reasons and as a visual barrier between their home and a hostile neighbor. The current cost to replace the trees Sichelstiel cut down is \$12,815 according to

Goods' expert, Paul Akker. Tr., p. 194, ll. 11. After restoration of the trees Sichelstiel cut, the Goods will need to irrigate the new stand for a period of years to enhance survival of the stand. Due to the risks of tree restoration, it is expected the twenty-five percent of the initially restored trees will die and require further replacement. Tr., p. 196, ll. 14. In a few years' time, the Goods may have the vegetation barrier between themselves and Sichelstiel that existed in June, 2009.

Larry Sichelstiel knew that he did not own the land and that the Goods did own the land on which he trespassed to cut down trees belonging to the Goods. The issue had been raised in the above referenced civil case, Kootenai County Case Number 07-5327. Tr., p. 19, ll. 2-6. Among a series of contexts in which the location of the boundary was raised was the judgment in that matter, a copy of which was attached as an exhibit to the complaint in this case. The judgment specifically defined the boundaries by metes and bounds and included a drawing depicting the boundary line as well as a fence that ran across Goods property in the area where the timber trespass occurred. Larry Sichelstiel admitted that he received a copy of the judgment in September, 2008 and consulted with an attorney regarding that judgment. Tr., p. 24.

ISSUES ON APPEAL

Appellants' brief does not comply with the provisions of IAR 35(a) in that the brief fails to explicitly identify any issues presented on appeal. Goods infer from Appellants' brief that the factual determinations of the trial court are not in issue on this appeal as the brief contains no suggestion that any factual determinations are not supported by substantial and competent evidence. In the event that Sichelstiels subsequently contend that factual determinations of the trial court are in issue, Goods request that they be provided a fair opportunity to address any such contentions. Similarly, Goods infer from Appellants' brief that the issue they raise on appeal is that the trial court erred in applying the law of Idaho as articulated in Weitz v. Green, 148 Idaho 851, 230 P.3d 743 (2010), to the facts of this case. In the event that Sichelstiels subsequently contend that they have raised other issues on appeal, Goods request that they be provided a fair opportunity to address any such contentions.

ADDITIONAL ISSUES ON APPEAL

Goods request that they be awarded their attorney fees on appeal. Goods claim attorney fees on appeal on the grounds that Idaho Code Section 6-202 authorizes an award of attorney fees under the circumstances of this case, Sichelstiels have raised no substantial or credible challenge to the factual determinations of the trial court and their claims that the trial court erroneously interpreted the law of Idaho in this case are so much without merit as to make this appeal frivolous and unwarranted.

ARGUMENT

1. Standard of Review.

The standard of review to be employed by the appeals court in this case wherein the trial court acted as a fact-finder is stated in Lettunich v. Lettunich, 141 Idaho 425, 111 P.3d 110 (2005) as follows:

When we consider an appeal from a district court sitting as the fact finder, we do so through our abuse of discretion [lens]; that is, we examine whether the trial court (1) rightly perceived the issues as ones of discretion; (2) acted within the outer boundaries of that discretion and appropriately applied the legal principles to the facts found; and, (3) reached its decision through an exercise of reason. Sun Valley Shopping Ctr. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). In conducting our review, we liberally construe the district court's findings in favor of the judgment. Ervin Constr. Co. v. Van Order, 125 Idaho 695, 699, 874 P.2d 506, 510 (1993). We will not disturb a district court's findings of fact unless they are clearly erroneous. A court's findings of fact are not clearly erroneous if they are supported by substantial and competent, though conflicting, evidence. Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp., 118 Idaho 116, 794 P.2d 1389 (1990); Murgoitio v. Murgoitio, 111 Idaho 573, 576, 726 P.2d 685, 688 (1986); I.R.C.P. 52(a).

141 Idaho 425, 429, 111 P.3d 110, 114 (2005). "This Court will not substitute its view of the facts for that of the trial court." Justad v. Ward, 147 Idaho 509, 511,

211 P.3d 118, 120 (2009). “Questions of credibility and the weight of the evidence are matters uniquely within the province of the trial court.” Treasure Valley Plumbing and Heating, Inc. v. Earth Res. Co., 115 Idaho 373, 376, 766 P.2d 1254, 1257 (Ct. App. 1988). “The findings of the trial court on the question of damages will not be set aside when based upon substantial and competent evidence.” Akers v. Mortensen, 147 Idaho 39, 43-44, 205 P.3d 1175, 1179-80 (2009). Weitz v. Green, 148 Idaho 851, 230 P.3d 743, 749 (2010).

2. Analysis.

In the absence of a statement of issues on appeal by Sichelstiel, Goods’ response to Appellants’ Brief relies upon Goods’ inferences from the Legal Analysis that has been presented by Sichelstiels. To the extent that Sichelstiels have raised issues on appeal that are not properly identified by Goods from Appellants Brief, Goods request an opportunity to brief any such issues in briefing to be submitted subsequent to any Reply Brief that Sichelstiels may submit.

No Factual Determinations are Clearly Erroneous

Sichelstiels’ brief does not explicitly contend nor substantiate a claim that any of the factual determinations of the trial court are clearly erroneous. Hence, there is no basis on which the reviewing court should disturb the Findings of Fact that were filed in the case by the trial judge.

Controlling Precedent

The trial court correctly determined that *Weitz* is controlling precedent in the instant case. Sichelstiels presented to the trial court the arguments that they have presented in the brief to the appellate court in support of their contention that the instant case is distinguishable in a material manner from *Weitz*. The trial court found that it was not persuaded by Sichelstiels' efforts to distinguish *Weitz* and concluded "Those are distinctions without a difference". R., p. 88. The trial court made a specific finding of fact that Larry Sichelstiel did not commit an innocent or negligent mistake when he went onto the Goods' property and cut down the trees referenced on Trial Exhibit 29. R., p. 84. This finding of fact fits squarely within the precedent established by *Weitz* as found by the Supreme Court. *Id.*, p. 756. Sichelstiels' argue that there was no ongoing litigation regarding the property line between Sichelstiels and Goods and therefore that the instant case is distinguishable from *Weitz*. This argument is factually wrong as specifically found by the trial court in its Findings of Fact. R., pp. 84-85. *Weitz* is clearly controlling precedent for the instant case.

Trial Court Properly Applied Law

Sichelstiels argue that the trial court failed to properly interpret and apply the law of *Weitz*. Sichelstiels arguments demonstrate that Sichelstiels do not understand the plain language of *Weitz*. An example is Sichelstiels' argument that restoration costs may be used as a measure of damages only in cases where there is "wrongful destruction of ornamental or shade trees" and therefore that native trees and vegetation are beyond the scope of *Weitz*

authority for restoration costs. *Weitz* does not limit restoration costs damages to fruit and shade trees, either explicitly or implicitly. There is no evidence in the record that the trees in *Weitz* were fruit or shade trees. They appear to have been wild trees growing in the forest, very much like the trees in the instant case. A second example is Sichelstiels' argument that *Weitz* requires a finding that the plaintiffs "intend to spend the money to restore the wild trees in the condition they were in at the time they were cut." Appellants' Brief, p. 6. Sichelstiels seem not to note that the language in *Weitz* citing *Orndorff v. Chrisitiana Community Builders*, 217 Cal. App. 3d 683, 687, 266 Cal. Rptr. 193 (Cal. Ct. App. 1990) which Sichelstiels quote in their brief is written in the disjunctive, not the conjunctive, so that either a personal reason as found by the trial court for Goods or a finding that plaintiff will make the repairs qualifies for an award of restoration costs as damages. The trial court properly applied the principles of *Weitz* in awarding restoration costs damages on the facts of this case in which it had determined that the trees and vegetation did not have substantial timber value, the value of Goods' property was not materially diminished and the trees and vegetation were maintained for their personal and aesthetic values to Goods. R., p. 87.

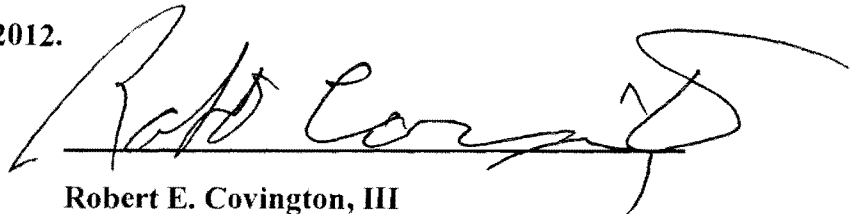
Attorney Fees on Appeal

With respect to attorney fees on appeal, the Court in *Weitz* awarded attorney fees on appeal pursuant to Idaho Code Section 6-202. Because 6-202 and *Weitz* are controlling authority in this case, it is appropriate that attorney fees on appeal likewise be awarded in this case to Goods.

CONCLUSION

Sichelstiels make no showing or argument that any of the factual determinations in this matter by the trial court are clearly erroneous. On the basis of the facts as determined by the trial court, its determination of liability under Idaho Code Section 6-202 and award of restoration costs damages under *Weitz* are properly sustainable. Similarly, based upon the trial courts' determination that Larry Sichelstiel's repeated trespasses upon and removals of trees and vegetation from Goods' property were not negligent and were willful and intentional, its award of treble damages and attorney fees to Goods from Sichelstiels are properly sustainable. Goods respectfully request that the judgment of the trial court be fully affirmed and that attorney fees on appeal be awarded to Goods.

Dated this 30th day of March, 2012.



Robert E. Covington, III

Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of Respondents' Brief was served by hand delivery on March 30, 2012, upon the following:

Larry D. Purviance

5920 North Government Way, #4

Dalton Gardens, Idaho 83815

