2014 IL App (1st) 133914-U

No.1-13-3914

September 30, 2014

FIFTH DIVISION



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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| JAMES GIESE, AS TRUSTEE OF THE CONSTANCE R. GIESE TRUST, | ) | Appeal from the Circuit Court of Cook County |
| Plaintiff-Appellee, | ) | |
| v. | ) | Nos. 12 M6 1725<br>12 M6 1733 |
| LEO NEAL and BRIDGETTE NEAL, | ) | The Honorable Robert J. Clifford, |
| Defendants-Appellants. | ) | Judge Presiding. |

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PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Robert E. Gordon concurred in the judgment

**O R D E R**

¶ 1 Held: Trial court applied incorrect measure of damages to plaintiff's claim for damages resulting from defendants unauthorized cutting of trees on plaintiff's property. Court's order awarding plaintiff damages for the replacement value of the trees is vacated. Case remanded to the trial court for a determination on diminution in value of the property.

¶ 2 Defendants Leo and Patricia Neal appeal from an order of the circuit court awarding plaintiff James Giese, as Trustee of the Constance R. Giese Trust, $145,752.67 in damages as the replacement value of trees defendants cut down on plaintiff's real property without plaintiff's authorization. Defendants argue the court applied the wrong measure of damages. We vacate the order of the trial court and remand with directions.

¶ 3 BACKGROUND

¶ 4 The Constance R. Giese Trust owned real property at 14600 Silver Lakes Drive in Orland Park, Illinois. Plaintiff is the trustee for the trust. His mother, Constance Giese, lived on the property until her death. Plaintiff did not live on the property and intended to sell it. However, when approached by defendants, plaintiff entered into a two-year lease agreement with defendants in December 2011. The lease allowed defendants to occupy the single family dwelling on the property and gave them an option to buy the property for $450,000 at any time during the lease period. Under the lease, defendants stipulated that their examination of the premises showed it to be "in good order, repair, and in a safe and clean and tenantable condition." They agreed that they would make no alternations to the buildings or improvement on the premises without the landlord's written consent and, at their "sole expense, [would] keep and maintain the Premises and appurtenances in good and sanitary condition and repair during the term" of the lease and any renewals.

¶ 5 In March 2012, defendants cut down more than 50 mature trees in the backyard of the property. Plaintiff sent defendants a lease termination notice on April 2, 2012. He asserted defendants materially breached the lease "causing irreparable harm to the

Premises" by, *inter alia*, "[r]emoval and clearing of substantially all of the trees in the yard of the Premises without [his] prior approval."

¶ 6 In April 2012, plaintiff filed a two-count complaint against defendants seeking in excess of $100,000 in damages for the cutting down of the trees. He subsequently amended the complaint. In the amended complaint, plaintiff alleged that defendants intentionally cut down in excess of 53 mature trees of assorted varieties on his property without his permission. He asserted that defendants' actions violated the Wrongful Tree Cutting Act (740 ILCS 185/1 *et seq*. (West 2012)) and sought three times the "stumpage" (standing tree) value of the trees as damages under the act.[1] Plaintiff also asserted that defendants had committed intentional property damage as their actions were willful, malicious, intentional and designed to permanently deprive him of his trees.

¶ 7 Defendants answered and asserted as an affirmative defense that they had a duty under the lease to remove the trees. They asserted that, due to years of neglect, many of the trees were dead or suffered from carpenter ant or other pest infestation, rot and decay, that large branches began to crack and fall off the trees and that the trees, in their then current condition, were a safety hazard, eyesore and "needed to be removed due to their unsanitary condition resulting from the pest infestation." Defendants asserted that the lease required them to maintain the premises and appurtenances "in good and sanitary condition and repair during the term of" the lease

[1] Section 2 of the Wrongful Tree Cutting Act provides that, "[a]ny party found to have intentionally cut or knowingly caused to be cut any timber or tree which he did not have the full legal right to cut or caused to be cut shall pay the owner of the timber or tree 3 times its stumpage value." 740 ILCS 185/2 (West 2012). " 'Stumpage' means standing tree." 740 ILCS 185/1 (West 2012).

and, therefore, the lease plainly and unambiguously required them to remove the tress from the property to eliminate a safety hazard and prevent further pest infestation.

¶ 8 Plaintiff also filed a forcible entry and detainer action against defendants. The court consolidated the two actions and held a bench trial on April 18, 2013.

¶ 9 The record contains a "Record of Proceedings: Rule 323(d) Stipulated Statement of Facts Material to the Controversy" (stipulation). The stipulation shows that, at the April 18, 2013, hearing, plaintiff testified that, when the house was vacant, he took care of the property, walked the property, hired landscapers and he did not believe that the trees were in "bad shape." It shows landscaper Jake Agema, of Agema Landscape LLC, testified for plaintiff and the court admitted into evidence photographs showing piles of brush and solid tree stumps and a copy of an estimate report prepared by Agema. Agema testified that he inspected the property on March 29, 2012, "and found that the trees were still alive at the time they were removed based on his personal inspection of the property that included a 'scratch test' of various branches and pictures that [he] inspected." He testified that the removed trees were many years old and, "even though some of the stumps were hollow to some extent, they did not necessarily pose a danger nor did it necessarily mean that the lives of those trees were in danger." Agema testified that he returned to the property the following day with a certified arborist and an arbor care specialist to evaluate the conditions and prepare an estimate.

¶ 10 In Agema's estimate report, he stated that, when he inspected the property on March 29, 2012, he counted "53 fallen (cut down) trees and saw "a considerable pile of brush on property as well as smaller piles that were placed within the forest preserve." He identified the various species of trees that had been cut down and reported that

"[i]nspection of those brush piles showed swelling of buds for the upcoming growing season," and a "scratch test" showed that the limbs were green and pliable." He stated that "[t]rees of this variety are considered priceless and would take multiple lifetimes to grow." Agema provided individual estimates for the cost of cleaning the property, removing debris, grinding up stumps and roots and, relevant here, an estimate of $145,752.67 for the cost to "install 53, 7-10" caliper trees at various species."

¶ 11 The stipulation shows that defendants admitted cutting down the trees without permission from plaintiff in the belief that the lease provided them the authority to have dangerous trees removed. Defendants testified that the trees were hollow and that carpenter ants had moved from the trees into the house. They did not consult an arborist prior to cutting down the trees.

¶ 12 "Board certified master arborist" Harold Hoover testified for defendants. Based on visits to the property in January 2013, almost a year after the trees had been cut down, and "before and after" photographs taken by defendants, Hoover believed that "some" of the tree removals were justified to prevent damage and injury to person and property. He testified that some of the oak, hickory and ash stumps showed significant decay and carpenter ant galleries, some of the cut branches and limbs showed partially healed vertical cracks, old wound holes and cavities and some of the recently broken branch stubs in remaining standing trees appeared to have significant decay at their centers. Hoover testified that standing material of this kind can fail at any time under many weather influences and plaintiff's photographs of stumps did not tell "the entire picture."

¶ 13 On May 14, 2013, the court entered an order of possession on the forcible entry and detainer complaint but stayed enforcement of the judgment. It also entered an order finding for plaintiff on the Wrongful Tree Cutting count and for defendants on the personal property damage count. However, on July 15, 2013, on plaintiff's motion to reconsider, the court reversed its earlier decisions. First, on its own motion, it vacated its judgment in favor of plaintiff on the Wrongful Tree Cutting count, three appraisals having determined that the cut down trees did not meet the definition of commercial timber under the act. Second, it vacated its earlier judgment in favor of defendants on the personal property damage claim and instead found for plaintiff on that count, reserving the issue of damages.

¶ 14 On August 16, 2013, plaintiff sold the property.

¶ 15 On August 27, 2013, after considering the parties' supplemental briefs on the subject of damages, which informed the court that the property had been sold, the court entered judgment against defendants for $145,752.67 "based upon the tree replacement plus costs."

¶ 16 On November 5, 2013, the court denied defendants' motion to reconsider the damage award. Defendants filed a timely notice of appeal on November 25, 2014.

¶ 17 ANALYSIS

¶ 18 Defendants admitted below that they cut down the trees without authorization and, on appeal, challenge only the court's order awarding plaintiff $145,752.67 in damages for the replacement value of the trees. They do not assert that plaintiff failed to prove his right to damages. Instead, they argue that the proper measure of damages is the diminution in value of the real property and not the replacement value of the trees as

ordered by the trial court. They also assert that, given plaintiff presented no evidence of the diminution of value, nominal damages should have been awarded. We will not reverse a trial court's damage award unless it is against the manifest weight of the evidence, *i.e.*, unless the court either ignored the evidence or used an incorrect measure of damages. *Metropolitan Water Reclamation District of Greater Chicago v. Terra Foundation for American Art*, 2014 IL App (1st) 130307, ¶ 82; ); *First Baptist Church of Lombard v. Toll Highway Authority*, 301 Ill. App. 3d 533, 543 (1998).

¶ 19 "Generally, an 'award of damages aims at compensating the injured party for damage to his property.' " *Ceres Terminals, Inc. v. Chicago City Bank & Trust Co.*, 259 Ill. App. 3d 836, 860 (1994) (quoting *Rittenhouse v. Tabor Grain Co.*, 203 Ill. App. 3d 639, 650 (1990)). " 'The goal is to restore the party to the equivalent of his rightful pre-injury position.' " *Id*. (quoting *Rittenhouse*, 203 Ill. App. 3d at 650). Tort damages to real property are usually measured by the difference between the market value of the property before the injury and its value after the injury, *i.e.*, by the diminution in value of the property resulting from the injury. *LaSalle National Bank v. Willis*, 378 Ill. App. 3d 307, 329 (2007); *First Baptist Church of Lombard*, 301 Ill. App. 3d at 544.

¶ 20 However, " 'rules governing the proper measure of damages in a particular case are guides only and should not be applied in an arbitrary, formulaic, or inflexible manner, particularly where to do so would not do substantial justice.' " *First Baptist Church of Lombard*, 301 Ill. App. 3d at 544 (quoting *Myers v. Arnold*, 83 Ill. App. 3d 1, 7 (1980)). For example, " '[[t]he diminution in market value] measure of damages may be painfully inadequate when the land is held for a personal use such as a family residence and the harm may be corrected with a reasonable expenditure even though the

expenditure exceeds the amount the land has diminished in value.' " *First Baptist Church of Lombard*, 301 Ill. App. 3d at 545 (quoting *Myers*, 83 Ill. App. 3d at 7).

Therefore, the proper measure of damages for injuries to realty depends on the nature of the realty involved and the impact of the injury on the plaintiff. *LaSalle National Bank*, 378 Ill. App. 3d at 329.

¶ 21 In determining the appropriate measure of damages, courts variously examine whether the injury is permanent or temporary, whether it is repairable, whether the real property is used for personal or commercial/investment purposes, whether the damaged item/fixture has value apart from the real estate and whether the cost of repair or replacement would be disproportionate to the value of the property. Depending on the particular facts of a case, courts have followed the general rule and awarded the diminution in value of property as damages. For example, in G*villo v. Stutz*, 306 Ill. App. 3d 766 (1999), the court awarded the diminution in the value of property as damages where a neighbor destroyed trees on the plaintiffs' property. The court awarded the diminution in value rather than the replacement cost of the trees because the property had been held for development rather than personal use, the trees had no value apart from the land, the repair could not be made at moderate expense and the amount claimed for restoration of the trees "grossly exceeded" the diminution in value of the property. G*villo*, 306 Ill. App. 3d at 770-72. See also *Ceres Terminals, Inc.*, 259 Ill. App. 3d 836 (diminution in value of property awarded to landlord for tenant's failure to repair warehouse where property was for commercial rather than personal use, tenant never used the warehouse, landlord had intended to and did demolish the warehouse,

landlord never made repairs and to allow recovery for cost to repair rather than diminution in value would award landlord a "windfall").

¶ 22 Courts have also awarded the cost of repair or replacement as damages. For example, in *LaSalle National Bank*, 378 Ill. App. 3d 307, the court awarded the cost of repair to the plaintiff for damage to her home of 80 years. The court reasoned that the home had been for her personal use, she had been forced to sell her home when she could not afford the repairs caused by defendant, the house had been reparable at the time of injury and reasonable expenditure to repair the property "would have come close to restoring what was actually lost and would have prevented the loss of her home." *LaSalle National Bank*, 378 Ill. App. 3d at 331. See also *Myers*, 83 Ill. App. 3d 1 (cost of repair awarded for damage caused by the wrongful dumping of concrete on plaintiffs' property where the property was held for personal rather than business use, the injury was capable of repair and the repair could be accomplished without expending amounts wholly disproportionate to the value of the land); *Wujcik v. Gallagher & Henry Contractors*, 232 Ill. App. 3d 323 (1992) (replacement cost of trees awarded to plaintiffs where the injury was "nonpermanent" as the trees could be replaced at moderate expense in relation to the value of the entire property, the plaintiffs lived on the property and the trees had aesthetic and environmental value to the plaintiffs); *Rittenhouse v. Tabor Grain, Co.*, 203 Ill. App. 3d 639 (1990) (replacement cost of grain storage facilities awarded to plaintiffs as damages where, although facilities were income producing fixtures to realty, court departed from general diminution of value rule and allowed replacement cost because the structures were almost new and in pristine condition).

¶ 23 Defendants argue that the test stated in *Ceres Terminals, Inc.,* 259 Ill. App. 3d 836, governs the calculation of damages in the First District. In *Ceres Terminals Inc.*, the court stated the rule for determining the measure of damages as follows:

> " '[i]n cases of injury to real estate or to that which has no value separate and apart from the real estate, the proper measure of damages is as follows: (1) if the injury is permanent, the measure of damages is the market value of the real estate before the injury, less the market value after the injury; (2) if the injury to the real estate is not permanent, then the measure of damages is the cost of restoration.' " *Ceres Terminals Inc.*, 259 Ill. App. 3d at 861 (quoting *Arras v. Columbia Quarry Co.*, 52 Ill. App. 3d 560, 564-65 (1977)).

"[T]he distinction between permanent and temporary injuries turn[s], [at] least in large part, on the practicability of repairing the injuries in question." *Ceres Terminals Inc.*, 259 Ill. App. 3d at 861 (citing *Williams–Bowman Rubber Co. v. Industrial Maintenance, Welding & Machining Co.*, 677 F. Supp. 539, 545 n. 5 & n. 6 (N.D.Ill.1987)).

> " 'If real property is partially injured, and the injury may be repaired in a practicable manner, then the proper measure of damages is the cost of restoring the property to its condition prior to the injury. If, however, the real property is totally destroyed or damaged in a manner which renders repair impracticable, then the diminution in value rule applies.' " *Ceres Terminals Inc.*, 259 Ill. App. 3d at 861-62 (quoting *Williams–Bowman Rubber Co.,* 677 F. Supp. at 545).

¶ 24 In *Ceres Terminals*, after a tenant vacated commercial property, its former landlord sought damages for the tenant's failure to make interior repairs to two warehouses, one metal and one wooden, on the landlord's commercial property as required under the lease between the parties. The trial court awarded the landlord $54,500 in damages for the tenant's failure to make the repairs. In making its damage award, the trial court expressly stated that the repairs the tenant failed to perform during the lease period "did not cause any damage to or diminution in value" of the property. *Ceres Terminals Inc.*, 259 Ill. App. 3d at 849. The appellate court affirmed the award of damages for the cost of repair to the metal warehouse but vacated the award for the cost of repair to the wooden warehouse. *Id*. at 862-63. The court found that, although the trial court had determined that the tenant's failure to make the repairs required under the lease had not caused damage to or diminution in value of the property, repairs were still appropriate and practicable for the metal warehouse. "The metal warehouse is still functional and in use and the repairs are capable of being made. In such an instance, it is the cost of repairs that is the proper measure of damages, not the diminution in the fair market value of the property." *Id*, 259 Ill. App. 3d at 862. "The adoption of the decrease in fair market value of the property measure in this case would be inconsistent with the general rule as summarized above and would serve to stifle the recovery of appropriate damages in the name of preventing windfalls when such repairs are appropriate and practicable." *Id*.

¶ 25 However, the court found the trial court erred in awarding any damages for the wooden warehouse. *Ceres Terminals Inc.*, 259 Ill. App. 3d at 862. Noting that the interior repairs were never made and the building had been torn down, the court found:

> "As such, defendants have not suffered any expenditures as a result of [the lessee's] failure to make the repairs in question. Because the warehouse has since been demolished, any damages recovered could not be put towards making the necessary repairs. To allow recovery in this case, would require some indication of an injury in the form of a diminution in the fair market value of the property. The trial court, however, expressly found that the damages to the wooden warehouse did not result in any diminution of the property's fair market value." *Id*. at 862-63.

The court held that the diminution of the property's fair market value was the proper measure of damage for the wooden warehouse because the landlord did not make the repairs to the warehouse and awarding the landlord damages for the cost of repair would place it in a much better position than if the tenant had performed the repairs. *Id*. at 863 (following *Associated Stations, Inc. v. Cedars Realty & Development Corp*, 454 F. 2d 184, 189-90 (4th Cir. 1972)). However, given that the trial court's express finding was that there was no diminution of the fair market value controlled, the court reversed the court's award for damages for repair of the wooden warehouse. Id.

¶ 26 Defendants argue that the diminution of value method for calculating damages is appropriate here because, as in *Ceres Terminals*, the injuries here were permanent and inflicted on land held solely for the production of income. Defendants also argue that, even though the property was not destroyed as was the wooden warehouse in *Ceres Terminals*, plaintiff admitted the property was subsequently sold for $385,000. They assert that the property, therefore, is out of plaintiff's control and any damages collected cannot be applied to restoration of the property. They also point out that there is no

evidence that plaintiff made any expenditures in an attempt to restore the property to its previous condition.

¶ 27 Citing *First Baptist Church of Lombard*, 301 Ill. App. 3d 533, plaintiff responds that defendants' reliance on C*eres Terminals Inc.* is misplaced because the proper measure of damages for injury to real property depends of the nature of the injury involved. *First Baptist Church of Lombard*, 301 Ill. App. 3d at 544. However, he then cites to *First Baptist Church of Lombard* for the exact same proposition as stated in *Ceres Terminals*:

> " 'If real property is partially injured, *and the injury may be repaired in a practicable manner,* then the proper measure of damages is the cost of restoring the property to its condition prior to the injury. If, however, the real property is totally destroyed *or damaged in a manner which renders repair impracticable,* then the diminution in value rule applies.' " (Emphasis in original.) *First Baptist Church of Lombard*, 301 Ill. App. 3d at 544 (quoting *Williams-Bowman,* 677 F. Supp. at 545); see also *Ceres Terminals*, 259 Ill. App. 3d at 861-62 (quoting *Williams–Bowman Rubber Co.,* 677 F. Supp. at 545).

The above citation shows that, as did the courts in *First Baptist Church of Lombard* and the numerous other decisions cited by plaintiff, the court in *Ceres Terminals* clearly recognized that the proper measure of damages for injury to real property depends of the nature of the injury involved. The *Ceres Terminals, Inc.* court expressly recognized that the location and character of the real property, the reasonable cost of repair of the injury, the exact nature of the interest harmed and the question of whether the cost of

repair is disproportionate to the value of the property or to the benefit to the plaintiff may all be considered in making a determination regarding the appropriate measure of damages (*Ceres Terminals*, 259 Ill. App. 3d at 862) and, in fact, applied each of these considerations in making its decision.

¶ 28 It is uncontested that plaintiff proved the trust was entitled to damages for defendants' unauthorized cutting down of the trees. For the following reasons, having considered the nature of the realty and injury involved and the impact of the injury on the property and on plaintiff, we find the proper measure of damages for plaintiff's injury is the diminution in market value of the property resulting from the cutting of the trees.

¶ 29 First, the property was held for the production of income. It is uncontested that, although the property is residential and was occupied by plaintiff's mother prior to her death, plaintiff did not live on the property after his mother's death and, instead, rented it to defendants for $2,300 per month and intended to sell the property. Further, plaintiff made no assertion below that the cut down trees had any personal or sentimental value to the trust. The property was clearly held for the production of income rather than for personal use.

¶ 30 Second, although plaintiff sold the property, there is no evidence that he was forced to sell the property as a result of destruction of the trees. Plaintiff did not argue such and, as shown in the stipulated statement of facts, he admitted at trial that he had intended to sell the property but then rented it to defendants under a lease with an option to buy. The evidence shows it was always plaintiff's intention to sell the property, either to defendants or to a third party if defendants declined the option to buy. His sale of the property would have occurred in any event.

¶ 31 Third, repair is no longer possible. Replacement of the trees cannot be implemented given that plaintiff sold the property.[2]

¶ 32 Awarding plaintiff the cost of replacing the trees as damages would award him a windfall. As in *Ceres Terminals, Inc.,* the property on which the injuries occurred was not held for personal use and the repairs were never made. Further, plaintiff sold the property as he had always intended and there is no evidence to show that he was forced to sell the property because of the cutting of the trees. To paraphrase the court's statements in *Ceres Terminals, Inc.,*

> "[a]s such, [plaintiff has] not suffered any expenditures as a result of [defendants' cutting down the trees]. Because the [property has since been sold], any damages recovered could not be put towards making the necessary repairs. To allow recovery in this case, would require some indication of an injury in the form of a diminution in the fair market value of the property." *Ceres Terminals Inc.*, 259 Ill. App. 3d at 862-63.

Adoption of the diminution in value measure of damages here would be consistent with the general rule that tort damages to real property are usually measured by the difference between the market value of the property before the injury and its value after the injury. Although courts have occasionally awarded the cost to repair or replace damaged property in cases where the repair/replacement cost exceeded or was vastly disproportionate to the diminution in value of the real property, these awards are made only where the plaintiffs has suffered personal losses as a result of the injuries. See *LaSalle National Bank,* 378 Ill. App. 3d 307 (cost to repair plaintiff's home was awarded

[2] As plaintiff has sold the property, we find any consideration as to whether the property damage could be repaired to be irrelevant.

where plaintiff was forced to sell her home of 80 years as a result of the defendants' actions); *Rodian v. Seiber*, 194 Ill. App. 3d 504 (1990) (cost to repair damage to land and replace trees awarded where plaintiff lived on the land and purposely kept the land in its natural state as a wildlife and bird sanctuary preserve). This is not such a case.

¶ 33 Where " 'real property is totally destroyed *or damaged in a manner which renders repair impracticable*, then the diminution in value rule applies.' " (Emphasis added.) *Ceres Terminals Inc.*, 259 Ill. App. 3d at 861-62 (quoting *Williams–Bowman Rubber Co.,* 677 F. Supp. at 545); *First Baptist Church of Lombard*, 301 Ill. App. 3d at 544 (quoting *Williams-Bowman,* 677 F. Supp. at 545. Here, although plaintiff's property was not completely destroyed, repair of the property is impracticable. Accordingly, the diminution of value rule is the appropriate measure of damages in this case and the trial court erred in awarding plaintiff the replacement cost of the trees. We vacate the court's order awarding plaintiff $145,752.67 in damages for the replacement cost of the trees and remand for entry of an order awarding plaintiff the diminution in value of the property as damages.

¶ 34 Defendants argue that plaintiff did not provide any evidence to show diminution of market value of the property and is, therefore, entitled to only nominal damages. If a party has proved its right to damages but fails to provide a reasonable basis for computing those damages, only nominal damages may be awarded. *Wilson v. DiCosola*, 352 Ill. App. 3d 223, 228 (2004).

¶ 35 Plaintiff's damages evidence consisted of (1) the Agema report and (2) copies of the lease with defendants and a "HUD settlement statement" for the final sale of the property to a third party showing the property sold for 65,000 less than the price for the

property stated in the lease. The Agema report sets forth the estimated cost to repair the property and replace the trees and is, therefore, inapplicable in determining the diminution of value of the real property.

¶ 36 However, plaintiff's documentary evidence regarding the difference in the contract prices stated in the lease and final sales contract is relevant to determining the diminution of value of the property. This evidence was presented in support of plaintiff's assertion in his "supplemental [trial] brief regarding damages" that "there has been a reduction in the property value of $65,000 which the court can take into consideration in determining damages." Whether this evidence is sufficient to show diminution of value is a question of fact for the trial court to determine. The court awarded damages for the replacement value of the trees and, therefore, did not consider the sufficiency of evidence regarding diminution in value of the property. Accordingly, we make no finding regarding the diminution in value of the property and remand to the trial court for this determination.

¶ 37 CONCLUSION

¶ 38 For the reasons stated above, we vacate the order of the trial court awarding plaintiff the replacement cost of the trees as damages and remand with directions.

¶ 39 Vacated; Remanded with directions.