No. 2—09—1307
Order filed February 18, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARGO BAIRD,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 05—L—1015
	)	
CHESTER GASAWAY,	)	Honorable
	)	Dorothy F. French,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

Held: The trial court's consideration of the evidence and calculation of damages in favor of plaintiff were not against the manifest weight of the evidence. We affirmed the judgment of the trial court.

Following a bench trial, the court found that defendant, Chester Gasaway, trespassed on land owned by plaintiff, Margo Baird, when defendant cut down trees and shrubs on plaintiff's property. As a result, the court awarded plaintiff $21,150 in damages. Defendant timely appeals, claiming that the court's damages award is against the manifest weight of the evidence. We disagree, and, thus, we affirm.

Plaintiff owns a horse farm in Du Page County. To the west of plaintiff's land is defendant's property. Separating the two parcels of land was a thick tree line. Although this tree line consisted of noxious trees and shrubs that could not be bought at a nursery and planted, it provided plaintiff with a privacy barrier in addition to a barrier from wind, noise, and the sun.

In the summer of 2005, while plaintiff was out of town, defendant hired a tree cutting company to cut down the trees and shrubs growing in the tree line. When plaintiff discovered the damage, more than 200 feet of the tree line had been cut down. Plaintiff sued defendant for trespass, conversion, and wrongful tree cutting.

At trial, evidence was presented concerning the cost to reestablish a tree line between plaintiff's and defendant's properties. A professional whom plaintiff retained examined the tree line and submitted a proposal for reestablishing the tree line. The professional suggested that plaintiff plant within the 218-foot strip of cleared land 11 Red Sunset maple trees (at a cost of $9,075 plus $4,400 in labor), 10 Armstrong maple trees (at a cost of $6,370 plus $4,130 in labor), and 60 arborvitae bushes (at a cost of $16,200 plus $1,800 in labor). The total cost for such planting was $41,975. No other evidence on reestablishing the tree line was presented at trial.

The court found that plaintiff failed to establish conversion or wrongful tree cutting but that defendant was liable to plaintiff for trespass. Based on this finding, the court awarded plaintiff $21,150 in damages. Of the $21,150 awarded to plaintiff, $20,950 represented the cost to plant trees. The remaining $200 covered the cost of the tranquilizers that plaintiff had to give her horses after the tree line was removed.

In assessing damages, the court explained how it arrived at an award of $20,950 to reestablish the tree line. Specifically, the court stated:

"I think the proper measure of damages *** is the replacement value, trying to recreate this scrub line of trees and it's impossible to recreate this scrub line of trees because you cannot replant some of these trees. And in other ways nobody sells these trees to be planted. They are just basically natural woody trees from the Illinois Prairies. So you can't recreate this. So you really can't get to an actual replacement value. All you can really do is determine the value to the property owner.

And this scrub line of trees does have value to the property owner. It provided [a] windbreak. It provided a noise break. It provided privacy, and it really doesn't matter that by doing that it had trees that most people don't value very highly. As a whole it was valuable. *** The plaintiff offered the evidence of *** the cost of obtaining this wind[,] noise and privacy screen and [her professional] suggested a line of Sunset Maples, Armstrong Maples and Arborvitae. Clearly, that's not an exact replace. It's also really more of an enhancement to what [plaintiff] had before because, clearly, a whole row of Sunset Maples and Armstrong Maples would be absolutely gorgeous. So I had to take a serious look at that because that's the only evidence I had.

The defense said the plaintiff was due nominal damages only and nominal is in the eye of the observer so to speak. So I took [the professional's] testimony and that his recommendation of 11 Sunset Maples, Armstrong Maples, 10, and Arborvitae 60. And I also took his testimony that Sunset Maples should be planted 30 feet apart and Armstrong Maples 20 feet apart and the Arborvitae, three feet apart. And from that evidence, this was essentially a 218-foot strip of about eight to ten feet that was removed. And doing those types of calculations, it is the Court's finding that the value of replacing the overall wind[,]

noise and privacy screen could be done with 4 Sunset Maples, 5 Armstrong [Maples], and 36 Arborvitae. When you add 4 and 5, that's 9, and you divide it up 218, that's about 25 feet apart. So it's about—it's halfway between 30 and 20.

As far as the Arborvitae is concerned, they have to be three feet apart. Arborvitae are at least three feet wide and so that's how I got to 36. I, again, divided 218 by 6 feet and got 36.

Factoring in [the evidence presented regarding] the cost of the trees, the Arborvitae along with the cost of labor for planting them, what I come to as far as the value of the replacement for the scrub line of trees is in the amount of $20,950."

Defendant filed a timely notice of appeal. Defendant contends that the trial court's award to plaintiff of $20,950 in damages to reestablish the tree line was erroneous. Addressing that issue requires this court to determine (1) for what loss the damages were awarded, and, then, (2) whether an award of $20,950 was proper to cover that loss.

In considering for what loss the damages were awarded, an examination of the trial court's ruling reveals that the court awarded plaintiff damages for the barrier she lost when defendant cut down her trees and bushes. Replacing this barrier had nothing to do with the value of plaintiff's property. Rather, the loss of the barrier, which blocked the sun, wind, and noise, affected how plaintiff used her land. Giving plaintiff damages for the lost barrier was entirely proper. As this court has said before, "[w]here the thing which that is destroyed or injured, though affixed to the realty, has a distinct value without reference to the real estate upon which it stands, the measure of recovery is for the value or depreciation of value of the thing destroyed or injured, and not for the

difference of the value of the land before and after the destruction." *Kremeyer v. Shumate*, 20 Ill. App. 2d 542, 546 (1959).

In another context, this court has awarded plaintiffs damages for the impact a removed fixture had on the plaintiffs' land. See *Wilson v. DiCosola*, 352 Ill. App. 3d 223 (2004). In *Wilson*, the defendant bought a home next door to the plaintiffs' home. *Wilson*, 352 Ill. App. 3d at 224. The defendant demolished the home he bought and proceeded to build a new one. *Wilson*, 352 Ill. App. 3d at 224. During the construction of the new home, a seven-foot-high masonry wall that was near the property line and belonged to the plaintiffs was removed. *Wilson*, 352 Ill. App. 3d at 224. This masonry wall provided the plaintiffs with a privacy barrier to their backyard patio, and, after the masonry wall was torn down, the plaintiffs stopped using their patio, because they could see into the kitchen of the neighboring home. *Wilson*, 352 Ill. App. 3d at 224-25. Thereafter, the plaintiffs and the defendant entered into an agreement, whereby the defendant would erect a new masonry wall. *Wilson*, 352 Ill. App. 3d at 225. When the defendant failed to follow the agreement, the plaintiffs sued the defendant for breach of contract and sought damages for their loss of use of their patio. *Wilson*, 352 Ill. App. 3d at 224. The trial court found in favor of the plaintiffs, and the defendant appealed. *Wilson*, 352 Ill. App. 3d at 225. On appeal, this court determined that the plaintiffs were entitled to damages related to the loss of enjoyment of their patio that the plaintiffs suffered when the masonry wall was torn down. *Wilson*, 352 Ill. App. 3d at 226.

Although *Wilson* admittedly does not represent a factually similar situation to the one we face, *i.e.*, Wilson arose from a breach of contract and the plaintiffs in *Wilson* sought damages based on a loss of use, *Wilson* is instructive. In *Wilson*, the loss the plaintiffs suffered had nothing to do with the value of the wall itself that was destroyed. Rather, the loss concerned the *impact* the wall

had on the plaintiffs' land. That is, the wall shielded the plaintiffs from view by the neighbors so that the plaintiffs could enjoy their backyard patio without worrying about whether they were being watched. Here, as in *Wilson*, the loss that plaintiff suffered had nothing to do with the value of the individual trees and bushes that were cut down. Rather, the value of the trees and bushes to plaintiff lay in the way they shielded plaintiff's property from prying eyes, the wind, the sun, and noise. What Wilson suggests, and this case clearly illustrates, is that although a party's fixture might lack any intrinsic value, the fixture may nevertheless have another value to the injured party, *e.g.*, shelter or privacy, that is recoverable when the fixture is destroyed.

Citing *First Baptist Church of Lombard v. Toll Highway Authority*, 301 Ill. App. 3d 533, 544-45 (1998), defendant argues that the trial court's damages award is erroneous, because the reviewing court made clear in *First Baptist* that damages to real property should be determined according to either (1) the cost of restoring the property to its condition prior to the injury or (2) the diminution in the land's value. Because plaintiff failed to present any evidence regarding the value of her property, defendant argues that, under *First Baptist*, she is entitled to only nominal damages.

Although the reviewing court made such statements in *First Baptist*, we also emphasized in that case that " '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*, 301 Ill. App. 3d at 544, quoting *Myers v. Arnold*, 83 Ill. App. 3d 1, 7 (1980). This is a case where the rules governing the proper measure of damages to property should not be arbitrarily applied. Because the injury plaintiff suffered had to do with the barrier she lost and the impact the barrier had on plaintiff's land, and not any loss in

value to her property, the trial court, consistent with our admonishment in *First Baptist*, did not apply either the cost-to-repair or the diminution-in-value measure of damages.

Having decided that the trial court properly awarded damages for the lost barrier, the next issue we consider is whether an award of $20,950 was proper to cover that loss. We will not reverse a trial court's damages award unless it is against the manifest weight of the evidence. *Royal's Reconditioning Corp. v. Royal*, 293 Ill. App. 3d 1019, 1022 (1997). A trial court's damages award is against the manifest weight of the evidence when the court ignored the evidence or used an incorrect measure of damages. *Royal's Reconditioning Corp.*, 293 Ill. App. 3d at 1022.

Here, plaintiff was awarded damages based on defendant's trespass. Trespass is a tort. See *Enzenbacher v. Browning-Ferris Industries of Illinois, Inc.*, 332 Ill. App. 3d 1079, 1081 (2002). When assessing damages based on an injury caused by a tort, courts are concerned with placing the injured party in the position the injured party was in before the injury. *Wujcik v. Gallagher & Henry Contractors*, 232 Ill. App. 3d 323, 331 (1992).

The evidence before the trial court revealed that the barrier plaintiff lost could not be replaced with the same types of trees and bushes that were cut down. Rather, according to the professional's proposal, the barrier could be replaced with Red Sunset maples, Armstrong maples, and arborvitae bushes. Each Red Sunset maple cost $825 plus $400 in labor to plant. Each Armstrong maples cost $637 and $413 in labor to plant. To plant arborvitae, plaintiff would have to spend $270 for each bush and $30 in labor to plant each bush. Given those figures and based on the distance at which each variety of plant needed to be planted in order to grow, the court found that 4 Red Sunset maples (at a total cost of $3,300 plus $1,600 in labor), 5 Armstrong maples (at a cost of $3,185 plus $2,065 in labor) and 36 arborvitae (at a cost of $9,720 plus $1,080 in labor) would provide plaintiff with a

barrier similar to the one she had before the trees and bushes were cut down. The total cost to follow this plan was $20,950. Given the above, the trial court did not ignore the evidence or use an incorrect measure of damages in arriving at this figure. That is, the court's damages award is not against the manifest weight of the evidence.

In reaching our conclusion, we note that the proposal before the trial court indicating what it would cost to replace the barrier included costly trees and bushes. Defendant could have countered plaintiff's proposal with evidence that replacing the barrier could be accomplished with less expensive trees and bushes (see *Trout Auto Livery Co. v. People's Gas Light & Coke Co.*, 168 Ill. App. 56, 61 (1912)), but he failed to do this. As a result, defendant cannot now argue that plaintiff is entitled to less than $20,950. See *Trout Auto*, 168 Ill. App. at 61 (in the absence of any evidence rebutting the defendant's evidence on lost profits, which evidence indicated that the plaintiff lost $160 in profits after the defendant's taxicab was hit, the reviewing court determined that the award of damages for lost profits was not excessive).

For these reasons, we affirm the judgment of the circuit court of Du Page County.

Affirmed.