COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE
WILMINGTON, DELAWARE 19801

John K. Welch
Judge

April 28 2010

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Re: *Martin J. and Margaret A. Pensak v. Michael J. and Robyn S. Mooney*
C.A. No.: 2008-06-345

Date Submitted: March 15, 2010
Date Decided: April 28, 2010

MEMORANDUM OPINION

Dear Counsel:

Trial in the above captioned matter took place on Monday, March 15, 2010 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of documentary evidence and sworn testimony the Court reserved decision. This is the Court's Final Decision and Order.

I. The Facts

Plaintiff in his civil action has filed a complaint seeking monetary damages for the alleged cutting of trees on their property.[1] Plaintiff's complaint seeks $16,559.64

[1] This Court, on or about January 27, 2009 granted a Motion in Limine striking one of the plaintiff's experts following a hearing before the Honorable Judge Alfred Fraczkowski.

(clean up costs and costs to re-landscape the area) as damages for an area designated as Exhibit "B" to the complaint. Both parties have filed Civil Case Management Statements and stipulated to the issues pending before the Court. Following trial, the Court must consider, *inter alia,* if the trees in question were located on plaintiff's property. Second, the Court must consider whether defendants are liable for moving and cutting down the trees at issue. Third, the Court must determine whether the plaintiffs are entitled to recover what, if any, damages and determine the appropriate amount of damages to be awarded. Fourth, the Court must consider whether 25 *Del.C.* §1401 *et seq.* limits or bars plaintiff's damages.[2, 3]

a) <u>Plaintiffs' Case-In-Chief</u>

Martin J. Pensak ("Pensak") was called as a witness to testify at trial. In August 2006 plaintiffs hired Marty's Contracting ("Marty's") and an invoice marked as Defendants' Exhibit No.: 19 was received into evidence with no objection. Defendants' Exhibit No.: 19, incorporated herein, sets forth for the work performed for plaintiffs' as follows:

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[2] Defendants have raised multiple affirmative defenses in their Answer to the Complaint, including but not limited to Failure to State a Claim, Failure to Mitigate, the claim is barred by waiver or estoppel; the claim is barred because the trees at issue were causing flooding and/or where a nuisance and were a dangerous condition on defendant's property; plaintiffs claim is barred because defendant's were innocent trespassers; and finally, plaintiffs claim as an improper and excessive measure of damage under the circumstances.

[3] The Court received into evidence eighteen (18) photographs marked Plaintiffs' Exhibits 1-18 which depicted various areas of the property and the trees that were cut down and laying on what plaintiff consisted was his property. In some of the photographs the trees had been cut into small logs and in other exhibit there were long uncut portions laying down on the subject property. Plaintiffs' Exhibit No. 9 was the start of plaintiffs' exhibits showing different stumps. Plaintiffs' Exhibit No. 9 was a 2' 9" stump; Plaintiffs' Exhibit No.: 10 was a 7" stump; Plaintiffs' Exhibit No.: 11 was a 14" stump; Plaintiffs' Exhibit No.; 12 was a 1' 9" stump; Plaintiffs' Exhibit No.; 15 was a 2" stump; Plaintiffs' Exhibit No.: 16 was a 1' stump; Plaintiffs' Exhibit No.: 17 was a 1' 6" stump; Plaintiffs' Exhibit No. 18 was a 2' 4" stump.

Work performed:

a. Deliver 8 loads of fill dirt @ $135 per load.	$ 1,080.00
b. Spread fill dirt and grade.	$ 1,500.00
c. Excavate swale. Tear out old catch basin. Remove 3 stumps. Load dumpster with stumps and brush. Clear wooded area. Remove rock.	$ 650.00
d. Supply and install 12" x 12" catch basin.	$ 100.00
e. 20-Yard Dumpster – stumps and brush	$ 150.00
f. Dump Fees – 5.13 tons @ $61.50 per ton.	$ 315.50
Amount Due	***$ 3,795.50***

According to Pensak, he and his wife first had to restore their property in the area where the trees were cut down and have all the debris and stumps removed. They claim they were also required to clear the subject area for the future planting of trees.

Pensak testified that some of the trees were 75 feet or higher and involved work actually removing the trees after they were cut down as well as installing a catch basin and swale.

Pensak testified at some point he stopped discussion with the co-defendants even thought Mr. Mooney had put two invoices in his mailbox requesting input on what types of trees to install on the Pensaks' property.

On cross-examination Pensak testified Mr. Mooney did, in fact deliver a letter to his wife with "some ideas" for clearing the property, as well some suggestions as to what type of trees to re-plant in the area. There were actually two notes, according to Pensak. The first one was misplaced and the second note was given to his wife by Mr. Mooney and placed in their mailbox after Mrs. Pensak misplaced the first letter.

Pensak testified that some of the fill dirt he paid for was actually used near his house, not at the area where the trees were formerly located. He spent $1,500.00 for

the dirt which involved eight (8) loads of dirt, although as indicated, 3 loads were used and dumped near his house for grading purposes.

According to Pensak, Marty informed him the catch basin needed replaced but Pensak could not recall the reason for the re-installation of a new catch basin.

Pensak also conceded three (3) stumps were not actually removed because they were buried. Pensak could also not testify why the dump fee was 5.31 tons.

Pensak also conceded on cross-examination that the area where the trees were cut down had been largely unattended to with years of leaves and ground coverage accumulating in the area. He also did not know the degree of maintenance done on the swale or the catch basin before Marty replaced and re-installed a new catch basin. Pensak also conceded that sixteen (16) different plants were actually planted next to his driveway, not in the area where the trees were previously located. Pensak testified he planted these bushes because he believed he was restoring the property for privacy reasons.

Margaret Pensak ("Mrs. Pensak") presented testimony at trial. She is also the owner of the subject property. She contacted Old Country Gardens to install the trees and bushes; 'grade the area'; and plant 16 bushes by her driveway. Mrs. Pensak inquired as to a price from Old Country Gardens who later sent a representative to her residence on two (2) different occasions to price the job. *See:* Plaintiffs' Exhibit No.: 20 and 21. Plaintiffs' Exhibit No.: 20 was a proposal from Old Country Gardens was set forth $14,321.35 for the cost of fourteen (14) trees, forty-five (45) bags

Complete Planting Mix and sixteen (16) bags of mulch; delivery, removal, clean-up; a fuel charge of 1% and an Equipment Charge of 4% and a dumping fee. The total cost for three (3) types trees would be Amelanchier Canadensis, six (6) Euonymus Alatus "Compacta", and four (4) Cornus Kousa Chinensis was $14,321.35. Plaintiffs' Exhibit No.: 21 was moved into evidence which indicated a reduced price $11,719.14 and the actual invoice for the trees installed because some of the trees could not be located. Exhibit No.: 21 that indicated that there was three (3) trees for $225.00; three (3) trees for $750.00; six (6) trees for $485.00; and four (4) trees for $285.00.

During Mrs. Pensak's testimony, Plaintiffs' Exhibit No.: 22 was moved into evidence without objection. It shows "b"s and "t"s which are locations of "brushes" and "trees" installed by Old Country.

Mrs. Pensak testified that after the trees were cut she could see the headlights of the Mooney's car shine into her family's Florida room which she believed caused their family annoyance and discomfort.

As to settlement discussion with the Mooneys, Mrs. Pensak testified there was some initial conversations with Mr. Mooney. She did receive two (2) notes from Mr. Mooney. However, once she had completed the contract negotiations with Old Country Gardens, she testified she did not discuss the proposal any further with co-defendants. *See,* Plaintiffs' Exhibit No.: 22.

On cross-examination Mrs. Pensak conceded the Mooney's did not intentionally or maliciously cut down her trees on the day in question. Mrs. Pensak

also testified that Mr. Mooney produced a survey the next day after he had the trees cut down. He informed her that the subject trees he cut down were actually on his property. Mrs. Pensak also testified that Mr. Mooney relied on an old survey he received at his settlement when he cut down the subject trees. Mrs. Pensak also conceded the sixteen (16) bushes and some trees were not in the same areas as the trees that were cut down and installed by Old Country Gardens.[4]

Mrs. Pensak also testified that she was advised by Old Country Gardens not to re-install gum trees, because of water and drainage problems and the ability of gum trees not to grow in a wet or damp environment.

Donald Elrod ("Elrod") was called as a witness for plaintiffs' case-in-chief. Elrod is a professional land surveyor and has been licensed in Delaware since 1992. Elrod has attended four college classes and has attended 500 hours of seminars. He is in good standing in the State of Delaware.[5] Elrod is a member of the Delaware Association of Surveyors and is President of AES Surveyors since October 1994. Elrod had been requested by plaintiffs' counsel to do a survey of defendants' property at 1721 Gunning Road, Forest Hills Park. He successfully prepared a plot plan marked as Plaintiffs' Exhibit No.: 23 which was received into evidence.[6]

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[4] Mrs. Pensak installed six (6) burning bushes and four (4) dogwoods as a part of the contract with Old Country Gardens.

[5] Elrod was not offered as an expert by plaintiff in this proceeding. No motion was made by plaintiffs' counsel, and when questioned, Elrod was offered only as a licensed surveyor.

[6] Plaintiff did move the Court through a Motion to Declare Elrod an expert at trial. When questioned by the Court, plaintiff's counsel indicated, after questioning, Elrod was offered as a fact witness.

According to Elrod, the new survey prepared by AES Surveyors shows the new Lot 56 and the Lot 55 which the Mooney's now own marked as 55 on the Survey Plan, Plaintiffs' Exhibit No.: 23. According to Elrod, there is a "new dotted line" which shows the old boundary line for Lot 55 and it carried a "circled 55" in between the dark bold print and the dotted line on the survey plan which purportedly represents the old "Lot 55". Elrod claims that there were two iron pipes on each end of the ground which he found which marked the new lot line for Lot 55. Elrod also marked on his survey stumps numbered 1 – 6 which he testified where trees cut down by defendants which are now on the new Lot 56 depicted on Plaintiffs' Exhibit No. 23. Elrod testified that stump 6 is 35" in diameter and stump 5 is 18" in diameter, stump 4 was 35" x 30", stump 3 is 23" in diameter, stump 2 is 23" in diameter and stump 1 is 24" x 20". According to Elrod, all are located on the new Lot 56 which is on the left side of the old dotted line for Lot 55.

Donald Marty Millinger ("Millinger") testified at trial. Millinger is an excavationist/contractor for the past twenty-one (21) years. He was hired by plaintiffs to do the work which has already been testified to in plaintiffs' case in chief through various exhibits. Millinger was informed the trees had to be removed in the subject; the area re-regraded; a new swale installed; and the installation of a new catch basin and removal of the old one. Millinger also does not recall the reason for the installation of the new catch basin and replacement of the old catch basin. Plaintiffs' Exhibit No.: 19 was shown to Millinger which indicated although there were eight (8)

loads of fill dirt, only five (5) loads were used in the area where the trees were cut down. Three (3) loads, according to Millinger, were placed in another area by the plaintiffs' driveway, up the hill near the plaintiff's house. Millinger testified he removed three (3) stumps, but could not specify why the $315.50 cost was for 5.13 tons. He previously worked at the Pensak's house and Plaintiff's Exhibit No.: 19 is an invoice which was paid by the Pensaks for his services rendered on August 8, 2006.

On cross-examination, Millinger testified he believes a catch-basin was installed because the "old one was blocked and was in poor condition". However, he agreed that his invoice indicated "tear out old catch basin" and did recall at trial why the new basin was actually installed.

Christian Tauber ("Tauber") was sworn and testified as part of plaintiffs' case in chief. Tauber is a Landscape Developer for twenty-four (24) years and works for Old Country Gardens. Tauber has a bachelor's degree. Plaintiff's Exhibit No.: 21 was moved into evidence and indicates the actual invoice plaintiffs paid for by plaintiffs for the installation of trees and landscape work provided by Old Country Gardens to the plaintiffs. Tauber testified he did not see the site before all of the trees were removed. He also testified the subject area where the trees were cut had already been cleaned up. There were no stumps or other debris when he was asked to give an estimate at trial to base the estimate on repair work.

Tauber was requested by plaintiff to "bring the screening and privacy back" at plaintiff's house. Tauber testified that is the reason he recommended the actual plan

that was approved and paid for by plaintiff. i.e., Plaintiff's Exhibit No.: 21. Tauber installed the subject trees because he was informed there was "lots of shade" and "water problems" in the subject area. He also testified that he needed trees that would root well, live and thrive in the wet area; not gum trees which he testified couldn't survive.

Tauber testified the reason gum trees would not be a suitable choice was because of the wetness problems and shade. He planted sixteen (16) trees and understands that only eleven (11) trees were cut down and believes he installed sixteen (16) trees because these are now small trees. He invoiced plaintiffs $11,719.14 for Old Country Gardens work which represented "three (3) Amelanchier Canadensis at $225.00; three (3) Amelanchier Canadensis at $750.00; six (6) Euonymus Alatus "Compacta" at $485.00, and four (4) Cornus Kousa Chinensis at $285.00." This differs from the original proposal in the amount of $14,321.35 because some of the trees were no longer available.

Tauber testified on cross-examination that he always invoices the plaintiff fifty percent (50%) of the cost of the trees as installation costs.

Michael Mooney ("Mooney") was called as a witness for the plaintiffs' case in chief. He owns 1721 Gunning Drive and when he purchased the property he received a survey which was marked Plaintiffs' Exhibit No. 29. Mooney believed all the subject trees that were cut were on his lot as depicted in that survey and he relied on that survey in order to cut down the trees. When questioned by counsel, Mooney

was shown copies of Plaintiffs' Exhibit No.: 30, the deed in question; Plaintiffs' Exhibit No.: 32; a survey from Michael Mooney and Robin Mooney for Lot No. 55 by Zebley & Assoc., Inc. and Plaintiff's Exhibit No.: 34, all marked and received into evidence. Mooney believes when he relied on these surveys the dotted lines and since Lot 55 was inside the dotted lines on his survey he believed that the trees were either on his property or on some sort of easement owned by the County and not plaintiff's land.

At this point in case in chief, when plaintiff rested, defendants Moved for a Directed Verdict in favor of the Mooneys.[7]

b) <u>Defendants' Case-In-Chief</u>

Through Michael Mooney, defendants introduced Defendant's Exhibits A-F which depicted various pictures of Mooney's property from March 3, 2002. Mooney testified that his family actually could see plaintiffs' property when the trees were still located on the Pensaks' property and not cut down. Mooney testified he could always

[7] Co-defendants' Directed Verdict Motion alleged *inter alia*, and was presented at trial, that plaintiffs failed to prove the subject trees were on their own lot and the testimony focused on defendants' property, not plaintiffs' property. In essence, co-defendants argued they proved some trees were removed, but not that they were on their actual property. In addition, plaintiff alleged there is a lack of evidence that the eleven (11) trees were actually located on their property and rely on Exhibits No.: 29 which referenced "part of Lot 50" on the survey and that the tree stump, which indicates 20.2 to the property omits that the subject lot was not part of Lot 55 and was actually located on the Mooney's property. With reference to Plaintiff's Exhibit No.: 32, defendants allege in their Motion for a Directed Verdict the bold line shows the property line on Lot 55, not Lot 56. In addition, co-defendants argue Plaintiffs' Exhibit No.: 30, paragraph 2 references "b in part of Lot 55 known as 7 between 21 and therefore the subject trees were on the defendant's property. Further, co-defendants argue Plaintiffs' Exhibit No.: 23 shows the same lot line and part of Lot 55 and the six stumps and all trees were actually located on the Mooney's property. As to damages, co-defendants argue that the trees on the subject property purchase were not a commercially reasonable method and that much of the materials were used outside of the location of the subject area where the trees were cut down. Finally, co-defendants argue that 25 *Del.C.* §1401 is an exclusive remedy of law for damages for trees and plaintiffs have not met that burden.

see the Pensak's house from his driveway. Mooney believed also that the gum trees located in these pictures and introduced by plaintiff were located on his property as he relied on his survey. Mooney decided to move the trees because he believed it was an unkept area; there were water issues; and the area was causing drainage problems with excess water draining onto his property. Mooney also believed he had the legal rights after reviewing the survey he received at his house settlement to remove the trees. He also testified that Plaintiff's Exhibit No.: 32 depicted Lot 55 within his property lines and area where the trees were cut down. Mooney testified he offered weeping willows and/or to replace the trees cut down in the area. He testified he was not consulted by the Mooneys when they actually replaced the trees through an Old Country Gardens contract.

Mrs. Robyn Mooney (Mrs. Mooney) also testified on behalf of the defendants. Mrs. Mooney believed the area subject to be their land and trees because of the survey they received at their settlement as no one had maintained the area in question for years and it was largely an unlandscaped lot. Mrs. Mooney also testified that she was "always willing to plant the trees" in the wooded area and actually met several times with the plaintiffs.

II. Discussion

After trial was completed, the Court ordered post-trial briefing on the various issues. The Court also ordered counsel to brief the issue of whether plaintiff actually

proved at trial that the subject trees were located on their lot. The Court has carefully reviewed those Memoranda of Law and the matter is ripe for a decision.

The Court requested counsel in their Memorandum of Law to address the issue of whether 25 *Del.C.* §1401 *et seq.* is an exclusive remedy under Delaware law for tree trespass.

In the instant action, the Court finds 25 *Del.C.* §1401 *et seq.* is not an exclusive remedy under Delaware law for an action in a tree trespass. First, 25 *Del. C.* §1401 *et seq.* as plaintiff's counsel noted in his Memorandum at 2, became law in 1953. Prior to the date of that statutory scheme a common law action referred to as trespass *quare clausum fregit* existed. (Plaintiff's Memorandum at 2). The Superior Court in *Vaugh v. Veasey*, 125 A.2d 251, p. 139 noted the following, three years after the passage of that statute into law:

> The object of the statute is the better protection of the owners of standing timber. Its adoption was induced by the tendency of some timber cutters to be extremely careless about observing property lines. Obviously, the Legislature became convinced that the evil has become so widespread as to demand stronger deterrents than were provided by the criminal statutes and civil remedies previously existing. Instead of making the criminal law more stringent, it has modified the civil remedy so as to cause greater burdens on the wrongdoer, subjectively and adjectively.[8]

Neither counsel has provided case law that the elements of trespass has changed or that the instant statute was intended to be an exclusive remedy for tree trespass, such as the enactment of the Workman's Compensation statute, 19 *Del.C.*

[8] *See Vaugh v. Veasey,* 125 A.2d 251, p. 139.

§2304. It is clear that the Workman's Compensation statute is an exclusive remedy for workplace injuries.

In previous case law, the Delaware Supreme Court listed the appropriate standard for measure of damages in a timber trespass case as follows:

> Where the trees were for personal enjoyment, court uses replacement costs, modified as necessary to reach a just and reasonable result, as the proper measure of damages. In rebuttal, a defendant may demonstrate that the replacement costs are wholly disproportionate to the damages inflicted, but it is for the fact finder to balance these elements of damages to arrive at a just and reasonable award.[9]

As plaintiff's counsel pointed out, previous decisions of trial courts of this jurisdiction "have balanced the amount of damages for the replacement cost where the replacement costs were excessive and unreasonable."[10] Prior to the instant statute the standard was set for the injury that was actually sustained.[11]

It must be noted that the plaintiffs did not plead or seek a cause of action under the instant trespass statute, 25 *Del.C.* §1401 *et seq.* which provides punitive or exemplary damages under §1401(b) equal to the "triple the fair value of the trees removed plus cost of the litigation." Plaintiffs are therefore not entitled to this statutory award for a violation of 25 *Del.C.* §1401 *et seq.* as they did not seek the remedy in their complaint. Assuming, arguendo, plaintiffs had filed a cause of action under 25 *Del.C.* §1401, Mrs. Pensak admitted at trial on cross-examination that the defendants never "negligently or maliciously cut the trees down on her land." The

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9 *See J.S.F. Properties, LLC v. Richard S. McCann and Sharon McCann*, 985 A.2d 390, WL 4301625.
10 *Hastings v. Harding*, WL 3325916.
11 *Phillips v. Brittingham*, 77 A. 964, *Conaway v. Isaacs*, 94 A. 768.

elements of 25 *Del.C.* §1401(a) therefore do not exist in the trial record. Hence, the Court therefore finds that the plaintiffs are limited to the remedy sought in their instant complaint and not exemplary or punitive damages or the statutory provisions of 25 *Del.C.* §1401 *et seq.*[12] Having found above that the timber trespass statute is non-exclusive, the Court as will be set forth below, finds which items were proven by a preponderance of the evidence at trial.

Second, the Court requested counsel of record to address whether the plaintiffs, in the trial record have proven by a preponderance of evidence that they are the owners of the subject disputed wooded area identified in the trial record as the location of the alleged trespass by a preponderance of evidence. For the reasons enumerated below, the Court finds plaintiffs have proven by a preponderance of evidence in the record the trees were on their land. Looking at the totality of circumstances, as well as the Deeds Surveys, oral testimony and other indicia of ownership in the trial record, including all the exhibits stipulated into evidence at trial, this Court finds the plaintiffs met the threshold minimum preponderance of evidence standard that the trees cut were actually on plaintiffs' property. The Court bases this finding on several additional factors, including Mr. Pensak testified he purchased 1719 Gunning Drive in 1995 and eleven (11) trees were cut down on his property. He testified he purchased the property and he had it surveyed and he had markers

[12] The Court must note that plaintiffs, through trial strategy sought only to prove by Elrod's testimony, not an expert that the defendants were not the record owners of the area where the trees were cut down.

installed. (*See Exhibit B, Plaintiff's Op. Brf.*). He also testified there were markers on each corner of his lot which adjoined the defendant, Mooney's lot.

Second, Donald Elrod, a licensed surveyor, although not qualified as an expert at trial testified he was requested to survey 1719 Gunning Road and 1721 Gunning Road. *(See Appendix, Plaintiff's post-trial Memorandum).*[13]

Finally, is no dispute at trial that the Pensaks and Mooneys lot adjoined each other and at trial, plaintiff's counsel asked Elrod the material question, and that was "…even if the stakes were off nine (9) inches, would all these trees still be located within the Pensaks' property?" Elrod testified "Yes, they would be."

Before concluding, the Court notes, the plaintiffs conceded in their post trial memorandum, that they did not have the entire Pensak property surveyed. However, reviewing the various exhibits in trial, included in both plaintiffs' and defendants' counsel post-trial memorandum and listening carefully to Elrod's testimony, the Court finds by a preponderance of the evidence that plaintiffs owned the subject area where the trees were cut down.[14, 15]

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[13] Referring to Plaintiff Exhibit "C-23", Elrod testified he found a pipe in the right rear area of the lot and at the right front corner based upon the re-subdivision plan and testified, although he didn't' show the front pipe on his drawing, it was partially nine (9) inches off where it should have been located.

[14] *See also*, *A.E.S. Surveyors,* Survey, September 1, 2009; Survey Plan 1721 Gunning Drive, which depicts the dotted line that clearly indicates the old Lot 55 and the new dark line indicating the new plot plan for Lot 55 which is the Mooney's property.

[15] What is apparent to the Court and the subject of the instant dispute is that the Mooney's used an old survey at the time they purchased their property and the new survey indicates the property line for Lot 55 and the dark line on Exhibit "23" places the trees on the Pensaks' property by a preponderance of evidence.

III. The Law

The burden of proof in the instant tort/trespass action is proof by a preponderance of the evidence or more likely than not that the plaintiff's have sustained actual damage sought in the instant complaint.[16]

IV. Opinion and Order

Ultimately this Court must decide the specific items introduced by the plaintiff meet the preponderance of evidence standard for damages. The Court must determine the installation of these various items were proximately caused by defendants cutting of the instant trees.

V. Damages Proven at Trial

a) The Trees, Potting Mix, Delivery, Clean-up and Fuel Charges.

Taubert, as a fact witness, testified at trial that the gum trees would not be a suitable choice for reinstallation in the subject area because of wetness and shade. Taubert actually planted sixteen (16) trees and the Court notes that only eleven (11) trees were cut down. Purportedly sixteen (16) trees were planted because the new trees are now smaller than the trees cut down by the defendant. Taubert, on behalf of Old Country Gardens submitted an invoice in the amount of $11,719.14 which represented "three (3) Amelanchier Canadensis at $225.00; three (3) Amelanchier Canadensis at $750.00; six (6) Euonymus Alatus "Compacta" at $485.00, and four (4)

16 *See e.g. Orsini Top Soil v. Carter*, C.A. No.: 2002-03-430, CCP, New Castle, 2004 Del.C.P. LEXIS 17, May 18, 2004 (Welch, J.); *Dreybold v. Kenney*, C.A. No.: 2004-03-867 ,CCP, 2005 Del.C.P. LEXIS 32, Aug. 23, 2005 (Welch, J.); and *Best Construction Co. v. Dino & Sons, Inc.*, C.A. No.: 2001-03-492, CCP, 2002 Del.C.P. LEXIS 2, Nov. 14, 2002 (Welch, J.).

Cornus Kousa Chinensis at $285.00." Citing the case law above, the Court must determine the reasonableness of planting these new, what appear to be fairly exotic trees, in lieu of the old gum trees.

As to the invoice from Old Country Gardens, the record above indicates the plaintiffs are entitled to replacement costs, but the Court must determine *sua sponte* the reasonableness of the costs of the trees installed, and whether these new exotic trees meet the actual damages sustained as a result of the trespass by the defendants.

Old Country Gardens invoiced plaintiffs for $14,321.35, the Court finds the $6,945.00 for the exotic trees and $3,472.50 for planting not proven by a preponderance of evidence and unreasonable. Gum trees were actually on the lot and plaintiffs installed various more exotic trees. A reasonable amount of actual damages sustained would be 50% of both of those costs or $3,872.50 plus $1,736.25 for planting. The Court has decided to award the $191.68 for the potting mix. It awards $450.00 for the delivery, removal and clean up as well as $110.59 for fuel charge and equipment, charge of 4% for $442.36.

b) <u>The Installation and Removal of the New Catch Basin and Five (5) Loads of Dirt; Cost of Disposal</u>.

It is clear in the trial record that it was never proven by a preponderance of evidence that the installation of the new catch basin or removal of the old catch basin was because of the defendants cutting of plaintiffs' trees. Donald Millinger did not even recall at trial the reason for the installation of the new catch basin at trial and also testified that only five (5) loads of dirt of the actual eight (8) loads of dirt installed

were used in the area where the trees were cut down. Millinger also testified he removed three (3) stumps, but could not specify at trial while $315.50 costs for 5.13 tons of disposal. He also agreed that his invoice indicated "tear out old catch basin" and he did not recall at trial why the new catch basin was actually installed, or why the old catch basin was removed. The damages for these items shall not be awarded.

c) <u>The Bushes Planted on Pentaks' Property</u>.

Carefully scrutinizing the record the Court discounts and finds by a preponderance of evidence that defendants are also not entitled to the various bushes planted along the driveway which were additional "privacy coverage" that were not caused by defendants cutting of the trees. The damages for these items shall not be awarded by the Court.

d) <u>The Loads of Dirt and Other Items</u>.

The Court therefore finds by a preponderance of the evidence that plaintiffs are entitled to five loads of dirt at $135.00; a partial reimbursement to fill the dirt and grade at 5/8 charge of the $1,500.00. Plaintiffs admitted three (3) loads of dirt were used in areas near their house, not where the trees were cut down by the defendants.

e) <u>Damages for Old Catch Basin Replacement</u>.

The Court finds plaintiffs are not entitled to the $650.00 to tear out the old catch basin, remove the tree stumps, and load the dumpster and not entitled to the $100.00 to install the 12" x 12" new catch basin.

f) Dumpster Fee.

Plaintiff's are entitled to the 20 yard dumpster fee for the brush, but did not sustain the burden of the 5.13 tons at $661.50 per ton. The Court finds this was proven by a preponderance of the evidence for an award of $150.00.

g) The City Dump Fee.

Likewise the city dump fee of $32.01 and one trip for the truck and driver in the amount of $75.00 was proven by a preponderance of the evidence.[17]

Therefore the Court finds by a preponderance of the evidence a total amount of damages sustained by the plaintiff based upon the case law above, in the amount of $7,101.35. *See, Exhibit A* for itemized damages award. Each party shall bear their own costs.

IT IS SO ORDERED this 28th day of April, 2010.

John K. Welch
Judge

/jb

cc: Ms. Tamu White, Case Manager
CCP, Civil Division

[17] The Court finds defendants' Motion for a Directed Verdict is moot and therefore denied as a result of the Court's decision. *See, Rick Pheasant and State Farm v. Jason E. Destating*, 1998 Del.C.P. LEXIS 23, Welch, J. (September 29, 1998); *Dennis Wright v. Matthew Foraker*, 2001 Del.C.P. LEXIS 45, Welch, J. (June 4, 2001); *Cynthia G. Boyle v. Mary Creed v. Denise and Rich Widdoes and Widdoe Construction*, 2001 Del. C.P. LEXIS 39, Welch, J. (April 26, 2001).

APPENDIX

DAMAGES AWARDED

1.	Dirt: 5 yards @ $135.00	$675.00
2.	20 yard dumpster fee; stumps & Brush	$150.00
3.	Tree replacement	$3,872.50
4.	Planting of trees	$1,736.25
5.	Delivery, removal and clean-up	$450.00
6.	Fuel charge	$110.59
7.	City dumpster fee	$32.01
8.	Truck and driver trip charge	$75.00
	TOTAL AWARD	**$7,101.35**