

No. **08-0639**

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE STARK COUNTY COURT OF APPEALS,
FIFTH APPELLATE DISTRICT,
CASE NO. 2006 CA 00342

DAVID REICOSKY, dba TREES 4U, et al.,

Appellees,

v.

TONY McCAMMON, dba ROYAL GARDEN CENTER et al.,

Appellants.

**MEMORANDUM OF APPELLANTS, TONY McCAMMON
and GARNETT McCAMMON**

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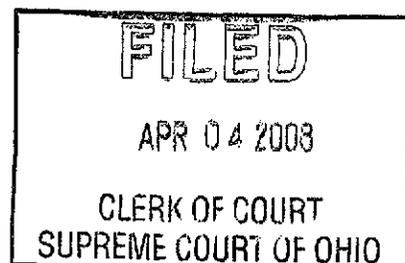


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**STATEMENT OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL
INTEREST**

This case involves a simple dispute between parties to a contract for the harvesting of evergreen boughs from trees located on the Plaintiff-Appellee's tree farm, however, the crux of this case turns on a universal issue present in most every civil case brought under any theory of law, every day, in courts throughout the State of Ohio: damages. Notwithstanding Plaintiff-Appellee's failure to prove damages, an essential element of its claim, the trial court denied Defendant-Appellants' motion for directed verdict. On the first issue in this appeal, the Court has the opportunity to affirm and preserve Ohio law that a plaintiff must prove its actual loss to properly claim damages. This is an important issue that affects almost every civil case brought in Ohio.

On the second issue of this appeal, the Court has the opportunity to guide trial courts in the task of ordering jury interrogatories in a way that will assure the jury's meaningful consideration. The trial court submitted interrogatories in an order that obviated the consideration of a key liability factor. By accepting jurisdiction, the Court can uphold the intended purpose of interrogatories in testing jury verdicts, an important interest for all litigants which the decision below puts at risk.

STATEMENT OF THE CASE AND FACTS

This case involves a dispute between parties to a contract for the harvesting of evergreen boughs from trees on the plaintiff's tree farm. Plaintiff alleged that he gave the defendants permission to cut boughs only within a specified area, and that the defendant harvested boughs outside that area, damaging trees that he intended to sell as landscape trees. Plaintiff did not allege breach of contract, however, but alleged liability only under an Ohio statute that prohibits the willful or reckless damaging of another's trees. The statute provides for treble damages upon proof of liability.

The defendants claimed that the plaintiff had given permission to harvest in the disputed area when the parties made their agreement over the telephone. There was no written agreement defining the area to be harvested.

The defendants moved for a directed verdict at trial on the ground that plaintiff had not presented any evidence that defendants had acted willfully or recklessly, and also on the ground that the plaintiff had not presented evidence of his actual losses. The court denied the motion, and submitted the case to the jury. It instructed the jury that defendants could not be found to have acted recklessly if they had a good faith belief that they were entitled to cut the boughs. It submitted interrogatories, however, that asked the jury to decide first whether defendants had acted recklessly and to then decide whether defendants had a good faith basis to cut the boughs in the disputed area.

The jury returned a verdict for plaintiff, and the court entered judgment on the verdict, awarding plaintiff treble damages.

Defendants moved for judgment notwithstanding the verdict, arguing again the insufficiency of evidence to establish recklessness or damages. They also moved for a new trial

based on the ordering of interrogatories that had the jury decide recklessness before considering whether such a finding was even possible. The court denied both post-judgment motions, and defendants timely appealed. On February 19, 2008, the Stark County Court of Appeals, Fifth Appellate District filed its judgment, affirming the trial court's judgment on the jury verdict and denial of the motion for a new trial.

ARGUMENT

I. A plaintiff alleging damages for damage to his property has the burden of proving his actual loss. The court must grant a defendant's motion for directed verdict on damages when the plaintiff fails to prove actual damages. A court may allow a claim for damages based on lost profits to go to the jury only when the plaintiff has presented evidence under the proper measure of damages, showing both potential revenue and the expense of performance.

The trial court denied Defendant-Appellant's motion for directed verdict and motion for judgment notwithstanding the verdict, despite the fact that Plaintiff-Appellee failed to offer any evidence of his actual damages of lost profits. The court awarded him pre-treble damages in the amount of \$35,654.00 based on the sale price of a landscaped tree multiplied by the number of trees alleged to be damaged. Plaintiff-Appellee's testimony showed that in calculating his damages "he took his price list for his balled and burlapped landscape tree and multiplied the price by the quantity of each tree in a size category"¹ to arrive at the same amount of \$35,654.00. However, that calculation failed to include the relevant labor, material, equipment and sales costs Plaintiff-Appellee would have incurred in preparing the burlapped trees for sale.

The only evidence on the issue of damages was Plaintiff-Appellee's own testimony on the price he possibly could have received for each landscape tree. It is obvious that planted trees require certain preparation in order to sell them in a balled and burlapped condition. Plaintiff-Appellee's own testimony described a process of digging out the tree with the root system intact,

¹ 2008- Ohio – 669; ¶63.

moving it to a jig where it is fitted inside a wire basket of burlap which is tightened so as to preserve the soil, and then cranked tightly into a ball. Despite the fact that Plaintiff would have the cost of those processes in realizing any gain from the sale of his trees, Plaintiff's lawyer, in closing argument, urged the jury to take Reicosky's testimony of the sale price of a tree and multiply it by the number of damaged trees in order to determine damages.

Plaintiff-Appellee failed to prove the elements necessary for his claim of lost profits. In *Allen, Heaton, & McDonald, Inc. v. Castle Farm Amusement, Co.*,² this Court wrote that the plaintiff claiming damages for "profits he would have earned from full performance of the contract" must prove "(a) what he would have received under the contract from the performance so prevented, and (b) what such performance would have cost him." Here, Plaintiff-Appellee failed to prove his costs of preparing and selling the landscape trees. Accordingly, he failed to carry his burden of proving actual loss.

A trial court should grant a motion for a directed verdict when the plaintiff fails to prove actual damages; a court should allow a claim for damages based on lost profits to go to the jury only when the plaintiff has presented evidence under the proper measure, i.e., evidence of both revenues and expenses. This is a common issue for trial courts to resolve in many different types of cases, however, the appellate court's opinion makes it more difficult for trial courts to now resolve this issue.

In fact, the appellate court below fumbled this issue badly, declining to address it under the curious reasoning that appellants had waived the issue by failing to submit jury instructions to guide the jury in determining plaintiff's damages under the correct standard. Of course, the error concerned the court's failure to direct a verdict, and the question of jury instructions is

² (1949), 151 Ohio St. 522, at paragraph three of the syllabus.

irrelevant to that issue. Moreover, such a proposed instruction would have been improper since there was no evidence for the jury to use in deciding the proper measure of damages.

Finally, as further evidence on the need for the Court to accept jurisdiction, the appellate court's decision is in conflict with a decision out of the Wood County Court of Appeals. In the recent case of *Kosier v. DeRosa*,³ the plaintiff sued for breach of contract after the defendant failed to pay him for a hardwood floor he had installed. The trial court directed a verdict for the defendant on the ground that plaintiff failed to present essential evidence supporting his claim for damages, and the appellate court affirmed, stating:

Kosier carried the burden of proving the lost profit damages, the difference between the price Kosier would have received under the contract less the expense of performance that was saved because of the breach. [Citations omitted.] Such damages are designed to put the non-breaching party in as good of a position as he would have been in if the contract had not been breached. Furthermore, Kosier was required to prove the value of his own labor and the number of hours to complete the contract, which must be deducted from the contract price, to determine lost profits. [Citation omitted.]

* * *

Even if we accept the trial court's finding that Kosier did half of the labor and that there was evidence to support the court's finding that Kosier paid his employee \$20 an hour, this information does not enable us to determine Kosier's lost profits. Kosier did not present any evidence regarding how many labor hours were required to install and finish the floor. Therefore, there was no means to calculate the cost of the employee's and Kosier's labor, which must be deducted from the contract price.

* * *

... Because there was no evidence to establish lost profits, DeRosa was entitled to a directed verdict in his favor.⁴

The facts of *Kosier* on the issue of damages are very similar to the facts at issue here, however, the appellate courts arrived at two very different results on the motions for directed verdict. Accordingly, the Court should allow this appeal to clarify the standard for lost profit

³ Wood App. No. WD-05-050, 2006-Ohio-5114.

⁴ 2006-Ohio-5114, at ¶¶ 34, 37, 39.

damages by finding that a court may allow a claim for damages based on lost profits to go to the jury only when the plaintiff has presented evidence of both potential revenues and expenses. Appellants have moved the appellate court below to certify a conflict on this issue pursuant to App. R. 25(A).

II. An affirmative finding of good faith precludes a jury from finding that a defendant acted in a reckless manner. In order to prevent confusion to the jury, the court must give the jury interrogatories that have them decide whether a defendant acted under a good faith belief before deciding whether a defendant acted recklessly and, therefore, is liable for damages.

The order of the jury interrogatories presented by the trial court confused the jury, such that the interrogatory on whether Defendant-Appellant acted in good faith was rendered moot. In *Cincinnati Riverfront Coliseum, Inc. v. McNulty, Co.*,⁵ this Court wrote that “[t]he essential purpose to be served by interrogatories is to test the correctness of a general verdict by eliciting from the jury its assessment of the determinative issues presented by a given controversy in the context of evidence presented at trial.” [*emphasis added*]. Here, the court denied the defendants their right to a decision on the determinative issue by having the jury decide the ultimate liability question before deciding the dispositive issue.

The Defendant-Appellant requested that the jury decide the essential elements of the claim by interrogatory. Over defendants’ objection, the court confused the ordering of the interrogatories by having the jury first decide the final question as to liability based on recklessness, and only then consider whether the Defendant-Appellant acted in good faith. In fact, the jury reached its verdict, and the trial court read the verdict before anyone realized that the jury had failed to answer the interrogatory on good faith. Instead of granting a mistrial on

⁵ (1986), 28 Ohio St.3d 333, 336-337.

this issue, the trial court sent the jury back to the jury room to deliberate on the good-faith interrogatory even though the verdict had already been read by the court. It took the jury only seven minutes to answer the interrogatory in a way that was consistent with its liability finding, and the jury answered the interrogatory by finding that Defendant-Appellant did not act in good faith.

It will be helpful in understanding this issue to consider a hypothetical scenario in which the plaintiff alleges a negligence claim and the court has the jury first decide whether defendant is negligent, and only then decide whether defendant breached the standard of care. The question on the standard of care becomes irrelevant in that context, just as the jury's finding on the good-faith interrogatory was irrelevant once it determined defendants' liability for recklessness.

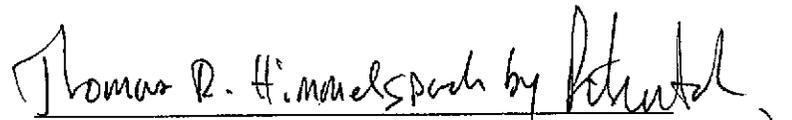
If the jury had found that Defendant-Appellant acted in good faith, then the deliberations would have ended and the jury would not have been able to find that Defendant-Appellant was reckless. This result was not possible, however, due to the erroneous ordering of the interrogatories. Defendants were denied their right to have the jury decide the essential elements of the claim. Accordingly, the Court should accept jurisdiction to uphold the intended purpose of interrogatories in testing jury verdicts, an important interest for all litigants which the decision below puts at risk.

CONCLUSION

The decision below presents two issues warranting review by the Court. The Court should clear the confusion raised by the appellate court's decision concerning the plaintiff's burden in proving damages. The Court should also accept jurisdiction on the second issue to

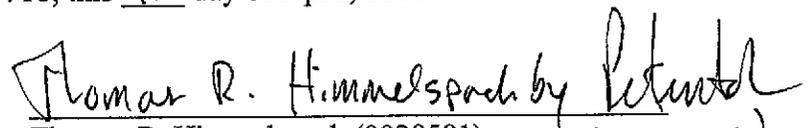
protect the right of parties to have jury interrogatories presented in a manner that assures meaningful consideration on determinative issues.

Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum of Appellants in Support of Jurisdiction* was sent by regular U.S. mail to Don M. Benson and James J. Collum, counsel for plaintiff-appellee, at 4571 Stephen Circle NW, Canton, Ohio 44718, this 4th day of April, 2008.


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COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
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DAVID REICOSKY, dba TREES 4U,
et al.,
Plaintiffs-Appellees

JUDGES:
Sheila G. Farmer, P.J.
John W. Wise, J.
Julie A. Edwards, J.

-vs-

Case No. 2006 CA 00342

TONY McCAMMON, dba ROYAL
GARDEN CENTER et al.,

Defendants-Appellants : OPINION

CHARACTER OF PROCEEDING:

Civil Appeal From Stark County Court Of
Common Pleas Case No. 2006 CV 01460

JUDGMENT:

Affirmed

(B)

DATE OF JUDGMENT ENTRY:

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ENTERED BY JH

A TRUE COPY TESTE:

NANCY S. REINBOLD, CLERK

By *J. F. Hickman* Deputy

Date *2/20/08*

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Edwards, J.

{¶1} Defendants-appellants Tony McCammon and Garnett McCammon appeal from the jury verdict of October 26, 2006, and the November 14, 2006, Judgment Entry of the Stark County Court of Common Pleas denying their Motion for New Trial and Judgment Notwithstanding the Verdict.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 5, 2005, appellees David Reicosky and Bonnie Reicosky, dba Trees 4U, filed a complaint against appellants Tony and Garnett McCammon, dba Royal Garden Center. Appellees, in their complaint, alleged that appellants, in November of 2004, had recklessly cut down landscape grade trees on appellees' property. Appellees, in their complaint, sought treble damages pursuant to R.C. 901.51.

{¶3} Subsequently, a jury trial commenced on October 17, 2006. The following testimony was adduced at trial.

{¶4} Appellees David Reicosky and Garnett Reicosky own a tree farm in East Sparta, Ohio that consists of 65.32 acres. Appellants Tony and Garnett McCammon are the owners of Royal Garden Center in Circleville, Ohio.

{¶5} In 1996, appellants Tony and Garnett McCammon had appellee ship approximately 300 balled trees to them to use as greens or tree boughs. Appellee had no contact with appellants again until 2002, when appellant Tony McCammon [hereinafter "appellant"] called and said that he wanted some boughs, but did not want the trunks of the trees. Appellee David Reicosky [hereinafter "appellee"] sent the boughs to appellant, who then took what he wanted and sent the rest back.

{¶6} In 2003, appellant made arrangements to go to appellees' tree farm and cut his own boughs. According to appellee, appellant was instructed not to cut east of the drainage ditch on the property, but disregarded such instruction. The following is an excerpt from appellee David Reicosky's trial testimony:

{¶7} "Immediately I called Mr. McCammon and I gave him a heated discussion and made it clear and on - - under no uncertain terms that where he was supposed to cut and where he was not supposed to cut. I further went to the length of marking the drainage ditch with a 2- - a 2,500 foot roll of yellow and black construction safety tape. Uh, there's an example over there in my, my briefcase. Uh, and I lined the edge of the drainage ditch with that tape and I also encircled trees within that west side that he was not supposed to cut. That would be a tree that I was managing for landscape trees.

{¶8} "And obviously the small amount of money that I'm getting for tree boughs from Mr. McCammon does not compare to the price that I can get for a landscape tree, and as a business owner I would rather get the most value out of my product and my commodity, so that's why I was restricting those trees for growing there. But I mark- - I completely encircled those trees with the yellow and black construction tape.

{¶9} "After I did that - - and, and the primary reason I did that is I, I knew Mr. McCammon knew where to go and where not to go but if he sent his crew up without him, I wanted to make sure that his crew knew precisely where to go and it was easy to identify where the line of demarcation was.

{¶10} "After I did that, uh, his crew from Royal Gardens, the cutting crew, came up at least four times, got four 12 foot trailer loads of, of boughs, and there was no incidents in 2003 of them coming east of the drainage ditch." Transcript 1 at 62-63.

{¶11} At trial, appellee testified that appellant called him in November of 2004 and wanted to come out and cut some boughs. Appellee testified that he told appellant that he could cut where he had cut the previous year, but could not cut any trees east of the drainage ditch. Appellee denied ever telling appellant that he could cut boughs east of the drainage ditch. Appellee further testified that appellant went out to the tree farm on four separate occasions in 2004 and that, on December 1, 2004, he drove over to check on appellant's cutting crew and discovered that appellant had cut trees east of the drainage ditch. The following testimony was adduced when appellee was asked what happened:

{¶12} "A. Total devastation of my trees that I was managing for landscape trees. He got totally out of the - - he, he came west - - or excuse me, he came east of the drainage ditch. The designated area was west of the drainage ditch. He came totally east. Stand alone trees that I was managing, was ready to dig in 2005 totally destroyed, of no value to me. Totally removed my revenue stream.

{¶13} "Q. Had you prior to 2004 marked any of those trees east of the drainage ditch for harvesting in 2005?

{¶14} "A. Yes, I had markings there where I had, had the size markings that I go through to select a tree for digging. There were trees marked in that area that had - - I had designated and was using for landscape trees.

{¶15} "Q. How did you mark them?

{¶16} "A. I had a, a flagging tape. A flagging tape is just a narrow piece of tape and with multiple colors. A blue and white stripe on it is a 10 foot tree. And I tie that

flagging around the branch of the tree so that I can easily identify it when I tie the tree up and get it ready for the ball and burlap process that we have." Transcript 1 at 72-73.

{¶17} Appellee further testified that when appellant called him on December 6, 2004 asking about more tree boughs, he told appellant that he had cut out of bounds and had ruined appellee's trees. When asked whether appellant ever said anything to him about having authorization to go east of the drainage ditch, appellee responded in the negative.

{¶18} Thereafter, on or about December 14, 2004, appellee sent appellant a letter seeking compensation for the damage to 211 landscape trees.

{¶19} At trial, appellant testified that he and his wife, Garnett, run a garden center called Royal Gardens and that they purchase boughs for grave blankets. Appellant testified that he had never had a written contract with appellee, but that he went to appellee's tree farm in 1996 and arranged to purchase boughs from appellee. Appellant testified that, from 1997 to 2001, he did not purchase any boughs from appellee because he found another supplier.

{¶20} In 2002, appellant contacted appellee again for tree boughs and arranged to come and cut the boughs himself. Appellant testified that appellee told him to cut west of the drainage ditch, which was marked off with tape. At trial, appellant further testified that he had the same arrangement in 2003 as to where he could cut boughs and that the parties' arrangement was that appellant could cut anywhere west of the drainage ditch. According to appellant, at such time, there was a limited supply of greenery on the west side of the ditch. As a result, appellant also had to obtain boughs

from another supplier. Appellant testified that he only paid appellee \$944.00 in 2003 in contrast to \$3,476.00 in 2002.

{¶21} Appellant further testified that, due to the scarcity of boughs on the west side of the drainage ditch, he called appellee in 2004 and told appellee that "there's no way we can come back... I said, there's not enough greenery on that [west] side. I said, we'd have to go to the west -- or to the east side of the ditch to get enough." Transcript II at 92. The following testimony was adduced when appellant was asked how appellee responded:

{¶22} "A. And he said, No, I don't want you to, and I said, All right, but I said, That's the only way we can come back. And I said - - you know, I said, But if you would allow us to pick the trees out of there, the big ones, you know, or the ones that's not usable. And that's when we discussed the different things and the trees, and I said you know, if we took a stand alone tree, we could - - you know, we wouldn't touch those, and he said, I don't want you touching any one I've got marked, and then we discussed doing that.

{¶23} "Q. Okay. So tell me more specifics about that discussion, what did you actually discuss?

{¶24} "A. So I asked him how big of trees he could dig, and he says he could dig up to 16 feet.

{¶25} "Q. Okay.

{¶26} "A. And I said, All right. I said, So if we was to go in there and not touch anything that was 16 feet or less, you'd be all right with that. And I still wasn't clear for

quite awhile talking to him, and then he said, Well, let's have a gentlemen's agreement that you won't go farther south than the power lines.

{¶27} "Q. All right.

{¶28} "A. And then he made that statement, I knew that he knew that we was crossing the ditch because the power lines had no relevance in the previous two years at all, they've never been mentioned.

{¶29} "Q. All right. What did he say specifically about the power lines?

{¶30} "A. He just said, Let's just have a gentlemen's agreement that you'll stay north of the power lines.

{¶31} "Q. All right. Now, and um - -

{¶32} "A. Toward the north side.

{¶33} "Q. The north side of the property?

{¶34} "A. Right.

{¶35} "Q. And as we showed already, you in 2003 were already cutting greenery south and all west of the ditch, right?

{¶36} "A. Right.

{¶37} "Q. So the arrangement was that you could cut trees east of the ditch, right?

{¶38} "A. Beg your pardon?

{¶39} "Q. That you can - - in 2004 the arrangement was that you could cut greenery or boughs east of the ditch, right.

{¶40} "A. Correct.

{¶41} "Q. All right. Now, explain again more details the specifics of that conversation. How did it end?

{¶42} "A. I - - it ended with me knowing that we could cross that ditch and that we could cut anything up to 16 feet unless it was a stand alone. You know, if the trees were growing together, we could cut it.

{¶43} "Q. Okay.

{¶44} "A. But if it was a stand alone tree, that we wasn't to touch it up to 16 feet, or anything that, that was salable. And we've sold trees for enough years that I think that we knew that." Transcript II at 93-95.

{¶45} According to appellant, the two did not discuss what was meant by the term "stand alone" tree. Based on his conversation with appellee, appellant cut trees east of the ditch on four occasions in 2004.

{¶46} At trial, appellant's wife, appellant Garnett McCammon, testified that, in 2004, she heard her husband speaking on the phone with appellee and heard him tell appellee that all of the greenery available on the west side of the drainage ditch had been exhausted. She further testified that she heard her husband say that they would not cut any stand alone trees. Appellant Garnett McCammon testified that, based on such conversation, there was no doubt in her mind that her husband had been given permission to cut on the east side.

{¶47} At the conclusion of the evidence and the end of deliberations, the jury, on October 19, 2006, found in favor of appellees and against appellants and awarded appellees damages in the amount of \$35,645.00. The jury, in its response to interrogatories, found that appellants had acted recklessly.

{¶48} Pursuant to a Judgment Entry filed on October 26, 2006, the trial court granted appellees' Motion for Treble Damages pursuant to R.C. 901.51 and awarded appellees damages in the amount of \$106,935.00 plus interest.

{¶49} On November 8, 2006, appellants filed a "Motion for New Trial and Judgment Notwithstanding the Verdict." With respect to their Motion for Judgment Notwithstanding the Verdict, appellants argued there was insufficient evidence to establish recklessness or damages. With respect to their Motion for New Trial, appellants argued that the order of interrogatories was prejudicial. As memorialized in a Judgment Entry filed on November 14, 2006, the trial court denied such motion.

{¶50} Appellants now raise the following assignments of error on appeal:

{¶51} "I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR PLAINTIFF ON THE JURY VERDICT.

{¶52} "II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL."

{¶53} Appellants, in their first assignment of error, argue that the trial court erred in denying their Motion for Directed Verdict and their Motion for Judgment Notwithstanding the Verdict. We disagree.

{¶54} In the case sub judice, appellees sued appellants under R.C. 901.51. Such section states as follows: "No person, without privilege to do so, shall recklessly cut down, destroy, girdle, or otherwise injure a vine, bush, shrub, sapling, tree, or crop standing or growing on the land of another or upon public land. In addition to the

penalty provided in section 901.99 of the Revised Code, whoever violates this section is liable in treble damages for the injury caused."

{¶55} The Ohio Supreme Court, in *Wooten v. Knisely*, 79 Ohio St.3d 282, 1997-Ohio-390, 680 N.E.2d 1245, held that the term "recklessly," as used in R.C. 901.51, has the same meaning in a civil claim for treble damages as such term is defined in R.C. 2901.22(C). Such section states that: "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶56} In the case sub judice, appellants moved for a directed verdict, arguing that appellees had failed to present evidence that appellants acted recklessly or wantonly and also that appellees failed to present evidence of their actual losses. Appellants now argue that the trial court erred in denying their Motion for a Directed Verdict and their Motion for Judgment Notwithstanding the Verdict on such basis.

{¶57} While appellants argue that the court erred in overruling their Motion for Directed Verdict and their Motion for Judgment Notwithstanding the Verdict, our standard of reviewing both motions is the same. In *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 344 N.E.2d 334, the Ohio Supreme Court held a trial court must construe the evidence adduced at trial and any facts established by admissions in the pleadings and record most strongly in favor of the party against whom the motion is made. If it finds there is substantial evidence to support the non-movant's

case, upon which reasonable minds may reach different conclusions, the court must overrule the motion. The trial court does not determine weight of the evidence or credibility of witnesses.

{¶58} In *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 1996-Ohio-85, 671 N.E.2d 252, the Supreme Court noted under the reasonable minds test, the court must determine whether there is any evidence of substantial probative value in support of the claims of the non-moving party. Although the court must review the evidence in deciding the motion, a motion for directed verdict raises only questions of law, *Id.* On questions of law, this court reviews a trial court's judgment de novo.

{¶59} Upon our review of the record, we find that the trial court did not err in denying either motion. As is stated above, appellants, in their brief, maintain that the evidence did not support a finding of recklessness or wantonness. Appellants note that they had permission to be on appellees' property to cut boughs and note also that they left many landscape quality trees on the east side of the drainage ditch untouched. Appellants also emphasize that they only cut boughs from trees that they determined met certain criteria.

{¶60} However, at trial, appellee testified that he did not give appellants permission to cut trees east of the drainage ditch. Testimony was adduced at trial that after appellant, in 2003, cut trees on the east side of the drainage ditch and destroyed some landscape trees, appellee contacted appellant and told him that he was not permitted to cut trees on the east side of the ditch. When questioned at trial, appellee denied ever giving appellant permission to cut east of the drainage ditch. He further testified that appellant cut trees on the east side that were landscape quality trees.

{¶61} Based on appellee's testimony, we find that the trial court did not err when it denied appellants' Motion for Directed Verdict and when it entered judgment in favor of appellees on the jury verdict. While appellants argue that the evidence showed only a misunderstanding between the parties as to what trees could be cut, we note that the jury, as trier of fact, was in the best position to assess credibility. The jury clearly found appellee's testimony, that he never gave appellants permission to cut trees on the east side of the ditch to be credible.

{¶62} As is stated above, appellants also argue that the trial court erred in denying both of their motions because appellees did not establish their damages.

{¶63} In the case sub judice, appellee testified that he sent a letter to appellants on or about December 14, 2004, stating that appellants had damaged 211 landscape trees. When asked how he arrived at a damage figure of \$35,654.00, appellee testified that he took his price list for his balled and burlapped landscape trees and multiplied the price by the quantity of each tree in a size category. He further testified that, after his initial assessment of damages in December of 2004, he more thoroughly assessed the number of landscape trees that were cut east of the drainage ditch and determined that a total of 266 landscape trees were damaged rather than 211. Appellee testified that the total value he placed on all 266 trees was \$45,005.00.

{¶64} Appellees' expert, Ernest Frank, who has been in the tree business for over 27 years, testified at trial that he went out to appellees' property in the summer of 2005 to look at the damaged trees and determined that the trees were not marketable. Appellants argue that appellees failed to meet their burden of proving damages because they only produced evidence of the list price of the landscape trees. Appellants

confend that appellees did not take into account the expenses associated with the sale of the trees, which they did not have to pay in this case because the trees were ruined. Appellants note that if appellees had sold balled and burlapped trees at the list price, they would have expended labor and material in facilitating the sales. However, we note that appellants never requested that the trial court instruct the jury that, in determining damages, they were to deduct the expenses that appellees did not have to incur from the list price of the trees. The jury instruction on damages given by the trial court was substantially similar to the jury instruction requested by appellants. Reviewing the instruction we find that the jury would have had no way of knowing that they were to calculate damages in the manner in which appellants are now arguing is the correct manner. We find that any error in the jury's determining of damages was invited by appellants. Under the invited error doctrine, "a party will not be permitted to take advantage of an error which he himself invited or induced." *State v. Bey* (1999), 85 Ohio St.3d 487, 493, 709 N.E.2d 484 (Citation omitted).

{¶65} Appellants further contend that it is clear that the jury believed that appellees gave them an "incomplete picture" of damages because they only awarded appellees damages for the loss of 211 trees. Appellants note that, at trial, appellee claimed that 266 trees were damaged. However, as is stated above, appellee originally only alleged that 211 trees were damaged. The jury apparently did not find appellee's testimony, that he later found 55 additional trees to be damaged, to be credible.

{¶66} Appellants' first assignment of error is, therefore, overruled.

II

{¶67} Appellants, in their second assignment of error, contend that the trial court erred in denying appellants' Motion for a New Trial pursuant to Civ.R. 59. We disagree.

{¶68} A trial court has discretion when ruling on a motion for a new trial, and a reviewing court should not disturb its decision absent an abuse of discretion. *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 321, 2001-Ohio-47, 744 N.E.2d 759. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶69} In the case sub judice, appellants filed a Motion for a New Trial pursuant to Civ.R. 59(A). Civ.R. 59 states, in relevant part, as follows: "(A) Grounds

{¶70} "A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:...

{¶71} "(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application;.."

{¶72} Appellants specifically contend that the trial court erred in denying their motion based on the order that the interrogatories were given to the jury. Appellants note that the jury was first given Interrogatory A which asked them to determine whether appellants were reckless and, therefore, liable for damages. Interrogatory A states as follows:

{¶73} "(A) Do you find by a preponderance of the evidence that the Defendants trespassed on certain land owned by the Plaintiffs on one or more occasions during November 2004 and recklessly and without privilege to do so cut tree boughs from trees

earmarked for other usage in certain areas which were off limits to the Defendants causing damage to the Plaintiff's?"

{¶74} Appellants note that the jury then was given an interrogatory that asked them whether appellants had acted under a good faith belief that they were permitted to harvest the boughs. Interrogatory B, the second interrogatory, states as follows:

{¶75} "(B) Do you find by a preponderance of the evidence that the Defendants had a good faith belief that they were permitted to cut boughs from the trees within the area of Plaintiffs' property that Plaintiffs allege they had designated as an area where no boughs were to be cut?"

{¶76} According to appellants, the order of the interrogatories "negated consideration of the defense that [appellants] acted with a good faith belief that they were entitled to cut trees on [appellees'] property."

{¶77} In the case sub judice, we find that the trial court did not abuse its discretion in denying appellants' Motion for a New Trial because the trial court's decision was not arbitrary, unconscionable or unreasonable. The jury's responses to the interrogatories were consistent with their general verdict in favor of appellees. Specifically, the jury, when asked in Interrogatory A whether they found by a preponderance of the evidence that appellants trespassed on certain land owned by appellees on one or more occasions during November 2004 and recklessly and without privilege to do so cut tree boughs from trees earmarked for other usage in certain areas which were off limits to appellants causing damage to appellee responded as follows: "YES."

{¶78} After appellants moved for a mistrial on the basis that the jury had not answered Interrogatory B, the trial court sent the jury back to deliberate on the same. The jury's finding, with respect to Interrogatory B, that appellants did not have a good faith belief that they were permitted to cut boughs was consistent with both their general verdict in favor of appellees and their response to Interrogatory A. We find, therefore, that appellants were not prejudiced by the order of the Interrogatories.

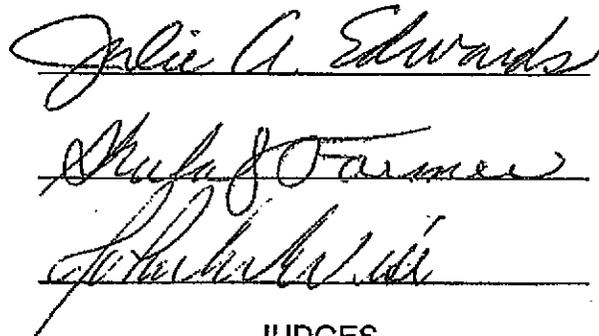
{¶79} Based on the foregoing, appellants' second assignment of error is overruled.

{¶80} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Farmer, P.J. and

Wise, J. concur



Julie A. Edwards
Paula J. Farmer
Patricia A. Wise

JUDGES

JAE/0907

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DAVID REICOSKY, dba TREES 4U,
et al.,
Plaintiffs-Appellees

-vs-

TONY McCAMMON, dba ROYAL
GARDEN CENTER et al.,

Defendants-Appellants

JUDGMENT ENTRY

CASE NO. 2006 CA 00342

08 FEB 19 PM 2:59
MARCO S. REIBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellants.

Julia A. Edwards

Shirley J. Farmer

Richard L. ...

JUDGES