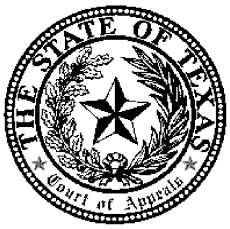
Affirmed as Modified and Opinion filed December 13, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00069-CV

BOYER, INC., Appellant

V.

TEXAN LAND AND CATTLE COMPANY, Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 97-50574

O P I N I O N

Boyer, Inc., appeals from a judgment notwithstanding the verdict entered in favor of Texan Land & Cattle Company. Texan Land & Cattle sued Boyer, alleging that Boyer trespassed and removed trees from Texas Land & Cattle's property. The jury found a trespass and awarded $62,500 in damages. The trial court then granted a j.n.o.v. and awarded $231,600 in damages. On appeal, Boyer contends: (1) that the evidence is legally and factually insufficient to support a finding on any amount of damages; (2) that the trial court erred in disregarding the jury's findings as to the amount of damages; and (3) that the

evidence does not conclusively establish damages in the amount of $231,600. We modify the trial court's judgment so as to reinstate the damages award as calculated by the jury and to recalculate prejudgment interest accordingly, and we affirm the judgment as modified.

Background

Texan Land & Cattle owns a fifty-five acre tract of undeveloped land in Houston. Apparently no one has ever lived on the tract. It is unused except for the grazing of several head of cattle. Most of the property is forested. Running across the northern boundary of the tract are two parallel easements. One of the easements was owned by Houston Light & Power. The other easement is for a roadway, which has never been developed. An eighteen-inch sanitary sewer line, approximately twenty-five years old, ran down the middle of the roadway easement before traversing the HL&P easement and running off the property.

The City of Houston contracted with Boyer to replace the sewer line because it had collapsed in several places, which had to be bypassed. In mid-August 1997, Boyer began work on the part of the line running across Texan Land & Cattle's property. Because the project required the maneuvering of heavy machinery in the area and the digging of a twelve-foot deep trench, Boyer hired Underbrushers, Inc., to clear trees and brush in the area.

Texan Land & Cattle sued Boyer and Underbrushers, claiming, *inter alia*, trespass and seeking "intrinsic value" damages for the removal of trees from its property. The jury found that Boyer did trespass on Texan Land & Cattle's property but Underbrushers did not. The jury then awarded damages for the lost trees in the sum of $62,500. The trial court subsequently granted Texan Land & Cattle's Motion to Disregard Jury Findings and for Judgment Notwithstanding the Verdict. The final judgment awarded damages in the amount of $231,600.

Cross-Issues

Initially, Texan Land & Cattle urges: (1) that Boyer has failed to invoke the jurisdiction of this court in filing an amended notice of appeal, and (2) that nine trial exhibits do not appear in the appellate record and thus we may not properly review the sufficiency of the evidence. This court has already considered and rejected Texan Land & Cattle's jurisdictional arguments in denying it's motion to dismiss. We find that the amended notice of appeal does, in fact, invoke jurisdiction over this appeal. *See* TEX. R. APP. P. 25.1(a), (b), (d), (f); 27.1(a); 27.2. Additionally, as Boyer points out, the trial exhibits now appear in the appellate record. Any prior difficulties concerning those exhibits have, therefore, been sorted out. To the extent Texan Land & Cattle properly raised these issues, they are overruled.

Sufficiency

Boyer first contends that the evidence is legally insufficient to support a finding that the trees had any intrinsic value. In reviewing a no evidence challenge, we consider all of the record evidence in the light most favorable to the party in whose favor the verdict has been rendered and indulge every reasonable inference deducible from the evidence in that party's favor. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). If more than a scintilla of probative evidence supports the finding, the no evidence challenge fails. *Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 738 (Tex. 1997). More than a scintilla of evidence exists where the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Merrell Dow*, 953 S.W.2d at 711.

Generally, in a suit for permanent damage to land, the correct measure of damages is the difference between the market value of the property immediately before and immediately after the trespass. *Porras v. Craig*, 675 S.W.2d 503, 504 (Tex. 1984). However, when a trespass defendant's cutting down of trees does not reduce the market

value of the property, courts are authorized to award damages based on the "intrinsic value" of the trees. *See Porras*, 675 S.W.2d at 506.[1] The jury charge in the present case defined "intrinsic value" as "the true, inherent and essential value of a thing, not depending upon accident, place or person but the same everywhere and to everyone." This language was apparently taken, almost *verbatim*, from Black's Law Dictionary. *See* BLACK'S LAW DICTIONARY 823 (6th ed. 1990).

Intrinsic value may be proven by evidence of a thing's uses, it's particular fitness for such uses, and the reasonable value thereof. *Lower Colo. River Auth. v. Hughes*, 122 S.W.2d 222, 223 (Tex. Civ. App.—Austin 1938, writ dism'd). The property owner may testify as to the intrinsic value of the trees. *See Porras*, 675 S.W.2d at 506 (remanding for determination of intrinsic value based on owner's testimony of personal value); *Garey Const. Co., Inc. v. Thompson*, 697 S.W.2d 865, 867 (Tex. App.—Austin 1985, no writ) (finding owner's testimony and photographs sufficient to support the verdict). There is no bright line test for evaluating such testimony, and courts have upheld findings granting intrinsic value damages for lost trees on a number of theories. *See, e.g., Lamar County Elec. Coop. Ass'n v. Bryant*, 770 S.W.2d 921, 923 (Tex. App.—Texarkana 1989, no writ) (shade and barrier); *Shearer's Inc. v. Lyall*, 717 S.W.2d 128, 129 (Tex. App.—Houston [14th Dist.] 1986, no writ) ("ornamental or shade"); *Garey Const.*, 697 S.W.2d at 867 (tree and shrubs served "ornamental or aesthetic purpose"); *Lucas v. Morrison*, 286 S.W.2d 190, 191 (Tex. Civ. App.—San Antonio 1956, no writ) (shade for dairy cows); *Stephenville, N. & S. T. Ry. Co. v. Baker*, 203 S.W. 385, 385 (Tex. Civ. App.—Austin 1918, no writ) (fruit and shade); *see also Porras*, 675 S.W.2d at 506 (remanding for determination of value of "shade or ornamental" trees).

[1] The parties have stipulated that the property suffered no diminution in value due to the loss of the trees.

In the present case, Texan Land & Cattle's president, J. N. Taub, testified concerning the land and the trees. He stated that he inspects the property from time to time, passes by once or twice a month, and is generally familiar with it, having walked and ridden horseback across it. He said that he has pastured cattle on the property in years past and that the land is currently leased for grazing six or seven head of cattle. He admitted, though, that the company owned the tract primarily as an investment, in the hopes of one day making a profit on its sale. He further acknowledged that no one had ever lived on the property, Texan Land & Cattle had never considered developing the property, and it had not determined the best use for the land. He also stated, however, that the trees on the property are beautiful and losing the trees on the north end hurt the "beautification" of the land. He said that the trees acted as a barrier to keep the cattle in and provided shade for the cattle in the summertime and fodder for the cattle in times of drought. He also said that the trees acted as a barrier to keep people out and thereby prevented "public depredation" of the property.

Boyer contends that Taub's testimony regarding the intrinsic value of the lost trees amounted to no more than general conclusions about the value of trees. We disagree. The jury was not only competent but it was in the best position to determine whether Taub's comments referred to the idea of trees in general or to the specific trees removed from the property. *See Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 215 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (jury is the sole judge of the weight to be given a witness's testimony; this court cannot substitute its judgment for that of the jury). Although some of Taub's answers may have been spoken in general terms, given the context of the litigation and the questions and answers concerning the specific trees, the jury may have reasonably determined that he was describing the intrinsic value of the actual trees at issue in this case. Even if that is not the case, Taub was quite specific in his comments that the loss of these trees hurt the beautification of the property and that the trees had served as a barrier to "public depredation."

Boyer additionally suggested in oral argument that because numerous other trees remained on the property, the removal of these particular trees resulted in no appreciable loss of intrinsic value. Although the jury could have, and may have, considered the existence of other trees in determining intrinsic value damages, it does not alter our analysis of the legal sufficiency of the testimony. Taub specifically referenced the downed trees in parts of his testimony, and the jury may well have interpreted his more general comments as referring to the downed trees in calculating the intrinsic value at something more than zero.

The jury was also shown photographs taken before and after the removal of the trees, so that they could see the change in the property for themselves. We find that the testimony of Taub, as supported by the comparison photographs, is legally sufficient to support the jury's conclusion that the trees held intrinsic value. In other words, more than a scintilla of probative evidence exists in the record to support the damages finding, such that reasonable and fair-minded people could differ in their conclusions. *See Merrell Dow*, 953 S.W.2d at 711. The no evidence challenge fails. *See Minnesota Mining*, 953 S.W.2d at 738.

Boyer's statement of issues presented also raises the factual sufficiency of the evidence, but Boyer fails to cite a standard of review or undertake any analysis on this separate issue. It has, therefore, waived any claim regarding the factual sufficiency of the evidence. *See* TEX. R. APP. P. 38.1(h) ("brief must contain a clear and concise argument for the contentions made, with appropriate citations to authority"); *Seymour v. Amer. Engine & Grinding Co.*, 956 S.W.2d 49, 61 (Tex. App.—Houston [14th Dist.] 1996, writ denied) ("[w]ithout argument and citation of authority, appellants' points of error are waived"). Accordingly, Boyer's first issue is overruled.

J.N.O.V.

Boyer next contends that the trial court erred in disregarding the jury's finding as to the amount of damages and entering a j.n.o.v. In order to uphold a j.n.o.v., a reviewing court must determine that no evidence supports the jury's findings. *Mancorp., Inc. v.*

Culpepper, 802 S.W.2d 226, 227 (Tex. 1990). Determining the dollar amount to be assigned for intrinsic value damages should usually be left to the jury. *See Garey Const.*, 697 S.W.2d at 867; *Lucas v. Morrison*, 286 S.W.2d at 191. The jury may not, however, ignore the uncontroverted facts and arbitrarily fix an amount neither authorized nor supported by the evidence. *Shearer's, Inc.*, 717 S.W.2d at 130. In entering the j.n.o.v., the trial court apparently adopted the calculations of Texan Land & Cattle's tree expert as to the full replacement value of the trees. But the jury was free to ignore the experts testimony and assign a different value to the trees, so long as the evidence presented at trial supports the amount of damages awarded. *See id*.

The testimony of the tree expert regarding the number and size of the removed trees was contradicted on a number of points. His calculations were based on a sampling from another area of the property, but this method ignored the fact that an existing sewer line already ran across the effected property so that the number and size of the trees may not have been comparable in the two sections. Additionally, the testimony of the Underbrushers employee, who actually cleared the area, dramatically downplayed the number and size of the trees removed. The jury was also shown photographs taken before and after the trees were removed, as well as photographs of other areas of the property. In comparing these images, the jury may have concluded that the area of removal had fewer and/or smaller trees than did other areas of the property. Furthermore, question one of the jury charge instructed the jury regarding the possible abandonment of the roadway easement. Based on this instruction, the jury may have determined that the easement was not, in fact, abandoned and, accordingly, they may not have included damages for the trees removed from that area.

The trial court erred in disregarding the jury's finding as to damages. The $62,500 jury finding is amply supported by the record. Accordingly, we sustain Boyer's second issue. Because we find that the trial court erred in disregarding the jury's finding and

granting a j.n.o.v., we need not address Boyer's third issue, arguing that the evidence does not conclusively demonstrate damages in the amount of $231,600.

We modify the trial court's judgment to reinstate the jury's award of $62,500 in actual damages and to recalculate prejudgment interest at $15,513.12, and we affirm the judgment as modified.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed December 13, 2001.
Panel consists of Justices Yates, Edelman, and Wittig.[2]
Do Not Publish — TEX. R. APP. P.47.3(b).

[2] Senior Justice Don Wittig sitting by assignment.