

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1213**

Pauline Sellner,
Appellant,

vs.

Pheasants Forever, Inc.,
Respondent,

Curtis Plotz, et al.,
Respondents,

vs.

Glen Mathiowetz, et al.,
Third-Party Defendants.

**Filed April 1, 2024
Affirmed
Smith, Tracy M., Judge**

Brown County District Court
File No. 08-CV-22-82

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Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this dispute arising from respondents' destruction of trees on appellant's property, appellant argues that the district court erred by determining that the measure of damages is the diminution in property value and asserts that the proper measure of damages is the replacement cost of the trees. We affirm.

FACTS

This case involves several parcels of land in Brown County. Before 2019, respondent Pheasants Forever, Inc., bought one of the parcels—a tract of land to the north of Brown County Road 22, which runs east and west. Its intent was to create a wildlife-management area (WMA) funded in part by a grant from the third-party defendant Minnesota Department of Natural Resources (DNR). To the west of the WMA is a parcel of land owned by third-party defendant Leavenworth Flats, a partnership with third-party defendant Glen Mathiowetz as officer.¹ To the north of the WMA is a parcel of land owned by appellant Pauline Sellner. Sellner's parcel is nearly landlocked; the only access to the parcel is narrow strip of land that Sellner owns between Mathiowetz's parcel and the WMA. The WMA had three rows of trees on the property that ran north to south—one on the east of the property, one in the middle of the property, and one on the west of the property. The westernmost row of trees extended onto the strip of land owned by Sellner.

¹ We refer to Leavenworth Flats and Mathiowetz jointly as "Mathiowetz" in this opinion.

Pheasants Forever applied for a grant from DNR to remove trees from several sites, including the WMA, “to provide higher quality grassland habitat for wildlife.” In its application, Pheasants Forever requested funds to remove only the easternmost and middle rows of trees from the WMA; it did not initially seek to remove the westernmost row of trees. DNR approved the grant. Pheasants Forever then sought bids from contractors to remove the trees. Pheasants Forever awarded the contract to respondent Plotz Timber Harvest, associated with respondent Curtis Plotz.²

After the bidding process, additional funds remained, so Pheasants Forever emailed DNR to ask about other tree-removal sites. DNR suggested removing the westernmost row of trees from the WMA. Pheasants Forever responded to DNR’s suggestion, stating, incorrectly, that “Mathiowetz owns [the] neighboring land” and requesting that DNR “flag the boundary very clear for the contractor so there would be no chance of them cutting a tree on the neighboring property.” DNR subsequently sent a letter to Mathiowetz about the possibility of removing the entire westernmost row of trees. Mathiowetz responded via email that it was “OK to remove the trees along the property line.” Plotz then removed all three rows of trees.

The westernmost row of trees, however, was not on land owned by Mathiowetz; rather, that row of trees extended only onto the strip of land owned by Sellner. After Sellner discovered that Plotz had removed trees from her land, Sellner sued Pheasants Forever and Plotz. Pheasants Forever filed a cross-claim against Plotz. Plotz then filed a third-party

² We refer to Plotz Timber Harvest and Plotz jointly as “Plotz” in this opinion.

complaint against Mathiowetz and DNR. DNR filed a cross-claim against Pheasants Forever. Finally, Mathiowetz filed a counterclaim against Plotz and a cross-claim against DNR.

Following discovery, DNR moved for summary judgment as to its cross-claim against Pheasants Forever. Mathiowetz moved for summary judgment as to Plotz's claims. And Pheasants Forever filed a motion asking the district court to determine the correct method to calculate damages for the destruction of the trees on Sellner's land.

On February 24, 2023, the district court filed an order granting summary judgment to DNR and Mathiowetz and determining, in response to Pheasants Forever's motion, that the correct measure of damages was the diminution in value of Sellner's property, not the cost to replace the destroyed trees.

After that order, Sellner and the remaining defendants—Pheasants Forever and Plotz—filed a stipulation with the district court. The stipulation stated that, “based upon the reasoning” of the district court's order establishing that the proper method of calculating damages is the diminution in property value, summary judgment against Sellner “would have been appropriate” if it had been requested. The stipulation also stated that Sellner “wishe[d] to preserve the right to appeal the Court's ruling while saving the parties . . . costs associated with a trial on claims that would have likely been dismissed at summary judgment had summary judgment been requested.” Sellner concedes that there was no evidence in the record regarding the value of the property, so she would not have been able to establish any damages had the case gone to trial. The parties stipulated “that summary judgment be entered in favor of [Pheasants Forever and Plotz] on all claims

brought against them by [Sellner].” On April 4, the district court issued an order directing entry of judgment for Pheasants Forever and Plotz pursuant to the parties’ stipulation. The district court entered judgment on July 5, 2023.

Sellner appealed, and Pheasants Forever moved to dismiss the appeal. Relevant here, Pheasants Forever argued that the April 4 stipulated order for summary judgment on “all claims” foreclosed Sellner’s right to appeal. A special term panel of this court denied Pheasants Forever’s motion, concluding that the “April 4, 2023 stipulated order does not preclude this court from reviewing the February 24, 2023 damages order challenged in this appeal.”

DECISION

I. This court has jurisdiction over this appeal.

Plotz argues that the appeal is not properly before this court because we lack jurisdiction. He cites *Bulau v. Bulau*, 294 N.W. 845, 846 (Minn. 1940), for the proposition that appellate jurisdiction cannot be conferred by the consent of the parties. Pheasants Forever also cites *Bulau* but suggests that this court can maintain jurisdiction by deeming the district court’s ruling on the measure of damages as a judgment under Minnesota Rule of Civil Procedure 54.02, which permits district courts to direct the entry of final judgment partially resolving a case when there is no just reason for delay.

We previously decided that we have jurisdiction over this appeal. By order of a special term panel, we denied Pheasants Forever’s motion to dismiss, determining that the April 4 stipulated order for summary judgment does not preclude this court from reviewing the February 24 order ruling on the method for calculating damages. We came to that

conclusion because, although the parties agreed to the entry of judgment against Sellner, they did so “to avoid the costs of a trial on claims that had been effectively resolved by the district court’s ruling on the method of calculating damages” and the stipulation “expressly reserved Sellner’s right to appeal the district court’s ruling.”

Although *Bulau* was not raised or addressed in the special term proceedings, we remain convinced that our special term decision was correct. We conclude that we have jurisdiction and proceed to the merits.

II. The district court did not err by determining that the correct measure of damages is the diminution in property value.

Sellner argues that the district court erred by concluding that the correct measure of damages is the diminution in value of her property, rather than the cost to replace her destroyed trees, and that summary judgment against her must be reversed and the case remanded for trial.

Appellate courts review a district court’s grant of summary judgment de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). “In doing so, [appellate courts] determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Id.* “[Appellate courts] view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

Two seminal cases govern the measure of damages for the destruction of trees: *Baillon v. Carl Bolander & Sons Co.*, 235 N.W.2d 613 (Minn. 1975), and *Rector, Wardens,*

& Vestry of St. Christopher's Episcopal Church v. C.S. McCrossan, Inc., 235 N.W.2d 609 (Minn. 1975). These opinions were released on the same day, and they each reference the other.

In *Baillon*, homeowners sued a highway-construction company that went onto their property and removed a number of trees and shrubs growing near the highway. 235 N.W.2d at 614. Following a trial, the homeowners appealed, arguing that the district court erred by not awarding them the replacement cost of the trees. *Id.* The supreme court observed that “[i]t has long been the rule in this state that the measure of damages for destruction of trees and shrubbery is the difference between the value of the land before and after the damage has been inflicted.” *Id.* The trees that were removed by the highway-construction company were “for the most part, quite small, ill-formed, and not particularly desirable as shade trees or ornamental trees but did serve to prevent erosion and act as a sound barrier.” *Id.* at 615. The supreme court held that, although the district court found that the appellants “desired to have the particular trees to preserve a natural and wild appearance and to help in avoiding noise from the highway as well as to preserve the beauty of the premises,” the proper measure of damages was the diminution in value of the real estate. *Id.* at 614-15. The supreme court wrote: “[T]o use a replacement cost as the measure of damages would be to replace deformed, unhealthy, crooked and unsightly trees with vigorous, healthy, well-shaped and well-formed trees,” which could “involve an expense greatly out of proportion to the actual damage to the real estate.” *Id.* at 615 (quotation marks omitted).

In the companion case *McCrossan*, a church sued a construction company that was constructing the church’s new parking lot for negligently destroying shade trees on the

church's property. 235 N.W.2d at 610. The district court directed a verdict for the construction company because the church did not prove damages based on a diminution of property value, and the church appealed. *Id.* The trees that were destroyed were two black cherry trees and 20 red oaks. *Id.* They were "large and mature." *Id.* The trees not only screened the area from traffic but "gave the area a natural, pleasing, aesthetic, wooded atmosphere." *Id.* The supreme court decided that damages were not limited to the diminution in property value. Distinguishing this case from *Baillon*, the supreme court held that, "where trees and shrubbery have aesthetic value to the owner as ornamental and shade trees or for purposes of screening sound and providing privacy, replacement cost may be considered to the extent that the cost is reasonable and practical." *Id.* at 611.

In accordance with this caselaw, if the undisputed facts establish that Sellner's trees lacked aesthetic value (1) as ornamental and shade trees or (2) for purposes of screening sound and providing privacy, the traditional damages measure of the diminution in property value applies. Following a careful review of the record and viewing the evidence in the light most favorable to Sellner, we conclude that there are no disputed issues of material fact on those issues and that the district court properly concluded that the diminution in property value, and not the replacement value of the trees, is the proper measure of damages.

First, the evidence presents no genuine dispute of fact as to whether the trees had aesthetic value as ornamental or shade trees. The trees were a row of Siberian elms on Sellner's narrow strip of unoccupied land running along an access road. Pheasants Forever submitted an expert witness report appraising the trees. According to that expert, Siberian

elms are a nonnative species that invades roadsides, pastures, and prairies. They form thickets that displace native vegetation. Sources consulted by the expert describe Siberian elm as “[a] poor ornamental tree” and “[o]ne of, if not, the world’s worst trees.” The expert knew of no Minnesota nurseries that carry Siberian elm.

Sellner also submitted an expert witness report. Her expert stated generally that “[t]rees have value” and, with respect to the Siberian elm trees at issue, stated that they “contributed to wildlife habitats, wind and weather protection, physical security and barrier to trespass, weed and erosion control, along with many other intangible and immeasurable traits that are not easily quantified.” But the expert did not identify any shade or ornamental aesthetic value. He recognized that the trees were in a rural setting and were not landscape trees. He stated that “[t]here is no maintained landscape, home or urban style marketable property to relate these trees to.”

The only positive testimony about the shade or ornamental value of the trees was from Sellner’s son, who stated,

These trees had a full canopy, full – full foliage. They were hardy. They were healthy. And I have to admit, there were several times that I’ve eluded to their shade when we were doing manual work, whether putting in fence or planting trees, whatever the – the course would have been. But to have them there was a – a treat.

But Sellner’s son’s enjoyment of the trees’ shade on several occasions is insufficient to create a genuine issue of material fact as to whether this rural row of Siberian elms was like the ornamental shade trees on church property in *McCrossan*.

Second, the evidence presents no genuine dispute of fact as to whether the trees had aesthetic value for screening or privacy purposes. Given their location on the narrow strip of land between the WMA and Mathiowetz's property, the row of trees did not provide screening or privacy protection for Sellner. And, though Sellner's expert described the trees as providing an access barrier to Sellner's property, Sellner does not explain how that is the case given their location. And other uses identified by Sellner's expert—for example, erosion protection and windbreak—did not go to the aesthetic value of the trees and do not distinguish the trees from those in *Baillon*, where the traditional diminution-in-property-value measure of damages applied.

We conclude that there is no genuine dispute of material fact and that the district court correctly determined that the diminution in property value is the proper measure of damages for the destruction of Sellner's trees. The district court therefore did not err by granting summary judgment against Sellner.

Affirmed.