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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

WARD TUTTLE, *Plaintiff/Respondent*, vs. **RONALD OSBORNE,** *Defendant/Appellant*.	Case No. **CV 2016 4131** **MEMORANDUM DECISION AND ORDER ON APPEAL AFFIRMING MAGISTRATE JUDGE**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on appellant/defendant Ronald L. Osborne's (Osborne) appeal from the magistrate court's decision to award damages in the amount of $8,290 to respondent/plaintiff Ward Tuttle (Tuttle).

Osborne and Tuttle own real property in the Cougar Gulch area of Kootenai County, Idaho. Pl. and Def.'s Stipulation of Facts for Trial 2 (Stipulation), ¶ 3. Osborne owns a 5.04-acre parcel of property located at 1944 S. Kindred Trail, Coeur d'Alene, Idaho. *Id.* at 1–2, ¶ 2. Tuttle owns a 7.63-acre parcel of property located at 2166 South Big Bear Road, Coeur d'Alene, Idaho. *Id.* at 1, ¶ 1. The Osborne and Tuttle properties contain mature trees, are accessed by private driveways, and share a common boundary line. *Id.* at 12, ¶¶ 1–3.

On May 2, 2016, agents of Osborne cut down four mature Douglas fir trees located on a slope above Osborne's private driveway. *Id.* at 2, ¶ 4. After doing so, Osborne learned that the trees were in fact located on Tuttle's property. *Id.* Tuttle

subsequently filed a small claims action against Osborne for the loss of his four Douglas fir trees. He filed his claim on June 1, 2016, and on August 9, 2016, the small claims court held a trial. At the trial, Tuttle testified that the loss of the trees impacted his view. Def. Ex. A, Court Minutes (Aug. 9. 2016). He also stated that he didn't know how to monetize that loss. *Id.* He ultimately requested damages in the amount of $1,250. *Id.* The damage amount he requested was based on an arborist's estimate.[1] *Id.* At the conclusion of the trial, Tuttle was awarded damages in the amount of $1,120. *Id.* Osborne appealed that damage award.

On October 3, 2016, a trial on Osborne's appeal from the small claims court was held as a trial de novo in the magistrate court with Judge Mayli Walsh presiding. Tuttle appeared pro se and Osborne appeared represented by counsel. Tuttle requested damages in the amount of $2,575. First Trial Tr. 9:23–25, 10:14–21 (Oct. 3, 2016). The amount of damages requested was based on a cost estimate provided by Grace Tree Service.[2] *Id.* at 10:14–21. At the trial, Tuttle testified that he was seeking compensation for the value of the felled trees, and not the value of the trees as lumber. *Id.* at 25:17–19, 27:17–19, 28:19–25. Similarly, a witness for Osborne, Christy Shindelar (Shindelar), testified that Tuttle told her that his view and privacy were negatively impacted by the loss of the trees. *Id.* at 68:14–24, 69:4–10. As for Osborne, he asked the magistrate judge to award Tuttle $205 for the loss of the four Douglas fir trees. *Id.* at 99:5–23. That amount represented the market value of the trees as lumber and was based on testimony provided by Osborne's expert witness, Gregory Bassler (Bassler), a professional forester. *Id.* at 72:2–4, 77:4–20. At the conclusion of

[1] The arborist's estimate was for $1,000. Def. Ex. A, Court Minutes (Aug. 9. 2016). Tuttle requested an additional $250 for his "costs." *Id.*

[2] According to Tuttle, Grace Tree Service estimated it would cost $2,575 to replace the felled trees with four 12 to 15 foot tall Douglas fir trees. First Trial Tr. 9:23–10:21.

the trial, the magistrate judge awarded damages to Tuttle in the amount of $2,245.[3] *Id.* at 105:5–16. In doing so, she explained that Tuttle did not hold the trees on his property for lumber; rather, the trees provided Tuttle with privacy and their loss impacted his view. *Id.* at 102:19–25, 103:1–8. Consequently, she concluded that the appropriate measure of damages was the cost to replace the trees, not the value of the trees as lumber. *Id.* at 104:11–23.

On November 14, 2016, Osborne appealed the magistrate judge's decision to the district court on the ground that she admitted and relied on inadmissible evidence. Specifically, Osborne argued that the magistrate judge erred by admitting and relying on the Grace Tree Service's cost estimate as provided by Tuttle. The district court ultimately agreed with Osborne and, on May 22, 2017, the district court vacated the magistrate judge's decision and remanded the case to the magistrate court for a second trial de novo.

On July 31, 2017, the magistrate judge held a second trial de novo in this case. Both Tuttle and Osborne were represented by counsel at the second trial de novo. Prior to starting the second trial de novo, the parties asked the magistrate judge to take judicial notice of the transcript from the first trial de novo. Second Trial Tr. 3:16–7:10 (July 31, 2017). The magistrate judge generally granted that request. *Id.* at 7:11–19. The parties also presented the magistrate judge with the following stipulated facts:

> 1. The Plaintiff, Ward Tuttle owns real property commonly located at 2166 S. Big Bear Road, Coeur d'Alene, Idaho. The Tuttle property is approximately 7.63 acres in size and has mature trees located on and about the property. The Tuttle property is accessed by a private drive not shared with Osborne.

[3] The magistrate judge stated that the value of replacing the four Douglas fir trees totaled $2,330. First Trial Tr. 104:12–23. She subtracted $205 from that total (i.e., the value of the trees as lumber), added the $120 filing and service fee, for a total judgment in the amount of $2,245. *Id.* at 105:5–16.

2. The Defendant, Ronald Osborne owns real property commonly located at 1944 S. Kindred Trail, Coeur d'Alene, Idaho. The Osborne property is approximately 5.04 acres in size and also has mature trees located on and about the property. The Osborne property is accessed by a paved private drive not shared with Tuttle.

3. The Tuttle and Osborne properties share a common boundary line and are located in an area commonly known as "Cougar Gulch."

4. On May 2, 2016, agents for Osborne undertook to fell some mature Douglas fir trees located on the slope above his private drive. Thereafter, four (4) of the trees felled were later determined to have been located on the Tuttle property.

5. The felling of four (4) Douglas fir trees on the Tuttle property by agents for Mr. Osborne was accidental and not intentional.

6. After Mr. Osborne's agents felled the trees, they were limbed and decked up. However, before Osborne's agents could haul and sell the decked logs, Tuttle contacted Osborne's agents to dispute ownership of the trees he believed were felled from his property. As a result, Osborne's agents did not haul the logs, but left them decked up.

7. Tuttle has been damaged by the felling of the four (4) trees. However, the parties dispute the amount of that damage.

Stipulation 1–2.

The parties then proceeded to present evidence and argument. Tuttle called one witness, Timothy Mark Kastning (Kastning), a consulting arborist, and Osborne again called Bassler, a professional forester. Second Trial Tr. 11:2–16, 64:21–23. Kastning and Bassler testified about three methods used to value felled trees: the cost replacement method, the trunk formula method, and the market valuation method.[4]

[4] Kastning testified primarily about the cost replacement and trunk formula methods, Second Trial Tr. 21:2–7, 2:21–22:12, while Bassler primarily testified as to the market valuation method (i.e., the "cost approach method of valuation"). *Id.* at 66:7–68:23, 70:9–11. In general, the cost replacement method is used to value a felled tree when the felled tree can be replaced by a new tree of the same species and size and planted in the same location as the felled tree. *Id.* at 21:19–22:12, 35:12–23. The trunk formula method is used to value a tree when the felled tree is too large to replace and/or was located in place where a new tree of equal size could not realistically be planted. *See id.* at 21:21–29:20. The market valuation method is used to value

Kastning testified that the trunk formula method was the appropriate method to value the four felled Douglas fir trees. *Id.* at 21:2–7. He stated that the cost replacement method was inapplicable because the size and location of the four felled Douglas fir trees precluded actual replacement—the four trees were too large to replace and they were located on an embankment, meaning that planting replicas would be difficult if not impossible to do. *Id.* at 21:2–7, 22:6–12. As for the market valuation method, Kastning stated that he did not use that method because it is used to determine the value of the trees as timber, not as a replacement cost. *Id.* at 57:4–23.

When applying the trunk formula method, Kastning assigned each tree a number. *Id.* at 27:18–21. He then valued the trees by determining the base price[5] of each tree and applying depreciation factors to the base price. *See id.* at 21:2–29:20. The depreciation factors included the tree species and condition and location of the tree. *Id.* at 28:7–17. Tree number 1 was dead, so Kastning gave it no value. *Id.* at 29:16–20. Kastning assigned tree number 2 a base cost of $9,389, and after applying the depreciation factors, he appraised it at $2,540. *Id.* at 28:5–20. Tree number 3 was the same size as tree number 2, so Kastning also appraised it at $2,540. *Id.* at 28:21–29:4. Tree number 4 was the largest tree. *Id.* at 29:5–15. Kastning gave it a base cost of $11,883, and after applying the depreciation factors, he assigned it an appraisal value of $3,210. *Id.* Based on these calculations, Kastning concluded that the value of the four felled Douglas fir trees totaled $8,290. *Id.* at 36:4–7. He noted that if he had valued the trees using the cost replacement method, the valuation would total approximately $30,000. *Id.* at 35:10–25.

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a tree when the felled tree is a "forest product species" sold commercially for lumber. *Id.* at 65:19–68:5.

[5] Kastning testified how he calculated the base price. *See* Second Trial. Tr. 23:2–26:7.

In contrast, Bassler testified that the market valuation method was the appropriate method to value Tuttle's trees. *Id.* at 66:7–13. He stated that the market valuation method, rather than the trunk formula method, was the appropriate valuation method because the felled Douglas fir trees are a forest product species with a local market, the trees are not ornamental or landscape trees, and the trees are a native species growing in a forested setting. *Id.* at 66:14–68:9. When applying the market valuation method, Bassler concluded that the value of the four felled Douglas fir trees totaled $205.[6] *Id.* at 67:7–10.

At the conclusion of the second trial de novo, the magistrate judge took the matter under advisement. On August 16, 2017, she issued a Memorandum Decision and Order, in which she awarded Tuttle $8,290 in damages. Mem. Decision and Order 6. The magistrate judge based her decision on the Idaho Supreme Court's analysis in *Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010). *Id.* at 3, 5. In light of *Weitz* and the evidence presented, she found that Tuttle held the Douglas fir trees on his property for their aesthetic value and for privacy purposes. *Id.* at 5. He did not hold the trees for their timber value. *Id.* As a result, the magistrate judge determined that application of the "restoration or replacement rule [was the] appropriate measure of damages . . . ." *Id.* She further determined that Kastning's testimony was credible, reliable, and provided an "objective valuation of the trees based on a formula that took into consideration the type of trees, the location of the trees, their placement and the manner in which they were growing." *Id.* at 5–6. She concluded that Kastning's testimony represented substantial and competent evidence as to the cost to replace the

[6] Bassler testified how he calculated this value in the first trial de novo. *See* First Trial Tr. 76:23–77:25.

felled Douglas fir trees. *Id.* at 5–6. Consequently, the magistrate judge awarded Tuttle $8,290 in damages.

On September 25, 2017, Osborne appealed the magistrate judge's decision in the second trial de novo. On December 20, 2017, he filed his Appellant's Brief. Osborne makes two arguments in support of his appeal. First, he generally argues that the magistrate judge abused her discretion when she relied on Kastning's "valuation opinion testimony" because Kastning's testimony was inconsistent with Kastning's previous valuation of Tuttle's trees and Tuttle's prior testimony. Appellant's Br. 13–15. Second, Osborne argues that the magistrate judge erred when she held that the "proper measure of damages in this case was based on a cost approach utilizing the trunk formula method of appraisal as opposed to a market approach utilizing stumpage value." *Id.* at 15–18. He seems to argue the magistrate judge should have used the market approach to calculate damages because Tuttle did not present evidence related to diminution in market value and loss of use of his property and because the market approach is more reasonable and fair than the trunk formula method. *Id.* at 17.

On January 17, 2018, Tuttle filed his Respondent's Brief. In response to Osborne's first argument on appeal, Tuttle states that Osborne is attempting to attack Kastning's credibility and, under the applicable standard of review, this Court is not free to question the magistrate court's credibility determinations. Resp't's Br. 14–15. He then proceeds to explain why Tuttle's request for damages increased over time. *Id.* at 15–25. As for Osborne's second argument, Tuttle asserts that Osborne is precluded from arguing that Tuttle must establish diminution in market value or the loss of use to property in order to recover damages under the trunk formula method because Osborne did not make this argument at the second trial de novo. *Id.* at 26. He also

contends that Tuttle has misstated the law in that regard. *Id.* at 27–28. As for Osborne's argument that use of the trunk formula method resulted in an unreasonable and arbitrary damage award, Tuttle points out that he presented evidence demonstrating that he held the Douglas fir trees on his property for their aesthetic value and that the damage award is reasonable when compared to the "approximately $30,000 strict replacement cost." *Id.* 28–30.

On February 7, 2018, Osborne filed a Reply Brief, in which he reiterates the arguments presented in his Appellant's Brief. With regard to his first argument, Osborne clarifies that the magistrate judge abused her discretion when she relied on Kastning's testimony. By relying on Kastning's testimony, Osborne contends that the magistrate judge did not exercise reason. Appellant's Reply Br. 6. As for his second argument, Osborne did not present anything new or offer any clarifications. *Id.* at 7–8.

A hearing on this matter was held on March 15, 2018. At the conclusion of that hearing, this Court took the appeal under advisement.

II. STANDARD OF REVIEW.

On an appeal from the magistrate division to the district court, the district court sits in an appellate capacity. I.R.C.P. 83(f)(1). When doing so, Idaho Rule of Civil Procedure 83 directs the district court to "review the case on the record and determine the appeal in the same manner and on the same standards of review as an appeal from the district court to the Supreme Court . . . ." *Id.* Accordingly, in this instance, the district court reviews the magistrate "record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. . . . ." *Pelayo v. Pelayo*, 154 Idaho 855, 858–59, 303 P.3d 214, 217–18 (2013) (quoting *Bailey v. Bailey*, 153 Idaho

526, 529, 284 P.3d 970, 973 (2012) (citation omitted)). The district court liberally construes the magistrate court's findings of fact in favor of the judgment, and it will not disturb the magistrate court's findings of fact unless they are clearly erroneous. *Lettunich v. Lettunich*, 141 Idaho 425, 429, 111 P.3d 110, 114 (2005). The magistrate court's "findings of fact are not clearly erroneous if they are supported by substantial and competent, though conflicting, evidence." *Id.* (citations omitted). Additionally, "[i]t is the province of the [magistrate] judge acting as trier of fact to weigh conflicting evidence and testimony and to judge the credibility of the witnesses." *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (citations omitted).

The district court "exercises free review over the lower court's conclusions of law to determine whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found." *Lettunich*, 141 Idaho at 429, 111 P.3d at 114.

III. ANALYSIS.

Osborne's appeal presents two issues.[7] The first issue is whether the magistrate judge abused her discretion or otherwise erred when she relied on Kastning's testimony. The second issue is whether the magistrate judge applied the wrong measure of damages to the facts of this case.

A. The magistrate judge did not abuse her discretion or otherwise err by relying on Kastning's testimony.

As a preliminary matter, the Court notes that Osborne has chosen an incorrect standard by which this Court should evaluate the magistrate judge's decision. Osborne

[7] As an aside, this Court finds the fact that the magistrate judge's final judgment exceeds the small claims court $5,000 threshold, is not an issue. *See Gilbert v. Moore*, 108 Idaho 165, 168, 697 P.2d 1179, 1182 (1985).

repeatedly states that the magistrate judge "abused her discretion." Osborne begins his appeal by stating an issue on appeal is:

> A. Whether Magistrate Wash abused her discretion in relying on the valuation opinion testimony of Respondent's expert Timothy Kastning when Mr. Kastning conceded that he had (1) visited the Respondent's property prior to the date of the small claims trial in August 2016; (2) charged the Respondent a consulting fee for his site visit; (3) advised the Respondent that the felled trees had a value of $1,000; (4) concluded that $1,000 was an acceptable value between two neighbors; (5) failed to undertake a trunk value method appraisal at that time; and (6) the Respondent had previously testified that the value of the four felled trees was $1,000?

Appellant's Br. 10. This paragraph is reiterated in the Appellant's Brief at the beginning of his argument on appeal. *Id.* at 13. Osborne is correct that, "The appellate court reviews challenges to a trial court's 'evidentiary rulings under an abuse of discretion standard.' *Herman v. Herman,* 136 Idaho 781, [784], 41 P.3d 209, [212] (2002)." *Id.* at 12-13. However, when this Court reads Osborne's brief on appeal, it is clear Osborne is not arguing Judge Walsh made an evidentiary ruling incorrectly, rather, Osborne repeatedly argues Judge Walsh placed too much emphasis on Tuttle's expert Tim Kastning.

This Court specifically finds Osborne has not pointed to any specific evidentiary ruling made by Judge Walsh. This Court finds Osborne is asking the Court to make a credibility determination about witnesses, and this Court cannot make credibility determinations on an appeal. This Court finds the "substantial and competent evidence standard" must be applied to Osborne's arguments on appeal. Finally, even using Osborne's requested standard of review, this Court finds that Judge Walsh did not abuse her discretion, even though her decision to rely on Kastning's testimony is not subject to an abuse of discretion review.

In general, Osborne argues that the magistrate judge abused her discretion when she relied on Kastning's testimony to determine the amount of damages Osborne owed Tuttle for the accidental felling of Tuttle's Douglas fir trees. Appellant's Br. 11, 13–15. He contends that the magistrate judge should not have relied on Kastning's valuation of the trees at the second trial de novo because it was inconsistent with Kastning's earlier advice to Tuttle and Tuttle's prior testimony. *Id.* at 11, 14. He explains that by relying on Kastning's testimony, the magistrate judge did not exercise reason. Appellant's Reply Br. 4–6. Tuttle disagrees and argues that the magistrate judge did not abuse her discretion. Resp't's Br. 14–26. He asserts that Osborne is using his appeal to attack Kastning's credibility and, under the applicable standard of review, the credibility of a witness is for the magistrate (or trial) court to determine, not the district (or appellate) court. *Id.* at 14–15. Tuttle then explains his reasons for obtaining three different valuations[8] and he further challenges Osborne's interpretation of the events that resulted in Tuttle obtaining two valuations from Kastning.

The Court agrees with Tuttle. First, Osborne is essentially asking this Court to decide which expert witness is more credible—Kastning or Bassler. Credibility determinations are for the magistrate judge to make and not this Court. *See Benniger*, 142 Idaho at 489, 129 P.3d at 1238. In this instance, the magistrate judge found Kastning to be a credible and reliable witness. While she found Kastning to be credible and reliable, her decision to rely on Kastning's testimony was not solely based on

[8] First, he states that Kastning's $1,000 valuation of the Douglas fir trees was a proposal meant to facilitate a "neighborly" settlement. Resp't's Br. 15–16. Second, Tuttle states that the proposal for $2,575 represented the cost to replace Tuttle's 60 foot tall Douglas fir trees with 12 to 15 foot tall Douglas fir trees, and as such, the proposal was not a "proper replacement" value. *Id.* at 16. Moreover, Tuttle asserts that because the award of damages from the first trial de novo was vacated, Tuttle was free to "reassess his claim for damages and develop additional evidence to support that claim. *Id.* at 17. Third, Tuttle states after having two previous judgments appealed, he hired Kastning to perform a formal valuation of the trees

Kastning's credibility. Rather, she relied on Kastning's testimony because he was credible *and* his valuation of the trees reflected the cost to replace the trees while Bassler's testimony reflected the value of the trees as timber. Judge Walsh stated:

> Mr. Kastning's testimony supplied an objective valuation of the trees based on a formula that took into consideration the type of trees, the location of the trees, their placement and the manner in which they were growing. Furthermore, Mr. Kastning testified extensively about his qualifications and experience in the field of tree and plant appraisal and the court found such testimony credible and reliable.

Mem. Decision and Order 5-6. Judge Walsh also noted, "Notably, the Defendant's expert, Mr. Bassler, did not disagree with the manner or method used by Mr. Kastning to appraise these trees." *Id.* at 5.

Second, the magistrate judge did not err by relying on Kastning's testimony. The magistrate judge found Kastning's testimony to be credible and reliable and that finding was not clearly erroneous because it was supported by substantial and competent evidence. *See Lettunich*, 141 Idaho at 429, 111 P.3d at 114. Before finding Kastning to be a credible and reliable witness, the magistrate judge summarized Kastning's testimony and, as noted above, found that Bassler, Osborne's expert, did not disagree with the manner and method Kastning used to appraise the trees. Mem. Decision and Order 5. Instead, Kastning and Bassler disagreed about what method should be used to value the trees given the facts of the case. She later explained that Kastning's testimony provided an objective valuation of the trees based on the trunk formula method and that the trunk formula method took into consideration the type of trees, location of the trees, the placement of the trees, and the manner in which the trees were growing. *Id.* at 5-6. After reviewing the trial transcript from the second trial de

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using an industry-accepted methodology—the trunk formula method. *Id.* at 17–18.

novo, the Court concludes that each of these findings is supported by substantial and competent evidence. *See* Second Trial Tr. 21:2–29:20, 70:3–71:13.

Third, to the extent that abuse of discretion is the appropriate standard of review, the magistrate judge exercised her discretion, and she did not abuse that discretion when she relied on Kastning's testimony at the second trial de novo.[9] Osborne asserts that the magistrate judge's decision to award Tuttle $8,290 was not reached by an exercise of reason because she relied on Kastning's testimony from the second trial de novo. Appellant's Reply Br. 4–6. He points out that at the small claims trial, Tuttle requested $1,000 in damages and that request was based on Kastning's advice. *Id.* at 5. Then, at the second trial de novo, according to Osborne, Kastning conceded that $1,000 was a fair and reasonable amount of damages. *Id.* at 6. To Osborne, because Kastning conceded that $1,000 was fair and reasonable and because there were no material changes in the facts (presented at the second trial de novo), "an exercise of reason dictates the logical conclusion that $1,000 was a fair and reasonable replacement cost value for the trees." *Id.* Thus, in Osborne's view, the fact that the magistrate judge reached a different conclusion and awarded Tuttle more than $1,000 shows that she did not exercise reason.

The Court disagrees with Osborne and concludes that the magistrate judge's decision to rely on the second valuation, rather than the first valuation, does not demonstrate a failure on her part to exercise reason. If anything, it demonstrates just the opposite for two reasons: (1) there was substantial and competent evidence

[9] In a case where the magistrate court acts as a fact-finder, the district court considers the appeal through an abuse of discretion lens. *Lettunich*, 141 Idaho at 429, 111 P.3d at 114. It "examine[s] whether the [magistrate] court (1) rightly perceived the issues as ones of discretion; (2) acted within the outer boundaries of that discretion and appropriately applied the legal principles to the facts found; and (3) reached its decision through an exercise of reason."

presented at the second trial de novo to support the $8,290 valuation and little evidence and testimony related to the $1,000 valuation, and (2) the inconsistency in Kastning's first and second valuations required the magistrate judge to make a credibility determination. At the second trial de novo, the magistrate judge was presented with testimony regarding the replacement cost of the trees ($8,290) and the market value of the trees ($205). Kastning provided extensive testimony regarding the process and method he used to calculate the replacement cost of the trees, as well as his qualifications to value the trees. Second Trial Tr. 21:2–37:14. In contrast, Kastning only testified about his first valuation of $1,000 on cross-examination. *See id.* at 47:7–51:16. Kastning explained that the first valuation was "off the top of [his] head" and he did not use "any process" to value the trees. *Id.* at 49:3–7. He further explained that the first valuation was only "acceptable" if used to resolve the dispute between neighbors prior to litigation. *Id.* at 51:9–16. This summary shows that the magistrate judge heard testimony regarding Kastning's $8,290 valuation, she heard Kastning explain why he provided Tuttle with two valuations, and she heard Osborne's efforts to impeach Kastning's credibility because of the two valuations. In turn, Osborne's argument that it would have been more reasonable for the magistrate judge to adopt Kastning's "off the top of his head" pre-litigation estimate rather than Kastning's formal appraisal requires the Court to reweigh evidence and make credibility determinations. It is the role of the magistrate judge acting as the fact-finder to weigh conflicting evidence and testimony and to judge the credibility of witnesses. *See Benniger*, 142 Idaho at 489, 129 P.3d at 1238. As such, the Court will not reweigh the evidence or make any credibility determinations. Further, to the extent that the magistrate judge exercised any

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Id. (citing *Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

discretion, the Court concludes that the magistrate judge exercised reason when she relied on Kastning's testimony to reach her decision.

Fourth, it is unclear to the Court how Tuttle's decision to retain Kastning, rather than Grace Tree Service, to testify at the second trial de novo is material to Osborne's appeal. *See* Appellant's Br. 15. Likewise, Osborne's various attempts to ascribe ulterior or bad motives to Tuttle's request for damages are unpersuasive.

In summary, the decision of the magistrate judge was supported by substantial competent evidence in the record, the magistrate judge did not err and, she did not abuse her discretion when she relied on Kastning's testimony to award damages to Tuttle.

B. The magistrate judge did not err when she concluded that the cost to replace Tuttle's four Douglas fir trees was the appropriate measure of damages.

Osborne asserts that the magistrate judge's award of damages was based on an erroneous application of *Weitz v. Green*, 148 Idaho 851, 230 P.2d 743 (2010), to the facts of this case. Specifically, he asserts that the proper measure of damages in this case is the market value of the trees as timber, and not the cost to replace the trees as discussed in *Weitz*. Appellant's Br. 15–17. In response, Tuttle argues that magistrate judge "correctly interpreted and applied the holding in *Weitz* to the facts of this case and properly concluded that the correct measure of damages was reasonable replacement cost." Resp't's Br. 27–28.

The Court disagrees with Osborne's assertion and concludes that the magistrate judge correctly applied the principles in *Weitz* to this case. In Idaho, the general rule is that a damage award for timber trespass is based on the market value of the harvested trees as sold for lumber. *Weitz*, 148 Idaho at 864, 230 P.3d at 756 (citing *Bumgarner v.*

Bumgarner, 124 Idaho 629, 862 P.2d 321 (Ct. App. 1993)). However, Idaho case law permits a departure from this general rule "where the trees are held on the property not for the purpose of harvesting them as timber, but rather for their aesthetic value[.]" *Id.* (citing 87 C.J.S. § 155 (2009)). In departing from the general rule, Idaho courts recognize that "an award of damages based upon the market value of trees as timber does not properly compensate the property owner" who cultivates trees on his property for their aesthetic value. *Id.* As a result, in such cases, the *reasonable* cost of restoring or replacing the felled trees, rather than the market value of the trees as timber, is the appropriate measure of damages. *Id.* at 867, 230 P.3d at 759.

In this case, the magistrate judge issued a Memorandum Decision and Order in which she awarded damages to Tuttle in the amount of $8,290. The magistrate judge found that Tuttle did not use the four Douglas fir trees as commercial forest product, i.e., timber. Instead, she found that Tuttle held the trees on his property for their aesthetic value and for privacy purposes.[10] As a result, in accordance with *Weitz*, the magistrate judge concluded that the market value of the trees as timber would not sufficiently compensate Tuttle for his loss. Rather, she determined that the appropriate measure of damages was the reasonable cost of replacing the four Douglas fir trees. The magistrate judge further found Kastning, Tuttle's expert, to be a credible and reliable witness, and she found Kastning's testimony to be an objective measure of the trees' value. She noted that Bassler, Osborne's expert, did not disagree with the manner and method Kastning used to value the trees. Instead, Bassler and Kastning disagreed as to which method of valuing the trees was most reasonable under the facts of this case. Thus, based on Kastning's testimony, the magistrate judge concluded that

[10] Osborne does not challenge this factual finding on appeal. It was supported by Tuttle's and Shindelar's testimonies at the first trial de novo.

the reasonable cost of replacing the four Douglas fir trees in this case totaled $8,290. She entered a judgment in favor of Tuttle for that amount.

Osborne argues that the magistrate judge should not have based the damage award on the reasonable cost of replacing the four Douglas fir trees because Tuttle did not present evidence regarding diminution in market value or loss of use of his real property and *Weitz* requires him to do so. Appellant's Br. 16–17. Without that evidence, Osborne contends that the magistrate judge erred when she relied on *Weitz* to award replacement damages as Tuttle did not meet his burden of showing he's "entitled to anything more than $1,000 to make himself whole." *Id.* at 17. However, the *Weitz* Court did not state that the injured party must present evidence related to the diminution in market value of his or her property or show some loss of use related to his or her property in order to 'qualify' for replacement or restoration damages.[11] Rather, in its analysis, the *Weitz* Court explained that the diminution in market value rule may limit the amount of restoration or replacement damages that can be awarded. *Weitz*, 148 Idaho at 866, 230 P.3d at 758. It then distanced itself from application of that limitation in cases similar to the one before this Court—cases where an owner holds trees on his or her property for their aesthetic value. *Id.* Specifically, the *Weitz* Court recognized that other jurisdictions protect a property owner's right to enjoy the aesthetic value of their trees, and those jurisdictions allow for restoration or replacement costs even where the trees have little commercial value or their destruction *increases* the market value of the property. *Id.* at 867, 230 P.3d at 759. It further determined that the appropriate *limit* upon such an award of restoration or replacement costs was

[11] It appears that in *Weitz* the parties themselves did not address or otherwise present evidence related to diminution in property value. Instead, the parties appear to dispute whether the award should be based on the value of the trees as merchantable timber or their aesthetic value. *Weitz*, 148 Idaho at 867, 230 P.3d at 759; *see also Threlfall v. Muscoda*, 190 Wis.2d

"reasonableness and practicality" rather than the diminution in market value limitation.[12] *Id.* (citing *Threlfall v. Muscoda*, 190 Wis.2d 121, 527 N.W.2d 367, 373 (Wis. App. 1994)). Given this, the Court concludes that *Weitz* does not require Tuttle to present evidence related to the diminution in market value of his property or show some loss of use related to his property in order to pursue replacement or restoration damages. Consequently, the magistrate judge did not err when she relied on *Weitz* to award replacement damages to Tuttle.

Osborne also argues that the amount of damages awarded to Tuttle is unreasonable because it is inconsistent with Tuttle's prior testimony regarding the amount required to make him whole and is at odds with Kastning's prior opinion. Appellant's Br. 17. He states that the magistrate court "should have appreciated [Kastning's] concession that his first opinion of value to [Tuttle] was fair and reasonable." *Id.* In making this argument, Osborne is once again asking this Court to make a credibility determination—determine that Kastning's testimony at that the second trial de novo was not credible in light of his prior opinion to Tuttle. As discussed above, the magistrate judge, not this Court, is in the best position to make that type of determination. *See Benniger*, 142 Idaho at 489, 129 P.3d at 1238.

121, 527 N.W.2d 367, 373 (Wis. App. 1994).

[12] This does not mean that evidence of diminution in market value is irrelevant or must be disregarded by the Court when offered. Instead, the Court simply does not believe that *Weitz* imposes an evidentiary burden on Tuttle to present such evidence as a prerequisite to pursuing damages based on the cost to replace or restore the trees. For example, if Osborne had presented evidence of no diminution in market value to Tuttle's property, the magistrate court could have considered that evidence as it relates to Osborne's argument that the amount Tuttle requested for restoration costs was *unreasonable*. Similarly, if Tuttle had presented evidence that the felling of the Douglas fir trees resulted in a decrease in the market value of his property, the magistrate court could have considered that evidence as it relates to Tuttle's argument that the cost to replace the trees was *reasonable*. In other words, evidence related to the diminution in market value may be relevant to the reasonableness of a damage award but *Weitz* does not seem to require the injured party to present such evidence in order to qualify for restoration or replacement costs or otherwise prove the damage request is reasonable.

Osborne further argues in his Reply Brief that the magistrate judge "erred by ignoring the market approach—one that provides a readily ascertainable market value of the trees in favor of a cost approach—one that relies on a plug-and-play formula that generates a value number that bears no relationship to the actual value of the trees." Appellant's Reply Br. 7–8. However, the record clearly demonstrates that the magistrate judge did not ignore Osborne's proposed market approach. *See* Mem. Decision and Order 4–5. The magistrate judge discussed and rejected that method because she found that Tuttle held the trees for their aesthetic value, not for timber, and she concluded that Osborne's proposed valuation did not sufficiently compensate Tuttle for the loss of the *aesthetic value of his trees*. *Id.* To compensate him for that loss, the magistrate judge concluded that Tuttle was entitled to damages based on the cost to replace the trees and Kastning's methodology provided that valuation. Thus, Osborne's suggestion that the magistrate judge ignored the market approach and, in turn, arbitrarily adopted the cost approach for valuing the felled trees is without merit.

In summary, the magistrate judge did not err when she determined that the appropriate measure of damages for the loss of four Douglas fir trees was the cost to replace those trees.

C. The Court declines to award attorney fees to Tuttle on appeal.

Tuttle seeks an award of attorney fees pursuant to Idaho Code § 12-121, Idaho Appellate Rule 41(a), and Idaho Rule of Civil Procedure 54(e)(2). Tuttle argues that Osborne's appeal merely asks the Court to second guess, or substitute its opinion, for that of the trier of fact. Resp't's Br. 10–13. "An award of attorney fees pursuant to [Idaho Code] § 12-121 is appropriate when an appeal is brought or defended 'frivolously, unreasonably or without foundation.'" *Gibson v. Ada Cty.*, 142 Idaho 746,

760–61, 133 P.3d 1211, 1225–26 (2006) (quoting *Fisk v. Royal Caribbean Cruises, Ltd.*, 141 Idaho 290, 295, 108 P.3d 990, 995 (2005)). An appeal has been brought frivolously, unreasonably, or without foundation "[w]hen an appellant does not identify a finding of fact that is not supported by substantial and competent evidence, and the appellate court is simply asked to second-guess factual determinations and is not asked to establish new legal standards, nor modify or clarify existing standards . . . . " *Gibson*, 142 Idaho at 761, 133 P.3d at 1226 (citing *Fairchild v. Fairchild*, 106 Idaho 147, 152, 676 P.2d 722, 727 (Ct. App. 1984)). The Court, in part, agrees with Tuttle. The issues presented in Osborne's appeal primarily ask the Court to reweigh evidence and second-guess the magistrate judge's credibility determinations and factual findings. However, the Court concludes that Osborne's argument that the magistrate judge erred when she applied the principles in *Weitz* to this case, absent evidence of diminution of market value or loss of use to Tuttle's property, is not frivolous and is a good faith legal argument. Therefore, the Court declines to award attorney fees to Tuttle.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court finds the magistrate court's award of damages must be affirmed, and Tuttle's request for attorney fees on appeal is denied.

IT IS HEREBY ORDERED the decision of Magistrate Judge Walsh is AFFIRMED in all aspects.

IT IS FURTHER ORDERED the request of respondent Tuttle for attorney fees on appeal is DENIED.

IT IS FURTHER ORDERED that counsel for respondent Tuttle prepare a Judgment consistent with this memorandum decision and order.

Entered this 20th day of March, 2018.

_____

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2018, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Michael A. Ealy	208 664-5884	Ian D. Smith	208 765-9089

Hon. Mayli A. Walsh

_____
Jeanne Clausen, Deputy Clerk