

Supreme Court of Rhode Island.

Cheryl DOWDELL

v.

Peter BLOOMQUIST.

847 A.2d 827 (R.I. 2004)

March 15, 2004.

OPINION

(portions redacted and edited)

FLAHERTY, Justice.

"Tree at my window, window tree, My sash is
lowered when night comes on; But let there never
be curtain drawn Between you and me."

--Robert Frost

In the matter before us, four western arborvitae trees are at the plaintiff's window. Sadly, however, the curtains between the neighboring parties have long since been drawn, forever dividing what was once an amicable relationship between them. The fate of the offending trees now hangs in the balance.

The plaintiff, Cheryl Dowdell, brought this action in Superior Court alleging that the defendant, Peter Bloomquist, planted four western arborvitae trees on his Charlestown property solely to exact revenge against her, to retaliate by blocking her view, and in violation of the spite fence statute, G.L.1956 § 34-10-20. [FN1] She sought legal and equitable relief. After considering the testimony and evidence presented at a nonjury trial, [FN2] the presiding Superior Court justice found that the trees were planted to satisfy defendant's malicious intent, not his pretextual desire for privacy, and that defendant had violated § 34-10-20. The trial justice granted plaintiff injunctive relief. We affirm the judgment of the trial justice. [FN3]

FN1. General Laws 1956 § 34-10-20 provides as follows:

"Spite fences.--A fence or other structure in the nature of a fence which unnecessarily exceeds six feet (6') in height and is maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance, and any owner

or occupant who is injured, either in the comfort or enjoyment of his or her estate thereby, may have an action to recover damages for the injury."

FN2. The trial on the merits was consolidated with the hearing on plaintiff's request for a preliminary injunction, in accordance with Rule 65 of the Superior Court Rules of Civil Procedure.

FN3. This matter was referred to mediation pursuant to Provisional Rule A of the Supreme Court Rules of Appellate Procedure before a retired justice of this Court subsequent to oral argument. The justices sitting on this case did not participate in the mediation process, have no knowledge with respect to any mediation sessions that were conducted and no knowledge as to the reasons why mediation was unsuccessful. However, the case not having been resolved in mediation, we have proceeded to decide this matter.

The facts pertinent to this appeal are as follows. The parties' homes are on adjoining lots in a subdivision of Charlestown, each approximately one acre in size. Dowdell's *829 home sits at a higher elevation than Bloomquist's and has a distant view of the ocean over the Bloomquist property. In June 2000, defendant acquired the home from his mother, Lorraine Bloomquist. Prior to that time, the Dowdell family had an amicable relationship with defendant's mother. Change was in the wind in the fall of 2000, however, when defendant petitioned for a zoning variance from the Charlestown zoning board seeking permission to build a second-story addition to his home. The plaintiff expressed concern about the petition, anxious that the addition would compromise her view of the Atlantic Ocean. For six months the parties argued before the Charlestown Zoning Board of Review as to the merits of the addition. As a result, the relationship between the neighbors became less than friendly. In March 2001, defendant began clearing land and digging holes to plant the disputed trees in a row between their homes. In April, defendant's counsel sent a letter to plaintiff warning him against trespass onto the Bloomquist property. In May, one day after the zoning board closed its hearing on defendant's variance request, [FN4] defendant began planting the four western arborvitae

trees that now stand in a row bordering the property line. [FN5] Although the forty-foot-high trees enabled little light to pass into Dowdell's second- and third-story picture windows, testimony at trial evidenced that the vegetation was not a bar to the unkind words between the neighbors.

FN4. The Zoning Board of Review of the Town of Charlestown subsequently granted defendant's dimensional variance request. Although Dowdell appealed the decision to the Superior Court, it was affirmed in March 2003.

FN5. The western arborvitae were planted directly behind a row of eastern arborvitae already existing on the Dowdell property near its boundary with the Bloomquist land. According to expert testimony at trial, the eastern arborvitae are smaller trees, growing to a height of eight to eleven feet. In contrast, the western arborvitae are capable of growing to a height of seventy feet. Although the Dowdell trees are in excess of six feet, there are no allegations that they were ever placed out of spite and these trees are not the subject of the instant matter. However, the trial justice noted that the Dowdell trees already offered sufficient privacy between the Dowdell and Bloomquist properties and cited this as one reason why he considered defendant's purported privacy motive to be a subterfuge for malicious intent.

After the trial justice heard four days of testimony and viewed the property, he made a finding that the row of trees were a fence, based on the language of § 34-10-1. [FN6] He further found that the objective of privacy claimed by defendant was "no more than a subterfuge for his clear intent to spite his neighbors by erecting a fence of totally out of proportion trees." Hence, the trial justice found that the trees constituted a spite fence in violation of § 34-10-20. He noted testimony that plaintiff's real estate values had depreciated by as much as \$100,000. Nonetheless, he found that money damages could not adequately compensate her and that equitable relief was more appropriate. Bloomquist was ordered "to cut the four Western Arborvitae to no more than 6' in height and keep them at that level or remove them entirely with no more Western Arborvitae to be planted." [FN7]

FN6. Section 34-10-1 includes in its definition of lawful fences "[a] hedge" of specified proportions. The trial justice concluded that the four arborvitae trees may be considered a hedge based on expert testimony at trial and that, therefore, the trees constitute a fence.

FN7. In employing the language ordering that "no more Western Arborvitae [are] to be planted," we assume that the trial justice is restricting the plantings along the property lines and in the nature of a fence.

***830** The defendant timely appealed to this Court. In his appeal, defendant asserts that the offending trees do not constitute a fence. Moreover, defendant contends that even if the trees were considered a fence, the trial justice erroneously granted relief in the face of testimony that the trees serve a useful purpose of privacy for defendant. To support that contention, defendant relies on *Musumeci v. Leonardo*, 77 R.I. 255, 259-60, 75 A.2d 175, 177-78 (1950), for the proposition that when a fence is erected for a useful purpose, despite spiteful motive, no relief may be granted.

Not surprisingly, plaintiff defends the lower court ruling. She asserts that the trial justice correctly exercised this authority based on his well-supported finding that the four trees constituted nothing more than a fence erected out of spite.

The trial justice found a violation of the spite fence statute based on his careful and deliberate findings of fact and on his credibility assessment of the testimony at trial. We are mindful that factual findings "are entitled to great weight and will not be disturbed by this Court absent proof that they are clearly wrong or that the trial justice overlooked or misconceived material evidence." *Tavares v. Beck*, 814 A.2d 346, 350 (R.I.2003) (per curiam); *Perry v. Garey*, 799 A.2d 1018, 1022 (R.I.2002). We grant the same level of deference to a trial justice's determination of credibility. See *Bogosian v. Bederman*, 823 A.2d 1117, 1120 (R.I.2003). Based on this standard, we decline to disturb the trial justice's findings that the four arborvitae trees planted in a row constitute a fence and that defendant planted them with spiteful intentions. Based on the record before us, we cannot say that the trial justice was clearly wrong or that he overlooked or misconceived material evidence with respect to his findings of fact

or credibility.

This is the first occasion this Court has had to address the issue of whether a row of trees may be considered a fence within the meaning of the spite fence statute, § 34-10-20. We believe the trial justice properly referred to the definition of "lawful fences" found in § 34-10-1 to understand the simple meaning and legislative intent behind its use of the word "fence." Based upon the language of § 34-10-1, a fence clearly includes a hedge. And based upon the expert testimony relied on by the trial justice, a row of western arborvitae trees may constitute a hedge. However, even if the trees were not a hedge per se, the spite fence statute refers to "[a] fence or other structure in the nature of a fence." The trial justice considered the proximity of the four trees that touched one another, and the broad span of sixty feet across which they spread, and rationally interpreted that the trees were a fence. Although defendant argues that he presented expert testimony that the western arborvitae is not a hedge plant, we nonetheless believe that the trees, when taken as a whole, fall well within the statutory definition of a "structure in the nature of a fence." This may not be the most optimal species for the creation of a hedge owing to their enormous stature and girth. However, it is ***831** specifically because of their towering presence, as well as their relative positioning on defendant's land, that we can consider the trees nothing less than a fence. What makes a spite fence a nuisance under § 34-10-20 is not merely that it blocks the passage of light and view, but that it does so "unnecessarily" for the malicious purpose of "annoyance." This is a notable distinction.

We next consider defendant's contention that the trial justice erroneously discounted defendant's testimony that the trees were erected for the beneficial purpose of privacy. We recognize that some useful purpose for a fence may render the victim of one even maliciously erected without a remedy. In *Musumeci*, this Court determined that a fence served the useful purpose of preventing water from entering the premises of the first floor of the complainant's house. Hence, because the purpose of the fence was not wholly malicious, it was not enjoined as a private nuisance. *Musumeci*, 77 R.I. at 258-59, 75 A.2d at 177 (citing *Burke v. Smith*, 69 Mich. 380, 37 N.W. 838 (1888) (one of the first cases announcing the new American rule on spite fences, now considered to embody the prevailing modern view)). However, based on the turbulent history between the parties, the provocative statements made by defendant, the notice of trespass letter sent to plaintiff, and the size, timing, and placement of the

trees, we cannot say that the trial justice was wrong to give defendant's testimony little weight and to find his claim that the fence was installed to enhance his privacy lacked credibility. In the circumstances of this case, we agree with the trial justice that defendant needed to provide more than just privacy as justification for the fence. This is especially true when a row of smaller arborvitae already stood between the homes. As the trial justice noted, "Accepting privacy alone would simply result in the statute being rendered meaningless and absurd." The very nature of a fence is such that privacy could always be given as the reason for erecting it. In an egregious case such as this, where evidence of malicious intent plainly outweighs the discounted benefit claimed by defendant, the court correctly found defendant's actions to violate the spite fence statute.

Conclusion

For the reasons set forth above, we affirm the judgment of the Superior Court. The record shall be remanded to the Superior Court.

FLANDERS, Justice, concurring in part and dissenting in part.