

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

BOBBY M. KELLY,	:	APPEAL NO. C-240655
	:	TRIAL NO. A-2302346
and	:	
DENESSA MINOR-KELLY,	:	
Plaintiffs-Appellees,	:	<i>JUDGMENT ENTRY</i>
vs.	:	
FOREST HOLDCO, LLC,	:	
Defendant-Appellant.	:	

MOORE, Judge.

This court sua sponte removes this cause from the regular calendar and places it on the court’s accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); Loc.R. 11.1.

On August 13, 2024, the Hamilton County Court of Common Pleas found that defendant-appellant Forest HoldCo, LLC, (“Forest”) trespassed onto, excavated parts of, and destroyed trees on property belonging to plaintiffs-appellees Bobby M. Kelly and Denessa Minor-Kelly. At the close of trial, the court found for the Kellys and pronounced that Forest owed the Kellys \$390,000 in damages. The court’s pronouncement specified that \$275,000 was to restore the Kellys’ land, \$35,000 was to compensate the Kellys for seven trees that were destroyed, \$30,000 was for trees that still needed to be taken down, and \$50,000 was for punitive damages.

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On August 27, 2024, the court’s journalized entry altered the damages award verbally expressed by the court. The \$30,000 award was now listed for “stress, inconvenience, frustration, mental anguish, and annoyance.” Forest was still obligated to pay the same total sum, \$390,000. The court later added that Forest was also obligated to pay \$21,750 in attorneys’ fees.

Forest now appeals the judgment of the trial court and raises three assignments of error.

Dismissal

First, Forest argues the trial court erred when it failed to dismiss the case based on res judicata after it was made aware of a prior lawsuit between the parties that had been disposed of on the merits. However, courts have recognized that where a defendant fails to raise an affirmative defense, like res judicata, the defense is waived. *See State v. Ofori*, 2023-Ohio-1460, ¶ 11 (1st Dist.) (holding that failure to raise a res judicata claim at trial forfeits the chance to do so on appeal). Forest’s failure to timely and expressly raise the res judicata affirmative defense at trial constituted waiver.

Even if we review the court’s failure to dismiss for plain error, Forest’s claim still fails. We review issues not raised or objected to at trial for plain error. *State v. Bond*, 2022-Ohio-4150, ¶ 7. Plain error in the civil context is “sharply limited to the *extremely rare* case involving *exceptional* circumstances where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself.” (Emphasis in original.) *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122 (1997). “To receive consideration on appeal, trial-court errors must be argued and supported by citation *to the record*.” (Emphasis added.) *Berger v. Wade*, 2014-Ohio-1262, ¶ 25 (1st Dist.). “This court will not consider material not in the record and ‘cannot add matter to the record before it, which was not part of the

trial court's proceedings, and then decide the appeal on the basis of the new matter.” *State v. Robinson*, 2006-Ohio-1217, ¶ 7 (1st Dist.), quoting *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus. Because Forest did not make the disposition of the prior case a part of the record at trial, we are precluded from considering it for the first time on appeal. Based upon the record before this court, the court below did not plainly err. Accordingly, Forest's first assignment of error is overruled.

Damages Award for Trees

As to Forest's second assignment of error taking issue with the court's damages award for the Kellys' lost trees, we similarly conclude the court did not err. “We will not reverse a trial court's assessment of damages so long as ‘some competent, credible evidence supports it.’” *Danopoulos v. Am. Trading II, LLC*, 2021-Ohio-2196, ¶ 9 (1st Dist.), citing *Capital Plus, Inc. v. Parker Ents. Imperial Distrib. Inc.*, 2004-Ohio-3896, ¶ 53 (1st Dist.).

There are several ways to assess damages as it concerns damaged trees. *Denoyer v. Lamb*, 22 Ohio App.3d 136, 138 (1st Dist. 1984). An owner may recover to remedy any diminution in value arising from damaged trees, as well as for the stumpage or other commercial value for the timber. *Id.* “Recovery, however, has not been limited to trees used for ‘specific uses.’ It has been awarded when the owner's personal use is neither specific nor measurable by commercial standards, and when the trees form a part of an ecological system of personal value to the owner.” *Id.* at 140. Instead, an owner may recover where a damages award reasonably restores the property to the preexisting condition. *Id.* at 138.

The present facts are similar to the circumstances in *Francis v. Wilson*, 1999 Ohio App.LEXIS 224, *23 (4th Dist. Jan. 25, 1999), in which the court allowed the

plaintiff property owner to testify that the destroyed trees were worth approximately \$10,000. There, the court concluded that the plaintiff had special knowledge of the value of the trees “gained by virtue of her ownership” of the property and deemed the plaintiff to be competent to testify. *Id.* at *15-16. While the trial court considered the valuation to be “remote,” the appellate court held that the plaintiff’s personal familiarity with her property rendered her competent to testify at trial, and that the trial court was well situated to assess both the admissibility and credibility of the plaintiff’s valuation. *Id.* at *22-23. Further, the court noted that the defendant could have rebutted the plaintiff’s testimony but failed to do so. *Id.*

Here, the court heard testimony that the Kellys had lived in the same home for the past 20 years and had a number of mature trees that were well taller than their three-story home. Mr. Kelly approximated that each tree was worth between \$5,000 and \$7,500, because he has had mature trees removed from his properties in the past. Forest did not dispute Mr. Kelly’s testimony on cross-examination, did not object to Mr. Kelly’s valuation, nor did Forest introduce a competing valuation. Here, like in *Francis*, Mr. Kelly competently testified to what he valued each tree to be worth, and Forest failed to meaningfully rebut that value. Therefore, there was competent and credible evidence that to remedy the Kellys’ loss of seven trees, a \$35,000 damages award was appropriate.

We therefore overrule Forest’s second assignment of error.

Emotional Distress

Finally, Forest insists that the court’s journalized damages award is incorrect. Forest argues that the court was bound to journalize in the entry what it had orally pronounced at the end of trial.

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“[A] court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum.” *State v. Leegrand*, 2022-Ohio-3623, ¶ 8, citing *Schenley v. Kauth*, 160 Ohio St. 109 (1953), paragraph one of the syllabus. Civ.R. 58 provides that “a judgment is effective only when entered by the clerk upon the journal.” See *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80, 83 (1988) (“It is not inconceivable that the judge in this or any other case might change his mind between the time of announcing a decision and the filing of a judgment entry. This underscores the purpose of Civ.R. 58 and case law sustaining the rule.”); *Paul v. PNC Bank, N.A.*, 2022-Ohio-672, ¶ 9 (1st Dist.) (“[T]he trial court was free to change its mind before making its journal entry.”); *Buckingham v. Buckingham*, 2018-Ohio-2039, ¶ 46 (2d Dist.) (“Thus, judges can change their minds ‘before making a journal entry without giving the parties grounds for an appeal, because the court has not spoken until its journal entry is filed.’”). Here, the court heard testimony that the Kellys suffered as a result of Forest’s repeated conduct, and as a result, the court’s emotional-distress award was supported by the record. Therefore, the court’s emotional-distress award was permissible.

Accordingly, each of Forest’s three assignments of error are overruled, and the judgment of the trial court is affirmed.

The court further orders that 1) a copy of this Judgment constitutes the mandate, 2) the mandate be sent to the trial court for execution under App.R. 27, and 3) costs shall be taxed under App.R. 24.

KINSLEY, P.J., and **ZAYAS, J.**, concur.

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To the clerk:

Enter upon the journal of the court on 9/24/2025 per order of the court.

By:  _____
Administrative Judge