RENDERED: August 22, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-0217-MR

COSTAIN COAL, INC. APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 93-CI-907

KEVIN RATLIFF; CHRISTOPHER RATLIFF;
and THOMAS RATLIFF APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

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BEFORE: BUCKINGHAM, HUDDLESTON, and KNOPF, Judges.

KNOPF, JUDGE: This is an appeal from findings of fact, conclusions of law and a judgment finding that the appellant willfully trespassed on a coal lease tract owned by the appellee. Finding that there was insufficient evidence to find that the appellant's initial trespass was willful, we affirm in part, reverse in part, and remand for recalculation of damages.

Prior to 1972, the appellee, Thomas Ratliff, owned a coal mining operation on several tracts of land located in Pike County, Kentucky. On June 1, 1969, Ratliff leased approximately

4,000 acres of coal from Virginia Iron Coal & Coke (VICC). That property is located on Island Creek in Pike County, Kentucky. (The VICC lease tract). In connection with the VICC lease, Ratliff had an adjacent coal preparation plant, C & O. Railroad sidetrack, underground mining equipment, coal-handling equipment, leasehold development permits, surface tracts, and other associated real estate interests.

On March 1, 1971, W. T. Huffman and Violet Connolly, et al., executed and delivered a coal lease agreement to Thomas Ratliff. (The Huffman lease). The lease covered a forty-six (46) acre boundary of coal located on the Raccoon Branch of Island Creek in Pike County. (The Huffman lease tract). The Huffman lease provided for an initial term of five (5) years, to be automatically extended thereafter for terms of five (5) years each until the coal underlying the premises was exhausted. The Huffman lease set a royalty rate of thirty-five cents (.35¢) per ton of coal mined.

The Huffman lease tract is surrounded by the VICC lease tract. The Huffman lease states that, as a result of previous mining operations, the only access to the Huffman lease tract was through the VICC lease tract. Consequently, the lease stipulated that the mining of coal from the Huffman lease tract must be delayed until headings could be driven through the adjoining VICC lease tract. Soon afterward, Ratliff executed an agreement with VICC to allow him to mine the Huffman lease tract in conjunction

with the VICC lease tract. However, Ratliff did not conduct any mining operations on the Huffman lease tract.

On August 8, 1972, Ratliff entered into an assignment agreement with UMET Mining Company. UMET was a wholly owned subsidiary of Industrial Fuels Corporation, the predecessor in title to the appellant, Costain Coal, Inc. (Costain). Under the assignment agreement, Ratliff sold UMET his VICC leasehold estate on Island Creek and the Raccoon Branch of Island Creek, as well as most of his mining equipment and facilities on that site. Costain contends that Ratliff never informed UMET that the Huffman lease tract was not included in the assignment. Further, Costain alleges that Ratliff's own maps show the Huffman lease tract as included in the assignment. Ratliff disputes this contention. However, the Huffman lease tract was not included in the description of the property being conveyed.

In October 1991 Costain's contract miner, Jet Coal Company, commenced a new mine in the Raccoon branch area of the VICC lease tract. In January 1992, this mine entered the Huffman lease tract. In April, Costain made a royalty report to VICC for coal mined in January 1992. Costain included the Huffman lease tract in its royalty payments to VICC. VICC's land manager contacted Costain on April 29, 1992, and informed them that some of the coal that Costain had mined was not owned by VICC. An examination of the property records revealed that the property was owned by the Huffmans and leased to Ratliff. Costain changed

its mine plan and ordered Jet Coal to turn right exit the Huffman lease tract. However, Jet Coal continued to mine the property on Costain's behalf until January 1993.

In early November 1992, Costain contacted Ratliff and asked him to assign to Costain his thirty-five cents (.35¢) per ton lease on the Huffman coal. Costain contends that Ratliff agreed to assign his lease; Ratliff denies that he made any such agreement. Ratliff obtained a ratification of the Huffman lease from the Huffman heirs, and an amendment to the lease increasing their royalty to two dollars ($2.00) per ton. The parties dispute whether Ratliff informed the Huffman heirs about Costain's mining of the property prior to obtaining the ratification and amendment. Further negotiations between Ratliff and Costain broke down.

On July 13, 1993, Ratliff, and his sons Kevin and Christopher Ratliff, brought an action for trespass against Costain.[1] Costain filed a counterclaim, asserting that its rights to the Huffman lease tract are superior to those of Ratliff by virtue of the 1972 assignment agreement. Following a four (4) day bench trial, the trial court entered findings of fact and conclusions of law. The trial court found that Ratliff was the record title owner of the Huffman lease tract in 1992;

[1] In December, 1992, Thomas Ratliff assigned the Huffman lease to his sons Kevin and Christopher. The trial court found that the trespass occurred before the assignment and that all of the damages were sustained prior to their obtaining title.

that he had not abandoned his interest in the Huffman lease tract prior to 1992; and that Ratliff was the rightful possessor of the coal at the time it was mined by Costain. The trial court further found that Costain was on notice of Ratliff's interest in the property as of April 29, 1992, but that it continued to mine coal on the Huffman lease tract until January 1993. Consequently, the trial court found that Costain's actions constituted a willful trespass on the Huffman lease tract. The trial court awarded damages to Ratliff in the total amount of one million, two hundred and sixteen thousand, two hundred and eighty-one dollars and twenty-seven cents ($1,216,281.27). This appeal followed.

Costain first argues that the trial court violated CR 52.01 by delegating the task of making findings of fact. Costain points out that the trial court adopted nearly all of Ratliff's proposed findings of fact. When an action is tried upon the facts without a jury, CR 52.01 requires the trial court to find the facts specifically and separately state its conclusions of law. Faced with the burden of an increasing case load, many trial judges ask the parties to submit findings of fact and conclusions of law at the conclusion of trial. The trial judge then either adopts the tendered findings or tailors them to conform to the court's views.

Kentucky courts have expressed varying degrees of ambivalence toward this practice. In Kentucky Milk Marketing and

Anti-Monopoly Commission v. Borden Co., Ky., 456 S.W.2d 831 (1969), the former Court of Appeals refused to condemn the practice outright. Yet the Court did not approve of the practice either. In Callahan v. Callahan, Ky. App., 579 S.W.2d 385 (1979), this Court unequivocally condemned the practice of adopting findings of fact prepared by counsel. Id. at 387. See also, G.R.M. v. W.M.S., Ky. App., 618 S.W.2d 181 (1981). On the other hand, in Brunson v. Brunson, Ky. App., 569 S.W.2d 173 (1978), this Court noted that adopted findings "are not to be rejected out-of-hand, and they will stand if supported by evidence." Id. at 175; quoting United States v. El Paso Natural Gas Co., 376 U.S. 651, 656, 84 S. Ct. 1044, 1047, 12 L.Ed.2d 12 (1964).

Finally, in Bingham v. Bingham, Ky., 628 S.W.2d 628 (1982), our Supreme Court allowed trial judges greater latitude in adopting tendered findings of fact. Unless there is evidence that the findings of fact and conclusions of law are not the product of the deliberation of the trial court, they are sufficient under CR 52.01 and will not be disturbed. Id. at 629-30. Since Bingham, there have been no published cases involving a reversal of a judgment solely on the ground that the trial judge adopted tendered findings of fact. See, Texas American Bank v. Sayers, Ky. App., 674 S.W.2d 36 (1984).

In this case, there is no showing that the decision-making process was not under the control of the trial judge, nor

that these findings and conclusions were not the product of the deliberations of the trial judge's mind. Bingham, 628 S.W.2d at 629-30. In addition, Costain did not object to the trial court's request to submit tendered findings. Indeed, Costain submitted two (2) drafts of tendered findings of fact and conclusions of law; the first was thirty-four (34) pages long and the second was eighteen (18) pages. Consequently, we do not find that the trial court delegated its responsibility to make findings of fact.

However, we advise trial judges to exercise caution in using findings submitted by the parties. The trial judge should take care that the tendered findings of fact accurately reflect the evidence presented at trial. The court should also avoid adopting extraneous language or biases which are not supported by the record. Furthermore, even where the trial judge agrees with a tendered statement commenting on the credibility of the witness or the weight of the evidence, adoption of the language verbatim may create the appearance of a delegation of the trial court's role as finder of fact. To this extent, the practice should be avoided.

We are more disturbed by the insinuation in Costain's brief that the trial judge engaged in deliberate misconduct. We are particularly troubled by suggestion that the trial judge was biased in favor of Ratliff, and that he colluded with Ratliff's counsel to grant the judgment in Ratliff's favor. Yet counsel presents only innuendo and unsupported inferences to support such

a conclusion.[2] Such disparaging remarks about the trial judge have no place in any pleading. See, Kentucky Bar Association v. Waller, Ky., 929 S.W.2d 181 (1996). An argument that the trial court erred should not devolve into personal attacks on the trial judge.

More to the point, once the trial court enters its findings of fact and conclusions of law, it is no longer the product of either party. Rather, it becomes the judgment of the court, and will be reviewed for error as such. Brunson, 569 S.W.2d at 175. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. CR 52.01. Findings of fact are sufficient if they are supported by substantial evidence. The test of substantiality of evidence is whether when taken alone or in light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable persons. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 307-08 (1972).[3]

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[2] Even if Costain's allegations of judicial misconduct had factual support, this court is not the proper forum in which to originate the charges. Costain did not object to Judge Coleman's presence on the case, nor did it bring a motion to recuse Judge Coleman at the trial level. Following the entry of the judgment, Costain did not bring a CR 60.02 motion to vacate the judgment on the grounds of fraud. Any complaints about the trial judge's conduct of the trial are not properly before this court.

[3] The trial court found that Costain's mining of the Huffman tract continued through January, 1993. Costain notes that there

Costain takes issue with the trial court's findings that it trespassed on the Huffman lease tract, and that the trespass was willful. Since there is no question of fact that Costain mined the property, Costain first focuses on Ratliff's property interest in the Huffman lease tract. Thus, Costain argues that Ratliff did not have title to the coal mining rights in 1992.

Costain first argues that Ratliff's actions in 1972 showing his intent to leave the coal mining industry, as well as his failure to mine the Huffman lease tract for twenty-one (21) years, demonstrates that he abandoned his claim to the property. Along similar lines, Costain argues that the 1971 Huffman lease had expired prior to 1992. Costain points to the provision in the Huffman lease providing:

> The term of this lease shall be for five (5) years with automatic renewals thereof for successive terms of five (5) years until all minable and merchantable coal upon the premises is recovered.

Costain asserts that the lease expired by its own terms due to Ratliff's failure to take any action during the first primary term of five (5) years. As a result of the abandonment

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was no evidence of mining on the Huffman lease tract during the months of August, October and November of 1992. Costain also complains that the trial court incorrectly found that it never changed its' mine plans after April 29, 1992. Even if we grant that these findings are inaccurate, we will assume that the trial court based its findings on the entire record of evidence and not on the basis of these minor inaccuracies. Warner v. Sanders, Ky., 455 S.W.2d 552, 554 (1970).

or expiration of the Huffman lease, Costain contends that Ratliff is not the real party in interest to bring an action for trespass.

We agree with Ratliff that Costain is not the proper party to assert these defenses. Costain was not a party to the Huffman lease, nor did it rely on the lease in mining the property. Furthermore, the terms of the Huffman lease show that the parties understood that there would be some delay in mining the property. By ratifying the lease in 1992, the Huffman heirs waived the defenses of abandonment and expiration against Ratliff. Thus, Ratliff is the real party in interest to assert a trespass claim against Costain.

Costain next argues that, if the lease was still valid in 1992, then it is entitled to an assignment of the lease as part of the 1972 assignment agreement. Costain contends that the parties intended for the Huffman lease tract to be conveyed in 1972. Costain points to several maps which Ratliff provided to UMET in 1972. Costain also refers to section 4 of the 1972 assignment agreement, in which Ratliff covenanted that he would execute and deliver to UMET "such further instruments as may by UMET be reasonably deemed proper or necessary for the more effectual vesting in it of the interests intended to be assigned."

The trial court disagreed with Costain, finding no evidence to show that title to the coal under the Huffman lease

was vested in Costain at the time it was mined and removed. This conclusion is supported by substantial evidence. The Huffman lease was not listed on the property schedule of the 1972 assignment agreement as justification for the purchase price. In addition, Ratliff testified that he also provided UMET with a copy of an 8' x 6' map prepared by VICC in 1969. This large map shows the Huffman lease tract as adverse to the VICC lease tract.

In any event, the maps were not made a part of the assignment agreement. In fact, the second paragraph of section 5 of the 1972 assignment agreement specifically provides: "RATLIFF does not warrant, either by expression or implication, the VICCO [VICC] leasehold, the title thereto, the quantity, quality or minability of the coal, the accuracy of the property maps of VICCO, or the title of any property or property rights hereby conveyed, except as expressed in this Agreement or in any ancillary instruments attached hereto." (Emphasis added).

The Huffman lease tract and the Huffman lease to Ratliff were both recorded. Although there may have been some ambiguity in the maps concerning the existence of the Huffman lease tract, Costain was under a duty to know the boundary lines within which it could operate. Hoskins' Adm'r v. Kentucky Ridge Coal Co., Ky., 305 S.W.2d 308, 310-11 (1957). There was no direct evidence showing that the parties intended for the Huffman lease tract to be included in the assignment to UMET. Although a different inference might have been drawn from the evidence, the

drawing of inferences from the evidence is properly left to the trial court. As a result, the trial court's finding is not clearly erroneous. For the same reasons, we find insufficient evidence to establish that Ratliff should be estopped to deny Costain's title to the Huffman lease tract.

Costain also contends that Ratliff should be estopped from asserting that Costain willfully trespassed on the Huffman lease tract. The doctrine of equitable estoppel is applied to transactions where it is found that it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit. Louisville Joint Stock Land Bank v. McMurry, 278 Ky., 238, 128 S.W.2d 596, 600 (1939). The elements of estoppel include: (1) conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied on this conduct to his detriment. Gray v. Jackson Purchase Production Credit Association, Ky. App., 691 S.W.2d 904, 906 (1985).

Costain vehemently complains about Ratliff's conduct after November 1992. However, all of this alleged conduct occurred after Costain had completed most of its mining operations on the Huffman lease tract. There is no showing that

Costain relied on any of this conduct in mining the property. Furthermore, any representations which Ratliff made that the VICC lease he sold to UMET included the coal under the Huffman tract go to the underlying issue of whether or not Costain's trespass was innocent or willful.

In determining the nature of the trespass committed by Costain, the trial court must determine whether the trespass was innocent or willful. The law is that every trespass is presumed willful, with the burden on the trespasser to prove his innocence. Swiss Oil Corp. v. Hupp, 253 Ky. 552, 69 S.W.2d 1037, 1041 (1934). The test of willfulness is whether a trespass:

> [W]as perpetuated in a spirit of wrongdoing, with a knowledge that it was wrong, or whether it was done under a bona fide mistake, as where the circumstances were calculated to induce or justify the reasonably prudent man, acting with a proper sense of the rights of others, to go in and to continue along the way

Church & Mullins Corp. v. Bethlehem Minerals Co., Ky., 887 S.W.2d 321, 323-24 (1993); quoting, Swiss Oil, 69 S.W.2d at 1041.

Costain asserts that it mined the property in the good faith belief that it had a right to do so. However, Costain continued to mine the Huffman lease tract after VICC informed Costain that it did not own the property, and after Costain discovered Ratliff's interest in the property. Costain continued to pay coal royalties from the Huffman lease tract to VICC. Costain failed to take any steps to vacate the property after April 1992, except by ineffectively changing the direction of its

mining. Indeed, Costain admits that it did not inform Ratliff of the trespass until at least late October. As a result, we find that the trial court's finding that Costain was a willful trespasser after April 29, 1992, was clearly supported by the evidence.

The trial court also concluded that Costain willfully trespassed on the Huffman lease tract prior to April 29, 1992, on the ground that Costain was negligent in failing to determine the ownership of the Huffman coal in January 1992. The knowledge necessary to find a willful trespass may be imputed based on the circumstances. As stated in Mitchell v. First National Bank of Hopkinsville, 203 Ky. 770, 263 S.W.2d 15 (1924):

> One who has reasonable grounds for suspecting or inquiring ought to suspect and ought to inquire, and the law charges him with the knowledge which the proper inquiry would have disclosed. If a person has knowledge of such facts as would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry, and he fails to do so, he is chargeable with the knowledge by which ordinary diligence he would have acquired.

Id. at 17.

At the same time, a finding of a willful trespass should not be premised solely upon imputed knowledge. The test to be applied in determining the quality of the trespass is not the trespasser's violation of the law in the light of the maxim that every person knows the law. Rather, it is a question of intent, or the state of mind, of the trespasser based upon the circumstances surrounding the trespass at the time the trespass

occurred. Swiss Oil, 69 S.W.2d at 1042. Determining intention of a party generally cannot be done by direct evidence. The trespasser's acts must be judged based on conditions as they then appeared, rather than disclosed in the light of facts later revealed. The trial court must review the totality of the circumstances surrounding the trespass to determine whether the trespasser ". . . [W]as acting in good faith and under an honest conviction that he was right in his assumption." Id. at 1041.

The appropriate standard of review is whether or not the trial court clearly erred or abused its discretion in finding that Costain's trespass was willful. If it was not, then its holding shall not be disturbed by an appellate court. Church & Mullins, 887 S.W.2d at 323. However, we find no evidence in the record that Costain had reason to question its right to mine the Huffman lease tract in January 1992. Costain possessed several maps showing the Huffman lease tract as part of the VICC lease tract. In fact, VICC had prepared several of these maps, and Ratliff had provided them to UMET as part of the 1972 assignment agreement. Furthermore, there was no evidence of a course of dealing between Costain and Ratliff, between Costain and the Huffman heirs, or between Costain and VICC, which might have placed Costain on notice of the adverse tract prior to April 29, 1992. Consequently, the trial court's finding that Costain willfully trespassed on the Huffman lease tract prior to April 29, 1992, was not supported by substantial evidence and is

clearly erroneous.

As a result of our holding, this matter must be remanded to the trial court for a determination of damages based upon an innocent trespass until April 29, 1992. All of the parties agree that the Huffman lease tract could not be mined except in conjunction with the VICC lease tract. Where the owner of the tract had no feasible way to extract the coal except through the trespasser's opening, a reasonable royalty is the most appropriate means of compensation. Bowman v. Hibbard, Ky., 257 S.W.2d 550, 552 (1953); Huggett v. Caldwell County, 313 Ky. 85, 230 S.W.2d 92, 95 (1950). The trial court previously found that two dollars and fifty cents ($2.50) per ton is a reasonable royalty rate. Therefore, the trial court should recalculate Ratliff's damages based upon this royalty rate for the coal mined by Costain between January 1992 through April 29, 1992.

Lastly, Costain argues that the trial court incorrectly calculated damages for willful trespass. The measure of damages for a willful trespass is the value of the coal when appropriated, without deduction for the expense of mining it. Bowman v. Hibbard, 257 S.W.2d at 552. Costain asserts that it should be allowed to deduct the cost of "washing" and processing the coal after it was mined. Costain contends that the coal should be valued based upon its marketable value based upon post-severance processing. Although Costain's point is well-taken, it is not currently the law. Therefore, we conclude that the trial

court correctly calculated damages for Costain's willful trespass occurring after April 29, 1992.

Accordingly, the judgment of the Pike Circuit Court is affirmed in part, reversed in part, and remanded for calculation of Ratliff's damages based upon Costain's innocent trespass on the Huffman lease tract from January 1992 until April 29, 1992.

ALL CONCUR.

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