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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001526-MR
AND
NO. 2011-CA-001529-MR

BARBARA DELONG — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 09-CI-00190

LARRY C. PENIX — APPELLEE/CROSS-APPELLANT

OPINION
VACATING AND REMANDING APPEAL NO. 2011-CA-001526-MR
AND AFFIRMING CROSS-APPEAL NO. 2011-CA-001529-MR

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Barbara Delong brings Appeal No. 2011-CA-001526-MR and Larry C. Penix brings Cross-Appeal No. 2011-CA-001529-MR from a June 7, 2011, Findings of Fact, Conclusions of Law, and Judgment of the Martin Circuit

Court awarding damages for trespass. We vacate and remand Appeal No. 2011-CA-001526-MR, and we affirm Cross-Appeal No. 2011-CA-001529-MR.

Delong owns two tracts (Lots 37 and 38) of real property in Martin County, Kentucky, and Penix owns an abutting tract (Lot 39) of real property in Martin County, Kentucky. In January 2007, Penix contracted with Joseph Hunt to cut and remove timber from his real property. After the timber was cut and Penix received payment therefrom, Delong discovered that timber had been cut from her lots without her consent and without receiving compensation. Apparently, Hunt cut the timber from Delong's property while cutting timber on Penix's property. Shortly thereafter, Penix accompanied Delong's son, Gerald, to the area on Delong's property where the timber had been removed. Penix acknowledged to Gerald Delong that some timber may have been removed from Delong's property. Penix made no effort thereafter to contact Delong.

In 2009, Delong filed a complaint against, *inter alios*, Penix alleging trespass and seeking compensation for the timber and other damage sustained to her property. In its Findings of Fact, Conclusions of Law, and Judgment, the circuit court found that Penix did not contact Delong as set forth in Kentucky Revised Statutes (KRS) 364.130 prior to commencing logging operations and that Penix did not have title to Delong's property. The court awarded damages equivalent to the stumpage value of the timber removed but declined to award Delong treble damages under KRS 364.130. The court concluded Penix did not "intend[ ] to cut timber from property" he did not own. Findings of Fact at 16.

The court awarded Delong $37,069.20 for the timber removed, other damages to the property in the amount of $6,944.08 and the costs of reclaiming the property in the amount of $4,696. These appeals follow.

Appeal No. 2011-CA-001526-MR

Our analysis begins with determining the appropriate standard of review. The circuit court heard this matter without a jury pursuant to Kentucky Rules of Civil Procedure (CR) 52.01. Under CR 52.01, the circuit court's findings of fact will not be disturbed on appeal unless clearly erroneous. A reversible error arises when there is no substantial evidence in the record to support the trial court's findings. *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114 (Ky. App. 1998). The clearly erroneous standard is applicable to boundary disputes. *Croley v. Alsip*, 602 S.W.2d 418 (Ky. 1980). And, of course, we review issues of law *de novo*. *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51 (Ky. 2011).

Delong contends that the circuit court erred by failing to award her treble damages per KRS 364.130. Because we conclude that the circuit court erroneously interpreted KRS 364.130, the issue will be remanded for further consideration.

KRS 364.130 reads:

> (1) Except as provided in subsection (2) of this section, any person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing upon the land of another without legal right or without color of title in himself to the timber or to the

land upon which the timber was growing shall pay to the rightful owner of the timber three (3) times the stumpage value of the timber and shall pay to the rightful owner of the property three (3) times the cost of any damages to the property as well as any legal costs incurred by the owner of the timber.

(2) (a) If a defendant can certify that prior to cutting:

1. A signed statement was obtained from the person whom the defendant believed to be the owner of all trees scheduled to be cut that:

a. All of the trees to be cut were on his property and that none were on the property of another; and

b. He has given his permission, in writing, for the trees on his property to be cut; and

2. Either:

a. A written agreement was made with owners of the land adjacent to the cut that the trees to be cut were not on their property; or

b. Owners of the land adjacent to the cut were notified in writing, delivered by certified mail, restricted delivery, and return receipt requested, of the pending cut and they raised no objection, the court may render a judgment for no more than the reasonable value of the timber, actual damages caused to the property, and any legal costs incurred by the owner of the timber.

(b) With respect to subsection (2)(a)2.b. of this section, if no written objection was received from the persons notified within seven (7) days from the date of signed receipt of mail, it shall be presumed, for the purposes of setting penalties only, that the notified owner had no objection to the proposed cut.

(3) This section shall not be construed as repealing any of the provisions of KRS 514.030 of the Kentucky Revised

> Statutes and any penalties provided by this chapter shall be considered as additional thereto.

In its judgment, the circuit court refused to award Delong treble damages because Penix did not possess the "intent" to convert the timber on Delong's property to his own:

> [Delong] contends that she is entitled to treble damages for the value of the timber on the stump as a result of the provisions of KRS 364.130. Many of the requirements of that statute are met. There is no question that [Penix] caused to be cut or sawed down timber from [Delong's] property. There is also no question that [Penix] had no legal right to cut the timber. Further, there is no question that no notice was give to [Delong] prior to sending the logger on the property to cut the timber. However, the statute requires [Penix] to have the timber "with intent to convert to his own use timber growing upon the land of another without legal right." With regard to intent, the evidence is certainly mixed. [Penix] testified that he did not know his boundary lines, and obtained a survey of the property. The evidence likewise discloses that [Penix] did not accompany either the surveyor or the logger upon the property when the lines were apparently shown. There was some indication that logger Hunt questioned [Penix] as to the location of the lines when he was in the middle of cutting the timber, but one must recall that logger Hunt is now deceased That testimony was quoting logger Hunt, who is not subject to direct or cross examination. While the Court has little concern in concluding that [Penix] was negligent in contracting with the logger, and having the timber cut, the Court is unable to conclude as a matter of law that [Penix] intended to cut timber from property that he did not own. Therefore, the Court concludes as a matter of law that [Delong] is not entitled to treble damages under KRS 364.130.

Findings of Fact at 15-16. The circuit court erroneously focused on intent and in doing so erroneously interpreted the mandates of KRS 364.130.

Our Supreme Court has recently interpreted KRS 364.130 in *Meece v. Feldman Lumber Company*, 290 S.W.3d 631 (Ky. 2009). In *Meece*, appellee logged timber on appellant's property without appellant's consent. The Supreme Court initially noted that appellee did not possess "title in fact" to the logged property and did not follow the mitigation provisions of KRS 364.130(2). *Id.* Consequently, the Court concluded that the measure of damages then depended upon whether appellant possessed "color of title." *Id.* at 635. In discussing the requirement of color of title as found in KRS 364.130, the Supreme Court explained the difference between the statutory requirement of "color of title" and the common law rule of willful versus innocent trespasser:

> At common law, the amount of damages in the civil action would depend on whether the trespass was innocent or willful. . . . "[T]he abstract distinction between a willful and an innocent trespasser [is] . . . the one knows he is wrong and the other believes he is right." . . . "The test to be applied is that of intent, but, being a state of mind, it can seldom be proved by direct evidence."
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> This early version of the statute made four changes to the common law rule on damages. . . . Second, the common law distinction between an innocent or willful trespass became statutorily whether the person has or does not have "color of title" in himself.
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> . . . .
>
> While a trespass may be innocent based only on a subjective belief, a trespass with "color of title" requires an objective "color of title" to form a subjective belief that the trespass is innocent.

Meece, 290 S.W.3d at 632-634 (citations omitted). Thus, at common law, the issue of intent of the trespasser was relevant; however, under KRS 364.130, the Court stressed the pivotal inquiry is now whether the trespasser possessed "color of title." The Court held that the trespasser holds the burden of proving color of title[1] and to specifically demonstrate objective evidence of title "from which a subjective belief may be formed." *Id.* at 636. The Court further noted that color of title is normally demonstrated by a written instrument whose description of boundaries reasonably embraces the trespassed property in question:

> In such a case, "[t]he burden was on the plaintiffs [the persons claiming ownership through color of title] to locate the boundaries and to show that the land in dispute was embraced within the lines claimed by them." The Court looked at the description in the Perry deed and concluded "the lines are susceptible of more than one location." When there is uncertainty as to whether the description embraces the land in question, the claim of color of title fails.
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> Likewise, in the case sub judice, both Meece and Feldman claim they have color of title by virtue of their deeds. Both have valid chains of title, Meece's going back to a patent and Feldman's going back to a commissioner's deed. However, only Meece has a description that readily allows the property to be located, albeit by a surveyor. That is why title was quieted in Meece.
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> Feldman's description cannot be located by a surveyor without a lot of guess work. Even assuming the property (Tract II) is located in Pulaski County, we only know that it is somewhere on the East side of Buck Creek and it touches the Silas Dyke line. The 18 acres in question are alleged to be part of Tract II. The 18 acre

[1] Generally, color of title is demonstrated by a written instrument purporting to transfer title or right of possession. *Kelly v. Kelly*, 293 Ky. 42, 168 S.W.2d 339 (1943).

> tract in dispute had not been cleared, was unenclosed, had no well-marked boundary, no natural monuments, no defined point of beginning, nor any signs of adverse possession. Ralph Peters, the Feldman's surveyor, could not locate the boundaries in Feldman's deed. He tried to draw the boundary lines and then place the property (like a puzzle) in a map of other properties in the area. It didn't fit, but Peters looked at other deeds and the other surveyors' corners from those other deeds and produced a survey. The problem was that the survey did not match the description in the Feldman deed. The uncertain description precludes color of title in Feldman.
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> In quieting title in Meece, the trial court relied on the survey by David Altizer. Altizer also reviewed other deeds and surveys as well as visiting the property where he found a freestone cliff. The Meece legal description references a freestone cliff (a natural monument) in the center of the line in dispute. With one correction in a deed call, Altizer's survey fit the Meece deed description and other surveyors can locate the property in the field. Thus Meece's legal description was certain and ascertainable, therefore Meece had color of title to the 18 acres.
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> In quieting title in Meece, Feldman, by operation of law, turns out to be a trespasser, or in the words of KRS 364.130, an entry "upon the land of another without legal right." Feldman's deed description does not allow the property to be located with certainty and thus does not amount to color of title.

Meece, 290 S.W.3d at 636 (citations omitted).

In this case, we observe that Penix neither followed the mitigation provisions of KRS 364.130 nor possessed title in fact to Delong's property. As a result, the circuit court focused on the "intent" of Penix to determine if treble damages were proper under KRS 364.130. We believe such focus on Penix's intent was erroneous. Rather, as directed by the Supreme Court in *Meece*, the

proper inquiry is whether Penix possessed color of title under KRS 364.130. *Meece*, 290 S.W.3d 631. So, we vacate the circuit court's award of damages and remand to the circuit court for reconsideration of the damage award consistent with *Meece*, 290 S.W.3d 631. Specifically, the circuit court shall determine if Penix was acting under color of title within the meaning of KRS 364.130, and if not it shall award treble damages.

Delong next asserts that the circuit court erred by failing to award her "legal costs" as provided by KRS 364.130(1), which are in addition to treble damages as provided therein. We believe the language of KRS 364.130(1) is plain and unambiguous as to an award of legal costs. Thereunder, a trespasser who cuts timber without title in fact or color of title is responsible for treble damages and legal costs of the owner of the timber. Upon remand, if the circuit court determines that Penix acted without color of title and awards treble damages to Delong, KRS 364.130(1) mandates that Delong also be awarded her legal costs, and the circuit court shall award such legal costs. On the other hand, if the circuit court determines that Penix acted with color of title, Delong is not entitled to award of legal costs pursuant to KRS 364.130(1).

Cross-Appeal No. 2011-CA-001529-MR

Penix argues that the circuit court erred by imposing liability upon him for the trespass to Delong's property committed by the logger, Hunt, who was an independent contractor. Penix maintains that Hunt carried out the logging operations and committed the trespass upon Delong's property. As an employer of

an independent contractor, Penix maintains that he is not liable for any damages caused by Hunt to Delong's property.

It is true that generally an employer who hires an independent contractor is not liable for torts committed by that contractor. *See Nazar v. Branham*, 291 S.W.3d 599 (Ky. 2009). This would include the tort of trespass. There, however, are exceptions to this general rule; a specific exception is recognized in relation to a trespass committed by an independent contractor:

> Where the trespassing act is done by an independent contractor, the other party is not liable for it when it is not authorized in any way by the contract. However, a party who keeps control of the work, authorizes the specific act, or breaches a nondelegable duty not to breach the peace, may be liable although it was committed by an independent contractor under the theory of liability for trespass holding that a person may be liable for trespass if he aids, assists, advises, or causes another to enter the property.

87 C.J.S. *Trespass* § 28 (2013) (citations omitted). Relevant to this appeal, an employer may be liable for a trespass of an independent contractor if the trespass was authorized by the contract or if the employer retained control over the work leading to the trespass. As pointed out above, the foundation of such exception is rooted in the common-law rule that "one who aids, abets, assists, or advises a trespasser in committing a trespass is equally liable" with the trespasser. *Weaver v. Ficke*, 174 Ky. 432, 192 S.W. 515, 516 (1917).

Here, Penix entered into a written contract with Hunt. The contract read, in part:

> I (Joseph Hunt, Jr.) am buying timber off of Larry C. Penix located at Tomahawk, Kentucky[,] up Rockhouse on Trace Fork. I will pay 40% for all grade timber and 35% for low grade timber. Larry C. Penix will not be held responsible for any accidents that may occur on this property and **the owners are responsible for the property line.** [Emphasis added.]

The facts are uncontroverted that Penix was the owner of the property to be logged by Hunt. Thus, under the terms of the contract, Penix retained the contractual right to control and ultimate responsibility for determining the correct property line or boundaries for Hunt's logging activities. As Penix possessed the contractual right to control the location of logging activities conducted by Hunt, Penix is equally liable for Hunt's logging upon Delong's property. Accordingly, we cannot say that the circuit court erred by concluding that Penix was liable for Hunt's trespass upon Delong's property.

Penix also maintains that the circuit court committed reversible error by admitting certain hearsay evidence at trial. In particular Penix asserts:

> The trial court also relied upon inadmissible statements to determine that Larry Penix should be subjected to liability including: Mr. Hunt's alleged statement that Mr. Penix told him to cut the ribboned area as opposed to the area marked with survey pins; Mr. Hunt's alleged statement that Larry and William Penix told the logger that the ridge top was the boundary line and Mr. Hunt's alleged call to Larry Penix where [Penix] told Mr. Hunt to keep cutting the lumber.
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> . . . .
>
> [Penix] objected several times to [Gerald Delong] offering hearsay testimony by the late Joe Hunt, Jr. that

> tended to subject [Penix] to liability for any actions on the part of the logging contractor. . . .
>
> . . . .
>
> It is clear that any statements that subjected anyone other than Mr. Hunt to liability are to be excluded from trial as hearsay. As was explained at trial it is impossible for [Penix] to cross examine a dead person. If [Delong] wanted this information available at trial then she should have taken Mr. Hunt's deposition and afforded [Penix] an opportunity to cross examine him. She chose not to do that and Mr. Penix was prejudiced at trial. At best, all these self serving statements did was to bolster a defense that Mr. Hunt was allegedly misled by [Penix] and should not have been held accountable. These statements are thus precluded from being entered into evidence and without it, [Delong's] claims cannot be substantiated.

Penix's Brief at 9, 16-17 (citations omitted). The specific hearsay testimony of Gerald Delong[2] as to the extrajudicial statements of Hunt was more thoroughly set forth by the circuit court as follows:

> [Gerald Delong] stated that Hunt told him that he was advised by [Penix] and William Penix that the ridge top was the boundary between [Penix] and adjoining land owners. [Gerald Delong] testified that Hunt gave him the impression that Hunt used the ribbons as the boundary line, and stated that [Penix] said that they were the boundary line. [Gerald Delong] testified that at some point in the process [Hunt] thought he was timbering too much area, since [Penix's] property was ninety acres, and he may be off the tract. He said that he called [Penix], but [Penix] told him to keep cutting.

Findings of Fact at 5-6.

[2] Gerald Delong is the adult son of Barbara Delong.

It is clear that Gerald Delong's testimony concerning Hunt's statements to him constituted hearsay evidence. Kentucky Rules of Evidence (KRE) 801(c). KRE 804 sets forth sundry hearsay exceptions where the declarant is unavailable as a witness.[3] Specifically, under KRE 804(b)(3), hearsay evidence is not excluded if the statements are against the interest of the declarant. KRE 804(b)(3) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

To be admissible as a statement against interest under KRE 804(b)(3), the Supreme Court held:

> [T]here must be a showing that the witness is unavailable at the time of trial, and there must also be a showing by either the inherent nature of the statement or by other proof that the declarant knowingly made statements which were "against the declarant's interest when made."

Fisher v. Duckworth, 738 S.W.2d 810, 814 (Ky. 2010) (citations omitted). And, it is within the discretion of the circuit court to determine whether evidence is

[3] Joseph Hunt passed away before the trial took place in this action.

admissible under the hearsay exception set forth in KRE 804(b)(3). *Fugett v. Commonwealth*, 250 S.W.3d 604 (Ky. 2008).

In this case, Hunt passed away before the trial and was unavailable as a witness. Moreover, the essence of Gerald Delong's hearsay testimony was that Hunt admitted to trespass upon Delong's property at the implicit or explicit direction of Penix. Hunt's admission to committing the tort of trespass certainly would expose him to civil liability. Additionally, as Hunt was an experienced logger, he was obviously aware that such admission was against his interest at that time. Considering the circumstances of his case, we are unable to conclude that the circuit court abused its discretion by admitting the above evidence. *See Fugett*, 250 S.W.3d 604.

For the foregoing reasons, the Findings of Fact, Conclusions of Law, and Judgment of the Martin Circuit Court is vacated and remanded in Appeal No. 2011-CA-001526-MR for proceedings consistent with this opinion and affirmed in Cross-Appeal No. 2011-CA-001529-MR.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:	BRIEF FOR APPELLEE/CROSS-APPELLANT:
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