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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001116-MR
AND
CROSS APPEAL NO. 2003-CA-001180-MR

OMER COOK — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM MARION CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 99-CI-00145

CHRISTOPHER FAMILY, LLC;
THOMAS CHRISTOPHER; ROBERT ROBERTS;
JEANETTE ROBERTS; SAM FINLEY; and
CAROLYN FINLEY — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART, AND
REMANDING IN PART

** ** ** ** **

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

VANMETER, JUDGE: This is an appeal and cross-appeal from a judgment entered by the Marion Circuit Court after a jury found for appellees Christopher Family, LLC (LLC), Thomas Christopher

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

(Christopher), Robert Roberts, Jeanette Roberts, Sam Finley and Carolyn Finley on their claims that appellant Omer Cook trespassed on and wrongfully harvested timber from their land. For the reasons stated hereafter, we affirm in part and remand in part.

Briefly, the record shows that appellees and Cook owned various adjacent tracts of land in Marion County. In June 1999, appellees filed the underlying action alleging that Cook had trespassed and wrongfully harvested timber from their property, and they sought relief pursuant to KRS 364.130. Cook defended by asserting that he possessed legal title to the property and/or that he had acquired the contested areas pursuant to parole boundary agreements.

After a trial, a jury found in favor of appellees as to all claims except Sam Finley's claim of outrage. The trial court entered a judgment consistent with the jury's award of 10% of the damages requested by appellees. The court then trebled certain damages, and it awarded costs and attorney's fees. Cook appealed, raising more than sixty issues and sub-issues in his appellate brief.[2] Appellees cross-appealed as to the inadequacy of the award of damages. For the reasons stated hereafter, we affirm except insofar as we remand for further proceedings to

[2] As the trial court stated in several orders, the parties "have filed enough motions and memos to choke a goat."

determine the Finleys' interests in the award of damages relating to Tract 9.

First, Cook contends that the trial court abused its discretion by failing to grant his motions for a continuance of the trial based on any one of several possible grounds, and that the court erred by failing to later afford posttrial relief based on the same grounds. We disagree.

The first ground raised by Cook relates to the property surveys conducted by appellees' surveyor, Sam Anzelmo. Cook asserts when Anzelmo was first deposed in March 2002, Cook's counsel was new to the case and therefore was unable to effectively cross-examine the surveyor. Cook argues that he was prejudiced when the trial court, in November 2002, refused to grant a continuance so that he could depose Anzelmo after Anzelmo revisited the property and allegedly modified his survey. However, Cook fails to note that his counsel in fact deposed Anzelmo a second time in September 2002, after the latter's return to the property, but chose not to question him regarding any newly-gathered information.

Although Cook complains that Anzelmo brought a "corrected" survey to court, that survey was not admitted into evidence. Moreover, Anzelmo indicated below that there were no relevant substantive differences between the two surveys as to the locations of the disputed boundary lines, that his

corrections were made only to comply with the county clerk's formal filing requirements, and that none of his opinions had changed. In response to Cook's motion, the court delayed the trial for some ninety minutes and then, after Anzelmo's direct examination, adjourned the trial to the following day to allow Cook's counsel time to prepare for cross-examination. Under these circumstances, we cannot say that the court abused its discretion by denying Cook's request for a continuance, or that it later erred by denying his motion for a mistrial on this ground.

Cook also asserts that the trial court erred by permitting Christopher to intervene and assert a claim of outrage against Cook some eleven days prior to trial. We disagree.

CR 15.01 provides that once a responsive pleading has been served, a pleading may be amended "only by leave of court," which "shall be freely given where justice so requires." The trial court possesses broad discretion in determining whether to permit such an amendment.[3]

Here, the record indicates that Christopher was the managing member of the LLC. Although the parties agreed to dismiss the LLC's outrage claim shortly before trial, Christopher was permitted to individually intervene in lieu of

[3] *See, e.g., Cheshire v. Barbour,* 481 S.W.2d 274, 276 (Ky. 1972); *First National Bank of Cincinnati v. Hartmann,* 747 S.W.2d 614, 616 (Ky.App. 1988).

his involvement on the LLC's behalf. The allegations supporting Christopher's individual outrage claim were the same as those which had supported the LLC's outrage claim, and Cook already had conducted discovery and extensively questioned Christopher about those allegations during a September 2002 deposition. As the trial court stated in its order denying Cook's motion for a new trial,

> [t]hroughout this litigation outrage claims had been asserted by the Christopher Family, LLC and Sam Finley. Christopher Family, LLC's claim of outrage consisted of acts taken by the Defendant against the LLC's managing member, Tom Christopher. Discovery was taken, including the deposition of Tom Christopher regarding the Christopher Family, LLC's outrage claim. When the issue arose as to whether or not the Christopher Family, LLC could maintain a cause of action under the tort of outrage Tom Christopher was permitted to intervene and file a claim for the tort of outrage. This was not prejudicial to the Defendant.

Under these circumstances we cannot say that the trial court abused its discretion by permitting Christopher to intervene and assert a claim of outrage.

We also are not persuaded by Cook's argument that Christopher's outrage claim should have been dismissed for failure to state a claim. Unlike the situations described in *Banks v. Fritsch*[4] and the other cases cited by Cook, here the alleged outrageous conduct did not involve touching or threats

[4] 39 S.W.3d 474 (Ky.App. 2001).

of touching which could amount to causes of action under traditional torts. The tort of outrage is a "gap filler" tort which is intended to provide a remedy where the defendant's "actions or conduct is intended only to cause extreme emotional distress to the victim,"[5] and no other tort is intended.

In *Burgess v. Taylor*,[6] a panel of this court reiterated that

> [i]n order to recover under the tort of outrage, a plaintiff must prove:
>
> 1) the wrongdoer's conduct must be intentional or reckless;
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> 2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
>
> 3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and
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> 4) the emotional distress must be severe.

Here, appellees adduced evidence to show that Cook threatened Christopher's life, property and employees. As there was a genuine issue of material fact as to whether Cook in fact intended to cause severe emotional distress to Christopher, the trial court did not err by failing to grant a summary judgment in Cook's favor as to Christopher's outrage claim. Moreover, we

[5] *Brewer v. Hillard*, 15 S.W.3d 1, 8 (Ky.App. 1999).

[6] 44 S.W.3d 806, 811 (Ky.App. 2001).

are not persuaded by Cook's argument that he was denied due process when he was not afforded twenty days before trial in which to answer appellees' third amended complaint, as Cook not only filed an answer to the amended complaint but he raised multiple defenses that were not previously raised in response to appellees' claims.

Further, we are not persuaded by Cook's contention that he is entitled to relief because the trial court failed to rule on numerous pending motions earlier than the day before or the day of trial. Despite the obvious advantages of having substantial advance notice of a trial court's rulings on pending motions, a party is not entitled to receive such notice by a particular date.

Next, Cook contends that the trial court erred by finding that appellees hold record title to seven particular tracts of land. We disagree.

Title to land may be shown by proof that the land comes from the Commonwealth, by proof of title to a common source with the opposing party, or by proof of adverse possession.[7] Although Cook correctly notes that our highest

[7] *Skaggs v. Ohio Valley Rock Asphalt Co.,* 292 Ky. 758, 166 S.W.2d 1005, 1007 (1942); *Bentley v. Kentland Coal & Coke Co.,* 242 Ky. 511, 46 S.W.2d 1077 (1932). *See also Rose v. Griffith,* 337 S.W.2d 15 (Ky. 1960); *Noland v. Wise,* 259 S.W.2d 46 (Ky. 1953); *Martt v. McBrayer,* 292 Ky. 479, 166 S.W.2d 823 (1942).

court held in *Bolin v. Buckhorn Coal & Lumber Co.*[8] that proof of title "through a common grantor is not sufficient to dispense with proof of title from the commonwealth, where the tracts are separate and distinct and the common grantor's title was derived from separate sources[,]" that court also held that "where each of the parties claims that the disputed strip is covered by his deed, proof of title to a common grantor is all that is required." Hence, except in certain instances not relevant here, it is not necessary to trace title back to the Commonwealth where both parties can prove title to their property back to a common grantor.[9] If a defendant files a counterclaim asserting title, both parties must prove their respective claims.[10]

Here, Cook has challenged the trial court's summary judgment finding that appellees hold legal record title to seven of the thirteen tracts surveyed for purposes of this action.[11] We disagree, as it is clear from a careful review of the record that the parties' tracts trace back to common sources.

The record shows that the Cooks' Tract 2, and the Finleys' Tracts 3 and 4, share a common source of title as

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[8] 211 Ky. 847, 278 S.W. 154, 154 (1925).

[9] *Jones v. O'Connell,* 237 Ky. 219, 35 S.W.2d 290, 292 (1931).

[10] *Madden v. Bond,* 269 Ky. 31, 106 S.W.2d 95 (1937).

[11] Tracts 3, 4, 8, 9, 10, 12 and 13.

reflected in Deed Book 53, page 522, dated April 14, 1937, pertaining to the conveyance of 640 acres which subsequently were divided. Similarly, the Cooks' Tract 7, and the LLC's Tract 8, share a common source of title as reflected in Deed Book 9, page 525, dated June 4, 1877, regarding the conveyance of 218 acres which subsequently were divided to form Tract 7 on the north end of the property and Tract 8 on the south.

Tract 9, which apparently is owned by Sam Finley, Edwin Smith, James Tyler and Larry Kruse, can be traced back to an 1848 land grant to William Hayes[12]. Although the original deeds were destroyed in an 1863 courthouse fire, the record shows that on April 21, 1864, the Marion County Clerk certified that on October 15, 1851, William Hays [sic] and Nancy Hays [sic] conveyed to Samuel Kinnett their interests in two parcels of land including the 201-acre land grant parcel from which Tract 9 evidently was later carved. The clerk also certified that on October 13, 1851, Henry Taylor, Artemisia Taylor, Usia Gartin and Elizabeth Gartin transferred their interests in the same property to Samuel Kinnett. Thus, the undisputed record shows that through two different transactions conducted three years after the land grant was issued, the three couples conveyed to Kinnett all their interests in the subject property.

[12] Also spelled as "Hays" in the various records.

Cook nevertheless argues that subsequent title to Tract 9 was not adequately traced because there is a gap between Samuel Kinnett's 1851 acquisition of the property and Charles Kinnett's 1867 conveyance of the property to others. However, the 1867 deed in fact shows that Charles Kinnett acquired title to the property when it was "hereby Sold under Samuel Kinnetts heirs." In the absence of any evidence to contradict that recorded statement, we are not persuaded by Cook's assertion that appellees' source of title was not adequately traced to the 1848 land grant.

However, this matter must be remanded for a determination of the Finleys' proportionate interests in the damages resulting from the claims relating to Tract 9. Although Edwin Smith, James Tyler, and Tina Tyler each assigned and conveyed to Finley "all of their right, title and interests" in any claims against Cook in this action, the record does not address whether the fourth purchaser listed in the 1972 deed, Larry Kruse, continues to hold any interest in Tract 9. If an interest in Tract 9 is held by Kruse or by his heirs or assignees, on remand the trial court must conduct further proceedings to determine the Finleys' interests in the award of damages relating to Tract 9.

Next, the LLC's Tracts 10 and 13, and the Cooks' Tract 5, share a common source of title as reflected in a deed filed

at Deed Book 136, page 526, dated August 8, 1984, which transferred four parcels of land including Tracts 5, 10 and 13. The Cooks acquired Tract 5 in 1990, while the LLC acquired the remaining parcels, or portions thereof, as reflected in Deed Book 191, page 498, dated March 18, 1997. Thus, the parties' respective titles to Tracts 5, 10 and 13 may be traced back to the common 1984 source. Any and all interests which the Frenches may have in the claims against Cook were assigned to the LLC in April 2002.

Finally, the Cooks' Tract 11 and the LLC's Tract 12 share a common source of title in Deed Book 109, page 150, dated January 3, 1977, regarding the conveyance of some 140 acres to Harry and Lois Hinsley. The Hinsleys transferred to the LLC's predecessors in title some 121 acres (Tract 12) of the 140-acre parcel, as documented in Deed Book 129, page 264, dated October 11, 1980. Deed Book 156, page 119, dated October 16, 1990, reflects that the Hinsleys transferred to the Cooks the remainder (Tract 11) of the 140-acre parcel, specifically excepting the 121 acres earlier transferred to the LLC's predecessors. Contrary to Cook's contention, the conveyances do not appear to be in conflict.

In summary, after carefully reviewing the record, including the evidence as to appellees' possession of the property, we conclude that except as to any possible ownership

interest retained by Larry Kruse or his assignees in Tract 9, the trial court did not err by granting summary judgment regarding the ownership of the tracts in issue.

Next, Cook contends that the trial court erred both by failing to find as a matter of law that some of appellees' timber trespass claims were barred by limitations, and by finding that appellees were entitled to assert claims assigned to them by others. We disagree.

KRS 413.120(4) requires any action for "trespass on real or personal property" to be "commenced within five (5) years after the cause of action accrued[.]" Hence, the LLC could not pursue any claims regarding trespass which occurred more than five years prior to the filing of their initial complaint on June 11, 1999. Further, the Finleys and the Roberts could not pursue any claims regarding trespass which occurred more than five years before their April 2000 entry into the case, and Christopher could not pursue any claims of trespass which occurred more than five years before his November 2002 joinder.

The record shows that appellees' trespass claims relate to events which occurred after April 1995. Although Cook asserts that the Roberts waived all claims by failing to identify any trespass while still in possession of the property, there is evidence that shortly before selling the property to

the LLC in 1999, Cook and Robert Roberts discussed the location of boundary lines and Roberts voiced an intent to obtain a survey. After Cook nevertheless continued to log and hunt in the disputed area, the Roberts and the LLC, as their successor in title, jointly made the claim below and thereby ensured that the claims were brought by the parties in possession of the property at all pertinent times.

Further, although the Frenches did not join the proceedings below, they assigned any and all of their claims against Cook to the LLC. Contrary to Cook's assertion the assignment of those interests, and the assignment to the Finleys of the interests of at least two of the three Tract 9 co-owners, were not void as champertous given the LLC's and the Finleys' existing interests in the proceedings and their status as legitimate parties.[13] Also, we are not persuaded by Cook's assertion that those claims were choses in action which were not assignable, as it is well established in Kentucky that even a parol assignment of a chose of action is valid to transfer a party's rights in any possible recovery.[14]

Regardless of whether there is evidence that timber trespass occurred more than five years before the June 1999

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[13] *See* KRS 372.060. *See also Whisman v. Wells,* 206 Ky. 59, 266 S.W. 897 (1924); *Wilhoit's Adm'x v. Richardson*, 193 Ky. 559, 236 S.W. 1025 (1921).

[14] *Young v. Auxier,* 302 Ky. 571, 195 S.W.2d 295, 298 (1946).

filing of the LLC's initial complaint, the record shows that all of the parties' claims of timber trespass pertain to dates after April 1995. Although Cook seems to argue that the evidence was insufficient to send the claims to the jury, the record in fact shows that there was considerable evidence of timber trespass by Cook within the five-year period preceding each party's claim. The weight to be given to the evidence against Cook was an issue for the finder of fact herein.

Next, other than as to the possible Tract 9 issue discussed above, we are not persuaded by Cook's contention that appellees' recovery should be limited because their cotenants in title were not joined as parties below. It is settled that the assignee of an interest in property is the real party in interest, and that a court may grant complete relief even in the absence of the assignors of such interests.[15] Moreover, we have found and Cook has cited to nothing in the record to show that he timely preserved his contention that his wife, as the owner of an undivided one-half interest in the property in dispute, was an indispensable party to the proceedings below. Hence, this issue will not be further discussed on appeal.

Next, Cook contends that the trial court erred by entering summary judgment for appellees on his claim of ownership by adverse possession. Cook relies on KRS 413.072(4),

[15] *See Maxwell v. Moorman,* 522 S.W.2d 441 (Ky. 1975); *Root v. John Deere Co. of Indianapolis, Inc.,* 413 S.W.2d 901 (Ky. 1967).

which provides that for purposes of nuisance and trespass, a silvicultural operation "shall be deemed continuously operating so long as the property supports an actual or developing forest." However, that statute simply has no relevance to any claim by Cook that he is entitled to ownership of land by adverse possession.

Next, Cook contends that the trial court abused its discretion by granting appellees' motion to allow the jurors to view a portion of the property. Although Cook concedes that this matter fell within the court's sound discretion, he asserts that in this instance the court abused its discretion because the jurors were angered by the delay occasioned by the viewing, because the delay increased the attorney's fee award against him, and because the viewing of certain parts of the property prejudiced the jury against him. However, after reviewing the record we are not persuaded that the court abused its discretion in this regard. Moreover, we find no merit in Cook's contention that the court abused its discretion by allowing the jury to dictate the course of the trial when it considered the jurors' input when scheduling dates for the trial's continuation.

Next, Cook contends that the trial court erred by permitting appellees to introduce evidence of Anzelmo's August 2000 survey, including Anzelmo's testimony regarding the location of the various boundaries. We disagree.

KRE 702 provides for testimony by expert witnesses as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Here, the record shows that both Anzelmo and Cook's surveyor testified in great detail regarding their opinions about the locations of various boundary lines. Under KRE 702, such testimony was admissible to assist the jury as the trier of fact, and Cook's efforts to impeach or discredit Anzelmo's testimony under 201 KAR 18:150, pertaining to the standards of practice for surveyors, went to the weight of the evidence rather than its admissibility. We cannot say that the trial court abused its discretion in admitting the evidence.[16]

Next, Cook contends that the trial court erred by permitting witnesses to voice their previously-undisclosed opinions regarding the cutting of the timber; by permitting Anzelmo to estimate the size of the tracts based on the measurements contained in deeds; by permitting appellees to introduce photos without proper foundations and to introduce some but not all of Anzelmo's field notes; by failing to permit

[16] *See Goodyear Tire & Rubber Co. v. Thompson,* 11 S.W.3d 575 (Ky. 2000).

Cook to introduce evidence of gunshots allegedly fired toward his friends by LLC members or their friends; by allowing opinion testimony regarding Christopher's emotional distress and state of mind; by admitting allegedly irrelevant and prejudicial testimony as well as improper hearsay and testimony; and by permitting Christopher to testify from notes and a videotape. However, we are not persuaded that reversible error occurred in regard to any of these matters. Further, although Cook complains that the court prohibited his witnesses and him from testifying "about certain aspects of the parol boundary line agreements," the excluded testimony was not entered into the record by avowal and thus may not be reviewed on appeal.[17]

Next, Cook contends that the trial court erred when instructing the jury. We disagree.

Cook first alleges that the court erred by failing to instruct the jury in accordance with the instruction set out in *Louisville Cooperage Co. v. Collins,*[18] which described in great detail the legal principles and methods which should be used by surveyors when locating deed descriptions. The trial court instead simply directed the jury to find from the evidence whether "the Anzelmo survey correctly locates the boundaries of

[17] KRE 103. *Noel v. Commonwealth,* 76 S.W.3d 923 (Ky. 2002); *Commonwealth v. Ferrell*, 17 S.W.3d 520 (Ky. 2000).

[18] 228 Ky. 266, 14 S.W.2d 1090, 1092 (1929).

the properties of the Plaintiffs being Tracts #3, 4, 8, 9, 10 and 12 on the Anzelmo survey[.]" An interrogatory and additional instructions followed.

Section 13.01 of Palmore's *Kentucky Instructions to Juries*[19] addresses the function of jury instructions as follows:

> The basic function of instructions in Kentucky is to tell the jury what it must believe from the evidence in order to resolve each dispositive factual issue in favor of the party who bears the burden of proof on that issue. In other jurisdictions, as at common law, it may be appropriate to say that the purpose of instructions is to advise the jury on the law of the case, but not in this state. The enumeration or definition of a party's rights or duties is permissible only as a convenient means of presenting the factual question of whether such rights or duties were violated. The increasing use of interrogatories instead of general instructions reflects a realization that the less the jurors know about the law of the case the easier it is for them to remain strictly within the province of fact-finding. The jury's only function is to decide disputed issues of fact, and the instructions should seek to "fairly submit proper issues to the jury." In at least one case it has been suggested that when there is more than one issue on which a general verdict may be based it is better practice to submit those issues separately in the form of special interrogatories.
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> "Contrary to the practice in some jurisdictions, where the trial judge comments at length to the jury on the law of the case, the traditional objective of our form of instructions is to confine the

[19] (4th ed. 1989)

> judge's function to the bare essentials, and let counsel see to it that the jury clearly understands what the instructions mean and what they do not mean."

(Footnotes omitted.) Further, Section 13.10[20] specifies that "[r]egardless of which form is used, the instructions should be simple, direct, and confined to the specific factual issues raised by the pleadings and the evidence." Although *Kentucky Instructions to Juries* does not contain a model instruction which exactly fits the scenario now before us, the land dispute instructions set out in Chapter 47 utilize a simple form requiring the jury to find, for instance, whether "the trees in question were located within the boundary described in his deed,"[21] or whether parties "held adverse possession of any part of the land described in the deeds from X to Y and from Y to P, claiming it to the full extent of the boundaries mentioned therein[.]"[22]

Here, although Cook's tendered instruction mimicked that set out in *Louisville Cooperage* in 1929, it far exceeded the "bare essentials" objective later supported in *Kentucky Instructions to Juries.*[23] The court's instruction, by contrast, met the goal of submitting the factual issues to the jury while

[20] John S. Palmore, *Kentucky Instructions to Juries* (4th ed. 1989).

[21] *See* Sections 47.01 and 47.02.

[22] *See* Sections 47.03 and 47.04.

[23] *Id.* at Section 13.01.

leaving to counsel the opportunity to flesh out those instructions in closing argument. We are not persuaded that the trial court erred when instructing the jury regarding the Anzelmo survey lines.

Cook also argues that the court improperly instructed the jury that he could not prove that boundary lines were established by parol agreement unless the jury found that such boundary lines were plainly marked by the participants to the agreement. However, the court's instruction was consistent with long-established case law which provides that

> before a parol agreement is binding the location of the boundary line must be in doubt and a bona fide dispute must exist . . . . We think this case comes within the doctrine laid down in *Garvin v. Threlkeld,* 173 Ky. 262, 190 S.W. 1092, 1093, quoted in two of the above cases and in others since decided. The rule is well stated in that case as follows: "While the validity of parol agreements to settle disputed boundaries was long resisted on the ground that, in effect, they passed the title to real property without the solemnities required by the statute, it is now settled that, where the dividing line is uncertain and there is a bona fide dispute as to its location and the parties agree on the dividing line and execute the agreement by marking the line or building a fence thereon, such an agreement is not prohibited by the statute of frauds, nor is it within the meaning of the provisions of the law that regulate the manner of conveying real estate. The reason for the rule is that the parties do not undertake to acquire and to pass the title to real estate, as must be done by written contract or conveyance.

> They simply by agreement fix and determine the situation and location of the thing that they already own, the purpose being simply by something agreed on to identify their several holdings and to make certain that which they regarded as uncertain."[24]

(Emphasis omitted.) Here, the court's instruction simply followed a long line of cases, including *Wolf* and *Garvin v. Threlkeld,*[25] in requiring the parties to have clearly marked and identified the location of any boundary line fixed by oral agreement. That instruction was not erroneous.

Cook also asserts that the trial court erred by failing to provide a separate instruction concerning the assignment of co-owners' interests to the Finleys; by failing to limit the instructions "to the claims and amounts stated in their pleadings and discovery;" by failing to instruct the jury concerning estoppel, acquiescence or waiver; and by failing to define the clear and convincing standard or to require the jury to find nominal or actual damages before awarding punitive damages for outrage. However, as Cook failed to specifically indicate whether or how he timely preserved these issues below, we shall not consider these assertions on appeal.

Next, Cook contends that the trial court erred in several respects when issuing injunctive relief in favor of appellees. We disagree.

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[24] *Wolf v. Harper,* 313 Ky. 688, 233 S.W.2d 409, 411 (1950).

[25] 173 Ky. 262, 190 S.W. 1092, 1093 (1917).

Appellees' second amended complaint, alleging that Cook "virtually destroyed a road across the [LLC] easement built by [the LLC] on land" owned by the LLC and third parties, sought to permanently enjoin Cook "from trespassing upon" their property. After the jury unanimously found that Cook had no right of way "across the [LCC] property . . . tracts #10, 12, 13," the court entered a judgment concluding that there was no right of way in Cook's favor across the three tracts. However, the court then provided that Cook, his agents and his employees were permanently enjoined

> from going upon or removing trees and logs from the Plaintiffs' tracts 3, 4, 8, 9, 10 and 13; traveling upon the "Christopher road"; destroying any gates, chains, locks or fences; hunting upon or leasing the plaintiffs' land to others; destroying any personal property of the Plaintiffs; blocking or damming Wheeler's Branch; threatening, intimidating or assaulting any of the Plaintiffs, the Plaintiffs' agents, employees or family.

Cook now contends that the court's judgment improperly enjoined him both from using a road not in controversy, and from engaging in acts involving nonparties to the action. However, Cook fails to show that he adequately objected[26] to the court's

[26] Cook asserts for the first time in his reply brief that his "instructions were specific enough to avoid any controversy on this point, R. 1245-1267, but the court gave a more broad one, to which [he] objected. [Dec.] 18-15:29:05 *et seq.,* [Dec.] 18-19:18:30, *et seq.,* and [Dec.] 19-02:03:05, *et seq."* However, Cook does not provide this court with any more information to support his contention that he adequately and specifically preserved the issue on the grounds now raised on appeal, and neither he nor the record provides us with any reasonable means of determining where, on the eight

instruction which resulted in the jury's specific finding that he had no right of way across tracts 10, 12 and 13. He therefore waived any objection to the court's subsequent entry of a judgment enjoining him from either going upon tracts 10 and 13, or traveling upon the Christopher road. However, as the court's grant of injunctive relief does not specifically address tract 12, there is no merit to Cook's allegation that the court erred by issuing an injunction regarding that tract.[27] Moreover, we are not persuaded by Cook's argument that the trial court's order granting injunctive relief should be stricken as being vague and overbroad.

Next, Cook raises various arguments in support of his allegation that the trial court erred or abused its discretion when awarding damages, costs and attorney's fees. We disagree.

KRS 364.130(1) specifically provides that

> 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

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undated trial videotapes, the cited references might be located so that we might review his contention that this issue was preserved. This court will not search the record for testimony where there is no reference to the record, *Ventors v. Watts,* 686 S.W.2d 833 (Ky.App. 1985), or where such reference is inadequate.

[27] We shall not address any allegations regarding orders which may have been issued by the trial court after this appeal was filed, as such matters are not properly before us on appeal.

> 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.

Thus, while it is the jury's function to determine the award of damages, it is the trial court's statutory duty to treble such damages, and "to award legal costs to the damaged party, which, under the statute, include a reasonable attorney's fee." [28]

Here, Cook asserts that appellees are not entitled to an automatic award of legal costs since such an award would amount to punitive damages. However, legal costs are clearly distinguishable from those common law punitive damages which may not be awarded in addition to trebled damages under KRS 364.130.[29] Moreover, since KRS 364.130 requires the trebling of damages in addition to the payment of costs and attorney's fees, there is no merit to Cook's argument that the court erred by trebling that award.

Cook then argues that although appellees' attorney's fees were not unreasonable, the court's award of those fees was excessive since the jury awarded appellees only about 10% of the requested damages and Cook "established that any trespass was in good faith." However, since the jury in fact found that Cook acted without legal right or color of title when cutting the

[28] *King v. Grecco*, 111 S.W.3d 877, 883 (Ky.App. 2002).

[29] *Id.* at 882.

timber, we cannot say that the trial court abused its broad discretion by awarding the attorney's fees and costs to which appellees were statutorily entitled.

Cook also asserts that the court's award of attorney's fees and costs should be reduced by the amounts attributable to prosecuting appellees' outrage claims, since fees and costs relating to such claims are not recoverable under KRS 364.130. However, appellees' counsel submitted to the court an itemized list of the billable hours associated with the outrage claims, and those identifiable costs were deducted from the final award of fees. Again, we cannot say that the trial court abused its considerable discretion in this regard.

Further, Cook contends that the award for expert witnesses' fees were excessive since the jury awarded substantially less damages than those sought by appellees. He argues that Anzelmo's fee in any event should be limited to the agreed amount for surveying the thirteen tracts, minus the costs of surveying certain areas which Cook contends were unnecessary to the resolution of the claims. Cook also asserts that the fee should be reduced by the costs associated with preparing for trial, performing additional pretrial survey work, and surveying an unrelated property line. However, the award of such costs lies squarely within the trial court's discretion, and we cannot say that the court abused that discretion. As the trial court

stated when denying Cook's motion to alter, amend or vacate the judgment, both parties'

> surveyors testified that finding the original boundary lines on the type of terrain involved in this case could not be done without substantial survey work. Throughout the course of this litigation the Defendant argued that the Plaintiffs' survey work was inadequate or incomplete. The Defendant cannot now complain that the Plaintiffs' surveyors spent too much time preparing the survey.

Cook next contends that he "has already paid $875.00 of [deposition] fees and an additional $100.00 by order of the Court after he contested the propriety of the other charges." He apparently miscalculated those figures when concluding that a charge of "$1,875.00" must be deducted from the amount due Anzelmo. As it seems that the trial court already addressed this issue when noting that $975 was deducted from appellees' "final survey invoice" for the "costs and depositions" of their surveyors, Cook is not entitled to the requested relief.

We also are not persuaded by Cook's contention that the trial court erred by awarding certain costs not allowed by CR 54.04, including the costs of copies of depositions. Again, there is no merit to the argument that the costs should be reduced because appellees did not prevail in all respects. Moreover, although CR 54.04(2) permits only the recovery of "costs of the originals of any depositions . . . and such other

costs as are ordinarily recoverable by the successful party," KRS 364.130 permits a broader recovery of costs in timber cutting cases to include "any legal costs incurred by the owner of the timber." (Emphasis added.) Such language clearly authorizes the trial court's award.

Next, Cook contends that the trial court erred by failing to find that KRS 364.130 "is unconstitutional to the extent that it deprives [him] of his jural rights" by impermissibly eliminating any good faith defense to punitive damages for timber trespass, by providing for trebled damages that could not be awarded against a trespasser at common law, and by permitting appellees to determine whether Cook could exercise his jural rights. Further, he asserts that the term "legal costs" allows for awards which violate his rights. We disagree.

Contrary to Cook's contention, KRS 364.130(2) specifically provides for a good faith defense to punitive damages if the defendant can demonstrate that he or she obtained advance written permission from the timber's putative owner. Given that the jury found that Cook did not act in good faith, he was not denied a meritorious good faith defense herein. Moreover, there is no merit to any argument that Cook otherwise was denied a fundamental jural right, as he had no common law right to engage in timber trespass, and the legislature

certainly is vested with the authority to set or change the terms of punishment for actions taken in violation of state laws. Further, we are not persuaded that there is any merit to Cook's argument that the term "legal costs" is impermissibly vague and arbitrary, or that the allowance of such costs violates his rights in any way.

Next, given the outcome of this appeal, we need not address the issues raised by Cook regarding the posting of a bond on remand, or regarding the court's denial of postjudgment motions for relief. The remaining issues raised by Cook on appeal lack merit and need not be discussed in this opinion.

Finally, appellees contend on cross-appeal that the trial court erred by denying their motion for a new trial as to damages. They assert that the jury's award of only 10% of the requested damages failed to fall within the range of the evidence presented by both parties' expert witnesses, and that at a minimum the jury should have awarded the damage amounts put forth by Cook's expert witness. Appellees seek relief pursuant to CR 59.01, which permits the granting of a new trial where it appears that excessive or inadequate damages were "given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court."

The trial court instructed the jury that any award of damages should not "exceed the sum of" the maximum figure shown

by the evidence for each requested item of damages. However, there is no indication that appellees timely objected to the instructions' failure to include minimum damage figures. Given the conflicting evidence as to when the damages occurred, and as to whether some of the damages may have been caused by persons other than Cook, his agents or his employees, it follows that the jury's award of 10% of the maximum damages set out in the instructions fell within the range of the evidence presented. It follows, therefore, that the trial court did not err by denying appellees' motion to alter, amend or vacate the judgment.

The court's judgment is affirmed in part, and remanded in part for further proceedings to determine the Finleys' interests in the award of damages relating to Tract 9.

ALL CONCUR.

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