IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

REX McCRARY, Appellant, v. ROBERT E. DOIGE and "JANE DOE" DOIGE, husband and wife; ROBY E. DOIGE and "JANE DOE" DOIGE, husband and wife; GUILLERMO BRAVO and "JANE DOE" BRAVO, husband and wife, and sole proprietors, Respondents.	No. 38686-1-II UNPUBLISHED OPINION

Van Deren, C.J. — In this timber trespass action, Rex McCrary appeals summary judgment in favor of Roby Doidge, based on the trial court's determination that McCrary cannot show that Roby Doidge was vicariously liable for timber trespass on McCrary's property. McCrary argues that genuine issues of material fact precluded summary judgment. We agree and reverse and remand for further proceedings.

FACTS[1]

I. Background

McCrary owned approximately 200 acres of partially forested land in rural Thurston County, Washington. He used the land for recreation, as a wildlife habitat, and intended to build a home on it. Robert Doidge owned a sizeable lot adjacent to McCrary's property where he lived for 35 years and on which he conducted a forestry business.

In 1989, Robert sold a roughly 12.5 acre parcel to his sons, Roby and Ross.[2] This 12.5 acre parcel is immediately west of McCrary's property and north of Robert's property; both properties border McCrary's property. In 1993, Roby and Robert entered a real estate contract for Roby to purchase roughly 10 acres[3] located immediately west of the 12.5 acre parcel. In 2003, Roby paid his last installment and received title to this 10 acre parcel.[4] Ross lived on the 12.5 acre parcel in 2001 and 2002, but Roby never lived there. Roby infrequently traveled from his home in Mason County to check on these parcels.

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[1] When reviewing an order on summary judgment, we view the facts in the light most favorable to the nonmoving party, that is, McCrary. *See Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008). Thus, while further proceedings may ultimately prove the following to be inaccurate, we assume that Guillermo Bravo committed timber trespass on McCrary's property and that Robert negligently supervised Bravo and his crew. To be clear, McCrary must still prove these assumptions during any further proceedings.

[2] Because they share the same last name, for clarity, we refer to Robert Doidge, Roby Doidge, and Ross Doidge by their first names.

[3] The parcel is 9.87 acres in size, but for simplicity we refer to it as 10 acres, as do the parties.

[4] Robert testified that Roby purchased the 10 acre lot in about 1999 or 2000 while, in his deposition, Roby said he purchased the 10 acre lot in 1993. While the record indicated that this 10 acre parcel is west of the 12.5 acre parcel and not adjacent to McCrary's property, McCrary stated at oral argument that the 10 acre parcel was adjacent to his property and argued that Roby's liability also turned on his permission for Bravo to cut on this parcel.

Guillermo Bravo sold cedar boughs for Christmas garlands and wreaths and had, for several years, trimmed cedar boughs for that purpose on a number of properties. On November 23, 2001, Robert entered into an agreement with Bravo to have Bravo and his crew cut cedar boughs on the Doidge properties, including the 12.5 acre parcel. Robert and Bravo agreed that Bravo would pay four cents per pound for the cedar boughs.

Robert did not commission a professional survey of the properties. Instead, he relied on a review of the boundaries that he performed 30 years earlier with a compass. Robert marked only about 800 feet of the 2626 foot boundary line between McCrary's property and the Doidge properties and walked only part of that line with Bravo.

Robert monitored Bravo's work daily. After a few days,[5] Bravo and his crew stopped cutting because it was too late in the holiday season and he was unable to sell the boughs. Robert removed the ribbons marking the boundary after Bravo left the property and did not see any indication that Bravo had cut boughs from McCrary's property.

In September 2002, Robert decided to have Bravo and his crew trim cedar boughs again. Robert called Roby to ask if he wanted boughs cut from his two properties.[6] Ross had already agreed to have trees trimmed on the 12.5 acre parcel. Roby gave Robert permission to have Bravo cut on both the 12.5 acre and the 10 acre properties and allowed Robert to handle the arrangements with Bravo. Roby told Robert to mark the property line before Bravo began

[5] Robert stated in his declaration that Bravo worked in 2001 for a single day but testified during his deposition that Bravo may have worked for three or four days.

[6] Despite Robert and Roby's testimony about a single telephone conversation, they appear to have had multiple conversations because Roby stated that he spoke to Robert about the 10 acre property before Bravo started and after a few weeks of harvesting.

cutting. According to Roby, he "figured that [Robert would] be out there every day. You know, when you have a crew working on your property, you should be out there every day." Clerk's Papers (CP) at 182. Roby requested that Robert call before Bravo began cutting on Roby's 10 acre parcel. Roby wanted to show Bravo which trees to cut—"everything 30 feet from the road" that people can see. CP at 251.

No one marked the McCrary/Doidge property line in 2002. Instead, Robert pointed out the boundaries and some markers to Bravo from several hundred feet away. These markers included a two inch pipe that McCrary's surveyor installed and a swamp that provided a natural boundary between the properties. Robert again monitored the project and determined where and how much cedar the crew cut. Bravo and his crew worked intermittently for two or three weeks.

At the end of Bravo's work on the 12.5 acre parcel, Roby spoke with Bravo for five or ten minutes about how the work should proceed on the 10 acre parcel. Roby instructed Bravo to remove boughs from the bottom two-thirds of the trees, trimming the boughs to their trunk. Roby also went to the 12.5 acre parcel that day but said that he did not tell Bravo how to cut on the parcel. After the cutting, Robert gave Roby $1,200 as his share of Bravo's payment, but Roby did not know how much Robert had earned.

Around March 13, 2003, McCrary surveyed his property boundaries to install a fence. When McCrary met the surveyor at the site, McCrary noticed that his trees were cut and he reported this damage to the Thurston County Sheriff's Department. McCrary also found what appeared to be a staging area for loading and removing cedar boughs on his land, adjacent to a road running from Roby's property to his. McCrary determined that roughly 316 of his mature cedar trees were missing boughs and debris remained on the ground. The sheriff's department

contacted Robert about the timber trespass but decided that he was not a suspect.

In September 2004, McCrary learned from a neighbor that Bravo and his crew were cutting cedar boughs on his neighbor's property. McCrary asked the neighbor to have Bravo contact him and, at the neighbor's request, Bravo did contact McCrary. Bravo apologized, admitting that he and his crew had cut boughs on McCrary's property while working for the Doidges and that nothing marked the McCrary/Doidge boundary line.

On October 16, 2004, McCrary again met Bravo to discuss a settlement. Bravo made an initial payment of $2,000 and, in exchange for McCrary not pursuing criminal prosecution against him, Bravo agreed to testify about his trespass. Shortly after the agreement, Robert told Bravo to stop paying McCrary until Robert learned more about the situation. Bravo did not make any additional payments and disappeared until 2006.

McCrary spent $4,203 to clean up the site and $2,853 to appraise the damage. According to an expert forester, the missing boughs had a value of $217,965. McCrary estimated direct damages in excess of $225,000.

II. Pretrial Proceedings

McCrary sued Robert, Roby, Bravo, and their marital communities for timber trespass. Roby successfully moved for summary judgment on the basis that McCrary failed to show any genuine factual issue as to whether Roby was liable for Robert's negligence or Bravo's timber trespass. Robert also moved for summary judgment but the motion was stricken.

McCrary unsuccessfully moved for reconsideration of the trial court's summary judgment ruling. On February 14, 2007, following his reconsideration motion, McCrary submitted Bravo's February 12 deposition testimony stating that Roby directed the crew's actions on the 12.5 acre

parcel. Roby successfully moved to strike this late-submitted deposition testimony and the trial court did not consider it. Finally, McCrary unsuccessfully moved to vacate the summary judgment order.

McCrary took a default judgment against Bravo and voluntarily dismissed his suit against Robert with prejudice. McCrary appeals the summary judgment in favor of Roby.

ANALYSIS

I. Standard of Review

We review summary judgment decisions de novo. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008). We consider all the facts and reasonable inferences in the light most favorable to the nonmoving party, that is, McCrary. *See Potter*, 165 Wn.2d at 78. Summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). A nonmoving party must present specific facts, not mere allegation or speculation, to show a genuine issue for trial. *Ranger Ins. Co.*, 164 Wn.2d at 552. Finally, "where material facts are particularly within the knowledge of the moving party," the case should go to trial so that the nonmoving party has an opportunity "'to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.'" *Riley v. Andres*, 107 Wn. App. 391, 395, 27 P.3d 618 (2001) (internal quotation marks omitted) (quoting *Mich. Nat'l Bank v. Olson*, 44 Wn. App. 898, 905, 723 P.2d 438 (1986)).

II. Vicarious Liability for Timber Trespass

In a timber trespass action, the plaintiff must prove that an individual, without lawful authority, cut down or damaged the plaintiff's trees. *See* former RCW 64.12.030 (1881); *Seattle-First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 197, 570 P.2d 1035 (1977). McCrary took a default judgment against Bravo after proving he committed timber trespass. But McCrary argues that whether Robert or Bravo acted as Roby's agents is a genuine factual issue regarding Roby's vicarious liability.[7]

A. Agency

"[A]n agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969). "The crucial factor is the right of control which must exist to prove agency." *Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.*, 28 Wn. App. 669, 674, 626 P.2d 30 (1981). Agency does not require payment for services. *Coombs v. R. D. Bodle Co.*, 33 Wn.2d 280, 285, 205 P.2d 888 (1949); *Baxter v. Morningside, Inc.*, 10 Wn. App. 893, 896-97, 521 P.2d 946 (1974).

"An 'independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect

[7] McCrary assigns error only to the trial court's summary judgment and not to its decisions (1) denying reconsideration or (2) striking his submission of Bravo's February 12 deposition testimony that Roby directed the cutting along McCrary's property line. Accordingly, we do not consider McCrary's arguments regarding these rulings. *See* RAP 10.3(g); *Painting & Decorating Contractors of Am., Inc. v. Ellensberg Sch. Dist.*, 96 Wn.2d 806, 815, 638 P.2d 1220 (1982). Because we reverse and remand for further proceedings, we assume that the trial court will be able to consider all the evidence, including Bravo's deposition testimony, when making further rulings.

to his physical conduct in the performance of the undertaking.'" *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002) (alteration in original) (quoting Restatement (Second) of Agency § 2(3) (1958)). In timber trespass, the traditional rule for vicarious liability is that

> "[o]ne who engages an independent contractor to perform logging operations is not liable to landowners for the trespasses of the independent contractor or those employed by the independent contractor, whether as agents or independent contractors themselves, unless the trespass is the result of the advice or direction of the principal, or unless the principal has notice of the trespass and fails to interfere."

Saddle Mountain Minerals, LLC v. Santiago Homes, Inc., 146 Wn. App. 69, 78, 189 P.3d 821 (2008) (alteration in the original) (internal quotation marks omitted) (quoting *Ventoza v. Anderson*, 14 Wn. App. 882, 895, 545 P.2d 1219 (1976)), *review denied*, 165 Wn.2d 1033 (2009); *see Bloedel Timberlands Dev.*, 28 Wn. App. at 676.

B. Partnership and Agency Vicarious Liability

A "partnership" is an "association of two or more persons to carry on as co-owners a business for profit," irrespective of whether they intended to form a partnership. RCW 25.05.055(1). A partnership with a limited purpose or scope is a joint venture. *Pietz v. Indermuehle*, 89 Wn. App. 503, 510, 949 P.2d 449 (1998).

Whether a partnership existed depends on the parties' intentions, which are facts based on the parties' actions and conduct and the surrounding circumstances. *Malnar v. Carlson*, 128 Wn.2d 521, 535, 910 P.2d 455 (1996). Formation does not require any filing, formality, explicit statement, or consideration. *See* RCW 25.05.055. We presume that one who received a share of the business's profits is a partner, unless he or she received the profit in a debt, rent, or loan interest payment, or as payment for independent contractor or employee services. *See* RCW

25.05.055(3)(c). "Each partner is an agent of the partnership for the purpose of its business" and an agent and co-principal for every other partner. RCW 25.05.100(1); *Poutre v. Saunders*, 19 Wn.2d 561, 565-66, 143 P.2d 554 (1943).

Generally, partners are vicariously liable for torts that a partner committed (1) while acting in the scope of partnership business or (2) with the authority of his or her copartners. *See* RCW 25.05.120; RCW 25.05.125. A partnership or agency relationship can cause a person to be vicariously liable for another's trespass. *See Bloedel Timberlands Dev.*, 28 Wn. App. at 676-77.

C. Summary Judgment Evidence

As a preliminary matter, we only consider evidence that the trial court had before it when granting summary judgment. RAP 9.12. McCrary did not file Bravo's February 12, 2007, deposition testimony asserting that Roby personally directed the cutting along McCrary's property line until February 14, nearly a month after the trial court entered its summary judgment order on January 19. Thus, we will not consider this evidence on appeal, which counsel did not timely call to the trial court's attention.

1. Bravo

McCrary claims that Roby was vicariously liable for Bravo's timber trespass on the 12.5 acre parcel because Roby later controlled how Bravo cut boughs at the 10 acre parcel. McCrary points out that the two parcels were adjacent and argues that we should view the circumstances as a "single cutting event." Br. of Appellant at 4. But even viewing the evidence in the light most favorable to McCrary, as we must, the record shows that Roby did not make contact with Bravo until after the timber trespass. Thus, Roby could not have advised or directed Bravo's trespass.[8]

[8] We do not opine about how Bravo's deposition testimony affects this analysis because the trial court did not consider it on summary judgment.

See Saddle Mountain Minerals, 146 Wn. App. at 78.

2. Robert

Nevertheless, it is unclear whether Robert acted on Roby's behalf as an independent contractor for purposes of handling the transaction with Bravo or as Roby's partner or joint adventurer in a bough cutting business. Robert's failure to supervise Bravo and his crew may have constituted a tort committed squarely within the scope of possible agency or a partnership business. *See* RCW 25.05.120; RCW 25.05.125; *Malnar*, 128 Wn.2d at 535. As such, genuine issues of material fact remain.

Robert and Roby's conduct may have constituted an agency relationship for the 2002 harvest. To dispute this, Roby points to his recollection of a telephone call during which he agreed to have Bravo harvest this property:

> [McCrary's Counsel]: Now, as I understand from reading your declaration and talking to [Robert] the last few hours, in 200[2[9] Robert] calls you up and says he's having some cedar boughs cut by a guy named Guillermo Bravo on his place, and [Robert] wants to know if you want cedar boughs cut on your place.
> [Roby]: That's correct.
> [McCrary's Counsel]: And --
> [Roby]: [Robert] wanted permission to go on it. "I've talked to Ross. He said that would be okay. Want permission from you too."
> [McCrary's Counsel]: And that related to your 10-acre piece and your 12-acre piece?
> [Roby]: That's correct.
> [McCrary's Counsel]: Okay. And so you gave [Robert] permission to proceed?
> [Roby]: Yes.
> [McCrary's Counsel]: All right. And you left everything in his hands to take care of it?
> [Roby]: I asked him if he would walk the line with [Bravo and the crew].
> [McCrary's Counsel]: Okay. So you wanted [Robert] to handle the interaction

[9] The parties used the years 2001 and 2002 somewhat interchangeably and the record remains unclear about when the trespass occurred. The record indicates that Robert obtained permits for Bravo to harvest in 2002 and 2003.

with Guillermo Bravo for you?
[Roby]: That's correct.
[McCrary's Counsel]: All right. Now, did you meet with Guillermo Bravo once yourself?
[Roby]: I told [Robert] -- I said, "Give me a call when [Bravo]'s doing the 10 acres. I would like to show him what trees [be]cause know they cut the trees out. I want to show him what trees on the side of the road." I had a five-minute, maybe ten, walk with [Bravo] on the 10[-acre parcel].
. . . .
[McCrary's Counsel]: And you met with Guillermo Bravo on your 10-acre piece?
[Roby]: That's correct.
[McCrary's Counsel]: And you told him how you wanted the trees cut there?
[Roby]: "Trim the trees to the trunk."
[McCrary's Counsel]: "Trim 'em to the trunk"?
. . . .
[McCrary's Counsel]: Okay. And did you give him any instruction regarding the 12½-acre piece?
[Roby]: No.
. . . .
[McCrary's Counsel]: Now, what did you tell [Robert] that you wanted him to make sure happened out there if these guys were going to be cutting limbs on your property?
[Roby]: That he walk the line.
[McCrary's Counsel]: Okay. Did you want him to mark it?
[Roby]: You bet.
[McCrary's Counsel]: Did you tell him to mark it?
[Roby]: Yes.
[McCrary's Counsel]: Do you think he did mark it?
[Roby]: Yes.

CP at 249-53.

This conversation indicates that Robert sought Roby's permission to act on his behalf, but subject to his general control, and that both agreed to this arrangement. On this record, Roby appears to cede some supervisory authority over Bravo's actions, but Roby nevertheless directed Robert to mark and show Bravo the boundary line over which his crew ultimately crossed, resulting in the timber trespass. *See Saddle Mountain Minerals*, 146 Wn. App. at 78. Therefore,

this record raises a genuine issue of material fact regarding Roby's vicarious liability.

Even if this conversation alone is insufficient to raise a factual question about Roby's liability for an independent contractor, when considered under the following circumstances, the conversation raises factual questions about whether Robert, Roby, and perhaps Ross formed a partnership or joint venture to annually profit from harvesting cedar boughs on their properties. Robert hired Bravo in 2001 and 2002 (and possibly 2003, if the harvesting permit is accurate) and handled the entire transaction for himself and his sons. Having worked in the forestry business, Robert applied for harvesting permits, negotiated the payment for Bravo's services, may have marked or showed Bravo the property lines, and paid Roby $1,200 as his share of the profits. And, in declarations and depositions, Robert apparently continued to refer to the 12.5 acre parcel that he sold in 1989 as his own property. Whether this shows that he misspoke or evidences a partnership or joint venture is a genuine issue of material fact.

Finally, only Roby, the moving party on summary judgment, and Robert, his co-defendant father, know the material facts regarding the possible formation of an agency relationship, partnership, or joint venture. Accordingly, this matter should proceed to trial so McCrary may elicit the pertinent facts and test the defendants' testimony and so a fact finder may observe the witnesses' credibility. *See Olson*, 44 Wn. App. at 905. We hold that genuine issues of material fact remain unresolved about the relationships among and between Roby,

Robert, and Bravo and that the trial court erred in granting summary judgment to Roby.

We reverse the summary judgment and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Penoyar, J.