REL: September 25,2020

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2190596

Ralph Eustace et al.

v.

James Ray Wilbourn et al.

Appeal from Jackson Circuit Court
(CV-04-150)

PER CURIAM.

This appeal, which was transferred to this court pursuant to Ala. Code 1975, § 12-2-7(6), follows this court's dismissal of a previous appeal (case no. 2161079) at the direction of our supreme court, which concluded that the trial court's

judgment under review was not final. See Ex parte Eustace, 291 So. 3d 33 (Ala. 2019) (reversing Eustace v. Wilbourn (No. 2161079, July 13, 2018), 285 So. 3d 787 (Ala. Civ. App. 2018) (table)), and this court's subsequent opinion in Eustace v. Wilbourn, 291 So. 3d 37 (Ala. Civ. App. 2019), dismissing case no. 2161079.

On May 13, 2004, Ralph Eustace, his wife, and other owners of fractional interests in a tract of real property located in Jackson County ("the Eustace tract") brought a civil action in the Jackson Circuit Court, asserting various claims against James Ray Wilbourn, the owner at that time of a tract of property adjacent to the Eustace tract ("the Wilbourn tract"), and Scott Putman. Among the claims enumerated in the complaint were negligent and wanton trespass and conversion of timber on a portion of the Eustace tract, as well as a claim seeking a judgment declaring the parties' rights as to a particular alleged right-of-way across the Wilbourn tract. On June 2, 2004, Wilbourn moved for injunctive relief, asserting that Eustace's commencement of the action, his recordation of a lis pendens notice, and his attorney's direct communication of the pendency of the action

to an attorney retained to close a prospective sale of the Wilbourn tract to Morris Scherlis, a prospective purchaser, had caused the sale to fall through. Wilbourn subsequently answered the complaint; impleaded his wife as an additional party; asserted a counterclaim on his and his wife's behalf claiming title to a disputed portion of the Eustace tract and alleging that Eustace and his agents had intentionally interfered with Wilbourn's contractual relations with Scherlis (and requesting awards of actual and punitive damages as to that claim); and added a third-party claim against Scherlis and Fowler Auction Service, Inc., alleging breach of the sale contract. After the case in its entirety had been referred to mediation proceedings, which proved unsuccessful, the parties to the third-party claim entered into a stipulation of dismissal and the trial court entered a summary judgment in favor of Putman, leaving only the claims of Eustace and his co-owners and the counterclaims of Wilbourn as of March 2009.

The case then entered a period of relative dormancy because of intervening conveyances by, or deaths of, parties having fractional interests in the Eustace tract; after the trial court entered an order in September 2014 requesting a

status update on the case, Wilbourn referred to the pendency of a partition action involving Eustace and his co-plaintiffs and their successors in interest, whereas a new attorney for Eustace and his co-plaintiffs appeared in the action and indicated that there would be a need for new parties to be substituted. In August 2015, counsel for Eustace and his co-owners moved for his own substitution as a partial owner of the Eustace tract, which prompted the recusal of all the judges in the pertinent judicial circuit and the Chief Justice's subsequent appointment of a visiting circuit judge; in July 2016, counsel for Eustace and his co-owners identified the real plaintiffs in interest as Eustace and Eustace's wife (joint owners of a 7/8 interest in the Eustace tract) and Eustace's counsel (owner of a 1/8 interest in the Eustace tract).

In March 2017, Eustace and his wife asserted a new claim against Wilbourn under the Alabama Litigation Accountability Act ("the ALAA"), Ala. Code 1975, § 12-19-270 et seq. Also, an ore tenus proceeding was finally held, at which the trial court heard testimony from Eustace, Wilbourn, their respective forestry expert witnesses, a surveyor, and three fact

witnesses called by counsel for Wilbourn regarding the boundary between the tracts at issue. After receiving trial memoranda and proposed judgment forms, the trial court entered a judgment in May 2017 ruling that Eustace and his co-owners were entitled to compensatory damages only based upon Wilbourn's trespass upon the Eustace tract and Wilbourn's agents' cutting and selling timber from the Eustace tract; that Wilbourn was entitled to "damages" because of Eustace's intentional interference with Wilbourn's contract with Scherlis; that neither Eustace nor Wilbourn would be entitled to a recovery because their damages (which were not specified in the May 2017 judgment) offset each other; that, in response to the declaratory-judgment claim, Eustace and his co-owners were entitled to an easement by prescription across the Wilbourn tract for access to the Eustace tract; and that all other claims for relief were denied. Eustace and his co-owners, following the denial of their postjudgment motion to alter or amend the judgment, appealed from the trial court's judgment, and that appeal (i.e., case no. 2161079) was transferred to this court pursuant to Ala. Code 1975, § 12-2-7(6).

On certiorari review of this court's judgment of affirmance in case no. 2161079, our supreme court opined that the May 2017 judgment was not final because "the trial court [had not] determined ... with specificity the amount of compensatory damages to which each party was entitled," 291 So. 3d at 36, and our supreme court directed that this court dismiss case no. 2161079. After this court had complied with the mandate of our supreme court and dismissed that appeal, the trial court amended its May 2017 judgment so as to award damages of $35,810 to Eustace and his co-owners and compensatory damages of $25,810 and punitive damages of $10,000 to Wilbourn and his wife, stating that those damages awards "are each offset by the other." Eustace and his co-owners again appealed following the trial court's denial of their postjudgment motion directed to the amended judgment.

In this appeal, Eustace and his co-owners state that four issues exist: (1) whether the trial court properly determined that Eustace intentionally interfered with Wilbourn's contract with Scherlis by filing the lis pendens notice; (2) whether the trial court erred in determining the damages to which Eustace and his co-owners were entitled on their trespass

theory; (3) whether the trial court erred in determining the damages to which Eustace and his co-owners were entitled on their timber-conversion theory; and (4) whether interest on damages awarded to Eustace and his co-owners should have been calculated by the trial court. However, as to the fourth issue, Eustace and his co-owners have failed to cite legal authority that would mandate reversal for any failure or refusal to award interest, and we conclude that consideration of that issue is foreclosed under Rule 28(a)(10), Ala. R. App. P., because it is neither an appellate court's duty nor its function to perform an appellant's legal research. University of S. Alabama v. Progressive Ins. Co., 904 So. 2d 1242, 1247-48 (Ala. 2004); Ex parte Showers, 812 So. 2d 277, 281 (Ala. 2001); and Spradlin v. Birmingham Airport Auth., 613 So. 2d 347 (Ala. 1993).

Because it is clear that the trial court deemed the damages due Eustace and his co-owners to have been completely offset by the damages award to Wilbourn and his wife,[1] it is

[1]Because Wilbourn and his wife did not take a cross-appeal, just as they did not in the first appeal, the correctness of the trial court's determination of Wilbourn's and his wife's damages is not an issue before this court.

logical to consider first whether Eustace was properly held liable to Wilbourn on the counterclaims before determining whether the trial court erred to reversal in assessing the rights of recovery of Eustace and his co-owners against Wilbourn and his wife. In this regard, our standard of review is deferential:

> "When evidence is presented ore tenus, the trial court is '"unique[ly] position[ed] to directly observe the witnesses and to assess their demeanor and credibility."' Therefore, a presumption of correctness attaches to a trial court's factual findings premised on ore tenus evidence. When evidence is taken ore tenus and the trial judge makes no express findings of fact, [an appellate court] will assume that the trial judge made those findings necessary to support the judgment. We will not disturb the findings of the trial court unless those findings are 'clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence.' '"The trial court's judgment [in cases where evidence is presented ore tenus] will be affirmed, if, under any reasonable aspect of the testimony, there is credible evidence to support the judgment."'"

Espinoza v. Rudolph, 46 So. 3d 403, 412 (Ala. 2010) (citations omitted).

The record reflects that, in April 2002, Wilbourn and his wife were deeded what was described as a 310-acre tract in Township 2 South, Range 4 East, in Jackson County consisting of a larger portion in Section 32 and a rectangle of 10

adjacent acres in the southwest quarter of the southwest quarter of Section 33[2]. Maps admitted into evidence indicate that the 10-acre rectangle deeded to Wilbourn and his wife in 2002 abuts land owned by Eustace and his co-owners in Section 33, namely a 30-acre rectangle to the east and a 40-acre rectangle to the north of the Wilbourn rectangle. After acquiring that tract, Wilbourn purchased a skidder and a log trailer and directed some of his own farm employees to begin logging operations on his land, warning them to stay about 150 feet away from the apparent property lines between his tract and the Eustace tract. However, Wilbourn testified that, during the course of those logging operations, a surveyor whom Wilbourn had hired to "get everything ready for selling" informed Wilbourn that his employees had cut some timber on land outside the property described in the 2002 deed.

In response to the surveyor's report, Wilbourn immediately directed his employees to cease logging operations that evening, and, on the next day, he approached Eustace and his wife to inform them of what the surveyor had stated.

[2]Testimony indicates that the actual aggregate acreage of the tract as a whole was approximately 291 acres.

Wilbourn testified that he and Eustace had, approximately two to three months later, examined the Eustace tract on foot to determine the extent of the cutting of the timber on the tract.

After the surveyor's notification, but before walking on the Eustace tract with Eustace, Wilbourn had entered into a contract with a broker to sell the Wilbourn tract, under which the broker agreed to receive $4,000 for advertising costs and $10,000 as a commission for selling the tract. Although it had been anticipated that the Wilbourn tract would be auctioned, Wilbourn, with notice to the broker, entered into an agreement with Scherlis on April 13, 2004, under which Scherlis would purchase the Wilbourn tract for $398,000, or approximately $1,368 per acre, without its going to auction; the closing was to occur under that contract within 30 days, i.e., on or before May 13, 2004.

On May 13, 2004, as Wilbourn and his wife were traveling to the scheduled closing of the sale of the Wilbourn tract, they received a telephone call from the closing agent, who informed Wilbourn that counsel for Eustace had telephoned her and informed her that a lis pendens notice had been filed; the

closing agent told Wilbourn that the closing could not take place as scheduled because she could not obtain title insurance under the circumstances. The lis pendens notice filed by Eustace's counsel read, in pertinent part, as follows:

> "Comes now [counsel for Eustace] and gives notice of lis pendens as set out in the complaint filed May 13, 2004, in the Circuit Court of Jackson County, Alabama. The parties to said action are:
>
> "(A) PLAINTIFFS: Ralph Eustace and Linda Eustace, Cleo E. Styles, Martha and Curtis Haislip and Russell and Ada Eustace;
>
> "(B) DEFENDANTS: James Ray Wilbourn and Scott Putman."

The notice was filed in the Jackson County probate records along with a copy of the complaint filed by Eustace and his co-owners in this action, which refers only to the south part of the northwest quarter of the southwest quarter and the east three-quarters of the southwest quarter of the southwest quarter of Section 33, i.e., the complaint bears no legal description of real property at issue apart from the Eustace tract. Further, there was testimony to the effect that Eustace had known of the imminent closing of the contracted

sale of the Wilbourn tract to Scherlis at the time the complaint and the lis pendens notice were filed.

Wilbourn testified that, over the succeeding days after counsel for Eustace had brought the lis pendens notice to the closing agent's personal attention, Eustace and his counsel directed efforts to Scherlis attempting to persuade him to convey an express right-of-way easement to Eustace across the Wilbourn tract as a component of the overall sale transaction -- a concession that Wilbourn had been unwilling to make because he had felt that it would harm his efforts to sell his tract, although, Wilbourn testified, he had "never denied [Eustace] access." After approximately 10 days of those efforts, Scherlis "finally got fed up" and backed completely out of the sales transaction, saying "it wasn't fun anymore." Wilbourn then again undertook efforts to sell the Wilbourn tract, paying his broker another commission and additional advertising costs ($14,000), paying his surveyor and other service providers additional moneys for efforts to market and subdivide the tract as smaller lots ($4,908), and paying additional interest on a mortgage loan that would have been extinguished had the April 2004 sale closed ($32.74 per diem,

or a total of $2,601.41). The Wilbourn tract was ultimately sold to a substitute buyer in August 2004 for $398,000, or approximately $1,368 per acre, after counsel for Wilbourn had located a title-insurance policy despite the outstanding lis pendens notice recorded by counsel for Eustace.

As we have discussed, Wilbourn asserted in his counterclaim that the actions of Eustace amounted to intentional interference with his contractual relationship, i.e., his contract to sell the Wilbourn tract to Scherlis. Our supreme court has summarized the elements of the intentional-interference tort as: "(1) the existence of a protectible business relationship; (2) of which the defendant knew; (3) to which the defendant was a stranger; (4) with which the defendant intentionally interfered; and (5) damage." White Sands Grp., L.L.C. v. PRS II, LLC, 32 So. 3d 5, 14 (Ala. 2009). The argument advanced by Eustace and his co-owners in their brief that addresses Wilbourn's counterclaim seeks to justify Eustace's conduct by placing all blame on the statute requiring the filing of lis pendens notices in certain circumstances -- Ala. Code 1975, § 35-4-131(a) -- which provides, in pertinent part:

> "When any civil action or proceeding shall be brought in any court to enforce any lien upon, right to or interest in, or to recover any land ..., the person ... commencing such action ... shall file with the judge of probate of each county where the land or any part thereof is situated a notice containing the names of all of the parties to the action or proceeding, ... a description of the real estate and a brief statement of the nature of the lien ... or action sought to be enforced...."

(Emphasis added.)

In the context of an intentional-interference claim, such as that asserted by Wilbourn, "[j]ustification is an affirmative defense to be pleaded and proved by the defend[ing]" party, i.e., Eustace in this case. White Sands, 32 So. 3d at 12. Assuming, without deciding, that the invocation of § 35-4-131(a) in Eustace's trial memorandum satisfied his burden to "plead" the affirmative defense of justification, we cannot agree with the implicit contention in the briefs filed by Eustace and his co-owners (and the amici curiae filing briefs in support of them) that the trial court was required to conclude that that statute alone immunized Eustace's conduct with respect to the Wilbourn/Scherlis sale contract.

There are two reasons why we must reject the arguments made by Eustace and his co-owners and the amici curiae filing

briefs in support of them as to § 35-4-131(a) in this appeal. First, the trial court could properly have concluded that the lis pendens notice filed by Eustace was not required to be filed in connection with the principal claims set forth in the complaint, which sought only damages as a result of trespass and timber-cutting claims. "The doctrine of lis pendens has no application when the action involved merely seeks the recovery of a money judgment." Stephens v. Huie, 37 So. 3d 776, 779 (Ala. Civ. App. 2009). Although the complaint did also contain a request that the trial court declare the rights of the parties as to a right-of-way traversing the Wilbourn tract, neither the boundaries nor the location of that tract were mentioned in either the complaint (which disclosed only the Eustace tract) or the lis pendens notice. Second, Eustace's conduct directed to Wilbourn was not limited merely to filing the complaint and the lis pendens notice: (a) Eustace knew of the Wilbourn/Scherlis contract, yet his agent made direct telephone contact with the closing agent on the date that the sale to Scherlis was scheduled to close, causing the closing not to occur as scheduled, and (b) Eustace and his counsel then took advantage of the disrupted closing by

seeking to compel Scherlis to execute an instrument making a conveyance of a express right-of-way easement across the Wilbourn tract, which efforts persuaded Scherlis to completely renege on his promise to purchase the Wilbourn tract. The presence in this case of the foregoing evidence persuades this court that the trial court's judgment in favor of Wilbourn and his wife on their counterclaim does no violence to the proper scope of § 35-4-131(a), which Eustace exceeded.

Based upon the foregoing evidence and authorities, we cannot conclude that the trial court erred in finding in favor of Wilbourn on his counterclaim against Eustace. That counterclaim sought an award of both actual and punitive damages, and Eustace does not challenge the trial court's compensatory-damages and punitive-damages calculations (i.e., $25,810 and $10,000, respectively). See generally White Sands, 32 So. 3d at 17 (listing recoverable damages in intentional-interference actions as including pecuniary losses of the benefits of the business or contractual relation, consequential losses for which the interference is a legal cause, emotional distress if reasonably expected to result from the interference, and punitive damages), and Flint

Constr. Co. v. Hall, 904 So. 2d 236, 254 (Ala. 2004) (punitive-damages award constituting single-digit ratio of compensatory-damages award deemed proper).

We next turn to the propriety of the damages awards to Eustace and his co-owners, which, as we have noted, the trial court specified to have been offset by Wilbourn's damages. There is evidence tending to support the trial court's conclusion that Eustace and his co-owners proved nothing more than a negligent trespass and cutting of timber on the part of Wilbourn's employees on the 30-acre and 40-acre rectangles of the Eustace tract located adjacent to Wilbourn's rectangle in Section 33. Evidence was adduced that Wilbourn had instructed his employees to stay 150 feet away from any boundaries and that he had immediately informed Eustace and his wife of Wilbourn's employees' error in cutting trees across the actual boundary line after Wilbourn was notified by his surveyor of the incursion. Although Eustace and his co-owners correctly note that the trier of fact may properly award punitive damages in a trespass action when the trespass is attended by rudeness, wantonness, recklessness or an insulting manner or is accompanied by fraud, malice, oppression, aggravation, or

gross negligence, see, e.g., Downs v. Lyles, 41 So. 3d 86, 92 (Ala. Civ. App. 2009), the trial court was not, under the state of the record, required to award punitive damages on the trespass claim. We thus conclude that the trial court could properly have confined its damages calculations as to the claims asserted by Eustace and his co-owners to theories of recovery permitting only compensatory damages.

In their trial memorandum, and again on appeal, Eustace and his co-owners invoke the statutory right to recover double damages for removal of timber not owned by the remover, which is set forth in Ala. Code 1975, § 9-13-62. That statute, since 2000, has provided that anyone who "damages, destroys, cuts, or removes timber or other forest products not owned by that person or without the authority of the legal owner," and "any person or entity who shall supervise any other person in so doing," is liable to the owner "for double the fair market value of the timber or other forest products that were damaged, destroyed, cut, or removed" regardless of the actor's state of mind. There were two expert opinions presented regarding the fair market value of the timber cut by Wilbourn's agents on the Eustace tract: an expert witness

retained by Eustace and his co-owners opined that the value of the timber cut was $17,905, whereas an expert witness retained by Wilbourn (who had the benefit of a survey at the time of his examination of the affected rectangles) opined that the fair market value was $11,015.47. If the trial court deemed the testimony of the expert retained by Eustace and his co-owners to be more persuasive, the trial court could properly have determined that Eustace and his co-owners were entitled to recover precisely double that amount, or $35,810, based on that statutory theory.[3]

Moreover, the trial court could properly have reached that determination of compensatory damages rather than awarding the amount of $68,680 that Eustace and his co-owners insist should have been awarded. Although Eustace testified that, in his opinion, the trespass upon and the cutting of timber from his rectangles had resulted in a loss of value to his tract of almost $49,000 (or approximately $700 per acre), the trial court could properly have discounted that evidence

[3]We thus disagree with Wilbourn and his wife that the trial court "refused" to award damages under § 9-13-62 because of the injection of that statute into the case as an issue after trial.

based upon Wilbourn's ability to sell his own logged land at approximately the same price as Eustace's pre-cutting value ($1,300-$1,500). Similarly, although Ala. Code 1975, § 35-14-1 et seq., authorize an award of either $10 or $20 per tree if it is shown that the defendant has cut down trees on another's land "wilfully and knowingly," § 35-14-1(a), those statutes are "subject to a strict construction" such that a defendant may not be held liable under them if that defendant did not direct the destruction of trees by others, Daniels v. Ward, 562 So. 2d 1335, 1336 (Ala. Civ. App. 1990), and the trial court could properly have determined from the evidence in this case that nothing more was shown than an inadvertent cutting of timber on the part of Wilbourn's agents. Finally, that same evidence of inadvertency would support the proposition that any trespass upon Eustace's rectangles was not "committed under circumstances of insult and contumely" so as to permit an award of compensatory damages based upon claimed emotional distress (Johnson v. Martin, 423 So. 2d 868, 871 (Ala. Civ. App. 1982), and Downs, 41 So. 3d at 92).

As our supreme court aptly stated in Kennedy v. Boles Investments, Inc., 53 So. 3d 60 (Ala. 2010), "'[t]he ore tenus

standard of review extends to the trial court's assessment of damages,'" 53 So. 3d at 68 (quoting Edwards v. Valentine, 926 So. 2d 315, 325 (Ala. 2005)). Given the existence of evidence in the record tending to support the trial court's compensatory-damages award as to the claims asserted by Eustace and his co-owners, as well as that court's determination that Wilbourn's conduct was unintentional, and given our previously stated conclusion that the judgment on the counterclaim was consistent with Alabama law, the trial court's judgment in this case is due to be affirmed.

AFFIRMED.

Thompson, P.J., and Moore and Hanson, JJ., concur.

Donaldson and Edwards, JJ., concur in the result, without writings.