NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 08-1171

	Opinion Delivered APRIL 29, 2009
SHERRY MEEKS APPELLANT	APPEAL FROM THE MONTGOMERY COUNTY CIRCUIT COURT,
V.	[NO. CV-05-62]
	HONORABLE J.W. LOONEY, JUDGE
CALVIN HORN and ANGELA HORN APPELLEES	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Sherry Meeks appeals the order of the Montgomery County Circuit Court that held her jointly and severally liable for double damages due to improper cutting and harvesting of her neighbor's timber. Appellees are Calvin Horn and Angela Horn Duke (collectively "Horn"), who own more than one hundred acres to the south of appellant near Caddo Gap, Arkansas. Appellant appeals the judgment, asserting that it was clearly against the preponderance of the evidence to find that she "knowingly" had Horn's timber cut and sold because she had no such knowledge. Her defense was basically that she hired two men to cut and harvest her timber, not Horn's; that she specifically directed the men to stay well behind her boundary line with Horn; and that she was not present when the trees were harvested. To the extent any liability should attach, she said it should be to those men and not her. We disagree with her arguments and affirm the judgment.

Much of the evidence was undisputed. David Porter and Lonnie Cogburn were hired by appellant to harvest timber on her property. While an older survey existed, and appellant thought she knew where the boundary line was, she did not conduct a survey to pinpoint the boundary prior to the cutting. Porter and Cogburn cut, harvested, and sold the timber and related products to a local mill. They were paid by the mill, and the mill separately paid appellant.

Horn became aware of the timber loss and filed suit in circuit court seeking damages against all three. Horn sought damages at common law, and alternatively double or triple damages provided by statute, for the wrongful cutting. Cogburn filed an answer but did not appear at trial; Porter did not answer or appear at trial. Appellant Meeks was the sole defendant in court. After a bench trial, the judge entered judgment against the three defendants jointly and severally, awarding double damages pursuant to Ark. Code Ann. § 15-32-301 (Repl. 2003). Damages were proved to be $14,663.88, which was doubled for "knowingly" taking the timber. Appellant is the sole party to appeal.[1]

The testimony was undisputed that appellant, at the time of trial, agreed that the timber cut included trees located on Horn's property. Her defense was that she instructed Cogburn and Porter to stay within her property line, that the property line was not perfectly

[1]The letter opinion was issued on April 30, 2008. Horn's counsel was instructed to prepare the judgment. The judgment was filed of record on May 16, 2008. Appellant's counsel did not file a notice of appeal until July 9, but leave was granted pursuant to Ark. R. App. P.–Civ. 4(b)(3) to extend the time for notice of appeal for failure of Horn to provide a copy of the judgment to the opposing side. Thus, the order of July 24, 2008, entered by the trial court permitted appellant's appeal to be timely.

clear but that she marked it and instructed both men to stay at least ten feet within her line, that Cogburn stated his understanding of the property line, and that she figured out later that Cogburn should not have been trusted. Appellant admitted that she and Cogburn had a personal relationship at some point in the past and that Cogburn had a criminal history. She agreed she had received $19,000 from Bean Lumber Company, but she believed it was for her timber. Appellant said she tried to have a new surveyor come out prior to the cutting, but was unable to do so. She relied on what she thought abided by an older survey. Appellant's son testified that he heard his mother insist to Cogburn that he stay on her side of the property line in cutting timber. Appellant believed that it was only after her relationship with Cogburn soured that he tried to pin the wrongful cutting of timber on her.

Appellee Calvin Horn testified that he confronted appellant about the cutting on his land and that she said she did it because of financial need. Horn's brother-in-law, Murrel Nooner, testified that he hauled logs and that it was easy to determine the boundary line difference between appellant's and Horn's property.

Steven Horn testified that he was approached by Cogburn after the cutting whereupon Cogburn told Steven that appellant had been cutting timber on Horn's land, and asked Steve to inform Horn. Steven said that when confronted, appellant said that Cogburn had told her that Horn had cut timber on her property, so she might as well cut Horn's.

Billy Joe Williams, a county ranger for the Arkansas Forestry Commission, testified that he investigated the accusation of criminal trespass and wrongful harvesting of timber. Williams personally walked the property and determined the existence of blazes, some paint,

and flags to mark boundaries. Williams verified that Ray Burk was hired to prepare a report of timber loss, which set the damages at $14,663.88 for approximately seventeen acres of cut timber from Horn's property. Information was also gleaned from the mill tickets and checks issued by Bean Lumber Company. Miles Burk, a registered forester, testified that he measured the area of stumpage on Horn's property as well. Burk estimated the value of the cut trees at a "conservative" figure of $14,663.88.

On this evidence, the trial judge rendered a letter opinion, reflecting his belief that the question of liability was clear. The more difficult question for him was the measure of damages, noting consideration of double and triple damages. Ultimately, however, the judge found that appellant had failed to acquire a survey to mark the proper boundary prior to hiring the men to cut the timber, she wrongfully received monies for timber that was not hers and misplaced reliance on Cogburn, and that damages would be doubled pursuant to statute. A formal order followed, and now the appeal of that judgment is before us.

The argument posited on appeal is the same: appellant relies on her claimed ignorance of the fact that the men she hired cut on Horn's property. She admitted to receipt of monies from the cut timber, at least part of which was cut from Horn's land.

The standard of review of a circuit court's findings of fact after a bench trial is whether those findings are clearly erroneous. *See First Nat'l Bank v. Garner*, 86 Ark. App. 213, 167 S.W.3d 664 (2004). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *See id.* In reviewing a trial court's findings of fact,

we give due deference to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded their testimony. *See Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996).

In Arkansas, there are three measures of damages for the wrongful cutting of a another's timber: (1) common law remedies for the value of the loss; (2) statutory double damages for "knowingly" taking the timber; and (3) statutory triple damages for "willfully" taking the timber. *See generally* Brill, *Arkansas Law of Damages* § 30-8 (4th ed.). Here, Horn sought all three in the alternative, prevailing on double-damage recovery.

Arkansas Code Annotated section 15-32-301 establishes "double-damage" liability for unlawful cutting, and it provides in subsection (a):

> Any person who shall knowingly cut down, destroy, or carry away any tree, timber . . . contrary to this subchapter, [or] any person who shall aid and abet or assist any other person in so doing . . . shall be jointly and severally liable to the owner in double the value thereof[.]

The requirement of knowledge is a prerequisite to liability for double damages. *Parker v. Fenter*, 216 Ark. 398, 225 S.W.2d 940 (1950). Relevant to that question is whether one acquires a survey to mark the boundary line prior to commencement of cutting. *See id.* Our statutes provide that boundaries are to be ascertained before the timber is cut, stating in Ark. Code Ann. § 15-32-101 that:

> (a) Any person who desires to cut and remove any timber from any land in this state, unless the land has been surveyed and the boundaries thereof ascertained and known, before cutting and removing the timber, the person shall:
> (1) Cause the land to be surveyed and the metes and bounds of the land marked and plainly established;
> (2) Rely in good faith on an existing marked line or established corners; or

(3) Acquire a document signed by the landowner selling the timber and signed by the adjoining landowners, indicating that the landowners agree on the location of the boundary.

Here, the trial judge listened to the testimony and evidence, finding that appellant failed to conduct a survey prior to the cutting; that her reliance on Cogburn's assurances was "misplaced"; and that she was jointly liable with the men she hired. As was held in *Lewis v. Mays*, 208 Ark. 382, 186 S.W.2d 178 (1945), a person who engages a timber cutter can be liable for triple damages for the acts of the timber cutter, without regard to the status of the cutter as an employee or independent contractor. Joint liability attaches where a timber cutter acts at the advice or direction of the employer. *See id.* There was evidence upon which the trial court could rely in finding that appellant directed or acquiesced in having Horn's timber cut. We acknowledge that there was evidence from which the trial court could have also concluded that appellant was innocent in this cutting. It was a matter of deciding the credibility of the parties and where the preponderance of the evidence fell.

For the foregoing reasons, we affirm.

PITTMAN and GRUBER, JJ., agree.