RENDERED: September 22, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003035-MR

STONEY NEWSOME; FORREST HALL;
LOIS NEWSOME; S & M LOGGING;
AND D & L LOGGING — APPELLANTS

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN CAUDILL, JUDGE
ACTION NO. 96-CI-00333

EDNA HARRIS; TOM REYNOLDS;
AND RAY REYNOLDS — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: Stoney Newsome, S & M Logging, Lois Ann Newsome, and D & L Logging (appellants) appeal from a judgment of the Floyd Circuit Court entered October 19, 1998, which awarded Edna Harris (Harris) $12,587.65 in damages for the wrongful removal of timber from her property. After reviewing the record, we affirm.

Harris lives on a tract of land consisting of approximately 39 acres off of Corn Fork of Brandy Key Creek in Floyd County, Kentucky. Harris' property line runs from the creek by the road in front of her house to the top of the hill

behind her house. Immediately upstream from Harris, beginning near the creek, Harris' property is bordered by the Collins family property. The Collins property runs some distance up the hillside. The Collins property line then ends, and above that, on up the hill, Harris' property is bordered by the Reynolds family property. The Harris and Reynolds property border each other to the top of the Hill.

In the spring of 1996, the appellants entered into a contract with Ray Reynolds to remove timber from the Reynolds property. At the same time, the appellants approached Harris and asked her if she was interested in selling some of the timber located on her land. Harris told the appellants she was not interested in selling the timber. A short time thereafter, Harris saw trees being cut and falling in an area that she believed was within her property. She contacted Ray Reynolds about her concern; however, he assured her that the appellants were not cutting on her property.

On May 3, 1996, Harris filed a complaint in circuit court alleging that the appellants had wrongfully entered upon her land and removed timber. In their response, the appellants asserted that they were advised by Ray Reynolds on three separate occasions that they were in the correct location and that any trespass was the result of their reliance on said assurances. In addition, the appellants filed a motion to dismiss for failure to join an indispensable party on the grounds that Ray Reynolds had agreed in a statement signed April 2, 1996, to be responsible for all timber cut if the appellants accidentally crossed the

boundary line, Harris was aware of the agreement, and she had not taken steps to join Ray Reynolds as a party to the action. The trial court denied the appellants' motion to dismiss, and the appellants thereafter filed a third party complaint against Ray Reynolds and his son Tom Reynolds.

After a jury trial, the circuit court entered a judgment in accordance with the jury's verdict which found appellants liable for damages caused by the removal of timber from Harris' property and apportioned the award of $14,809.77 between the appellants and the third party defendants, Ray and Tom Reynolds, at 85% and 15%, respectively. The appellants then filed a motion for new trial, motion to alter, amend or vacate judgment, motion for judgment not withstanding the verdict, and motion to set aside judgment. The circuit court denied the motions on December 1, 1998. This appeal followed.

On appeal, the appellants argue that (1) the jury's verdict was not supported by substantial evidence, (2) the instructions given to the jury were improper, (3) statements made by Harris' counsel in closing arguments were highly improper, (4) Harris' claim should have been dismissed for failure to join an indispensable party, (5) appellants were entitled to a judgment against Ray Reynolds as a matter of law, and (6) Kentucky Revised Statute (KRS) 364.130 is unconstitutional.

In their first argument, the appellants contend that Harris failed to prove the whereabouts of her boundary line and the extent of the trespass, and therefore, there was no evidence of probative value from which the jury could have reasonably

based its verdict. In addition, the appellants contend that two of the witness called by Harris to establish the location of the boundary line provided inconsistent statements, thereby creating uncertainty as to its actual location. It is uncontested that Harris bears the burden of proving the location of her boundary line in relation to the trespass. West v. Keckley, Ky., 474 S.W.2d 87 (1971).

Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. Kentucky & Indiana Terminal R. Co. v. Cantrell, 298 Ky. 743, 184 S.W.2d 111 (1944); Cochran v. Downing, Ky., 247 S.W.2d 228 (1952). The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" NCAA v. Hornung, Ky., 754 S.W.2d 855, 860 (1988). If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed

verdict. Otherwise, the judgment must be affirmed. Lewis v. Bledsoe Surface Min. Co., Ky., 798 S.W.2d 459, 462 (1990).

The deed to Harris' property indicates that she shares a common boundary line, in part, with both the Reynolds property and the Collins property. While Harris' deed does not disclose where the property lines run together, all three property owners – Edna Harris, Earl Collins, and Ray Reynolds – unequivocally identified the boundary as being indicated by a barbwire fence. Harris testified that her late husband, Charlie Harris, built the barbwire fence along the boundary line some twenty to twenty-five years ago. Earl Collins testified that the boundary between his family's land and the Harris property was indicated by a barbwire fence which ran up the hillside and joined the Reynolds property. Earl Collins also stated that the fence was still there, and was there when he took Peter Kovalic, the forestry appraiser who calculated damages on behalf of Harris, up to the area. Tom Reynolds likewise testified that a barbwire fence ran along the border of the Harris' property and the Collins and Reynolds property. Ray Reynolds, who has lived in the area for over 55 years, stated that he knew where the Harris property line was located. He described the existence of the barbwire fence and stated that he had helped build the portion of the fence that ran up the hill along his own property. Kovalic testified that he saw the fence when he went to the area to do his damage appraisal, and that he used the fence in determining which trees had been cut on Harris' property.

C.V. Reynolds, Ray Reynolds son, testified that a barbwire fence ran along the boundary line of his family's property. As to the inconsistent testimony of C.V. Reynolds and Earl Collins, which the appellants contend causes uncertainty, we construe the inconsistency as applying to the location of the Reynolds/Collins line and not the Harris line.

If all evidence which favors Harris is taken as true, and Harris is given the benefit of all reasonable inferences which may be drawn from the evidence, we cannot say that the verdict rendered was palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. The appellants are not entitled to a reversal on the grounds that the jury's verdict is not supported by the evidence.

Next, the appellants argue that the trial court gave erroneous jury instructions in two respects. First, the appellants contend that the circuit court erred by not properly instructing the jury on the law relating to damages for the conversion of timber as set forth in KRS, Chapter 364. The statute which relates specifically to the liability of persons who enter upon and cut timber growing upon the land of another is KRS 364.130. KRS 364.130 provides, in pertinent part:

> (1) Except as provided in subsection (2) of this section, any person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing upon the land of another without legal right or without color of title in himself to the timber or to the land upon which the timber was growing shall pay to the rightful owner of the timber three (3) times the stumpage value of the timber and shall pay to the rightful owner of the property three (3) times the cost of any damages to the property as well as any legal costs incurred by the owner of the timber.

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

1. A signed statement was obtained from the person whom the defendant believed to be the owner of all trees scheduled to be cut that:
a. All of the trees to be cut were on his property and that none were on the property of another; and
b. He has given his permission, in writing, for the trees on his property to be cut; and

2. Either:
a. A written agreement was made with the owners of the land adjacent to the cut that the trees to be cut were not on their property; or
b. Owners of the land adjacent to be cut were notified in writing, delivered by certified mail, restricted delivery, and return receipt requested, of the pending cut and they raised no objection,

the court may render a judgment for no more than the reasonable value of the timber, actual damages caused to the property, and any legal costs incurred by the owner of the timber.

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

After reviewing the court's instructions to the jury and the court's comments in overruling counsel's objection to instruction number 3, we find that the court did, contrary to appellants' contention, instruct the jury as to the law set forth in KRS 364.130(1). Interrogatory No. 3 of the jury instructions stated, in relevant part, as follows:

> If you have found for Plaintiff under Instruction Number 1, you will award a sum of money equal to three (3) times the reasonable market value of said timber on the stump at the time it was cut and removed from

> Plaintiff's property, not to exceed three (3) time (sic) $4,936.59.

This instruction is substantially similar to the one found in 2 Palmore & Eades, Kentucky Instructions to Juries, sec 32.02 (Supp. 2000). In fact, in rejecting appellants' counsel's objection to the instruction, the trial court referred to the comments that followed the instruction in Palmore and Eades' treatise.

The appellants, however, argue that the jury should have been additionally instructed on the possibility of mitigation pursuant to KRS 364.130(2). The problem with this argument is two-fold. First, the appellants presented no evidence, and in fact admitted, that they did not comply with all of the terms required to alleviate treble damages under KRS 364.130(2). Second, even if "substantial compliance" was, as argued by the appellants, adequate to invoke KRS 364.130(2), the appellants failed to establish that they substantially complied with its terms. There is no dispute that the appellants failed to either enter into a written agreement with Harris concerning the timber to be cut, or to give her proper written notice pursuant to KRS 364.130(2)(a)2. The trial court did not abuse its discretion by denying the appellants' objection to the jury instructions as concerns KRS 364.130.

The appellants additionally contend that the jury instructions were erroneous because the damages instruction failed to make a distinction between "innocent trespassers" and "willful trespassers." We disagree that the instructions were erroneous in this respect.

Prior to 1994, two measures of damages for the conversion of timber which were used, depending upon the intent of person removing the timber. Gum v. Coyle, Ky. App., 665 S.W.2d 929 (1984); D.B. Frampton & Co. v. Saulsberry, Ky., 268 S.W.2d 25 (1954). In Saulsberry, the court adopted the following rule:

> [W]here timber is cut and removed by an innocent trespasser, the measure of damages is the reasonable market value of the timber on the stump. If the trespass is willful, a different measure of damages is applied. In that event, the measure of damages is the gross sale price at the point of delivery.

Id. at 27 (citations omitted).

In 1994, the General Assembly amended KRS 364.130 to provide for treble damages unless the provisions of KRS 364.130(2) were complied with. This statutory scheme does not so much discard the traditional "innocent trespasser"/"willful trespasser" distinction as it does establish a criteria for qualification as an "innocent trespasser." To qualify as an "innocent trespasser", a logger must now comply with KRS 364.130(2)(a).

KRS 364.130 statutorily overrules and supercedes Saulsberry, and the trial court did not err by refusing the appellants' request to include an "innocent trespasser" jury instruction that would permit it to escape the treble damage provisions of KRS 364.130. In summary, even if a logger is otherwise an innocent trespasser under the old Saulsberry rule, the legislature has deemed that he must nevertheless comply with KRS 364.130(2) in order to escape the statute's triple damages

provision.[1]

Next, the appellants contend that statements made by Harris' counsel in closing were highly improper and violated fundamental legal principles by telling the jury his version of the law, which, the appellants argue, was different from the law as set forth in the jury instructions. Appellants specifically cite to that portion of his closing in which Harris' counsel referred to the provisions of KRS 364.130(2)(a), which defines how a defendant can avoid triple damages for entering upon and cutting timber growing upon the land of another. Specifically, Harris' counsel stated as follows:

> "Let's say that they had gone to her and they couldn't get any kind of written statement out of her that they were or were not her trees. Then, all they had to do was send her a certified letter in the mail and ask if okay; and, if she doesn't respond, it's okay. And if she doesn't respond to that, then it's okay. That's all these fellows had to do. Send her a letter. They didn't do it. And that's where it results in the three (3) times the value of what was taken. That's what she's entitled to Fourteen Thousand Eight Hundred and Nine Dollars ($14,809.00). That's what we'd ask you to give her today. Thank you."

The appellants had requested a jury instruction based upon KRS 364.130(2)(a), but, as previously explained, the instruction was denied because the appellants failed to present

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[1]In addition to the measure of damages recognized in the Saulsberry case, prior law permitted the owner of the land to seek punitive damages if the person "unlawfully" entered and cut the timber without color of title. KRS 364.130 (1980). Punitive damages, beyond treble damages, were not requested in this case, and we do not address whether, in addition to treble damages, KRS 364.130 permits punitive damages under KRS 411.184.

evidence that they had complied with its provisions. In his closing statement, Harris' counsel correctly stated the law as set forth in KRS 364.130(2)(a). The appellants argument, therefore, rests solely on the point that opposing counsel referred to a provision of law that was not incorporated into the jury instructions.

Following opposing counsel's comment, the appellants objected. Thereafter, the trial court admonished the jury as follows:

> I'm going to take your objection under advisement and admonish the jury that under the law that they will follow the instructions and to disregard any comment about any other law. I'm taking your objection under advisement."

At issue is merely one brief utterance during the course of closing arguments, after which the trial court properly admonished the jury. As a general rule, improper argument of counsel requires reversal only when it is prejudicial and results in injustice or deprives a party of a fair and impartial trial. Mason v. Stengell, Ky., 441 S.W.2d 412, 416 (1969). We are not persuaded that opposing counsel's brief reference to a point of law not incorporated into the jury instructions, followed by an admonishment, deprived the appellants of a fair and impartial trial.

Next, the appellants contend that Harris' claim against Newsome should have been dismissed for failure to join an indispensable party, Ray Reynolds. It was, and remains, Edna Harris' position that she had no claim against Ray Reynolds.

On January 20, 1998, Newsome filed a motion to dismiss on the basis that Harris had failed to join Ray Reynolds as an indispensable party. In her reply, Harris stated that if Newsome wanted Ray Reynolds in the lawsuit, it was his duty to make him a party. On January 30, 1998, the trial court entered an order "sustaining" Newsome's motion, and ordering Harris to "immediately file a Third Party Complaint against Ray Reynolds and Tom Reynolds to bring them in as Parties Defendant to this action." On that same day, Newsome filed a "Third Party Complaint" naming Ray Reynolds and his brother Tom Reynolds as third party defendants. The appellants do not provide a citation to the record directing us to an order denying their January 20 motion, and the record refutes their version of the procedural history as to this issue.

The decision as to necessary or indispensable parties rests within the sound authority of the trial judge in order to effectuate the objectives of CR 19.01. The exercise of discretion by the trial judge should be on a case-by-case basis rather than on arbitrary considerations and such a decision should not be reversed unless it is clearly erroneous or affects the substantial rights of the parties. Commonwealth, Dept. of Fish & Wildlife Resources v. Garner, Ky., 896 S.W.2d 10, 14 (1995). Though the trial courts order, of January 30, 1998, is confusing in that it ordered Harris to file a "third party complaint" against Reynolds, nevertheless, the trial court "sustained" Newsome's motion. It would appear that before Harris had an opportunity to respond to the order, Newsome brought

Reynolds into the suit. In any event, Ray Reynolds, along with his brother Tom, were joined as parties in this case. The appellants' interest in having Ray Reynolds as a party in the case was thereby protected. By our understanding of the trial court's order of January 30, 1998, the trial court's ruling as to this issue was favorable to the appellants, and, in addition, the substantial rights of the appellants were not affected.

Next, the appellants contend that Newsome was entitled to a judgment against Ray Reynolds as a matter of law based upon a handwritten agreement with Ray Reynolds which stated as follows:

> 4/26/96, I Ray Renolds [sic] will be responsible for all timber cut where Tom Renolds [sic] showed up the boundary line upon the FLAT above Tom Lackey's house to Ms. Harris. We are about one hundred fifty or to [sic] hundred ft. From big squire [sic] rock. Signed, Ray Reynolds.

At this point we will comment upon a problem we have observed throughout the appellants' brief - their tendency to overstate their case. Here, in regard to the above agreement, the appellants state that "Ray Reynolds agreed to indemnify Newsome for any and all damages that may result from the claim against him." Obviously, the agreement does not go that far.

Reynolds was joined into the suit as a third party defendant, and in the jury instructions, an apportionment instruction was included which permitted the jury to assign a portion of the fault to Ray Reynolds to the extent that he bore responsibility for indemnification to the appellants under the agreement. Based upon the testimony at trial and the wording of

the agreement, we disagree that the agreement entitles Newsome to a judgment against Reynolds for the full amount of the damages awarded by the jury. The agreement was ambiguous and conditional. Under the agreement, Ray Reynolds assumed responsibility only for timber cut "where Tom Renolds [sic] showed up the boundary line[.]" The area that Tom Reynolds "showed" was an issue in dispute, and one to be decided by the jury. There was trial testimony to support that the appellants cut timber outside the area identified by Tom Reynolds, and the testimony supports the apportionment of fault.

Finally, the appellants contend that KRS 364.130 is unconstitutional because it "automatically penalizes innocent trespassers" and fails to provide for a distinction between innocent trespass and willful trespass.[2] See pages 7-8, supra, for the relevant text of KRS 364.130.

Appellants' contention that KRS 364.130(2)(b) violates due process constitutional protections is unpersuasive. When economic and business rights are involved, rather than fundamental rights, substantive due process requires only that the statute be rationally related to a legitimate state objective. Stephens v. State Farm Mut. Auto. Ins. Co., Ky., 894 S.W.2d 624, 627 (1995). A court dealing with a challenge to the constitutionality of an act of the General Assembly must "necessarily begin with the strong presumption in favor of constitutionality and should so hold if possible." Brooks v.

[2]The appellants properly notified the Attorney General of their constitutional challenge pursuant to KRS 418.075.

Island Creek Coal Co., Ky. App., 678 S.W.2d 791, 792 (1984). Due process or equal protection is violated "'only if the resultant classifications or deprivations of liberty rest on grounds wholly irrelevant to a reasonable state objective.'" Edwards v. Louisville Ladder, Ky. App., 957 S.W.2d 290, 295-296 (1997); Earthgrains v. Cranz, Ky. App., 999 S.W.2d 218, 223 (1999).

KRS 364.130 is rationally related to the legitimate state objective of discouraging loggers from entering upon the property of another and cutting timber by providing for treble damages based upon the stumpage value of the timber. Section (2)(a) provides a simple, unburdensome, safe harbor provision whereby a logger may avoid treble damages in the event he inadvertently crosses onto another's property in the course of his logging activities. KRS 364.130 is constitutional under both the United States and Kentucky Constitutions.

For the foregoing reasons, the judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

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