

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001135-MR
AND
NO. 2002-CA-001313-MR

TALBERT BALL AND RON BALL

APPELLANTS/CROSS-APPELLEES

v. APPEAL/CROSS-APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 96-CI-00867

CAMP CREEK MINING COMPANY

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART AND REVERSING IN PART
AND REMANDING

** ** * * * * *

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

TACKETT, JUDGE: Talbert Ball and Ron Ball (hereinafter, the Balls) appeal from a jury verdict finding them liable for the unlawful conversion of a coal auger, stolen piecemeal from Camp Creek Mining Company in 1980. The Balls argue on appeal that the action was barred by the applicable statute of limitations, that the evidence was insufficient to support the jury's verdict, and that a particular jury instruction was

inappropriate and misleading. Camp Creek Mining Company cross-appeals, arguing that it was entitled to prejudgment interest. We affirm.

The coal auger, purchased in 1978, was moved to an area of Pike County, Kentucky, called Tierney Hollow in 1980 after it was used in Camp Creek's mining operations. Over time, a person or persons began to steal the auger by disassembling it and taking its parts. When the company's president, James J. Hamilton, was advised of the theft, he inspected the auger and discovered that only portions of it remained, the frame and engines having been removed. Hamilton reported the theft to the Kentucky State Police, but their investigation failed to reveal the identity of the thief. Many years later, in 1996, the investigation was reopened due to the discovery of new information, and that information led to the filing of this action against the Balls.

Hamilton, in his deposition, did not remember many specific details of the case, including the dates of most of the important events in this case. Hamilton died before this case came to trial, however, a matter of key importance is when he first discovered that the Balls were involved in the theft. At several points in his deposition, Hamilton appeared to be confused about the exact order of events, and stated that he was unsure whether he visited the Balls property with the state

police in 1981 or 1996. He also stated that his son, Jimmy, would recall events more clearly, and Jimmy testified that the Balls' involvement in the theft came to light in 1996.

At the jury trial, the Balls were held liable for the theft and a judgment of \$111,000 was entered against them. This appeal followed.

The Balls argue that the relevant statute of limitations applies to bar this action, because they argue that James Hamilton knew in 1981 of the Balls' involvement in the theft and did nothing. A thorough review of the record, however, indicates that this is not the case. The trial court submitted the question of when Hamilton became aware of the Balls' involvement to the jury, and the jury determined that he was not aware of their involvement until 1996. After reviewing the deposition testimony of Mr. Hamilton and the other evidence in the record, we conclude that the jury's finding was supported by the evidence and shall not be disturbed on appeal.

The Balls also claim that Instruction No. 5, the instruction pertaining to the time of discovery of the identity of the thieves, was confusing and improper. We first note that the argument is not adequately preserved for appellate review, because it appears that the specific issue presented to this Court was not raised in the trial court. Even so, the argument is without merit. The instruction reads as follows: "If you

answered 'YES' to either Instruction No. 3 or 4, do you further believe from the evidence that less than one year before June 17, 1996, employees or agents of Camp Creek Mining Corporation discovered that Talbert Ball, Ron Ball, or both of them, alone or as an accessory to another or others, took the coal auger?" We acknowledge that the phrasing may be somewhat awkward, but we do not believe that it rises to the level of reversible error to include this instruction as phrased.

Lastly, with respect to the Balls' appeal, we reject the argument that the jury's verdict was not supported by sufficient evidence. There was ample evidence in the record, from admissions of the parties to the testimony of Ezra Coleman, regarding the Balls' involvement in the theft. Accordingly, the jury's verdict will not be disturbed on appeal.

Turning to the cross-appeal, we hold that the matter of prejudgment interest is within the sound discretion of the trial court. The case cited by Camp Creek, Nucor Corp. v. General Electric Co., Ky., 812 S.W.2d 136 (1991), only reinforces the proposition that in cases involving unliquidated damages, it is within the discretion of the court to award prejudgment interest. While we acknowledge the merit of Camp Creek's argument that the case may have been an appropriate one for prejudgment interest, we cannot agree that the court abused its discretion in refusing to do so in this case.

On cross-appeal, Camp Creek also argues that it was entitled to an instruction on punitive damages. The taking of the property, it argues, rose to the level of criminal conduct, and even though it was not prosecuted as such, shows evidence of conscious wrongdoing that entitles it to a trial on punitive damages. Amlung v. Bankers Bond Co., Ky., 411 S.W.2d 689 (1967). We agree, and reverse in part the judgment of the circuit court.

The conduct of the Balls in this case rises to the level of intentional, unlawful taking of property; in other words, theft. The case was not prosecuted criminally by the decision of the state police; however, there is no need for a criminal prosecution to take place for an instruction on punitive damages to be proper. We must, therefore, reverse and remand for a limited trial on the issue of punitive damages only.

For the foregoing reasons, the judgment of the Pike Circuit Court is affirmed in part, reversed in part and remanded.

ALL CONCUR.

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