

RENDERED: SEPTEMBER 3, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001506-MR

AGNES AILEEN HAMILTON

APPELLANT

APPEAL FROM KNOTT CIRCUIT COURT
v. HONORABLE SAMUEL T. WRIGHT, SPECIAL JUDGE
ACTION NO. 00-CI-00042

CONSOL OF KENTUCKY, INC.;
JIMMY BRANHAM; JIM'S TRUCKING, INC.;
AND JIM'S TRUCKING CO., INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

KNOPF, JUDGE: The estate of Agnes Hamilton¹ appeals from a summary judgment of the Knott Circuit Court, entered June 20, 2003, dismissing its claim for damages against Consol of Kentucky, Inc. Consol is a coal-mining company, and the estate

¹ Hamilton filed her complaint in February 2000; she died while the suit was still pending in January 2003. Her estate was substituted as the plaintiff.

alleges that coal haulers for Consol trespassed on real property Hamilton owned along Motts Branch of Jones Fork of Right Beaver Creek near Mousie. The trial court ruled that Hamilton had failed to proffer any evidence that Consol had entered her property. The estate contends that it has proffered such evidence. We affirm.

In the late 1990s, Hamilton and Consol owned adjoining tracts of land up Motts Branch from Kentucky Highway 550. As provided in Hamilton's deed, the boundary line began at a culvert where the branch crossed the highway and followed the meanders of the branch. In the early 1980s, apparently, mining companies had built a road up the branch, which began from the highway on Hamilton's side, but after a short distance crossed a culvert to Consol's side. Over the years, Hamilton had received wheelage payments from various coal companies hauling coal to the highway along this road.

Adjacent to the road on Hamilton's side, she owned a building and lot that had formerly been a service station. Some months before October 1998, Hamilton leased those premises to Jimmy Branham, a coal-hauling subcontractor. The lease contemplated that Branham would use the premises to turn and to park his empty coal trucks, but he was not to block the road.

In October 1998, Consol began mining its property on Motts branch and contracted with Branham to haul the coal. It

built a short access road from its portion of the mining road into its loading area. Branham's trucks would drive from Hamilton's lot; along her portion of the old mining road; across the culvert to Consol's portion of the mining road; to the new access road; into Consol's loading area; then, after loading, down Consol's lot to the highway.

When Hamilton learned of Consol's mining, she visited the scene and became convinced that loaded trucks were being driven back across her property to the highway and that Consol's access road encroached upon her land. She demanded that Branham's trucks no longer use the mining road on her property past the leased service-station lot, and in February 2000 brought suit against Consol for trespass. Consol, seeking indemnity, filed a third-party complaint against Branham. Following a visit to the scene, the trial court ruled that Consol's access road was clearly on its own property and did not encroach upon Hamilton's land, and that Hamilton had failed to proffer any evidence that loaded trucks had exited across her land or that Consol had otherwise trespassed. It is from that ruling that the estate has appealed.

As the estate correctly notes, summary judgment motions are not to be used to resolve factual disputes, but only

to test whether a material factual dispute exists.² If not, and if under the undisputed facts the movant is entitled to judgment as a matter of law, then summary judgment is appropriate.³ A party resisting a properly supported summary judgment motion is obliged to come forward with evidence beyond mere allegations showing that material facts are genuinely in dispute.⁴

Hamilton's trespass claim requires her to prove that Consol made an unauthorized entry upon her property.⁵ Consol and Branham produced evidence tending to show that it had not, that Consol's access road was entirely on its own land and that Branham's loaded trucks exited not by driving back across Hamilton's portion of the mining road but by driving down Consol's lot to the highway.

Against this evidence, other than repeating Hamilton's allegations, the estate proffered nothing but Hamilton's deposition testimony that she had seen a flat-bed truck on her land and Branham's admission that when Hamilton complained about his use of the mining road he ordered his drivers to stop using it. The estate does not seriously dispute the fact that Consol

² Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

³ *Id.*

⁴ *Id.*

⁵ Rose v. Gatliff Coal Company, 266 Ky. 416, 99 S.W.2d 214 (1936).

built the short access road entirely on its own property. Hamilton's testimony about the flat-bed truck would not permit an inference that Consol entered Hamilton's land, because Hamilton also testified that she had no idea whose truck it was and did not allege that it belonged to Consol. And Branham's admission that his use of Hamilton's road to enter Consol's loading area may have been unauthorized in no way contradicts his testimony that loaded trucks exited the loading area across Consol's land.

The estate having failed to support its allegations of trespass, the trial court did not err by granting Consol's motion for summary judgment. Accordingly, we affirm the June 20, 2003, order of the Knott Circuit Court.

ALL CONCUR.

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