RENDERED: January 7, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000032-MR

IDELLA WARREN — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 02-CI-00116

RICE JOHNSON, JR.; DORIS JOHNSON; DANIEL DUNAWAY; JACKIE DUNAWAY; IMOGENE WARREN; LLOYD CARSON; BONNIE CARSON; JAMES PINION; THELMA PINION; JOHN WARREN; AND LOLA WARREN — APPELLEE

OPINION
AFFIRMING IN PART;
VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, and MINTON, JUDGES.

McANULTY, JUDGE: Idella Warren (appellant) appeals from a judgment from the Bell Circuit Court entered October 30, 2002. The appellant is also appealing from the Order denying her Motion to Vacate entered December 2, 2002. The appellant asserts (1) she is not liable under Ky. Rev. Stat. (KRS) 364.130(1) since she did not cut or saw down any timber and it

was up to the timber cutter to determine who had true legal ownership, and (2) the award of attorney's fees was not supported by the record.

The appellees in this case are the heirs of Nealey Warren. They are the owners in fee of 50 acres of land, referred to as the Ivory Grove property, which they inherited from their father under his Last Will and Testament in 1982. The appellant is the surviving spouse of Nealey Warren. She, along with one of the appellees, was a co-executor of the estate.

The trial court found that on July 27, 2000, Jeff Warren, Jr., who had no relationship to the parties, entered into a contract with the appellant to remove timber from the Ivory Grove property. This was done without the consent or knowledge of the appellees. Jeff Warren, Jr. was a co-defendant at the trial level, but is not a party in this appeal. Pursuant to the contract and the removal of the timber, the appellant received two checks totaling $6,796.40.

The trial court granted a Partial Summary Judgment, entered on August 27, 2002, against the Appellant in the amount of $6,796.40, the amount the Appellant received from Jeff Warren, Jr. for the timber. At trial, relying on the depositions of Matthew Cox, the logger, and Donnie Simpson, the timber purchaser, the court ruled that the Appellant had signed

the contract and that she was subject to the treble damages provision under KRS 364.130(1). In the Judgment entered October 30, 2002, the Court awarded the Appellees the sum of $22,592.80 plus pre-judgment interest of 8% per annum from July 19, 2000, until the date of judgment and post-judgment interest of 12% per annum from the date of judgment until paid, court costs of $230.50 and attorney fees of $9,796.40 (1/3 of the gross amount awarded).[1]

The central issue in this case is whether KRS 364.130(1) applies to the appellant. Our standard of review of construction and application of statutes is de novo. Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 612 (Ky. 2004).

The relevant part of KRS 364.130 provides as follows:

> (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.

[1] There was a Partial Summary Judgment entered against the appellant on August 27, 2002, which awarded the appellees $6,796.40 with interest at the rate of 8% per annum from July 19, 2000, until August 27, 2002, and thereafter at the rate of 12% per annum until paid, and taxable costs in the amount of $256.00.

The appellant asserts that she is not liable for damages from cutting timber under this statute. She claims the record shows she was not the one who actually cut or sawed down the timber. She claims there is nothing in the record which shows she caused the timber to be cut or sawed down with the intent to convert the timber to her own use. The appellant also claims the statute places the duty, not on her, but rather on the person cutting the timber to determine the true legal owner of the timber. The appellant's argument is meritless.

Despite claiming she never signed a contract with Jeff Warren, Jr., the trial court found she did sign the contract, visited the timber site at least twice, misrepresented her ownership of the land and knew how to contact the appellees. The trial court also found that she had accepted $6,796.40 in timber royalties paid pursuant to the contract by Jeff Warren, Jr. The trial court emphasized how the appellant was liable under the statute in its Order Denying Motion to Vacate, entered December 2, 2002:

> KRS 364.130 attaches liability to any person without title in himself to the timber or the land of another who *causes to be cut* down timber to be converted to his own use. The Court interprets this statute to mean that if you don't own it you can't cut it *or let anyone else cut it*, and if you do cut it or cause it to be cut by someone else you have to pay the rightful owners three times the stump value.

(emphasis added). Although we do not have to give deference to the trial court's findings under a de novo review, we find the trial court's findings to be very insightful.

The appellant has admitted in the record that she has no ownership interest in the timber. However, according to the depositions of both Donnie Simpson and Matthew Cox, the appellant told them that she owned the property and timber, that she had the deed to give them the book and page number, and that she stated the children (appellees) had no interest in the timber. They also state they witnessed her signing the contract. Mr. Cox testified that the appellant even visited the timber site at least twice while they were cutting the timber. Despite the appellant's assertion to the contrary, there was sufficient evidence to find that she did in fact sign the contract, and despite knowing she did not have ownership, she accepted the money under the contract for the timber. The appellant asserts, regardless of those findings, she is still not liable because she did not actually physically cut down the timber nor convert the timber to her own use. She claims it was the responsibility of the timber cutter to find out who was the true owner. The statute states that anyone who "causes [timber] to be cut or sawed down" is liable. KRS 364.130(1). The appellant clearly "caused" the timber to be cut down by misrepresenting she owned the timber and then selling the timber

under a contract. It does not matter that she, herself, did not physically cut the timber because the statute specifically provides for instances such as this where a person contracts with someone else to do the cutting. Appellant's argument that she did not convert the timber to her own use is also meritless. Although she did not take the timber, she sold the timber. By selling the timber, she converted the timber into money, which she used for her own use. Since the statute clearly applies to the appellant, we affirm the trial court's award of everything accept the attorney's fees, discussed below.

The appellant also argues that the trial court's award of attorney fees of one-third the gross amount of the judgment was not supported by the record. The appellees argue that this issue is not reviewable on appeal since the appellant failed to name the appellees' attorney as a party. The appellees rely on several Court of Appeals cases to support their argument, however overlooks the most recent Supreme Court decisions which address whether an attorney is a necessary party to an appeal. In both Louisville Label, Inc. v. Hildesheim, 843 S.W.2d 321 (Ky. 1992) and Knott v. Crown Colony Farm, Inc., 865 S.W.2d 326 (Ky. 1993), the appellee raised the argument that the award of attorneys fees was not reviewable since the attorney was not named in the appeal. Although Louisville Label did not deal with a fee-shifting statute, the reasoning behind the opinion is

still applicable. There, the court stated that the award of attorney's fees "would be by way of equitable reimbursement for a debt which [appellee] is, himself, the primary obligor. In these circumstances [appellee], not his attorney, is the real party in interest and the indispensable party to the appeal." Louisville Label, 843 S.W.2d at 326. Knott, following this case, applied the same rationale, focusing on the difference between the award naming the attorney, himself, versus the situations where the individual party awarded the fees, thereby remaining the primary obligor. Knott, 865 S.W.2d at 331. "Absent an award of fees to an attorney by judgment in his or her favor (thus allowing the attorney enforcement of the award by execution), there is no reason for requiring the attorney to be named on the appeal as a necessary party. One of the fundamental principles in the American legal system is that parties are responsible for their own attorney's fees." Id. Knott distinguished Tyler v. Bryant, 394 S.W.2d 454 (Ky. 1965). The court in Tyler focused on an attorney's fees award under KRS 403.220. The Knott court focused on the fact that KRS 403.220 applies in divorce cases, and divorce cases are different than other legal matters. The court found that divorce cases were treated differently because of the "inherent likelihood of later reconciliation between the parties, where an attorney's client may reunite with and join the opposition in challenging an award

of attorney's fees." Knott, 865 S.W.2d at 330, 331. Thus, the court found that KRS 403.220 permits a judgment to be made directly in the attorney's name and that "such legislation has not been enacted as applicable to other types of legal action." Id. at 331. Knott, went on to expand this rationale to some situations where the statute itself underlies the obligation to reimburse the attorney's fees. Id. at 330.

Pursuant to KRS 364.130, the Legislature allows a person to recover their attorney fees if they are successful under the statute. However, this statute differs from KRS 403.220, the fee-shifting statute mentioned in Tyler and distinguished in Knott. KRS 403.220 states:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. *The court may order that the amount be paid directly to the attorney who may enforce the order in his name*.

(emphasis added.) KRS 364.130 differs because it merely says the attorney's fees shall be paid "to the rightful owner of the timber." Since the award is not given directly to the attorney, the attorney is only an indirect party to an appeal of an award of attorney's fees.

Moreover, the trial court's award awarded the fees to the appellees, not the specific appellees' attorney. The Order stated "*The Plaintiffs* are also entitled to recover attorney fees equal to one-third of the gross amount awarded herein in the sum of $9,796.40 . . ." (emphasis added). Since the award was not specifically to appellees' counsel, the appellees remain the primary obligor in reimbursing their attorney and thus, the only indispensable party. Therefore, the appellant has properly appealed this issue.

The appellant claims the record lacks any testimony regarding a fee agreement between the appellees and their counsel, nor a motion for allowance of attorneys fees with documentation reflecting expenses. Based on this, the appellant claims the appellees are not entitled to the award of attorney's fees. In the Plaintiff's Memorandum, submitted to the trial court, the appellees state the attorney fee that was agreed upon was one-third of any recovery. They also rely on King which found that attorney fees must be paid to the prevailing party pursuant to the use of "shall" in KRS 364.130(1). King v. Grecco, 111 S.W.3d 877, 883 (Ky.App. 2002). Based on that, the trial court awarded the appellees recovery of attorney fees equal to one-third of the gross amount of the judgment awarded.

Attorney's fees cannot be awarded absent a statute or contract expressly providing that the other party shall pay.

Batson v. Clark, 980 S.W.2d 566, 577 (Ky.App. 1998). Here, KRS 364.130(1) provides that "any legal costs incurred by the owner of the timber" shall be paid "to the rightful owner." Since the statute provides for the award of attorney's fees, a contract is not needed. When reviewing the trial court's award of attorney's fees, our standard of review is an abuse of discretion standard. King, 111 S.W.3d at 883, quoting Giacalone v. Giacalone, 876 S.W.2d 616, 620 (Ky.App. 1994). "[T]he only requirement is that the court make a reasonable award." Id. The court in King upheld an award of a one-third contingency fee stating that such a fee was reasonable in the legal profession. Id. However, in that case, counsel had provided an itemization of his time and efforts. Although counsel was seeking a much higher fee award, the trial court used the itemization to determine that a one-third contingency fee was a more reasonable award. Id. Here, the only thing appellees' counsel has submitted is (1) a paragraph on page 4 of the Plaintiff's Memorandum to the trial judge which states "the attorney fee that the [P]laintiffs have agreed upon to pay in the case at bar is one-third of any recovery," and (2) a paragraph in it's appellate brief that the trial court took judicial notice that a one-third contingency fee is a common legal arrangement and therefore reasonable. The record is devoid of any evidence of how the trial judge found the requested fee to be reasonable or

that he took judicial notice of such an arrangement being reasonable in the legal profession. There is nothing stated in the trial judge's award stating what he relied upon in order to find that the attorney fees were reasonable, nor that he took judicial notice of such a fee being a reasonable arrangement. We are not saying that counsel need submit any particular itemization in order to be awarded his fees, only that the record should support a finding that such fees are reasonable. We remand this action for the trial court to enter a finding with regards to the reasonableness of the attorney's fees.

For the foregoing reasons, the judgment of the Bell Circuit Court is affirmed in part and vacated in part, remanding for further findings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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