RENDERED: AUGUST 28, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002066-MR

VAEL EUGENE BROWN,
AND ELWOOD BROWN — APPELLANTS

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 98-CI-00148

CARLOS GENE BLANKENSHIP — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; HENRY,[1] SENIOR JUDGE.

LAMBERT, JUDGE: This is a timber trespass action where the sole issue before this Court is whether the trial court's apportionment of damages between Appellants who were found liable for the unauthorized trespass and cutting of timber on land owned by Appellee, Carlos Gene Blankenship, is supported by

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

substantial evidence. Only Appellant, Vael Eugene Brown, appeals from the Greenup Circuit Court's October 16, 2008, order apportioning damages between Vael and his father, Elwood. Finding substantial evidence in the record to support the trial court's apportionment findings, we affirm.

This case was before this Court previously on direct appeal from a determination of liability against Appellants. Finding that the trial court erred in holding Appellants jointly and severally liable for the damages caused to Blankenship's property, we remanded the case with directions that the trial court make findings as to the percentage of each Appellant's total fault pursuant to KRS 411.182. *Brown v. Blankenship*, 2008 WL 682075 (Ky. App. 2008) (unpublished).

After hearing arguments of counsel and considering the evidence, the trial court entered an order on October 16, 2008, apportioning 50% of the total fault for damages to Blankenship's property to Vael. The remaining 50% was apportioned to Elwood. To support its conclusion of 50% total fault to Vael, the trial court determined that Vael either actively participated in the cutting and removal of timber from Blankenship's property or acquiesced in allowing his father, Elwood, to do the same.

On appeal to this Court, Vael argues there is not substantial evidence in the record to support the trial court's apportionment of 50% fault to him for damages sustained to Blankenship's property. Determinations of fault made under KRS 411.182 are findings of fact. *See* KRS 411.182. Having been tried before the

circuit court without a jury, we review the trial court's findings of fact for clear error. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005); CR 52.01. In order to withstand clear error review, this Court must find substantial evidence in the record to support each disputed finding. *Gosney*, 163 S.W.3d at 898. "Substantial evidence is evidence, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Id.*

Vael concedes on appeal that his father unlawfully contracted with Jack and William Gullet to trespass upon and cut down timber from Blankenship's property. However, he claims that he "had nothing to do with the wrong done [by his father] to Blankenship." Vael argues that the evidence set forth in the record does not support the trial court's findings that he either actively participated in the hiring of the Gullets to cut down timber on Blankenship's property or that he acquiesced in his father doing the same. Accordingly, Vael contends it was clear error for the trial court to apportion any percentage of fault to him. Upon careful review of the record, we disagree.

As set forth in the trial court's October 16, 2008, order, Vael conceded to being the sole owner of a tract of land bordering the property owned by Blankenship where timber was unlawfully cut. In fact, Vael, as owner of this tract of land, initiated the lawsuit in this matter against Blankenship for trespass and unauthorized removal of timber from property bordering Blankenship's, which Vael claimed was his. When Blankenship countersued contending that he was the

true owner of the disputed property, and in fact it was Vael who owed him damages for trespass and unauthorized cutting and removal of timber, the trial court appointed Greenup County surveyor, Richard A. Howerton, to survey the boundary line.

After reviewing the surveyor's report, the trial court entered a partial summary judgment determining that the disputed land was indeed owned by Blankenship, not Vael. Thus, it was Vael who was subject to liability for any trespass or cutting and removal of timber from this property. Prior to this final adjudication of ownership, it was discovered that Vael's father, Elwood, was actually living on the property owned by Vael and bordering Blankenship's property. In response to interrogatories submitted during the course of this litigation, the trial court found that Vael made several admissions against interest.

First, Vael admitted that he had contracted with the Gullets to remove timber from his property in the past ten years. Second, Vael admitted that both he and his father exercised control over the property and that they both received portions of all rent and income derived from the property. Finally, Vael admitted that he knew his father had removed trees from the disputed property and that his father had contracted with the Gullets to remove said trees.

The trial court also noted the testimony of Malcolm Layne, who stated that he had talked with Elwood and Elwood's adult son who lived in Ohio about the subject property. According to Layne, Elwood stated in front of his adult son that timber was being cut from the subject property and that he was aware that the

property's ownership was in dispute at the time the timber was cut. Answers to interrogatories provided by Vael indicated that he lived in Ohio.

From the evidence summarized above, the trial court concluded that at the very least, Vael knew the Gullets were cutting timber from property whose ownership was in dispute, and Vael knowingly shared in profits from this activity. Because Vael did not stop the illegal cutting and trespass and further shared in profits from such activity, the trial court concluded that Vael was 50% at fault for the damages caused to Blankenship's property.

In his brief to this Court, Vael does not dispute the evidence set forth above. He simply argues it is insufficient to support the trial court's conclusion that he was 50% at fault for the damages caused to Blankenship due to the fact that he did not personally engage the Gullets to cut down the trees on the disputed property, nor did he assist the operation in any way. We disagree. While Vael may not have personally contracted for the illegal activity himself, his conduct was more than sufficient to justify a finding of fault for the damages caused to Blankenship's property. When viewed in its entirety, the evidence set forth above is of sufficiently probative value to constitute substantial evidence supporting the trial court's conclusion that the nature of Vael's conduct, i.e., equal control over property, knowledge, and profit sharing, resulted in a 50% causal relationship between this conduct and the damages found. *See* KRS 411.182(2).

Finding no clear error in the trial court's KRS 411.182 findings as they relate to Vael Eugene Brown, we hereby affirm the Greenup Circuit Court's

October 16, 2008, order apportioning 50% fault to Vael Eugene Brown and 50% fault to Elwood Brown for damages caused by the unlawful trespass and cutting of trees on Blankenship's property.

ALL CONCUR.

BRIEF FOR APPELLANTS:

James W. Lyon, Jr.
Greenup, Kentucky

BRIEF FOR APPELLEE:

Roger R. Cantrell
Greenup, Kentucky