IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WILLIAM and ANNETTE LEWIS, Appellants,	)	
v.	)	**WD81231**
JOE MASON, et al., Respondents.	)	**FILED: October 16, 2018**

Appeal from the Circuit Court of Johnson County
The Honorable Sue Dodson, Judge

Before Division Four: Mark D. Pfeiffer, P.J., and Alok Ahuja and Edward R. Ardini, Jr., JJ.

The Appellants, William and Annette Lewis, allege that they owned property in Warrensburg, which they had agreed to sell to Joe Mason pursuant to a contract for deed. The Lewises contend that, while Mason was in possession of the property, he authorized Respondents Harley Akin, Robert Wooley, and Chris Hidy to remove timber from the property. The Lewises asserted a claim for statutory trespass against Akin, Wooley, and Hidy under § 537.340,[1] seeking to recover treble damages for the trees the Respondents had taken. The circuit court granted the Respondents' motion to dismiss, on the basis that the Lewises could not pursue a statutory trespass claim because they were not in possession of the property at the time the timber was removed. The Lewises appeal. We affirm.

[1] Unless otherwise indicated, statutory citations refer to the 2016 edition of the Revised Statutes of Missouri, updated by the 2017 Supplement.

Factual Background

The Lewises filed this action in the Circuit Court of Johnson County. They asserted a claim for statutory trespass under § 537.340 against Respondents Akin, Wooley and Hidy, as well as a claim for statutory waste under § 537.420 against defendant Mason. This appeal involves only the dismissal of the Lewises' statutory trespass claim against Hidy, Akin, and Wooley.

In their Petition, the Lewises alleged that they owned a tract of real estate in Warrensburg, and that Mason possessed the property pursuant to a Contract for Deed from January 2014 to December 2016. The Contract for Deed was attached to the Petition and incorporated by reference. Under the Contract for Deed, Mason agreed to purchase the property for a total purchase price of $145,000, with a $5,000 down payment, and the remaining balance of $140,000 to be paid in equal monthly installments over a twenty-year period. The Contract for Deed provided that the Lewises would deliver a warranty deed for the property to Mason "[u]pon total payment of the purchase price and any and all late charges, and other amounts due" to the Lewises.

Paragraph 5 of the Contract for Deed, entitled "Maintenance of Improvements," provided:

> All improvements on the property, including, but not limited to, buildings, trees or other improvements now on the premises, or hereafter made or placed thereon, shall be a part of the security for the performance of this contract and shall not be removed therefrom. Purchaser shall not commit, or suffer any other person to commit, any waste or damage to said premises or the appurtenances and shall keep the premises and all improvements in as good condition as they are now.

The Lewises' Petition alleged in Count I that, "at Mason's invitation and without the [Lewises'] consent or knowledge," the Respondents "entered onto the Property and cut down and removed a number of trees," which had a fair market value in excess of $70,000. Pursuant to § 537.340.1, the Lewises prayed for

judgment against Respondents for three times the value of the timber removed from the property.

The Lewises' Petition also asserted a claim in Count II against Mason, for statutory waste under § 537.420. Count II alleged that Mason "committed waste on the Property by inviting Defendants Akin, Wooley and Hidy to enter onto the Property and cut down and remove timber growing on the Property." The Petition alleged that the Lewises' damages from the waste committed by Mason exceeded $70,000, and that the Lewises were entitled to recover three times that amount under § 537.420.

Hidy and Wooley filed answers to the Petition. Hidy also filed a motion for judgment on the pleadings, to dismiss for failure to state a claim upon which relief can be granted, or to dismiss for lack of standing. Hidy's motion argued that the Lewises lacked standing to pursue a statutory trespass action because they were not in actual or constructive possession of the property at the time of the alleged trespass. The trial court granted Hidy's motion. The court concluded that Hidy's argument applied equally to the Lewises' claims against Respondents Akin and Wooley, and it accordingly dismissed the Lewises' claims against all three Respondents.

Mason failed to respond or enter his appearance, and the Lewises obtained a default judgment on their statutory waste claim against him.

Following the circuit court's entry of a final judgment disposing of the Lewises' claims, they filed this appeal.

Standard of Review

Hidy's dispositive motion, on which the circuit court granted relief to all three Respondents, sought judgment on the pleadings, and dismissal for failure to state a claim and for lack of standing. While he invoked multiple procedural mechanisms, Hidy essentially made a single legal argument: that the Lewises could not

prosecute a claim for statutory trespass because they were not in actual or constructive possession of the property at the time the Respondents removed timber from it. We review this legal issue *de novo*. *See*, *e.g.*, *Kohner Props., Inc. v. Johnson*, 553 S.W.3d 280, 282 (Mo. banc 2018). Whether viewed as a ruling on motion for judgment on the pleadings, or on a motion to dismiss for failure to state a claim or for lack of standing, we accept as true all of the well-pleaded allegations of the Lewises' Petition. *Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 12 (Mo. banc 2012) (motion for judgment on the pleadings); *K.M.M. v. K.E.W.*, 539 S.W.3d 722, 732 (Mo. App. E.D. 2017) (motion to dismiss for failure to state a claim); *McGaw v. McGaw*, 468 S.W.3d 435, 438 (Mo. App. W.D. 2015) (dismissal for lack of standing).

Discussion

In their single Point Relied On, the Lewises argue that the trial court erred in dismissing their claim for statutory trespass under § 537.340. They argue that, even though they were not in actual or constructive possession of the Warrensburg property at the time the Respondents cut down trees on the property, they were injured by the Respondents' actions, and could therefore prosecute a claim for statutory trespass.

It is well-established that, in order to pursue a claim for <u>*common-law*</u> trespass under Missouri law, a plaintiff must plead and prove that the he or she was in possession of the property on which the trespass occurred. As we explained in *International Brotherhood of Electrical Workers, Local 814 v. Monsees*, 335 S.W.3d 105 (Mo. App. W.D. 2011):

> The essence of an action for trespass is violation of possession. Accordingly, to support an action for trespass, the party making the claim must have the legal right to possession.

Id. at 108 (citations, quotation marks, and footnote omitted); *see also*, *e.g.*, *Philips v. Citimortgage, Inc.*, 430 S.W.3d 324, 330 (Mo. App. E.D. 2014) ("the central issue of a trespass action is violation of possession").

The Lewises' Petition affirmatively alleged that "Defendant Joe Mason . . . possessed the property from on or about January 27, 2014, until on or about December 1, 2016, under a *Contract for Deed* entered into with the Plaintiffs." The Contract for Deed, which was attached to the Lewises' Petition, expressly provided that "Purchaser [*i.e.*, Mason] shall take possession of the property and all improvements thereon on **March 1, 2014** and shall continue in the peaceful enjoyment of the property so long as all payments due under the terms of this contract are timely made." Therefore, under the allegations of the Lewises' Petition, their statutory trespass claim would fail if they were required to establish that they possessed the property at the time the timber was removed.

The Lewises argue that, although possession is required in order to pursue a <u>*common-law*</u> trespass claim, it is not required for a <u>*statutory*</u> trespass claim prosecuted under § 537.340. Section 537.340.1 provides:

> If any person shall cut down, injure or destroy or carry away any tree placed or growing for use, shade or ornament, or any timber, rails or wood standing, being or growing on the land of any other person, . . . the person so offending shall pay ***to the party injured*** treble the value of the things so injured, broken, destroyed or carried away, with costs. Any person filing a claim for damages pursuant to this section need not prove negligence or intent.

(Emphasis added.) The Lewises argue that, under the statute, they were only required to establish that they were "the party injured" by the Respondents' actions; according to them, possession is not a requirement to pursue a claim under § 537.340.1.

Section 537.340.1 does not expressly provide that a cause of action for statutory trespass can be asserted only by the person in possession of property. But

the statute has been interpreted, for more than 150 years, to require that a plaintiff have possession of the affected property in order to state a claim for statutory trespass. This principle has been stated in multiple decisions of the Missouri Supreme Court, which were are bound to follow pursuant to Article V, § 2 of the Missouri Constitution.

Thus, in *Cochran v. Whitesides*, 34 Mo. 417 (1864), the plaintiff was the record title owner of a piece of real property. The plaintiff sued the defendant "to recover damages for wrongfully entering and cutting timber on the land of the plaintiff." *Id.* at 419. The trespass statute at the time, ch. CLXI, § 1, RSMo 1855, like the current statute, provided that "the person so offending shall pay to *the party injured* treble the value of the thing so injured, broken, destroyed or carried away . . . ." (Emphasis added.)

The evidence in the *Cochran* case indicated that, "at the time of the commission of the trespasses complained of, and for several years prior thereto, the defendant was in the actual possession of the land trespassed upon, claiming and holding the same adversely to the plaintiff." *Id.* The circuit court instructed the jury that the plaintiff could not recover "[i]f the jury find that at the time of the commission of the alleged trespasses the plaintiff was not in the actual possession of the premises on which the trespasses were committed . . . ." *Id.* The plaintiff appealed following an adverse judgment. The Supreme Court affirmed. It noted that a trespass action "could be maintained at common law only where the plaintiff was in the possession of the close at the time of the commission of the trespass." *Id.* The Supreme Court concluded that "the law in this respect is unchanged by" the new trespass statute, and that the new statute "did not give an action where none existed before." *Id.*

Similarly, in *Brown v. Hartzell*, 87 Mo. 564 (1885), the plaintiff was the record title owner of property, and sought to pursue a statutory trespass claim

against the defendant "for cutting and carrying away poplar trees from the described premises." *Id.* at 567. Like the statute at issue in this case, the statute involved in *Brown* provided that, if a person removed trees from "the land of any other person," "the person so offending shall pay, *to the party injured*, treble the value of the thing so injured, broken, destroyed or carried away." § 3921, RSMo 1879 (emphasis added).

The evidence in the *Brown* case indicated that, although plaintiff held record title to the property, he "was never in the actual possession of the land." *Id.* Instead, it appeared from the evidence that *the defendant* had been in possession of the property at the time the trees were removed, pursuant to an aborted transaction to purchase the property from the plaintiff's grantor. Citing *Cochran* and other cases, the Supreme Court in *Brown* once again emphasized that actual or constructive possession was necessary in order to prosecute a statutory trespass action:

> This action of trespass can only be maintained where the plaintiff is in the actual or constructive possession of the premises. There is no evidence of actual possession on the part of the plaintiff . . . in the case. The possession is constructive when the property is in the custody and occupancy of no one, but rightfully belongs to the plaintiff. In that case the title draws to it the possession. The foregoing principles of law have been repeatedly asserted by this court.

Id. at 568 (citations omitted). Numerous other cases reach the same result: despite the fact that the statute itself authorizes suit by "the party injured," the plaintiff must be in actual or constructive possession of the property in order to state a statutory trespass claim.[2] While these cases are older, to our knowledge they remain good law, and we are bound to follow them.

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[2] *See*, *e.g.*, *More v. Perry*, 61 Mo. 174, 175 (1875) (in a statutory trespass action, "[t]he necessary averment in the petition, therefore, is that the defendant has forcibly and wrongfully injured the property in the possession of the plaintiff, and under the general issue the plaintiff must prove that he was rightfully in possession as against the defendant at the time the injury was committed.") (citations omitted); *Brown v. Carter*, 52 Mo. 46, 48

The Lewises cite to a series of cases which state that "'[a] cause of action brought under this penal statute [(*i.e.*, § 537.340.1, RSMo)] differs from a cause of action brought under common law trespass.'" *Hale v. Warren*, 236 S.W.3d 687, 695 (Mo. App. S.D. 2007) (quoting *Ridgway v. TTnT Dev. Corp.*, 26 S.W.3d 428, 435-36 (Mo. App. S.D. 2000)).[3] None of these cases suggests, however, that the causes of action differ with respect to the requirement that a plaintiff be in possession of the property on which the trespass occurs. Instead, these cases distinguish between common-law and statutory trespass (1) in discussing the measure of damages; (2) to emphasize that the statutory cause of action requires more than mere unauthorized entry onto another's land; or (3) in the course of holding that the two causes of action are distinct and must be separately pleaded. Indeed, in one of these cases, the Court acknowledged that, "while the action for treble damages may be a separate and distinct cause of action from the common-law action of trespass or trover, *the line of demarcation is fine, and they all belong to the same general classification*[.]" *Hunter Land & Dev. Co. v. Caruthersville Stave & Heading Co.*, 9

(1873) ("This action can be maintained only where the plaintiff is in the possession of the close at the time of the commission of the trespass. It is an action for injury to the possession, which may be actual or constructive. But if the defendant be in the actual possession the action cannot be maintained, and plaintiff's remedy is by ejectment.") (citation omitted); *Robertson v. Welch*, 246 S.W.2d 828, 830 (Mo. App. 1952) ("the Missouri cases uniformly hold that an action in trespass can be maintained against a trespasser by a party in possession"; "'possession alone, is sufficient to maintain an action of trespass as against a stranger.'" (citations omitted)); *Avitt v. Farrell*, 68 Mo. App. 665, 667, 669 (1897) ("'It is well settled that in order to maintain an action of trespass under the statute, the plaintiff must be in the possession of the property injured"; instruction which required jury to find only that plaintiff was the property's *owner* "was wrong in omitting the all-important disputed question of possession being also in plaintiffs"); *Harris v. Sconce*, 66 Mo. App. 345, 347 (1896) ("All the evidence concedes that, at the date of the alleged trespasses, the defendants were in the adverse possession of the lands under a claim of title. This action, therefore, under the decisions in this state, could not have been maintained against them even if the legal title were in the plaintiff." (citations omitted)).

[3] *See also*, *e.g.*, *Porter v. Fitch*, 727 S.W.2d 161, 164 (Mo. App. W.D. 1987); *Crews v. Tusher*, 651 S.W.2d 677, 679 (Mo. App. S.D. 1983); *Harris v. L.P. & H. Constr. Co.*, 441 S.W.2d 377, 382 (Mo. App. 1969); *Hunter Land & Dev. Co. v. Caruthersville Stave & Heading Co.*, 9 S.W.2d 531, 533 (Mo. App. 1928); *King v. Sligo Furnace Co.*, 190 S.W.368, 371 (Mo. App. 1916).

S.W.2d 531, 533 (Mo. App. 1928) (emphasis added). Nothing in the cases the Lewises cite suggests that the plaintiff's actual or constructive possession of the affected property does not remain a prerequisite to a statutory trespass claim.

The Lewises also emphasize that, in 2000, the legislature added the final sentence to § 537.340.1, which provides that "[a]ny person filing a claim for damages pursuant to this section need not prove negligence or intent." H.B. 1097, 2000 Mo. Laws 234, 235. As the Lewises point out, the addition of this sentence was apparently intended to overrule cases which had held that, in order to state a claim under the statute, "it is required . . . that there be an intentional act; i.e. an intent to enter the land which results in the trespass." *Fondren v. Redwine*, 905 S.W.2d 156, 157 (Mo. App. E.D. 1995) (citations omitted). The statutory amendment in 2000 reduced (or eliminated) the requirement that a defendant act with a particular *state of mind*. That amendment says nothing, however, about the requirement established by the Missouri Supreme Court more than a century earlier, that a plaintiff must be in actual or constructive possession of the property on which the trespass occurred in order to state a claim under § 537.340.

Because the allegations of the Lewises' Petition establish that they were not in actual or constructive possession of the Warrensburg property when the Respondents removed timber from it, the circuit court properly held that the Lewises could not state a claim for statutory trespass under § 537.340.1.[4]

[4] On appeal, the Lewises argue only that plaintiff's possession of the relevant property is not an element of a statutory trespass claim under § 537.340. They do not argue that, if a "possession requirement" exists, they fall within an exception to that requirement based on the specific circumstances of this case. We decide only the issue the Lewises have presented.

Conclusion

The judgment of the circuit court is affirmed.

Alok Ahuja, Judge

All concur.