



Missouri Court of Appeals  
Southern District

Division One

TINA M. PENNINGTON,	)	
	)	
Appellant,	)	
	)	No. SD37144
vs.	)	
	)	<b>Filed: January 11, 2022</b>
BRANDON WILSON and	)	
KRIS WILSON,	)	
	)	
Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable David B. Mouton, Judge

**AFFIRMED**

Tina Pennington sued her neighbors, Respondents (“Wilsons”), when their contractor cleared trees and brush on Pennington’s side of the property line. She did not name the contractor as a defendant. At the bench trial, the contractor admitted he cleared brush and some small trees on Pennington’s property, and that his bulldozer struck some of her railroad ties. Nevertheless, the trial court denied Pennington’s petition, finding she had presented evidence of some damages but no credible evidence the Wilsons were legally responsible for the damages.

Pennington’s appeal presents two claims of error: (1) that the court misapplied the

law of agency, and (2) that the court’s determination as to damages was against the weight of the evidence.<sup>1</sup> We affirm.

### **Principles of Review**

Rule 84.13(d), Missouri Court Rules (2012), and *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976), govern our review. “We are required to affirm the trial court’s judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law.” *McDermot v. Doner*, No. SD36775, slip op. at \*7 (Mo.App. Oct. 14, 2021), *reh’g and/or transfer denied* (Nov. 2, 2021) (citing *Murphy*, 536 S.W.2d at 32); *accord Karney v. Dep’t of Labor & Indus. Relations*, 599 S.W.3d 157, 161 (Mo. banc 2020). Where a party asserts a misapplication of law claim, we review the trial court’s legal conclusions and application of law to the facts *de novo*. *Empire Dist. Elec. Co. v. Scorse as Tr. Under Tr. Agreement Dated November 17, 1976*, 620 S.W.3d 216, 224 (Mo. banc 2021).

“When evidence is contested by disputing a fact in any manner, this Court defers to the trial court’s determination of credibility.” *White v. Dir. of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010). Only when the evidence is uncontested do we give no deference to the trial court’s findings. *Id.* To prevail on appeal in such a circumstance, the appellant would have to show the evidence presented compelled the trial court to find in their favor as a matter of law and no reasonable trier of fact could have concluded otherwise. *See Empire Dist. Elec. Co.*, 620 S.W.3d at 227-28.

### **Discussion**

Appellant first argues the trial court erroneously applied the law when it found no

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<sup>1</sup> The Wilsons did not file a brief on appeal. While they are not required to file a brief, the failure to do so ensures that we will review the claimed errors without the benefit of whatever argument they may have presented. *Turner v. Missouri Dep’t of Conservation*, 349 S.W.3d 434, 438\_n.1 (Mo.App. 2011).

credible evidence of a principal-agent relationship between the Wilsons and their contractor.

“Agency is the fiduciary relationship resulting from the manifestation of consent by an agent to a principal that the agent will act on the principal’s behalf and subject to his control.” ***Bach v. Winfield-Foley Fire Prot. Dist.***, 257 S.W.3d 605, 608 (Mo. banc 2008) (citing RESTATEMENT (SECOND) OF AGENCY § 1 (AM. L. INST. 1958)). A “principal must have the ‘right to control’ the agent.” ***Id.*** Conversely, “An independent contractor is one who contracts with another to do something for him but is neither controlled by the other nor subject to the other’s control with respect to his physical conduct in the performance of the undertaking.” ***Tom Lange Co., Inc. v. Cleaning by House Beautiful***, 793 S.W.2d 869, 871 (Mo.App. 1990) (citing RESTATEMENT (SECOND) OF AGENCY § 2 (AM L. INST. 1957)). While a principal may be responsible for the acts of her agent undertaken with actual authority, ***Bach*** 257 S.W.3d at 608, “[a] principal is generally not responsible for the wrongs committed by the independent contractor.” ***Tom Lange Co., Inc.***, 793 S.W.2d at 871.

Agency is not presumed, ***World Res., Ltd. v. Utterback***, 943 S.W.2d 269, 271 (Mo.App. 1997), but agency and the agent’s authority often are *implied* by proof of facts, circumstances, and conduct of the party to be charged. ***Peoples Nat’l Bank, N.A. v. Fish***, 600 S.W.3d 273, 279 (Mo.App. 2020). The existence of an agency relationship generally is a question of fact, not a question of law. ***West v. Sharp Bonding Agency, Inc.***, 327 S.W.3d 7, 11 (Mo. App. 2010). Pennington had the burden to prove that the Wilsons’ contractor was acting as their agent when he cleared the brush and trees on Pennington’s property. ***Utterback***, 943 S.W.2d at 271.

Here, the Wilsons contested the allegation of agency by denying it in their answer

and by cross-examining Pennington's witnesses who testified on this issue. Proof on this contested fact issue involved witness testimony and the party with the burden of proof lost. What we said in ***Black River Elec. Coop. v. People's Cmty. State Bank*** bears repeating here:

[A] fact-finder *always* can disbelieve all or any part of the evidence, just as it always may refuse to draw inferences from that evidence. Credible, believable, even uncontradicted proof of *evidentiary* facts may not prove a contested issue of *ultimate* fact to the fact-finder's satisfaction. A party with the burden of proof cannot merely offer a submissible case; it must convince the fact-finder to view the facts favorably to that party. This is because evidence never proves any element until the fact-finder says it does.

466 S.W.3d 638, 640 (Mo.App. 2015) (internal quotation marks and citations omitted).

Because the issue was contested, we must defer to the trial court's assessment of witness credibility, particularly on a fact-intensive issue such as agency. There was no evidence the Wilsons themselves damaged Pennington's land and no *credited* evidence the Wilsons' contractor acted as their agent rather than as an independent contractor. With no credited evidence to substantiate an agency claim on which Pennington bore the burden of proof, the trial court did not err in declaring or applying the law as it did. Point I is denied.

Given our disposition of Point I, no purpose would be served in analyzing Point II. The named defendants are not liable for whatever damages Pennington may have suffered, regardless of their extent. Point II is denied. Judgment affirmed.

JACK A. L. GOODMAN, J. – OPINION AUTHOR

WILLIAM W. FRANCIS, JR., P.J. – CONCURS

JEFFERY W. BATES, J. – CONCURS