NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RONALD LICKMAN, KOCHER COAL COMPANY, AND RAUSCH CREEK LAND, L.P., AS ASSIGNEE OF EASTERN EQUITIES, INC., AND AS ASSIGNEE OF GARRETT GROUP, L.P., Appellants v. ERIC E. EMINHIZER, DOROTHY I. COLONY, AND CHARLES M. COLONY, T/D/B/A FERGUSON VALLEY HARDWOODS, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1439 MDA 2013

Appeal from the Order entered July 29, 2013,
in the Court of Common Pleas of Schuylkill County,
Civil Division, at No(s): S-1168-2004

BEFORE: DONOHUE, ALLEN, and STABILE, JJ.

MEMORANDUM BY ALLEN, J.: **FILED MAY 22, 2014**

Ronald Lickman, Kocher Coal Company, and Rausch Creek Land, L.P., as assignee of Eastern Equities, Inc., and as assignee of Garrett Group, L.P., (collectively "Appellants"), appeal from the judgment entered after the trial court denied the removal of the nonsuit which was entered against Appellants and in favor of Eric E. Eminhizer, Dorothy I. Colony, and Charles M. Colony, t/d/b/a Ferguson Valley Hardwoods, (collectively "Ferguson Valley"). We affirm.

Our review of the record indicates that Appellants and Ferguson Valley were parties to a contract which provided for the harvesting of trees by

Ferguson Valley from Appellants' land. Appellants subsequently initiated an action for conversion against Ferguson Valley for harvesting or "overcutting" trees outside of designated timber blocks, and below contractually established minimum tree diameters. *See generally* Complaint, 8/31/05. Appellants further averred that Ferguson Valley failed to institute appropriate erosion sedimentation control standards while they harvested the trees. *Id.* The action was tried without a jury on March 25, 2013. At the conclusion of Appellants' case-in-chief, the trial court granted Ferguson Valley's oral motion for compulsory nonsuit regarding Appellants' claims that Ferguson Valley overcut trees outside of designated timber blocks, and cut trees below established diameters. N.T., 3/25/13, at 140-141. The trial court denied Ferguson Valley's motion for nonsuit regarding Appellants' claim that Ferguson Valley failed to institute erosion sedimentation control standards during their harvesting activities. *Id.*

On April 4, 2013, Appellants filed a motion for post-trial relief seeking removal of the nonsuit. On June 21, 2013, Ferguson Valley filed a brief in opposition to Appellants' motion. On July 29, 2013, the trial court denied Appellants' motion. Judgment was entered on August 7, 2013.[1] On August 8, 2013, Appellants filed a notice of appeal. Appellants and the trial court

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[1] "Where a court has entered judgment in a compulsory nonsuit, the appeal lies not from the entry of the judgment itself, but rather from the court's refusal to remove it." ***Vicari v. Spiegel***, 936 A.2d 503, 508 n.5 (Pa. Super. 2007) (citation omitted).

complied with Pa.R.A.P. 1925. On September 3, 2013, the trial court adopted its July 29, 2013 Order as the trial court's Pa.R.A.P. 1925(a) opinion.

Appellants present the following issues for our review:

> A. WHETHER, IN GRANTING [FERGUSON VALLEY'S] MOTION FOR COMPULSORY NONSUIT, THE TRIAL COURT COMMITTED AN ERROR OF LAW AND ABUSED ITS DISCRETION BY MISINTERPRETING AND MISAPPLYING THE LEGAL STANDARDS SET FORTH IN PA. R.C.P. 230.1(a)(2) AND RELATED CASELAW.
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> B. WHETHER THE TRIAL COURT COMMITTED AN ERROR OF LAW AND ABUSED ITS DISCRETION IN GRANTING FERGUSON VALLEY'S MOTION FOR COMPULSORY NONSUIT BY HOLDING, IN EFFECT, THAT A PRIMA FACIE CASE CANNOT BE PRESENTED UNDER 42 PA. C.S.A. §8311 BASED UPON CIRCUMSTANTIAL EVIDENCE.
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> C. WHETHER THE TRIAL COURT COMMITTED AN ERROR OF LAW AND ABUSED ITS DISCRETION IN GRANTING FERGUSON VALLEY'S MOTION FOR COMPULSORY NONSUIT NOTWITHSTANDING THE ADMISSION OF THE REPORT OF [APPELLANTS'] EXPERT, JEFFREY E. HUTCHINSON, ACF, INTO EVIDENCE.
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> D. WHETHER THE TRIAL COURT COMMITTED AN ERROR OF LAW AND ABUSED ITS DISCRETION BY GRANTING FERGUSON VALLEY'S MOTION FOR COMPULSORY NONSUIT BASED UPON IRRELEVANT TESTIMONY OF ERIC EMINHIZER CONCERNING CUTTING IN THE AREA OF BLOCK 10.
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> E. WHETHER THE TRIAL COURT COMMITTED AN ERROR OF LAW AND ABUSED ITS DISCRETION BY EXCLUDING TESTIMONY BY FRANK KRAMMES AS TO THE IDENTITY OF PERSONS WHO WERE ENGAGED IN OVERCUTTING.

Appellants' Brief at 7.

Since Appellants' issues are interrelated, and challenge the trial court's discretion in granting Ferguson Valley's motion for compulsory nonsuit, we address them together. We recognize:

> The standard of review on appeal from the denial of a motion to remove a compulsory nonsuit is as follows:
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> > The plaintiff must be allowed the benefit of all favorable evidence and reasonable inferences arising therefrom, and any conflicts in the evidence must be resolved in favor of the plaintiff. Further, [i]t has been long settled that a compulsory nonsuit can only be granted in cases where it is clear that a cause of action has not been established. However, where it is clear a cause of action has not been established, a compulsory nonsuit is proper. We must, therefore, review the evidence to determine whether the order entering judgment of compulsory nonsuit was proper.

Braun v. Target Corp., 983 A.2d 752, 764 (Pa. Super. 2009), *appeal denied*, 987 A.2d 158 (Pa. 2009). "This Court will reverse an order denying a motion to remove a nonsuit only if the court abused its discretion or made an error of law." ***Brinich v. Jencka***, 757 A.2d 388, 402 (Pa. Super. 2000) (citation omitted), *appeal denied*, 771 A.2d 1276 (Pa. 2001).

Pennsylvania Rule of Civil Procedure Rule 230.1 governs compulsory nonsuits, and provides in pertinent part:

> **Rule 230.1. Compulsory Nonsuit at Trial**
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> (a)(1) In an action involving only one plaintiff and one defendant, the court, on oral motion of the defendant, may enter a nonsuit on any and all causes of action if, at the close of the plaintiff's case on liability, the plaintiff has failed to establish a right to relief.

> (2) The court in deciding the motion shall consider only evidence which was introduced by the plaintiff and any evidence favorable to the plaintiff introduced by the defendant prior to the close of the plaintiff's case.
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> (c) In an action involving more than one defendant, the court may not enter a nonsuit of any plaintiff prior to the close of the case of all plaintiffs against all defendants. The nonsuit may be entered in favor of
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> (1) all of the defendants, or
>
> (2) any of the defendants who have moved for nonsuit if all of the defendants stipulate on the record that no evidence will be presented that would establish liability of the defendant who has moved for the nonsuit.

Pa.R.C.P. 230.1(a)(1)-(2), (c).

Here, the trial court explained:

> We granted [Ferguson Valley's] Motion for a Compulsory Nonsuit at the close of [Appellants'] case because [Appellants] failed to present any evidence demonstrating the identity of the person or persons who cut the trees that were outside of the approved logging area. [Appellants] also failed to present any evidence demonstrating the identity of the person or persons who cut trees which were too small and not to be cut within that area.
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> We may only enter a compulsory nonsuit in a clear case, after giving [Appellants] the benefit of all evidence in their favor and all reasonable inferences therefrom. Volpe v. Atlantic Crushed Coke Co., 208 Pa.Super. 11, 14, 220 A.2d 393, 395 (1966). [Appellants] sued [Ferguson Valley] for conversion. No one, including [Appellants'] expert forester and timber appraiser, nor [Ferguson Valley], could identify the person or persons who cut down the trees. In fact, Defendant Eric Eminhizer, who was called in [Appellants'] case in chief as if on cross, testified that he went to an agent of the [Appellants] and informed him that someone else (and not [Ferguson Valley]) was cutting down trees on the property. [Appellants'] agent replied that those persons were cutting trees for the [Appellants]. *See* Notes of

> Testimony dated [March 25, 2013] (N.T.) at 80-82. Eminhizer testified that he watched [Appellants'] tree cutters actually cut down trees and haul them away, trees that he had intended to cut himself. N.T. at 82-83.
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> [Appellants] also offered the testimony of Frank Krammes, who attempted to testify that he questioned people regarding who they were working for, but that testimony was inadmissible hearsay, and Mr. Krammes was not able to identify where exactly these people were cutting down trees on [Appellants'] expert's map. N.T. at 119-23.
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> [Appellants] wish to pin liability on [Ferguson Valley] because the trees which were improperly cut were either next to or within [Ferguson Valley's] approved timber section, therefore giving rise to an inference that it must have been [Ferguson Valley] who did it. This is simply not enough evidence to establish that [Ferguson Valley was] the perpetrator. Without any evidence of who actually cut these trees, together with evidence that other loggers were working on the property with the knowledge and consent of [Appellants], we conclude that we properly entered a compulsory nonsuit in this matter and that [Appellants'] Motion [to remove the compulsory nonsuit] must be denied.

Trial Court Opinion, 7/29/13, at 1-3.

Conversion is defined under Pennsylvania law as: "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." ***McKeeman v. Corestates Bank, N.A.***, 751 A.2d 655, 659 n.3 (Pa. Super. 2000) (citation omitted). On appeal, Appellants cite the testimony of their forestry expert, Jeffrey Hutchinson, neighboring landowner Frank Krammes, and general manager, Robert Feldman, to support their contention that they presented "a prima facie case concerning Ferguson Valley's overcutting beyond designated cutting blocks and with

respect to Ferguson Valley's cutting of trees smaller than specified in the parties' contract." Appellants' Brief at 13. Because our review of the record comports with the trial court's analysis, we cannot agree.

At trial, Appellants called forestry expert, Jeffrey Hutchinson, who testified that he "performed a timber audit for" Appellants in November of 2002, approximately midway through Appellants' contract with Ferguson Valley. N.T., 3/25/13, at 9, 11. During his audit, Mr. Hutchinson found "the Bear Mountain [timber] blocks 9 and 10 were areas of great concern [and that] [i]t seemed to be that the cutting ranged…all over the mountain in various places outside of the blocks such as they were laid out in the contract" with Appellants. *Id.* at 12. Mr. Hutchinson further testified, "there were a couple [of] areas where…there was significant cutting of smaller trees below what we felt the diameter…limit should have been." *Id.* at 13. Mr. Hutchinson stated that "236 acres" had been "harvested outside [of] the [timber] blocks" for "an interim damage figure" of $224,000, "appl[ying] the sale price of $950 per acre." *Id.* at 13-14.

Mr. Hutchinson performed a second larger audit "from July to September of 2003." *Id.* at 15. Mr. Hutchinson explained that blocks 9 and 10 were the areas where "the overcutting that's at issue in this case occurred[.]" *Id.* at 26. Mr. Hutchinson explained that "within especially block 9 and to some extent block 10…there was cutting that occurred outside of the boundary as it was laid out in block 9 and 10[.]" *Id.* at 30. He further testified that "the cutting on...primarily block 4 area was

excessive in relation to the specified diameter limit of the contract." *Id.* at 46.

On cross-examination, Mr. Hutchinson was asked if he had ever seen Ferguson Valley "cut any of the trees" that he reported as overcut in his report. *Id.* at 52. Mr. Hutchinson responded that he had "never met them out on the property." *Id.* Mr. Hutchinson conceded that there were "other leaseholders operating on [Appellants'] property," and that he saw "other activity on the property." *Id.* at 53. Significantly, Mr. Hutchinson admitted that he did not know "who cut the trees for which [he] [gave] an opinion for [damages]." *Id.* at 60.

Appellants next called defendant/appellee Eric Eminhizer as on cross. Mr. Eminhizer testified to being a partner in Ferguson Valley along with Dorothy I. Colony and Charles M. Colony. *Id*. at 64. Mr. Eminhizer testified that he "went to check on the area" he wanted to cut, and "heard a skidder running." *Id*. at 80, *see also id*. at 99-100. Mr. Eminhizer testified that he "ran right to" Appellants' office to tell them "you got timber trespassers." *Id*. Mr. Eminhizer stated:

> I ran to them on their behalf to tell them there was someone cutting on them, and they came to say, well, they're cutting our timber for us.

Id. at 82.

Appellants also called neighboring landowner, Frank Krammes. Mr. Krammes testified to observing "timbering operations in the vicinity of blocks

9 and 10." *Id*. at 118. Mr. Krammes testified that he confronted "the people who were operating", and attempted to testify to what they said, but Ferguson Valley objected on the basis of hearsay, and the trial court sustained the objection. Appellants argue that Mr. Krammes' testimony was admissible as an exception to hearsay under Pa.R.E. 803(25)(D), which provides for a statement's admissibility where "the statement is offered against an opposing party and was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." We initially note that Appellants have not cited any case law to support their argument, such that this argument is undeveloped and waived. ***See, e.g., Commonwealth v. Genovese***, 675 A.2d 331 (Pa. Super. 1996) (portion of appellate brief must be developed with pertinent discussion of point which includes citations to relevant authority). Further, Appellants presented no evidence – other than Mr. Krammes bare assertions – that the statements were in fact made by Ferguson Valley's "agents or employees" as required by the hearsay exception in Pa.R.E. 803(25)(D).

Our review of Mr. Krammes' testimony indicates that Mr. Krammes made broad assertions about observing timbering operations by Ferguson Valley. Mr. Krammes' testimony was vague; he did not testify as to any specific dates for his observations, other than recalling they occurred during the four year contract period between the parties, and he did not describe or detail the individuals who he perceived as overcutting the trees. N.T., 3/25/13, at 116-124. Also, Mr. Krammes conceded that in his deposition, he

had been unable to specify on a field map where he had observed the purported Ferguson Valley workers harvesting trees outside of the designated timber blocks. *Id.* at 122-123. With regard to Mr. Krammes referencing statements made by "people that were operating under authority of Ferguson Valley", the trial court properly excluded the testimony as inadmissible hearsay.

Appellants' general manager, Robert Feldman, testified that on one occasion "last fall" he saw Mr. Eminhizer point to a tree stump outside of the contracted area and say that he had "cut that" tree. *Id.* at 126-129. In stating "last fall" at the March 25, 2013 non-jury trial, Mr. Feldman was referencing 2012 – almost seven (7) years after the filing of Appellants' August 31, 2005 complaint. Further, in his rebuttal testimony, Mr. Eminhizer denied cutting "any trees anywhere on [block] 9 or 10, [or] anywhere else on [Appellants'] property[.]" *Id.* at 132.

In opposing Ferguson Valley's oral motion for nonsuit, Appellants' counsel explained that Appellants' theory of liability was that Ferguson Valley "allowed others working under [Ferguson Valley's] contract to go out and over-cut those [timber] blocks, [Ferguson Valley] put nothing in place to make certain that they stayed within the perimeters of those blocks; and as a result of…the failure of those [lack of] controls, those people cut outside the blocks and converted timber owned by [Appellants]." *Id.* at 135. Appellant's counsel argued, "the proof [supporting Appellants' theory of liability] is that the [over]cutting was done at the same time [as Ferguson

Valley's contractually approved cutting within the timber blocks was being performed]. There was no other cutting being done other than the cutting being done at that time by the people working under the authority, the contract between Ferguson Valley and [Appellants]. And so one can conclude that that timbering could have been done by no one else but those folks…" *Id.*

After a brief recess to consider Appellants' motion for nonsuit, the trial court granted the nonsuit in part. Specifically, the trial court determined that "[i]t is my considered opinion that [Appellants] [have] not proved the identity of the person who did the cutting outside [of] the approved area, the area contemplated by the contract; and furthermore...[Appellants] have not proven by a preponderance of the evidence the identity of the person who cut trees that were too small." *Id.* at 140-141.

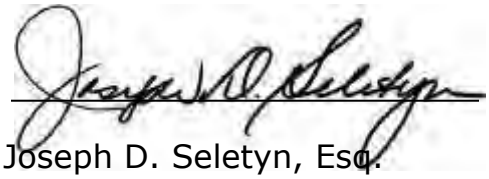
Given the foregoing, we discern no abuse of discretion by the trial court. The trial testimony presented during Appellants' case-in-chief did not satisfy Appellants' burden of proving that Ferguson Valley, or any of their employees or agents, were the parties that improperly harvested trees. This failure is fatal to Appellants' action. ***Dietzel v. Gurman,*** 806 A.2d 1264, 1268 (Pa. Super. 2002) (internal citation omitted) ("A trial court's entry of compulsory nonsuit is proper where the plaintiff has not introduced sufficient evidence to establish the necessary elements to maintain a cause of action, and it is the duty of the trial court to make a determination prior to submission of the case to a jury."); ***see also Pittsburgh Const. Co. v.***

Griffith, 834 A.2d 572, 581 (Pa. Super. 2003) (In a common law action for conversion, a plaintiff must prove that the defendant deprived the plaintiff of his right to a chattel, or that the defendant interfered, without plaintiff's consent or justification, with the plaintiff's use or possession of the chattel.); ***Feingold v. Hendrzak,*** 15 A.3d 937, 942-43 (Pa. Super. 2011) (emphasis and internal citation omitted) ("Blind suspicions and unsupported accusations simply do not state a cause of action pursuant to any theory of tort recovery."). Because are not persuaded that the trial court abused its discretion, we affirm the trial court's denial of Appellants' motion to remove the compulsory nonsuit of Appellants' claims that Ferguson Valley overcut trees outside of designated blocks and cut undersized trees.

Order affirmed.

Judge Stabile concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/22/2014