SUPREME COURT OF KENTUCKY
2014-SC-000083-D

LARRY C. PENIX — APPELLANT

VS.

APPELLANT'S BRIEF

BARBARA DELONG — APPELLEE

****

On Discretionary Review from the Kentucky Court of Appeals:
NO. 2011-CA-0001526-MR
NO. 2011-CA-0001529-MR

Appeal from: Martin Circuit Court
09-CI-00190
Hon. John David Preston

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4 day of February, 2015, ten (10) originals of this brief were served via Federal Express upon Hon. Susan Stokley Clary, Clerk of the Supreme Court, Room 209, 700 Capital Ave., Frankfort, KY 40601 with one (1) copy served by regular mail on the following: Hon. R. Eric Mills, PO Box 2057 Inez, KY 41224; Hon. John David Preston, Judge, Martin Circuit Court; and Hon. Samuel Givens, Clerk, Court of Appeals of Kentucky, 360 Democratic Drive, Frankfort, KY 40601, on January 1, 2015.

KYLE R. SALYER

INTRODUCTION

Appellant, Larry C. Penix, appeals from the Court of Appeals' opinion affirming the Martin circuit court's award of damages to the Appellee in a timbering case. Appellant should have been granted summary judgment and/or a directed verdict as the timbering on Appellee's land was performed by an independent contractor, against whom the Appellee received a judgment.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument because when last he relied on the Court of Appeals already having considered this exact issue on two occasions (see *Worley v. Dugger*, 2007 WL 4373120 (Ky.App.)[1] and *Meenach v. Denlinger*, 2005 WL 1994070 (Ky.App.))[2][3] the Court declined to follow their own precedent.

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[1] ROA at 242 - 247.

[2] ROA at 248 - 251.

[3] Both opinions were cited at the trial court level pursuant to 76.28(4)(c) as they were the only two opinions dealing with independent contractors and KRS 364.130.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This is a timber trespass case that was tried before the Martin Circuit Court on May 31, 2011. The facts of this case when Appellant's motion for summary judgment was filed showed that Mr. Penix engaged Mr. Hunt as an independent contractor to cut his timber.

1. Pursuant to the contract signed on January 13, 2007, Mr. Penix had no right of control over the details of the work performed by Mr. Hunt;[4]
2. Mr. Hunt was engaged in the business of logging or timbering;[5]
3. Mr. Hunt supplied the supplies the instrumentalities and tools to do the job;[6]
4. Mr. Hunt was employed for a short time and not on an ongoing basis;[7]
5. Mr. Hunt paid Mr. Penix a percentage of the total amount gained from the job;[8]
6. logging and timbering is not part of the regular business of Mr. Penix;[9]
7. the parties did not believe that Mr. Penix was Mr. Hunt's boss;[10] and
8. Mr. Penix is not in the business of logging.[11]

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[4] Exhibit 1.

[5] Deposition of Gerald Delong, p. 31, Ln. 4-6. (Note: The depositions were not numbered by the Clerk's office at the time Appellant reviewed the record.

[6] Deposition of Gerald Delong, p.14, ln 22; p 15, ln. 3.

[7] Deposition of Larry C. Penix, p. 27, ln. 9-10.

[8] ROA 241.

[9] Deposition of Larry C. Penix, pp. 7-8.

[10] ROA 241.

[11] Deposition of Larry C. Penix, pp. 7-8.

Appellant filed a motion for summary judgment based on the Appellant, landowner not being held liable for any of his contractors actions. This motion was denied[12] and the case proceeded to a bench trial.

Testimony at trial revealed that:

1. the Appellant does not own nor has he ever owned a timber company;[13]
2. the Appellant did not supervise Mr. Hunt;[14]
3. Mr. Hunt used his own equipment;[15]
4. the Appellant did not personally cut any trees;[16]
5. Joe Hunt Jr. was a professional logger with many years of experience;[17]
6. the properties shared a boundary line that was not completely marked by a fence or a discernible feature;[18]
7. the logging process was a shorter job that only lasted a number of months as opposed to an ongoing, permanent job;[19]
8. it takes a certain amount of skill to be in the logging profession;[20]

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[12] ROA at 228.

[13] VR 9:12:10; 10:14:55; 11:32:43.

[14] VR 9:12:38; 11:31:02; 11:31:09; 11:31:15.

[15] VR 9:12:47; 10:15:17; 10:17:15; 10:40:52; 11:31:48.

[16] VR 9:13:30.

[17] VR 9:13:50; 10:11:30; 10:11:48; 10:40:42; 10:40:42; 11:31:29.

[18] VR 9:14:22; 9:14:34.

[19] VR 10:10:39.

[20] VR 10:41:22.

9. the Appellant got a professional company Westek Development Incorporated to do a survey to be able to convey the proper boundary lines;[21]
10. the deed to the Appellant's property was given to the surveyor in order for them to get the appropriate boundaries;[22]
11. William Penix walked the boundaries with the surveyor, Westek Development;[23]
12. William Penix showed the logger where Westek placed the stakes for the correct boundary line;[24]
13. William Penix was not asked to go with either the surveyor or the logger by Larry Penix;[25]
14. William Penix had no ownership nor ability to bind the property;[26]
15. William Penix was only a witness to the contract that was signed by Larry Penix and Joe Hunt Jr;[27]
16. the financial arrangement between the logger and Larry Penix was a percentage deal as opposed to an hourly rate;[28]
17. William Penix received no money from the logging of the appellant's land;[29]

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[21] VR 10:45:53.

[22] VR 10:47:20; 11:15:27.

[23] VR 10:48:10; 11:16:56.

[24] VR 10:48:13.

[25] VR 11:30:45; 11:30:53.

[26] VR 11:30:28.

[27] VR 10:56:20.

[28] VR 10:57:52; 11:32:32.

[29] VR 11:30:17.

18. William Penix testified that he was not sent by Larry Penix on Larry's behalf and William at no time led Mr. Hunt to believe that he was sent by Larry Penix.[30]
19. William Penix also testified that he was not a landowner and had no power to bind other owners with his actions;[31]
20. the appellant's expert testified that typically a landowner has no right to control the manner in which logs are removed other than to say don't cut this tree down;[32]
21. Typically the instruments used in timbering are provided by the contractor and not the landowner.[33]

The trial court also relied upon inadmissible statements to determine that Larry Penix should be subjected to liability including: Mr. Hunt's alleged statement that Mr. Penix told him to cut the ribboned area as opposed to the area marked with survey pins;[34] Mr. Hunt's alleged statement that Larry and William Penix told the logger that the ridge top was the boundary line and[35] Mr. Hunt's alleged call to Larry Penix where Appellant told Mr. Hunt to keep cutting the lumber.[36]

After denying the Appellant's motion for directed verdict, **the court found that Joe Hunt, Jr. was an independent contractor.**[37] The court also **found that there was**

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[30] VR 11:30:45; 11:30:53.

[31] VR 11:30:28.

[32] VR 12:00:35.

[33] VR 12:00:22.

[34] ROA at 297.

[35] ROA at 298.

[36] *Id.*

[37] ROA at 316.

no way to find that Appellant knowingly acted with the intent to convert the Appellant's timber to his own use.[38]

Timely motions to alter amend or vacate were filed[39] and denied[40] and these appeals followed. The Court of Appeals rendered its decision on January 24, 2014 and this Court granted the Appellant's Motion for Discretionary Review on December 10, 2014.

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[38] ROA at 317 - 318.

[39] ROA at 322 - 333.

[40] ROA at 334.

ARGUMENT

I. **The court erred when it denied Penix's motion for summary judgment as to Joe Hunt's status of an independent contractor.**

Method of Preservation: Defendant's Motion for Summary Judgment - ROA 235 - 252.

Standard of Review:

Summary judgment procedure authorized by CR 56.01 et seq. is intended to expedite the disposition of cases and if the grounds provided by the rule are established, it is the responsibility of the trial judge to render an appropriate decision." *Haney v. Monskey*, 311 S.W.3d 235, 239 (Ky. 2010).; citing *Pile v. City of Brandenburg*, 215 S.W.3d 36, 39 (Ky. 2006). Summary judgment is generally appropriate where the pleadings, depositions, answers to interrogatories, stipulations and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56.03. This Court has also held that summary judgment is proper where the movant shows that the adverse party could not prevail under any circumstances. *Steelvest, Inc., Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In either case, a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial. *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992). A "trial court must then view the record in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006) (quoting *Steelvest*, 807 S.W.2d at 480).

The liability of a landowner for acts of independent contractors is limited to those instances where the acts of the independent contractor(s) constitutes a nuisance or the acts themselves are inherently dangerous. *Clemons v. Browning,* 715 S.W.2d 245, 246 (Ky.App.,1986). In *Miles Farm Supply v. Ellis,* 878 S.W.2d 803, 805 -806 (Ky.App., 1994) the Court of Appeals held that though "the term inherently dangerous is not limited to the use of explosives; we are reluctant, however, to expand the term to include a comparatively passive activity." *Id.* at 805. Essentially, if an employer of an independent contractor is held liable on the basis of the nature of the work performed, his own negligence is immaterial. *Id.* Hence, the employer's liability is premised on strict liability.

In *Jennings v. Vincent's Administratrix,* 284 Ky. 614, 145 S.W.2d 537, 541 (1940), the court held that in an independent contractor situation, if the work can be accomplished without probable injury except in the event of negligence, no liability attaches to the owner. *Id.,* 145 S.W.2d at 541. Later, in *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145, 152 (Ky.,2003) the court held that the employer must know, or have reason to know, that a special danger exists which is inherent, or natural, to the work. The Court went on to hold that to extend the meaning of inherently dangerous would cause the courts to become involved in a circuitous analysis which would ultimately result in the erosion of our basic legal premise that one who employs an independent contractor is not liable for the latter's negligent acts. *Id.*

In *Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc.,* 91 S.W.3d 575 (Ky.,2002) the Supreme Court held that in determining

whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business. *Id.* at 579.

The Court acknowledged no one of [the above-mentioned] factors is determinative, and each case must be decided on its own particular facts. *Id.*; citing *Locust Coal Co. v. Bennett,* Ky., 325 S.W.2d 322, 324 (1959).

The facts of this case when Appellant's motion for summary judgment was filed showed that Mr. Penix engaged Mr. Hunt as an independent contractor to cut his timber.

(a) Pursuant to the contract signed on January 13, 2007, Mr. Penix had no right of control over the details of the work performed by Mr. Hunt;[41]

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[41] Exhibit 1.

(b) Mr. Hunt was engaged in the business of logging or timbering;[42]

(c) Commercial logging or timbering is usually performed by a specialist, without supervision;

(d) logging or timbering requires a certain amount of skill as an occupation;

(e) Mr. Hunt supplied the supplies the instrumentalities and tools to do the job;[43]

(f) Mr. Hunt was employed for a short time and not on an ongoing basis;[44]

(g) Mr. Hunt paid Mr. Penix a percentage of the total amount gained from the job;[45]

(h) logging and timbering is not part of the regular business of Mr. Penix;[46]

(i) the parties did not believe that Mr. Penix was Mr. Hunt's boss;[47] and

(j) Mr. Penix is not in the business of logging.[48]

The facts of this case were clear that Mr. Penix needed his timber cut. In 2005, Mr. Penix had a survey performed by a professional detailing the boundaries of his land.[49] In 2007, Mr. Penix engaged another professional, Mr. Hunt, to cut his timber, the only responsibility Mr. Penix had being to let the logger know where his boundaries

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[42] Deposition of Gerald Delong, p. 31, Ln. 4-6. (Note: The depositions were not numbered by the Clerk's office at the time Appellant reviewed the record.

[43] Deposition of Gerald Delong, p.14, ln 22; p 15, ln. 3.

[44] Deposition of Larry C. Penix, p. 27, ln. 9-10.

[45] ROA 241.

[46] Deposition of Larry C. Penix, pp. 7-8.

[47] ROA 241..

[48] Deposition of Larry C. Penix, pp. 7-8.

[49] Deposition of Larry C. Penix, p 28-30.

were. Mr. Penix gave Mr. Hunt the survey and had no other input into his work. If the plaintiff was damaged, it was due to the actions of Mr. Hunt and the judgment the appellant was given against Hunt reflects the same. We now also have the benefit of hindsight and the trier of fact also found that Mr. Hunt was an independent contractor and as such, the Appellant/landowner has no responsibility for the contractors actions.

II. **The court erred when it denied Penix's motion for directed verdict at the close of plaintiff's case as to Joe Hunt's status of an independent contractor.**

Method of preservation: Plaintiff's Motion for directed verdict at the close of evidence.[50]

Standard of Review: In *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461-62 (Ky.1990), the Supreme Court stated:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "`palpably or flagrantly' against the evidence so as `to indicate that it was reached as a result of passion or prejudice.'" *NCAA v. Hornung,* 754 S.W.2d 855, 860 (Ky.1988). If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed. (Internal citations omitted).

See also *USAA Casualty Insurance Co. v. Kramer*, 987 S.W.2d 779 (Ky.1999), and *Bierman v. Klapheke*, 967 S.W.2d 16 (Ky.1998).

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[50] VR 12:59:45-1:03:45.

At trial, there was no testimony that controverted that Joe Hunt, Jr. was an independent contractor or that the Appellant did anything with regard to the boundary lines other than have them surveyed and give the survey to Joe Hunt, Jr.

III. **The Court erred in admitting evidence of what a deceased, undeposed witness (Joe Hunt, Jr.) told the plaintiff's witnesses, as the statements did not fall within a hearsay exception.**

Method of Preservation: Trial objections.[51]

The Appellant objected several times to the Plaintiff offering hearsay testimony by the late Joe Hunt, Jr. that tended to subject the Appellant to liability for any actions on the part of the logging contractor. KRE 804 (3) states that:

> A statement which was at the time of its making so far contrary to the **declarant's** pecuniary or proprietary interest, or so far tended to subject **the declarant** to civil or criminal liability, or to **render invalid** a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. Emphasis added.

The Code provides that "no person shall testify for himself concerning any verbal statement of, or any transaction with, or act done or omitted to be done by, *** a person who is dead." *Newton's Ex'r v. Field* 32 S.W. 623, 625 (Ky.App. 1895). Bland's testimony as to his transactions with Proctor, Randolph's testimony, the letter which Proctor (the deceased) sent Bland on June 22nd, were not admissible as substantive evidence. *Illinois Central Railroad Company v. Winslow*, 119 Ky. 877, 84 S.W. 1175, 27 Ky.Law Rep. 329; *Sparks v. Maeschal*, 217 Ky. 235, 289 S.W. 308; *Chesapeake & O. R. Co. v. Saulsberry*, 262 Ky. 31, 88 S.W.2d 949.

> Furthermore, the letter from Proctor to Bland, the copy of the letter which Proctor was supposed to have written to Downs, and also the two bills of lading came into Bland's possession through his transactions and communications with Proctor. Therefore, Bland could not testify as to any

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[51] VR 9:53:27; 9:57:27; 9:59:41 – 10:00:17 – 10:01:13; 10:02:00; 10:02:36; 10:05:14.

> of these transactions and communications under section 606, subsection 2 of the Civil Code of Practice, because Proctor was dead.
>
> *Wabash Elevator Co. v. Illinois Cent. R. Co.*, 130 S.W.2d 76, 78 (Ky.App. 1939)

This court has repeatedly held that ... no person shall testify for himself concerning any verbal statements or any transactions with or any act done or omitted to be done by one who is dead. *Fortney v. Elliott's Adm'r,* 273 S.W.2d 51, 53 (Ky.1954)

It is clear that any statements that subjected anyone other than Mr. Hunt to liability are to be excluded from trial as hearsay. As was explained at trial, it is impossible for the Appellant to cross examine a dead person. If the Appellee wanted this information available at trial then she should have taken Mr. Hunt's deposition and afforded the Appellant an opportunity to cross examine Mr. Hunt. Appellee chose not to do that and Mr. Penix was prejudiced at trial. At best, all these self serving statements did was to bolster a defense that Mr. Hunt was allegedly misled by the Appellant and should not have been held accountable. These statements are thus precluded from being entered into evidence and without it, the Appellee's claims cannot be substantiated.

IV. The court did not err in denying treble damages and costs.

Kentucky courts have long held "that for purposes of appellate review, a finding of fact of a trial judge ranks in equal dignity with the verdict of a properly instructed jury, *i.e.,* if supported by substantial evidence, it will be upheld, otherwise, it will be set aside as 'clearly erroneous.' " *Owens–Corning Fiberglas Corp. v. Golightly,* 976 S.W.2d 409, 414 (Ky.1998) (citations omitted). " '[S]ubstantial evidence' means evidence of substance and relevant consequence having the fitness to induce conviction in the

minds of reasonable men." *Id.* (citations omitted). A trial court's division of marital property "will be reviewed for abuse of discretion, namely, 'whether the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.' " *Rice v. Rice,* 336 S.W.3d 66, 68 (Ky.2011) (citations omitted).KRS 364.130 provides that treble damages and costs are incurred when an intent to convert is found. KRS 364.130(2) provides that treble damages can be avoided if someone wrongfully cuts trees down, with an intent to convert, but places the rightful owner on notice before hand.

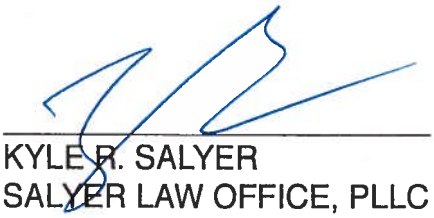
Here the fact finder, found that there was no intent to convert under the statute and awarded damages under general trespass law. If no intent to convert was found then no recovery can be made pursuant to the statute.

CONCLUSION

When the Martin Circuit Court determined that Joe Hunt, Jr. was an independent contractor, the Appellant should have been free from liability. When the Martin Circuit Court determined that there was no intent to convert the Appellee's timber, the issue of trebel damages was decided.

The Appellant prays that the trial court's Judgment be vacated or remanded to the Martin Circuit Court for entry of a summary judgment on liability. In the alternative, the Appellant prays that the Court of Appeals' decision to impose trebel damages should be reversed.

Respectfully submitted,



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