RENDERED: November 12, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2001-CA-002549-MR

ROBERT APPLEGATE — APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 99-CI-00099

WILLIAM CROPPER; NITA CROPPER;
WALTER TAYLOR; KIMBERLY TAYLOR;
REBECCA POWELL AND THELMA FLIPPIN,
CO-EXECUTORS OF THE ESTATE OF GALE CLATON — APPELLEES

AND

NO. 2001-CA-002647-MR

WILLIAM CROPPER AND
NITA CROPPER — CROSS-APPELLANTS

v.

CROSS-APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 99-CI-00099

ROBERT APPLEGATE; WALTER TAYLOR;
KIMBERLY TAYLOR; REBECCA POWELL AND
THELMA FLIPPIN, CO-EXECUTORS OF THE
ESTATE OF GALE CLATON — CROSS-APPELLEES

AND

NO. 2002-CA-002168-MR

ROBERT APPLEGATE — APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 99-CI-00099

REBECCA POWELL AND THELMA FLIPPIN, CO-EXECUTORS OF THE ESTATE OF GALE CLATON; WILLIAM CROPPER; NITA CROPPER; WALTER TAYLOR; KIMBERLY TAYLOR — APPELLEES

OPINION
AFFIRMING APPEAL NO. 2001-CA-002549-MR;
REVERSING AND REMANDING CROSS-APPEAL NO. 2001-CA-002647-MR;
AND AFFIRMING APPEAL NO. 2002-CA-002168-MR

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[1]

TAYLOR, JUDGE: Robert Applegate ("Applegate") brings Appeal No. 2001-CA-002549-MR from a judgment entered August 21, 2001, after a bench trial by the Lewis Circuit Court, awarding treble damages against him for the wrongful cutting and removal of

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

timber under Kentucky Revised Statutes (KRS) 364.130(1). William Cropper and Nita Cropper ("the Croppers") bring Cross-Appeal No. 2001-CA-002647-MR from the same judgment denying their claim for an award of attorney fees under KRS 364.130(1). Applegate also brings Appeal No. 2002-CA-002168-MR from a separate post-judgment order entered by the Lewis Circuit Court on September 21, 2002, ordering Applegate to pay $200.00 in attorney's fees to Croppers' attorney for failure to comply with post-judgment discovery requests and denying Applegate's Rule 60.02 challenge to the judgment in favor of Gale Claton[2] entered on August 21, 2001 (Appeal No. 2001-CA-002549). We affirm Appeal No. 2001-CA-002549-MR, reverse and remand Cross-Appeal No. 2001-CA-002647-MR, and affirm Appeal No. 2002-CA-002168-MR.

In May 1999, Applegate purchased land in Lewis County for the purpose of cutting and removing timber located thereon. Sometime thereafter, Applegate also acquired the right to cut timber from property owned by Walter Taylor and Kimberly Taylor.[3] Applegate's purchase from the Taylors included the right to cut timber located at their residence, as well as the timber rights to a separate six-acre tract of land the Taylors owned. At the

[2] Applegate filed a third-party complaint against Gale Claton who then filed a cross-claim against Applegate for wrongfully cutting and removing timber from his property. Claton died after the appeal was filed in this action and his Executors have been substituted as parties to the appeal.

[3] Walter and Kimberly Taylor were also named third-party defendants in Applegate's third-party complaint in the original action. However, the claims against the Taylors were dismissed in the August 21, 2001, judgment of the Lewis Circuit Court.

time of the sale of the timber rights, Walter Taylor advised Applegate that he did not know exactly where the six-acre tract was located; however, Taylor pointed Applegate in what he thought was the general direction of the tract, and told Applegate that he was free to remove the timber if he was able to locate the six-acre tract.

Thereafter, Applegate met with Gale Claton, a neighbor of both the Taylors and the Croppers. Claton gave Applegate permission to traverse his property to reach the timber on an adjacent parcel of land. Applegate and his employees inspected the adjacent parcel and, having determined that it was the Taylor's six-acre tract, Applegate then began to cut and remove the timber. Shortly afterward, Applegate was informed by the Croppers that the land upon which he was cutting the timber actually was owned by them.

The Croppers filed an action against Applegate for the wrongful cutting and removal of timber from their property in the Lewis Circuit Court on June 15, 1999. A temporary restraining order was entered against Applegate by the court pending the outcome of the litigation. The Taylors and Claton were subsequently joined by Applegate as third-party defendants. Thereafter, Claton filed a cross-claim against Applegate, alleging that Applegate also removed several trees from Claton's property and caused damage to the surface of his land.

The matter was tried by the court without a jury. On August 21, 2001, the Lewis Circuit Court entered Findings of Fact, Conclusions of Law, and Judgment. The court concluded Applegate had cut and removed timber from the Croppers' property without their permission and without title or color of title to the property. The court also found Applegate had cut and removed several trees from Claton's property without Claton's permission. However, the court found that Applegate had been granted permission by Claton to traverse his property in order to reach the timber on the adjacent tract.

The circuit court held that the Croppers and Claton had both proved their cases by a preponderance of the evidence and therefore, satisfied the requirements of KRS 364.130(1). Applegate was ordered to pay treble damages to the Croppers totaling $34,539.30 and treble damages to Claton totaling $4,800.00. Applegate was also ordered to pay the Croppers' and Claton's "legal costs," exclusive of their attorney's fees.

Following the circuit court's decision, Applegate filed a motion to alter, amend, or vacate judgment. The motion was based largely on Applegate's contention that he had "color of title" to the land in question. The Lewis Circuit Court entered an order on October 19, 2001, denying Applegate's motion. The court noted that "[t]he Taylor deed in no way established color of title to the Cropper land which was

actually cut." The court further noted that the evidence clearly established Applegate had failed to take reasonably prudent steps to locate the Taylor six-acre tract before cutting Croppers' timber. Applegate's appeal of this order and judgment and the Croppers' cross-appeal followed.

The second order that has been appealed by Applegate in this case was entered by the Lewis Circuit Court on September 21, 2002. This order arose from two separate post-judgment motions filed by Applegate. On July 29, 2002, the court ordered Applegate to pay $200.00 to Croppers' attorney for failure to timely respond to post-judgment discovery requests. Applegate filed a Rule 59.05 motion in response. Before this motion was heard, Applegate filed a Rule 60.02 motion seeking to set aside Claton's judgment for money damages on the ground of newly discovered evidence.[4] In August of 2002, Applegate had discovered a deed in the Lewis County Clerk's Office whereby Claton had transferred his property to a living trust in 1992. Applegate thus argued that the trust and not Claton was the real party in interest and the judgment for Claton should be set aside.[5] The court considered both motions at a hearing on

[4] This was the judgment entered in August of 2001 (made final by Order entered October 19, 2001), which was on direct appeal to this Court in Appeal No. 2001-CA-002549-MR.

[5] It should be noted that Applegate initiated the third-party complaint against Claton, apparently without reviewing the real estate records in the Lewis County Clerk's Office.

September 20, 2002, and denied them. As concerns the Claton motion, the court held that the evidence supported the judgment on the merits and substituting the trust for Claton would not have changed the result. Applegate appealed this order on October 21, 2002, which was consolidated with the pending appeals, all of which are now before this Court for review.

APPLEGATE APPEAL – NO. 2001-CA-002549-MR

Applegate raises three arguments in his direct appeal of the judgment entered August 21, 2001. We will address each separately.

In his first argument, Applegate contends the Croppers failed to establish the boundary of their property and that the trial court's finding that such boundary was established is clearly erroneous. We disagree.

Our review of this judgment is governed by Ky. R. Civ. P. (CR) 52.01. This rule states that, on appeal, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The Croppers introduced evidence at trial of a search tracing their property's title to 1894. Subsequent deeds were also introduced, as was testimony regarding the boundary line of the property. In fact, Applegate did not produce any evidence

to contradict the Croppers' claim of ownership, nor did he introduce any evidence that the property he cut and removed timber from was in fact the Taylor's six-acre tract. Upon the whole of the evidence, we cannot conclude that the trial court's findings of fact with regards to the Croppers' property boundaries were clearly erroneous.

Applegate's second argument is that the trial court erred in holding that Applegate was without color of title to the six-acre tract of land he cut timber from, and, as such, erroneously awarded the Croppers and Claton treble damages. We again disagree.

KRS 364.130(1) states:

> [A]ny person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing up on the land of another without legal right or without color of title in himself to the timber or to the land upon which the timber was growing shall pay to the rightful owner of the timber three (3) times the stumpage value of the timber and shall pay to the rightful owner of the property three (3) times the cost of any damages to the property . . . .

It is well-established that the term "'[c]olor of title' does not mean title in fact, but appearance of title . . . ." Hurst v. Commonwealth, Ky. App., 125 S.W.2d 772, 774 (1939). In Hurst, a dispute arose between the parties regarding the boundary line between their adjoining parcels of land.

Appellant was convicted of a misdemeanor for cutting down and removing timber. On appeal, appellant claimed that since there was confusion as to the actual boundary between the two properties, he had reason to believe the timber was his, and, thus, had color of title to the timber. The Court agreed, holding that appellant had color of title since "there was a bona fide dispute between the parties and appellant had reasonable grounds to believe that the line claimed by him was the correct one." Id. at 774.

In McDaniel v. Ramsey's Adm'rs, Ky., 204 S.W.2d 953 (1947), the center of the controversy was a deed purportedly obtained through a tax sale. Appellant claimed that the sale, and therefore the deed, was invalid. The Court disagreed, holding that, "[a]ny instrument purporting to convey land and showing the extent of the grantee's claim may afford color of title." Id. at 954. The Court further held:

> Evidences of title such as deeds, etc., purporting to convey title, whether valid or not, under which an entry is made, constitute color of title and accompanied by actual possession evidence possession to the extent of the boundary described therein.

Id. at 954, quoting New York-Kentucky Oil & Gas Co. v. Miller, 187 Ky. 742, 220 S.W. 535, 537 (1920).

These authorities are clearly distinguishable from this case. Here, Applegate had no writing or instrument to

document his title. Applegate purchased the timber rights to a six-acre tract of land from the Taylors without any knowledge of the actual location of the tract. In fact, Applegate did not independently attempt to locate the tract. He did not survey the property, consult topography maps, or complete a title search. There could not have been a dispute regarding the proper boundary between the Croppers' and the Taylors' property because no one knew where the Taylors' property was. As the trial court noted, Applegate failed to take those steps that a reasonable and prudent logger should take to locate property that he intended to remove timber from. We do not believe Applegate can pass this responsibility to a third party. The trial court concluded from the evidence as a whole that Applegate removed timber from the Croppers' property. Applegate has failed to demonstrate that these findings are clearly erroneous.

Finally, Applegate argues Claton mistakenly represented to him that the land from which Applegate cut timber belonged to the Taylors. Applegate contends that since he relied on Claton's statements to his detriment, Claton should be held partially responsible for the damage to the Croppers' property. We disagree.

As noted, CR 52.01 prevents this Court from setting aside the factual findings of the trial court unless those

findings are clearly erroneous. The trial court did not believe Applegate's contention that Claton had mistakenly represented to him the location of the Taylor's property. Similarly, there is nothing in the record, other than the allegations made by Applegate, to indicate that Claton did in fact make such statements. Therefore, the findings of the trial court were not clearly erroneous and will not be set aside.

CROPPER CROSS-APPEAL – NO. 2001-CA-002647-MR

The Croppers argue on cross-appeal that the trial court erred by failing to award attorney fees as "legal costs" under KRS 364.130. We agree with the Croppers' interpretation of the statute and reverse the trial court's ruling on this issue.

KRS 364.130(1) states that an individual who cuts timber on the land of another without legal right or color of title "**shall** pay to the rightful owner . . . any legal costs incurred by the owner of the timber." (emphasis added). In this case, the Croppers prevailed in their action against Applegate and were awarded treble damages as provided by the statute. However, the trial court apparently misconstrued the term "legal costs" and refused to award attorney fees as part of its judgment. The trial court indicated in the judgment that legal

costs do not include attorney fees and those costs must be established by the filing of a Bill of Costs.

Apparently, the trial court confused court costs with legal costs and, thus, misinterpreted the statute. Court costs are defined in CR 54.04 and KRS 453.050. Attorney fees are not court costs. However, our Court has recently examined this issue of whether "legal costs" includes attorney fees under KRS 364.130(1). In King v. Grecco, Ky. App., 111 S.W.3d 877 (2002), we held that an award of attorney fees under KRS 364.130(1) is mandatory. In other words, a trial court is required to award attorney's fees to a party who prevails under this statute. In this case, the trial court had no discretion in not awarding attorney fees to the Croppers once it had determined that Applegate had violated the statute by cutting the Croppers' timber.

However, King requires that any award of attorney fees must be reasonable. Id. On remand, the trial court is directed to determine the reasonableness of the attorney fees sought by the Croppers in this action. The reasonableness of the fees incurred will look to the amount of time involved, the task assigned, and the degree of difficulty for the services provided under the circumstances of this case. See Dingus v. FADA Service Co., Inc., Ky. App., 856 S.W.2d 45 (1993). It should be noted that on remand, consideration of an award of attorney fees

shall be limited to the Croppers' claim only. Since Claton did not appeal the denial of attorney fees in his judgment, the denial of those fees will not be reconsidered by the trial court on remand.

APPLEGATE APPEAL – NO. 2002-CA-002168-MR

Applegate argues that since Claton filed his cross-claim against Applegate in his individual capacity rather than in his capacity as trustee of the "Gale J. Claton Trust," he was not a real party in interest. We disagree. CR 17.01 states that "[e]very action **shall** be prosecuted in the name of the real party in interest . . . ." (emphasis added). The definition of the term "real party in interest" has been previously addressed by this Court. In Brandon v. Combs, Ky. App., 666 S.W.2d 755, 759 (1984), the Court held that "[t]he real party in interest is the one who is entitled to the benefits of the action upon the successful termination thereof." Likewise, in Gay v. Jackson County Board of Education, Ky., 205 Ky. 277, 265 S.W. 772, 773 (1924), the Court held that "[t]he 'real party in interest' is one who has actual and substantial interest in the subject-matter as distinguished from one who has only nominal interest therein." In Taylor v. Hurst, Ky. App., 186 Ky. 71, 216 S.W. 95 (1919), the Court further held that "'[t]he test of whether one is the real party in interest, within the meaning of the

statute, is: Does he satisfy the call for the person who has the right to control and receive the fruits of the litigation?'" Id. at 96, quoting Gross v. Heckert, 120 Wis. 314, 97 N.W. 952, (Wis. 1904).

With regard to a person acting as trustee of an express trust, CR 17.01 states that a "trustee of an express trust . . . may bring an action without joining the party or parties for whose benefit it is prosecuted."

Both parties agree that when Applegate cut timber from Claton's property, the property was held in the name of the trust. Claton was (and remained up to the date of the trial) the sole settlor, trustee, and beneficiary of the trust. As such, Claton was the only person "who is entitled to the benefits of the action upon the successful termination thereof." Brandon, 666 S.W.2d at 759. Likewise, Claton's status as sole trustee and sole beneficiary make him the only individual with an "actual and substantial interest in the subject-matter" of the trust. Gay, 265 S.W. at 773. Thus, the question of whether Claton is the individual who has control over and would receive the benefits of this litigation must be answered in the affirmative. See Taylor, 216 S.W. 95.

The Court would again note that Applegate initiated this action against Claton without determining the status of the legal title to the property that he wrongfully removed timber

from. Applegate also went to trial without raising this issue. Only in hindsight after losing at trial did he check the county clerk's records and discover the actual status of Claton's title. Under these circumstances, we believe Applegate is also estopped from now raising this technical defect.

For the foregoing reasons, the August 21, 2001, judgment of the Lewis Circuit Court is affirmed in part and reversed in part and this matter is remanded for proceedings not inconsistent with this opinion; and the September 21, 2002, order is affirmed.

ALL CONCUR.

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