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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002217-MR
&
NO. 2008-CA-002247-MR

DANNY SEALS; IRIS SEALS,
AND DOVE LOGGING, LLC — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIMBERLEY CORNETT CHILDERS, JUDGE
ACTION NO. 05-CI-00292

EDGAR AMBURGEY AND
LAVERA AMBURGEY — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: KELLER, MOORE AND TAYLOR, JUDGES.

MOORE, JUDGE: This is an appeal by Danny Seals, Iris Seals, and Dove Logging, LLC (the Seals) from Judgment entered by the Knott Circuit Court. The

Amburgeys cross-appeal the amount of damages awarded in Judgment. We reverse and remand on the issue of damages.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Amburgeys have owned and resided upon a tract of land since 1960. Danny and Iris Seals purchased an adjoining tract of land, separated by a common boundary line, around 1997 or 1998. In late 2004, Danny Seals entered into an oral contract with Dove Logging, LLC to cut and remove standing timber from an area of property as designated by Danny Seals and to which he claimed ownership. In early 2005, the Amburgeys discovered Dove Logging, LLC carrying out timbering activities on a portion of property to which the Amburgeys claimed ownership. The Amburgeys then filed suit to quiet title and to enjoin further trespass. They requested equitable relief and triple damages to compensate them for the loss of their timber and the injury to their property.

An Agreed Order was entered by the court, providing that Richard Hall, licensed land surveyor and Letcher County Surveyor, be appointed to review the pleadings, evidence, etc., including surveys obtained independently by the Seals and the Amburgeys. The Seals's independent survey indicated that the property on which the logging occurred belonged to Danny and Iris Seals. The Amburgeys' independent survey indicated that the property on which the logging occurred belonged to Edgar and Lavera Amburgey. Hall was authorized to take whatever steps were necessary to report to the court whether the property timbered by the Seals was located upon property owned by Danny and Iris Seals or Edgar

and Lavera Amburgey. The Agreed Order provided "[t]hat the report of Richard Hall to the Court and his conclusions therein expressed shall be binding upon the parties and adopted by the Court in its judgment." Hall filed his report with the court, finding that Danny Seals's survey erroneously located his deed description on the property and map and that the survey undertaken by the Amburgeys was correct. Hall concluded that the area timbered by the Seals occurred on property owned by the Amburgeys.

As a result of Hall's conclusions in conjunction with the Agreed Order, the Amburgeys filed a Motion for Summary Judgment. The Knott Circuit Court entered Summary Judgment in favor of the Amburgeys on October 15, 2007, finding that the Seals did enter upon property owned by the Amburgeys and did cut and remove timber from the Amburgeys' property and converted same to their own use. Based on the trespass, the trial court held that the Amburgeys were entitled to compensation under the law. For reasons explained *infra*, this judgment is not before this Court.

The issue of damages to be awarded to the Amburgeys was set for bench trial. However, by agreement of the parties and Order of the court, the matter was submitted for determination upon the depositions, affidavits, exhibits, and other evidence in the record. The trial court found the Seals to be innocent trespassers and awarded, in addition to other damages, actual damages for the stump value of the trees taken and damage to the property thereby.

The Seals appeal on two grounds. First, the Seals argue that the trial court erred in entering Summary Judgment based on its determination that the logging occurred on the Amburgeys' property. Second, the Seals assert that no damages or fees should have been awarded to the Amburgeys under KRS[1] 364.130. The Amburgeys filed a cross-appeal, arguing they should have received triple damages under KRS 364.130 rather than actual damages for the stump value of the trees taken and damage to the property.

II. STANDARD OF REVIEW

The standard of review of a trial court's grant of summary judgment is whether it correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Amos v. Clubb*, 268 S.W.3d 378, 380-81 (Ky. App. 2008) (citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996)). We are mindful that "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Id.* (citing *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991)). Summary judgments are reserved for cases where the movant demonstrates that the nonmoving party cannot, under any circumstances, prevail at trial. *Price v. Godby*, 263 S.W.3d 598, 601 (Ky. App. 2008) (citing *Steelvest*, 807 S.W.2d at 480). Appellate courts review grants of summary judgment *de novo*. *Baker v. Weinberg*, 266 S.W.3d 827,

[1] Kentucky Revised Statutes.

831 (Ky. App. 2008) (citing *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001)).

The trial court granted Summary Judgment based on its finding of fact, established by the Agreed Order, that the property which was timbered belonged to the Amburgeys. We review findings of fact made by the trial court only to determine if they are clearly erroneous. CR[2] 52.01 states, in part, "[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 test of whether a finding of fact is clearly erroneous is whether it is supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954 (Ky. 1964); *D.H. Overmyer Warehouse Co. v. Smith*, 451 S.W.2d 668 (Ky. 1970). Substantial evidence does not mean undisputed evidence, but where both parties introduce adequate evidence, if believed, to support their respective positions, the findings of the trial judge are not clearly erroneous. *Hensley v. Stinson*, 287 S.W.2d 593, 594 (Ky. 1956). The clearly erroneous standard has been applied specifically to boundary disputes. *West v. Keckley*, 474 S.W.2d 87 (Ky. 1971); *Croley v. Alsip*, 602 S.W.2d 418 (Ky. 1980). The fact finder may choose between the conflicting opinions of surveyors so long as the opinion relied on is not based upon erroneous assumptions or fails to take into account established factors. *Webb*

[2] Kentucky Rules of Civil Procedure.

v. Compton, 98 S.W.3d 513, 517 (Ky. App. 2002) (citing *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183 (Ky. App. 1987)).

III. ANALYSIS

A. The Seals's Appeal of Summary Judgment

The Seals assert that the Amburgeys "failed to sustain the burden of proof imposed upon them of establishing their property line." In support of their argument, the Seals cite to their lack of intent to trespass upon land beyond the extent of their own true boundary in accordance with their own survey. The Seals fault the Amburgeys in not formally disputing the boundaries before the logging even occurred. They argue that the accuracy of a land survey in proving ownership is a matter of discretion and that the land descriptions found in those surveys were "more than enough to confuse the Court as to the decision relating to the boundary lines."

The Seals also attempt to place the burden on the Amburgeys to quiet title. In their brief, the Seals casually mention the concept of adverse possession. The relevance of adverse possession in this case is not clear. The Seals are not arguing that they adversely possessed the portion of the Amburgeys' property on which the logging occurred. It appears that the Seals are attempting to insinuate that the Amburgeys acquired the land by adverse possession but did not quiet title in the land. If this is their argument, it is unpersuasive. The Amburgeys obtained a deed in 1960 granting them title to the land.

As the rightful owners, the Amburgeys are not required to quiet title. It is not the Amburgeys' duty to dispute the boundary lines of their own property, prior to any trespass, so that the Seals can be put on notice that future logging activities will be unlawful. Rather, it is the Seals's duty to determine their own boundary lines prior to authorizing logging on property which they believe is their own but in reality does not belong to them.

The Seals attack the boundary line determined by Summary Judgment entered on October 15, 2007. In their Notice of Appeal, the Seals provide, "[t]he Judgment appealed is from the Judgment . . . dated October 31, 2008." The Judgment on October 31, 2008 addresses only the issue of damages. Pursuant to CR 73.03(1), "[t]he notice of appeal shall . . . identify the judgment, order or part thereof appealed from." Accordingly, the Summary Judgment entered on October 15, 2007 is not before this Court.

Where the notice of appeal does not conform to CR 73.03(1) by failing to designate the judgment appealed from, the appeal will be dismissed. *Rose Bowl Lanes, Inc. v. City of Louisville*, 373 S.W.2d 157 (Ky. 1963). "Dismissal is not an appropriate remedy for this type of defect so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the opponent." *Ready v. Jamison*, 705 S.W.2d 479, 481-82 (Ky. 1986).

In this case, it is clear from the Notice of Appeal which judgment is designated on appeal. The Seals did not make a technical or clerical error, and the

designation is not ambiguous. Rather the Seals neglected to designate both judgments. Because the October 15, 2007 judgment is not before us, we will not address the Seals's claim as to the placement of the boundary.[3]

B. The Seals's Appeal of Damages and the Amburgeys' Cross-appeal

As the Seals's remaining appeal and the Amburgeys' cross-appeal both deal with the award of damages, they will be analyzed together. Both parties' appeals are based on KRS 364.130. The construction and interpretation of statutes are matters of law; therefore, our standard of review is de novo. *Lexington-Fayette Urban County Health v. Lloyd*, 115 S.W.3d 343, 347 (Ky. App. 2003). When interpreting a statute, we must "ascertain and give effect to the intention of the Legislature and that intention must be determined from the language of the statute itself if possible." *Id.* at 347. "We have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." *McElroy v. Taylor*, 977 S.W.2d 929, 931 (Ky. 1998). When reviewing a statute, we must give "significance and effect ... to every part of [an] Act." *Id.* at 931. However, where the language of a statute is plain and unambiguous, we should not resort to the legislative record in order to interpret the statute. *City of Vanceburg v. Plummer*, 275 Ky. 713, 122 S.W.2d 772, 775 (1938).

[3] Had the October 15, 2007 judgment been before us, the Agreed Order would have been dispositive on the issue of ownership. Hall concluded that the Amburgeys' survey was correct and that the timbered land belonged to the Amburgeys. The trial court adopted Hall's findings of fact pursuant to the Agreed Order. The Seals would be bound by this determination of ownership. There would be no genuine issue of material fact as to who owned the land on which the logging occurred. Summary Judgment in favor of the Amburgeys would be affirmed.

KRS 364.130 sets out the liability of a person entering upon and cutting timber growing upon land of another and provides for the measure of damages. It reads:

> (1) Except as provided in subsection (2) of this section, any person who cuts or saws down, or causes to be cut or sawed down with intent to convert to his own use timber growing upon 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 as well as any legal costs incurred by the owner of the timber.
>
> (2) (a) If a defendant can certify that prior to cutting:
>
> 1. A signed statement was obtained from the person whom the defendant believed to be the owner of all trees scheduled to be cut that:
>
> a. All of the trees to be cut were on his property and that none were on the property of another; and
>
> b. He has given his permission, in writing, for the trees on his property to be cut; and
>
> 2. Either:
>
> a. A written agreement was made with owners of the land adjacent to the cut that the trees to be cut were not on their property; or
>
> b. Owners of the land adjacent to the cut were notified in writing, delivered by certified mail, restricted delivery, and return

> receipt requested, of the pending cut and they raised no objection,
>
> the court may render a judgment for no more than the reasonable value of the timber, actual damages caused to the property, and any legal costs incurred by the owner of the timber.
>
> (b) With respect to subsection (2)(a)2.b. of this section, if no written objection was received from the persons notified within seven (7) days from the date of signed receipt of mail, it shall be presumed, for the purposes of setting penalties only, that the notified owner had no objection to the proposed cut.
>
> (3) This section shall not be construed as repealing any of the provisions of KRS 514.030 of the Kentucky Revised Statutes and any penalties provided by this chapter shall be considered as additional thereto.

KRS 364.103(2) provides for the mitigation of damages if it can be proven that specific formalities are satisfied. In this case, none of the formalities identified in the statute took place. Therefore, any claim by the Seals for mitigation of damages under the statute fails.

The exceptions in subsection (2) not applying, subsection (1) then controls our analysis. Subsection (1) provides that the trespasser must pay the owner of the timbered property three times the stumpage value of the timber and three times the cost of any damages to the property, in addition to other damages. To be liable for these triple damages, however, the trespasser must have cut or sawed down or caused to be cut or sawed down, with intent to convert to his own use, timber growing upon 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.

The trial court found that the Seals cut or sawed down or caused to be cut or sawed down, with intent to convert to his own use, timber growing upon the land of another. The Seals's actions took place on the Amburgeys' land. It is undisputed that Danny Seals entered into a verbal contract with Dove Logging, LLC to cut and remove standing timber from an area of property as designated by Danny Seals. As pointed out in the Seals's brief, "Seals was to be paid 25% of the sale price for the timber cut and removed by Dove Logging, LLC under this agreement." We do not see how the Seals can argue "[t]here was no evidence that the Appellants had any intent to convert [the timber] to their own use . . . ." The findings established in Summary Judgment are certainly supported by substantial evidence.

The remaining issue that we must address to determine whether the Amburgeys are entitled to triple damages under the statute is whether the Seals timbered the property without legal right or without color of title to the timber or to the land upon which the timber was growing. It is clear from the facts that the Seals did not have legal right to the timber or to the property on which the timber was located. The trees were located on the Amburgeys' land, and the Amburgeys did not grant permission to timber their property. Thus, the determinative factor is whether the Seals had color of title.

A recent Kentucky Supreme Court case is directly on point. In *Meece v. Feldman Lumber Co.*, 209 S.W.3d 631 (Ky. 2009), Feldman filed an appeal of the trial court's judgment quieting title in Meece. Meece filed a cross-appeal on

damages, contending that the trial court erred in failing to award triple damages and attorney fees under KRS 364.130. The Court of Appeals affirmed the trial court on quieting title in Meece and affirmed the trial court on denying triple damages. The Court denied triple damages because it agreed with the trial court that "Feldman had reason to believe the timber was his and thus possessed color of title." The Court of Appeals concluded that Feldman was an innocent trespasser not subject to KRS 364.130. The Kentucky Supreme Court granted discretionary review to discuss the issue of damages and KRS 364.130.

Our Supreme Court held that the lumber company lacked objective evidence of title from which a subjective belief could be founded that it owned the property upon which it cut down trees, and thus, lacked "color of title," requiring statutory award for triple damages, rather than mere stump value, of the timber it cut. The *Meece* Court required objective evidence to establish color of title.

In the case before us, the Knott Circuit Court held that "KRS 364.130 provides a distinction between a willful and an innocent trespasser. The former knows he is wrong and the latter believes he is right." The circuit court determined that the Seals were innocent trespassers and thereby awarded actual damages rather than triple damages.

At common law, it was necessary to distinguish between an innocent and willful trespasser because the amount of damages awarded was based on that distinction. *Meece*, 209 S.W.3d at 632. But the common law, prior statutes, and the public policy growing out of them all must yield to the superior authority of a

later enacted statute. *General Elec. Co. v. Am. Buyers Coop.*, 316 S.W.2d 354, 358 (Ky. 1958); *see also Com. ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992).

An early version of KRS 364.130 altered the common law distinction between an innocent or willful trespass. The statutory determination became whether the person has or does not have "color of title" in himself. The current version of KRS 364.130 has not changed that early distinction. So, it is irrelevant under the statute whether the trespasser was innocent or willful. Being an innocent trespasser will not mitigate damages under the statute. Color of title is now the crucial determination. If the trespasser did have color of title, he would be liable for actual damages. Conversely, if the trespasser did not have color of title, he owes triple damages. *Meece*, 290 S.W.3d at 635; KRS 364.130.

"While a trespass may be innocent based only on a subjective belief, a trespass with 'color of title' requires an objective 'color of title' to form a subjective belief that the trespass is innocent." *Meece*, 290 S.W.3d at 634 (citing *Swiss Oil Corp., et al. v. Hupp*, 253 Ky. 552, 69 S.W.2d 1037 (1934); *Hurst v. Commonwealth*, 276 Ky. 824, 125 S.W.2d 772 (1939)). "Color of title is not based on a subjective belief, but on objective evidence of title from which a subjective belief may by founded." *Meece*, 290 S.W.3d at 631.

The burden is on the persons claiming ownership through color of title to locate the boundaries and to show that the land in dispute was embraced within the lines claimed by them. *Id.* at 636. "When there is uncertainty as to whether the

description in a deed embraces the land in question, the claim of color of title fails." *Id.*

However, we are not dealing with a disputed boundary under a deed. The deeds, as read by Hall and agreed to by the parties, establish a boundary in favor of the Amburgeys. The issue with which we are faced revolves around the land surveys. Not only did Hall perform a survey, but the Seals and the Amburgeys commissioned their own independent surveys to be performed. The Seals's survey indicated that Danny and Iris Seals owned the land to be timbered, allegedly causing the Seals to have a subjective belief that Danny and Iris Seals owned that land.

This Court must now determine whether the Seals's survey can be objective evidence upon which the Seals's subjective belief of ownership was based. If the survey is objective evidence, then the Seals had color of title. If the survey is not objective evidence, then the Seals did not rely on objective evidence to form their subjective belief of ownership and, therefore, did not have color of title.

In *Kelly v. Kelly*, 293 Ky. 42, 168 S.W.2d 339 (1943), the Court held the allegations in that case were insufficient to show that plaintiff had color of title, where she did not claim under any instrument or deed as vesting her with color of title. *Kelly* indicated that the words "color of title," as defined in section 11, page 267, 27 Am. Jur., mean

> that which is appearance of title, but which in reality is not title. Color of title may be said to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used- a title that is imperfect, but not so obviously imperfect that it would be apparent to one not skilled in the law.

See in accord Bragg v. McCoy, 188 Ky. 762, 224 S.W. 200 (1920).

"In the same section of the same authority it is also said that: 'There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title or to give him the right of possession.'" *Kelly*, 168 S.W.2d at 342. A bare survey does not give color of title. *Holcomb v. Swift Coal & Timber Co.*, 251 Ky. 642, 65 S.W.2d 741, 744 (1933) (*see* 2 C. J. p. 192, § 377).

A survey is the measuring of a tract of land and its boundaries and contents or a map indicating the results of such measurements. BLACK'S LAW DICTIONARY (8th ed. 2004). We find it persuasive that "[i]n no event can the survey done at the request of an owner or owners have any further effect than to establish the true boundary lines . . . . [I]t cannot in any way affect or determine the title." 11 C.J.S.[4] Boundaries § 179 (citing *Mahlandt v. Jabes*, 232 Kan. 435, 658 P.2d 356 (1983)). In submitting to a survey a party does not put himself in the position of surrendering his or her land, or any part of it. *Id.* (citing *Cleveland v. Obenchain*, 107 Ind. 591, 8 N.E. 624 (1886)). The survey cannot defeat a title held and acquired by adverse possession (*id.*) (citing *Wood v. Kuper*, 150 Ind. 622, 50 N.E.

[4] Corpus Juris Secundum.

755 (1898)) and does not affect the location of an independent agreed boundary. *Id.* (citing *Chessmore v. Terrell*, 94 Kan. 611, 146 P. 1152 (1915)).

Pursuant to 201 KAR[5] 18:150, a professional land surveyor is not permitted to represent that (i) a boundary survey determines land ownership, (ii) a boundary survey provides more than evidence of rights in land, or (iii) land ownership can be established by a means other than an action in a Kentucky court.

The survey commissioned by the Seals was not an appearance of title. It was not an instrument purporting to transfer title, and it did not give the Seals a right of possession. Additionally, the surveyor would not have been permitted to assert that the survey was evidence of title. The Seals even assert in their brief that the accuracy of a land survey in proving ownership is a matter of discretion. Therefore, the survey was not objective evidence of title, the Seals did not base their subjective belief of ownership on objective evidence, and the Seals did not have color of title.

The Seals entered upon the land of another without legal right and without color of title and sawed down the trees. They did not obtain mitigating statements as authorized by KRS 364.130(2). Thus, the Amburgeys are entitled to triple damages. Therefore, this case must be remanded to the trial court for an award of damages pursuant to KRS 364.130(1).

IV. CONCLUSION

[5] Kentucky Administrative Regulations.

This Court being otherwise duly advised, we affirm Summary Judgment in favor of the Amburgeys, establishing that the timbering occurred on the Amburgeys' property. Awarding the Amburgeys triple damages under KRS 364.130(1), we reverse the judgment and remand for proceedings by the circuit court on the sole issue of damages.

KELLER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
James W. Craft, II Whitesburg, Kentucky	Gene Smallwood, Jr. Whitesburg, Kentucky