

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002493-MR

ROBERT QUILLEN; AND LAWANNA
QUILLEN, HIS WIFE

APPELLANTS

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 01-CI-00159

KANNAN MINING COMPANY; DAVID W.
HOGG; THOMAS R. ROMINE; CLYDE
HOGG, JR.; AND JOHN ROMINE

APPELLEES

OPINION
AFFIRMING IN PART, AND
REVERSING AND REMANDING IN PART

** ** *

BEFORE: DIXON, VANMETER AND WINE, JUDGES.

VANMETER, JUDGE: Robert and Lawanna Quillen (“Quillen”) appeal from a jury verdict awarding them surface royalties for the use and destruction of their property in Letcher County. They also appeal from a directed verdict absolving the individuals¹ who

¹ According to the record, David W. Hogg, Thomas R. Romine, Clyde Hogg, Jr., and John Romine.

served as the directors and officers of the Kannan Mining Company (“Kannan”) from personal liability for those damages. We affirm in part, and reverse and remand in part.

Quillen and Kannan own the surface of a two-hundred acre tract of property in Letcher County, with Quillen owning an undivided nine-tenths and Kannan owning the remaining one-tenth interest. In addition, Kannan has the right to mine the coal underneath the tract pursuant to a coal lease from Consolidated Coal Company, the owner of the mineral estate. Prior to 2001, Quillen and the officers of Kannan attempted to negotiate a surface lease of the property so that Kannan could strip mine the Quillen property in connection with Kannan's other strip mining operations in the area. Apparently unable to agree on either a lease or an outright purchase of the surface, Kannan, as a co-tenant of the surface estate, began surface mining operations on the property in early 2001.

Quillen filed this action alleging waste, destruction, diminution of fair market value, loss of quiet enjoyment, emotional distress, and punitive damages. After the close of the evidence at the 2003 trial, the trial court directed a verdict in favor of the individual directors and officers of Kannan, and dismissed Quillen's claims damages relating to diminution of fair market value, hauling of coal from other property across the land, timber loss, emotional distress, loss of enjoyment and punitive damages. The court directed a verdict for Quillen as to the liability of Kannan, and submitted to the jury the issue of a surface royalty award for coal mined from the land itself. The jury deadlocked. Upon retrial in 2006, the trial court granted a directed verdict on all issues previously

resolved, and the jury returned a verdict of \$78,642 in favor of Quillen. This appeal follows.

On appeal, Quillen advances two arguments: that the trial court erred in dismissing a number of Quillen's damage claims, and that the trial court erred in directing a verdict with respect to the individual directors and officers of Kannan.

I. STANDARD OF REVIEW.

The standard of review of a trial court's granting of a motion for a directed verdict is well established. In *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998), the Kentucky Supreme Court held:

On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. *Meyers v. Chapman Printing Co., Inc.*, Ky., 840 S.W.2d 814 (1992). Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. *Davis v. Graviss*, Ky., 672 S.W.2d 928 (1984).

See also Gibbs v. Wickersham, 133 S.W.3d 494, 495-96 (Ky.App. 2004).

II. MEASURE OF DAMAGES.

In the December 2003 trial, the court dismissed a number of Quillen's damage claims: loss of quiet enjoyment and emotional distress, wheelage royalty, value of timber, damage to surface, and punitive damages. At the August 2006 trial, the court's damage instruction was predicated upon a surface royalty based upon the tonnage of coal

mined from the property. *See Taylor v. Bradford*, 244 S.W.2d 482, 484-85 (Ky. 1951).

Each of these claims will be discussed in turn.

A. Loss of quiet enjoyment and emotional distress.

Quillen's complaint and tendered jury instructions included a cause of action for loss of quiet enjoyment which resulted in emotional distress. At the conclusion of Quillen's case, the trial court granted Kannan's motion for a directed verdict on the claim of emotional distress. The elements of a claim for emotional distress are that:

1. The wrongdoer's conduct must be intentional or reckless;
2. The conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
3. There must be a causal connection between the wrongdoer's conduct and the emotional distress; and
4. The emotional distress must be severe.

Kroger Co. v. Willgruber 920 S.W.2d 61, 65 (Ky. 1996) (citing *Craft v. Rice*, 671 S.W.2d 247, 249 (Ky. 1984), and *Restatement (Second) of Torts* § 46 (1948)).

The basis for the trial court's ruling was that Quillen presented no expert witness to support the extent of his injury. We have not found, nor have the parties cited us to, any Kentucky decision that requires expert testimony regarding the extent of a party's emotional distress. However, we find it unnecessary to address that issue since the trial court was well within its bounds to rule that Kannan's conduct did not rise to the level of outrageous conduct sufficient to support a claim of emotional distress. *See*

Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 788-89 (Ky. 2004) (court noting that “[i]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery”) (quoting *Restatement (Second) of Torts* § 46(1) cmt. h (1965)). See also *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1 (Ky. 1990). The record in this case reveals that the parties undertook negotiations prior to Kannan's mining, and that then-counsel for the parties believed that Kannan, as co-tenant of an undivided interest in the surface estate, had the right to mine the coal. The trial court did not err in granting a directed verdict for Kannan on this issue.

B. Wheelage Royalty.

The trial court dismissed Quillen's claim of a wheelage royalty for Kannan's hauling of coal, mined on adjacent property, over the jointly-owned property. The basis for this ruling was that Quillen's expert apparently was unable to testify as to how much coal had been hauled across the jointly-owned property.

A co-tenant has a right of entry and, subject to the rights of his co-tenants, a right to use and enjoy the common property as though he were a sole proprietor. *Taylor v. Bradford*, 244 S.W.2d 482, 483-84 (Ky. 1951). While Quillen cites *Ky. Border Coal Co. v. Mullins*, 504 S.W.2d 696 (Ky. 1973), for the proposition that he was entitled to a royalty for the hauling of foreign coal across the property, the basis for the royalty claim in *Mullins* was the absence of authorization to transport such coal across the property, and the royalty constituted compensation for the resulting trespass. *Id.* at 698.

Conversely, in this case, Kannan as a co-tenant cannot “trespass” against his co-tenant Quillen, as Kannan has authority to use the property as though it were the sole proprietor.

The record is silent as to how the hauling of any coal across the property, in and of itself, violated Quillen's rights or operated to oust him from the property. In fact, the opposite was noted in *MCI Mining Corp. v. Stacy*, 785 S.W.2d 491, 496 (Ky.App. 1989), in which the parties conceded that the surface co-tenant had the right to haul foreign coal across the surface tract. The trial court did not err in dismissing Quillen's wheelage royalty claim.

C. Value of Timber.

The trial court directed a verdict in favor of Kannan on Quillen's claim for the value of the timber destroyed by Kannan's mining activities. While Quillen argues that this directed verdict was improper, he provides no supporting rationale other than arguing that “where ouster and conversion occur damages therefrom must include . . . loss of timber[,]” citing *Ky. Border Coal Co. v. Mullins*, 504 S.W.2d 696 (Ky. 1973).

The trial court's basis for granting a directed verdict is not clear from the record. Our review of the record shows that Quillen called Joe Weddington as an expert witness on valuation issues, including loss of timber. In chambers, the trial court and counsel discussed Weddington's report which indicated that his estimate of the value of the lost timber, \$13,750, was based on the average timber density in the area. Weddington disclosed that he was not qualified to value the timber removed from the property without a forester's report of the amount and species of timber removed.

Weddington's testimony, however, established that he had bought and sold timber in the area, was familiar with average timber density in the area, had taken classes in timber valuation, and had a rational basis for estimating timber value. Based on the view that Weddington was unable to give a precise value as to the timber lost, the court granted Kannan's motion to prohibit Weddington from testifying as to such value. Quillen presented no other testimony of timber loss, and the trial court apparently directed the verdict due to the failure to present proof of loss. *See Gibbs v. Wickersham*, 133 S.W.3d 494, 496 (Ky.App. 2004) (stating rule that “the court will direct a verdict where there is no evidence of probative value to support the opposite result and the jury may not be permitted to reach a verdict based on mere speculation or conjecture”).

Kentucky case law has long recognized that a co-tenant may be liable to his co-tenants for waste in the form of destruction of timber. *E.g., Medcalf v. Hensley*, 158 Ky. 198, 204, 164 S.W. 788, 791 (1914); *Nevels v. Ky. Lumber Co.*, 108 Ky. 550, 552-53, 56 S.W. 969, 970 (1900). Although contingent, uncertain and speculative damages may not be recovered, *Spencer v. Woods*, 282 S.W.2d 851, 852 (Ky. 1955), precise proof of damages is not required; damages need only be shown with reasonable certainty. *Commonwealth, Dep't of Highways v. Jent*, 525 S.W.2d 121, 122 (Ky. 1975); *see King v. Grecco*, 111 S.W.3d 877, 886 (Ky.App. 2002) (court holding that forester's examination of the tree stumps on property, estimate of the size of the standing trees, calculation of the number of board feet of lumber contained in each tree, and valuation based on the species

of tree, while not perfectly re-creating the amount of standing timber, provided “a reasonable basis for a calculation of damages”).

While Weddington was not qualified as a forester to give as detailed an assessment as the forester in *Grecco*, his methodology, based on the area's average board feet per acre, was sufficient to provide a reasonable calculation of timber loss from Kannan's mining activity, especially since all remnants of the timber, i.e., the tree stumps, would have been removed. The trial court, thus, erred in prohibiting Weddington from testifying on this issue.

D. Damage to the Surface.

Kannan has conceded, before both the trial court and this court, that it is liable for some amount of royalty award for damage to the surface. As previously noted, the court's damage to the surface instruction was for a surface royalty award calculated upon the tonnage of coal mined from the property, based on *Taylor v. Bradford*, 244 S.W.2d 482, 484-85 (Ky. 1951). Specifically, the court instructed the jury that “you will determine from the evidence and award the Plaintiffs surface royalties at a cash rate per ton for all tonnages of coal mined by the Defendant.” While we question the applicability of a measure of damages based on the value of the mineral estate,² the

² The damages in *Taylor* were based upon co-equal interests in the surface and mineral estates. In other words, unlike the instant case, the two estates in *Taylor* had not been severed. As noted, the crucial distinction between this case and *Taylor* is that Quillen has no interest in the mineral estate. Thus, any measure of damages based on the value or proceeds of the mineral estate would appear to be erroneous. See *MCI Mining Corp. v. Stacy*, 785 S.W.2d 491, 496 (Ky.App. 1989) (court rejected a measure of damages based on value of minerals mined since surface owner had no interest in mineral estate); but see *Taylor v. Coal-Mac, Inc.*, 864 S.W.2d 302, 305 (Ky.App. 1992) (court noting practice of mineral owners paying “surface royalties” to surface owners, sometimes based on value of coal extracted).

parties appear to accept this measure of damages and, because Kannan has not filed a cross-appeal, we will not disturb this aspect of the trial court's judgment.

Quillen's argument appears to be that in addition to a royalty award for damage to the surface, he was also entitled to damages for ouster. In *MCI Mining Corp. v. Stacy*, 785 S.W.2d 491 (Ky.App. 1989), in circumstances very similar to those below, a co-tenant surface owner sued a co-tenant surface owner which also owned the mineral estate. The court rejected the co-tenant surface owner's claim that it had a right to an accounting based on the amount of coal mined, and held that since the co-tenant mineral owner had the right to disturb the surface in order to mine the coal, the co-tenant surface owner's right to recover was limited to a claim based on ouster. *Id.* at 495. The court held that the issue of whether an ouster had occurred was a factual question, noting that the two essential elements of ouster are: a) the tenant to be charged “must assert exclusive claim to the property[,]” denying any interest, right or title in the ousted tenant; and b) the actions of the tenant to be charged must be so open and notorious as to place beyond doubt the fact that such tenant is claiming the entire interest. *Id.* As to the measure of damages, the court explained that

[t]he proper measure of damages, should an ouster be found, is rent for use and occupation. *Taylor, supra*. Rent for use and occupation would not be based upon per ton wheelage payments that are sometimes used in private contracts. *Middle States Coal Co. v. Hicks*, Ky.App., 608 S.W.2d 56 (1980); *Triple Elkhorn Mining Co., Inc. v. Anderson*, Ky., 646 S.W.2d 725 (1983). Damages should be based upon the difference in the fair market value of Stacy's property interest immediately before the mining took place and the fair market value of same immediately after the

mining if the damage is found to be permanent. If the damage is temporary, the measure of damage is the diminution in the value of its use. *Pike-Floyd Coal Co. v. Nunnery*, 232 Ky. 805, 24 S.W.2d 614 (1930); *Middle States Coal v. Hicks*, *supra*; *Triple Elkhorn Mining Co., Inc. v. Anderson*, *supra*.

MCI Mining, 785 S.W.2d at 496.

Here, the record is clear that Kannan did not assert exclusive claim to the entire property. Thus, the trial court did not err in granting a direct verdict and dismissing Quillen's claim for damages to the surface based on ouster.

E. Punitive Damages.

As to Quillen's claim for punitive damages, the trial court concluded that since Kannan, as co-tenant, had the right to use the surface to mine the coal, it had committed no wrongful act. Therefore, no punitive damages could be recovered.

This court noted in *Kinney v. Butcher*, 131 S.W.3d 357, 358-59 (Ky.App. 2004) (quoting *Williams v. Wilson*, 972 S.W.2d 260, 264 (Ky. 1998)), that “the well established common law standard for awarding punitive damages was [and is] gross negligence.” Further, while it has not always been precisely defined, “the prevailing understanding defines gross negligence as a ‘wanton or reckless disregard for the safety of other persons.’” 131 S.W.3d at 359 (quoting *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 52 (Ky. 2003)).

In the instant case, the record contains no evidence that the safety of any person was implicated by Kannan's activities. Certainly, Quillen's safety was not threatened since he did not reside on the property.

Even under the standards established by KRS 411.182(1)(a) and (b), punitive damages are allowable only in instances of oppression or fraud. *See* KRS 411.184(2).³ “Oppression” is defined as “conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship[.]” and “fraud” is defined as “an intentional misrepresentation, deceit, or concealment of material fact[.]” KRS 411.184(1)(a) and (b). Under our review of the record, Kannan's actions in mining the property did not amount to either oppression or fraud. Thus, the trial court did not err in granting Kannan's motion for a directed verdict on the issue of punitive damages.

III. INDIVIDUAL LIABILITY OF CORPORATE DIRECTORS AND OFFICERS.

In ruling on Quillen's claim that Kannan's individual directors and officers should be liable for the damages, the trial court noted that such liability could be imposed only in the event of the commission of a tort by the directors and officers, or under other circumstances which would result in the “piercing of the corporate veil.” *See, e.g., White v. Winchester Land Dev. Corp.*, 584 S.W.2d 56 (Ky.App. 1979) (discussing circumstances under which a corporate entity may be disregarded and individual liability imposed). In discussing the matter, Quillen's counsel advised the court that no allegation was made that the corporate veil should be disregarded. Thus, the only avenue upon which Quillen sought this remedy was if the individual directors or officers participated in the commission of tortious activity. The trial court's finding, that no tortious or

³ In *Williams*, 972 S.W.2d 260, the Kentucky Supreme Court held that the standard imposed by KRS 411.184(1)(c) was unconstitutional. Thus, we address only the aspects of the statute that have not been held unconstitutional.

wrongful activity was committed by Kannan's directors or officers since Kannan had the right to mine the property, was not clearly erroneous and will not be disturbed on appeal. CR 52.01.

The Letcher Circuit Court's judgment is affirmed except insofar as it excluded damages for loss of timber. As to such damages, this matter is reversed and remanded to the Letcher Circuit Court for further proceedings consistent with this Opinion.

ALL CONCUR.

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