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7/03

Brief to the Court on behalf of Plaintiff Vargas
In the action of Vargas v. Monte

Statement of Facts

The parties in the above-entitled action, Plaintiff Vargas and Defendant Monte, are adjoining landowners. From March 2000 to January 2002 Defendant Monte, as stipulated, cut and removed approximately 700 trees from a strip of land admittedly owned by both parties independently without the consent or permission of plaintiff Vargas. Plaintiff Vargas brought suit, within the statutory period, against Defendant Monte for timber trespass to recover three times such sum as would compensate for the actual detriment he has suffered. For a more in depth statement of facts, the statement of stipulated facts has been previously submitted.

Liability

By cutting and removing timber from a strip of land along the parties' shared boundaries which includes the exclusive land of Plaintiff Vargas, without Plaintiff Vargas's permission or any other viable defense, defendant Monte fulfilled the elements required to establish timber trespass and is therefore liable.

Elements satisfied

In order to establish a prima facie case for timber trespass the plaintiff must prove that the defendant (1) wrongfully injured or removed timber, trees or underwood (2) upon the land of another (Civil Code Section 3346). Once these two elements are satisfied, the defendant is liable for the tort of timber trespass. The mental state of the defendant is only taken into consideration for damages purposes (discussed below).

Defendant Monte wrongfully injured and removed timber upon Plaintiff Vargas's land when he cut down trees located on the land owned by Plaintiff Vargas. Defendant Monte's actions are not in dispute and thus the Civil Code elements are satisfied absent a defense. Defendant Monte is liable for timber trespass.

Possible defenses

Currently the state of Franklin recognizes only one defense to timber trespass: the doctrine of agreed boundary, which is not a successful defense in this case because the actions by the parties do not satisfy the requirements of the defense. The doctrine of agreed boundary is a judicially created rule intended to secure repose and prevent litigation when two parties honestly and in good faith enter a private agreement fixing and marking boundary lines. There is no requirement that the true boundary line be ascertainable. In order to successfully assert the defense of agreed boundary the defendant has the burden to produce and persuade this court that as between the parties: (1) the true boundary lines are uncertain; (2) the parties are adjoining landowners who agree as to the boundary; (3) the agreed-upon boundary is identifiable on the ground; and (4) acceptance and acquiescence to the agreed-upon boundary is for a period at least equal to the statute of limitations.

If it is accepted by this court that letter dated April 18, 1906 was an agreement between the parties because (1) the true boundary line was uncertain at the time of the writing made by (2)

adjoining landowners, then the defendant must also satisfy the other elements. The third element is not satisfied because the agreed-upon boundary line must be identifiable on the ground. The letter was only a writing and did not effect any part of the land as required by the court made defense. Hence, at the most, the writing only fulfilled the first two elements but the actions of the parties made the third element fail, and thus the entire defense unsuccessful. As such this doctrine is clearly inapplicable and this defense fails. Hence, without a viable defense, which besides this was neither plead nor proved, the defendant is liable for timber trespass.

If, in the alternative, the court finds that the "old blaze marks and paint stains" were identifiable on the ground, then they must find that those marks were made in accordance with the agreement by the parties as required by the second element. The agreement, clearly on its face, indicates that the old markers were no good, even in 1906, and thus unreliable. Therefore this court must find that, between the parties, the same marks are unreliable 97 years later without evidence to the contrary. Hence the second element cannot be satisfied if we try to satisfy the third and the defense as a whole fails. Therefore, the defendant is liable for timber trespass.

Damages

Plaintiff, Vargas is entitled to the maximum damages allowable, treble damages, because the evidence shows that Defendant Monte deliberately entered Plaintiff Vargas's land to removed approximately 700 trees; Defendant Monte's actions were not casually, involuntarily, based on probable cause to believe the land on which the trespass was committed was his own, directed by the Plaintiff, or based on a reliance upon a survey of boundary lines.

Purpose

The purpose of Civil Code Section 3346 is to protect timber and trees and provides the damages associated with its violation. Our Appellate court found, in Anderson v. Flush, that wrongful actions of trespass which interfere with timber and trees mandate double damages. Casual and involuntary trespass also mandate double damages. Section 3346, provides trial courts the flexibility to determine circumstances under which treble damages should be awarded, taking into consideration the punitive purpose especially appropriate in cases where defendants act willfully and maliciously. In this case when the defendant cut timber and removed 700 trees from the strip of land stipulated by the parties to be shared, he willfully did the actions with the mental state satisfying malice because of his blatant disregard for the protection of the rightful owner's timber and trees. Because of the defendant's actions and the courts discretion regarding treble damages, the defendant in this case should be held liable for three times such sum as would compensate for the actual detriment.

Trial Court's Discretion Regarding Damages

The trial court's discretion will not be an abuse of discretion if all willful and malicious actions are taken into account. The trial court in the Anderson case was found to not abuse its discretion by imposing only double damages because it found that the defendant necessarily had to trespass and did not act with malice or reckless disregard because in his necessary situation he chose the least invasive means available. Additionally the trial court found that the defendant in that case acted reasonably in mitigating damages to the public street and public telephone poles. Hence the defendant was found liable for his action but his affirmative actions to minimize the damages enabled him to not receive a punitive award. Here there are no facts that indicate the defendant's

actions were of necessity or the least intrusive means available, hence this mitigation would fail. Therefore plaintiff Vargas, under this court's discretion, should be awarded treble damages for the timber trespass committed by defendant Monte.

Based on Probable Cause

Defendant Monte did not have probable cause to believe that the land was her own because she knew, as did the entire community, that there was a real and honest dispute regarding the boundary lines. In fact, Defendant Monte admitted (record page 9) that the boundary line condition as "poor." Additionally she went on to admit that she "thought" although never discussed it with Plaintiff Vargas, Vargas would not object to her logging along "the common border." Defendant Vargas' actions show a complete "disregard of an indifference to the rights of the owner." The Franklin Court of Appeals in 1971, Hardway Limber v. Thompspon, sites that these descriptions of behavior justifiably lead to treble damages. With this knowledge and the Appeal Court's analysis of Hardway Lumber v. Thompspon, Defendant Monte cannot mitigate damages. Hence Defendant Monte acted with malice and ill and there are no mitigating factors. As such, Plaintiff Vargas should be awarded treble damages.

Conclusion

Due to the above reasons, Defendant Monte should be held liable for timber trespass and Plaintiff Vargas should be awarded the maximum damages allowable by law based on the evidence presented. As indicated above, any lower measure of damages are inappropriate.

Hereby certified on July 29, 2003 by

Applicant

/s

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