

only causal connection that could be made in this case by any stretch of the imagination is that Whitaker's accident indirectly resulted out of his attempt to avoid a collision with Edwards's truck; this is improbable, given that after the accident the two trucks were located some 300 feet away from each other on completely opposite sides of the bridge. Moreover, Talbott testified that despite the road conditions, Whitaker should have been able to bring his truck to a stop before it collided with the bridge or would have collided with Edwards's truck. Cook testified that although Whitaker made the right decision in attempting to stop his truck when he saw that Edwards was having problems controlling his own vehicle, he found fault in Whitaker's execution of the braking maneuver, which, in his opinion, caused Whitaker's accident. Given these circumstances, I believe Coca-Cola and Edwards presented substantial evidence indicating that there is no genuine issue of material fact regarding Whitaker's negligence in causing his own accident and I believe that they are entitled to a judgment as a matter of law. I would not have concluded that the trial court erred in granting their motion for a summary judgment.



Glenn CREEL, individually and
d/b/a Creel Tree Service

v.

Forest R. CRIM and Tisia
Baker Lovelady.
2990907.

Court of Civil Appeals of Alabama.

Sept. 7, 2001.

Neighbor brought trespass action against adjoining landowner and lumber-

man, after landowner directed lumberman to cut trees on neighbor's property, and lumberman filed a cross-claim against landowner for indemnification. The Circuit Court, Shelby County, No. CV-98-142, G. Daniel Reeves, J., entered judgment for neighbor and awarded partial indemnification to lumberman. Lumberman appealed. The Court of Civil Appeals, Murdock, J., held that landowner was required to indemnify lumberman for the entire award of damages.

Affirmed in part, reversed in part, and remanded with instructions.

1. Appeal and Error \S 931(1), 1008.1(6)

Under the "ore tenus rule," the trial court's judgment and all implicit findings necessary to support it carry a presumption of correctness and will not be reversed unless found to be plainly and palpably wrong.

See publication Words and Phrases for other judicial constructions and definitions.

2. Appeal and Error \S 931(1)

Where the trial court has made a visual inspection of the subject matter of a finding of fact, there is an even greater presumption indulged in favor of that finding than is the case when the same finding is made from other evidence.

3. Indemnity \S 13.2(5)

Although generally a trespasser may not recover indemnity from a co-trespasser, that rule does not apply if there is not a known, meditated wrong and if the parties act bona fide under the supposition of the entire innocence and propriety of the act and under circumstances excluding intentional wrong.

4. Indemnity ◊13

Every man who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have.

5. Indemnity ◊13.2(5)

Landowner who directed lumberman to cut trees on her neighbor's property was required to indemnify lumberman for the entire award of damages granted to neighbor in neighbor's trespass action against landowner and lumberman; landowner represented to lumberman that she owned the property on which he was to cut trees and was responsible for the entire burden of the loss.

6. Trespass ◊12, 30

A person may become liable for trespass to adjoining land without actually going upon that land when that person, or that person's agent, points out an erroneous division line between the tracts to a lumberman who later cuts trees on the adjoining land.

Christopher R. Smitherman, Montevallo, for appellant.

Mickey L. Johnson of Johnson & Bass, P.C., Pelham, for appellee Forest R. Crim.

MURDOCK, Judge.

Forest R. Crim sued Tisia Baker Lovelady and Glenn Creel, individually and doing business as Creel Tree Service, alleging that in August 1997 the defendants had trespassed upon his property and had cut and carried away trees from the property. Creel filed a cross-claim against Lovelady for indemnification for any damages that he might have to pay as a result of Crim's

claim against him; Creel claimed that Lovelady had directed him to cut timber on her property but that she had instructed him to cut trees that were not on her property. After conducting an ore tenus proceeding, during which it viewed the land upon which the trespass allegedly had occurred, the trial court entered a judgment in which it expressly found that Creel had cut timber from a portion of Crim's land, but that he had been acting on Lovelady's representations that she owned that portion. The trial court also expressly found that Creel had entered upon and had damaged Crim's property, and directed Creel to pay Crim \$5,400; however, the trial court found in favor of Lovelady as to Crim's claim against her, and concluded that statutory damages for Crim's damaged trees were not due to be awarded because Creel and Lovelady had not intended to cut Crim's trees (*see* Ala. Code 1975, § 35-14-1). Lovelady was directed to pay \$2,700 to Creel on his indemnity cross-claim.

[1, 2] Creel appeals, claiming that the trial court erred in finding for Crim on Crim's trespass claim and in awarding Creel only \$2,700 on his indemnity claim. The following principles govern our review of the trial court's judgment:

"We note that under the ore tenus standard of review, the trial court's findings of fact based on oral testimony, and a judgment based on those findings, are given a presumption of correctness. A judgment based on such findings will not be reversed unless it is shown to be plainly and palpably wrong. The appellate courts are not allowed to substitute their own judgment for that of the trial court if the trial court's decision is supported by reasonable inferences to be drawn from the evidence. The reason for giving such deference to the trial judge's findings based on disputed evi-

dence in ore tenus proceedings is that the trial judge has the benefit of observing the witnesses' manner and demeanor and has the better opportunity to pass upon the credibility of their testimony."

Ex parte Pielach, 681 So.2d 154, 154-55 (Ala.1996) (citations omitted). "Under the ore tenus rule, the trial court's judgment and all implicit findings necessary to support it carry a presumption of correctness and will not be reversed unless found to be plainly and palpably wrong." *Trans-america Commercial Fin. Corp. v. Am-South Bank, N.A.*, 608 So.2d 375, 378 (Ala. 1992) (citations and internal quotation marks omitted). Finally, we note that "[w]here the trial court has made a visual inspection of the subject matter of a finding of fact there is an even greater presumption indulged in favor of that finding than is the case when the same finding is made from other evidence." *Gantt v. Bamberg*, 491 So.2d 925, 925 (Ala.1986).

Creel contends that the trial court abused its discretion in concluding that he had trespassed upon and damaged Crim's land and in assessing Crim's damages at \$5,400.¹ In doing so, Creel correctly notes that damages in cases involving trespass to land wherein trees are removed are "not measured by the value of the timber or property severed, but by the injury to the land by reason of its severance—the difference between the value of the land immediately before [the trespass] and [the value of the land immediately] after the trespass." *Granade v. United States Lumber & Cotton Co.*, 224 Ala. 185, 189, 139 So. 409, 412 (1931). Creel contends that Crim's testimony concerning the location of his boundary line was not credible and that he failed to present "competent evi-

dence" concerning diminution of value resulting from the trespass and the removal of trees; therefore, Creel says, a judgment for \$5,400 in Crim's favor is necessarily erroneous.

However, we note that the trial judge personally viewed the property in question and that the knowledge he obtained during that view constitutes proper evidence in this case. See *Lowe v. Morrison*, 412 So.2d 1212, 1213 (Ala.1982) (view of premises by trier of fact supported awards for both substantial performance and breach of implied warranty); *Frederick v. Strickland*, 386 So.2d 1150, 1151-52 (Ala.Civ. App.1980) (view of premises by trier of fact supported its computation of difference between value of dwelling as contracted and its value as actually constructed); 2 Charles W. Gamble, *McElroy's Alabama Evidence* § 208.01 & .02 (5th ed.1996) (discussing judicial views generally).

Crim testified concerning the existence of an old, visible fence line roughly paralleling a quarter-section line constituting the boundary between Crim's property and Lovelady's property; he further testified that a marker pipe had been removed from the boundary between his land and Lovelady's, and that Creel had cut pine and poplar trees from the north side (i.e., Crim's side) of the old fence/section line. Moreover, an exhibit admitted into evidence contains a handwritten statement signed by Creel in which he states "I'm very sorry for the over cut, but I simply done [sic] what I was told to do." From that evidence, as well as the trial court's view of the property, the trial court could

1. We reject Crim's contention that the sufficiency of the evidence before the trial court to support its findings is not properly raised as an issue in this court. See *Ex parte Vaughn*, 495 So.2d 83, 87 (Ala.1986) (holding that

express findings of fact by a trial court will in and of themselves preserve for appellate review the sufficiency of the evidence to support those findings).

have ascertained not only that Creel trespassed upon, and cut trees from, Crim's land, but also that Creel's actions diminished the value of Crim's property in the amount of \$5,400.

[3-5] As to Creel's cross-claim, we reach a different conclusion.² While Alabama law generally provides that a trespasser may not recover indemnity from a co-trespasser, that rule does not apply "if there is not a known, meditated wrong" and "if the parties act bona fide under the supposition of the entire innocence and propriety of the act and under circumstances excluding intentional wrong." *Eureka Coal Co. v. Louisville & N.R.R.*, 219 Ala. 286, 289, 122 So. 169, 171 (1929); accord, *Moore v. Appleton*, 26 Ala. 633 (1855). Indeed, the Alabama Supreme Court long ago recognized that "[e]very man . . . who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have." *Vandiver v. Pollak*, 97 Ala. 467, 470, 12 So. 473, 474 (1893) (quoting *Adamson v. Jarvis*, 4 Bing. 66, 130 Eng. Rep. 693 (C.P.1827)).

[6] Although the trial court declined to hold Lovelady directly liable to Crim for the trespass of Creel,³ the court awarded Creel \$2,700 on Creel's cross-claim for indemnity, implicitly finding that Lovelady's representations concerning the extent of her land were the primary reason Creel trespassed upon Crim's land. However, at common law, "indemnity shifts [the] entire burden of loss from one party to another;

2. Lovelady has not favored this court with a brief.
3. The correctness of the trial court's judgment as to Crim's claim against Lovelady is not before us, because Crim did not appeal from the judgment. However, Alabama law does recognize that a person may become liable for

thus, the measure of recovery is *all or nothing*." 42 C.J.S. *Indemnity* § 41 (1991) (emphasis added); accord, *Poling Transp. Corp. v. United States*, 613 F.Supp. 1319, 1321 (E.D.N.Y.1985). Because the trial court found that Creel was entitled to indemnity because of Lovelady's representations, but did not require full indemnity, the court erred. See *Steel City Erection Co. v. Johnson-Rast & Hays, Inc.*, 402 So.2d 1014, 1015 (Ala.Civ. App.1981) (trial court abused its discretion in awarding plaintiff only \$4,000 plus interest, where evidence would support only an award of \$10,117—the entire premium of one insurance policy—or an award of nothing).

Based upon the stated facts and the cited authorities, the judgment is affirmed insofar as it relates to Crim's trespass claim against Creel. However, insofar as it relates to Creel's cross-claim against Lovelady, the judgment is reversed. The cause is remanded with instructions for the trial court to enter a judgment in the amount of \$5,400, plus costs, in favor of Creel on his cross-claim.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

YATES, P.J., and CRAWLEY,
THOMPSON, and PITTMAN, JJ., concur.



trespass to adjoining land without actually going upon that land when that person, or that person's agent, points out an erroneous division line between the tracts to a lumberman who later cuts trees on the adjoining land. See *Oswalt v. Smith*, 97 Ala. 627, 12 So. 604 (1893).

Questions Connected to the Reading

Directions: In *Creel v. Crim*, there are three parties involved in the litigation. Answer the following questions:

1. What do the following legal terms mean?
 - a. *Ore tenus* proceeding
 - b. Chattel
 - c. Indemnity
 - d. Vicarious Liability
 - e. Complaint
 - f. Cross-Complaint
2. What happened leading to the legal dispute?
3. Why is this case before the Court of Civil Appeals of Alabama and not the Alabama trial court?
4. Who are the three parties involved?
5. What are the parties' legal interests in the case?
6. What are the issues being decided by the Court?
7. What are the parties' arguments presented to the Court?
8. Explain the reasoning given by the Court to resolve the trespass claim.
9. Explain the reasoning given by the Court to resolve the indemnity claim.

Trespass to Chattel

A trespass to a chattel may be committed by intentionally

- (a) dispossessing another of the chattel, or
- (b) using or intermeddling with a chattel in the possession of another.

Rest. Torts 2d. §217

Conversion

Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

Rest. Torts 2d. § 222A

Trespass to Land

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

- (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
- (b) remains on the land, or
- (c) fails to remove from the land a thing which he is under a duty to remove.

Rest. Torts 2d. §158

Problems

Directions: Consider the factual situations presented below.

Q: Do the facts give rise to a cause of action for trespass to chattels; conversion; both; or neither of the two torts?

- Mel slashes Pam's tires on her car.
- Mel, a medical researcher jealous of a colleague, contaminates his colleague's cell cultures ruining her experiment.
- Grace, an environmental activist, chains herself to a commercial logging machine owned by Paper Co. As a result, logging operations in the forest cease for a full workday while the police remove Grace.
- Steve is waiting to interview Jeff, a corporate executive, accused of wrongdoing. Steve notices that Jeff left his papers out on a desk in his office, while he conferred with his lawyers in a nearby conference room. Steve deftly entered the office and took photos of Jeff's papers with his cell phone. The next day Steve published a story based on the photos of the documents on Jeff's desk.