

In the Circuit Court of Marion County, West Virginia

**Gregory S. Bradley,
Judy Johnson Bradley,
Plaintiffs,**

vs.)

**Andrea Dale Dye,
Larry Jones, Jr.,
Roberta J. Jones,
OTHER UNKNOWN DEFENDANTS,
Defendants**

Case No. CC-24-2018-C-110

Order Granting Defendants' Motion for Summary Judgment Against Plaintiffs

On January 25, 2021, came Plaintiffs, Gregory S. Bradley and Judy Johnson Bradley (hereinafter referred to collectively as "Plaintiffs"), by and through their counsel, John R. Angotti, Chad C. Groome, and Angotti & Straface, L.C., and Defendant Andrea Dale Dye (hereinafter referred to as "Defendant Dye"), by and through her counsel, the law firm of Bailey & Wyant, P.L.L.C., James W. Marshall, III, and Daniel T. LeMasters for a hearing upon *Defendant Andrea Dale Dye's Motion for Summary Judgment against Plaintiffs*. In her Motion for Summary Judgment, Defendant Dye sought an award of summary judgment as to Plaintiffs' claims asserted against her and for this Civil Action to be dismissed, with prejudice. The Court has considered *Defendant Andrea Dale Dye's Motion for Summary Judgment against Plaintiffs* ("Motion for Summary Judgment"), *Memorandum of Law in Support of Defendant Andrea Dale Dye's Motion for Summary Judgment against Plaintiffs*, *Plaintiffs' Response in Opposition to Defendant Andrea Dale Dye's Motion for Summary Judgment against Plaintiffs*, *Defendant Andrea Dale Dye's Reply to Plaintiff's Response in Opposition to Defendant Andrea Dale Dye's Motion for Summary Judgment against Plaintiffs*, the arguments of counsel; and the relevant legal authorities; and it hereby **GRANTS** *Defendants' Motion*

for Summary Judgment against Plaintiffs based on the Findings of Fact and Conclusions of Law that follow:

FINDINGS OF FACT

1. Defendant Dye is a bus driver, and has no experience in timbering, logging, or surveying. *See Memorandum of Law In Support of Defendant's Motion for Summary Judgment at Exhibit 1* at p.7:16-18;12:1-5; 19:8-11.

2. Defendant Dye currently resides and owns property located at 1872 Flaggy Meadow Road in Mannington, West Virginia. Exhibit 1 at p. 5:3-10.

3. Defendant Dye's property is one of the bordering properties of Plaintiffs' subject property at issue in this matter. *See Memorandum of Law In Support of Defendant's Motion for Summary Judgment at Exhibit 2* at p. 22-23:24-11. Plaintiffs' property is also bordered by property belonging to the Hayes and Hill. *See Id.* at p. 39-40:20-6; 90:17-19. Plaintiffs' purchased the subject property from Nation Timber Partners in 2010 or 2012. *See Id.* at p. 6:12-14; 7:4-6.

4. An easement runs through Defendant Dye's property to get to Plaintiffs' property. *See Id.* at p. 22-23:24-11.

5. Defendant Larry Jones sought a right-of-way through Defendant Dye's property to timber for James Hayes. *See Exhibit 1* at p. 20-21:23-6.

6. Defendant Dye granted permission to Defendant Jones Hauling and Defendant Larry Jones to cross her property. *See Id.* at p. 22-23:24-2.

7. When Defendant Dye granted permission to Defendant Jones Hauling and Defendant Larry Jones to access her property, she did not give permission to access or cross over anyone else's property. *See Id.*

8. When Defendant Larry Jones approached Defendant Dye about obtaining access across her property, he also proposed timbering her property. *Id.* at p. 28:16-19. Defendant Larry Jones told Ms. Dye that "[w]hile I'm up there timbering on Mr. Hayes, I

can get some of your logs, your timber on my way back when I'm done with him[.]” *Id.* at p. 28-29:20-1. After making this statement, Defendant Larry Jones gave Ms. Dye the Co-Defendants’ contract. *Id.* at p. 29:1-2; 34-35:24-3; *see also, Memorandum of Law In Support of Defendant’s Motion for Summary Judgment at Exhibit 3.*

9. Defendant Larry Jones advised Defendant Dye that Herbert Hill’s property was also going to be timbered prior to her property. *See Exhibit 1 at p. 3-8.*

10. Herbert Hill’s and James Hayes’ properties also boarder Plaintiffs’ property at issue. Exhibit 2 at p. 39-40:20-6; 90:17-19.

11. On January 10, 2016, Defendant Dye entered into a contract with Jones Hauling, Larry Jones, Jr., and Roberta J. Jones. *See Exhibit 3.*

12. The contract states, in pertinent part, that:

This agreement made and entered into on 1-10-16 by and between Andrea Dye A partnership, hereinafter referred to as Seller, and Larry Jones Jr. DBA: Jones Hauling 2630 Picken Paw Road Smithfield, WV 26437 hereinafter referred to as Buyer.

Id. at p. 1.[1]

13. Pursuant to the contract, Defendant Dye was referred to as the seller, and Co-Defendants were referred to as the buyer. *See Id.*

14. Section Five Indemnity Subsection 1 within the contract states that:

Seller makes no representations as to the present or future condition of its property. Buyer assumes all risks of personal injury or damage to its property in connection with operations hereunder. Buyer hereby represents that he is personally familiar with this property, and the boundaries lines delineating the area to be logged.

Id. Section Five Indemnity Subsection 2 within the Contract states that:

Buyer shall indemnify Seller against all claims or liabilities asserted by others arising from or in any manner related to activities connected with this contract.

Id.

15. Section Six of the subject contract clearly states that “Buyer agrees and covenants that he is an independent contractor[.]” *Id.*

16. Section Seven of the subject contract provides that "Buyer is to do said work according to his methods; is to employ and pay all employees he engages to assist him in said work; is to have the sole right of control over such employees; and that he and his employees are not subject to the control of Seller." *Id.* at p. 2.

17. Section Eight of the subject contract provides that "Buyer hereby covenants not to cut any line tree or trees on land owned by other third parties over which a right of way has not been procured. Buyer further agrees not to violate the laws of nuisance, and not to cut timber in such careless fashion as unnecessarily create fire hazards." *Id.* at p. 2.

18. Defendant Dye never directed the Co-Defendants where to timber. Exhibit 1 at p. 39:8-17. Defendant Dye never helped the Co-Defendants timber. *Id.* at p. 37:20-24.

19. The subject contract provides that the Co-Defendants were familiar with Defendant Dye's property lines and her property's boundary lines. Exhibit 3 at p. 1.

20. Defendant Dye did not have the ability to timber her property or any property. Exhibit 1 at p. 35:12-14.

21. Defendant Dye didn't oversee Co-Defendants' work or day-to-day operations. *Id.* at p. 43-44:21-7.

22. Defendant Dye did not identify, select, or direct Co-Defendants as to the timber to be removed from her property. *Id.*

23. Defendant Dye did not identify, select, or direct Co-Defendants to timber Plaintiffs' timber. *Id.* at p. 39:8-17; 53:10-13.

24. Defendant Dye did not tell or direct Co-Defendants to enter upon any other individuals' property, which would include Plaintiffs' property. *Id.* at p. 39:8-17.

25. Defendant Dye never made any representations to Co-Defendants about her property boundaries. *Id.* at p. 29:13-25. Defendant Dye never walked her property lines with Co-Defendants or marked her property for them. *Id.* at p. 31:1-6.

26. Defendant Larry Jones told Defendant Dye that he was going to walk her property. *Id.* at p. 34:4-6.

27. Defendant Dye relied upon Co-Defendants' representations and the contract they provided to her. *Id.* at p. 34:4-6.

28. Defendant Dye didn't physically enter upon Plaintiff's property to remove their trees. *See Exhibit 2* at p. 125:12-15.

29. Defendant Dye didn't physically cut, carry away, or damage trees upon Plaintiffs' property. *See Id.*

30. Defendant Dye didn't physically create any haul roads, debris piles, or other physical changes to Plaintiff's property. *See Id.*

31. When specifically asked whether he thought Ms. Dye physically went on to his property and cut down trees, Plaintiff Gregory Bradley testified "Oh, absolutely not." *See Id.*

32. Defendant Dye was never aware of anyone timbering on Plaintiffs' property. *Id.* at p. 69:17-19.

33. Defendant Dye never physically entered upon Plaintiffs' property during any timbering activities being conducted. *See Exhibit 1* at p. 43:21-23;45:4-10;*Exhibit 2* at p. 125:12-15.

34. Defendant Dye's property had select cut timber performed on it. *See Defendant Andrea Dale Dye's Reply to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment at Exhibit 4* at p. 56-57:21-6.

CONCLUSIONS OF LAW

1. A party is entitled to summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure if the record shows there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c).

2. Summary judgment is a favored procedure that “plays an important role in litigation.” *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 335 (W. Va. 1995). “It is ‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,’” and “to isolate and dispose of meritless litigation.” *Id.* (quoting *Painter v. Peavy*, 451 S.E.2d 755, 758 n.5 (W. Va. 1994)).

3. Summary judgment is proper “when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Stemple v. Dobson*, 400 S.E.2d 561, 564 (W. Va. 1990) (citation omitted); *see also* W. Va. R. Civ. P. 56, 50. The moving party initially bears the burden of showing that there is no genuine issue of fact, after which “the burden of productions shifts to the nonmoving party,” who must present evidence showing that there are material facts in dispute. *Williams*, 459 S.E.2d at 337. “[T]he nonmoving party must nonetheless offer some ‘concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor.’” *Id.* (alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).

4. The *Williams* Court noted that “[t]he evidence illustrating the factual controversy cannot be conjectural or problematic.” *Williams*, 194 W.Va. at 60, 459 S.E.2d at 337. *See also Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (holding that unsupported speculation is insufficient to defeat summary judgment). “The mere existence of a scintilla of evidence in support of the plaintiff’s position” cannot satisfy that burden. *Liberty Lobby*, 477 U.S. at 252. Further, any such evidence may not consist of vague, unsupported assertions by counsel; rather, “the nonmovant must go beyond the pleadings and contradict the showing by pointing to specific facts demonstrating a single ‘trial worthy’ issue.” *Powderridge Unit Owners Ass’n. v. Highland Props, Ltd.*, 474 S.E.2d 872, 977-80 (W. Va. 1996).

A. Defendant Dye did not violate West Virginia Code § 61-3-48a.

5. West Virginia Code § 61-3-48a states, in pertinent part, that:

Any person who enters upon the land or premises of another without written permission from the owner of the land or premises in order to cut, damage or carry away or cause to be cut, damaged or carried away, any timber, trees, logs, posts, fruit, nuts, growing plant or product of any growing plant, shall be liable to the owner in the amount of three times the value of the timber, trees, growing plants or products thereof, which shall be in addition to and notwithstanding any other penalties by law provided.

W. Va. Code § 61-3-48a.

6. West Virginia Code § 61-3-48a requires that Defendant Dye physically entered the land or premises of Plaintiffs to cut, damage or carry away or cause to be cut, damaged or carried away, any timber, trees, or logs.

7. The West Virginia Supreme Court's decisions applying West Virginia Code § 61-3-48a involve only the tortfeasor logging companies that allegedly committed the timber trespass through their respective employees or agents. *See Response* at p. 14; *citing, Bullman v. D&R Lumber Co.*, 464 S.E.2d 771 (W. Va. 1995); *Chesser by Hadley v. Hathaway*, 439 S.E.2d 459 (W. Va. 1993).

8. Defendant Dye didn't physically enter the land or premises of Plaintiffs to cut, damage or carry away any timber, trees, or logs. *See Exhibit 1* at p. 35:12-14; *Exhibit 2* at p. 125:12-15.

9. Defendant Dye didn't physically enter the land or premises of Plaintiffs to cause to be cut, damaged or carried away, any timber, trees, or logs. *See Id.*

10. There is no genuine issue of fact as to Plaintiffs' claim that Defendant Dye allegedly physically entered the land or premises of Plaintiffs to cut, damage or carry away or cause to be cut, damaged or carried away, any timber, trees, or logs.

11. Again, Defendant Dye didn't physically enter the land or premises of Plaintiffs to cut, damage or carry away or cause to be cut, damaged, or carried away, any timber, trees, or logs. *See Exhibit 1* at p. 35:12-14; *Exhibit 2* at p. 125:12-15.

12. Moreover, there is no evidence in the record to put forth a genuine issue of material fact to support Plaintiffs' position that Defendant Jones Hauling, Inc., Defendant Larry Jones, Defendant Roberta Jones, and/or the Co-Defendants' employees and/or agents relied upon any action of Defendant Dye to cause Defendant Jones Hauling, Inc., Defendant Larry Jones, Defendant Roberta Jones, and/or the Co-Defendants' employees and/or agents to cut, damage or carry away any timber, trees, or logs.

13. At the summary judgment stage, the Court cannot rely upon assumptions or what ifs as to what Defendant Jones Hauling, Inc., Defendant Larry Jones, Defendant Roberta Jones, and/or the Co-Defendants' employees and/or agents may or may not have relied upon in committing their alleged violation of West Virginia Code § 61-3-48a. Rather, the Court must rely upon the facts developed within the record before it. *See Powderridge Unit Owners Ass'n. v. Highland Props, Ltd.*, 474 S.E.2d 872, 977-80 (W. Va. 1996); *see also, Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 337 (W. Va. 1995).

14. The record before this Court establishes that Defendant Dye did not have control over Co-Defendants' and/or their employees' or agents' actions just like the other landowners whose land was timbered. *See* Exhibit 1 at p. 43-44:21-7.

15. The record before this Court establishes that Defendant Dye granted permission to Defendant Jones Hauling and Defendant Larry Jones to access only her property and to timber only her property. *See Id.* at p. 22-23:24-2 & p. 28:16-19; *see also* the Contract; Right of Way Agreement.

16. The record before this Court establishes that Defendant Dye did not give permission to Defendant Jones Hauling, Inc., Defendant Larry Jones, Defendant Roberta Jones, and/or the Co-Defendants' employees and/or agents to access any other properties. *See Id.* at p. 22-23:24-2 & p. 28:16-19; *see also* the Contract; Right of Way Agreement.

17. Plaintiffs have failed to put forth any record evidence to establish that a genuine issue of material fact exists of Defendant Dye actually entering upon Plaintiffs' property without permission to "cause to be cut, damaged, or carried away, any timber."

18. Accordingly, the record before this Court establishes that Defendant Dye did not violate West Virginia Code § 61-3-48a.

B. Ms. Dye did not owe Plaintiffs a legal duty.

19. In order to establish a negligence claim under West Virginia law, a plaintiff is required to prove the following four elements: (1) that the defendant owed the plaintiff a legal duty; (2) that the duty was breached; (3) that the plaintiff was injured; and (4) that the injury was proximately caused by the negligence. *Neely v. Belk, Inc.*, 668 S.E.2d 189, 197 (W. Va. 2008).

20. The West Virginia Supreme Court has recognized that "a common law negligence theory cannot proceed unless there is a duty owed by the alleged culpable person to the injured person. No action for negligence will lie without a duty broken." *Yourtee v. Hubbard*, 474 S.E.2d 613, 619 (W. Va. 1996). Ultimately, the determination of whether a defendant owes a duty to the plaintiff is a determination to be rendered by the court as a matter of law. Syl. Pt. 5, *Aikens v. Debow*, 541 S.E.2d 576 (W. Va. 2000).

21. Defendant Dye did not owe Plaintiffs a legal duty.

22. Defendant Dye entered into a timber contract with Co-Defendants for the purpose of only timbering her property.

23. Again, the record before this Court establishes that Defendant Dye did not have control over Co-Defendants' and/or their employees' or agents' actions just like the other landowners whose land was timbered. *See Exhibit 1* at p. 43-44:21-7.

24. The record before this Court establishes that Defendant Dye granted permission to Defendant Jones Hauling and Defendant Larry Jones to access only her property and to timber only her property. *See Id.* at p. 22-23:24-2 & p. 28:16-19; *see also Exhibit 3.*

25. The record before this Court establishes that Defendant Dye did not give permission to Defendant Jones Hauling, Inc., Defendant Larry Jones, Defendant Roberta Jones, and/or the Co-Defendants' employees and/or agents to access any other properties. *See Id.* at p. 22-23:24-2 & p. 28:16-19; *see also* Exhibit 3.

26. The record establishes that Defendant Dye was not involved in Co-Defendants' timbering activities. *See* Exhibit 1 at p. 43-44:21-7; *see also*, Exhibit 3.

27. Defendant Dye did not have any knowledge, nor could she foresee that Co-Defendants would timber portions of Plaintiffs' property. *See* Exhibit 1 at p. 69:17-19.

28. Defendant Dye only contracted with Co-Defendants to timber her property. *See* Exhibit 3.

29. At the summary judgment stage, Plaintiffs have advanced for the first time numerous legal theories and alleged criminal statute violations to attempt to create Defendant Dye owing them a duty. As established herein, the record establishes that these theories fail and there is no genuine issue of material fact to permit them to survive summary judgment.

C. A partnership does not exist between Defendant Dye and the Co-Defendants.

30. West Virginia Code § 47B-1-1(7) defines "partnership" as meaning "an association of two or more persons to carry on as co-owners of a business for profit formed under section two [§ 47B-2-2], article two of this chapter, predecessor law, or comparable law of another jurisdiction and includes, for all purposes of the laws of this state, a registered limited liability partnership." W. Va. Code § 47B-1-1(7).

31. In determining whether a partnership is formed, West Virginia Code § 47B-2-2(c) provides that the following rules apply:

- (1) joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.
- (2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property

from which the returns are derived.

(3) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

(i) Of a debt by installments or otherwise; (ii) For services an independent contractor or of wages or other compensation to an employee; (iii) of rent; (iv) of an annuity or other retirement or health benefit to a beneficiary, representative or designee of a deceased or retired partner; (v) Of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds or increase in value derived from the collateral; or (vi) For the sale of the goodwill of a business or other property by installments or otherwise.

W. Va. Code § 47B-2-2(c).

32. The West Virginia Supreme Court has recognized that “[a]n essential element of a partnership or joint venture is the right of joint participation in the management and control of the business[.]” *Armor v. Lantz*, 535 S.E.2d 737, 745 (W. Va. 2000).

33. The subject contract does not create a partnership. *See* Exhibit 3.

34. A plain reading of the contract shows that the mere two words following Defendant Dye’s name within the contract does not create a partnership. First, the contract states, in pertinent part, that:

This agreement made and entered into on 1-10-16 by and between Andrea Dye a partnership, hereinafter referred to as Seller, and Larry Jones Jr. DBA: Jones Hauling 2630 Picken Paw Road Smithfield, WV 26437 hereinafter referred to as Buyer.

Id. at p. 1. The words “a partnership” refer only to Defendant Dye, and they do not indicate that Defendant Dye and Co-Defendants are entering into the contract to form a partnership as Plaintiffs’ allege. *See id.*

35. Furthermore, the subject contract unambiguously designates the Co-Defendants as independent contractors. *Id.* (“Buyer agrees and covenants that he is an independent contractor[.]”)

36. The subject contract provides that the Co-Defendants have sole control of the timbering methods and their employees. *Id.* at p. 2.

37. The record establishes that Defendant Dye was not managing or controlling the

Co-Defendants and/or their employees and agents. *See* Exhibit 1 at p. 43-44:21-7; *see also*, Exhibit 3.

38. Defendant Dye was not receiving profits from Co-Defendants' business. *See* Exhibit 3 at p. 1. Rather, Defendant Dye was receiving payment for the trees that she was selling from her property to the Co-Defendants. *See id.*

39. As such, Plaintiffs' argument that a partnership exists between Ms. Dye and the Co-Defendants fails as a matter of law.

D. A joint venture does not exist between Defendant Dye and Co-Defendants.

40. The West Virginia Supreme Court has held that:

A joint venture . . . is an association of two or more persons to carry out a single business enterprise for profit, for which purposes they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied.

Syl. Pt. 5, *Armor v. Lantz*, 535 S.E.2d 737 (W. Va. 2000).

41. The West Virginia Supreme Court has emphasized that an agreement to share in the profits and losses of the enterprise is a distinguishing feature of a joint venture. *See Armor, supra* at 743; *see also, Pyles v. Mason County Fair, Inc.*, 806 S.E.2d 806, 812 (W. Va. 2017) (The Court recognizing that "the focus on the 'presence or absence of an agreement to share in the profits and losses of an enterprise' remains a critical component of the joint venture analysis today."). In order to establish a joint venture, the Court has also recognized that "joint venturers have equal control over the common commercial pursuit." *Armor*, 535 S.E.2d at 745. The Court has emphasized that "[p]ossibly the most important criterion of a joint venture is joint control and management of the property used in accomplishing its aims." *Id.*

42. There is no agreement between Ms. Dye and Co-Defendants to share in any of the losses and profits generated by Co-Defendant Jones Hauling's timbering actions. *See* Exhibit 3.

43. Again, the subject contract provides that Defendant Dye was receiving payment for the sale of her trees on her property.. *See Id.*

44. Defendant Dye and Co-Defendants did not combine their property, money, effects, skills, and knowledge for profit. *See Id.*

45. The record establishes that Defendant Dye was not involved in any timbering on Plaintiffs' property and did not manage or control the Co-Defendants and/or their employees and agents. *See* Exhibit 1 at p. 43-44:21-7; Exhibit 2 at p. 43-44:21-7; *see also*, Exhibit 3.

46. As such, Plaintiffs' joint venture argument in opposition to the Motion for Summary Judgment fails as a matter of law.

E. A principal-agent relationship does not exist between Defendant Dye and Co-Defendants.

47. The terms "principal and agent," "master and servant," and "employer and employee" are used interchangeably in cases involving respondeat superior. *Zirkle v. Winkler*, 585 S.E.2d 19 (W. Va. 2003). The doctrine of respondeat superior itself is sometimes referred to as "imputed" or "vicarious" liability. *Id.* It is the burden of the proponent of vicarious liability to make a "*prima facie* showing of the existence of a master-servant relationship." *Zirkle v. Winkler*, 585 S.E.2d 19, 22 (W. Va. 2003) (quoting *Sanders v. Georgia-Pacific Corp.*, 225 S.E.2d 218, 222 (W. Va. 1976)).

48. "There are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of respondeat superior: (1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative." Syllabus Point 5, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990). *See also Shaffer v. Acme Limestone*, 206 W.Va. 333, 340 (W. Va. 1999). The West Virginia Supreme Court of

Appeals has established that the determinative feature is the power of control. *Paxton*, 400 S.E.2d 245. This power is defined as power over the process, not just the outcome, that “demonstrates the essential feature of control” such that a relationship exists. *Robertson v. Morris*, 546 S.E.2d 770, 773 (W. Va. 2001). “The power of control factor refers to control over the means and method of performing the work.” *Shaffer*, *supra*.

49. Again, the record establishes that Defendant Dye did not manage or control the Co-Defendants and/or their employees and agents. *See* Exhibit 1 at p. 43-44:21-7; Exhibit 2 at p. 43-44:21-7; *see also*, Exhibit 3.

50. As such, Plaintiffs’ principal-agent relationship argument in opposition to the Motion for Summary Judgment fails as a matter of law.

F. Defendant Dye did not engage in a civil conspiracy with Co-Defendants.

51. The West Virginia Supreme Court has held that:

A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. This cause of action is not created by conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff.

A civil conspiracy is not a per se, stand-alone cause of action; it is instead a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrator(s).

Syl. Pts. 8 & 9, *Dunn v. Rockwell*, 689 S.E. 2d 255 (W. Va. 2009).

52. The record establishes that Defendant Dye entered into a contract for timbering to occur solely on her property. *See* Exhibit 3.

53. The subject contract was not for an unlawful purpose to be committed by Defendant Dye or Co-Defendants. *See id.*

54. The subject contract was not for Defendant Dye or Co-Defendants to engage in unlawful means to timber Defendant Dye's property. *See Id.*

55. Defendant Dye did not engage in a common plan or scheme with Co-Defendants to commit an alleged timber trespass on Plaintiffs' property. *See Id.* The subject contract provided that Co-Defendants were solely responsible for their methods of timbering, their work, and the identification of the property lines and boundaries. *See Id.* at p. 1-2.

56. As such, Plaintiffs' conspiracy argument in opposition to the Motion for Summary Judgment fails as a matter of law.

G. Defendant Dye did not substantially encourage or aid or abet Co-Defendants.

57. Regarding the legal theory of substantial encouragement or encouragement also known as aiding and abetting a tort, the West Virginia Supreme Court has recognized that:

[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.

58. *Courtney v. Courtney*, 413 S.E.2d 418, 426 (W. Va. 1991); *quoting, Price v. Halstead*, 355 S.E.2d 380, 386 (W. Va. 1987).

59. The West Virginia Supreme Court recognized the following six criteria to consider when determining whether a person can be liable for assisting or encouraging a tort:

a. the nature of the act encouraged; b. the amount of assistance given by the defendant; c. the defendant's presence or absence at the time of the tort; d. the defendant's relation to the other tortfeasor; e. the defendant's state of mind; and f. the foreseeability of the harm that occurred.

Courtney, supra.

60. The record establishes that Defendant Dye only entered into a contract for her timber to be cut. *See Exhibit 3.*

61. Defendant Dye did not give permission to Co-Defendants to cut anything other

than her timber. *See Id.*; Exhibit 2 at p. 29-31:13-6.

62. Defendant Dye never directed or assisted Co-Defendants in determining were to cut or what to cut. *See Id.*

63. Defendant Dye did not encourage, give any assistance, or aid and abet Co-Defendants' in committing their alleged timber trespass on Plaintiffs' property.

64. Plaintiffs have failed to put forth any record evidence to establish that a genuine issue of material fact exists to establish otherwise.

65. As such, Plaintiffs' aiding and abetting theory in opposition to the Motion for Summary Judgment fails as a matter of law.

H. Defendant Dye did not violate West Virginia Code § 61-3-33.

66. West Virginia Code § 61-3-33 states that:

If any person shall, without the consent of the owner or occupier thereof, enter upon the inclosed lands of another and do any damage, or shall, without such consent, pull down in whole or in part, or injure, any fence of another, or without permission open and leave open the gate or drawbar or another, or enter upon the inclosed lands of another after being forbidden so to do, or enter thereon and curse, or insult, or annoy, the owner thereof or any person rightfully there, he shall be guilty of a misdemeanor, and, upon conviction, be fined not less than five nor more than one hundred dollars; and, in default of the payment of the fine, the offender may, in the direction of the judge or justice, be committed to jail for not less than five days. He shall, moreover, be liable to the party injured for the damages sustained by such injury; and it shall be no defense to any prosecution or suit under this section, that such fence was not a lawful fence.

W. Va. Code § 61-3-33.

67. Defendant Dye did not enter upon Plaintiffs' property, without their permission, and do any damage or pull down in whole or part, or injure, any fence, or open and leave open any gate or drawbar.

68. Defendant Dye did not damage, destroy, and/or deface Plaintiffs' property.

69. As such, Plaintiffs' argument that Ms. Dye violated WV Code 61-3-33 raised in

opposition to the Motion for Summary Judgment fails as a matter of law.

I. Defendant Dye did not violate West Virginia Code § 61-3-30.

70. West Virginia Code § 61-3-30 states that:

(a) If any person unlawfully, but not feloniously, takes and carries away, or destroys, injures or defaces any property, real or personal, of another, he or she is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars, or confined in the county or regional jail not more than one year, or both fined and imprisoned.

(b) Any person who unlawfully, willfully and intentionally destroys, injures or defaces the real or personal property of one or more other persons or entities during the same act, series of acts or course of conduct causing a loss in the value of the property in an amount of two thousand five hundred dollars or more, is guilty of the felony offense of destruction of property and, upon conviction thereof, shall be fined not more than two thousand five hundred dollars or imprisoned in the state correctional facility for not less than one year nor more than ten years, or in the discretion of the court, confined in the county or regional jail not more than one year, or both fined and imprisoned.

(c) If any person breaks down, destroys, injures, defaces or removes any monument erected for the purpose of designating the boundaries of a municipality, tract or lot of land, or any tree marked for that purpose, or any sign or notice upon private property designating no trespassing upon the property, except signs or notices posted in accordance with the provisions and purposes of sections seven [§ 20-2-7], eight [§ 20-2-8] and ten [§ 20-2-10], article two, chapter twenty of this code, he or she is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than twenty dollars nor more than two hundred dollars, or confined in the county or regional jail not less than one nor more than six months, or both fined and imprisoned. Magistrates have concurrent jurisdiction of all offenses arising under the provisions of this section. The provisions of this paragraph do not apply to the owner, or his or her agent, of the lands on which such signs or notices are posted.

W. Va. Code § 61-3-30.

71. Again, the record establishes that Defendant Dye did not take, carry away, destroy, injure, or deface Plaintiffs' property.

72. The record establishes that Defendant Dye did not herself physically cause any damage or defacing of Plaintiffs' property.

73. As such, Plaintiffs' argument that Ms. Dye violated WV Code 61-3-30 raised in opposition to the Motion for Summary Judgment fails as a matter of law.

J. Defendant Dye did not violate West Virginia Code § 20-2-9.

74. West Virginia Code § 61-3-33 states that:

It shall be unlawful and shall constitute a misdemeanor offense for any person or his agent or employee willfully to post any notice or warning or willfully to ward, drive or attempt to drive any person off, or prevent his hunting or fishing on, any land not owned or lawfully occupied by such person, his agent, or employee, unless such land is a lawfully established game or fish preserve.

W. Va. Code § 61-3-33.

75. The record establishes that Defendant Dye did not willfully post no trespassing signs on Plaintiffs' property.

76. The record establishes that Defendant Dye placed no trespassing signs along an easement across the Plaintiffs' property used to access a gas well. *See* Exhibit 1 at p. 27-28:10-12.

77. Plaintiffs have failed to put forth any evidence that Defendant Dye posted no trespassing signs in the areas in which Plaintiffs assert their trees were wrongfully removed.

78. Plaintiffs have failed to put forth a genuine issue of material fact from the record to attempt to establish that the alleged timber trespass came forth from the no trespassing signs Plaintiffs identified in discovery.

79. Even if a duty was created by this statute, Plaintiffs cannot point to any facts in the record to create a genuine issue of material fact that Defendant Dye's actions of posting no trespassing signs along the gas well road breached this duty owed to them in a manner that proximately caused the Plaintiffs' alleged damages.

80. As such, Plaintiffs' argument that Ms. Dye violated WV Code 20-2-9 raised in opposition to the Motion for Summary Judgment fails as a matter of law.

K. Defendant Dye did not engage in willful, wanton, or reckless conduct to give rise to alleged punitive damages.

81. West Virginia's punitive damage statute states as follows:

An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.

W. Va. Code § 55-7-29(a).

82. Defendant Dye never engaged in any actions that would permit punitive damages to be considered against her or that she engaged in conduct "with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others."

83. Again, Defendant Dye entered into a contract with the Co-Defendants to timber her property. *See* Exhibit 3.

84. Defendant Dye never trespassed on Plaintiffs' property bringing forth damages or to cause damages to be brought forth by Co-Defendants. *See* Exhibit 1 at p. 43:21-23; 45:4-10; Exhibit 2 at p. 125:12-15.

85. Plaintiffs cite to no evidence that she acted with malice toward Plaintiffs or with a conscious, reckless and outrageous indifference to their health safety and welfare.

86. As such, Plaintiffs' claim for punitive damages against Ms. Dye fail as a matter of law.

CONCLUSION

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law the Court finds that summary judgment is appropriate under Rule 56(c) of the *West Virginia Rules of Civil Procedure*. Plaintiffs failed to create a genuine issue of material fact for each of their claims against Defendant Dye. Wherefore, pursuant to Rule 56(c) of the *West Virginia Rules of Civil Procedure*, Defendant Dye is entitled to summary judgment as a matter of law as to all of Plaintiffs' claims asserted against her. As there are no claims remaining against Defendant Dye, she shall be dismissed as a defendant from this Civil Action, with prejudice.

Each party's objections and exceptions are noted and preserved.

The Clerk of this Honorable Court is directed to forward a copy of this Order to all parties of record.

This is a final Order.

ENTERED this 17th day of March, 2021.

[1] The Plaintiffs contend the language in the contract creates a "partnership". However, contrary to the Plaintiffs' argument in opposition to the Motion for Summary Judgment, the partnership referenced in the contract clearly refers only to Andrea Dye, who is the seller under this agreement. Whether Andrea Dye herself is an individual or a partnership under the agreement is not at issue and irrelevant to the Court's ruling on this Motion.

/s/ Patrick N. Wilson
Circuit Court Judge
16th Judicial Circuit

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Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courts.wv.gov/e-file/ for more details.