COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000083-D

LARRY PENIX — APPELLANT

V.

ON DISCRETIONARY REVIEW
FROM THE KENTUCKY COURT OF APPEALS:
NO 2011-CA-0001526-MR
NO 2011-CA-0001529-MR
(FROM THE MARTIN COUNTY CIRCUIT COURT)
(CASE NO. 09-CI-00190)

BARBARA DELONG — APPELLEE

BRIEF OF THE APPELLEE BARBARA DELONG

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the Brief of the Appellee, Barbara Delong, was served by depositing same in the United States Mail, first class, postage prepaid, addressed to the following: Kyle R. Salyer, Esq., Salyer Law Office, PLLC, PO Box 2213 Paintsville, Kentucky 41240; Samuel P. Givens, Jr., Esq. Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; The Honorable John David Preston, Judge, Martin Circuit Court, 908 Third Street, Suite 217 Paintsville, Kentucky 41240, on this the 9 day of April, 2015. I do hereby further certify that the record was not removed by me from the Martin Circuit Court or the Kentucky Court of Appeals.

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I. INTRODUCTION

Appellee Barbara Delong respectfully requests that this honorable Court affirm the opinion of the Court of Appeals finding Appellant liable for the unauthorized cutting of timber from Appellee's land and awarding Appellee treble damages pursuant to KRS 364.130.

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellee, Barbara Delong, requests oral argument. Oral argument will (i) help ensure that the Court has a complete and thorough understanding of the issues raised on appeal and (ii) afford the Court an opportunity to ask questions of the parties.

III. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

IV. COUNTERSTATEMENT OF THE CASE

A. Introduction

The Appellee, Barbara Delong, does not accept the Statement of the Case of Appellant Larry Penix.

This Appeal is from an Opinion of The Kentucky Court of Appeals, entered January 24, 2014, affirming the judgment of the Martin Circuit Court finding that Appellant was liable for the unauthorized cutting of timber from Appellee's land, reversing the judgment of the Martin Circuit Court that Appellee was entitled only to single instead of treble damages, and remanding for determination of damages. The Opinion of the Kentucky Court of Appeals is attached as **Exhibit 1.**

Appellee Barbara Delong seeks proper enforcement and application of KRS 364.130 to compensate her for the unauthorized and wrongful cutting of timber on her land without her permission nor even knowledge. The language of KRS 364.130 is unequivocal. The intent of KRS 364.130 is even clearer when considered in light of the fact that the current language of the statute was written specifically to strengthen civil penalties for timber theft and to make it clear that intent to cut the timber of another was not a requirement for the imposition of liability for timber theft.

The relevant facts needed to decide this case under KRS 364.130 are undisputed. Timber belonging to Appellee was cut without her authorization or knowledge. The unauthorized cutting of Appellee's timber occurred as part of a logging operation on the property of Appellant, located next to the property of Appellee. Appellant did not take any of the actions specified under KRS 364.130 to mitigate the damages owed Appellee for the unauthorized cutting of Appellee's timber. By his own admission, Appellant neither received Appellee's consent for the cutting of the timber nor notified her of the timber operation commencing next door to her on Appellant's land. Appellant received the financial rewards of the timber cut from Appellee's land. Appellee has received no financial compensation for her timber that was cut. Appellant had his land surveyed in preparation for the logging operation and had his cousin show the logger the (apparently incorrect) property boundaries of his land. Appellant signed a contract with the logger stating that Appellant and Appellant alone was responsible for the boundary lines of his property and the logging operation. These facts, admitted to by Appellant, are alone enough to hold Appellant liable for treble damages for the unauthorized cutting of timber belonging to Appellee Delong.

B. Issues before the Court.

This is a case about the proper application of an unambiguous statute to undisputed facts. The primary issues of this appeal are twofold:

(1) Under the facts of this case and the unambiguous language and intent of KRS 364.130, can a claim that the unauthorized cutting of timber was performed by an "independent contractor" shield a landowner from liability for that timber theft; and

(2) Under the facts of this case the unambiguous language and intent of KRS 364.130, and current jurisprudence on this issue, are treble damages mandated for the theft of Appellee Delong's timber?

V. ARGUMENT

A. Appellant Penix cannot escape liability for the unauthorized cutting of timber belonging to Appellee simply because he used a third party to physically cut the timber; this is true regardless of whether the third party logger is considered an independent contractor.

Appellant has attempted to argue that he escapes liability for the unauthorized cutting of timber on Appellee's land by simple virtue of the fact that a logger physically cut the timber at his behest instead of Appellant wielding the saw himself. Appellant attempts to argue that he is not responsible for the timber operation he put into place, despite the fact that he directed the timber to be cut, was contractually responsible for the boundary lines of his property and the timber operation, actively had the land surveyed and then had his agent show the logger the boundary lines, reaped the financial rewards of the cut timber, and failed to even cursorily satisfy the requirements of KRS 364.130 requiring him to either follow procedures to notify Appellee that her timber would be cut or to secure her permission. That argument contravenes existing Kentucky jurisprudence on this issue, the plain language of KRS 364.130, the rules of contract construction, and the interest of justice.

1. Kentucky jurisprudence has long held that a person is liable for the unauthorized logging of the land of another where the person was responsible for the boundaries of a timber operation taking place on his land.

The Court of Appeals, hearing the instant case, entered judgment consistent with applicable precedent in Kentucky holding a landowner liable for the trespass to a neighbor's land in a fact pattern identical to the case at hand. In *Seals v. Amburgey*, 2008-CA-002217-MR, 2008-CA-002247-MR (Ky. Ct. App. 2009), landowner Seals contracted with a company, Dove Logging, to cut timber from his property. Under the oral agreement between Seals and Dove Logging, Seals was to be paid 25% of the sale price of the timber. In upholding the trial court's granting of summary judgment and awarding of damages to Plaintiff Amburgey, the Court of Appeals explicitly held that a landowner is liable for the unauthorized cutting of timber of neighboring land regardless of whether the landowner cut the timber themselves or arranged for someone else to do the physical cutting when that landowner, and not the logger, is responsible for the boundary lines of the timber operation.

> "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 . . . . 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." (emphasis added).

In both *Seals* and the case at hand, the landowner contracted with a logger to cut timber, with the landowner to be paid a percentage of the sale price of the timber. In both cases, the landowner was responsible for the boundary lines of the property to be logged. In both cases, the landowners designated the property lines. In both cases, a neighbor's timber was logged without compensation to the neighbor nor permission or notice occurring as required by KRS 364.130. The only difference in the two cases is that in *Seals*, the contract and thus the stipulation that the landowner and not the logger was responsible for the boundary lines was merely oral. In this case, there is a written and signed contract unequivocally stating that landowner Penix, and not logger Hunt, was responsible for the boundary line.

The opinion in *Seals* is consistent with earlier jurisprudence in this State. As early as 1984, the Kentucky Court of Appeals held that, where a landowner hired a logger to cut trees but did not adequately instruct the logger as to the boundary lines of the landowners property, then the landowner was responsible for the unauthorized cutting of timber from neighboring land. *Gum v. Coyle*, 65 S.W.2d 929 (Ky. App. 1984). Nothing in the analysis of this issue in *Gum* was changed by the subsequent changes in statutory law regarding the unauthorized cutting of timber from the land of another.

Despite this directly on point precedent holding that a landowner who is responsible for the boundary lines of timber operations on their land is liable for the unauthorized cutting of timber from another's property regardless of whether the landowner cut the timber themselves or arranged for another to do so, Appellant persists in his argument that the Court of Appeals "declined to follow their own precedent" despite having already considered the "exact same issue" on two prior occasions. Brief of Appellant at 3, *Penix v. Delong*, 2014-SC-000083-D (Ky. 2015). This characterization of the precedent of the Kentucky Court of Appeals is inaccurate and a misinterpretation.

In support of the tenuous and incorrect argument that if the logger was an independent contractor then Appellant cannot be held liable for the theft of Appellee's timber, Appellant has relied on two Kentucky Court of Appeals cases, *Worley v. Duggar*, 2007 WL 4373120 (Ky. App. 2007) and *Meenach v. Denlinger*, 2005 WL 199070 (Ky. App. 2005). Brief of Appellant at 3, *Penix v. Delong*, 2014-SC-000083-D (Ky. 2015). While it is true that the logger, and not the landowner, was held liable for the unauthorized cutting of timber in each case, neither case is analogous to the case at hand.

In *Duggar*, Defendant Duggar entered into a contract with a logger, Thomas, to cut timber from her property. Duggar specifically told Thomas not to cross a creek on the property, as Duggar's property rights ended at the creek.

Despite those specific instructions, Thomas crossed the creek and intentionally and knowingly cut timber from the land of Plaintiff Worley, in direct contravention of the specific instructions of Defendant Duggar. These facts were admitted to under oath by Thomas.

In *Meenach*, the logger approached the landowner to inquire about logging the landowners land in exchange for a percentage of the selling price of the timber (as opposed to the landowner procuring the logger, as happened in the case at hand), the logger crossed a boundary fence in order to access the neighboring land and cut their timber without permission, and, most importantly, there was no agreement between the landowner and the logger that the landowner was responsible for the boundaries of the land and timber cutting operation.

Neither of those cases presents an analogous fact pattern to the instant case, where the landowner was contractually responsible for the property boundaries for the logging operation. Furthermore, unlike in *Duggar* and *Meenach*, Appellant actively showed logger Mr. Hunt the wrong property boundaries of the property. Appellant had his land surveyed and then had his agent, his cousin Bill Penix, with the knowledge and consent of Appellant, walk the boundaries of his land with the surveyor to see "all the 70 some stakes they had around the property." Deposition of Larry Penix, February 15, 2011, page 33,

lines 8-11; page 34, lines 1-6. Bill Penix then, again with the knowledge and consent of Appellant, walked the boundary lines of the property with logger Mr. Hunt to show him the boundaries of the land owned by Appellant that was to be logged. Deposition of Larry Penix, February 15, 2011, page 34, lines 23-25; page 35, lines 1-6. This is vastly different than the situation in *Duggar* and *Meenach* where the property owners were (1) not contractually responsible for the boundary lines and (2) did not actively show the logger the wrong boundary lines.

The case at hand is, however, directly analogous to the *Gum* and *Seals* cases where the landowner was found liable. In fact, the Court of Appeals explicitly differentiated the *Duggar* case, where the landowner was not liable for unauthorized logging because the logger acted contrary to clear instructions from the landowner, from cases such as *Gum*, where the landowner was liable for unauthorized logging because the landowner did not adequately instruct the logger as to the boundary lines despite having the land surveyed and taking responsibility for the boundaries. If *Duggar* and *Meenach* are applicable to the case at hand in any way, it is to show that, unlike the landowner Defendants in those cases who were not held liable for the unauthorized logging because the landowners either were not responsible for the boundary lines of the timber operation or the logger acted in direct contravention of instructions regarding

boundary lines, Appellant was responsible for the boundary lines of his property to be logged, like the Defendants in *Gum* and *Seals*, and is therefore responsible for the unauthorized timber cutting on Appellee's land.

As the Court of Appeals correctly noted in considering this matter:

> "Here, Penix entered into a written contract with Hunt. The contract read, in part: I (Joseph Hunt, Jr.) am buying timber off of Larry C. Penix located at Tomahawk, Kentucky[,] up Rockhouse on Trace Fork. I will pay 40% for all grade timber and 35% for low grade timber. Larry C. Penix will not be held responsible for any accidents that may occur on this property **and the owners are responsible for the property line.** [Emphasis added.] The facts are uncontroverted that Penix was the owner of the property to be logged by Hunt. Thus, under the terms of the contract, Penix retained the contractual right to control and ultimate responsibility for determining the correct property line or boundaries for Hunt's logging activities. . . . Accordingly, we cannot say that the circuit court erred by concluding that Penix was liable for Hunt's trespass upon Delong's property. Delong v. Penix, 2011-CA-001526-MR, 2011-CA-001529-MR"

2. **The plain and unambiguous language of KRS 364.130 mandates that a person be liable for the unauthorized logging of the land of another when that person intends to convert that timber to their own use, regardless of whether that person cuts the timber or causes another to undertake such operations. This is true regardless of whether the person cutting the timber is considered an independent contractor under common law.**

Appellant attempts to support his argument that he is not liable for the cutting of Appellee's timber by citing common law regarding the liability of a principal for the acts of an independent contractor. However, as the Kentucky Supreme Court has held on countless occasions, "to the extent the statutes conflict with common law, the common law is displaced." *Pannell v. Shannon*, 425

S.W.3d 58 (Ky. 2014). Even if prior case law regarding common law torts such as trespass allow escape from liability for a landowner employing an independent contractor, "[t]his Court will depart from previous decisions where 'there are sound legal reasons to the contrary.' A statute directly on point . . . surely fits that bill." *Benningfield ex rel. Benningfield v. Zinsmeister*, 367 S.W.3d 561 (Ky. 2012) *citing Hilen v. Hays*, 673 S.W.2d 713, 717 (Ky. 1984).

In fact, this Court has explicitly held that "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...." *Meece v. Feldman Lumber Company*, 290 S.W.3d 631, 634 (Ky. 2009), *citing King v. Grecco,* 111 S.W.3d 877, 881 (Ky. App. 2002).

Where there is no ambiguity in a statute, the judicial branch must give effect to the plain meaning of that statute. The statutory language of KRS 364.130 is plain and unambiguous. The legislature intended a person to be liable for the unauthorized cutting of timber from the land of another whether that person does that cutting themselves or causes another to conduct the cutting.

> "In construing a statute, it is fundamental that our foremost objective is to determine the legislature's intent in enacting the legislation. To determine legislative intent, we look first to the language of the statute, giving the words their plain and ordinary meaning." *Richardson v. Louisville/Jefferson County Metro Government*, 260 S.W.3d 777, 779 (Ky. 2008). Further, we construe a "statute only as written, and the intent of the Legislature must be deduced from the language it used, when it is plain and unambiguous .

. . ." *Western Kentucky Coal Co. v. Nail & Bailey*, 14 S.W.2d 400, 401-02 (Ky. 1929)." *Pearce v. University of Louisville*, 2011-SC-000756-DG (Ky. 2014).

The legislature specifically included the words "or causes to be cut or sawed down" in the language of KRS 364.130, evidencing a clear intent to hold a person liable for unauthorized timber operations from which that person benefits, regardless of whether the person physically cuts the timber or secures a logger to carry out the operation. It is directly contrary to clear statutory language to assert that a person escapes liability from the unauthorized encroachment upon the land of another of timber operations which that person authorized, was contractually responsible for the boundaries of, and reaped great financial benefit from, simply because it was a logger, and not that person, who wielded the saw and axe.

3. **The Rules of Contract Construction, as adopted by the Supreme Court of Kentucky, require that the contract between Appellant and logger Mr. Hunt be construed in accordance with its plain meaning, and Appellant alone be held liable for the crossing of the property boundary onto Appellee's property.**

"In the absence of ambiguity a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Wehr Constructors, Inc. v. Assurance Co. of America*, 384 S.W.3d 680 (Ky. 2012), *citing Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003). In the case at hand the written contract between Appellant and logger Mr. Hunt was unambiguous:

Appellant, the property owner, was responsible for the boundary lines of his property in the timber operation. Accordingly, Appellant, and not Mr. Hunt, is liable for the unauthorized cutting of timber on Appellee's land by virtue of the terms of the contract he negotiated and agreed to with Mr. Hunt.

B. Treble Damages are not only an appropriate remedy for the theft of Appellee's timber, but are in fact mandated by the unequivocal language of KRS 364.130.

KRS 364.130 mandates that:

> "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 . . . **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." *Emphasis added.*

Appellant seems to argue in his brief that treble damages are inappropriate in this case because Appellant did not cut the timber of Appellee with an intent to convert to his own use. However, such an argument directly contravenes the plain meaning of the statute, the legislative intent of the statute, and all precedent regarding the issue of treble damages under this statute.

Even if Appellant inadvertently cut or caused to be cut the timber from Appellee's land, he is still liable for treble damages because, by his own admission, he never obtained authorization from adjacent landowners nor even notified adjacent landowners prior to beginning timber operations on his land.

See Deposition of Larry Penix, February 15, 2011, page 30, lines 23-25; page 31, lines 1-21; page 32, lines 4-24.

1. **KRS 364.130 explicitly provides for only two methods to avoid treble damages for the unauthorized cutting of the timber of another; neither method was utilized in this case.**

KRS 364.130 explicitly states that a person who cuts timber belonging to another without legal right to do so and without authorization can avoid treble damages if, and only if, the person responsible for the cutting obtained a signed statement from the person believed to be the owner of the timber and either obtained a written agreement from adjacent landowners that the trees to be cut did not belong to them or notified adjacent landowners via certified or restricted mail that a timber operation would be occurring on land adjacent to theirs. By plain and unambiguous language, KRS 364.130 mandates that only if those conditions are met, then "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."

It is also important to note that, even if the provisions of KRS 364.130 are met for single damages, the statute only allows a court to award single damages at that point. Treble damages could still be awarded in the discretion of the trial court even if the single damage conditions were met. However, the inverse is not true. The plain language of the statute only provides for treble damages by using the word "shall" and therefore does not allow the awarding of single

damages where there is unauthorized cutting of timber and where, as is the case here, there was no written agreement with nor even notice given to adjacent landowners.

2. **The legislative history of KRS 364.130 strongly supports the plain language reading of the statute that the legislature intended for treble damages to be awarded in cases of timber theft unless the specific requirements set forth as necessary to allow single damages were met.**

As was noted *supra*, the description of House Bill 6 of the 1994 legislative session, the bill amending the language of KRS 364.130 to its current form, described the changes as:

> "permit a court to set single damages rather than triple damages if the defendant can certify that: (1) he had authorization prior to the cut from the person he believed to be the landowner; and (2) he had notified restricted owners of adjacent land of the pending cut and no objections were raised; require notice to be by certified mail, restricted delivery and return receipt requested" Kentucky Legislative Record, Regular Session 1994, available at http://www.lrc.ky.gov/recarch/94rs/bills/hb006.htm.

The Legislative Record is attached at **Exhibit 2.**

It is worth noting that House Bill 6 passed both chambers of the General Assembly unanimously. A clearer record of legislative intent is rarely found springing forth from the halls of the Capitol, and cannot be ignored.

Finally, as has been noted by the Court of Appeals, the intent of the Kentucky legislature can be further divined from the fact that most state legislatures have similarly imposed treble damages for timber theft. "Almost

uniformly, the legislative response to this identified problem has been to enact a statute authorizing treble damages as punishment for the wrongful cutting of trees." *King v. Grecco*, 111 S.W.3d 877 (Ky. Ct. App. 2002).

3. Precedent supports the conclusion that Appellant intended to convert the timber of Appellee to his own use, and therefore KRS 364.130 mandates the awarding of treble damages to Appellee.

Appellant seems to argue that treble damages are not appropriate because he did not intend to "to convert to his own use timber growing upon the land of another" as is required for the awarding of treble damages pursuant to KRS 364.130. However, this argument is directly contrary to all precedent on point regarding this issue.

As noted above in *Seals*, a case nearly identical to the instant case, the Court of Appeals found that

> "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...'"

Likewise, in this case, Appellant has stated multiple times, including in his brief to this Court, that he was paid a percentage of the total amount earned from the sale of the timber cut, including the timber belonging to Appellee. *See* Brief of Appellant at 6, *Penix v. Delong*, 2014-SC-000083-D (Ky. 2015). As such, just like in

Seals, it is difficult to see how Appellant can argue that he did not intend to convert the timber cut from Appellee's land for his own use.

4. Precedent supports the conclusion that Appellant did not avail himself of the avenues for avoiding an award of treble damages under KRS 364.130, nor "color of title" and therefore KRS 364.130 mandates the awarding of treble damages.

As recently as 2009 this Court has found that when one cuts the timber of another without receiving authorization or giving notice as required to avoid treble damages pursuant to KRS 364.130, then treble damages are mandatory.

In addition to the statutory requirement, in *Meece v. Feldman Lumber Company*, 290 S.W.3d 631 (Ky. 2009), the Supreme Court established another path rooted in the legal theory of "color of title" analysis to avoid treble damages. As noted by the Court of Appeals in its order in this case at page 7, "...the Court stressed the pivotal inquiry is now whether the trespasser possessed 'color of title.' The Court held that the trespasser holds the burden of proving color of title and to specifically demonstrate objective evidence of title 'from which a subjective belief may be formed.' The Court further noted that color of title is normally demonstrated by a written instrument whose description of boundaries reasonably embraced the trespassed property in question." citing *Meece* at 636. Generally, the color of title is demonstrated by a written instrument purporting to transfer title or right of possession. *Kelly v. Kelly*, 293 Ky. 42, 168 S.W.2d 339 (Ky. 1943).

In this case, the Appellant had not only a statutory requirement, but also a contractual obligation to know the boundaries of - and to stay within - his own property for purposes of the timber operations. Indeed, the Appellant obtained a land survey of his property for this purpose and the Appellee agreed with the findings of that survey from the beginning. The facts in this case are undisputed and simply do not provide any basis upon which Appellant could claim the "subjective belief" that he somehow had a reasonable claim of ownership, "color of title," to Appellee's property.

Furthermore, in *Meece* where no mitigating statutory exceptions to treble damages nor color of title could be established, this Supreme Court ruled treble damages must be awarded, saying "Feldman entered upon the land of another without legal right and without color of title, and sawed down the trees. Feldman did not, or was not, able to obtain mitigating statements as authorized by KRS 364.130(2). Therefore, the case **must** be remanded to the trial court for an award of damages pursuant to KRS 364.130(1)." (emphasis added).

As such, treble damages are not only appropriate in this case, but mandatory and must be awarded to Appellee.

VI. CONCLUSION

Appellant is liable for the unauthorized cutting of Appellee's timber regardless of whether the logger who physically cut the timber on his behalf was an agent, an employee, or an independent contractor. As outlined herein, common law jurisprudence concerning the liability of those engaging independent contractors does not apply here, as KRS 364.130 supersedes that common law and unequivocally mandates that a person be held liable for timber theft whether they cut the timber themselves or caused someone else to do the cutting.

Jurisprudence interpreting KRS 364.130 has consistently and correctly held that, in cases with facts similar to the case at hand, KRS 364.130 requires that the landowner who caused the unauthorized cutting of timber that belonged to another be held liable for that timber theft.

Moreover, even without the overwhelming statutory and legal precedent that places liability squarely on the Appellant here, the Appellant himself voluntarily accepted this liability by entering into an unambiguous and signed contract with the logger stating that the Appellant, and the Appellant alone, was to be responsible for the boundaries of the property to be logged. This contract cannot be discarded simply because its terms are now unfavorable to Appellant.

Damages arising out of this liability are likewise defined and strongly supported by statute and legal precedent; the Appellee must be awarded treble damages plus costs and legal fees. The plain language of KRS 364.130, the clear intent of the legislature in amending KRS 364.130 to include treble damages, and the jurisprudence of this Commonwealth applying the statutory language are consistent and unequivocal: where the mitigating actions allowed in KRS 364.130 are not taken and the Appellant cannot otherwise establish color of title, treble damages are not just allowed but are mandatory.

Appellee Barbara Delong respectfully requests that the Opinion of the Court of Appeals be affirmed as to the liability of the Appellant, vacated as to the trial court remand on the issue of "color of title," and thereby affirm an award of treble damages plus fees and costs, including legal fees, and that the Opinion and Order of the Martin Circuit Court be vacated, and that this matter be remanded to the Martin Circuit Court for entry of final judgment of treble damages, plus fees and costs, including legal fees.

Respectfully submitted,

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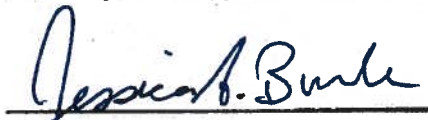

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