IN THE COURT OF APPEALS OF TENNESSEE

MELVIN SHEETS,	) C/A NO. 03A01-9510-CH-00380
	) ROANE COUNTY CHANCERY COURT
Plaintiff-Appellee,	)
	)
	)
	)
	) HONORABLE FRANK V. WILLIAMS, III
v.	) CHANCELLOR
	)
	)
	)
	)
BOBBY JOE KYLE and	)
DENNIS KYLE,	) AFFIRMED IN PART
	) VACATED IN PART
Defendants-Appellants.	) REMANDED

J. REED DIXON of DIXON & STUTTS, Sweetwater, for Appellants.

J. POLK COOLEY of COOLEY, COOLEY & AGEE, Rockwood, for Appellee.

OPINION

_____Susano, J.

Melvin Sheets sued Bobby Joe Kyle (Bobby Kyle) for breach of contract. He sought damages and other relief. He later amended his complaint to add Bobby Kyle's son, Dennis Kyle, as an additional party defendant. Sheets alleged that he had purchased standing oak timber from the Kyles, for which he paid $14,500. He charged that after he started to harvest the timber, Bobby Kyle refused to let him continue. After a bench trial, the Chancellor entered judgment for Sheets and awarded him $20,000 in damages. The trial court held the Kyles jointly and severally liable. They appeal, raising the following issues for our resolution:

> 1. Did the Chancellor err when he admitted into evidence extrinsic parol evidence to aid in the interpretation of the contract?
>
> 2. Did the Chancellor err in holding that Bobby Kyle contracted to sell timber belonging partly to himself and partly to his son, Dennis Kyle?
>
> 3. Did the Chancellor err in holding the Kyles jointly and severally liable for damages arising from the breach?
>
> 4. Is the damage award of $20,000 excessive?

I

In the fall of 1993, Bobby Kyle approached Sheets and told him he had standing timber to sell. In November, 1993, Sheets and his agent, F.B. Patterson, Jr., met Bobby Kyle who showed them the timber in question. It is undisputed that

Sheets, Patterson, and Bobby Kyle walked over, and observed the timber on, property located on the east side of the Sweetwater-Kingston road, and property on the west side. After some discussion, Sheets, through his agent, Patterson, made an offer of $14,500 for the standing timber. Shortly thereafter, Bobby Kyle accepted the offer.

A completed contract was produced by a representative of Sheets and presented to Bobby Kyle. As presented to Bobby Kyle, the contract reflected the name of "Joe Kyle" in the blank for the name of the owner. Bobby Kyle objected to this and told Sheets' representative that the name "Dennis Kyle" should be written in the blank for the owner. Pursuant to this request, the name "Joe" was scribbled over and the name "Dennis Kyle" placed in the blank. Bobby Kyle explained at trial why he wanted his son reflected as the owner:

> . . . they had my name on there instead of Dennis', and they knowed it was Dennis' timber to start with, I had done told them it was Dennis'. And he changed that. And I told him that I'd just go ahead and sign Dennis' name to it because he didn't have no education. And I had to sign his name to a lot of stuff anyhow.
>
> Q: You were acting for Dennis in that respect?
>
> A: Yeah, yeah, uh-huh.
>
> Q: You had Dennis' permission to do that, I expect?
>
> A: Yeah.

Bobby Kyle signed the name "Dennis Kyle" at the bottom of the

contract. The contract is a one page document. It is attached as an appendix to this opinion. As can be seen, the site of the timber was identified simply as being two tracts in Roane County.

In November, 1993, the month in which the contract was signed, Sheets hired loggers to harvest the timber and haul it to his lumber yard. The loggers moved their equipment onto a field adjacent to the timber; in order to get the necessary equipment into the woods to take down the trees, they cut three hickory trees. The parties agree that Bobby Kyle had told Sheets not to cut any species of tree other than white and red oak; however, the loggers testified that cutting the three hickories was necessary to create a right-of-way into the woods for their equipment. Bobby Kyle complained that the loggers' equipment was causing damage to his field.[1] He told the loggers to leave his property. When the loggers were ordered off the property, they had only harvested a part of the timber on the west side of the Sweetwater-Kingston road (the "west tract"), and had not yet begun operations on the tract on the east side (the "east tract"). Since Bobby Kyle would not allow any further harvesting, Sheets brought the instant action.

At trial, a controversy developed over exactly what

[1]The Chancellor held that the cutting of the hickory trees was reasonably necessary to facilitate the harvesting of the timber, and thus not a material breach of the contract. He also found that the damage to the field caused by the equipment was unavoidable, and that the loggers would have repaired it after harvesting if they had been given a chance. The Kyles do not challenge either of these holdings on this appeal.

land was included in the two tracts to which the contract made reference. The Kyles introduced a tax map of the area which showed that the west tract was actually divided into two separate parcels for property tax purposes, and argued that the two tracts mentioned in the contract referred to the two parcels on the west tract. Sheets contended that the parties contracted for the sale of the timber on both the east and west tracts, arguing that there was no fence marking the boundary between the two parcels on the west tract, and that Bobby Kyle had not informed him that the west tract was really two parcels. He testified that the parties treated the property on the west side of the road as one single tract for the purpose of the sale. The Chancellor resolved this issue in favor of Sheets, finding that the parties intended to include all of the oak trees on both sides of the road.

In this non-jury case, our review is *de novo* upon the record of the trial court's proceedings; however, that record comes to us accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. T.R.A.P. 13(d); ***Union Carbide Corp. v. Huddleston,*** 854 S.W.2d 87, 91 (Tenn. 1993).

II

The Kyles' first issue is whether the Chancellor erred in allowing extrinsic parol evidence to aid in the interpretation of the contract. Although our review of the record indicates this contention is without merit, we will not unduly lengthen this opinion with further discussion of this issue because no objection was made to the introduction of extrinsic evidence at trial. "Appellate review on the improper admission of evidence is waived unless the evidence was timely objected to at the trial." ***Huey v. Tipton,*** 734 S.W.2d 330, 332 (Tenn.App. 1986). We note, in passing, that the record reflects that the Kyles also introduced a significant amount of extrinsic evidence regarding the meaning of the contract.

III

The Kyles next challenge the Chancellor's ruling that the two tracts described in the contract referred to the land on both the east and west tracts. As noted above, the Kyles argue that the contract was only for the sale of the timber on the west tract. In support of this position, the Kyles produced proof showing that the west tract is divided into two separate parcels for tax purposes. They contend that the evidence clearly shows that the southern part of the west tract was jointly owned by Dennis Kyle and the latter's son, Joe Kyle. Bobby Kyle owns the northern part of the west tract, but he testified that he had

previously given the timber on that part to Dennis.[2] It appears from the record that Bobby Kyle owns the east tract. In summary, the Kyles argue that all of the timber on the west tract was owned by Dennis Kyle while the timber on the east tract was owned solely by Bobby Kyle. From this, the Kyles argue that since Bobby Kyle signed the contract in the name of "Dennis Kyle," the parties only intended to contract for the sale of timber on the west tract, all of which was owned by Dennis Kyle.

Sheets, on the other hand, contends that the sale was for timber on both the east and west tracts. In support of his theory, Sheets introduced proof suggesting that there was no fence between the parcels on the west tract,[3] and he testified that Bobby Kyle presented the property on the west side as one single tract. He testified that "nothing was mentioned about two parcels" on the west tract. All of the parties concur that Bobby Kyle took Sheets and Patterson to the east tract and showed them the timber on that tract after showing them the timber on the west tract. Sheets and Patterson stated that Bobby Kyle clearly presented the timber on the east tract to them as part of the sale, and that they would not have offered $14,500 for the timber on the west tract alone. Finally, Sheets presented uncontradicted proof that the best trees on both tracts, the oak

[2]On cross-examination, Bobby Kyle admitted that there was no written conveyance of his gift of the timber to Dennis.

[3]Sheets and Patterson testified unequivocally that there was no fence or divider between the two parcels. Bobby Kyle testified there was a fence running through the non-wooded part of the land, but no fence, only steel posts every hundred feet, separating the parcels on the wooded part.

veneer timber trees, had numbers painted on them. The trees on the west tract started with the number "1" and continued up to "34," and the first numbered tree on the east tract began at "35" and continued in sequence.

The Chancellor concluded that the parties intended to contract for the sale of timber on both the east and west tracts. Although there is evidence supporting the parties' competing theories, we cannot say that the evidence preponderates against the Chancellor's finding. This conclusion is bolstered by Bobby Kyle's own testimony regarding statements he made to Sheets and Patterson about the timber on the east tract, which was referred to as "Parcel 42" at trial:

> Q: When you went back there you walked all around that woods with Mr. Sheets and Mr. Patterson; didn't you?
>
> A: No, I didn't walk all the way around.
>
> Q: I'm talking about the tract--the Parcel 42.
>
> A: I--I was sitting in my truck when they come out of the woods.
>
> Q: What did you say to Mr. Sheets about not cutting any poplar on that property?
>
> A: Well all Mr. Sheets said to me, he come by where I was sitting at. He said it will be all right to cut them ash, won't it? And I told him no. And he--he wanted to know if it would be all right to cut them cherries. And I told him no.
>
> Q: Now we're talking about back here behind Dennis' house, [the east tract] on Parcel 42.

A: Yeah, but on this part right here he come by and wanted to know if it would be all right to cut the firewood, and I told him no.

* * * *

Q: But now you told him on that 42 that you didn't want him to cut the ash, Parcel 42 there?

A: Uh-huh.

Q: And that's right over here, across the road. You told him you didn't want the ash cut on that?

A: When he asked me if it would be all right to cut it, why I told him I didn't want it cut.

Q: And you told him you didn't want the poplar cut on it?

A: Uh-huh.

Q: Is that right?

A: That's right.

Q: *You didn't want him to cut anything but the oak?*

A: *The oak, yeah, right.* I didn't want them hollow oaks cut either, that they cut.

(Emphasis added). We agree with and affirm the Chancellor's ruling on the Kyles' second issue.

IV

We now turn to the issues regarding liability and damages. The Chancellor found that the Kyles breached the contract when Bobby Kyle refused to allow Sheets to harvest the timber, and held that the Kyles were jointly and severally liable for damages resulting from the breach. The Kyles argue on appeal that the Chancellor erred by holding the defendants jointly and severally liable. We agree that Dennis Kyle should not have been held liable for the sale of Bobby Kyle's timber.

It is undisputed that Bobby Kyle had authority to act as agent for his son in selling the latter's timber, and that he so acted by signing Dennis Kyle's name to the contract. Dennis Kyle admitted that his father had authority to sell his timber, and therefore Dennis Kyle is liable, as principal, for the breach of contract for sale of *his own* timber. However, it is clear that Dennis Kyle was not directly involved in this transaction and was not present during either the negotiations regarding or the execution of the contract. Consequently, we can conceive of no theory whereby, under these circumstances, Dennis Kyle could be liable for the breach regarding *his father's* timber, all of which was located on the east tract.

The issue of Bobby Kyle's liability presents a different question. Should he be held liable for breach of the contract for the sale of the entirety of the timber, or only of

his own? We examine the rules of agency in Tennessee to ascertain the answer.

Generally speaking, whether an agent is personally liable for contracts executed on behalf of his or her principal depends upon whether and to what extent the agent discloses the existence and identity of the principal. If the agent discloses the fact that he or she is contracting for another, the contract is generally presumed to be that of the principal alone. ***Weeks v. Summerlin,*** 466 S.W.2d 894, 899 (Tenn.App. 1970); ***Rooney v. Callins,*** 459 S.W.2d 430, 438 (Tenn.App. 1970); ***United American Bank of Memphis v. Gardner,*** 706 S.W.2d 639, 642 (Tenn.App. 1985). The general rule has been characterized by the Supreme Court as follows:

> If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone, unless credit has been given expressly and exclusively to the agent, and it appears that it was clearly his intention to assume the obligation as a personal liability and that he has been informed that credit has been extended to him alone. The presumption is that where one known to be an agent deals or contracts within the scope of his authority, credit is extended to the principal alone and the act or contract is his engagement as if he were personally present and acting or contracting.

Hammond v. Herbert Hood Co., 221 S.W.2d 98, 102-103 (Tenn. 1948), quoting 2 *Am.Jur.* 247-48, §315.

Conversely, if an agent does not disclose that he or she is contracting for another, the general rule is that the party with whom the agent contracted, upon discovering the existence of the principal, may elect to hold either the principal or the agent liable, but not both. ***Davis v. McKinney,*** 46 Tenn. 15, 17-18 (1868); ***Phillips v. Rooker,*** 184 S.W. 12, 13 (Tenn. 1916); ***Sparkman v. Phillips,*** 371 S.W.2d 162, 166-67 (Tenn.App. 1962); ***Holt v. American Progressive Life Ins. Co.,*** 731 S.W.2d 923, 925 (Tenn.App. 1987).

In the present case, the testimony is in conflict about what was said by way of explanation regarding Bobby Kyle's refusal to sign the contract in his own name, and insisting on signing as "Dennis Kyle." Bobby Kyle, as previously noted, testified that Sheets and his agent "knowed it was Dennis' timber to start with, I had done told them it was Dennis'." Patterson testified that Bobby Kyle did not tell them the timber on the west tract was owned by Dennis Kyle. Patterson stated that although he knew the man with whom they were dealing was named "Joe Kyle," and that he had a son named Dennis, "I didn't know how he signed his name even. I never had no reason to know." Sheets was not questioned on this issue at the trial.

It is clear that there was something less than full disclosure, but more than no disclosure at all. However, we think there is no need to attempt to force these facts into a legal niche of "disclosure" or "no disclosure." This is because the caselaw in this area indicates that we should look also to the overall intention of the parties, as evidenced by their conduct and the other surrounding circumstances as well as the contract itself, to determine whether the agent manifested an intent or willingness to be held personally liable on the contract. The Tennessee courts have made the following pertinent statements in this regard:

> [W]hile it is true as a general rule that in law "an agent who, acting within the scope of his authority, enters into contractual relations for a disclosed principal, does not bind himself, in the absence of an express agreement to do so," yet it is also true that whether such an agent does by such a transaction bind himself depends on the intention of the agent and the person dealing with him, and this intention must be gathered from the facts and circumstances of each particular case. And it is the disclosed intention that governs, and not some hidden intention of the agent; and so the agent may become personally liable, although this be contrary to his actual intention, if he has in fact bound himself according to the terms of the contract.

Siler v. Perkins, 149 S.W. 1060, 1061 (Tenn. 1912). Also pertinent here is the following from the case of ***Brown v. Mays***, 241 S.W.2d 871 (Tenn. App. 1949):

> It is true. . .that where an agent discloses his principal and contracts so as to bind the principal, the contract will ordinarily be regarded as that of the principal alone. But the contract may bind the agent alone, or the principal alone, or both together, depending on the intention of the parties manifested by the terms of the contract. That is, one as agent may make a contract on behalf of his principal and also on behalf of himself individually, making them both parties and joint principals to the contract.

Id. at 873; *see* ***Smith v. Continental Ins. Co.,*** 469 S.W.2d 138, 149 (Tenn.App. 1971); *see also* ***V.L. Nicholson Co. v. Transcon Inv. and Financial Ltd., Inc.,*** 595 S.W.2d 474, 483 (Tenn. 1980) ("The agent ordinarily does not incur liability unless it is shown that he intended to be personally responsible for his actions."); ***United American Bank of Memphis,*** 706 S.W.2d at 642 ("If the principal on a contract is disclosed,. . .the contract is that of the principal alone unless the agent manifests a contrary intent."); ***Holt,*** 731 S.W.2d at 925 (". . . a contract with a known agent for a disclosed principal is the contract of the principal unless circumstances show that the agent intended to be bound or assumed the obligations under the contract.")

We are of the opinion that Bobby Kyle, through his conduct and course of dealing with Sheets and his agent, manifested an intent to be held liable on the whole contract, including the sale of Dennis Kyle's timber as well as his own. Sheets dealt with Bobby Kyle from start. Bobby Kyle initiated the deal by contacting the buyer and he concluded it when he

somewhat cryptically signed "Dennis Kyle" for the sale of timber belonging to himself and his son. Kyle was the one who showed the timber, gave instructions regarding its harvesting, received and accepted the offer, signed the contract, and accepted the consideration of $14,500 from Sheets. He clearly presented himself as the person with whom the deal was to be made. Under these circumstances we feel Kyle manifested the requisite intent to be held personally responsible for the sale of Dennis Kyle's timber.

We now briefly discuss the issue of whether the award of $20,000 in damages[4] is excessive. Sheets presented detailed evidence of the number of contracted-for timber trees which remained uncut, and the estimated price he would have received for the timber, broken down into categories according to the grade of the timber. The Kyles' expert testified that, regarding the high-grade "veneer" trees, Sheets' estimate of $1,500 per thousand board feet was reasonable. Regarding the low-grade "saw" timber, the Kyles' expert testified that selling them at Sheets' estimate, $100 per thousand board feet, "would be giving them away." The Kyles presented no evidence tending to contradict Sheets' proof of damages. We find the Chancellor's award correct as to the *total* amount of damages due for the breach of this contract.

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[4]The Chancellor awarded damages in accordance with his finding that "the alternative relief sought by plaintiff of being permitted to return and complete his timber operation on defendants' land would not be feasible under the circumstances." The Kyles do not challenge this finding.

V

Accordingly, we affirm so much of the Chancellor's judgment as provides that the damages for breach of contract are $20,000, but vacate his holding that Bobby Kyle and Dennis Kyle are jointly and severally liable for all of this sum. Since we are unable to separate the portion of the damage award applicable to the timber owned by Dennis Kyle, i.e., all of the oak timber on the west side of the road from that part applicable to the timber owned by Bobby Kyle, i.e., the oak timber on the east side of the road, we remand this case to the trial court for the purpose of apportioning the $20,000 award between that applicable to Dennis Kyle's timber and that applicable to Bobby Kyle's timber. As to the former, Bobby Kyle and Dennis Kyle are jointly and severally liable; as to the latter, only Bobby Kyle is liable.

Costs on appeal are taxed to the appellants.

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Charles D. Susano, Jr., J.

CONCUR:

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Herschel P. Franks, J.

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William H. Inman, Senior J.