

RENDERED: JUNE 6, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-000318-MR

GLENN SMITH

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE, JUDGE  
ACTION NO. 04-CI-00193

MARVIN UNGER

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: CAPERTON, KELLER, AND WINE, JUDGES.

CAPERTON, JUDGE: Glenn Smith (Smith) appeals the November 22, 2006, and January 17, 2007, orders of the Lincoln County Circuit Court, the Honorable Jeffrey T. Burdette, presiding. Specifically, Smith asserts that the court committed error in awarding treble damages to the Appellee, Marvin Unger (Unger), that the court erred in overruling Smith's motion for judgment notwithstanding the verdict,

that the court erred in its instructions to the jury, that the court erred in failing to award Smith a directed verdict at the conclusion of Unger's evidence, and that the court erred in awarding costs and fees to Unger. For the reasons set forth herein below, we disagree and affirm the judgment of the trial court.

Unger and Smith own adjacent properties located in Lincoln County, Kentucky. Unger acquired his property on May 1, 1997, and Smith acquired his property on February 20, 2003. The properties share a common boundary line. Unger's property is primarily pastureland, while Smith's property is primarily woodland. The instant case arose when Smith removed eight trees from the area of the common boundary line, in which Unger asserted part ownership. Unger denied agreeing to the removal of the trees, and claimed that four of the eight trees which were cut by Smith straddled the common boundary line of the properties. Smith states that he believed the trees were on his land when he removed them.

Unger filed suit against Smith in the Lincoln County Circuit Court on June 1, 2004, asserting that he had not agreed to the removal of the trees, nor to entry upon his land for the purpose of removal. Upon filing his complaint, Unger elected to proceed under KRS 364.130 rather than the common law, with respect to the issue of punitive damages. A trial in this matter was held on October 9, 2006.

Much of the dispute between Unger and Smith arises from the presence of a fence which runs along the boundary area between the two properties. The parties acknowledge that the fence in question has been located in its current position for as long as Unger has owned the property, but disagree as to

how many years prior to that time the fence had been in place. All parties are in agreement that the deed to Smith's property makes no reference to the fence, nor does Unger's deed indicate the fence to be a boundary line. Smith conceded that he did not have this particular boundary line surveyed. The parties disagree insofar as Smith claims that Unger advised him of a belief that the fence was the appropriate property line, and Unger claims that he always determined the boundary line by the stakes. The parties are in agreement that these stakes were in place at the time that Smith purchased his land.

The parties do not dispute that just prior to the time that Unger initially obtained the property in 1997, a survey was conducted by Lindon Estes of Estes Engineering at the request of Clyde Hannah (the former owner of Unger's property) for the purpose of determining the true boundaries of the land. That survey was conducted in September of 1996, and was revised in 1997. It is undisputed that at the time the survey was conducted, several survey stakes were placed in the ground for the purpose of marking the boundaries. According to Unger, the stakes placed in the ground at the time that the survey was conducted indicate that his property extends to the other side of the fence.

There is no dispute that since Smith acquired title to his property in 2003, he has never raised an issue as to the location of the appropriate boundary line, nor has he filed suit to quiet title and claim the property located along the fence as his own. The parties are in agreement that there has never been a suit

filed to challenge Unger's claim as to the location of the boundary line between the properties, or to dispute the location of the true boundary line.

Unger testified that approximately one month after Smith purchased the property adjoining Unger, the two men discussed the trees located near the fence line between the properties. Unger states that at that time he understood the true boundary line between the properties to run according to the stakes, and not according to the fence. Also at that time, Smith stated that he believed the fence to be the boundary line between the properties.

According to Unger, he notified Smith prior to the time the trees were removed that he believed the trees were "line trees" and, as such, he deserved a portion of any proceeds made from their sale. Unger testified that following his initial conversation with Smith on this issue, he allowed Smith and his assistant to bring equipment through his gate and onto his property for the purpose of removing the first four of the eight trees.

Unger has stated that at the time he allowed the equipment onto his property, Smith knew his position on the line trees. Unger testified that after he initially allowed the first four trees to be removed, he waited for Smith to approach him and offer compensation. Unger testified that when Smith did not approach him but instead attempted to re-enter the property on April 27, 2004, to remove more trees, Unger would not allow re-entry. There is a factual dispute as to whether Smith requested to re-enter the property a second time. Nevertheless

Smith cut the remaining four trees on April 28, 2004, bringing the total number of trees in dispute to eight.

Unger testified that after the trees were removed, he requested Lindon Estes of Estes Engineering to re-survey the property for the purpose of determining exactly where the trees were in relation to the true boundary line. Lindon Estes testified in this matter as to the location of the trees in relation to the boundary line, including how far over the boundary line each of the trees extended, if at all.<sup>1</sup> On the basis of this survey, the parties were ultimately in agreement that stumps number eight, two, three, and one were wholly on Smith's property. The trial court sustained Smith's motion for a directed verdict with respect to those trees upon the close of Unger's proof.

Master Logger Denny King (King) was called to testify by Unger with respect to the value of the trees that were removed from the line in dispute. King testified: (1) that as part of his duties as master logger, he would evaluate standing timber "on the stump", (2) as to the value of each tree, numbered one through eight, "on the stump",<sup>2</sup> (3) that the values he provided for the trees were the board foot value "at the market", and (4) that the stump value of those trees would be

---

<sup>1</sup> Estes testified that Tree #1 was entirely on Smith's property, that Tree #2 was entirely on Smith's property, that Tree #3, was entirely on Smith's property, that Tree #4 was 42/100's on Unger's property, that Tree #5 was 3/10's of a foot on Unger's property, that Tree #6 was 1.19 feet on Unger's property, that Tree #7 was 94/100's on Unger's property, and that Tree #8 was entirely on Smith's property.

<sup>2</sup> King testified that Tree #8 would be worth \$1,157 as it stood, that Tree #7 would be worth \$1,376.40 as it stood, that Tree #6 would be worth \$1,037.60 as it stood, that Tree #5 would be worth \$381.60 as it stood, that Tree #4 would be worth \$561.60 as it stood. King later clarified that "as it stood," meant the tree's value at market. The stump value would apparently have been half this amount.

fifty percent. By way of explanation, King testified that if an individual was cutting the timber, he would receive 50% for cutting and moving the timber. Thus, a tree which was valued at \$1,157 would actually be worth half of that on the stump.

At the conclusion of the evidence presented by the parties, the matter was submitted to the jury with instructions offered by the court. Prior to the beginning of jury deliberations, Smith, through counsel, raised several objections to the instructions, which were overruled. This matter was submitted to the jury, and a verdict was ultimately rendered in favor of Unger.

Thereafter, on November 22, 2006, a final and appealable Order was entered by the Lincoln Circuit Court, granting judgment for Unger in the total amount of \$4,614.90 plus interest at the rate of 12% per annum until paid, consisting of \$1,538.40 in compensatory damages (representing the stump value of the trees) made treble (as set forth in KRS 364.130(1) and (2)). That was followed by an award of costs and fees on January 17, 2007, in which the court held that Unger was also entitled to costs in the amount of \$1,399.25, and attorney's fees in the amount of \$1,154.00, for a total of \$7,168.15, including the judgment of \$4,614.90 plus interest at the rate of 12% per annum from November 22, 2006. Smith appealed the decision of the trial court on February 6, 2007, on the aforementioned grounds.

Smith first argues that the trial court erred and abused its discretion to his prejudice in overruling his motion for judgment notwithstanding the verdict. In

support of his argument, Smith asserts that Unger's survey was adequate only to show the relationship of the trees in question to the fence but insufficient to establish a boundary. Smith also cites KRS 372.070(1) in support of his argument that Unger's deed was void to the extent that it purported to convey land within Smith's boundary, including the timber upon it.

In reviewing the denial of a motion for judgment notwithstanding the verdict, we use the same standard of review as for the denial of a motion for directed verdict. *Pichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky. App. 1987). Kentucky law is clear that a directed verdict is appropriate when, drawing all inferences in favor of the non-moving party, a reasonable jury could only conclude that the moving party was entitled to a verdict. *Buccholtz v. Dugan*, 977 S.W.2d 24, 26 (Ky. App. 1998). When ruling on a motion for directed verdict, a court must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). A reviewing court may not disturb a trial court's decision on a motion for directed verdict unless that decision is clearly erroneous. *Id* at 18.

After careful review of the record with these standards in mind, we affirm the decision of the trial court in overruling Smith's motion. Smith asserts that Unger's survey was insufficient to establish a boundary. We disagree with Smith and agree with the trial court that Unger provided adequate and, more importantly, undisputed proof of the location of his boundary line both by deed and survey.

At the time that Smith purchased his property, Unger's survey pins were already in place, and at no time during the course of this action did Smith file either pleadings questioning the location of the boundary itself or a separate action to quiet title. Further, in his Answers to Plaintiff's Interrogatories, Smith conceded that Unger owned the real estate described in Deed Book 280, Page 174, of the Lincoln County Court Clerk's Office.

Smith also cites to KRS 372.070(1) in support of his argument that Unger's deed was void to the extent that it purported to convey land within Smith's boundary, including the timber upon it. That statute reads as follows:

(1) Any sale or conveyance (including those made under execution) of any land (or the pretended right or title thereto) of which any other person has adverse possession at the time of the sale or conveyance, is void; but this section does not render void any devise of land in adverse possession. *(parentheses added)*.

In this instance, it is clear that no determination of adverse possession of the land in question was made, nor did Smith file any type of counterclaim to dispute Unger's proof of the boundary, or to quiet title. Therefore, we find this statute to be inapplicable.

Kentucky law is clear that the statutory period to establish adverse possession is fifteen years. Further, in order to ripen into title, the land in question must be held for the statutory period, the possession must be open, hostile and notorious to a well-defined boundary, thereby giving the world, and especially those in interest, notice of the extent of the claim. *LeMoyne v. Hayes*, 140 S.W.



552 (Ky. 1911).

In Kentucky, the pivotal question is largely the intent of the adverse holder at the time the possession began. *Heinrichs v. Polking*, 215 S.W. 179 (Ky. 1919). Indeed, where one through ignorance, inadvertence, or mistake as to true location of his boundary line enters into neighboring land up to a certain line in belief that it is the true line, claim to such land cannot ripen into title and such occupancy is deemed amicable and not hostile. *Brunton v. Roberts*, 97 S.W.2d 413 (Ky. 1936). Thus, where occupation of land is by mere mistake with no intention by occupant to claim land which does not belong to him, holding such land is not adverse. *Kinder v. Ramey*, 102 S.W.2d 32 (Ky. 1937).

In the instant case, it is clear that Smith did not intend to possess land beyond the extent of his true boundary. As noted, at no time did Smith ever formally dispute or question the boundaries as they existed, and at no time did Smith approach Unger and request that the survey stakes be moved to establish what Smith believed to be the more correct boundary between the two properties. In light of the foregoing, we believe it clear that Smith did not intend to establish actual adverse possession.

In his brief to this court, Smith also asserts that as a matter of law, he had possession of property to the survey line as testified to by Plaintiff's surveyor and that he "held the well-defined boundary to its full extent". *Moren v. Houston*, 2 S.W.2d 667 (Ky. 1928). Smith asserts that such a holding under color of title should defeat Unger's claim by negating an essential element of his proof under

KRS 364.130. Thus, Smith argues that Unger should not be entitled to either compensatory or treble damages. After a review of the record, we disagree, and believe that Smith's reliance on *Moren* is misplaced.

In that case, Moren sued Houston to obtain an injunction to prevent him from cutting disputed timber along a boundary. Moren's petition described the boundary that he claimed, alleging that Houston wrongfully asserted rights in the land and trespassed upon it, thereby causing damage to his title and causing injury. Houston filed an answer denying the allegations, and a counterclaim asserting title to the boundary described. Moren then filed a reply, broadening his claim to embrace ownership and possession of the land, and praying that his title be quieted against Houston.

In that case, the court found for Houston. In so finding, the court noted that Houston had been in actual adverse possession of the land in controversy for more than fifteen years prior to the institution of the action. Further, his adverse possession had ripened into title. Additionally, the court noted that Houston had been in adverse possession of the land in controversy when the deed to Moren was made. As such, the court found the deed to be void to the extent that it devised land in Houston's actual adverse possession.

In the instant case, we believe it is clear that Smith has not proven actual adverse possession of the disputed land. Further, as the *Moren* court duly noted, such constructive possession does not, in any event, prevail against actual

adverse possession by another, or as against a superior title deduced from the Commonwealth. *Ramsey v. Hughes*, 280 S.W. 99 (Ky. 1926).

In the case sub judice, Smith conceded that Unger owned the property as set forth in Deed Book 280, page 174, of the Lincoln County Court Clerk's Office in Kentucky. The record is clear that neither Smith's deed, Unger's deed, nor the surveys submitted into evidence established the fence as the appropriate boundary marker. Never at any time did Smith file a counterclaim, or a separate action to quiet title. Had he done so, he could certainly have resolved this issue by allowing the Court to determine which of the parties had better title. *Southern Oil Co. v. Holman*, 244 S.W. 762 (Ky. 1922).

Finally, Smith argues that his motion for judgment notwithstanding the verdict should have been granted on the basis of the affirmative defense of estoppel. Smith argues that he has met the criteria for the affirmative defense of estoppel in two ways. First, Smith asserts that because Unger opened his gate to Smith to knowingly allow a loader which Unger knew would be used to push the disputed trees away from the boundary fence, that Unger is estopped from later objecting. Secondly, Smith asserts that because the trees were not "growing upon the land of another" as required by KRS 364.130, Unger is estopped from asserting his objection to the removal of the trees.

First, we note that there is a factual dispute as to whether or not Unger gave Smith complete and unfettered permission to enter his land and remove the trees. Unger asserts that he allowed the loader onto his property the first time with

the understanding that he would receive a pro rata share of the proceeds from the timber. Unger states that when he failed to receive the expected proceeds, he refused to allow the loader onto his property again.

In the matter sub judice, fact finding was the province of the jury, whose members had the discretion to determine who they would believe when conflicting testimony was presented, and to determine the credibility of the witnesses. Indeed, it is well-established that judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Sub judice, a clear disagreement exists as to what was actually said and as to what Unger understood and thereby based his actions upon. As a reviewing court, we decline to find that Unger's actions constituted a basis for asserting estoppel and, therefore, affirm the trial court.

Smith also argues that the trees were "growing upon the land of another" as set forth in KRS 364.130 and, as such, Unger is estopped from asserting any objection to their removal. We disagree. In the instant matter, Unger provided unrefuted testimony that four of the eight trees in question were, in varying degrees, located on his side of the boundary line by both deed and survey. We agree with the trial court that Unger's unrefuted testimony is sufficient to establish that the trees were "growing upon the land of another". While the trees may have been partially on Smith's property, they were also partially on Unger's. While Smith may have assumed that the fence was the applicable boundary line,

case law is clear that one may be held liable for cutting trees from neighboring land in spite of not knowing where the boundary line was located. *Gum v. Coyle*, 665 S.W.2d 929 (Ky. App. 1984).

In light of the foregoing, we agree with the trial court that Unger's proof was sufficient to support the verdict of the jury. Unger established that Smith entered upon Unger's land unlawfully even though Smith mistakenly relied on the fence as the boundary line. *King v. Grecco*, 111 S.W.3d 877 (Ky. App. 2002).

As his second basis for appeal to this Court, Smith asserts that the trial court erred in awarding treble damages to Unger. In support thereof, Smith makes the same arguments as those used to support his assertion that the trial court should have granted his motion for judgment notwithstanding the verdict. Again, we affirm the ruling of the trial court for reasons set forth below.

Although Smith makes no statutory citation in his brief, we assume that he is appealing the award of damages on the basis of CR 59.01 (d) or (e) which reads as follows:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

(d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.

(e) Error in the assessment of the amount of recovery whether too large or too small.

The fixing and assessment of damages is exclusively a matter for the jury. *DeBuyser v. Walden*, 255 S.W.2d 616 (Ky. 1953). Determining whether a jury's award of damages meets this standard is a discretionary function assigned to the trial judge, who heard the witnesses firsthand, viewed their demeanor, and observed the jury throughout the trial. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001).

In reviewing the trial court's decision with respect to whether or not to grant a new trial on the basis of an excessive or inadequate jury verdict, our function is to determine if that decision constituted an abuse of discretion and, therefore, clearly erroneous. In this instance, we do not find clear error in the decision of the trial court in upholding the jury's award of damages, nor do we find the jury's award either excessive or inadequate.

As noted, KRS 364.130 governs damages for cutting timber from another person's land. The statute provides that a person is liable for treble damages for cutting timber from another person's land only if the person cutting the timber did not have at least color of title to the land. So, in order for Unger to receive treble damages, the evidence must show that Smith did not have color of title to the disputed property from which the timber was cut. Color of title is "that which gives the semblance or appearance of title, but which is not title...." 3 Am.Jur.2d *Adverse Possession* § 123 (2002). Thus, color of title is title in appearance only and not title in fact. If the instrument itself passes or constitutes

title, it is not “color of title.” *Shutt v. Methodist Episcopal Church*, 187 Ky. 350, 218 S.W. 1020, 1021 (1920).

It is true that any instrument that purports to convey land and shows the extent of the grantee's claim may afford color of title. Thus, even a deed or instrument of conveyance that is defective or invalid is sufficient to afford color of title. *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878, 880 (Ky. 1992). Sub judice, there is no issue as to the language in the deed of conveyance. Smith has conceded that his deed makes no mention of the fence as the appropriate boundary line, and the survey stakes marking Unger’s boundary were in place at the time Smith purchased the land.

Ultimately, the crux of the issue at hand is whether or not the jury determined that the trees themselves were on the boundary, as opposed to whether or not the trees were entirely on one property or the other. *If* the jury decided that the trees were boundary line trees (markers of the boundary) and that notice had been given to both parties that they were boundary line trees, *then* the taking of the trees by either party would be against the basic title held by either property owner and constitute the unlawful taking of timber from “the land of another”.

In *King v. Grecco*, 111 S.W.3d 877, this Court found that treble damages are appropriate when one elects to proceed under the statute and has proven damages sufficient to qualify for such an award; Unger has so elected. In this matter, the jury found that at least four of the trees at issue were boundary line trees taken by Smith without color of title. This the case, it is clear that the statute

entitles Unger to treble damages. We therefore affirm the ruling of the trial court on this issue.

With respect to the third issue raised on appeal, Smith asserts that the trial court erred and abused its discretion causing prejudice to Smith by awarding costs and fees to Unger. We disagree and affirm the award of the trial court.

It is well settled that awards of attorney's fees lie “within the sound discretion of the trial court and [the court's] decision will not be disturbed on appeal absent an abuse of discretion.” *Giacalone v. Giacalone*, 876 S.W.2d 616 (Ky. App. 1994), citing *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). The question then becomes whether the trial court abused its discretion. We find no abuse of discretion.

As noted in *Grecco*, an award of attorney fees to a property owner as a result of the wrongful cutting of trees on his land is mandatory, pursuant to KRS 364.130. That statute clearly provides for such an award upon determination of liability for such conduct. Indeed, that statute mandates that any party who has been found liable to another for a violation of the statute shall be responsible for any legal fees incurred by the person whose timber was cut.

Clearly, an award of attorney's fees is mandated by use of the word “shall”, as opposed to the more permissive “may”. Consequently, it is the obligation of the trial court to award attorney fees without submitting the issue of fees to the jury, in instances such as the case sub judice, when the only fact issues



for the jury to decide are liability and resulting damages. The trial court's award of costs and fees to Unger was appropriate.

For his fourth argument on appeal, Smith says that the trial court erred in instructing the jury. Smith argues that the Court erred in failing to require Unger to prove his proportional ownership of the timber at issue but, at the same time, concedes that there is no basis on which the jury could have determined proportional ownership. Essentially, Smith asserts that it is inequitable to award Unger the entire tree value in light of his concession that the majority of each tree stump stood, without dispute, on Smith's land. We are not so persuaded.

It is well-established that jury instructions in Kentucky "should not contain an abundance of detail, but should provide only the bare bones of the question for jury determination." *Rogers v. Kasdan*, 612 S.W.2d 133 (Ky. 1981). It is thus apparent that Kentucky is not a jurisdiction which favors instructing the jury at length regarding every subtle nuance of the law that may be relevant to a particular case. *See Grecco*.

In this matter, the jury's function was to determine whether or not Smith inflicted damage on Unger's land and, if so, what amount of money would compensate Unger up to the amount of the stump value. After that determination was made, the duty fell to the trial court to enter a judgment for triple the amount assessed by the jury.

Contrary to Smith's argument, the jury did not award Unger the entire value of the trees. The value of the trees was twice the stump value. Thus, the jury

award of “stump value” actually amounted to one-half the value of the standing trees. We believe Unger presents a better reasoned argument.

The jury awarded a sum of money to Unger. It is implicit in such an award that the jury saw Smith as a tortfeasor. Further, Unger was not found to have perpetrated a wrong on Smith. Smith himself removed the trees and, thereby, the physical evidence of the location of the trunk, the limbs, the shade the tree produced and any other benefit the tree would have had to the landowners that were provable by the physical presence of each individual tree. Certainly, there is no dispute that where each of these trees once stood, only stumps remain.

Smith attempts to benefit from the value of the trees both as landowner and as tortfeasor, but cannot have it both ways. Based on the testimony of King, it is custom that one who cuts and removes trees is paid at the rate of one-half the value of the trees, which is equal to the stump value. Smith seeks to acquire half the values of the trees on the basis of his tortious conduct, namely, cutting and removing the trees without permission. Further, as a landowner, Smith attempts to assert that he is entitled to a proportional share of the stump value. As a matter of policy, a tortfeasor should not be allowed to benefit from his wrong to the detriment of the injured party. *Burke Enterprises, Inc. v. Mitchell*, 700 S.W.2d 789 (Ky. 1985) and *Krahwinkel v. Commonwealth Aluminum Corp.*, 183 S.W.3d 154 (Ky. 2005).

The fixing and assessment of damages is exclusively a matter for the jury. *De Buyser v. Walden*, 255 S.W.2d 616, 618 (Ky.1953). The jury may merely

have found that Smith was not entitled to anything for his tortious act of cutting and removing the trees and, by awarding the stump value to Unger, allowed Unger and Smith each half the value of the standing tree.

Case law is clear that it is peculiarly the province of the jury to weigh the evidence, to determine the truth of it, and to determine the facts from the evidence. When, under proper instructions, the jury has done so, its verdict will not be disturbed unless clearly and palpably against the weight of the evidence. In the absence of error by the trial court, where the evidence is conflicting, the verdict of the jury will not be disturbed unless it appears that it is wholly unsupported by or is flagrantly against the evidence, or has been induced by passion or prejudice. *Castleman v. Littrell*, 181 S.W. 336 (Ky. 1916). We do not find either to be the case here and, therefore, uphold the jury's decision on this issue.

Finally, in his brief to this court, Smith asserts that the trial court committed error in failing to award Smith a directed verdict on all motions made by Smith at the conclusion of Unger's evidence. However, our review of Smith's brief reveals that he has made no specific arguments as to why he believes this to be the case. Kentucky Rule of Civil Procedure 50.01 establishes the procedure for making a Motion for Directed Verdict.

Kentucky law is clear that upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459 (Ky. 1990). All

evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. *Lewis*, citing *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 184 S.W.2d 111 (Ky. 1944), and *Cochran v. Downing*, 247 S.W.2d 228 (Ky. 1952).

The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is “‘palpably or flagrantly’ against the evidence so as ‘to indicate that it was reached as a result of passion or prejudice.’” *Lewis*, citing *NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988). If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed.

In reviewing the trial court’s decision not to grant defendant’s motion for directed verdict with those standards in mind, we find that the decision was appropriate and affirm. We find that the evidentiary record adequately supports the trial court’s decision, and find nothing in the record to indicate that the jury’s decision was reached as the result of “passion or prejudice.”

In light of the foregoing, with respect to all issues raised by Smith on appeal, we affirm the decision of the Lincoln Circuit Court, the Honorable Jeffrey T. Burdette presiding.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert N. Trainor, Esq.  
Covington, Kentucky

BRIEF FOR APPELLEE:

Kirk A. Correll  
Stanford, Kentucky