

NOTICE
Decision filed 07/08/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140524-U

NO. 5-14-0524

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

E. BERNIECE BUCHANAN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Lawrence County.
)	
v.)	No. 13-CH-14
)	
N.S.F. OIL COMPANY, INC.,)	
)	
Defendant-Appellant)	
)	
(N.S.F. Oil Company, Inc., Cross-Plaintiff and)	Honorable
Appellant; Kelly Aldrich, Cross-Defendant and)	Mark L. Shaner,
Appellee).)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Cates and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's decision that the plaintiff's son did not have apparent authority to act for the plaintiff was not against the manifest weight of the evidence where the plaintiff testified that she never granted authority to her son to act as her agent and the defendant failed to show that, based on the plaintiff's actions, a reasonably prudent person could conclude that the son was authorized to act as his mother's agent. The trial court did not err in sustaining a hearsay objection where no proper foundation for testimony offered for impeachment purposes was laid.

¶ 2 The plaintiff, E. Berniece Buchanan, filed a two-count complaint seeking a judicial determination that two separate oil and gas leases on her property had terminated.

Default judgment was entered as to count II, and its disposition is not the subject of this appeal. The defendant, N.S.F. Oil Company, Inc. (NSF), filed its answer to count I, which included a cross-claim against Kelly Aldrich alleging tortious interference with a contract. Following a bench trial, the trial court found that NSF violated the terms of the oil and gas lease and terminated the lease. The court also denied NSF's cross-claim with prejudice. NSF appealed. We affirm.

¶ 3

BACKGROUND

¶ 4 On January 29, 2007, Berniece and her husband, Clarence Buchanan, executed an oil and gas lease with NSF. Terry Fiscus is the sole officer of NSF. The primary term of the lease expired on January 29, 2008. The lease provided that "[a]fter the primary term expires, if at any time less than 200 barrels of oil are produced in any twelve month period from the lands covered by this lease, this lease shall immediately terminate and Lessee shall within 6 months of the date of said termination remove all equipment, power lines, and have all existing unplugged well bores plugged and well sites restored to the Illinois Department of Natural Resources, Division of Mines and Minerals' satisfaction."

¶ 5 On June 14, 2013, Berniece filed a complaint for the termination of the oil and gas lease. She alleged that NSF did not produce 200 barrels of oil per 12-month period after the expiration of the primary term of the lease, that she made a demand upon NSF to file a release of the lease, and that NSF refused. She asked that the court enter a judgment that the lease terminated and was of no further force or effect.

¶ 6 On July 18, 2013, NSF filed an answer, affirmative defenses, and a cross-claim. NSF alleged that, in the summer of 2012, Berniece's son, Mark Buchanan, represented to

it that Berniece would not require it to meet the production levels required in the oil and gas lease. It further alleged that, in the spring of 2013, Berniece interfered with its ability to operate the oil and gas lease and produce oil because she directed them to stay off the leased land and not operate the well. NSF filed a cross-claim against Kelly Aldrich, alleging that Aldrich was aware of its contractual arrangement with Berniece and that he intentionally and knowingly interfered with the agreement by threatening and interfering with its right to operate the oil and gas lease.

¶ 7 On August 25, 2014, the trial court held a bench trial. Fiscus testified that he spoke with Clarence and Berniece about two weeks prior to signing the lease and then met with them on the day the lease was signed. However, he stated that from the day he signed the lease until the present, he dealt exclusively with Mark. Fiscus estimated that he spoke with Mark about the lease three or four times per year. Clarence died on January 2, 2011.

¶ 8 Mark testified that Fiscus had a pattern of contacting him about the lease instead of Berniece and that he never told Fiscus not to contact him. He described his role with Fiscus as "a messenger boy," in that he just relayed information from Fiscus to his mother. He stated that he only saw Fiscus during the summer months and, on average, he saw him three or four times per year. He testified that he would ask Fiscus how much oil a well was producing, but they never discussed how much oil Fiscus was producing per month.

¶ 9 Fiscus stated that the oil wells were shut down in June 2012 due to vandalism. Mark testified that Fiscus told him about vandalism problems.

¶ 10 Fiscus testified that on June 27, 2012, he met with Mark to notify him that from May 2011 to May 2012, he sold 190 barrels of oil and produced over 200 barrels thereby meeting his 200 barrel quota. He told Mark that because he did not sell 200 barrels of oil, he would be willing to pay the Buchanans an additional • royalty of 200 barrels at the current market price. He stated that he offered to double the royalty from a • royalty to a ¼ royalty of 200 barrels that year even though he met his quota because he wanted to continue in good graces with the Buchanan family. Fiscus testified that Mark told him that there was no need to pay an additional royalty, that he was fine with production, and that he would tell his mother. He stated that Mark did not express, in words or substance, that he or his mother had any concern about the production levels.

¶ 11 Fiscus admitted that there were 12-month periods when he did not produce 200 barrels of oil but denied being in violation of his production quota. Fiscus disputed that he had to produce 200 barrels of oil in every 12-month period and stated he just had to produce it in one 12-month period.

¶ 12 Mark testified that, when he met with Fiscus in June 2012, Fiscus told him that he was not going to meet his oil production quota and offered to "buy his way out." Mark stated that he told Fiscus he would discuss it with Berniece. Fiscus denied that Mark told him this. Mark testified that Berniece told him that Fiscus came to see her. He denied telling Fiscus in words or substance that he would "stay as the operator." He stated that neither he nor Berniece ever spoke to Fiscus again. Mark testified that Berniece had the final say on issues related to the lease and that he did not have the authority to give Fiscus

permission to do anything related to the lease. Fiscus denied that Mark ever stated he had no authority to make decisions regarding the lease.

¶ 13 Berniece testified that, in the spring of 2013, Fiscus came to her house to tell her that he was not going to meet the oil production quota and to ask if, instead, he could pay her for the oil he should have produced. She told him she would have to think about it. She stated that she never spoke with him again. Fiscus denied ever going to Berniece's home to discuss oil production.

¶ 14 Berniece testified that she never gave Mark authority to tell Fiscus that he did not have to comply with the terms of the lease and that she never gave him authority to negotiate anything regarding the lease. She testified that she thought that because NSF had not produced 200 barrels each 12-month period, the lease was not valid. Therefore, she had her son John contact Aldrich about taking over the lease held by Fiscus.

¶ 15 Fiscus testified that Aldrich telephoned him on April 5, 2013. Aldrich informed Fiscus that he had leased the north 40 acres of the property that Fiscus had leased. Fiscus had planned to bring in a rig to open up two productive zones on the leased land, and Aldrich told him that, if he brought in a rig, he would be arrested for trespass. Fiscus testified that Aldrich interfered with his contract by telling him to stay off the Buchanans' property. He agreed to voluntarily stay off the property.

¶ 16 Bruce Stewart¹ testified that he had a small carried working interest in the lease. He stated that, in July 2012, Mark came to his house to discuss production levels on the

¹The Honorable Bruce D. Stewart is no relation to Bruce Stewart, the witness.

lease. He told Mark that Fiscus produced more than 200 barrels of oil between May 2011 and May 2012. Stewart was asked what Mark told him about Mark's conversation with Fiscus in June 2012. Berniece objected on the ground that it was hearsay, and the court sustained the objection. NSF provided an offer of proof in which Stewart testified that Mark told him that the Buchanans planned to continue the lease with Fiscus.

¶ 17 On September 16, 2014, the trial court entered its judgment. The court found that NSF violated the terms of the lease by failing to produce 200 barrels of oil during multiple 12-month periods. The court found that the lease stated that if after the primary term less than 200 barrels of oil were produced in any 12-month period from the lands covered by the lease, the lease shall terminate. The court noted that it was Fiscus's understanding that if he met the production requirement for one 12-month period during the calendar year he met the requirements of the lease. The court held that the language of the lease was clear that the requirement had to be met in any 12-month period.

¶ 18 NSF put forth reasons for its failure to meet its production quota including Fiscus's testimony that Mark had the authority on behalf of Berniece to excuse production. The trial court found that NSF failed to meet its burden of proving that its failure to produce the oil required by the lease was due to its reasonable reliance on Mark's apparent authority to act as an agent for Berniece and excuse the production quota. The court noted that to show apparent authority there has to be reasonable reliance, and there was insufficient evidence to establish that Fiscus could reasonably believe that Mark had the authority to bind Berniece. The court held that the January 29, 2007, oil and gas lease was terminated and ordered cancelled of record.

¶ 19 The court also found that NSF failed to prove the requirements for intentional interference with a contractual relationship and thus failed to meet its burden on the cross-claim. The court therefore denied NSF's cross-claim against Aldrich with prejudice. NSF filed a timely notice of appeal.

¶ 20 ANALYSIS

¶ 21 NSF argues that the trial court's finding that Mark did not have apparent authority to act for Berniece in connection with the oil and gas lease was contrary to the manifest weight of the evidence. We disagree.

¶ 22 Agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on behalf of the principal. *Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc.*, 326 Ill. App. 3d 126, 134 (2001). An agent's authority may be actual or apparent. *Id.* The party alleging an agency relationship must prove it by a preponderance of the evidence. *Id.* Whether an agency relationship exists and the scope of the purported agent's authority to act are questions of fact. *Id.* at 134-35. Whether a person has notice of the lack of an agent's authority, or is put on notice by circumstances, is also a question of fact. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 524 (1993). This court will reverse the trial court only if the trial court's findings are against the manifest weight of the evidence. *Amcore Bank*, 326 Ill. App. 3d at 135. A finding is against the manifest weight of the evidence if an opposite conclusion is clearly apparent. *Id.*

¶ 23 Apparent authority in an agent is the authority that the principal knowingly allows the agent to assume, or the authority that the principal holds the agent out as possessing.

Sycamore Municipal Hospital, 156 Ill. 2d at 523. Apparent authority is the authority a reasonably prudent person, exercising diligence and discretion, in light of the principal's conduct, would naturally suppose the agent to possess. *Id.* An apparent agent is one who, because of the actions of the principal, reasonably appears to third persons to be authorized to act as the principal's agent. *Amcore Bank*, 326 Ill. App. 3d at 137. "To prove apparent authority, the proponent must show that (1) the principal consented to or knowingly acquiesced in the agent's exercise of authority; (2) based on the actions of the principal and agent, the third person reasonably concluded that the party was an agent of the principal; and (3) the third person justifiably and detrimentally relied on the agent's apparent authority." *Id.*

¶ 24 NSF argues that Mark relayed information from Fiscus to Berniece and that she knowingly permitted the practice to occur thereby creating the appearance of authority in Mark to deal for her in connection with the lease. It argues that a principal will be bound not only by the authority that it actually gives to another, but also by the authority that it appears to give. See *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). While it is undisputed that Fiscus contacted Mark about the lease, NSF failed to show that, because of Berniece's actions, a reasonably prudent person, exercising diligence and discretion, would conclude that Mark was Berniece's agent.

¶ 25 NSF knew that Berniece signed the oil and gas lease, that she owned the mineral rights, and that she received the oil royalties. Berniece never told Fiscus to deal with Mark or that she was not the ultimate decision maker regarding the lease. Berniece

testified that she never gave Mark authority to act as her agent regarding the oil and gas lease.

¶ 26 Mark testified that, although Fiscus contacted him about lease matters, he merely acted as a "messenger boy" relaying the information from Fiscus to Berniece. He stated that Berniece had the final say on matters related to the lease and that he had no authority to make any decisions related to the lease.

¶ 27 Both Mark and Fiscus testified that their discussions were informational. When asked about the types of communications he had with Mark, Fiscus described an incident where he found a leak and contacted Mark to tell him that he planned to put a piece of equipment in the field to make the repair. Mark testified that in his dealings with Fiscus, Fiscus never asked permission to do or not do anything on the lease, he just told him "what was going on." Mark stated that many of their discussions dealt with the amount of oil a well was producing. These were informative conversations and not the type of communications that required action from Berniece or Mark.

¶ 28 Mark and Fiscus provided differing testimony about their discussion on June 27, 2012. Mark testified that when Fiscus offered to pay an additional royalty for failing to meet his oil production quota, he told Fiscus that he would inform his mother of the offer. Fiscus testified that he offered to pay the Buchanans an additional • royalty because, although he had produced over 200 barrels of oil, he had sold less than 200 barrels, and he wanted to maintain a good working relationship between the parties. He stated that Mark told him he did not need to pay the royalty, that he was "fine with [his] production," and that he would tell his mother. Both Mark and Fiscus agree that Mark

said he would inform Berniece about the conversation. Mark asserts that he was merely going to be a messenger and relay the offer from Fiscus to Berniece, but Fiscus asserts that Mark was acting as Berniece's agent and had the authority to bind her to the lease.

¶ 29 "Only the alleged principal's words and conduct, not those of the alleged agent, establish the agent's authority." *Amcore Bank*, 326 Ill. App. 3d at 134. Berniece did not, by word or conduct, indicate that Mark was her agent and could excuse the oil production quota or otherwise alter the terms of the lease. Other than Fiscus's testimony that Mark excused the oil production quota during their June 27, 2012, meeting, NSF provided no evidence that Mark made decisions regarding the lease and that Berniece acquiesced in his exercise of authority. It is the province of the trier of fact to assess the credibility of the witnesses, to weigh their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *Village of Bull Valley v. Winterpacht*, 2012 IL App (2d) 101192, ¶ 12.

¶ 30 In the present case, the trial court found that there was insufficient evidence to establish that Fiscus could reasonably believe that Mark had the authority to bind Berniece. Berniece testified that she never granted Mark authority to act for her and that she never told Fiscus to deal with Mark. Mark testified that Berniece was the ultimate decision maker in matters pertaining to the lease. Both Fiscus and Mark described their dealings as informational as opposed to ones in which Mark exercised authority over the lease. Mark testified that Fiscus offered Berniece a royalty because he failed to meet his oil production quota, and he told Fiscus he would relay the offer to her. Fiscus alleged

that he met his production quota and only offered to pay a royalty to maintain a good working relationship between the parties. He testified that Mark stated that it was "fine" and that he would let his mother know. The trial court weighed the credibility of the witnesses, resolved conflicting evidence, and drew reasonable inferences from that evidence. The trial court's finding that NSF failed to establish that it reasonably concluded Mark was Berniece's agent is not against the manifest weight of the evidence.

¶ 31 NSF also argues that the trial court erred in sustaining a hearsay objection to Stewart's testimony about a prior inconsistent statement Mark allegedly made, which was offered to impeach Mark's testimony. It contends that the hearsay rule does not preclude testimony regarding a witness's prior inconsistent statement when offered for impeachment purposes.

¶ 32 Hearsay is testimony of an out-of-court statement offered to establish the truth of the matter asserted and resting for its value on the credibility of the out-of-court declarant. *People v. Dunmore*, 389 Ill. App. 3d 1095, 1106 (2009). Unless it falls within an exception to the rule, hearsay evidence is generally inadmissible because there is no opportunity to cross-examine the declarant. *Id.* When an out-of-court statement is offered for impeachment purposes rather than to prove the truth of the matter asserted, it is not hearsay. *Kincaid v. Ames Department Stores, Inc.*, 283 Ill. App. 3d 555, 566 (1996). The decision to allow the admission of evidence for impeachment purposes is within the trial court's sound discretion, and a reviewing court will not disturb that decision absent an abuse of discretion. *Boyce v. Risch*, 276 Ill. App. 3d 274, 278 (1995).

¶ 33 After Mark's testimony was concluded, NSF sought, through Stewart's testimony, to introduce statements Mark allegedly made outside of court. Berniece objected to the testimony on the ground that it was hearsay. NSF asserted that Stewart's testimony was being offered to show that Mark made a prior inconsistent statement. The trial court sustained the objection.

¶ 34 Before a witness's prior inconsistent statement will be allowed into evidence for impeachment purposes, a proper foundation must be laid. *Brooke Inns, Inc. v. S&R Hi-Fi & TV*, 249 Ill. App. 3d 1064, 1080 (1993); see Ill. R. Evid. 613(b) (eff. Jan. 1, 2011). The foundation is laid by directing the witness's attention to the time, place, circumstances, and substance of the inconsistent statement. *Boyce*, 276 Ill. App. 3d at 278. "The purpose of the foundation is to provide the witness with an opportunity to deny, correct, or explain any prior inconsistent statement as well as avoid unfair surprise." *Id.*

¶ 35 In the present case, while on the witness stand, Mark was not alerted to the alleged conversation with Stewart, let alone its time, place, circumstances, or substance. Because a proper foundation was not laid for the introduction of Mark's prior inconsistent statement, the trial court properly excluded Stewart's testimony about what Mark allegedly told him.

¶ 36 CONCLUSION

¶ 37 For the reasons stated, we affirm the judgment of the circuit court of Lawrence County.

¶ 38 Affirmed.