IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GLEN D. JACKSON — APPELLANT

v. — NO. 2008-CA-00376

CHARLES CARTER, INDIVIDUALLY AND IN HIS CAPACITY AS A REGISTERED FORESTER AND DBA MID-SOUTH FORESTRY; MID-SOUTH FORESTRY, INC.; RICHARD CHISM, INDIVIDUALLY AND DBA CHISM LOGGING; UNKNOWN DEFENDANT A; UNKNOWN DEFENDANT B; AND UNKNOWN DEFENDANT C — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF UNION COUNTY, MISSISSIPPI

BRIEF OF APPELLEE, CHARLES CARTER, INDIVIDUALLY AND IN HIS CAPACITY AS A REGISTERED FORESTER AND D/B/A MID-SOUTH FORESTRY, AND MID-SOUTH FORESTRY, INC.

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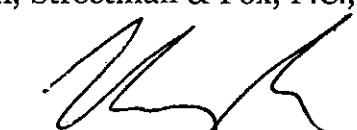
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following listed persons have interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Glen D. Jackson, Appellant;
2. John D. Weddle, Nichels & Weddle, PLLC, Counsel for Appellant;
3. Richard Chism, Individually and D/B/A Chism Logging;
4. John L. Hinkle, IV, Markow Walker, P.A., Counsel for Appellee;
5. Charles Carter, Individually and In His Capacity as a Registered Forester and D/B/A Mid-South Forestry; Mid-South Forestry, Inc., Appellee;
6. Matthew A. Taylor, Scott, Sullivan, Streetman & Fox, P.C., Counsel for the Appellee.

By: 

Matthew A. Taylor, Counsel of Record
Charles Carter, Individually and In His Capacity as a Registered Forester and D/B/A Mid-South Forestry and Mid-South Forestry, Inc.

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STATEMENT OF THE CASE

On October 30, 2001, Appellee Chism entered into a contract with this Appellee and the landowner, Louie Wages, to harvest the timber on Wages's property. (R. at 19) Appellee Chism harvested all of the timber that had been previously marked by this Appellee and utilized the land boundaries as provided by the landowner, Wages. Appellee Chism completed the contract for the Wages timber harvest on or about November 15, 2001. (*Id.*)

On or about April 18, 2007, Appellant discovered that an estimated twelve (12) acres of timber on his property had been harvested without his permission or knowledge. (*Id.*)

On June 29, 2007, Appellant filed suit against the Appellees alleging, *inter alia*, that the Appellees wrongfully removed timber from his property and sought damages pursuant to MISS. CODE ANN. § 95-5-10. (R. at 3-8)

However, as properly concluded by the Circuit Court of Union County Mississippi, Appellant failed to establish genuine issues of material fact with respect to his claims, as said claims were time barred. (R. at 28) As such, based on the undisputed facts, Appellees were properly granted summary judgment as a matter of law. (*Id.*) From the Trial Court's February 5, 2008 *Order* granting summary judgment, Appellant filed the instant appeal.

SUMMARY OF THE ARGUMENT

Appellant argues that, due to the alleged involvement on the part of Appellees, including this Appellee, he is entitled to damages for timber trespass as set forth MISS. CODE ANN. § 95-5-10.

Regarding timber trespass, the Mississippi Supreme Court has recognized that MISS. CODE ANN. § 95-5-10 is the "exclusive remedy for cutting down, deadening, destroying, or taking away of trees." *McCain v. Memphis Hardwood Flooring Co.*, 725 So.2d 788, 791 (Miss. 1998)(overruled on other grounds).

Additionally, the controlling statue governing the appropriate time limitation for instituting a claim under MISS. CODE ANN. § 95-5-10 is MISS. CODE ANN. § 95-5-29. Under the clear language of § 95-5-29, the appropriate statute of limitations on timber trespass is "twenty-four (24) months from the time the injury was committed and not after." Further, as enunciated by The Mississippi Supreme Court, there is no "discovery rule" in a timber trespass case because "[a]n owner of trees requires no unique expertise to realize when his trees have been taken without his permission[,]" and because "the taking of such trees without consent of an owner [is not] a secretive or inherently undiscoverable act...." *McCain v. Memphis Hardwood Flooring Co.*, 725 So.2d 788, 791 (Miss. 1998).

Here, the material facts are undisputed. Appellee Chism, concluded his logging contract, which was based in part on this Appellee's previous marking of the timber, on November 15, 2001. ®. at 19) Further, it is undisputed that Appellant failed to file the underlying suit until June 29, 2007, well over five and one half years after the alleged events giving rise to timber trespass. ®. at 3-8) As a result, Appellant's claims against this Appellee are barred by the applicable statute of limitations.

ARGUMENT

Appellant alleges that he is entitled to an award of actual, compensatory, and punitive damages under MISS. CODE ANN. § 95-5-10 from this Appellee due to his alleged involvement in the alleged timber trespass against Appellant's property.

As recognized by the Mississippi Supreme Court regarding timber trespass, MISS. CODE ANN. § 95-5-10 is the "exclusive remedy for cutting down, deadening, destroying, or taking away of trees." *McCain v. Memphis Hardwood Flooring Co.*, 725 So.2d 788, 791 (Miss. 1998)(overruled on other grounds). The pertinent portion of MISS. CODE ANN. § 95-5-10 that is most applicable here is found in sub-section (1) of that statute and reads as follows:

> The remedy provided for in this section shall be the exclusive remedy for the cutting down, deadening, destroying or taking away of trees and shall be in lieu of any other compensatory, punitive or exemplary damages for the cutting down, deadening, destroying or taking away of trees but shall not limit actions or awards for other damages caused by a person.

MISS. CODE ANN. § 95-5-10 (1).

Further, the controlling statue providing the appropriate time limitation for instituting a claim under MISS. CODE ANN. § 95-5-10 is MISS. CODE ANN. § 95-5-29. That statute provides:

> An action for the remedies and penalties provided by Section 95-5-10 may be prosecuted in any court of competent jurisdiction within twenty-four (24) months from the time the injury was committed and not after. All other actions for any specific penalty given by this chapter may be prosecuted in any court of competent jurisdiction within twelve (12) months from the time the injury was committed, and not after; and a recovery of any penalty herein shall not be a bar to any action for further damages, or to any criminal prosecution for any such offense as herein enumerated. A party, if he so elect, may, under any provision of this chapter, claim less than the penalty given.

MISS. CODE ANN. § 95-5-29.

Here, Appellant does not contend that he filed his Complaint within the twenty-four (24) months, as contemplated by the statute, but urges this Court to apply a judicial "discovery rule." However, as will be shown *infra*, the precedential decisions of Mississippi jurisprudence do not allow for any such application.

Under Mississippi law, the application of a discovery rule is only to be applied in "limited circumstances in negligence and products liability cases involving latent injury." *PPG Architectural Finishes, Inc. v. Lowery,* 909 So.2d 47, 50 (Miss. 2005)(quoting *Schiro v. Am. Tobacco Co.*, 611 So.2d 962, 964 (Miss. 2002)). The *PPG* court went on to say that "[i]mplicitly then, this Court has held that if a latent injury is *not* present the discovery rule would *not* apply." *PPG*, 909 So.2d at 50. (citing *Chamberlin v. City of Hernando*, 716 So.2d 596, 602 (Miss. 1998)). Further, *PPG* defined a latent injury as one where the "plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question...[or] when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act." *PPG*, 909 So.2d at 50 (quoting *Donald v. Amoco Prod. Co.*, 735 So.2d 161, 168 (Miss. 1999)).

As Appellant aptly points out, Mississippi law is clear on discovery rule application in timber trespass cases. In *McCain v. Memphis Hardwood Flooring Co.*, Plaintiffs brought a claim against Memphis Hardwood for timber trespass. *McCain*, 725 So.2d at 789 (overruled on other grounds). The Plaintiffs in *McCain* testified that they did not discover that the trees had been removed until more than two years had passed. *Id.* Like Appellant in the instant case, the Plaintiffs in *McCain* argued that the statute of limitations should not have begin to run until they knew or should have known of the damage to their property. *Id.* at 794. To the contrary, the Mississippi Supreme Court refused to apply the discovery

rule stating that it should only be applied

> "where the plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question ... An owner of trees requires no unique expertise to realize when his trees have been taken without permission. Neither is the taking of such trees without consent of an owner a secretive or inherently undiscoverable act which justifies the discovery rule."

Id. Nevertheless, Appellant avers that the holding in *McCain* was an *ad hoc* decision which was extensively fact driven, but does not and cannot distinguish *McCain* from the instant case. Therefore, under the clear holding of *McCain*, any "discovery rule" is inapplicable in a timber trespass case.

Additionally, Appellant, avers that under *Punzo v. Jackson County*, 861 So.2d 340 (Miss. 2003), the discovery rule is applicable in all property cases. (Brief of Appellee at 8) At the outset, it is important to note, as Appellant correctly points out in his brief, *Punzo* did not expressly overrule *McCain*. Moreover, *Punzo* is not a timber trespass case. The *Punzo* court was called upon to decide whether the discovery rule was applicable to damages resulting from negligence of the county in altering a bridge that may have lead to the flooding of the Plaintiff's property. *Id.* at 344. In *Punzo*, the plaintiff did not discover the cause of the flooding until three years after the first time his property flooded. *Id.* at 346. In *Punzo*, the Court held that the discovery rule should apply and stated that "[w]ater flow and flood currents are subjects requiring expert knowledge to be fully comprehended." *Id.* However, the Plaintiff in *Punzo* did not own the bridge and was clearly not involved in its alteration. Conversely, in the instant case, Appellant did own the land where the allegations of events involving this Appellee allegedly occurred. Furthermore, unlike the flooding issues in *Punzo*, under *McCain*, no expert was required here for Appellant to know

that the trees had been cut. Neither is the cutting or removal of such trees an inherently undiscoverable act. Therefore, the application of the discovery rule in *Punzo* is clearly inapplicable in the instant case and the argument for its application is at odds with the holding in *McCain,* and any timber trespass case, which requires no such expertise.

Appellant also cites *Evans v. Boyle Flying Service, Inc.*, 680 So.2d 821 (Miss. 1996) in support of his contention that the discovery rule should apply in the instant case. In *Evans,* the Defendant was allegedly negligent in applying chemicals to the Plaintiff's crops. *Id.* at 823. The issue before the Court was whether the Plaintiff had given proper notice prior to filing its claim. *Id.* at 826. The Court held that the damage to the crops had not manifest itself within the applicable period to give the Plaintiff notice of the claim. *Id.* at 829. Thus, as Appellant correctly points out, the Court held that it was unreasonable to hold a person to the notice requirement "when they did not or could not have been able to discover the damage within sixty days after the spraying...." *Id.* at 827. However, much the same as *Punzo,* the discovery rule in *Evans,* is easily distinguishable from the instant case. Furthermore, *Evans* was not a timber trespass case. In *Evans,* it was impossible for the Plaintiff to discover the crop damage in time to comply with the notice requirement, as the damage to the crops had not manifest itself. Conversely, here, the damage was clearly manifest at the time of the timber harvest in November of 2001. Therefore, there was no secretive or inherently undiscoverable act, as contemplated by *McCain,* which would justify the application of the discovery rule to a timber trespass case.

As demonstrated by the consistency of the Mississippi Supreme Court in *McCain, PPG, Punzo* and *Evans,* the applicability of the discovery rule should be reserved for "limited circumstances." *PPG,* 909 So.2d at 50. Further, a latent injury is one that the

Plaintiff would be precluded from discovering because of its secretive or inherently undiscoverable nature or when the plaintiff as a layman could not perceive the injury. *Id.* This is precisely the contemplation of the Court in *McCain* where, as set forth *supra*, the Court determined that timber trespass was not to be construed as secretive or inherently undiscoverable. *McCain*, 725 So.2d at 794. Further, the *McCain* court held that there was no unique expertise required to know that the timber had been harvested. *Id.* Appellant attempts to distinguish *McCain* with *Punzo* and *Evans*. However, both *Punzo* and *Evans* are wholly consistent with the Court's reasoning in *PPG* and application of the discovery rule in limited circumstances, and clearly inconsistent with the applicability of the discovery rule to a timber trespass case, such as *McCain* and the instant case.

The clear holding of *McCain* demonstrates the unwillingness of the Mississippi Supreme Court to apply the discovery rule to a timber trespass case. Appellant has wholly failed to cite any case which would overrule or distinguish *McCain* from the instant case. Appellant failed to file his claim within the requisite time period proscribed by statute. Because the discovery rule does not apply, the grant of summary judgment in favor of this Appellee must be affirmed.

CONCLUSION

The material facts of the instant case are undisputed. Plaintiff filed suit under MISS. CODE ANN. § 95-5-10 for the alleged actions involving this Appellee. MISS. CODE ANN. § 95-5-10 provides the exclusive remedy for cutting down, deadening, destroying, or taking away of trees. MISS. CODE ANN. § 95-5-29 provides for a twenty-four (24) month statute of limitation from the time of injury and not after.

The Mississippi Supreme Court is clear in holding that there is no applicable "discovery rule" in the case of timber trespass. It is undisputed that Appellee Chism concluded his logging operation on November 15, 2001, and this Appellee's involvement preceded that date. Appellant did not file the instant case until June 29, 2007, more than five and one-half years after the alleged incident giving rise to his claim. Because no material facts are in dispute and no reasonable jury could find that Appellant's claims are not time barred, the Trial Court's grant of summary judgment in favor of Appellees was clearly proper. Based on the foregoing, this Appellee respectfully requests that this Court **affirm** the Trial Court's grant of summary judgment in its favor.

RESPECTFULLY submitted this the 22nd day of August, 2008.

CHARLES CARTER, INDIVIDUALLY AND IN HIS CAPACITY AS A REGISTERED FORESTER AND D/B/A MID-SOUTH FORESTRY, AND MID-SOUTH FORESTRY, INC.

BY: _____

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CERTIFICATE OF SERVICE

I, Matthew A. Taylor, one of the counsel of record for Appellee, CHARLES CARTER, INDIVIDUALLY AND IN HIS CAPACITY AS A REGISTERED FORESTER AND D/B/A MID-SOUTH FORESTRY, AND MID-SOUTH FORESTRY, INC., do hereby certify that I have this date caused to be delivered, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee* to the following:

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Honorable Robert W. Elliot
Union County Circuit Court Judge
105 East Spring Street
Ripley, MS 38663

THIS the 22nd day of August 2008.

MATTHEW A. TAYLOR