2008-CA-00376 E

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00376

GLEN D. JACKSON — APPELLANT

VS.

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

I. CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the Appellee, Richard Chism Individually and d/b/a Chism Logging, certifies that the following listed persons have an 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, with the law firm of Nichels & Weddle, PLLC, counsel for appellant;
3. Richard Chism/Chism Logging, appellee;
4. John L. Hinkle, IV, with the law firm of Markow Walker, P.A., counsel for appellee;
5. Charles Carter/Mid-South Forestry, appellee;
6. Matthew A. Taylor, with the law firm of Scott, Sullivan, Streetman, & Fox, counsel for appellee.

JOHN L. HINKLE, IV
Attorney of Record for Defendant-Appellee Richard Chism, Individually and d/b/a Chism Logging

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IV. STATEMENT OF THE CASE

The facts of the present appeal are relatively straightforward and undisputed. On October 30, 2001, Chism entered into a contract with Charles Carter/Mid-South Forestry and Louie Wages, the landowner, to harvest timber on Mr. Wages's property **(R, AT 53-54)**. Chism harvested all of the timber that had been pre-marked by Carter/Mid-South Forestry and utilized the boundaries provided by Wages. Chism's timber cutting operation was concluded on or about November 15, 2001 **(R, AT 53-54)**.

On or about April 18 or 19, 2007, Jackson discovered that someone had harvested an estimated twelve (12) acres of his land without his knowledge or permission **(R, AT 53-54)**.

On June 29, 2007, Jackson filed suit against Chism and Carter/ Mid-South Forestry alleging that they had unlawfully removed trees from his property and sought damages as a result pursuant to MISS. CODE ANN. § 95-5-10 **(R, AT 3-10)**.

V. SUMMARY OF ARGUMENT

Jackson has alleged that he is entitled to actual and compensatory and punitive damages under MISS. CODE ANN. § 95-5-10 for Chism's alleged actions in cutting down Jackson's timber.

The Mississippi Supreme Court has provided that MISS. CODE ANN. § 95-5-10 is the exclusive remedy for cutting down, deadening, destroying, or taking away of tress." ***McCain v. Memphis Hardwood Flooring Co.***, 725 So. 2d 788, 794 (Miss. 1998).

The statute that governs the time limit for filing a claim under MISS. CODE ANN. § 95-5-10 is MISS. CODE ANN. § 95-5-29. § 95-5-29 provides for a statute of limitations of "twenty-four (24) months from the time the injury was committed and not after." The Mississippi Supreme Court has held that there is no "discovery rule" in timber trespass cases. ***McCain v. Memphis Hardwood Flooring Co.***, 725 So. 2d 788, 794 (Miss. 1998).

It is undisputed that Chism concluded his logging operation on November 15, 2001. It is also undisputed that Jackson did not file his suit until June 29, 2007, over 5 ½ years after the alleged negligent timber trespass occurred. As such, Jackson's claims against Chism are barred by the applicable statute of limitations.

VI. ARGUMENT

Jackson has alleged that he is entitled to actual and compensatory and punitive damages under MISS. CODE ANN. § 95-5-10 for Chism's alleged actions in cutting down Jackson's timber.

The Mississippi Supreme Court has provided that MISS. CODE ANN. § 95-5-10 is the exclusive remedy for "cutting down, deadening, destroying, or taking away of tress." ***McCain v. Memphis Hardwood Flooring Co.***, 725 So. 2d 788, 794 (Miss. 1998).

MISS. CODE ANN. § 95-5-10 provides as follows:

> (1) If any person shall cut down, deaden, destroy or take away any tree without the consent of the owner of such tree, such person shall pay to the owner of such tree a sum equal to double the fair market value of the tree cut down, deadened, destroyed or taken away, together with the reasonable cost of reforestation, which cost shall not exceed Two Hundred Fifty Dollars ($250.00) per acre. The liability for the damages established in this subsection shall be absolute and unconditional and the fact that a person cut down, deadened, destroyed or took away any tree in good faith or by honest mistake shall not be an exception or defense to liability. To establish a right of the owner prima facie to recover under the provisions of this subsection, the owner shall only be required to show that such timber belonged to such owner, and that such timber was cut down, deadened, destroyed or taken away by the defendant, his agents or employees, without the consent of such owner. 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.
>
> (2) If the cutting down, deadening, destruction or taking away of a tree without the consent of the owner of such tree be done willfully, or in reckless disregard for the rights of the owner of such tree, then in addition to the damages provided for in subsection (1) of this section, the person cutting down, deadening, destroying or taking away such tree shall pay to the owner as a penalty Fifty-five Dollars ($55.00) for every tree so cut down, deadened, destroyed or taken away if such tree is seven (7) inches or more in diameter at a height of eighteen (18) inches above ground level, or Ten Dollars ($10.00) for every such tree so cut down, deadened, destroyed or taken away if such tree is less than seven (7) inches in diameter at a height of eighteen (18) inches above ground level, as established by a preponderance of the

> evidence. To establish the right of the owner prima facie, to recover under the provisions of this subsection, it shall be required of the owner to show that the defendant or his agents or employees, acting under the command or consent of their principal, willfully and knowingly, in conscious disregard for the rights of the owner, cut down, deadened, destroyed or took away such trees.
>
> (3) All reasonable expert witness fees and attorney's fees shall be assessed as court costs in the discretion of the court.

The statute that governs the time limit for filing a claim under § 95-5-10 is MISS. CODE ANN. § 95-5-29, which provides as follows:

> 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 given 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 of the provisions of this chapter, claim less than the penalty given (emphasis added).

Jackson does not dispute that he failed to file his cause of action within the operative time frame allotted by MISS. CODE ANN. § 95-5-29 (**APPELLANT'S BRIEF, AT 1-2**). Rather, he argues for the application of a "discovery rule" to MISS. CODE ANN. § 95-5-29.

The Mississippi Supreme Court, in examining the application of the discovery rule has cautioned that it should only be applied in "limited circumstances in negligence and products liability cases involving latent injury. Implicitly then, this Court has held that if a latent injury is not present the discovery rule would not apply." ***PPG Architectural Finishes, Inc. v. Lowery,*** 909 So. 2d 47, 50 (Miss. 2005). Further, ***PPG*** defined a latent injury as one where "the plaintiff will be precluded from discovering the 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 acts." ***Id.***

Jackson admits that the Mississippi Supreme Court has already spoken on the issue of applicability of the discovery rule to timber cases such as the one at bar (**APPELLANT'S BRIEF, AT 5**). In ***McCain v. Memphis Hardwood Flooring Co.***, 725 So. 2d 788, 789 (Miss. 1998), the plaintiffs filed suit against the defendant, Memphis Hardwood, for cutting trees and removing timber from the plaintiffs' property without consent. ***Id.***. The plaintiffs testified that they did not learn of the timber trespass until over two (2) years after the trees had been cut. ***Id.*** In an identical argument to Jackson's, the plaintiffs contended that the statute should not have run until they knew or should have known of the damage or trespass to their trees. ***Id.*** at 794. The Court noted that it:

> has applied the discovery rule 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 tress 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.

However, Jackson contends that ***McCain*** was fact specific in its ruling but Jackson is unable to state how the facts differ from the case at bar.

Further, Jackson contends that ***Punzo v. Jackson County***, 861 So. 2d 340 (Miss. 2003), stands for the proposition that the discovery rule is applicable to all property cases (**APPELLANT'S BRIEF, AT 8**). Jackson has significantly overstated the holding and impact of ***Punzo***. First and foremost, as Jackson pointed out, ***Punzo*** did not expressly overrule ***McCain*** (**APPELLANT'S BRIEF, AT 8**). In fact, ***Punzo*** was not even a timber trespass case. ***Punzo*** dealt with the issue of whether the plaintiff could apply the discovery rule for damages that resulted from the County's alleged negligence in altering a bridge that may have led to the flooding of the plaintif's property. ***Id.*** at 344. The

plaintiff did not find out about the bridge alterations until six (6) months before the third flood. ***Id.*** at 346. The Court, in holding that the discovery rule should apply in the action, reasoned that "[w]ater flow and flood currents are subjects requiring expert knowledge to fully comprehend. ***Id.***

The Court of Appeals succinctly pointed out the distinctions between ***Punzo*** and the case at bar in ***Sims v. Bear Creek Water Ass'n***, 923 So. 2d 230 (Miss. Ct. App. 2005). In ***Sims***, the Court noted that the discovery exception in ***Punzo*** "applies to latent injuries where matters involving water flow may require expert knowledge that an injury has occurred before the statute of limitations begins to run." ***Id.*** at 233. The Court further noted that the plaintiff was not aware of the alteration of the bridge which caused the flooding and the damage. ***Id.***

The plaintiff in ***Punzo*** did not own the bridge and was clearly not involved in its alteration. In the case at bar, Jackson owned the land where the allegedly negligent acts of Chism were to have occurred. Further, unlike the flooding issues in ***Punzo***, it did not require an expert for Jackson to know that trees have been cut from their property; nor, is the cutting of trees an inherently undiscoverable act.

Jackson also cited to ***Evans v. Boyle Flying Serv., Inc.***, 680 So. 2d 821 (Miss. 1996), in support of his motion. ***Evans*** dealt with the allegedly negligent application of chemicals to the plaintiff's crops. ***Id.*** at 823. The issue was whether the plaintiff had given the proper sixty (60) day statutory notice prior to filing the claim. ***Id.*** at 826. The Court found that the damage to the crops had not manifested itself within the sixty (60) day period to give the plaintiff notice of the claim. ***Id.*** at 829. Thus, 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.

The application of the "discovery rule" in ***Evans***, much like in ***Punzo***, is easily distinguishable from the case at bar. Once again, this case did not deal with timber trespass. Further, in ***Evans***, the plaintiff could not have discovered the damage in time to comply with the notice requirement because the damage had not yet manifested itself in destruction of his crops. In the case at bar, it is undisputed that the damage had clearly manifested itself at the time of the cutting in 2001. As ***McCain*** stated, there was no secretive or inherently undiscoverable act which justifies the application of the discovery rule to the cutting of timber.

In a closer examination of all three (3) cases, ***McCain***, ***Punzo***, and ***Evans***, they are entirely consistent with the applicability of the "discovery rule" that was enunciated in ***PPG Architectural Finishes, Inc. v. Lowery,*** 909 So. 2d 47 (Miss. 2005). ***PPG*** indicated that the discovery rule should only be applied in "limited circumstances." ***Id.*** at 50. Further, a "latent injury" is one that the plaintiff would be precluded from discovering because of a secretive or inherently undiscoverable nature or when the plaintiff as a layman could not perceive the injury. ***Id.*** This is precisely the reasoning that the Court explored in ***McCain***. The Court determined that timber trespass was not secretive or inherently undiscoverable. ***McCain v. Memphis Hardwood Flooring Co.***, 725 So. 2d 788, 794 (Miss. 1998). Further, the Court held that there was no unique expertise required to realize that trees had been cut down. ***Id.*** Thus, the layman exception did not apply. While, Jackson tried to distinguish ***McCain*** with ***Punzo v. Jackson County***, 861 So. 2d 340 (Miss. 2003), and ***Evans v. Boyle Flying Serv., Inc.***, 680 So. 2d 821 (Miss. 1996), both were entirely consistent with the Court's reasoning in ***PPG***. The Court applied the discovery rule in the limited circumstances of ***Punzo*** due to the fact that water flow and flood currents were beyond the knowledge of a layman. ***Punzo***, 861 So. 2d at 346. Further, the Court applied the discovery rule in the limited circumstances of ***Evans***

because the alleged crop damage was inherently undiscoverable because it had not manifested itself. ***Evans***, 680 So. 2d at 829.

The Mississippi Supreme Court previously determined that the discovery rule should not apply in the limited circumstances of timber trespass. No cases cited by Jackson overruled the ***McCain*** holding or distinguish it in any appreciable way. Jackson failed to file his action within the time frame allotted by MISS. CODE ANN. § 95-5-29. As such, the grant of summary judgment in favor of Chism should be affirmed.

VII. CONCLUSION

The Plaintiff filed suit under MISS. CODE ANN. § 95-5-10 for Mr. Chism's alleged actions in cutting down the Plaintiff's timber. MISS. CODE ANN. § 95-5-10 is the exclusive remedy for cutting down, deadening, destroying, or taking away of tress. MISS. CODE ANN. § 95-5-29 provides for a statute of limitations of twenty-four (24) months from the time the injury was committed and not after. The Mississippi Supreme Court has been clear in its holding that there is no "discovery rule" in the limited circumstances of timber trespass.

It is undisputed that Mr. Chism concluded his logging operation on November 15, 2001. It is also undisputed that Jackson did not file his suit until June 29, 2007, over 5 ½ years after the alleged negligent timber trespass occurred. As such, Jackson's claims against Chism are barred by the applicable statute of limitations.

RESPECTFULLY SUBMITTED this the 21st day of July, 2008.

RICHARD CHISM, INDIVIDUALLY AND D/B/A CHISM LOGGING

BY: _____

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CERTIFICATE OF SERVICE

I, John L. Hinkle, IV, do hereby certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing ***Brief of Appellee, Richard Chism, Individually and d/b/a Chism Logging*** to:

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This the 25th day of July, 2008.

JOHN L. HINKLE, IV