2008-CA-00376

I. CERTIFICATE OF INTERESTED PERSONS

I, John D. Weddle, undersigned counsel of record for Appellant, hereby certify that the following listed persons have an interest in the outcome of this appeal. These representations are made in order that the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1.	John D. Weddle, Esq. Nickels & Weddle, PLLC	-	Counsel of record for Appellant
2.	Glenn Jackson	-	Appellant
3.	Honorable Robert W. Elliott	-	Trial Court Judge
4.	Charles Carter	-	Appellee
5.	Mid-South Forestry	-	Appellee
6.	Richard Chism, Individually and dba Chism Logging	-	Appellee
7.	Matthew A. Taylor, Esq. Scott, Sullivan, Streetman & Fox	-	Counsel for Charles Carter/Mid-South Forestry
8.	John L. Hinkle, IV, Esq. Markow, Walker, PA	-	Counsel for Richard Chism Individually and dba Chism Logging

So Certified,

JOHN D. WEDDLE
COUNSEL OF RECORD FOR
APPELLANT

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IV. STATEMENT OF THE ISSUE

Whether the trial court erred in holding that the discovery rule does not apply to actions involving the cutting of timber under *Miss. Code Ann. § 95-5-10.*

V. STATEMENT OF THE CASE

On October 30, 2001, Appellee Richard Chism, Individually and d/b/a Chism Logging (Hereafter referred to as "Chism") entered into a contract with Appellee Charles Carter d/b/a Mid-South Forestry (hereafter referred to as "Carter") and Louie Wages, the landowner of real property adjacent to property owned by Appellant. The contract was for the harvesting of timber from the Wages property. Appellee Carter marked trees for harvesting. Appellee Chism's harvesting of the trees was completed on or about November 15, 2001. *See Record Excerpts* at 19.

On or about April 19, 2007, Appellant, while traversing his real property with his brothers, discovered that an estimated twelve acres of timber had been harvested from his land without his knowledge or permission. Appellant contends that the property lines between his property and Wages' property were marked by a barbed wire fence line and were clearly visible. *See Record Excerpts* at 12-13, 19-24

On June 29, 2007, Appellant filed suit against the Appellees alleging that the Appellees had unlawfully removed trees from his land and sought damages pursuant to *Miss. Code Ann. § 95-5-10. See Record Excerpts* at 3.

After some discovery was completed, Appellees moved the trial court for summary judgment arguing that the applicable statute of limitation contained in *Miss. Code Ann. § 95-5-29* operates to bar recovery since Appellant did not file suit within

twenty-four (24) months from the time the injury was committed. Appellant responded arguing that the discovery rule should operate in this case to toll the statute of limitation until the Appellant discovered the unlawful harvesting of trees from his land. Appellant did not use the land for a residence and the acreage that was harvested is not visible from any public road. *See Record Excerpts* at 12-13, 19-24. Appellant did not discover that the trees had been taken until he and his brothers walked over the property to view for a select cut. Appellant and his brothers executed affidavits stating these facts. *See Record Excerpts* at 22-24.

The Court granted Appellees' motion for summary judgment and Appellant filed the pending appeal.

VI. SUMMARY OF THE ARGUMENT

Appellant argues that pursuant to *Punzo v. Jackson County, Mississippi,* 861 So.2d 340 (Miss.2003), the trial court erred in dismissing Appellant's claim on summary judgment. The trial court relies upon *McCain v. Memphis Hardwood Flooring Co.,* 725 So. 2d 788 (Miss. 1998) for the dismissal stating that *McCain* precludes examination of the discovery rule in cases brought under *Miss. Code Ann. § 95-5-10. See Record Excerpts at 3-4.* Appellant argues that the Court in *McCain* did not intend to put into place an absolute prescriptive period that would bar the trial court's application of the discovery rule, but that the court only applied the bar to recovery in the *McCain* case under its own facts. While *Punzo* has not overruled *McCain,* it has effectively applied the discovery rule to cases involving damages to real property such as the case at bar.

VII. ARGUMENT

The Supreme Court has consistently held that review of a grant of summary judgment is de novo. *Hurdle v. Holloway*, 848 So. 2d 183, 185 (Miss. 2003); *Miller v. Meeks*, 762 So. 2d 302, 304 (Miss. 2000); *Crain v. Cleveland Lodge*, 1532, Order of Moose, Inc., 641 So. 2d 1186, 1188 (Miss. 1994). A summary judgment motion is only properly granted when no genuine issue of material fact exists. *Miller*, 762 So. 2d at 304; M.R.C.P. 56(c). The Appellees in this case the burden of demonstrating that no genuine issue of material fact exists within the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any[.]" *Id.* (emphasis added); see also *Davis v. Hoss*, 869 So. 2d 397, 401 (Miss. 2004); *Anglado v. Leaf River Forest Prods., Inc.*, 716 So. 2d 543, 547 (Miss. 1998).

The Complaint filed in this cause by Plaintiff is pursuant to *Miss. Code Ann. § 95-5-10*, the exclusive remedy for cutting down, deadening, destroying, or taking away of trees. *See McCain v. Memphis Hardwood Flooring Co.,* 725 So. 2d 788 (Miss. 1998). The Statute states as follows:

> § 95-5-10. Cutting trees without consent of owner.
>
> (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.

Appellees argued in their summary judgment motion that the applicable twenty-four/twelve month statute of limitation pursuant to *Miss. Code Ann. § 95-5-29* bars recovery in this action due to Plaintiff filing suit some 5½ years after the trees were taken from his property.

Appellant's undisputed and stipulated testimony in this cause is that he did not discover that the trees were taken by Defendants until April of 2007. *See Record Excerpts* at 12-13, 19-24. On May 3, 2007, after the discovery, Appellant contacted the Union

County Sheriff's Office and reported the cutting of his timber without his knowledge or permission. *See Record Excerpts* at 12-13, 19-24. Appellant further stated that he had not discovered the cutting of his timber until he and his brother walked the property in April. On May 14, 2007, Appellant filed a Complaint Form with the Mississippi Board of Registration for Foresters and filed suit on June 29, 2007. A copy of an aerial view of the property shows the secluded location. *See Record Excerpts* at 21. This exhibit was part of Plaintiff's expert's valuation of the timber removed report.

The trial court in dismissing the case on summary judgment held that "[t]he discovery rule is not applicable to actions involving the cutting of timber in cases such as this" and cited *McCain v. Memphis Hardwood Flooring Co.,* 725 So. 2d 788 (Miss. 1998) as authority. However, Appellant contends that a careful reading of the *McCain* case reveals applicability only in that case. The Court stated that "application of the judge-made discovery rule would be inappropriate **in the instant case**." *Id. At 794* (emphasis added). The Court did state that an owner of trees requires no unique expertise to realize when his trees have been taken without his permission. *Id.* However, Appellant contends that the Court was applying the facts of that particular case to make an analysis. The trial court should be required to analyze the application of the discovery rule in each case, including cases brought under *§ 95-5-10*, in light of the particular facts in each case. In the case at bar, Appellant did not reside on the property in issue and therefore did not have knowledge of the time the trees were harvested. He must rely on facts represented to him by the Appellees. The property is secluded from public roads and therefore the only way for Appellant to discover the cutting of his trees was to walk over the property. Appellees worked to remove the trees from property that had clearly

marked boundaries delineating the adjacent Wages' property from Appellant's. In a 5-3 decision the dissent states that "trespass damage on large timber stands . . .is the sort of secretive or inherently undiscoverable injury to which the discovery rule should be applicable." *Id.* At 796. Further, the dissent states:

> In cases . . .where extensive timberlands are owned or the property is not immediately accessible to its owners, we cannot charge the property owner with an affirmative duty to constantly patrol the premises for damage. To not allow the application of the discovery standard . . .imposes just such a duty. Nevertheless, much damage may elude discovery by even the most observant landowners. Where logging operations are underway on an adjacent property, trespass may not be discernible until after a project is completed. . . Perpetuating an absolute prescriptive period may be appropriate for damage suffered to a tree in one's yard; it, however, ignores the realities of the large scale timber properties that contribute to this State's economy.

Id. at 797.

The Court has also held that genuine disputes as to the ability to discover a latent injury are questions of fact to be decided by the fact finder, not on summary judgment. *See Schiro v. American Tobacco Co.*, 611 So.2d 962 (Miss.,1992) wherein the Court stated:

> We hold that the statute commences upon discovery of an injury and that discovery is an issue of fact to be decided by a jury where there is a genuine dispute. We, therefore, reverse the summary judgment rendered in favor of the defendant . . .

Id. At 962.

The "discovery rule" should apply to the case at bar to toll the running of the applicable statute of limitation. Although *§ 95-10-29* clearly states that the Plaintiff only has twelve months or twenty-four months to file suit, depending on the damages

requested, the discovery rule has been applied by the Court to toll similar statutes of limitation in many types of litigation, including cases involving damages to property. *See Punzo v. Jackson County, Mississippi,* 861 So.2d 340 (Miss.2003). In *Punzo*, the Mississippi Supreme Court applied the discovery rule to toll the applicable 12-month statute of limitation that operates to bar claims filed after that time period under the Mississippi Tort Claims Act Statutes. The plaintiff in *Punzo* suffered flood damage to his home three and a half years after the county altered a nearby bridge. *Id.* at 342. However, Punzo was not aware of the alteration of the bridge which caused the flooding and subsequent damage to his home until a former Jackson County supervisor made him aware of the alteration of the bridge over three years from the first damage to his property and well over six years after the county had altered the bridge. *Id at 344.* When Punzo discovered that the altered condition of the bridge caused the flooding and the damage, he timely filed notice with the county as required by statute and followed through with filing a complaint in Jackson County. *Id.* The County in *Punzo* filed a motion to dismiss claiming that the applicable statute of limitation of one year operated to bar Punzo's claim. The Mississippi Supreme Court held that in discovery rule cases it is not reasonable to bar a person's cause of action when that person initially had no knowledge that time was running on the statute. *See Evans v. Boyle Flying Service., Inc.*, 680 So. 2d 821 (Miss. 1996). Of course, the applicable statute of limitation in the *Punzo* case is *Miss. Code Ann. §11-46-11(3)* which states that "[a]ll actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after." The applicable statute in the case at bar is *Miss. Code*

Ann. § 95-10-29 which states that the action must be commenced "from the time the injury was committed and not after." The operative language in each statute as identical.

Although the *Punzo* case does not specifically overrule *McCain*, Appellant argues that its operative effect is to make the discovery rule applicable to property cases such as Appellant's. The facts and applicable law as it relates to the statute of limitation issue in each case are similar to the point that one cannot analyze *Punzo* without having to deal with the Court's decision in *McCain*. In fact, the dissenting opinion in *Punzo* dealt directly with the inconsistent positions taken by the Court in each case. The *Punzo* Court focused on the facts of the case in applying the discovery rule instead of establishing an absolute prescriptive period as *McCain* may be interpreted as establishing. To allow a special absolute prescriptive period for claims brought pursuant to *Miss. Code Ann. § 95-5-10* without a proper analysis of the facts of each individual case goes against *Punzo* and the entire line of cases where the Court has applied the discovery rule analysis.

VIII. CONCLUSION

Due to the undisputed fact that Plaintiff did not discover the cutting of his timber until April of 2007 due to the secluded location of his property, the trial court's dismissal on summary judgment should be reversed and the case remanded for further proceedings. The discovery rule should be applied in this case to toll the applicable statue of limitation. Further, the issue should be decided by the jury in this cause, and not on summary judgment.

Respectfully submitted this the 16th day of July, 2008.

GLEN D. JACKSON
PLAINTIFF

JOHN D. WEDDLE
COUNSEL FOR APPELLANT

IX. CERTIFICATE OF SERVICE

I, John D. Weddle, attorney for appellant, Glen D. Jackson, certify that I have this day mailed a true and correct copy of the foregoing Appellant's Brief by United States mail with postage prepaid upon the following persons at these addresses:

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This the **16th** day of **July** , 2008.

Attorney for Appellant