

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STERLING PITTMAN

APPELLANT

V.

CASE NO. 2008-TS-00896

DYKES TIMBER COMPANY, INC.

APPELLEE

BRIEF OF DYKES TIMBER COMPANY, INC.

APPELLEE

ORAL ARGUMENT NOT REQUESTED

APPEAL FROM THE CIRCUIT COURT OF SIMPSON COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

- a. Sterling Pittman, Appellant;
- b. Dykes Timber Company, Inc., Appellee;
- c. William M. Vines, Esq., Page, Kruger & Holland, P.A., Counsel for Appellee;
- d. T. L. "Smith" Boykin, III, Esq., Page, Kruger & Holland, P.A., Counsel for Appellee;
- e. William Carl Miller, Esq., Counsel for Appellant
- f. Richard Barker, Esq., Counsel for Appellant
- g. Honorable Robert G. Evans, Simpson County Circuit Judge.

This, the 11th day of March, 2009.



WILLIAM M. VINES
T. L. "SMITH" BOYKIN, III

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STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that the facts and legal arguments are adequately presented in this brief and appellate record and the decisional process of this Court would not be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUES

- A. Whether the trial court abused its discretion in refusing to allow Mr. Pittman to call Dykes Timber's expert in his own case-in-chief;
- B. Whether the trial court erred in refusing to allow Mr. Pittman to pursue claims for "general damages;"
 - 1. Whether the trial court abused its discretion with regard to any evidentiary rulings;
 - 2. Whether the trial court erred in its instruction of the jury;
- C. Whether the trial court erred in entering judgment on the jury verdict insofar as it reflected an application of Miss. Code Ann. § 95-5-10;
 - 1. Whether Mr. Pittman's argument is subject to certain procedural bars;
 - 2. Whether Mr. Pittman waived any defect with regard to the form of the jury verdict;
 - 3. Whether Mr. Pittman can show that the jury erred in rendering its verdict.

STATEMENT OF THE CASE

A. Summary of Course of Proceedings and Disposition in the Court Below

On December 27, 2001, Mr. Sterling Pittman (hereinafter "Mr. Pittman") filed a Complaint against Dykes Timber Company, Inc. (hereinafter "Dykes Timber") in the Circuit Court of Simpson County, Mississippi. (C.P. 4-8). Mr. Pittman sought damages for the alleged wrongful cutting of timber and other property damage resulting from timber removal operations. (Id.). The matter proceeded to trial in front of a Simpson County jury, with Honorable Robert G. Evans presiding. (C.P. 47-48). This trial resulted in a general verdict in favor of Mr. Pittman in the amount of \$3,200.00. (C.P. 41, 47-48). Subsequently, Mr. Pittman filed his Notice of Appeal, indicating that he intended to challenge the "quantum" of the jury's verdict. (C.P. 49-50).

B. Statement of the Facts

On March 7, 2000, Mr. Pittman executed a notarized Warranty Timber Deed selling Dykes Timber "all merchantable timber," without limitation, on a 1.62 acre tract of land in Simpson County he allegedly owned. (T. 75-76, 93-95, 150). The Deed granted Dykes Timber a number of rights, including the following: full rights of ingress/egress; the right to clear areas of the land to use as roads and/or ramping and loading areas for harvesting operations; and the right to push/clear merchantable and non-merchantable trees as necessary for harvesting operations. (T. 97-98, 149-51). In return, Mr. Pittman was to receive and did, in fact, receive \$5,000.00. (T. 75, 94, 136).

The Deed granted Dykes Timber 18 months within which to complete their harvesting operations. (T. 96, 150). However, on January 10, 2001, while a crew from Dykes Timber was harvesting some of the timber, Mr. Pittman threatened the crew, cursed them, and ordered them to immediately vacate the land. (C.P. 5; T. 78-80, 152-53). Given Mr. Pittman's actions, Dykes Timber's president, Bob Dykes, decided not to have the crew return, leaving behind cut timber for

which it had already paid Mr. Pittman. (T. 152-54, 182).

Subsequently, on December 27, 2001, Mr. Pittman filed his Complaint against Dykes Timber, alleging that Dykes Timber cut 40 small pine trees, 4 large pine trees, and “approximately” 30 oak trees without his consent. (C.P. 5). He also alleged that Dykes Timber’s crew destroyed a building, various fencing, a “chicken wire pasture,” and pulled down a power line. (C.P. 6). Mr. Pittman demanded \$300,000.00 in compensatory and punitive damages. (C.P. 6-7). In response, Dykes Timber denied each and every allegation levied against it. (C.P. 9-14).

On March 19, 2008, the matter proceeded to trial in the Circuit Court of Simpson County. (T. 1). Mr. Pittman offered the testimony of three witnesses in support of his case: himself, Mr. Rockford Pittman (his brother), and Mr. Clinton Thames. (T. 51, 84-85, 105). Mr. Pittman also tried to call Mr. Arnold Cazari and Dykes Timber’s expert witness, Mr. Les Shelby. (T. 83, 170). The trial court did not allow Mr. Cazari to testify, as Mr. Pittman had never identified him during discovery. (T. 83-84). In addition, the trial court did not allow Mr. Pittman to call Mr. Shelby as a witness in Mr. Pittman’s case-in-chief. (T. 170). With only an off-the-record discussion held on the issue, the trial court’s reasoning behind this ruling was not preserved for review. (T. 170). Notably, however, Mr. Pittman did not designate any experts during the discovery phase of this matter and had never indicated any desire to call Mr. Shelby as a witness prior to the trial. (C.P. 1-3).

Mr. Thames was the first witness called by Mr. Pittman at trial. (T. 51). Mr. Thames offered general testimony about the alleged damage to Mr. Pittman’s property, as well as both the background and intended use for the property. (T. 55-58, 61-62). Notwithstanding, having only stopped by the land for “a second” since the harvesting operations, Mr. Thames did not know the number of trees that were allegedly improperly cut. (T. 58, 78). In addition, Mr. Thames admitted that he had no knowledge concerning the actual harvesting operations. (T. 77-78). In fact, Mr.

Thames could not even testify that Mr. Pittman actually owned the property at issue. (T. 70). However, and interestingly, Mr. Thames did testify that Mr. Pittman owed him \$10,000.00. (T. 71).

Rockford Pittman, Mr. Pittman's brother, testified next. (T. 84-85). He offered general testimony about the background to the execution of the Deed, and also confirmed both the contents of the Deed and Mr. Pittman's receipt of \$5,000.00 in exchange for the timber. (T. 89-96). However, not having witnessed Dykes Timber's harvesting operations, he disavowed any knowledge as to the same. (T. 100). Similarly, he did not know the number of trees that were allegedly improperly cut. (Id.). While he did describe some of the trees cut as "big," he did not offer any more specific testimony as to their characteristics – and none as to their value. (T. 59). Actually, Rockford Pittman testified that some of the allegedly improperly cut trees may have belonged to him and not his brother. (T. 99-100).

Next, Mr. Pittman testified. (T. 106). During direct examination, he testified that Dykes Timber caused \$2,000.00 in damage to fencing, \$600.00 in damage to a sewer line, and \$250.00 in lost deer meat due to the alleged loss of electricity secondary to a downed electrical line. (T. 126-27). He also testified that Dykes Timber caused other property damage and improperly cut "about like 40" pine trees, "between 35 and 40" oak trees, and 4 large pine trees. (T. 124). He also alleged that Dykes Timber damaged 1 pecan tree, which is still alive. (T. 116).

While Mr. Pittman did offer general testimony as to the size of some of the trees, he did not testify as to their fair market value. (T. 106-69). He also offered no testimony as to the acreage of land that would need reforestation. (Id.). In fact, Mr. Pittman offered absolutely no evidence, either through fact witnesses or expert witnesses, as to the fair market value of any of the trees allegedly wrongfully harvested or the area of needed reforestation.

Mr. Pittman's testimony was quite bizarre at times. During cross-examination, he warned to defense counsel not to point to a spot on Mr. Pittman's self-drawn map which represented the "sacred ground" upon which he buried his dog. (T. 158). Later, he openly confessed he was a cannibal and acknowledged previous consumption of human flesh. (T. 159). At one point, Mr. Pittman asserted that Dykes Timber removed some trees of over 1 foot in diameter with a mythical device that cuts them from below the ground without leaving a stump (as an explanation for his lack of proof). (T. 123). Later, he testified that that Dykes Timber verbally agreed only to enter his property by "helicopter" and/or by trucks outfitted with "marshmallow tires." (T. 146). He also tried to escape damaging testimony from his deposition through repeated reference to excessive narcotic use. (T. 108, 133, 134). Mr. Pittman's behavior was so bizarre that the trial court had to admonish him no less than ten times during his testimony. (T. 130-159).

After Dykes Timber's motion for directed verdict was denied, Dykes Timber presented the testimony of Bob Dykes. (T. 179). Mr. Dykes confirmed Dykes Timber's retention of the Deed and identified the copy before the jury as identical to that which was kept in Dykes Timber's file. (T. 180-81). Mr. Dykes also confirmed he ordered his crew off Mr. Pittman's property in response to Mr. Pittman's violent threats. (T. 182).

During the course of trial, the trial court had occasion to enter its ruling on a variety of evidentiary presentations and objections. (T. 65-66, 83-84, 90, 92, 94, 102-03, 111, 114, 125, 127-30, 132, 138, 141-42, 155, 167-68, 170, 181-83). Underscoring the trial court's position with regard to certain rulings, Mr. Pittman's own counsel affirmatively represented to the trial court that it was only dealing with a property damage case. (T. 66). Some of these evidentiary rulings went against Mr. Pittman, while others went against Dykes Timber. (T. 65-66, 83-84, 90, 92, 94, 102-03, 111, 114, 125, 127-30, 132, 138, 141-42, 155, 167-68, 170, 181-83). However, Mr. Pittman did not make

a single proffer in response to any of the trial court's evidentiary rulings. (Id.).

After both parties rested, the trial court asked the parties to present their proposed jury instructions for consideration. Mr. Pittman presented no proposed instruction other than one for a requested evidentiary inference. (T. 186-91). The court then considered the jury instructions presented by Dykes Timber. (Id.). The court decided that the jury would be instructed as to the proper method for calculating damages, if any, through Instructions D-5, D-9, D-10, and D-12. (C.P. 32-33, 36-40; T. 186-91). Instruction D-5 informed the jury of the necessity that damages awarded must be reasonable and must be proven beyond mere speculation. (C.P. 32-33). Instructions D-9 and D-10 informed the jury of the compensatory damages and statutory penalties potentially available for the alleged wrongful cutting of timber, and Mr. Pittman's burden of proof as to the same. (C.P. 36-37). Instruction D-12 informed the jury of the damages available to Mr. Pittman, if any, for other property damage, and Mr. Pittman's burden of proof as to the same. (C.P. 40).

Mr. Pittman did not object to any of these aforementioned jury instructions, and even adopted one of them as his own. (T. 186-91). Further, Mr. Pittman accepted the general verdict form offered by Dykes Timber and did not offer any special verdict form for the trial court's consideration. (Id.). This verdict form instructed that if the jury found in Mr. Pittman's favor, it was to state its verdict as follows: "[w]e, the jury, find for the Plaintiff, and assess damages at \$_____." (C.P. 41).

After deliberating, the jury rendered its verdict on the approved form, stating "[w]e, the jury, find for the Plaintiff, and assess damages at \$3,200." (C.P. 41). The record is void of any means by which to dissect this verdict and/or determine the basis upon which damages were assessed. (C.P. 1-55; T. 1-219). Subsequently, the trial court awarded judgment on that verdict to Mr. Pittman. (C.P. 47-48). Neither party filed any post-trial motions. (C.P. 3).

SUMMARY OF THE ARGUMENT

Each and every one of the arguments raised on appeal by Mr. Pittman is procedurally barred from consideration. However, even if this Court ignores the procedural bars, the Court should affirm the judgment of the lower court. There is no basis for Mr. Pittman's claim that the trial court abused its discretion in refusing to allow him to call Dykes Timber's expert in his own case-in-chief. With regard to the alleged improper jury instructions and evidentiary rulings, these arguments are devoid of merit insofar as Mr. Pittman's counsel affirmatively represented to the trial court that this was only a property damage case. Mr. Pittman cannot show that the trial court committed reversible error in any evidentiary rulings or jury instructions that focused the trial on its sole subject – property damage. Finally, given the bias and/or incredible testimony offered by Mr. Pittman, coupled with the absence of any evidence establishing the fair market value of the timber, Mr. Pittman cannot show that the verdict of \$3,200.00 was against the overwhelming weight of the evidence. Accordingly, this Court should affirm the judgment of the lower court.

ARGUMENT

A. STANDARDS OF REVIEW

Given the number and nature of the issues presented on appeal, this Court is to apply various standards of review. To the extent that Mr. Pittman challenges the trial court's evidentiary rulings, including those involving the inclusion/exclusion of expert testimony, the same must constitute an abuse of discretion to allow for reversal.¹ Alternatively, should this Court review the trial court's instruction of the jury for error, such instruction may only serve as a basis for reversal if the entire set of instructions presented to the jury fails to fairly announce the primary rules of law applicable to the

¹ *Canadian Nat'l/III. Cent. R.R. Co. v. Hall*, 953 So. 2d 1084, 1094 (¶ 29) (Miss. 2007).

case.² Finally, to the extent that this Court examines the trial court's decision to enter judgment on the jury's verdict in this matter, such a decision may only be reversed if the evidence is so indisputably in Mr. Pittman's favor on a particular issue that it should never have been sent to the jury.³ However, since Mr. Pittman cannot meet any of these standards, this Court must affirm the judgment entered by the trial court.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW MR. PITTMAN TO CALL DYKES TIMBER'S EXPERT IN HIS OWN CASE-IN-CHIEF

There are at least four reasons why Mr. Pittman is procedurally barred from appealing the trial court's refusal to let him adversely call defense expert Les Shelby in his case-in-chief. First, Mr. Pittman's failure to make a proffer of the testimony expected from Mr. Shelby means that Mr. Pittman failed to preserve the issue for appeal.⁴ Second, with only an off-the-record discussion held as to the issue, Mr. Pittman is unable to offer any citation to the Record in support of his argument that the trial court committed error on this issue, barring his ability to raise this issue on appeal.⁵ Third, Mr. Pittman's brief fails to offer any citation to any legal authority in support of his argument on this issue, which also means he is barred from raising this issue on appeal.⁶

² *Hall*, 953 So. 2d at 1099-1100 (¶ 57).

³ *White v. Stewman*, 932 So. 2d 27, 32 (¶ 11) (Miss. 2006). Unlike standards concerning evidentiary decisions and jury instructions, this examination involves a de novo examination of the evidence presented to the lower court. *See Hall*, 953 So. 2d at 1092 (¶ 19). In doing so, this Court is to view that evidence in the light most favorable to Dykes Timber, giving it the benefit of all available inferences, and is to affirm the verdict so long as there is substantial evidence in support of it. *See id.*

⁴ *See Redhead v. Entergy Miss., Inc.*, 828 So. 2d 801, 813 (¶ 37) (Miss. Ct. App. 2001) (failure to make proffer of expert testimony bars issue from appellate consideration); *Miss. R. Evid.* 103 (error may not be predicated on evidentiary ruling without objection or offer of proof).

⁵ *See Point South Land Trust v. Gutierrez*, 997 So. 2d 967, 977 (¶ 29) (Miss. 2008) (matter not on record cannot support appellate arguments); *Albert v. Allied Glove Corp.*, 944 So. 2d 1, 7 (¶ 21) (Miss. 2006) (argument not reflected in trial record may not be raised on appeal); *see also Miss. R. App. P.28(a)(6)* (parties must cite to part of record relied upon).

⁶ *See Boutwell v. Boutwell*, 829 So. 2d 1216, 1223 (¶ 29) (Miss. 2002); *R.C. Petroleum, Inc. v. Hernandez*, 555 So. 2d 1017, 1023 (Miss. 1990); *see also Miss. R. App. P.28(a)(6)* (parties must cite to authorities relied upon).

Finally, Mr. Pittman never designated any experts during discovery. Therefore, he cannot reasonably contend the trial court abused its discretion in disallowing his request to call Mr. Shelby as a witness in his case-in-chief.⁷ For all of these reasons, the trial court's refusal to allow Mr. Pittman to call Mr. Shelby in his case-in-chief cannot serve as any basis for reversal.

C. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW MR. PITTMAN TO PURSUE CLAIMS FOR "GENERAL DAMAGES"

In his second issue on appeal, Mr. Pittman claims that trial court erred in refusing to let him pursue a claim for "general damages." However, he fails to specify exactly what damages he contends should have been recoverable. Further, Mr. Pittman's contradictory arguments in support of this issue do not reveal whether Mr. Pittman claims that the error lies in unspecified evidentiary rulings of the trial court or the instructions presented to the jury. Regardless, Mr. Pittman's failure to cite any legal authorities or points in the record in support of his arguments bars the issue from consideration.⁸ Notwithstanding, separate analyses of the issue shows his argument(s) to be without merit, even though subject to additional procedural bars.

1. The trial court did not abuse its discretion with regard to any evidentiary rulings.

While Mr. Pittman claims the trial court erred with regard to certain evidentiary rulings, he fails to identify any specific ruling which he calls into question. Moreover, the record is void of a single proffer made in response to any evidentiary ruling.⁹ For these reasons, and his failure to offer any supportive citation to any legal authority, he is procedurally barred from pursuing this argument on appeal.¹⁰ Regardless, Mr. Pittman has not explained how or why the trial court erred in excluding any evidence of these undefined "general damages." Mr. Pittman's own counsel affirmatively

⁷ See generally *Banks v. Hill*, 978 So. 2d 663, 665 (¶ 6) (Miss. 2008) (citing principle before finding trial court in error for allowing party to call undisclosed/undesignated witness in rebuttal).

⁸ See *Boutwell*, 829 So. 2d at 1223 (¶ 29); *R.C. Petroleum*, 555 So. 2d at 1023; *Miss. R. App. P.* 28(a)(6).

represented that this was merely a property damage case.¹¹ If this was merely a property damage case – as claimed by Mr. Pittman at trial – then general damages were not relevant to begin with.

2. The trial court did not err in its instruction of the jury.

Since a jury can only apply the law upon which it is instructed, the only other way to examine this alleged source of error is to analyze the jury instructions issued by the trial court. The trial court instructed the jury as to the proper manner for calculating Mr. Pittman's damages, if any, through Instructions D-5, D-9, D-10, and D-12. Mr. Pittman did not object to any of these instructions. Furthermore, while he submitted D-10 himself (after it was withdrawn by Dykes Timber), he did not submit any other instructions concerning the proper categories of damages or manner in which to calculate the same, much less one concerning "general damages." Therefore, Mr. Pittman failed to preserve this argument for appeal.¹² Notwithstanding, this argument is also without merit, as – again – Mr. Pittman's counsel specifically represented to the trial court that this was a property damage case – a topic which is appropriately covered by the above-referenced instructions.¹³

D. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT ON THE JURY VERDICT INsofar AS IT REFLECTED THE APPLICATION OF MISS CODE ANN. § 95-5-10

Like his other arguments, Mr. Pittman's claim of jury error is subject to numerous procedural bars. Further, he waived any challenge to the form of the verdict issued by the trial court and utilized by the jury in rendering its decision. Regardless, Mr. Pittman can not show that the jury's verdict is against the overwhelming weight of the evidence. Therefore, this issue is without merit.

9 In fact, the Record on appeal is void of any of the evidence in this matter. No exhibits or evidence were included, leaving only the Clerks Papers and Trial Transcript as sources for support.

10 See *Redhead*, 828 So. 2d at 813 (¶ 37); *Miss. R. Evid.* 103; *Miss. R. App. P.* 28(a)(6).

11 See *Hall*, 953 So. 2d at 1094 (¶ 29) (noting discretion given to trial courts in evidentiary rulings); *Miss. R. Evid.* 401, 402 (inconsequential facts are not admissible).

12 See *Crews v. Mahaffey*, 986 So. 2d 987, 999 (¶ 44) (Miss. Ct. App. 2007) (failure to object to instruction bars appeal based upon its presentation); see generally *Cooper v. Lawson*, 264 So. 2d 890, 891 (Miss. 1972) (trial court can not be in error on issue not presented to it for decision).

13 See *Hall*, 953 So. 2d at 1099-1100 (¶ 57) (noting evidentiary basis must exist for instructions).

1. Mr. Pittman's argument is subject to certain procedural bars.

Mr. Pittman's argument is subject to several procedural bars. Failing to move the trial court for a judgment notwithstanding the verdict (or, alternatively, for a new trial), he did not preserve the issue for appeal.¹⁴ Moreover, his repeated failure to offer citation to any legal authorities dooms the claim, even had it been preserved.¹⁵ Similarly, Mr. Pittman is procedurally barred from relying on evidence that was **not ever submitted at trial**, such as his alleged video tape, extra photographs, or even his figures concerning the alleged fair market value of certain trees.¹⁶

2. Moreover, Mr. Pittman waived any defect with regard to the form of the jury verdict.

Given his failure to object to the verdict form and/or supply a special verdict form, Mr. Pittman waived his ability to challenge the jury's determination of damages.¹⁷ It is not disputed that the trial court properly instructed the jury as to the compensatory damages available to Mr. Pittman if Dykes Timber were found to have improperly cut his timber: double the fair market value of the tree(s), plus up to \$250.00 per acre in reforestation costs.¹⁸

Additionally, if Dykes Timber were found to have wrongfully cut the timber in either a willful or reckless manner, the jury could assess an additional statutory penalty of either \$55.00 or \$10.00 per tree, depending upon the size of the tree.¹⁹ The jury was also instructed that the Plaintiff could recover the fair market value of any other negligently or intentionally damaged property.

14 *Cooper*, 264 So. 2d 890, 891 (Miss. 1972); *see also Albert*, 944 So. 2d at 7 (¶ 21); *Delaughter v. Lawrence Cty. Hosp.*, 601 So. 2d 818, 820 (Miss. 1992) (holding that appellant who failed to seek new trial through motion with trial court may not seek review of jury verdict on appeal).

15 *See Boutwell*, 829 So. 2d at 1223 (¶ 29); *R.C. Petroleum*, 555 So. 2d at 1023; *Miss. R. App. P.* 28(a)(6).

16 *See Haggerty v. Foster*, 838 So. 2d 948, 954 (¶ 7) (Miss. 2003) (jury verdict is to be based on evidence presented at trial); *see also Point South Land Trust*, 997 So. 2d at 977 (¶ 29); *see generally Hall*, 953 So. 2d at 1092 (¶ 19) (appellate court is to consider evidence presented to the jury in examining its verdict).

17 *See White*, 932 So. 2d at 37 (¶ 29) (party must object to verdict form in order to raise error as to same); *Jones v. Westinghouse Elec. Corp.*, 694 So. 2d 1249, 1251 (Miss. 1997) (party waives challenge regarding determination of specific issues upon failure to submit specific issue(s) to jury or object to same).

18 *See Miss. Code Ann.* § 95-5-10.

19 *See id.*

The form of the verdict utilized by the jury, and to which Mr. Pittman did not object, states “[w]e, the jury, find for the Plaintiff, and assess damages at \$_____.” Therefore, there is no way to dissect the \$3,200.00 verdict to determine either the manner in which the jury found Dykes Timber liable or the manner in which it calculated damages; and Mr. Pittman may not claim any corresponding error on appeal.²⁰

3. Procedural bars aside, Mr. Pittman cannot show that the jury erred in rendering its verdict.

To succeed on this issue, procedural bars aside, Mr. Pittman must show that the evidence in his favor as to liability and damages was so substantially in his favor that it was not necessary to even present the issue to the jury.²¹ To recover the full measure of damages for the wrongful cutting of timber, Mr. Pittman had to prove: 1) the number of trees cut; 2) the acreage of the area that would need to be reforestation; and 3) the fair market value of the trees cut.²² To recover additional statutory penalties, Mr. Pittman would have needed to prove that Dykes Timber’s crew willfully and in reckless disregard for Mr. Pittman’s rights, cut trees that they were not supposed to cut under the command or consent of their principal, Mr. Bob Dykes, the president of Dykes Timber.²³ However, as this Court must defer to the jury’s verdict and resolve every permissible inference from the evidence in favor of Dykes Timber, Mr. Pittman can not meet his burden on appeal.²⁴

Mr. Pittman incorrectly claims that the jury was required to accept the testimony he presented, as well as that of Clinton Thames (to whom Mr. Pittman owes \$10,000.00) and Rockford Pittman (Mr. Pittman’s brother). In reality, the jury was free to consider the bias of any of these

20 See *White*, 932 So. 2d at 37 (¶ 29); *Jones*, 694 So. 2d at 1251.

21 See *White*, 932 So. 2d at 32 (¶ 11).

22 See *Miss. Code Ann.* § 95-5-10.

23 See *id.*

24 See *Bobby Kitchens, Inc. v. Miss. Ins. Guar. Ass’n*, 560 So. 2d 129, 131 (Miss. 1989).

witnesses and/or their lack of credibility.²⁵ Notwithstanding the biases of Rockford Pittman and Mr. Thames, Mr. Pittman himself gave the jury several reasons to question his credibility:

- 1) his assertion that Dykes Timber removed some trees of over one foot in diameter with a mythical device that cuts them from below the ground without leaving a stump;
- 2) his reference to his own excessive use of narcotics necessitated by an unrelated physical injury as a means to escape responsibility for his previous deposition testimony;
- 3) his warning to counsel for Dykes Timber not to point to a spot on Mr. Pittman's self-drawn map which represented the "sacred ground" upon which he buried his dog;
- 4) his apparent assertion that Dykes Timber had agreed to only enter his property by "helicopter" and/or by trucks outfitted with "marshmallow tires;"
- 5) his open profession to cannibalism and having previously consumed human flesh; or
- 6) the several instances in which the trial court had to admonish Mr. Pittman for his lack of cooperation and/or similar misconduct during his testimony.

Having viewed the testimony and conduct of Mr. Pittman and his two witnesses, the jury was free to believe or disbelieve them.²⁶

Also, despite Mr. Pittman's claims to the contrary, video, photographic, and other evidence not presented to the jury are not proof of error in the jury's determination of liability and damages under Miss. Code Ann. § 95-5-10.²⁷ Mr. Pittman did not produce an ounce of testimony or evidence concerning the fair market value of the trees alleged to have been wrongfully cut. Similarly, he did not produce any testimony or evidence concerning the acreage of the area to be reforested. In

²⁵ See *Denson v. George*, 642 So. 2d 909, 914 (Miss. 1994); *Hollaway v. Hollaway*, 631 So. 2d 127, 132-33 (Miss. 1993); *Alldread v. Bailey*, 626 So. 2d 99, 102 (Miss. 1993) (all noting fact finders are free to disbelieve even uncontradicted testimony if found to lack credibility).

²⁶ See *Denson*, 642 So. 2d at 914; *Hollaway*, 631 So. 2d at 132-33; *Alldread*, 626 So. 2d 102.

²⁷ See *Haggerty*, 838 So. 2d at 954 (¶ 7). In other words, contrary to Mr. Pittman's suggestion, video, photographic, and other evidence not presented to the jury can not be probative of jury error.

addition, neither Mr. Thames nor Rockford Pittman corroborated Mr. Pittman's own contradictory count of the number of trees alleged to have been improperly cut. Further, Mr. Pittman admitted that he did not present photographic or other proof of the full amount of trees alleged to have been improperly cut. Thus, notwithstanding the procedural bars noted above, Mr. Pittman cannot show error in the jury's determination of liability and/or damages under Miss. Code Ann. § 95-5-10.²⁸

This same reasoning fully rebuts Mr. Pittman's claim that he was entitled to additional statutory penalties under Miss. Code Ann. § 95-5-10. To be so entitled, Mr. Pittman was required to prove that Dykes Timber employees willfully, knowingly, and recklessly cut trees that they were not supposed to cut under Bob Dykes' command or with his consent. Mr. Pittman, Mr. Thames, and Rockford Pittman each admitted that they were not present during Dykes Timber's removal operations. Furthermore, Mr. Pittman did not call any Dykes Timber employees to testify in this regard; nor did his counsel examine Mr. Dykes on the subject at trial. Therefore, and – again – procedural bars aside, Mr. Pittman's lack of evidence on the subject renders him incapable of showing any error in the jury's verdict.²⁹

CONCLUSION

Given the numerous procedural bars to each issue presented by Mr. Pittman, examination of the merits in this matter is not necessary. However, even if this Court overlooks the procedural bars to engage in such examination, Mr. Pittman has not provided any evidentiary basis upon which this

28 See *Haggerty*, 838 So. 2d at 954 (¶ 7); see also *Teasley v. Buford*, 876 So. 2d 1070, 1079-80 (¶¶ 21 and 25) (Miss. Ct. App. 2004) (plaintiff must prove number of trees cut, their fair market value, and area to be reforested to collect full statutory damages under Miss. Code Ann. § 95-5-10). Again, however, because only a general verdict form was presented to the jury, no one can determine whether such damages were awarded and/or the basis for the same.


29 See *Haggerty*, 838 So. 2d at 954 (¶ 7); see also *Miller v. Pannell*, 815 So. 2d 1117, 1121-22 (¶¶ 14-17) (Miss. 2002) (examining various examples of proof of reckless conduct marked by evidence of explanation for improper cutting of timber and/or evidence of instructions given to worker(s) who actually cut said timber). Again, however, with only a general verdict form, no one can determine whether penalties were awarded and/or calculated.

Court might find reversible error in the decision(s) of either the trial court or the jury. He certainly cannot establish that the jury's verdict was against the overwhelming weight of the evidence or that any of the trial court's rulings constitute reversible error. Therefore, the Appellee, Dykes Timber Company, Inc., respectfully requests this Court to affirm the judgment of the trial court.

Respectfully submitted this 14th day of March, 2009.

DYKES TIMBER COMPANY, INC.,
Defendant/Appellee

By:



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CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellee, DYKES TIMBER COMPANY, INC., do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to:

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Honorable Robert G. Evans
Simpson County Circuit Court Judge
P. O. Box 545
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Honorable Cindy Jensen
Simpson County Circuit Clerk
P. O. Box 307
Mendenhall, MS 39114

THIS the 11th day of March, 2009.



WILLIAM M. VINES
T. L. "SMITH" BOYKIN, III