

In the
MISSISSIPPI COURT OF APPEALS
FOR THE FOURTH DISTRICT

NO. 2008-TS-00896

STERLING PITTMAN

Plaintiff-Appellant

VERSUS

DYKES TIMBER CO., INC.

Defendant-Appellee

Appeal from the Circuit Court of Simpson County, Mississippi

BRIEF OF PLAINTIFF-APPELLANT
STERLING PITTMAN

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**CERTIFICATE OF INTERESTED PERSON REQUIRED BY
LOCAL RULE 28.1**

Undersigned counsel for Plaintiff-Appellant, Sterling Pittman certifies that the following parties have an interest in the outcome of this case. The representations are made in order that the Honorable Judges of this Court may evaluate possible disqualification or recusal:

1. Sterling Pittman, Plaintiff-Appellant.
2. Richard H. Barker, IV., Esq. and William Carl Miller., Esq., Attorneys for Plaintiff-Appellant.
3. Dykes Timer Co., Inc., Defendant-Appellee.
5. Williams M. Vines, Esq., Attorney for Defendant-Appellee.


RICHARD H. BARKER, IV., ESQ.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant respectfully submits that this Honorable Court might find questions of its own which need to be answered by the means of a more thorough discussion of these facts and issues during an oral argument. Plaintiff-Appellant desires and requests the opportunity for oral argument.

TABLE OF CONTENTS

	Page
Certificate of Counsel.....	i
Statement Regarding Oral Argument.....	ii
Table of Contents.....	iii
Table of Citations.....	iv,v
Statement of Jurisdiction.....	vi
Issues.....	1
Statement of the Case.....	2
(i) Course of Proceedings and Disposition in Court Below	2
(ii) Statement of Facts	3
Summary of the Argument.....	6
Argument.....	7
Conclusion.....	10
Certificate of Service.....	11

TABLE OF CITATIONS

Page

v.

STATEMENT OF JURISDICTION

Jurisdiction in this case is proper as an Appeal from a Final Judgment of the Circuit Court in Simpson County.

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NO. 2008-TS-00896

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ISSUES

1. Did the jury commit reversible error by failing to award damages pursuant to Miss. Code Ann. § 95-5-10. ?
2. Did the Court commit reversible error by refusing to allow Pittman to pursue claims for general damages?
3. Did the Court commit reversible error by refusing to allow Pittman to call defendant's expert witness on cross examination as part of plaintiff's case in chief prior to resting plaintiff's case?

STATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

Plaintiff-Appellant, Sterling Pittman, filed a Complaint on or about December 27, 2001 against Defendant-Appellee, Dykes Timber Company Inc., seeking to recover money damages as a result of the cutting of trees on his home site, and the destruction of much of the land constituting his home site along with structures and other property located therein. Pittman admits that on or about March of 2000, he contracted with Dykes for the limited cutting of only certain trees and in limited and specified areas or parcels of land due to Pittman's intent to continue developing the several contiguous parcels as separate dedicated specific use sections of one entire home site. However Pittman claims that Dykes intentionally and fraudulently violated the agreement, stealing trees they were not entitled to cut, and trespassing onto sections/parcels of plaintiff's home site and destroying the land and property located thereon, when this was not necessary or reasonable if Dykes had performed its obligations in good and workmanlike manner.

During the course of a jury trial conducted on April 11, 2008 via several evidentiary rulings, plaintiff was not allowed to put on evidence of his general damages or non-pecuniary damages, but essentially was limited to introducing evidence only of his pecuniary damages for specific damage to items of his property, and for statutory damages pursuant to Miss. Code Ann. § 95-5-10. At the conclusion of its deliberations, the jury returned a verdict in favor of Pittman for the sum of \$3,200.00 — a sum which patently included payment for special damages to Pittman's destroyed personal property per receipts in evidence, but did not include any award for statutory damages for the wrongfully cut timber. Judgment upon said verdict was entered by the Court on April 11, 2008 and filed by the clerk on April 15, 2008

Pittman timely appealed from said judgment.

II.

STATEMENT OF THE FACTS

Pittman contracted with Dykes for the limited cutting of only certain trees and in limited and specified areas or parcels of land due to Pittman's intent to continue developing the several contiguous parcels as separate dedicated specific use sections of one entire home site¹. Ricky Bryant, an employee of Dykes negotiated directly with Pittman concerning the agreement. Prior to signing any documents, Pittman and Bryant expressly agreed to the following terms and conditions.

Plaintiff's home site was comprised of 3 adjacent parcels of land comprising a whole of 5.45 acres². These were:

- a) a 1 acre lot with a house trailer and a surrounding yard;
- b) a 3.83 acre pasture to pasture horses and to raise chickens, with an invaluable and irreplaceable chicken house/barn made of authentic sequoia redwood³, and numerous "tepees" for raising chickens; and
- c) a 1.62 acre tract with an area of young small "chip and saw" pine trees [which Pittman agreed to sell]⁴, and bordered on its farthest side at the edge of the home site by a stand of larger, old growth trees [which were not to be cut or sold] including^a:
 - a) 40 pines in excess of 1 foot in diameter;
 - b) 35 oaks which were approximately 80 yrs. old; and
 - c) 4 pines which were approximately 80 - 100 yrs. old; and
 - d) 1 very large pecan tree⁵.

Pittman and Bryant specifically agreed that only the "chip and saw" pines on the 1 1.62 acre parcel would be cut and sold, and that no harvesting would take place without Pittman being

^aThese are listed thus for convenience. In fact, the pecan tree and a couple of the very large, old pine trees were located on either the 1 acre or the 3.83 acre tracts.

present to ensure that only the proper trees would be taken⁶. The trees to be left were of paramount importance for Mr. Pittman's home site. The stand of large old growth trees were to serve both as a visual barrier or fence line closing off and isolating Pittman's home site from Hwy. 49, and as the continued home for a large colony of squirrels, Pittman's favorite delicacy⁷. Finally, they specifically agreed that ingress and egress would be effectuated from Hwy. 49, which required only a 50 foot transit from the highway to the trees to be cut⁸.

After the foregoing was agreed to, Bryant brought Pittman to a bank to have a written contract signed before a notary. As soon as Pittman signed the document and it was notarized, Bryant snatched the document and left with it — refusing to allow Pittman to read it or to give him a copy. Instead Bryant promised to get a copy to Pittman the next day. As of the date of trial, Pittman never had been provided with the original document or a verified copy of same⁹.

Notwithstanding the foregoing, Dykes intentionally and fraudulently violated the agreement, stealing trees they were not entitled to cut, and trespassing onto sections/parcels of plaintiff's home site and destroying the land and property located thereon, when this was not necessary or reasonable if Dykes had performed its obligations in good and workmanlike manner. Specifically, Ricky Bryant waited until he knew that Pittman was offshore working for a week and then sent in the Dykes crew with the intent of cutting down every living tree on the entire 5.45 acre home site. Pittman returned home before Dykes could complete this, and to his shock he discovered that Dykes already had cut down essentially every tree except the stand of "chip and saw" pines¹⁰. Moreover, rather than ingressing the site the 50 feet via Hwy. 49¹¹, the Dykes crew brought in their skidders and heavy equipment several hundred yards via E. Main St. causing the following devastation¹²:

- a) drove over, knocked down and destroyed a new wooden fence fronting E. Main St. for the front yard of the lot with his house¹³;
- b) crushed a sewer line and septic tank¹⁴, and created huge ruts from E. Main all into and all over all sections of each parcel of land, making the property essentially

unfit for any normal vehicle or equipment to traverse [short of heavy equipment such as the skidders used by Dykes]¹⁵;

- c) knocked down the main power line feeder to the house disconnecting electricity to the structure and ruining a freezer full of food¹⁶;
- d) crushed and destroyed the redwood henhouse¹⁷;
- e) bull dozed all of Pittman's barbed wire and chicken wire fence stock and the tepees [into the pond]¹⁸.

When the Dykes crew returned to Pittman's place to finish their work and finally to cut down the only remaining trees [i.e. the stand of chip and saw pines], he ran them off. Pittman tried in vain to contact Dykes to have his concerns about the foregoing violations addressed¹⁹. Eventually he was forced to retain counsel and to file suit in the captioned matter. Pittman's damages did not stop there. As a direct result of Dykes's trespass and destruction of his home site, he was unable to move into his planned new home, and was required to remain in a ramshackle old trailer where he "watches the sun come up through holes in the floor²⁰." When his fiancé arrived and saw his living conditions, she broke down in tears and after a couple of days, left him and went home for good. Lacking the funds to restore his home site, he remained living in sub-human conditions with the company of only his dog and his chickens. Eventually, the almost all of his chickens died or were killed by predators due to the substandard conditions in which he has been stranded²¹.

III.

SUMMARY OF THE ARGUMENT

1. Did the jury commit reversible error by failing to award damages pursuant to Miss. Code Ann. § 95-5-10. ?

THE JURY COMMITTED REVERSIBLE ERROR BY NOT AWARDING STATUTORY DAMAGES, AS PLAINTIFF'S PAROLE EVIDENCE WAS ADMITTED AND UNCONTRADICTED CONCERNING THE AGREEMENT ONLY TO SELL CERTAIN TREES AND THE NUMBER AND SIZE OF TREES IMPROPERLY TAKEN

2. Did the Court commit reversible error by refusing to allow Pittman to pursue claims for general damages?

BECAUSE PLAINTIFF PROVED BOTH FRAUD AND TRESPASS, REFUSAL TO ADMIT PLAINTIFF'S EVIDENCE OF GENERAL DAMAGES WAS REVERSIBLE ERROR

3. Did the Court commit reversible error by refusing to allow Pittman to call defendant's expert witness on cross examination as part of plaintiff's case in chief prior to resting plaintiff's case?

DEFENDANT HAD LISTED AN EXPERT FORESTER AS A WITNESS AND SINCE HE WAS PRESENT IN COURT FOR TRIAL, PLAINTIFF WAS ENTITLED TO CALL DEFENDANT'S EXPERT WITNESS ON CROSS

IV.

ARGUMENT

1. Did the jury commit reversible error by failing to award damages pursuant to Miss. Code Ann. § 95-5-10. ?

THE JURY COMMITTED REVERSIBLE ERROR BY NOT AWARDING STATUTORY DAMAGES, AS PLAINTIFF'S PAROLE EVIDENCE WAS ADMITTED AND UNCONTRADICTED CONCERNING THE AGREEMENT ONLY TO SELL CERTAIN TREES AND THE NUMBER AND SIZE OF TREES IMPROPERLY TAKEN

During trial it was hotly contested as to whether a document introduced by Dykes was an actual copy of the document Pittman signed²². Additionally, the Court noted on the record that the document was vague and ambiguous, requiring the admission of Pittman's parole evidence as to the specific details of the agreement negotiated by Pittman and Bryant on behalf of Dykes²³. Specifically, the property description in the document makes reference to a 1/4 section of a 1/4 section (i.e. 10 acres), but it does say that the amount of land is 1.62 acres.

Moreover, all of the foregoing factual allegations in support of Pittman's case were proved by live testimony and photographic evidence. Plaintiff had so many photographs and even a video tape, that defense counsel contended that much of it would have been cumulative, and accordingly, the undersigned accommodated defense counsel's concern and limited the amount of photographic evidence to a number of representative photographs, rather than insisting on forcing the jury to watch a long and boring video tape and to sift through pictures of each and every tree stump at issue²⁴. Plaintiff testified live as to each and every fact at issue, and his testimony was neither impeached nor rebutted by any other witness or evidence. Much of Pittman's testimony was corroborated by 2 other live witnesses, Clinton Thames and Rockford Pittman. The testimony of these 2 corroborating witnesses was neither impeached nor rebutted by any other witness or evidence.

Dykes did not call Ricky Bryant to refute Pittman's story which remained unchanged from his Complaint, to his pre trial deposition, and to his trial testimony. The fact that Dykes did not call Bryant assuredly allows the inference that Bryant's testimony would not have been favorable.

Dykes merely called its owner, Robert Dykes. If anything, Mr. Dykes was helpful to Pittman's case. He sat through the entire trial as the defense representative. He admitted that he was not an eyewitness to anything which Mr. Pittman testified to, and that he could not directly contradict anything that Pittman testified to. Additionally, he could not swear under oath that the document Dykes had purported to be the contract in question was either the original, or an exact copy, and he only could assume that the signature was Pittman's. Finally, he admitted that he never personally visited or inspected Pittman's property²⁵.

Considering the foregoing, any reasonable jury necessarily was required to award statutory damages for the trees improperly taken. In Pittman's case these damages included: (a) double the fair market value for each tree; and (b) an additional statutory penalty of either \$55 or \$10 for each tree based upon its size; and (c) \$250/acre for deforestation. Plaintiff respectfully submits that the lowest reasonable awards based upon the evidence presented would be \$34,062.50:

- a) **40 pines in excess of 1 foot in diameter - \$8,600;**
 - 1) Double Market Value - \$80 ea. x 2 = \$160/tree x 40 trees = \$6,400
 - 2) Additional Penalty - \$55 ea. x 40 = \$2,200
- b) **35 oaks which were approximately 80 yrs. old - \$19,425;**
 - 1) Double Market Value - \$250 ea. x 2 = \$500/tree x 35 trees = \$17,500
 - 2) Additional Penalty - \$55 ea. x 35 = \$1,925
- c) **4 pines which were approximately 80 - 100 yrs. old - \$2,620;**
 - 1) Double Market Value - \$300 ea. x 2 = \$600/tree x 4 trees = \$2,400
 - 2) Additional Penalty - \$55 ea. x 4 = \$220
- d) **1 very large pecan tree - \$2,055**
 - 1) Double Market Value - \$1,000 ea. x 2 = \$2,000/tree x 1 tree = \$2,000
 - 2) Additional Penalty - \$55 ea. x 1 = \$55
- e) **Deforestation \$1,363.50.**
 - 5.45 acres x \$250 = \$1,362.50

2. Did the Court commit reversible error by refusing to allow Pittman to pursue claims for general damages?

BECAUSE PLAINTIFF PROVED BOTH FRAUD AND TRESPASS, REFUSAL TO ADMIT PLAINTIFF'S EVIDENCE OF GENERAL DAMAGES WAS REVERSIBLE ERROR

As stated, *supra*, any reasonable juror necessarily was bound to accept the only credible and uncontradicted evidence introduced at trial. This clearly showed that in addition to the statutory special damages pursuant to Miss. Code Ann. § 95-5-10 for the improper taking of timber, defendant committed fraudulent conversion and trespassing onto sections/parcels of plaintiff's home site and destroying the land and property located thereon, when this was not necessary or reasonable if Dykes had performed its obligations in good and workmanlike manner. Pittman respectfully submits that Dykes should be liable for plaintiff's general damages based upon the foregoing and general tort liability.

3. Did the Court commit reversible error by refusing to allow Pittman to call defendant's expert witness on cross examination as part of plaintiff's case in chief prior to resting plaintiff's case?

DEFENDANT HAD LISTED AN EXPERT FORESTER AS A WITNESS AND SINCE HE WAS PRESENT IN COURT FOR TRIAL, PLAINTIFF WAS ENTITLED TO CALL DEFENDANT'S EXPERT WITNESS ON CROSS

Notwithstanding the fact that Pittman did, in fact, present an un-rebutted *prime facie* case as set forth, *supra* — out of an abundance of caution, prior to resting his case in chief, plaintiff sought to call a witness, Les Shelby, a Forester retained by Dykes. Mr. Shelby was present in court and available to testify. Dykes objected when plaintiff called Mr. Shelby and the Court sustained Dykes's objection, preventing plaintiff from calling Mr. Shelby²⁶.

Under the circumstances, Pittman should have been allowed to call Shelby, and Dykes's objection should have been overruled. First of all, Mr. Shelby was present and available to testify. Just because plaintiff had not served Shelby with a subpoena to compel his appearance in court for trial testimony does not mean plaintiff should not have been allowed to call him when he appeared in court voluntarily without the necessity of a subpoena. Plaintiff should not be forced to expend the time and money to have a witness served with a subpoena if plaintiff

understands that defendant and the witness have made arrangements for the witness to appear voluntarily. This is especially true when considering the equities of the case *sub judice*. For years prior to trial, Pittman had been severely disabled, unemployed and destitute²⁷. He lived in a hovel and frequently was forced to go without food or medicine. At times he was reduced to eating from garbage cans. The uncontradicted evidence showed that Dykes's misconduct had destroyed Pittman's home site, scared off his fiancé, and that they owed him a great deal of money when he most needed it. It would be a travesty to expect or to require this poor man to have the resources to hire his own expert witness forester, especially when he was willing and able to rely upon Mr. Shelby who already was present and available to testify.

In addition to the foregoing equitable justification to have allowed Pittman to call Shelby, conventionally accepted procedure long has recognized a party's right to call an hostile witness or a defendant or a defense witness on cross examination, or "under the rule." To the extent that there may be any objection contemplated by either the jury or this Court concerning the fact that Pittman did not put on evidence from an "expert witness," this certainly would have been cured by allowing Pittman to have called Shelby during his case in chief and prior to resting. Plaintiff respectfully submits that the refusal to do so constituted reversible error.


CONCLUSION

The uncontested evidence showed that Dykes sneaked on to Mr. Pittman's land when they knew he was working offshore, in violation of an agreement that no timber would be cut unless he were there. Not only did they steal valuable and aesthetic old growth timber instead of merely harvesting only the young small "chip and saw" pine trees from a limited 1/62 acre tract which it had paid for — but they even cut down almost every other tree on two adjacent tracts of land and in the process Mr. Pittman's green acres homestead was rendered into a briar patch. Although the jury rendered a verdict in plaintiff's favor, it was unreasonably low as a result of several elements of reversible error which occurred during trial. First of all, the jury committed reversible error by not awarding statutory damages, as plaintiff's parole evidence was admitted

and uncontradicted concerning the agreement only to sell certain trees and the number and size of trees improperly taken. In addition, because plaintiff proved both fraud and trespass, refusal to admit plaintiff's evidence of general damages was reversible error. Finally, since an expert forester, Mr. Shelby, was present in court for trial and available to testify, plaintiff was entitled to call Shelby, an expert witness, on cross examination.

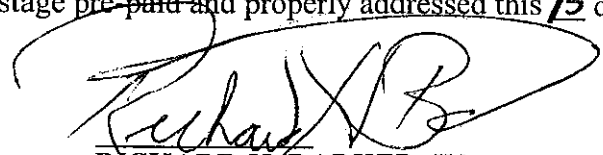
Accordingly, the judgement of the Trial Court should be amended or reversed and remanded.

Respectfully submitted:


RICHARD H. BARKER, IV (# [REDACTED])
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New Orleans, Louisiana 70130
Tel: (504) 525-5553 *117, 128
Fax: (504) 581-7057

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to counsel of record by depositing copy of same in the U.S. Mail, postage ~~pre paid~~ and properly addressed this 15 day of January, 2008.


RICHARD H. BARKER, IV

1. Please see Record, Vol. 2, pages 106, line 9 through 113, line 11 [hereinafter R-2, pp. 106/9 - 113/11],
2. Exhibit P-1; R-2 110/17
3. R-2, 125/7 - 13;
4. R-2, 110/29 - 112/1
5. R-2, 122/16 - 124/18, 116/4 - 11;
6. R-2, p. 112/2 - 9, R-3, 168/24 - 169/15

7. R-3, 159/20 - 26
8. R-2, 116/15 - 23, R-3, 147/20 - 24, 149/26-29, 166/20 - 167/26
9. R-2, 136/7-20, R-3, 148/12 - 149/4
10. R-2, 113/24 - 116/11, 131/17 - 132/6
11. R-2, 116/12-27
12. R2, 116/28 - 119/10
13. R-2, 120/4-7
14. R-2, 117/2-13
15. R-2, 116/28 - 117/22, 125/14-17
16. R-2, 117/3-23
17. R-2, 120/20-25
18. R-2, 113/1-7, 118/16 - 119/10, 121/7 - 122/12
19. R-2, 128/7-24, R-3, 151/27 - 153/10
20. R-3, 165/31 - 166/3
21. R-2, 134/3-10
22. R-2, 136/7 - 142/6, R-3, 150/21 - 151/26
23. R-3, 216/9 - 217/13;
24. R-2, 119/11 - 122/29, R-3, 155/10-29, 162/24-29
25. R-3, 179/19 - 180/21, 183/17 - 184/15
26. R-3, 170/2 - 9
27. R-2, 132/12-14

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VERSUS

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Defendant-Appellee

Appeal from the Circuit Court of Simpson County, Mississippi

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief of Plaintiff-Appellant, Sterling Pittman has been forwarded to the Honorable Judge Robert G. Evans by depositing copy of same in the U.S. Mail, postage pre-paid and properly addressed this 15th day of January, 2009.



RICHARD H. BARKER, IV