

**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**Curley Camp**

**Appellant**

**Vs.**

**Clint Stokes**

**Appellee**

**Certificate of Interested Parties**

**Certificate of Interested Persons is as follows:**

**Clint Stokes – Appellee**

**Curley Camp – Appellant**

**Carter Dobbs - Appellant's attorney**

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Clint Stokes, Appellee, Response Brief

Comes now, Clint Stokes and files this his Response Brief to the Brief filed by Curley Camp, Appellant and would show this honorable Court the following:

Summary of Argument

Appellant is not entitled to attorney's fees and expert fees under §95-5-10 because the attorney's fees described in that statute are for the relief of the Plaintiff for having to proceed with a case under the statute against a Defendant for Wrongfully cutting trees. Further, Appellant is not entitled to attorney's fees because they did not file an attorney's fees affidavit or an affidavit of expert fees nor any other documentation evidencing fees that would be reasonable in such a case. Further still, Appellant did not seek to have surveys done prior to the institution of suit which could have prevented suit from ever being filed.

Argument

1. §95-5-10 Mississippi Code Annotated (1972) as amended, *Cutting Trees Without Consent of Of Owner*, gives the prescription by which a wronged land-owner may be made whole after someone other than himself, without his permission, has cut trees belonging to the landowner. Each section of the statute speaks to the relief to be provided to the wronged landowner if it is shown that he in fact owned the timber. This includes section (3) of the statute that reads "All reasonable expert witness fees and

attorney's fees shall be assessed as Court costs in the discretion of the Court." When read in the context of the entire statute, (3) merely provides that the Court in its discretion, may provide additional relief to the wronged landowner in the form of expert witness fees and reasonable attorney's fees for having to bring the action. This section does not provide for attorney's fees and expert witness fees of the Defendant, should the Plaintiff not be successful. For such reason, Appellant should not be able to seek attorney's fees and expenses under the veil of this statute.

2. Appellant cited in his Motion to Amend Judgment filed in the lower court, Rule 54(d) of the Mississippi Rules of Civil Procedure that reads: "Except when express provision thereof is made in a statute, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs...". However, the comment to Rule 54 (d) explains that the meaning of costs is not synonymous with expenses and states that taxable costs under Rule 54(d) are more limited and represent official expenses such as court fees. The comments goes further and describes what are considered fees under Rule 54(d) by stating that fees commonly include filing fees, clerk's and sheriff's charges, and witnesses' fees.<sup>1</sup>

The last paragraph of the comment describes expenses and reads thusly, *"Expenses include all the expenditures actually made by a litigant in connection with the action. Both fees and costs are expenses but by no means constitute all of them. Absent a special statute or rule, or an exceptional exercise of judicial discretion, such items as attorney's fees, travel expenditures, and investigatory expenses will not qualify either as statutory fees or reimbursable costs. These expenses must be borne by the litigants."*

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<sup>1</sup> Please note that the witnesses' fees to which the comment refers are the official witness fees for mileage (i.e. \$5.00).

Since §95-5-10 Mississippi Code Annotated (1972) as amended, *Cutting Trees Without Consent of Owner* does not apply to Appellant's attorney's fees and expenses, there is no special statute or rule that would warrant the payment of such by Appellee. At best, Appellant may be entitled to recover the ten dollar (\$10.00) answer fee, but even that was in the discretion of the lower court.

3. Appellant did not provide unto the lower court, documentation of the alleged expert witness fee of \$2,350.00 nor did he provide an Attorney's Fees affidavit explaining why \$9,897.50 was reasonable in this matter. Appellee maintains that neither the attorney's fees nor the expert witness fees are reasonable under the circumstances.

4. Appellant never offered to have a survey performed or conducted prior to the institution of the suit. Even after Appellee paid the expense of having the property surveyed, Appellant saw fit not to act reasonably in having their own survey conducted with the antique deeds. For such reason, any expense born by Appellant in hiring a surveyor (expert) should be born by Appellant.

#### Conclusion

Prescription for *Defendant's* attorney's fees is not found under §95-5-10 of Mississippi Code Ann. (1972). Appellant has offered no proof of the attorney's fees or expert fees nor has he made any statement of their reasonableness. Appellant did not mitigate possible damages of suit by conducting a survey prior to suit being instituted. For these reasons, the lower Court's ruling denying Defendant attorney's fees should be upheld.

WHEREFORE, PREMISES CONSIDERED, Appellee would humbly request that this Honorable Court uphold the lower court's ruling and assess all Appellee's costs of defending this appeal.

Respectfully submitted, this the 30<sup>th</sup> day of December, 2008.

  
\_\_\_\_\_  
Clint Stokes

**Section 95-5-10 Mississippi Code Annotated (1972) as amended. 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.

**Sources:** Laws, 1989, ch. 558, § 1, eff from and after July 1, 1989, and applicable to causes of action accruing on or after July 1, 1989.

## **Mississippi Rules of Civil Procedure RULE 54. JUDGMENTS; COSTS**

(a) Definitions. "Judgment" as used in these rules includes a final decree and any order from which an appeal lies.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings; however, final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings.

(d) Costs. Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security. Costs may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.

### **Comment**

The first sentence of Rule 54(a) defines "judgment," for the purposes of these rules, to include a decree and any appealable order. Traditionally, in Mississippi courts in equity suits judges rendered a "decree," and an action at law resulted in the entry of a "judgment." There is no longer any purpose in preserving a technical distinction between a decree and a judgment. Therefore, Rule 54(a) indicates that a judgment at law and a decree in equity are to be treated in the same fashion.

Although it is not specifically described in the rule itself, there are several different stages that lead to the creation of a judgment that is final and appealable. It is important to differentiate the various steps that are part of this process. The first distinction is

between the adjudication, either by a decision of the court or a verdict of the jury, and the judgment that is entered thereon. The terms "decision" and "judgment" are not synonymous under these rules. The decision consists of the court's findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act that gives it legal effect.

A second distinction that should be noted is between the judgment itself and the "filing," or the "entry," of the judgment. A judgment is the final determination of an action and thus has the effect of terminating the litigation; it is "the act of the court." "Filing" simply refers to the delivery of the judgment to the clerk for entry and preservation. The "entry" of the judgment is the ministerial notation of the judgment by the clerk of the court pursuant to Rule 58; however, it is crucial to the effectiveness of the judgment and for measuring the time periods for appeal and the filing of various motions. See 10 Wright & Miller, Federal Practice and Procedure, Civil § 2651 (1973).

Rule 54(b) is designed to facilitate the entry of judgments upon one or more but fewer than all the claims or as to one or more but fewer than all the parties in an action involving more than one claim or party. It was proposed because of the potential scope and complexity of civil actions under these rules, given their extensive provisions for the liberal joinder of claims and parties. The basic purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available.

The rule does not require that a judgment be entered when the court disposes of one or more claims or terminates the action as to one or more parties. Rather, it gives the court discretion to enter a final judgment in these circumstances and it provides much needed certainty in determining when a final and appealable judgment has been entered. If the court chooses to enter such a final order, it must do so in a definite, unmistakable manner.

Absent a certification under Rule 54(b), any order in a multiple party or multiple claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory.

If the court decides that an order that does not dispose of all the claims of all the parties and that is not appealable under any other statute or rule should be given the status of a final judgment, Rule 54(b) requires it to take two separate steps before an appeal can be perfected. The court must make "an express determination that there is no just reason for delay" and it must make "an express direction for the entry of judgment."

When the court is asked to direct the entry of a judgment under Rule 54(b), it must consider whether the entire case as a whole and the particular disposition that has been made and for which the entry of a judgment is sought falls within the scope of the rules. The general requirements are that the case include either multiple claims, multiple

parties, or both, and that either one or more but fewer than all the claims have been decided, or that all the rights and liabilities of at least one party have been adjudicated.

Despite its apparently broad scope, Rule 54(b) may be invoked only in a relatively select group of cases and applied to an even more limited category of decisions. The rule itself sets forth three basic conditions on its applicability. The first requirement is that either multiple claims for relief or multiple parties be involved. If there are multiple parties, there need only be one claim in the action. All of the rights or liabilities of one or more of the parties regarding that claim must have been fully adjudicated. A decision that leaves a portion of the claim pending as to all defendants does not fall within the ambit of Rule 54(b). Whether multiple parties are before the court is, basically, a simple question that should pose no problems.

The second prerequisite for invoking Rule 54(b) is that at least one claim or the rights and liabilities of at least one party must be finally decided. The words "final judgment" in Rule 54(b) should not be construed too narrowly. A dismissal for lack of subject matter or personal jurisdiction may dispose of a claim completely and thus bring it within the scope of the rule; however, a dismissal for failing to state a claim upon which relief may be granted, made with leave to amend, clearly does not finally decide that claim and Rule 54(b) would not apply.

The third prerequisite to the issuance of a Rule 54(b) certificate is that the court must find that there is no just reason for delaying an appeal. A request that this determination be made is addressed to the trial judge's discretion and whether it will be granted depends on the facts of each case. See 10 Wright & Miller, *supra* § 2656.

Rule 54(c) has two central elements. The first sentence in the rule provides that a default judgment shall not give relief "different in kind from" or that "exceeds in amount that prayed for in the demand for judgment." The second sentence in Rule 54(c) provides that in non-default cases the judgment need not be limited in kind or amount by the demand, but may include the relief to which the successful party is deemed entitled. The rule must be read in conjunction with Rule 8, which requires that every pleading asserting a claim include a demand for the relief to which the pleader believes himself entitled. Thus, Rule 54(c) applies to any demand for relief, whether made by defendant or plaintiff or presented by way of an original claim, counter-claim, cross-claim, or third-party claim. But see, *Cain v. Robinson*, 523 So.2d 29 (Miss. 1988). A default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded; a judgment in a default case that awards relief that either is more than or different in kind from that requested originally is null and void and defendant may attack it collaterally in another proceeding.

Three related concepts should be distinguished in considering Rule 54(d): These are costs, fees, and expenses. Costs refers to those charges that one party has incurred and is permitted to have reimbursed by his opponent as part of the judgment in the action. Although costs has an everyday meaning synonymous with expenses, taxable costs under Rule 54(d) is more limited and represents those official expenses, such as court fees, that

a court will assess against a litigant. Costs almost always amount to less than a successful litigant's total expenses in connection with a law suit and their recovery is nearly always awarded to the successful party. See Miss. Code Ann. § 11-53-27 (1972) (successful party to recover costs, generally).

Fees are those amounts paid to the court or one of its officers for particular charges that generally are delineated by statute. Most commonly these include such items as filing fees, clerk's and sheriff's charges, and witnesses' fees. In most instances an award of costs will include reimbursement for the fees paid by the party in whose favor the cost award is made.

CERTIFICATE OF SERVICE

I, Clint Stokes do hereby certify that I have on this day, mailed by United States Postal Service, postage prepaid, a true and correct copy of the above and foregoing Response to *Brief Filed by Appellant* to Honorable Carter Dobbs, Jr., attorney for Appellee, at his usual mailing address of P.O. Box 517, Amory, Mississippi 38821.

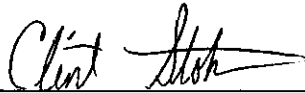
This the 30<sup>th</sup> day of December, 2008.

  
\_\_\_\_\_  
Clint Stokes

CERTIFICATE OF SERVICE

I, Clint Stokes do hereby certify that I have on this day, mailed by United States Postal Service, postage prepaid, a true and correct copy of the above and foregoing brief to Honorable Judge Mask, at his usual mailing address of P.O. Box 7395, Tupelo, Mississippi 38802.

This the 6<sup>th</sup> day of January, 2009.

  
\_\_\_\_\_  
Clint Stokes