

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

REBECCA E. REEVES AND  
JAMES REEVES,

Appellants

vs.

Supreme Court No.:  
2008-TS-01605

JOHN PETERSON,

Appellee

---

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, MISSISSIPPI  
HONORABLE LAMAR PICKARD, PRESIDING

---

---

BRIEF OF APPELLANTS  
ORAL ARGUMENT REQUESTED

---

WAYNE SMITH, MSB [REDACTED]  
151 WEST MAIN STREET  
P O BOX 525  
LIBERTY MS 39645  
PHONE: (601) 657-8994  
FACSIMILE: (601) 657-8987

ATTORNEY FOR APPELLANTS  
REBECCA REEVES AND  
JAMES REEVES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

REBECCA E. REEVES AND  
JAMES REEVES,

Appellants

vs.

Supreme Court No.:  
2008-TS-01605

JOHN PETERSON,

Appellee

CERTIFICATE OF INTERESTED PERSONS

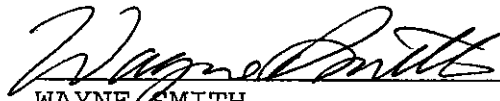
The undersigned counsel of record, in accordance with Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Rebecca E. Reeves and James Reeves, Appellants

Wayne Smith, Attorney for Appellants

John Peterson, Appellee

Robert E. Clark, Attorney for Appellee

  
WAYNE SMITH  
Attorney for Appellee

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS . . . . .	i
TABLE OF CONTENTS . . . . .	ii
TABLE OF AUTHORITIES . . . . .	iii
STATEMENT OF THE ISSUES . . . . .	1
STATEMENT OF THE CASE . . . . .	2
SUMMARY OF THE ARGUMENT . . . . .	4
ARGUMENT AND AUTHORITIES. . . . .	5
CONCLUSION . . . . .	10
CERTIFICATE OF SERVICE . . . . .	11

## TABLE OF AUTHORITIES

### CASES:

Cox v. F-S Prestress, Inc. 97-CA-01547-COA (Miss. 2001) . . . . .	8
Adams v. Cinemark USA, Inc. 831 So.2d 1170 (Miss. 2002) . . . . .	9

### OTHER AUTHORITIES:

Mississippi Code of 1972 Annotated Section 95-5-10. . . . .	4, 8
--	------

### STATEMENT OF THE ISSUES

1. Whether or not the trial court erred in not allowing an oral argument on a Motion for Reconsideration or In the Alternative, A New Trial.

2. Whether or not the trial court applied the proper standard in determining the value of the timber that was removed from the property of the appellants.

### STATEMENT OF THE CASE

This is a cause of action that has arisen due to a trespass and removal of timber by John Peterson upon the property of Rebecca E. Reeves and James Reeves. That the trespass onto the property of Rebecca E. Reeves and James Reeves occurred sometime in late 2005 and a cause of action was filed against John Peterson on May 26, 2006.

The history of this case is that John Peterson was previously married to Rebecca E. Reeves. That the parties jointly owned certain real property in Jefferson County, Mississippi, that had apparently been obtained by Rebecca E. Reeves (formerly Peterson) and John Peterson during their marriage. That a final ruling was entered concerning the marriage by way of Judgment of Divorce in the Family Court of East Baton Rouge Parish Louisiana thereby providing title in and to part of the jointly owned land in Jefferson County, Mississippi, to Rebecca E. Peterson Reeves. That said judgment of the Louisiana Court was duly entered by the Family Court of East Baton Rouge Parish Louisiana on July 29, 2005. (CP 36-41) That both parties acknowledge the judgment and its validity.

That immediately thereafter, with full knowledge of the division of the property, John Peterson proceeded to cut and remove certain timber from the property owned by him as well as the property owned by Rebecca E. Reeves (formerly Peterson).

A suit was filed, discovery was completed and the plaintiffs, Rebecca E. Reeves and James Reeves, filed a Motion for Summary

Judgment dealing with the issue of liability and damages. A summary judgment was entered in this case on the 30<sup>th</sup> day of January, 2007. (CP 233-235) The Court further entered a Writ of Inquiry in this case. (CP 230-232) A response to the writ of inquiry was made by the defendant, John Peterson, which was duly filed on the 20<sup>th</sup> day of February, 2007. (CP 236-270)

A final hearing was set in this cause of action for December 3, 2007. That said cause of action was heard and a memorandum and order was entered by the Court which was dated August 4, 2008, and being duly filed on August 6, 2008. (CP 304-308)

Immediately thereafter, a motion for reconsideration and, in the alternative, a new trial was filed on August 13, 2008. That the motion for reconsideration requested several things which included pre and post judgment interest, a request to reconsider the judgment and to retry th case under newly discovered evidence. The Court entered an order in this case granting the request for post judgment interest and denying any and all remaining issues in this matter. From this order the plaintiffs have appealed.

### SUMMARY OF THE ARGUMENT

The first issue is the error by the trial court was made in its failure to allow an oral argument on a motion for reconsideration and, in the alternative, a new trial. That without a hearing in this case, the Court entered an order (CP 310-312) and without any type hearing, allowing a part of the motion for reconsideration and denying the remainder of said motion. The Court should have allowed the parties to present oral argument to support its position in this case.

The second issue in this appeal deals with the fact that the trial judge applied the incorrect standard to the damages in accordance with Section 95-5-10 of the MS Code of 1972, Annotated, as amended. That the testimony adopted by the Court indicates that the prices given by the defendant's expert were, in fact, the landowner's and/or the delivered value of the trees. That the appropriate standard for damages is the value of the tree as it stood at the time it was cut.

## ARGUMENT AND AUTHORITIES

### Point of Error One:

Should the trial judge have allowed an oral argument when a party filed a motion for reconsideration and, in the alternative, a new trial?

This cause of action was based upon the cutting and removal of certain timber located on the property of the plaintiffs, Rebecca and James Reeves. That a trial of this matter was completed in December 2007 and a final order entered on August 4, 2008, and being duly filed with the Circuit Court of Jefferson County, Mississippi, on August 6, 2008. That immediately thereafter and within the ten (10) day period as allowed under Rule 59, a Motion for Reconsideration or in the alternative, A New Trial, was filed with the Court. (CP 310-312) Immediately thereafter, and without the benefit of a hearing, an Order was entered on August 25, 2008, by the trial judge granting part of the motion and denying all remaining issues. Specifically, the judge made a decision without allowing oral argument by the moving party.

The motion for reconsideration was filed in accordance with Rule 59 of the MS Rules of Civil Procedure and further, a hearing would have allowed the plaintiffs to produce proof of newly found evidence at this time. The appellants herein would show that they were unable to present their argument and a ruling was made without additional notification and/or hearing.

That Rule 78, which deals with motion practice, states as follows:

"Each court shall establish procedures for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions."

The apparent attempt of Rule 78 of the MS Rules of Civil Procedure is to encourage the Court to allow hearings to be conducted when dealing with motions pending before the Court.

In reviewing Rule 78 in conjunction with a motion filed under Rule 59, the Court should allow a party to be heard in order to establish the position or claim made by the motion. The applicable case in this cause of action is *Adams v. Cinemark USA, Inc.*, 831 So.2d 1156 in which the court dealt with a motion for summary judgment. That the footnote dealing with this form of case and the annotations thereunder noted within the MS Rules Annotated, Rule 78, "Motion Practice", states as follows:

"Pursuant to Rule 78, there is a right to an oral hearing on a motion for summary judgment under Rule 56(c)."

The appellants herein fully understand that this was not a motion for summary judgment but was, in fact, a motion for reconsideration and a new trial under Rule 59. That in order to properly present their case, the appellants should have been granted the right to present an oral argument before a final decision was made. The appellants would further show that they had requested a hearing date from the circuit judge's court administrator when they

received the order of the Court.

Point of Error Two:

Did the trial judge apply the proper standard in determining the value of the timber that was removed from the property of Rebecca E. Reeves and James Reeves?

During the course of the trial, there were two (2) expert witnesses called. One was Tom Middleton, who was the expert for the plaintiffs/appellants. The second was William Harold Brown, Jr., who was called as an expert witness for the defendant/appellee.

The trial court adopted the testimony of William Harold Brown, Jr. and incorporated his testimony into the final judgment. The testimony of Mr. Brown was that he used comparative sales that he had made during the time span that the timber was removed from the property of the appellants. Further, that his comparisons were made from bid sales as well as sales by volume.

In reference to a trial exhibit, being trial Exhibit D-12, Mr. Brown, on direct examination, testified:

"And on Page 3 [of Exhibit D-12] this reflects timber sales that I was involved with during January 2005 to January 2006." (T 46)

Mr. Brown later testified:

"Those particular sales were lump sum bids." (T 46)

When questioned on cross examination about the sale comparison, Mr. Brown stated on several occasions that the figures used were from specific bid sales. (T 56) The final derived price

for the timber varied, but was considerably lower than the testimony presented by the plaintiffs' expert, Tom Middleton.

In reviewing the testimony, it is clear that the value testified to by Mr. Brown is that which the landowner would receive. This is simply not the standard established by the law of the State of Mississippi.

That Miss. Code Ann. Section 95-5-10(1) provides as follows:

"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..."

This code section clearly states that the person who removes the tree without the consent of the owner shall pay double the fair market value of the tree. That double the fair market value of the tree has recently been defined and followed by the Supreme Court of this state in a Court of Appeals case being *Cox v. F-S Prestress, Inc.*, 97-CA-01547-COA (Miss. 2001) In *Cox*, the Court has affirmed, on several occasions, that:

"The fair market value of trees harvested on the disputed property is the value of the trees as they stand in the woods."

Further, the Court had affirmed the lower court's decision concerning the fair market value principle. This case has been cited within the footnotes of the MS Code of 1972, Annotated, as amended, in Section 95-5-10. This case affirms the position that the damages in this case and the definition of the "fair market value" of trees would be what the timber sells for while it is

standing in the woods.

The testimony of William Harold Brown, Jr. and the timber sales he has quoted are all timber sales that were made by bid and were values that would have been received by the landowners. Therefore, the Court, in this case, applied the wrong evaluation to the damages.

### CONCLUSION

There are two (2) distinct issues in this case.

The first issue deals with motion practice of the Circuit Court. A motion was duly filed in this case and was ruled upon without the benefit of a hearing. That this Honorable Court should remand this case for further hearing.

The second issue deals with the application of Mississippi Code Section 95-5-10 in determining the value of the timber that was removed from the property of the appellants. That the trial court applied the wrong standard to determine the damages. That said damages should be the entire value of a tree as it stood before it was cut. The case law gives a clear definition of the market value of the tree.

That this Honorable Court should remand this case for further hearing to determine the appropriate damages in this case.

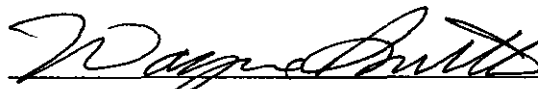
CERTIFICATE OF SERVICE

I, Wayne Smith, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to:

Robert E. Clark  
Attorney at Law  
P. O. Box 888  
Vidalia, LA 71373-0888

Honorable Lamar Pickard  
Jefferson Co. Circuit Court Judge  
Post Office Box 310  
Hazlehurst, MS 39083

This the 23<sup>rd</sup> day of March, A.D., 2009.

  
\_\_\_\_\_  
WAYNE SMITH