

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2001-CA-00409-COA

TED SMITH

APPELLANT

v.

PARKERSON LUMBER, INC.

APPELLEE

DATE OF TRIAL COURT JUDGMENT: 1/3/2001
TRIAL JUDGE: HON. JOSEPH H. LOPER, JR.
COURT FROM WHICH APPEALED: CHOCTAW COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT: ANDRE FRANCIS DUCOTE
WAYNE E. FERRELL
ATTORNEYS FOR APPELLEE: JEFFREY STEPHEN MOFFETT
H. WESLEY WILLIAMS
NATURE OF THE CASE: CIVIL - PROPERTY DAMAGE
TRIAL COURT DISPOSITION: DAMAGES AWARDED IN THE AMOUNT OF
\$1,650 FOR THE CUTTING OF TREES
DISPOSITION: REVERSED AND REMANDED: 4/20/2004
MOTION FOR REHEARING FILED:
CERTIORARI FILED:
MANDATE ISSUED:

BEFORE KING, P.J., MYERS, AND THOMAS, JJ.

KING, P.J., FOR THE COURT:

¶1. The Mississippi Supreme Court granted writ of certiorari to review the judgment of the Mississippi Court of Appeals dismissing *Smith v. Parkerson Lumber, Inc.*, 850 So. 2d 99 (Miss. Ct. App. 2002) for lack of jurisdiction due to an untimely appeal. After a determination that Smith's appeal was timely the Mississippi Supreme Court remanded the case to the Mississippi Court of Appeals for a decision on the merits. The following issues were asserted on appeal:

- I. Whether or not the trial court erred when it denied Plaintiff's motion for judgment notwithstanding the verdict based upon the verdict of the jury being contrary to the overwhelming weight of the evidence of liability and damages under § 95-5-1 covering Parkerson Lumber's trespass, cutting and taking away of trees from two sections of Smith's property, referred to in the trial as the northern fifty foot strip and the southwest corner, as well as committed the common law tort of trespass, after Parkerson had been informed of the boundaries both by flagging and first hand information.
- II. Whether or not the trial court erred when it denied Plaintiff's Motion for Additur based upon the fact that the damages awarded by the jury were insufficient and inadequate relief for common law trespass and wrongful cutting of timber proven by the Plaintiff, and were so shockingly low as to be clearly unreasonable.
- III. Whether or not the trial court erred when it denied Plaintiff's Motion for Additur based upon the verdict of the jury being inadequate for the reason that the jury was influenced by bias, prejudice, and passion and the damages awarded were contrary to the overwhelming weight of the credible evidence.
- IV. Whether or not the trial court erred when it denied Plaintiff's Motion for New Trial based upon the verdict of the jury was [sic] influenced by bias, prejudice, and passion and was contrary to the overwhelming weight of the evidence.
- V. Whether or not the trial court erred when it denied Plaintiff's Motion for New Trial based upon the trial court's refusal to allow the Plaintiff to present evidence through Plaintiff's expert as to what the standards of the industry, and duties of those cutting timber, are as to the determination of property boundaries and what could constitute a breach or violation of those standards and duties in relation to M.C.A. § 95-5-10 (1972).
- VI. Whether or not the trial court erred when it denied Plaintiff's Motion for New Trial based upon the trial court's refusal to allow the Plaintiff to cross-examine the defendant's expert as to what the standards of the industry , and duties of those cutting timber, are to the determination of property boundaries and what would constitute a breach or violation of those standards and duties in relation to M.C.A § 95-5-10 (1972).
- VII. Whether or not the trial court erred when it denied Plaintiff's Motion for New Trial based upon the court's denial of Plaintiff's challenge for cause on prospective juror Mary Olene May.
- VIII. Whether or not the trial court erred in the amount of its award of Plaintiff's attorney's and expert witness' fees mandated by M.C.A. § 95-5-10 (1972).

Finding merit in Appellant's issues VI and VIII we reverse and remand.

FACTS

¶2. In September 1997, Parkerson Lumber was cutting timber on the property of Lena Watson adjacent to fifty-four acres owned by Ted Smith in Choctaw County. After Parkerson completed the job Nancy Smith, Smith's sister who was living on Smith's property at the time, inspected his property and found that timber had been cut from two sections of Smith's property. Smith sued Parkerson, requesting damages for the cutting of the trees, the diminution of property value, and loss of enjoyment pursuant to Mississippi Code Annotated Section 95-5-10.¹ Parkerson acknowledged accidentally cutting the timber

¹Miss. Code Ann. § 95-5-10 (Rev. 2000): **Cutting 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.

on a fifty-foot strip of Smith's property, but denied cutting the timber on the southwest corner of Smith's property. On November 1 and 2, 2000, a trial was held on damages to the fifty-foot strip and damages and liability as to the southwest corner. On November 2, 2000, the jury found Parkerson not liable for cutting the southwest portion of Smith's land, but awarded Smith damages in the amount of \$1,650 for Parkerson's accidental cutting of the fifty-foot strip of land. On December 19, 2000, the trial judge entered an order awarding Smith attorney fees in the amount of \$959.06 and expert witness fees in the amount of \$450 pursuant to Mississippi Code Annotated Section 95-5-10 (3).² On February 5, 2001, Smith filed a motion for JNOV, or in the alternative a new trial. This motion was denied on February 7, 2001. On March 8, 2001, Smith filed his notice of appeal.

¶3. Finding Smith's appeal to be untimely, this Court dismissed the case due to lack of jurisdiction without ruling on the merits. Smith's motion for rehearing was likewise denied. The Mississippi Supreme Court granted Smith's writ of certiorari to determine whether the appeal was untimely. After finding the appeal to be timely, the supreme court remanded the case to this Court for a decision on the merits.

ISSUES AND ANALYSIS

²Miss. Code Ann. § 95-5-10 (Rev. 2000). **Cutting without consent of owner.** (3) All reasonable expert witness fees and attorney's fees shall be assessed as court costs in the discretion of the court.

¶4. The standard of review for jury verdicts in this state is well established. “Once the jury has returned a verdict in a civil case, we are not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found.” *Sivira v. Midtown Restaurants Corp.*, 753 So. 2d 492, 494 (¶ 5)(Miss. Ct. App. 1999) (citations omitted).

I.

Whether or not the trial court erred when it denied Plaintiff’s Motion for New Trial based upon the trial court’s refusal to allow the Plaintiff to question expert witness’ regarding industry standards and duties of those cutting timber

¶5. This Court applies an abuse of discretion standard to the review of a trial court's denial of a motion for new trial. *Allstate Ins. Co. v. McGory*, 697 So. 2d 1171, 1174 (¶ 13)(Miss. 1997). A trial judge in exercising his sound discretion may grant a motion for a new trial only when the jury verdict is against the overwhelming weight of the evidence or is contrary to the law. *Id.*

¶6. Smith claims that the trial court abused its discretion by not allowing him to present evidence through his expert, or by cross-examination of Parkerson’s expert regarding industry standards and the duties of those cutting timber.

¶7. Smith argues that the expert testimony would have aided the jury in determining whether punitive damages should be allowed. We assume that when Smith refers to “punitive damages” he is referring to those damages set out in Mississippi Code Annotated Section 95-5-10(2) which allow a statutory penalty for cutting with “reckless disregard.” Smith contends that a new trial should have been granted because the jury was not allowed to hear all pertinent testimony on whether the statutory penalty was warranted.

¶8. Smith attempted to establish an entitlement to the statutory penalty by expert testimony through the following questions:

BY MR. HOLMES [attorney for Smith]: Mr. Bell, would you describe a forester's failure to flag boundaries as reckless conduct?

BY MR. WILLIAMS [attorney for Parkerson]: Objection your Honor. That calls for a legal conclusion. And that's for the jury to determine.

BY THE COURT: I'll sustain the objection. I don't think that he's ----he's not qualified to give that kind of opinion.

BY MR. HOLMES: How would you describe a forester's failure to flag?

BY MR. WILLIAMS: Same objection.

BY THE COURT: Same objection sustained.

¶9. The court was correct in ruling that Holmes's first question to Williams was inadmissible. However, the trial judge merely stated the expert "was not qualified" to give that opinion, and we can not speculate as to his reasoning for the ruling; therefore, we err on the side of caution and discuss the inadmissibility of this testimony. The testimony was objectionable because it called for Williams to assess the state of mind of Parkerson which he was not qualified to do. The Mississippi Supreme Court has held that expert testimony regarding a defendant's state of mind is improper. *See Hart v. State*, 637 So. 2d 1329, 1340-41 (Miss. 1994). Since the question posed by Holmes required Williams to assess the state of mind of Parkerson it was inadmissible.

¶10. The second question that Holmes asked Williams, "How would you describe a forester's failure to flag?" was not objectionable, and the trial judge sustained an objection to this testimony on "the same grounds." Smith then made a proffer of the testimony of Bell who had been accepted by the court as an expert in the field of forestry. Smith's proffer of Bell's testimony indicated that he would have testified that Parkerson Lumber, and any other similar company, is obligated to determine the boundaries before they

cut any timber, and that the failure to do so constitutes reckless conduct. After the proffer the trial judge stated in the record:

BY THE COURT: I am going to stand by my previous ruling. But I am of the opinion that it would be highly prejudicial to allow anyone to come in and testify. And I just feel like that's beyond the scope of anybody to come in and testify. That would be just like having an expert come in on an auto accident and testify that somebody was negligent. I think that wouldn't be proper. And I don't think it is in this. . . in this instance.

Likewise, the trial court did not allow Stephen Butler, Parkerson's expert, to testify regarding whether it was reckless to cut timber before determining the boundary lines. Butler testified as follows:

BY MR. FERRELL [attorney for Smith]: Okay. Now, isn't it true that the typical or customary way for someone cutting timber to begin the process would be to determine what the boundaries are?

BY MR. BUTLER [Parkerson's expert]: Yes, sir.

BY MR. FERRELL: Where they're going to cut?

BY MR. BUTLER: Right.

BY MR. FERRELL: That's typical. But wouldn't you agree that that's also the prudent thing to do?

BY MR. BUTLER: Certainly.

BY MR. FERRELL: Okay. And so it's customary and it's prudent to do it that way?

BY MR. BUTLER: Uh-huh.

...

BY MR. FERRELL: Would it be reckless for someone to not do it that way?

BY MR. WILLIAMS: Objection. We've covered that. It calls for a conclusion. That's for the jury to determine.

BY THE COURT: I'll sustain the objection. I don't think this witness is in a position to testify about whether it's reckless or not. That's something for the jury to decide. And I think him stating it would be far more prejudicial than it would be probative.

¶11. It seems that the trial judge sustained the objection because the testimony called for the expert to give a legal conclusion. However, Rule 704 of the Mississippi Rules of Evidence allows testimony in the form of a legal conclusion as long as it is given by a qualified expert. M.R.E. 704. The Mississippi Supreme Court has held:

There is no invalidity to an expert witness's testimony even if the answer is in effect also a legal conclusion, if what underlies that conclusion is within the witness's specialized area of expertise. Another evidentiary rule provides that [t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. The comment to the rule states that an opinion is no longer objectionable solely on grounds that it invades the province of the jury.

Mississippi Baptist Foundation, Inc. v. Estate of Matthews, 791 So. 2d 213, 218 (¶17) (Miss. 2001).

The trial judge's determination that the testimony of Butler and Bell was inadmissible was in error as it is a crucial part of the evidence for the jury to determine if Smith was entitled to the statutory penalty under Mississippi Code Annotated Section 95-5-10(2). Mississippi Code Annotated Section 95-5-10 (2) only allows the statutory penalty if the conduct is "willful" or "reckless," and the jurors were not allowed to hear full testimony regarding the obligation of a timber cutter to determine the boundaries before they begin to cut, and that a subsequent failure to do so constitutes reckless conduct. We find this to have been error, and reverse for a new trial.

II.

Whether or not the trial court erred in the amount of its award of Plaintiff's attorney's and expert witness' fees mandated by M.C.A. § 95-5-10.

¶12. Smith contends that the trial court erred by granting Smith only \$959.06 in attorney's fees. Smith petitioned the Court for the payment of \$34,875 in attorney's fees and \$650 in expert witness's fees pursuant to Mississippi Code Annotated Section 95-5-10(3).

¶13. Smith's attorneys submitted billing statements for attorney's fees in the amount of \$34,875. The trial judge held that the majority of Smith's attorney's fees were unreasonable, saying "this Court is of the opinion that the defendant should not have to pay attorney's fees incurred on a claim the jury found to be without merit." In his order, the trial judge calculated the award of attorney's fees as follows:

The jury awarded the plaintiff 2.75 percent of the damages that he was seeking from the defendant. This court finds that the attorney fees should be awarded to the plaintiff in the same proportion that the jury awarded damages to the plaintiff. This court, therefore, finds that the plaintiff is entitled to recover the sum of \$959.06 in reasonable attorney fees from the defendant.

¶14. Smith also sought \$650 in expert witness fees, and \$120 in filing fees. The trial judge found \$350 "reasonable" for the testimony of the expert witness, but held that a \$300 inspection fee for the property was not reasonable because "the jury found the defendant was not responsible for cutting timber on at least half of the property that was inspected by the expert," and only allowed \$150 for the inspection of the property.

¶15. The total amount of fees and cost awarded to Smith was \$1526.06, with \$959.06 in attorney's fees, \$450 in expert witness fees, and \$120 in filing fees.

¶16. In his order, the trial judge made no finding of whether the fees assessed by Smith's attorneys were reasonable. The trial judge's method of calculation was to determine the percentage of damages Smith recovered from the jury verdict compared to the total amount of alleged damages, and finding that Smith recovered 2.75% of the damages he alleged, the judge reasoned that he should only recover 2.75% of the attorney's fees alleged. The Mississippi Supreme Court has held that "[t]he standard of review regarding

attorneys' fees is the abuse of discretion standard, and such awards must be supported by credible evidence." *Regency Nissan, Inc. v. Jenkins*, 678 So. 2d 95, 103 (Miss. 1995). "The fixing of reasonable attorneys' fees is a matter ordinarily within the sound discretion of the trial court. . . ." *Miss. Power & Light Co. v. Cook*, 832 So. 2d 474, 486 (¶ 39) (Miss. 2002), citing *Gilchrist Tractor Co. v. Stribling*, 192 So. 2d 409, 418 (Miss. 1966). The court in *Mississippi Power* also held:

It is well settled in this State that what constitutes a reasonable attorney's fee rests within the sound discretion of the trial court and any testimony by attorneys with respect to such fees is purely advisory and not binding on the trial court. We will not reverse the trial court on the question of attorney's fees unless there is a manifest abuse of discretion in making the allowance. . . .

Miss. Power & Light Co., 832 So. 2d at 486 (¶ 39) (citations omitted). The reasonableness of an attorney's fee award is determined by reference to the factors set forth in Rule 1.5 of the Mississippi Rules of Professional Conduct. *Id.* (¶ 40). This rule provides in pertinent part:

- (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- and
- (8) whether the fee is fixed or contingent.

Miss. R. Prof. Conduct 1.5.

¶17. The trial judge offered no reason why the fees of Smith's attorneys were not reasonable except that they did not prevail on all their claims. We find such an arbitrary method of calculation an abuse of discretion and therefore reverse. Our disposition of these issues renders moot Smith's remaining issues.

¶18. THE JUDGMENT OF THE CIRCUIT COURT OF CHOCTAW COUNTY IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS ARE TAXED TO THE APPELLEE.

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, THOMAS, LEE, MYERS, AND GRIFFIS, JJ., CONCUR. IRVING, J., CONCURS IN RESULT ONLY. CHANDLER, J., NOT PARTICIPATING.