IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00689 COA

BEDFORD C. ROBINSON, JR., SAMUEL ROBINSON, DOROTHY DEAN ROBINSON AND MATTIE ROBINSON DAWSON

APPELLANTS

v.

TIMBERLAND MANAGEMENT SERVICES, INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. B. REEVES

COURT FROM WHICH APPEALED: CHANCERY COURT OF AMITE COUNTY

ATTORNEY FOR APPELLANTS:

T. MACK BRABHAM

ATTORNEY FOR APPELLEE:

R. KENT HUDSON

NATURE OF THE CASE: TORT: UNAUTHORIZED CUTTING OF TIMBER

TRIAL COURT DISPOSITION: DAMAGES AWARDED TO PLAINTIFFS; STATUTORY PENALTY AND ATTORNEY'S FEES DENIED TO PLAINTIFFS

BEFORE BRIDGES, P.J., BARBER, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This appeal arises from an action in which the Appellants (collectively "the Robinsons") sought to recover damages under section 95-5-10(1) from Timberland Management, Inc. for the unlawful cutting of trees. The trial court determined that the Robinsons were entitled to statutory damages of $7,724; reforestation costs of $3,600; and an expert witness fee of $650. The trial court, however, denied the Robinsons' request for the statutory penalty and also denied the Robinsons' request for attorney's fees. Feeling aggrieved, the Robinsons appeal arguing that the trial court erred in failing to award the statutory penalty pursuant to section 95-5-10 (2) of the Mississippi Code of 1972 and that the trial court erred in failing to award attorney's fees pursuant to section 95-5-10(3) of the Mississippi Code of 1972. Finding that the chancellor acted within his discretion, we affirm.

STATEMENT OF THE FACTS

The Appellants are all brothers and sisters who owned a twenty-four-acre tract of "L-shaped" land in Amite County, Mississippi (the "Robinson tract"). The land had been in the Robinson family since the 1920's.

R.B. Nunnery, an adjoining land owner to the Robinson tract, would purchase land adjoining his property as it would become available. In 1987, the Robinsons met with R.B. Nunnery to arrange for a survey of their respective land to accurately separate the two. They hired Willie Moak to survey the property and shared the cost of the survey.

In 1988, after the death of Mr. Nunnery, Mrs. Alice Nunnery hired Timberland Management Services, Inc. (the Appellee) to manage her timber and produce funds for the estate. Timberland acquired the survey plat compiled by Willie Moak. The Moak survey only depicted the south and west boundaries of the Robinson tract. Alice Nunnery indicated to Timberland that she was the owner of the Robinson tract. Mrs. Nunnery testified that she showed Timberland's co-owner, Mr. Daughdrill, her property for which she was seeking Timberland's services. Included in what Mrs. Nunnery showed Mr. Daughdrill was the Robinson tract. Mrs. Nunnery testified that she, in fact, believed that the Robinson tract was among the properties which she owned.

Mrs. Nunnery also testified that approximately three to four years prior to his death in 1988, her husband purchased thirty-five acres from the Robinson estate. However, Mr. Samuel Robinson testified that at no time had any of the property owned by the Robinsons ever been sold to Nunnery. This discrepancy in the testimony illustrates the confusion over the ownership of the Robinson tract, while suggesting that another tract of land may be referred to by some as the "Robinson Estate."

Timberland hired Skipper Guy to survey the additional property lines not indicated on the original

Moak survey. After establishing these additional property lines, Timberland bulldozed around the property to be cut and painted bold yellow lines around the borders of the property to be cut. The marked property included the Robinson tract.

In February 1993, Timberland had Progress Wood Yard of Osyka, Mississippi, cut the timber on the Robinson tract. Mattie Robinson Dawson learned of the timber being cut on the Robinson tract. She went to the property and informed those cutting the timber that they were cutting the wrong timber. She next contacted Mrs. Nunnery with the information and then contacted Mr. Daughdrill.

The testimony indicates that the Robinson family had previously cut the timber from their property in 1987. The Robinson tract was considered "low volume" by the Robinsons' expert who valued the cut timber at $3,862 based on stumpage. Timberland's information indicated that the total value of the proceeds received from the timber cut from the Robinsons tract was $1,987.48. The Robinson tract's entire twenty-four acres were cut in one day.

The chancellor assessed Timberland for double the actual value of the timber cut from the Robinson tract ($3,862 x 2 = $7,724) plus reforestation costs $3,600. The chancellor also awarded the Robinsons their expert witness fee of $650. The total award to the Robinsons was $11,974.

STANDARD OF REVIEW

Our analysis in this case is governed by the familiar standard: "[t]his Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Malone v. Odom*, 657 So. 2d 1112, 1115 (Miss. 1995) (citations omitted).

ARGUMENT AND DISCUSSION OF THE LAW

> I. WHETHER THE TRIAL COURT ERRED IN FAILING TO AWARD THE STATUTORY PENALTY PURSUANT TO SECTION 95-5-10 (2) OF THE MISSISSIPPI CODE OF 1972.

The Robinsons argue that the chancellor erred in failing to award the statutory penalty under section 95-5-10(2). In order to understand the statute we are to construe, a brief history of the development of the claims process for the unauthorized cutting of trees will be helpful.

From 1857 to 1981, the law in Mississippi had been that for the unauthorized cutting of an oak tree, the owner will be paid $50 per tree or part thereof as penalty for the trespass. *See* Miss. Code Ann. § 95-5-1 (1972); Miss. Code Ann. § 1074 (1942). For various other trees, the penalty was $15 per tree, and for trees not listed in either section, the penalty was $5 per tree. Additionally, the tree cutter shall pay the owner the actual value of the trees. *See* Miss. Code Ann. § 95-5-3 (1972); Miss. Code Ann. § 1075 (1942).

In 1950, those sections were amended by Chapter 312 of the Laws of 1950 to provide specifically what the tree owner had to prove to recover, as follows:

> To establish the right of the owner prima facie, to recover under the provisions of this section, it shall not be required of the owner to show, by a preponderance of the proof,

> that the defendant or his agents or employees, acting under the command or consent of their principal, wilfully, recklessly, and knowingly cut such trees, but it shall only be required of the owner to show that such timber belonged to such owner, and that such timber was cut by the defendant, his agents or employees without the consent of the owner, provided, the defendant may establish good faith as an affirmative defense as to the statutory penalty.

Miss. Code Ann. § 1074 (Supp. 1950).

The 1950 amendment's language was added not only to section 1074 for oak trees with a $50 penalty but also to section 1075 which covered all other named trees with a penalty of $15 and unnamed trees with a penalty of $5. Miss. Code Ann. §§ 1074-75 (Supp. 1950).

The 1950 amended code sections were carried forward verbatim in the Mississippi Code of 1972 at sections 95-5-1 and 95-5-3. In 1981, by Chapter 359 of the Laws of 1981, the legislature amended those sections to raise the statutory penalty dollar amounts from $50 to $55 on live oaks; from $15 to $50 on other named trees; and from $5 to $35 on all others not named in the section. Miss. Code Ann. §§ 95-5-1 to -3 (Supp. 1982). The burden of proof was not changed.

In 1989, the legislature completely revised the law in regard to unauthorized cutting of trees by passing Chapter 558 of the Mississippi Laws which repealed sections 95-5-1 and -3. The 1989 enactment provides (1) for damages to be twice the value of the trees cut plus the cost of reforestation (cost of reforestation up to $250 per acre); (2) for penalty of $55 per tree at least seven inches in diameter and at least eighteen inches tall and for penalty of $10 for trees under that size; and (3) for authority of the chancellor, in his discretion, to award expert witness and attorney's fees. Miss. Code Ann. § 95-5-10 (1972 & Supp. 1990). Perhaps the most significant change came in the burden of proof. Under subsection (1) the "double of the actual damages and the reforestation" subsection, the burden on the land owner is still light:

> 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 . . . by the defendant . . . without the consent of such owner. *The remedy provided for in this section shall be the exclusive . . . and shall be in lieu of any other compensatory, punitive or exemplary damages for the cutting down . . . of trees* but shall not limit actions or awards for other damages caused by a person.

Miss. Code Ann. § 95-5-10(1) (1972 & Supp. 1990) (emphasis added).

Under (2) the penalties subsection, the requirement is now on the landowner to prove willfulness or recklessness:

> 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.

Miss. Code Ann. § 95-5-10(2) (1972 & Supp. 1990).

All of the Mississippi cases dealing with unauthorized cutting of trees have been tried under the "pre-1989" language, which gave the owner a specific penalty, actual value, and no burden of proof. Since prior to 1989 "good faith" was an affirmative defense of the unauthorized cutter, various elements were considered by the court in finding "good faith." Additionally, the defendant was charged with the burden of proving his case on that point.

Even under that rigid test, in order to prove good faith, the cutter did not have to prove lack of negligence:

> In order to avoid liability for the statutory penalty in a case of this kind the defendant is not required to prove freedom from negligence, but only that the trespass was not willful, or did not result from wantonness or recklessness.

Strawbridge v. Day, 232 Miss. 42, 53, 98 So. 2d 122, 128 (1957); *see also Lochridge v. Hannon*, 236 Miss. 687, 112 So. 2d 234, 236 (1959) (holding that the statutory penalty was not recoverable from one who cut trees in the belief that they were included in a sale to them). That attitude was later discarded by the court as tree farming became a more significant part of our economy.

The case of *Grisham v. Hinton*, 490 So. 2d 1201 (Miss. 1986), cited by the Robinsons, criticized the *Strawbridge* and *Lochridge* language as being incomplete. The supreme court in 1986 said that proving good faith meant more. *Grisham*, 490 So. 2d at 1205. To understand *Grisham* in context, one needs to know that the defendant tree cutter in that case, who was trying to prove good faith had disregarded the separate surveys of two individual surveyors and now claimed a good faith mistake because she acted "under the belief the surveyors were in error." The court stated:

> Mrs. Hinton was at the time of the trial in her 80s. Her basic contention was that, from many years experience, she was familiar with and knew the corner, and the surveyors she hired to locate their land boundaries were mistaken. Assuming arguendo, that Mrs. Hinton sincerely believed the surveyors were wrong, is this a "good faith" defense under the statute?
>
> The answer is "No." It is not the belief she entertained, but whether or not the belief was warranted under the facts of the case which controls.

Id. at 1204.

The *Grisham* court held that a factual issue was made on whether statutory penalties should have been assessed against Mrs. Hinton. The supreme court held, as we do here, that the determination of willfulness was for the trier of facts, the chancellor. In *Grisham*, the chancellor held that the "good faith" affirmative defense of Mrs. Hinton, the *tree cutter*, was not proved, and Mrs. Hinton lost. She had not carried her burden.

In the present case under the new 1989 law, the chancellor found that willfulness, which carries a heavier burden for the *landowner* (the Robinsons), was not proved, and he lost. The result is the same from both perspectives. The chancellor will not be reversed on his findings of fact if there is substantial evidence that the bearer of the burden of proof did not carry his burden. Under the facts in

the present case, one might be able to say that Timberland was negligent, but we do not find that the chancellor abused his discretion in finding that Timberland's actions were not done "willfully and knowingly, in conscious disregard for the rights of the owner." *See* Miss. Code Ann. § 95-5-10(2) (Rev. 1994). We find this issue to be without merit.

II. WHETHER THE TRIAL COURT ERRED IN FAILING TO AWARD ATTORNEY'S FEES PURSUANT TO SECTION 95-5-10(3) OF THE MISSISSIPPI CODE OF 1972.

The Robinsons argue that "equity and good conscience" require the awarding of attorney's fees in the present case so that their recovery is not diminished by payment of attorney's fees.

The statute is clear: "(3) All reasonable expert witness fees and attorney's fees shall be assessed as court costs *in the discretion* of the court." Miss. Code Ann. § 95-5-10(3) (1972) (emphasis added). The statute provides that the appropriateness of an award of attorney's fees is clearly for the chancellor to determine. We do not find that the chancellor abused his discretion in declining to award attorney's fees. Thus, this issue is without merit

THE JUDGMENT OF THE CHANCERY COURT OF AMITE COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. COLEMAN, J., NOT PARTICIPATING.