

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00263 COA

CONSOLIDATED WITH

NO. 96-CA-00351 COA

ROBERT CHUMBLEY AND OLENE CHUMBLEY

APPELLANTS

v.

CHAMPION INTERNATIONAL CORPORATION

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. FRANK ALLISON RUSSELL

COURT FROM WHICH APPEALED: ITAWAMBA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

GARY CARNATHAN

ATTORNEY FOR APPELLEES:

MICHAEL DAVID TAPSCOTT NATURE OF THE CASE: SUMMARY JUDGMENT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED FOR CHAMPION

MANDATE ISSUED: 6/10/97

BEFORE BRIDGES, C.J., McMILLIN, P.J., AND THOMAS, P.J.

THOMAS, P.J., FOR THE COURT:

Robert and Olene Chumbley (hereinafter Chumbley) appeal from the judgment of the Circuit Court of Itawamba County granting summary judgment in favor of Champion International Corporation (hereinafter Champion). Aggrieved by the circuit court's ruling, Chumbley alleges the following as reversible error:

I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING CHAMPION INTERNATIONAL CORPORATION'S MOTION FOR SUMMARY JUDGMENT.

II. WHETHER CHAMPION INTERNATIONAL CORPORATION CAN BE LIABLE TO THE CHUMBLEYS UNDER MISSISSIPPI CODE ANNOTATED SECTION 95-5-10.

III. WHETHER CHAMPION INTERNATIONAL CORPORATION'S EMPLOYEE, GORDON GEORGE, CONTRIBUTED TO THE TRESPASS ON THE CHUMBLEY PROPERTY.

Holding Chumbley's assignments of error to be without merit, we affirm the circuit court's grant of summary judgment in favor of Champion.

FACTS

In July of 1989 Champion's co-defendant, Johnny Miller, began cutting timber off of a tract of land adjacent to the Plaintiff Chumbley's property. The land upon which Miller was lawfully entitled to cut timber was owned by James Manasco. According to Chumbley's allegations, Miller encroached onto Chumbley's property and wrongfully "cut down, deadened, or destroyed" more than 1,605 trees of various species. Some of the timber allegedly cut from Chumbley's property was subsequently sold to Champion. Chumbley filed suit against Miller and Champion alleging that they were jointly and severally liable to him for the destruction of the trees, pursuant to section 95-5-10 of the Mississippi Code. Chumbley also sued for damages caused by the erosion to his property that occurred as a result of the alleged wrongful timber harvest. It is from the circuit court's grant of Champion's motion for summary judgment that Chumbley prosecutes the instant appeal.

I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING CHAMPION INTERNATIONAL CORPORATION'S MOTION FOR SUMMARY JUDGMENT.

Chumbley does not allege that Champion or its agents or employees actually engaged in the wrongful cutting of trees from his property. Rather, Chumbley contends that Champion is liable to him under section 95-5-10(1) of the Mississippi Code because the actions of its employee, Gordon George, "in some way resulted in the trespass on the Chumbley property." Chumbley argues that liability under section 95-5-10(1) is not limited to persons who actually engage in the wrongful cutting of trees, but rather that the statute impliedly creates a form of aiding and abetting liability. While acknowledging that "this statute appears to hold liable only those persons who actually participated in the wrongful cutting and removal of another's timber," Chumbley argues that the statute extends liability to those who "in some way aid or contribute to the trespass." Although Chumbley's argument is somewhat vague, essentially he seems to claim that by assisting Miller in locating one of the boundary lines of the property adjacent to his, Champion assumed a duty to insure that all the boundaries of the adjacent tract of land were properly delineated. Accordingly, Chumbley appears to argue that it was Champion's duty to prevent Miller from straying from the area in which Miller was legally entitled to

cut timber. Chumbley concludes by asserting that Champion's assistance to Miller in "running" one of the property lines could have "led to the trespass on Chumbley's property," thereby creating a genuine, material factual issue so as to render the grant of summary judgment inappropriate.

Champion responds by arguing that Section 95-5-10(1) of the Mississippi Code imposes liability only upon those persons (or their agents or employees) who wrongfully cut down, deaden, or destroy the timber of another, and does not create the aiding and abetting liability that Chumbley contends. Champion contends that because neither it nor its agents or employees engaged in the cutting of trees from Chumbley's property, Champion can not be held liable under section 95-5-10(1). In the alternative, Champion argues that even if section 95-5-10(1) imposed liability for aiding and abetting the wrongful removal of another's timber, no Champion agent or employee was involved in any action that could have "led to the trespass on the Chumbley property." Champion argues that it had no duty to keep Miller off of Chumbley's property, as Miller (the party who allegedly engaged in the wrongful cutting) was not an agent or employee of Champion. The undisputed facts indicate that none of Champion's agents or employees were involved in "running" the boundary line separating Chumbley's property from the property on which Miller was lawfully entitled to cut timber. Champion argues that in the absence of a genuine, material factual issue regarding any alleged duty flowing from it to Chumbley, the trial court's grant of summary judgment was mandated by Rule 56 (c) of the Mississippi Rules of Civil Procedure.

Mississippi's summary judgment rule provides that summary judgment shall be entered by a trial judge "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. Pro. 56(c). The burden of showing that no genuine issue of material fact exists is on the moving party (Champion), and the non-movant (Chumbley) is given the benefit of every reasonable doubt. *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990). As the Mississippi Supreme Court has stated, "[a]ll that is required of a non-movant to survive a motion for summary judgment is to establish a genuine issue of material fact by the means available under the rule." *Lyle v. Mladinich*, 584 So. 2d 397, 398 (Miss. 1991). All evidentiary matters are examined in the light most favorable to the party against whom the summary judgment motion has been made. *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983). Furthermore, it is standard practice that "[a]ll motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side of denying the motion." *Ratliff v. Ratliff*, 500 So. 2d 981, 981 (Miss. 1986).

The focal point on our standard for summary judgment is on material facts. In defining a "material" fact in the context of summary judgments, our supreme court has stated that "[t]he presence of fact issues in the record does not *per se* entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, *one that matters in an outcome determinative sense*." *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985) (emphasis added). In *Shaw*, the court further stated that "we have kept ever before us that basic tenet of Rule 56 theology that the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the *material* issues of fact." *Shaw*, 481 So. 2d at 252. Importantly, the parties are responsible for the production of evidence corresponding to their respective burdens at trial. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 600 (Miss. 1993). Summary judgment should only be granted when it is shown, beyond a reasonable doubt, that the non-movant (Chumbley) would be

unable to prove any facts to support his claim. *Downs v. Choo*, 656 So. 2d 84, 85-86 (Miss. 1995). This Court employs a *de novo* review of a trial court's grant of summary judgment. *McMichael v. Nu-Way Steel and Supply, Inc.*, 563 So. 2d 1371, 1374 (Miss. 1990).

Under the facts at bar, Chumbley appears to base his claim against Champion on two theories of liability. First, as detailed above, Chumbley argues for an implied aiding and abetting theory of liability under section 95-5-10 (1) of the Mississippi Code, contending that Champion's actions "in some way resulted in the trespass on the Chumbley property." Second, underlying his statutory claim seems to be a general negligence theory, under which Chumbley apparently claims that Champion's actions in helping Miller locate a property line could have "led to the trespass on the Chumbley property."

Regarding Chumbley's argument that Champion could be liable to him under section 95-5-10(1), we hold such assertion to be without merit and that it fails to state a claim upon which relief may be granted. This Court's conclusion is based upon our reading of the plain meaning of this statute, notwithstanding Chumbley's reliance on other now-repealed statutes dealing with tree cutting. *See Jones v. Mississippi Employment Sec. Comm'n*, 648 So. 2d 1138, 1142 (Miss. 1995) (holding that "when called upon to apply statutes to specific factual situations, we apply the statutes literally according to their plain meaning"); *City of Natchez v. Sullivan*, 612 So. 2d 1087, 1089 (Miss. 1992) (stating that when statute is unambiguous, court should apply statute according to its plain meaning and not use principles of statutory construction). Section 95-5-10(1) clearly and unequivocally requires that to establish a right to recover under its provisions, the plaintiff must show "that such timber was cut down, deadened, destroyed or taken away by the defendant, his agents or employees, without the consent of such owner." Miss. Code Ann. 95-5-10(1) (Rev. 1994) (emphasis added). Contrary to Chumbley's contentions, we hold that this statute imposes no liability upon persons who do not actually engage in the wrongful cutting. Merely "in some way aiding or contributing to the trespass" is not an action for which a person incurs liability under section 95-5-10(1). Clearly this statute imposes liability only upon those persons who actually do the cutting, or upon persons whose agents or employees perform the cutting within the scope of their employment or agency relationship.

Regarding Chumbley's assertion that Champion could be liable to him if the actions of Champion's employee "led to the trespass on the Chumbley property," we hold such allegation to be without merit. Chumbley's argument must fail under any sort of negligence theory because Chumbley has failed to establish that Champion had a legal duty to prevent Miller from cutting timber off of Chumbley's property. *See May v. V.F.W. Post No. 2539*, 577 So. 2d 372, 375 (Miss. 1991) (stating that under Mississippi law plaintiff must show duty, breach of duty, causation, and damages). The undisputed facts clearly show that Miller (the party who allegedly did the wrongful cutting) was not an agent or employee of Champion, and that the parcel of property adjacent to Chumbley's did not belong to Champion; it was owned by James Manasco. Additionally, the undisputed facts indicate that none of Champion's agents or employees were involved in "running" the boundary line separating Chumbley's property from the property on which Miller was lawfully entitled to cut timber. Chumbley simply failed to bring forth any legal basis upon which Champion owed him a duty to properly delineate the property lines of the adjacent parcel, or a duty to insure that persons cutting timber on the adjacent property did not stray onto Chumbley's.

In light of the forging analysis, it is clear that even if all the facts as alleged by Chumbley were

accepted as true, he would have no legally cognizable claim against Champion under either section 95-5-10 or a negligence theory. Because Champion demonstrated a complete failure of proof on an essential element of Chumbley's claim, i.e. the existence of a duty from Champion to Chumbley, any other factual issues thereby became immaterial and Champion was entitled to summary judgment as a matter of law. *See Grisham v. John Q. Long V.F.W. Post No. 4057, Inc.*, 519 So. 2d 413, 416 (Miss. 1988) (holding that "when the moving party can show *a complete failure of proof* on an essential element of the claim or defense, then all other issues become immaterial, and the moving party is entitled to judgment as a matter of law"). This assignment of error is without merit.

II. WHETHER CHAMPION INTERNATIONAL CORPORATION CAN BE LIABLE TO THE CHUMBLEYS UNDER MISSISSIPPI CODE ANNOTATED SECTION 95-5-10.

As discussed in conjunction with Chumbley's first assignment of error, this Court holds that section 95-5-10 of the Mississippi Code imposes liability only upon persons who actually engage in the wrongful cutting of timber, or upon persons whose agents or employees perform the wrongful cutting within the scope of their employment or agency relationship. Because the person (Miller) who allegedly engaged in the wrongful cutting of Chumbley's timber was not an agent or employee of Champion, Champion can not be liable under this statute. This assignment of error is without merit.

III. WHETHER CHAMPION INTERNATIONAL CORPORATION'S EMPLOYEE GORDON GEORGE CONTRIBUTED TO THE TRESPASS ON THE CHUMBLEY PROPERTY.

As discussed in conjunction with Chumbley's first assignment of error, Chumbley failed to establish that Champion had a legal duty to keep Miller off of his property. In the absence of any duty to control Miller's actions, Champion cannot be held responsible for Miller's alleged wrongful cutting of timber from Chumbley's property. Accordingly, this assignment of error must fail.

THE JUDGMENT OF THE CIRCUIT COURT OF ITAWAMBA COUNTY IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HINKEBEIN, J., NOT PARTICIPATING.