THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN W. DAVIS AND
NATIONWIDE MANAGEMENT LIMITED PARTNERSHIP — APPELLANTS

VS. — CASE # 2006-CA-01276

PATRICK R. BOSSETTA — APPELLEE/CROSS-APPELLANT

Appeal from the Chancery Court
of Pike County, Mississippi

APPELLEE/CROSS-APPELLANT'S BRIEF

Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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 disqualification or recusal.

1. **Paul N. Davis**, Appellant's Attorney
   Jackson, Mississippi

2. **W. Stewart Robison & Jose' B. Simo**, Appellee/Cross-Appellant's Attorneys
   McComb, Mississippi

3. **Honorable Debbra K. Halford,** Chancellor
   Magnolia, Mississippi

4. **John W. Davis**, Appellant

5. **Nationwide Management Limited Partnership**, Appellant

6. **Patrick Bossetta**, Appellee/Cross-Appellant

JOSE' B. SIMO
ATTORNEY FOR APPELLEE/CROSS-APPELLANT

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Issue on Cross-Appeal

Bossetta is entitled to his attorney fees proven in the trial court.

STATEMENT OF THE CASE

A. Course of Proceedings in the Lower Court

On May 11, 2005, Patrick R. Bossetta ("Bossetta"), the Appellee and Cross-Appellant herein, filed a Complaint for Injunction, Damages and Other Relief in the Chancery Court of Pike County, Mississippi, against John W. Davis ("Davis") and Nationwide Management Limited Partnership ("Nationwide"). (C.P. 6). Bossetta sought to enjoin Davis and Nationwide from interfering with the easement by which he accessed his property over land owned by Davis and Nationwide. Davis and Nationwide filed an Answer and Affirmative Defenses and Counterclaim on May 25, 2005. (C.P. 17).

After a hearing May 26, 2005, the Chancery Court of Pike County, Mississippi, granted Bossetta's request for a preliminary injunction. (C.P. 51). On June 17, 2005, the Preliminary Injunction was filed in which the court ordered Davis and Nationwide to remove the berms Davis constructed, preventing Bossetta's access to his property. (C.P. 51). Both Davis and Nationwide were

enjoined from interfering with Bossetta's peaceful use and enjoyment of the easement. (C.P. 51).

On September 30, 2005, Bossetta filed a Motion for Citation for Contempt against Davis and Nationwide for failing to restore the easement to its condition prior to the construction of the berms. (C.P. 116). Such motion was continued to the date of the trial on the merits.

Trial on the merits was conducted April 26, 2006, through April 28, 2006. Final judgment was entered July 6, 2006. (C.P. 361). The Chancellor held that Bossetta was entitled to both an access and utility easement by grant and implication, relocated the easement, and awarded Bossetta one-half of the attorney fees proved by him at trial. The chancery court also cited Davis and Nationwide for contempt, permanently enjoined Davis and Nationwide from interfering with the easements granted, and dismissed all of Davis and Nationwide's counterclaims. Davis and Nationwide timely filed a Notice of Appeal on August 1, 2006. (C.P. 370).

B. STATEMENT OF FACTS

Conveyances

Jane Stickney, et al. ("Stickney"), conveyed to Dale W. Hornsby and E. Lynn Singleton ("Hornsby and Singleton") approximately 138.2 acres of land, which included both the present Bossetta and Davis and Nationwide tracts, by Warranty Deed dated August 3, 1983. (Exh. 1). Also on August 3, 1983, Hornsby and Singleton executed a Deed of Trust to Thomas H. Walman, Trustee, for the benefit of Stickney, pledging the property conveyed by Stickney to Hornsby and Singleton as security for payment of the purchase price thereof. (Exh. 9). Both instruments contained language that made the conveyances "subject to . . . any existing right-of-ways for utility and/or road purposes now existing across said lands." (Exh. 1, Exh. 9).

On October 10, 1985, Hornsby and Singleton conveyed to John T. Madison and Geraldine B. Madison ("the Madisons") 1.11 acres from the 138.2 acre tract by Warranty Deed ("Madison Deed"). (Exh. 2). The Madison Deed granted the following road and utility easement across the original 138.2-acre tract ("Madison Easement") to the tract conveyed by Hornsby and Singleton to the Madisons:

B. A road and utility easement beginning at the intersection of Old

> Highway 51 and the Entrance Road to Chatawa Bluffs South, said point being South 988 feet and East 1553 feet from the Northwest corner of Section 13, T1N, R7E, Pike County, Mississippi; thence Southwesterly with the Entrance Road approximately 2175 feet to the intersection with a road running Southerly; thence turning Southerly with the Entrance Road go approximately 1485 feet to the North line of the Tiger Enterprises, Inc. property, also known as the Chatawa Bluffs South, also being the beginning point of a road know as Stone Ridge Road; thence with Stone Ridge Road go Southerly approximately 2200 feet to the intersection with Delta road; thence continuing Southeasterly and Southerly with Stone Ridge Road go approximately 2700 feet to the end of this easement near the North line of the above described 1.11 acre tract.

On October 11, 1985, First Bank, Stickney's successor in interest, executed a Partial Cancellation, releasing the 1.11-acre Madison tract from the Deed of Trust executed by Stickney in 1983. (Exh. 37, Exh. 38). The Partial Cancellation did not mention the subject road and utility easement.

On October 14, 1987, the Stickney Deed of Trust was foreclosed by Substituted Trustee's Deed. Keith Starrett, Substituted Trustee, conveyed to First Bank the 138.2-acre tract, less and except the Madison tract. (Exh. 11). The Trustee's Deed contained language that made the conveyance "subject to . . . Any existing right of way for utility and/or road purposes now existing across said lands." (Exh. 11).

On March 29, 1993, First Bank conveyed the conveyed the 138.2-acre tract (currently the Davis and Nationwide tract), less and except the Madison tract and other tracts previously conveyed, to Michael Corbin and Linda S. Corbin ("the Corbins"). (Exh. 12). By Warranty Deed executed March 2, 1998, the Corbins conveyed to John W. Davis and Sandra K. Davis the 138.2-acre tract less the 1.11-acre Madison tract and other tracts previously conveyed. (Exh. 13). On June 17, 1999, title to the same property was transferred to Nationwide, a limited partnership, of which Davis is managing partner. (Exh. 14).

The Madisons executed a Deed of Trust to Robert G. Barnett, as Trustee for the benefit of Deposit Guaranty National Bank on October 10, 1985. (Exh. 3). By Quitclaim Deed executed on October 31, 1998, the Madisons conveyed the 1.11 acre to Deposit Guaranty National Bank. (Exh. 5). On September 29, 1989, Deposit Guaranty National Bank executed a Special Warranty Deed to

Charles J. Hughes and Sharon F. Hughes ("Hughes") conveying the 1.11-acre Madison Tract. (Exh. 6). The deed specifically stated that the tract was served by and subject to any existing road and utility easements. *Id.* The deed then goes on to describe the easement in question. *Id.*

By Warranty Deed executed November 30, 2002, Hughes conveyed to St. Mary's Farms of Louisiana, LLC, of which Bossetta is an officer, the 1.11 acre as part of a larger tract. This Warranty Deed stated that the tract was served by the easement over the Davis and Nationwide land. (Exh. 7). By Warranty Deed executed November 5, 2003, St. Mary's Farms of Louisiana, LLC, conveyed to Bossetta the tract conveyed by Hughes to St. Mary's Farms in 2002. (Exh. 8). The last paragraph of the deed states that it is "made with any and all recorded or unrecorded road and utility easements, rights of way, servitudes of any type, nature and kind, rights of ingress and egress, and any other claims, causes of action, suits or demands relating to the property described on the attached exhibits." The attached Exhibit "A" to the deed also contains a description of the subject easement. *Id.*

Witnesses

James O. Long testified that he performed bulldozer work for John W. Davis in January 2005. (T. 55). Long testified that he was directed by John W. Davis to work on what he described as an old roadbed. (T. 56). He described the work he performed as preparation for planting trees and constructing wind rows. (T. 57). Long also testified he constructed berms across the clay gravel roadbed that was in place. (T. 58). Long testified that after construction of the berms the roadway would have been impassable to vehicular traffic. (T. 58). Long also testified that he did not construct berms on the entire roadway through Davis' property. (T. 67). He only constructed the berms in the vicinity of the Bossetta's green gate[1] to the end of the road. (T. 68).

Daniel Wayne Vielee testified that he performed bulldozer work for Patrick Bossetta in late November 2005. (T. 70-71). Vielee stated he was hired to restore a gravel road that had some berms

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1 Bossetta erected a gate in the fence line of his property, commonly referred to in the lower court case and this appeal as the "green gate." (T. 25).

across it. (T. 71). Vielee said he put the road back in the shape a vehicle could pass on it. (T. 71). He described the condition of the roadway before he performed his work as "ruts every three foot that cut across the road . . . and they were about two and half feet tall." (T. 71). He noted that before his restoration work the road was impassable due to the berms and loose soil. (T. 72). Vielee testified a bulldozer and gravel trucks were necessary to perform the road restoration work, and a tractor and box blade would not have been able to accomplish the work. (T. 77). Vielee also stated the work he performed was on Bossetta's right-of-way near the green gate. (T. 78).

Darlene Hughes testified that in 1996, she and her husband, Robert, wanted to run utilities to their land which was adjacent to the 1.11-acre tract. (T. 126). She also stated that she and her husband filed suit in an attempt to run utilities to their land. (T. 132). While she and her husband owned the land adjacent to the 1.11-acre tract, they were there at least several times a week.[2] (T. 132). Mrs. Hughes stated the access road to the land was rough, but not impassable. (T. 134). On the days the Hughes were enjoying their land they used a generator to power an air conditioner and a pump. (T. 137). Mrs. Hughes said the lawsuit to obtain utilities stalled when the attorney she and her husband retained closed his law practice. (T. 139-140).

Robert Hughes, Darlene Hughes' husband, testified that he sold his property to Patrick Bossetta in 2004.[3] (T. 146). During his ownership of the land adjacent to the 1.11-acre tract, Robert Hughes testified he built a cabin on it and used a generator to power lights at the cabin. (T. 147). Mr. Hughes periodically maintained the ingress and egress roadway with a bushhog. (T. 148). He and his brother also hired a third party to re-work the roadway which provided access to their land. (T. 148). Mr. Hughes never asked Davis for permission to use the road by which he accessed his property or make any improvements to the roadway. (T. 150). Mr. Hughes stated the filing of the lawsuit to obtain utilities was precipitated by Davis' disagreement with the Hughes about running

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2 The Hughes owned the land for approximately ten (10) years.

3 This land is adjacent to the 1.11-acre tract, and Bossetta purchased same from Robert and Darlene Hughes after purchasing the 1.11-acre Madison Tract.

utilities to their camp. (T. 151). Mr. Hughes testified that in the fence between the Davis/Nationwide tract and the 1.11-acre Bossetta tract there was a gap[4] that existed since 1989. (T. 158).

Charles Hughes stated he sold the 1.11-acre tract to Bossetta in 2002. (T. 179). Charles testified that by virtue of his deed from Deposit Guaranty National Bank he obtained an easement to access the 1.11-acre tract. (T. 177-178). Charles stated he used this easement as the sole means of ingress and egress to his property. (T. 178). Charles would go to the 1.11 acre tract every other week during the time he owned it. (T. 178). Charles described the access roadway as "a small patch of blacktop . . . and from there it was graveled down to my place." (T. 179). Again, Charles testified that he and his brother, Robert, maintained the roadway by bushhogging, adding new gravel and installing some culverts. (T. 179). Charles also said that he never asked Davis for permission to use the road from 1989, to 2002. (T. 180). He also mentioned the lawsuit by which he an his brother attempted to have utilities run to their land. (T. 181).

Patrick R. Bossetta testified that the 1.11-acre Madison Tract and the Davis and Nationwide tract once had common ownership. (T. 216). He stated that he acquired the property in 2002. (T. 214). Bossetta testified that he negotiated with Davis over the purchase of some of the Davis and Nationwide property in 2002. (T. 227). Bossetta said he became aware of the aforementioned gap in the fence shortly after he purchased the property. (T. 231). He stated he used the gap in the fence to access his property. (T. 231). Bossetta repaired the fence and the gap and erected a gate (the "green gate") in order to keep animals which he had on his property within the fenced area. (T. 232). He installed the green gate twenty (20) to thirty (30) feet from where the gap was located due to topography of the land. (T. 233). In the course of installing the green gate, Bossetta admitted he cut several small trees on Davis' property. (T. 283-284).Bossetta stated that in January 2005, he was notified by his wife while deployed to Iraq that berms were erected across the roadway near the green gate which rendered his property along the Tangiphoa River inaccessible. (T. 26, 236).

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[4] The gap was actually a wire gate which could be removed from the fence post in order for one to gain access to the Davis/Nationwide property located on the other side of the fence.

As heretofore stated, Bossetta filed suit to require Davis to remove the berms so that Bossetta could again gain access to his property. (C.P. 6). The Chancery Court granted the requested preliminary injunction Bossetta sought and ordered Davis to restore the road to its previous condition. (C.P. 51). Bossetta testified that even after Davis attempted to restore the roadway it remained impassable to vehicular traffic. (T. 239). Bossetta testified regarding his employment of Daniel Vielee to restore the road after Davis' purported attempt to do so. (T. 241).

John W. Davis testified he purchased 534 acres in the Chatawa Bluffs area in 1991, in two (2) transactions. (T. 313). Davis stated that in 1995, he was approached by Charles Hughes to run power to the Hughes' property. (T. 323). Davis testified he maintained the roadway in question with a bushhog and additional gravel. (T. 325). He said Bossetta was allowed to use the gap in the fence, but that Davis required Bossetta to call him in advance, though Bossetta never did. (T. 327).

Davis said that after he had the berms constructed he planted pine trees in the roadway between the berms. (T. 367). Davis stated that after the initial chancery court proceedings in which he was ordered to restore the roadway, he personally took his tractor and attempted to smooth the roadway. (T. 334-335, 392). Davis said that after he finished his work he did not leave any berms in the roadway. (T. 342). He also said that after the Vielees had completed their work a vehicle could not have passed on the roadway. (T. 335).

Davis testified that in constructing the green gate Bossetta cut one (1) tree that was six (6) inches in diameter, three (3) more that were about four (4) inches in diameter, and about fifteen (15) saplings. (T. 344).

Bossetta introduced a video tape into evidence at trial and played during the testimonies of Darlene Hughes and Robert Hughes. (T. 125, 151). The videotape depicted the entire easement in question.

SUMMARY OF THE ARGUMENT

The chancery court did not err in finding that Bossetta is entitled to an easement by implication. The tracts of land at issue in the instant appeal were once part of a larger, common tract. Well established Mississippi law states an easement by implication arises when part of a commonly-

owned tract of land is severed in such a way that either portion of the property has been rendered inaccessible except by passing over the other portion or by trespassing on the lands of another.

The chancery court did not err in finding Bossetta is entitled to an easement by grant. Both the Bossetta and the Davis and Nationwide chains of title contain numerous references to the easement in question. Davis and Nationwide had actual and constructive notice that an easement existed over the property the owned.

The holding in *Cox v. Trustmark National Bank*, 733 So.2d 353 (Miss. Ct. App. 1999), conclusively establishes that the easement by implication over the Davis and Nationwide tract was released from the Stickney/First Bank deed of trust, thereby subordinating the deed of trust to the implied easement in this case.

The chancery court did not abuse its discretion in finding Davis and Nationwide in contempt. The chancellor heard all testimony and viewed numerous photographs regarding the construction of berms and restoration of the roadway. There was ample credible evidence in the record by which the chancellor rightly concluded that Davis and Nationwide were in contempt.

The chancery court did not err in finding that Bossetta was entitled to a utility easement. The original severance of the 138.2-acre tract created the easement by implication for whatever is beneficial for the enjoyment and use of the 1.11-acre landlocked tract. Also, numerous conveyances in both chains of title were made subject to the easement.

The Mississippi Supreme Court has held that an award of punitive damages is not a prerequisite for an award of attorney fees. Accordingly, the chancery court did not err in awarding Bossetta attorney fees, and Bossetta is entitled to all of the fees proved in the trial court due to the conduct of Davis and Nationwide.

ARGUMENT

Standard of Review

A reviewing court applies a limited standard of review on appeals from chancery court. *Tucker v. Prisock*, 791 So.2d 190 (Miss. 2001) (citing *Redell v. Redell*, 696 So.2d 287 (Miss. 1997)). An appellate court should not interfere with the Chancellor's findings of fact unless they were

"manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Tucker*, 791 So.2d at 192, (quoting *Bell v. Parker*, 563 So.2d 594, 596-597 (Miss. 1990)). The Court has further stated, "This Court will accept a chancellor's finding of fact as long as the evidence in the record reasonably supports those findings." *Lee Hawkins Realty, Inc., v. Moss*, 724 So.2d 1116, 1118 (Miss. Ct. App. 1998). However, the chancery court's interpretation and application of law is reviewed under a *de novo* standard. *Tucker*, 791 So.2d at 192, (citing *In re Carney*, 758 So.2d 1017, 1019 (Miss. 2000).

Issue 1. The chancery court did not err in finding Bossetta entitled to an easement by implication.

It is well-established that an easement by implication arises by implied grant when a part of a commonly-owned tract of land is severed in such a way that either portion of the property has been rendered inaccessible except by passing over the other portion or by trespassing on the lands of another. *Broadhead v. Terpening*, 611 So.2d 949, 953 (Miss. 1992). The term easement by implication is considered the same as the term easement by necessity. *Broadhead*, 611 So.2d at 953. Such easements or rights-of-way by necessity last as long as the necessity exists and terminate when other access to the landlocked parcel becomes available. *Id.* (citing *Taylor v. Hays*, 551 So.2d 906, 908 (Miss. 1998) and *Thornton v. McLeary*, 161 Miss. 697, 702-703, 137 So. 785, 786-787 (1931)).

In the *Broadhead* case it was undisputed that the two tracts at issue were once owned by a single family. In this respect, the facts of the case are the same as the case *sub judice*. Both the Bossetta and Davis and Nationwide tracts were once part of a larger, common tract. The conveyance from Hornsby and Singleton to Madison isolated the Madison tract from road access. Without such an easement, Madison, and presently Bossetta, would not have been able to fully enjoy and use the land.

Davis and Nationwide allege that Bossetta's tract is not truly landlocked, and therefore, there is no strict necessity for the easement due to its frontage on the Tangipahoa River. (Appellant's Brief 10, 27). While true in the absolute, literal sense, this reasoning is flawed. Appellant quotes from *Rowell v. Turnage*, 618 So.2d 81 (Miss. 1993) that "without necessity there is no basis for such an easement and where justified the easement is a limited one . . The necessity must be real and not

merely convenience." However, the entire passage from *Rowell* which they quote states:

> An easement born of necessity is termed an easement by implication or an implied easement. The necessity must be real and not merely convenience. Such an easement is created, if at all, by conveyance. *Implicit in a sale by the owner of a tract of land, bordering on a main road of a rear section of the land having no access to the road, may be a right of way easement over the vendor's land to the road.*

Rowell, 618 So.2d at 85, (quoting R. Eubanks and R. Bouchard, *Harvey Law of Real Property and Title Closing*, § 301.02 at p. 177 (1985)); (Emphasis added). The Court in *Rowell* goes on to say:

> A "way of necessity" is an "easement" arising from an implied grant or implied reservation, and it is the result of the application of the principle that whenever a person conveys property, *he conveys whatever is necessary for the beneficial use of that property*, and retains whatever is necessary for the beneficial use of the land he still possesses.

Rowell, 618 So.2d at 85, (quoting *Tiffany Real Property* § 793 at 179 (3rd ed. Supp. 1990); (Emphasis added).

It is inconceivable that when they conveyed the 1.11-acre landlocked tract in 1985, Hornsby and Singleton intended for Madison, or any subsequent purchaser or successor in interest, to access the land from the Tangipahoa River. To assert that Bossetta should gain access to his land via the Tangipahoa River, in this day and age of the automobile, simply because he travels "pretty far" on the river for recreation and an overland route is not a "strict" necessity, is beyond any stretch of the imagination. "Necessity" means reasonable necessity, not absolute necessity. *Alpaugh v. Moore*, 568 So.2d 291, 295 (Miss. 1990) (citing *Quinn v. Holly*, 244 Miss. 808, 813, 146 So.2d 357, 359 (1962)); *See Rotenberry v. Renfro*, 214 So.2d 275 (Miss. 1968); *Reid v. Horne*, 208 So.2d 780 (1968).

Moreover, the Court has stated that such easements by implication /necessity are appurtenant to the dominant tenement and run with the land. *Pitts v. Foster*, 743 So.2d 1066, 1068 (Miss. Ct. App. 1999) (citing *Broadhead v. Terpening*, 611 So.2d 949, 953 (Miss. 1992)).

By severance of the common Hornsby and Singleton tract, an easement by implication was created over what is now the Davis and Nationwide tract to serve the landlocked Madison (Bossetta) tract. The created, implied easement, also conveyed by grant in the Madison Deed, is appurtenant to the dominant tenement. The easement requires no subsequent written conveyance because it is a

vested right for successive holders of the dominant tenement and remains binding on successive holders of the servient tenement, though it has been specifically referred to in numerous conveyances. *Pitts*, 743 So.2d at 1069; (Exh. 2, 5, 6, 7, 8). Accordingly, though it failed to mention the road and utility easement, the partial cancellation executed by First Bank in 1985, releasing the 1.11-acre Madison (Bossetta) tract also released the easement appurtenant to the Madison tract.

The chancery court correctly found that Bossetta was entitled to an easement by implication. The original 138.2-acre tract was severed in such a way that a landlocked parcel was created, requiring an easement for access and anything else necessary for the beneficial use of the property.

Issue 2. The chancery court did not err in finding Bossetta entitled to an easement by grant.

The Warranty Deed executed October 10, 1985, from Hornsby and Singleton to Madison conveyed 1.11 acre, which is presently the tract owned by Bossetta. The Deed contained language that the tract was to be served by the easement described below:

> B. A road and utility easement beginning at the intersection of Old Highway 51 and the Entrance Road to Chatawa Bluffs South, said point being South 988 feet and East 1553 feet from the Northwest corner of Section 13, T1N, R7E, Pike County, Mississippi; thence Southwesterly with the Entrance Road approximately 2175 feet to the intersection with a road running Southerly; thence turning Southerly with the Entrance Road go approximately 1485 feet to the North line of the Tiger Enterprises, Inc. property, also known as the Chatawa Bluffs South, also being the beginning point of a road know as Stone Ridge Road; thence with Stone Ridge Road go Southerly approximately 2200 feet to the intersection with Delta road; thence continuing Southeasterly and Southerly with Stone Ridge Road go approximately 2700 feet to the end of this easement near the North line of the above described 1.11 acre tract.

(Exh. 2). Also, the Quitclaim Deed executed by Madison to Deposit Guaranty National Bank on October 31, 1988, included language that states the 1.11-acre tract was to be served by the easement described *supra*. (Exh. 5). On September 29, 1989, Deposit Guaranty National Bank executed a Special Warranty Deed to Charles J. Hughes and Sharon F. Hughes ("Hughes") in which it was stated that the 1.11-acre tract was to be served by the subject easement. (Exh. 6).

By Warranty Deed executed November 30, 2002, Hughes conveyed to St. Mary's Farms of Louisiana, LLC, of which Bossetta is an officer, the 1.11 acre as part of a larger tract. Again, the

instrument stated that the tract was served by the easement over the Davis and Nationwide land. (Exh. 7). St. Mary's Farms of Louisiana, LLC, conveyed to Bossetta by Warranty Deed the tract conveyed by Hughes to St. Mary's Farms in 2002. (Exh. 8). The last paragraph of the deed states that it is "made with any and all recorded or unrecorded road and utility easements, rights of way, servitudes of any type, nature and kind, rights of ingress and egress, and any other claims, causes of action, suits or demands relating to the property described on the attached exhibits." The attached Exhibit "A" to the deed also contains a description of the subject easement.

In addition, numerous instruments in Davis and Nationwide's chain of title contain language which demonstrates that the Davis and Nationwide tract is burdened by Bossetta's easement. Page 592 of the Substituted Trustee's Deed executed September 18, 1987, by Keith Starrett states that "This Deed is *subject to* the following . . . 3. Any existing right of way for utility and/or road purposes now existing across said lands." (Exh. 11, Emphasis added). The Substituted Trustee's Notice of Sale within the Substituted Trustee's Deed, states "The Deed of Trust was *subject to* the following . . . 3. Any existing right of way for utility and/or road purposes now existing across said lands." *Id.*

In the Special Warranty Deed executed March 29, 1993, from First Bank to Michael Corbin and Linda S. Corbin ("Corbin") the following language appears at the end of the legal description: "*SUBJECT TO* ALL EXISTING EASEMENTS AND RIGHTS OF WAY." (Exh. 12, Emphasis added). The Warranty Deed executed March 2, 1998, from Michael Corbin and Linda S. Corbin to John W. Davis and Sandra K. Davis contains the following: *Subject to* . . . any existing rights of way [and] *Subject to* all existing easements and rights-of-way. (Exh. 13, Emphasis added).

In the case of *Texaco, Inc., v. Junior Pigott, et al.*, 235 F. Supp. 458 (S.D. Miss. 1964), the Court considered the language "subject to" in a conveyance, and concluded:

> the words "subject to" mean "subservient to" or "limited by" . . . "Subject to" as used in the referring to an earlier conveyance or lease means that title passed in the subsequent instrument was "subject to" the earlier lease. These words are words of qualification showing the grantor's intent not to grant an absolute title.

Texaco, 235 F.Supp. 458, 462.

In the case of *Stockstill v. Gammill*, 943 So.2d 35 (Miss. 2006), the Mississippi Supreme Court stated:

> A purchaser of land is charged with notice not only of every statement of fact made in the various conveyances constituting his chain of title, but he is also bound to take notice of and to fully explore and investigate all facts to which his attention may be directed by recitals in said conveyance contained. A duty is also imposed on him to examine all deeds and conveyances previously executed and placed of record by his grantor - either immediately or remote - if such deeds or conveyances in any way affect his title. And if in any such deed or conveyance there is contained any recital sufficient to put a reasonably prudent man on inquiry as to the sufficiency of the title, then he is charged with notice of all of those facts which could and would be disclosed by a diligent and careful investigation.

Stockstill v. Gammill, 943 So.2d 35, 43 (Miss. 2006) (quoting *Dead River Fishing and Hunting Club v. Stovall, et al.* 147 Miss. 385, 113 So. 336, 338); *See Florida Gas Exploration Company, et al., v. J. C. Searcy, et al.* 385 So.2d 1293 (Miss. 1980).

Citing the *Dead River Fishing and Hunting Club v. Stovall, et al.* case with approval in the case of *Keppner, et al. v. Gulf Shores, Inc., et al.*, 462 So.2d 719 (1985), the Mississippi Supreme Court concluded that reference to an easement agreement in one's chain of title, coupled with language in the recorded easement was sufficient to put a reasonably prudent man on notice to inquire of an arrangement between his predecessors in title relative to the easement.

The chancellor did not err in finding that Bossetta is entitled to an easement by grant. Both the Bossetta and the Davis and Nationwide chains of title contain references and the specific description of the easement in question. Clearly, Davis and Nationwide had actual and constructive notice that their land is burdened by the easement which serves the landlocked 1.11-acre tract.

Issue 3. Following the holding of *Cox v. Trustmark National Bank*, 733 So.2d 353 (Miss. Ct. App. 1999), the chancery court did not err in finding that the easement over the Davis and Nationwide tract was released from the Stickney/First Bank deed of trust, thereby subordinating the deed of trust to the implied easement.

Davis and Nationwide are correct in concluding that *Cox v. Trustmark National Bank*, 733 So.2d 353 (Miss. Ct. App. 1999) will be applied to Bossetta's argument. The *Cox* case precisely addresses one of the issues central to this appeal. The Court's reasoning and resolution in *Cox* should also be applied to case *sub judice*.

In *Cox*, John Cox conveyed a parcel of real estate to Patricia Jones. *Cox*, 733 So.2d at 355. Cox accepted Jones' deed of trust to secure payment of the purchase price of the land. *Id.* Jones then deeded an interior, landlocked portion of the land to Whitney Company, Inc. *Id.* Cox released Whitney Company's tract from his deed of trust. Id. Whitney Company then executed a deed of trust in favor of Trustmark National Bank. *Id.*

Trustmark foreclosed on the Whitney property, then sued Cox and Jones contending that easement to Cox's deed of trust should be declared to exist across the exterior portion of the land retained by Jones. *Id.* Cox then foreclosed his deed of trust, thereby extinguishing Jones' interest in the property.

The lower court held that an easement by necessity was created when Jones conveyed the landlocked Whitney parcel while retaining the exterior accessible portion of the land. *Id.* From that Judgment, Cox appealed. *Id.*

On appeal, the Court held that Cox's release of the interior of the Whitney/Trustmark tract from his deed of trust also released the easement by implication that existed with regard to such land. *Cox*, 733 So.2d at 358. In so holding, the Court noted that, "the only means for the owner of the entirety to prevent the creation of an easement by necessity when a landlocked tract is created is by specific language in the conveyance or by other evidence to show the intent that no easement be created." *Cox*, 733 So.2d at 358, (citing *Pencader Associates, Inc., v. Glasgow Trust*, 446 A2d 1097, 110 (Del. 1982)). In holding that the implied easement to the interior tract was also released when Cox released the interior tract from his deed of trust, the Court found that "for the release of the [interior] tract not also to have released the necessary appurtenant easement, the release would specifically have had to retain the lien on the easement across the non-released tract." *Cox*, 733 So.2d at 358. Finally, the Court held, "*Cox* had no rights in the easement even after foreclosing. . ." *Id.*

Under Mississippi law as established and interpreted by *Cox*, First Bank, by releasing the Madison (now Bossetta) tract from the Stickney deed of trust, also released the easement appurtenant thereto. First Bank and its grantees, Davis and Nationwide, like the Defendant in *Cox*, obtained no interest in the subject road and utility easement by virtue of First Bank's foreclosure of the Davis and

Nationwide tract.

As stated in the discussion of Issue 1 *supra*, easements by implication are appurtenant to the dominant tenement and run with the land. First Bank and its successors in title, the Corbins, as well as Davis and Nationwide, obtained no interest in the subject road and utility easements through First Bank's foreclosure of the servient Davis and Nationwide tenement. No written conveyance, reservation or exception was required to be included in the release executed by First Bank as the easement in question was a vested right for successive holders of the dominant tenement, such as Bossetta, and remain binding on the successive holders of the servient tenement, such as Davis and Nationwide.

Davis and Nationwide urge this Court overrule *Cox* and provide a discussion of other jurisdictions' law in support thereof. It is noted that the Court has held it is not bound by the decisions of courts of other jurisdictions on similar questions. *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1, 7 (Miss. 2007) (citing *Griffith v. Gulf Ref. Co.*, 215 Miss. 15, 36-37, 61 So.2d 306, 307 (1952)).

Issue 4. The chancery court did not err in citing Davis and Nationwide for contempt.

The Court has held that, "Contempt matters are committed to the substantial discretion of the trial court which, by institutional circumstance and both temporal and visual proximity, is infinitely more competent to decide the matter than we are." *Ellis v. Ellis*, 840 So.2d 806, 811 (Miss. Ct. App. 2003) (quoting *Varner v. Varner*, 666 So.2d 493, 496 (Miss. 1995)). "This Court will not reverse a contempt citation where the chancellor's findings are supported by credible evidence." *Ellis*, 840 So.2d at 811, (quoting *Goodson v. Goodson*, 816 So.2d 420, 422 (Miss. Ct. App. 2002). The Court has further stated that a citation for contempt is determined upon the facts of each case and is a matter for the trier of fact. *Weston v. Mounts*, 789 So.2d 822, 826 (Miss. Ct. App. 2001) (citing *Milam v. Milam*, 509 So.2d 864, 866 (Miss. 1987).

The chancellor had the opportunity to view the photographs and hear abundant testimony regarding construction of the berms and the subsequent feeble attempt by Davis to restore the

roadway to its previous condition.

Regarding the condition of the road after Davis' attempt to restore it, Daniel Vielee testified that ruts existed across the road that were approximately two and a half feet tall (T. 71). He stated that before his restoration work the road was impassable due to the berms and loose soil. (T. 72). Vielee testified a bulldozer and gravel trucks were necessary to perform the road restoration work and a tractor and box blade would not have been able to accomplish the work. (T. 77). Bossetta testified that after Davis attempted to restore the roadway it was still impassable to vehicular traffic. (T. 239). Quite simply, Davis knew he was making Bossetta's means of ingress and egress to his property impassable by constructing the berms or wind rows with a bulldozer, and thereafter, attempting to use his own tractor and box blade to correct his intentional wrong doing.

The chancellor heard the testimony from all parties, viewed numerous photographs of the area in question, and concluded that Davis and Nationwide were in contempt of the court's prior order. The chancellor did not abuse her discretion and her findings are supported by credible evidence in the record. As such, the chancellor did not err in concluding that Davis and Nationwide were in contempt.

Issue 5. The chancery court did not err in finding Bossetta entitled to a utility easement.

As has been stated *supra*, an easement by necessity will last as long as the necessity exists and will terminate after other access to the landlocked parcel becomes available. *Fike v. Shelton*, 860 So.2d 1227, 1231 (Miss. Ct. App. 2003) (citing *Pitts v. Foster*, 743 So.2d 1066, 1068-1069 (Miss. Ct. App. 1999)). The Court has also stated, "An implied easement may be highly convenient or essential to the full enjoyment of the land." *Tubb v. Monroe County Electric Power Association*, 912 So.2d 192, 197 (Miss. Ct. App. 2005) (citing *Fourth Davis Island Land Co. v. Parker*, 469 So.2d 516, 523 (Miss. 1985)). An easement by necessity applies the principle that whenever a person conveys property, he conveys whatever is necessary for the beneficial use of that property, and retains whatever is necessary for the beneficial use of the land he possesses. *Pitts v. Foster*, 743 So.2d 1066, 1068 (Miss. Ct. App. 1999).

As Davis and Nationwide have noted, no utilities were ever installed as a result of the original easement by implication and grant. However, the easement continued to be referenced in both the Bossetta and the Davis and Nationwide chains of title. Further, the Hughes filed suit in order to enforce their right to run utilities to their property[5].

Davis and Nationwide had actual and constructive notice that the easement, both for access and utilities, had not been abandoned. In the case *sub judice*, the conveyance of the original easement conveyed whatever is necessary for the beneficial use of the property, access and utilities.

The chancellor correctly found that the utility easement had not been abandoned. In doing so she did not abuse her discretion, and her findings are supported by credible and substantial evidence in the record.

Issue on Cross Appeal

Bossetta is entitled to an award of his attorney fees as proven in the trial court.

The Court has held in the majority of cases that attorney fees are usually only awarded in cases in which the award of punitive damages is proper. *See Greenlee v. Mitchell*, 607 So.2d 97 (Miss. 1992). In *Aqua-Culture Technologies, Ltd., v. Holly*, 677 So.2d 171 (Miss. 1996), the Court found that the question of whether punitive damages should be awarded depends largely upon the particular circumstances of the case. *Aqua Culture Technologies*, 677 So.2d at 184. The Court goes on to say:

> A trial judge may validly find that, although the conduct of a defendant in a given case is such that the awarding of punitive damages would be appropriate, the actual awarding of additional monetary damages above the compensatory damages would serve no purpose or otherwise be inappropriate. Nevertheless, the trial judge may also validly find that the plaintiff should not have to suffer the expense of litigation forced upon it by the defendant's conduct, and therefore determine that attorney fees should be awarded. A trial judge should be granted the flexibility to find that, although the actual awarding of punitive damages is inappropriate, the conduct of he defendant is so extreme and outrageous that he, rather than the

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5 *Charles J. Hughes and Robert M. Hughes and Wife, Darlene Hughes v. Michael Corbin and Wife, Linda S. Corbin, John W. Davis and Wife, Sandra K. Davis, and Magnolia Electric Power Association*; Pike County Chancery Court Cause No. 95-0621.

plaintiff, should bear the expense of litigation.

Aqua-Culture Technologies, 677 So.2d at 184-185. The Court also notes, "This Court did not hold in *Greenlee* that the actual awarding of punitive damages was a prerequisite for the awarding of attorney fees, and we expressly hold here that such an actual awarding of punitive damages is not a prerequisite for the awarding of attorney fees." *Id.* at 185.

In the instant case, the chancellor found that punitive damages were proper for consideration, although she made no award of such damages. (C.P. 366). Nevertheless, the chancellor awarded attorney fees to Bossetta. *Id.* By awarding attorney fees the chancellor did not err and did not abuse her discretion.

Due to the conduct of Davis and Nationwide, which precipitated this litigation, the expense of this litigation should not be borne by Bossetta. Had Davis and Nationwide not erected berms to impede Bossetta's rightful access to, and quiet enjoyment of, his property, Bossetta would not have incurred $22,732.50 in attorney fees in the prosecution of this case to the trial court. The conduct of Davis and Nationwide justify an award to Bossetta of the entirety of his attorney fees.

CONCLUSION

The chancery court correctly found that Bossetta is entitled to access and utility easements. In order for Bossetta to enjoy the full beneficial use of his property, these easements are necessary.

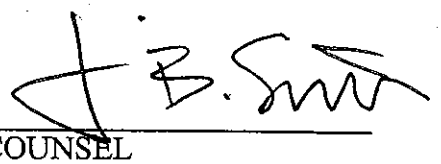
The chancery court also correctly relocated the easement to a location that would be the least onerous to Davis and Nationwide, while at the same time being beneficial to Bossetta. In fact, the chancellor shortened the easement from approximately one and a half (1½) miles to approximately 300 yards. (C.P. 368). The trial court also properly awarded attorney fees, but improperly concluded that Bossetta was entitled to only one-half (½) of the fees proved at trial.

Bossetta respectfully asks this Court to uphold the findings and judgment of the Chancery Court of Pike County, Mississippi, on direct appeal and reverse and render its decision on Appellee's Cross-Appeal.

Respectfully submitted,

PATRICK R. BOSSETTA

BY: ROBISON & HOLMES, PLLC



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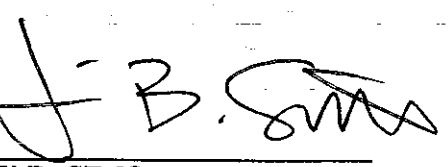
CERTIFICATE

I, JOSE' B. SIMO, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Appellee/Cross-Appellant's Brief to Paul N. Davis, Esquire, at his usual mailing address of 210 East Capital Street, Jackson, Mississippi 39201, and to Honorable Debbra K. Halford, Esquire, at her usual mailing address of Post Office Box 575, Meadville, Mississippi 39653.

THIS, the 24th day of April, 2007.



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