Case No. 2006-CA-01276

IN THE SUPREME COURT OF MISSISSIPPI

JOHN W. DAVIS and
NATIONWIDE MANAGEMENT LIMITED PARTNERSHIP, APPELLANTS

v.

PATRICK R. BOSSETTA APPELLEE

On Appeal from the Chancery Court of
Pike County, Mississippi
Honorable Debbra K. Halford, Chancellor

# REPLY BRIEF OF APPELLANTS/CROSS-APPELLEES

*ORAL ARGUMENT REQUESTED*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**AUTHORITIES** **PAGE(S)**

**Cases**

## TABLE OF AUTHORITIES - Continued

**AUTHORITIES** **PAGE(S)**

## TABLE OF AUTHORITIES - Continued

**AUTHORITIES** **PAGE(S)**



**Statutes**

## SUMMARY OF THE REPLY ARGUMENT AND RESPONSE TO CROSS APPEAL

This Court should not abandon the long-established principle of Mississippi real property law that ways of necessity arise out of "strict necessity" in favor of Bossetta's proposed new standard of "reasonable necessity." There is no strict necessity for an easement because Bossetta has access to the Madison Land via the Tangipahoa River.

Even if this Court were to change the law to require only a "reasonable necessity," there is still no reason to imply an easement for Bossetta's predecessors because they received an express easement which they could have protected pursuant to their statutory right of redemption. They failed to exercise their right to redeem, and as a result their express easement was extinguished. Additionally, there is no need to imply an easement because even today Bossetta has a statutory remedy for a private road to the Madison Land.

Since the Madison Deed was executed subsequent to the recording of the Stickney Deed of Trust, Madison and his grantees, including Bossetta, are strangers to and junior to Nationwide's prior chain of title to the Nationwide Land which arose pursuant to the foreclosure of the Stickney Deed of Trust. Thus, the "grant" of an easement in the Madison Land chain of title is void as to Nationwide as the successor to the purchaser under the foreclosure of the Stickney Deed of Trust.

Mississippi law does not support Bossetta's argument that the "subject to existing easement" clause in several deeds in Nationwide's chain of title creates or "grants" an easement for the benefit of strangers such as Bossetta.

Bossetta offers no argument to support the rationale in *Cox v. Trustmark National Bank*, 733 So. 2d 353 (Miss. Ct. App. 1999).

Bossetta admits the custom of using generators to provide the sole source of electricity in the area, and he fails to articulate any necessity for any utilities, much less an electric power line.

Moreover, Bossetta fails to offer evidence to overcome the abandonment of any such implied easement for utilities if it did exist at one time.

Bossetta offers no authority for the relocation of the alleged easement.

Bossetta's evidence for contempt is clearly insufficient to support the trial court's finding.

On cross appeal, Bossetta is not entitled to any attorney fees, much less full attorney fees.

## ARGUMENT AND AUTHORITIES

### 1. This Court Should Not Abandon The Requirement Of "Strict Necessity" For Implied Easements

Bossetta had the burden of proof to show a lack of access to the Madison Land. However, Bossetta's brief does not dispute that the Tangipahoa River gives him public access directly to the Madison Land without traversing the Nationwide Land. To overcome this fundamental obstacle to the implication of an easement, Bossetta argues that this Court should relax the standard for the implication of a way of necessity to that of "reasonable necessity" instead of "strict necessity." *See*, Appellee's Brief at p. 10. He argues that an overland route to the Nationwide Land is more "beneficial" or "convenient" to him than a river route and permits him to be "able to fully enjoy and use the land." *Id.* at pp. 9 & 11. However, these are not tests for imposition of a common law way of necessity.

Bossetta's brief fails to address the long-standing Mississippi authorities that easements by way of necessity will be implied only in cases of "strict necessity." *See*, *Mississippi State Highway Com'n v. Wood*, 487 So. 2d 798, 804 (Miss. 1986); *Thornton v. McLeary*, 161 Miss. 697, 137 So. 785, 786 (Miss. 1931); *Fike v. Shelton*, 860 So. 2d 1227, 1230 (Miss. App. 2003); *Leaf River Forest Products, Inc. v. Rowell*, 819 So. 2d 1281, 1284 (Miss. App. 2002).

Bossetta also fails to address modern cases from other jurisdictions re-affirming that there is no strict necessity warranting an implied easement across neighboring land when a tract is

accessible via a public water way, regardless of the fact that water access may be much more inconvenient. *See*, *Mackie v. U.S.*, 194 F. Supp. 306, 308 (D.C. Minn. 1961); *Welch v. State*, 908 A.2d 1207, 1210 (Me. 2006); *Murch v. Nash*, 861 A.2d 645, 652 (Me. 2004); and *Wiggins v. Short*, 469 S.E.2d 571, 578 (N.C. App. 1996); *see also*, *McFarland v. Kempthorne*, 464 F.Supp.2d 1014, 1020-1021 (D. Mont. 2006).

This Court should not grant Bossetta an implied easement by necessity because such easements are only available when there is no other means of access. *Rowell v. Turnage*, 618 So. 2d 81, 85 (Miss. 1993) ("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.***")(emphasis added). While access by water may not be a convenient method of access, the public waterway access does show that the Madison Land is not landlocked and negates any "strict necessity" for an overland route to the Madison Land.

As authority for a "reasonable necessity" standard, Bossetta cites only *Alpaugh v. Moore*, 568 So. 2d 291, 295 (Miss. 1990) and similar cases construing Miss. Code Ann. §65-7-201 and its predecessor statute as requiring only "reasonable" necessity for an application to a Board of Supervisors to lay out a private road. *See*, Appellee's Brief at p. 10. The simple answer is that this action involves Bossetta's demand for a way of necessity at common law, not a private road under this statute. Moreover, this statute provides only for road access, not utilities. It is ironic that *Alpaugh* and Section 65-7-201 actually demonstrate that Bossetta has a statutory remedy as discussed below.

Bossetta also argues, without any evidentiary support, that the creators of the Madison Land chain of title, Hornsby and Singleton, did not "intend[] for Madison . . . to access the land from the Tangipahoa River, in this day and age of the automobile." *See*, Appellee's Brief at p. 10. Ways of necessity are imposed by the Court without regard to speculation as to what

Hornsby and Singleton may or may not have intended. Moreover, the test for implication of a way of necessity is not altered by the fact that "this day and age of the automobile" may make land routes more "convenient."

Essentially, Bossetta asks this Court to re-write property law in Mississippi to expand the creation of ways of necessity by abandoning the requirement of "strict necessity" in favor of a more relaxed standard of reasonable necessity or convenience. In *Welch v. State*, 908 A.2d 1207, 1212 (Me. 2006) the Supreme Judicial Court of Maine recently addressed and rejected this same argument:

> The Welches also urge us to reexamine our rule set forth in case law, *see e.g., Murch,* 2004 ME 139, ¶ 20, 861 A.2d at 652, that land accessible by navigable water is not entitled to an easement by necessity. The Welches cite to case law in several other states that has implied an easement by necessity over land, even when the property in question had access by water, via ocean or lake. Such a change in the law would have wide ranging and unpredictable impacts upon property rights along thousands of miles of shorelines abutting ponds, lakes, rivers, and the Atlantic Ocean. We decline to alter the current law on the facts of this case.

The Maine court wisely recognized that a change in the standard for imposing ways of necessity would lead to disputes altering long-established property rights "along thousands of miles" of properties abutting waterways. Mississippi should follow the decision of the Maine court in order to preserve long-established property rights.

### 2. Bossetta's Brief Fails To Address The Two Statutory Remedies Which Negated Any Necessity For An Implied Easement

In their principal brief, Davis and Nationwide explained that even if the Nationwide Land was deemed to be landlocked, there is no necessity for implication of a way of necessity because Bossetta's predecessors had two independent statutory remedies which they chose not to pursue.

First, there was not a need to imply an easement because Bossetta's predecessors, the Madisons, received an express easement which they had a statutory right to protect via their right of redemption under Miss. Code Ann. § 89-1-59. *Mechanics State Bank v. Kramer Service*, 184

Miss. 895, 186 So. 644, 645 (1939)("[i]t is an invariable rule that junior encumbrancers . . . have the right to appear and pay of [sic] the senior encumbrance"). This statutory remedy no doubt is at least in part a basis for the well-established principle that implied easements arise, ***if at all***, at the time of the conveyance of the landlocked tract and not afterwards as suggested by Bossetta. *Leaf River Forest Products, Inc. v. Rowell*, 819 So. 2d 1281, 1284 -1285 (Miss. App. 2002).

Bossetta's brief fails to address the numerous authorities raised by Davis and Nationwide which expressly confirm that the sole remedy for protecting junior easements from foreclosure is the right of redemption. *See, Alabama Historical Com'n v. City of Birmingham*, 769 So. 2d 317, 320-321 (Ala. Civ. App. 2000)(expressly holding that a junior easement holder's sole remedy to avoid extinguishment of his easement resulting from a foreclosure is to exercise his statutory right of redemption); *Prestwood v. Weissinger*, 945 So. 2d 458, 461-462 (Ala. Civ. App. 2005); *Naccash v. Hildansid Realty Corp.*, 236 A.D. 686, 257 N.Y.S. 748, 749 (N.Y.A.D. 2 Dept. 1932)(easement by necessity is extinguished by foreclosure of senior mortgage - - easement holder's sole remedy is to redeem the mortgage); *Leonard v. Bailwitz*, 166 A.2d 451, 455 (Conn. 1960) (no way of necessity will be implied where tract becomes landlocked as a result of owner's failure to exercise right to redeem); *Christ Protestant Episcopal Church v Mack*, 93 NY 488, 494-495, 1883 WL 12694 (N. Y. Ct. App. 1883) (if holder of easement created subsequent to mortgage desires to protect easement from extinguishment in foreclosure, then holder must "bid the full amount of the mortgage debt and costs"); *Diamond Benefits Life Ins. Co. v. Troll*, 66 Cal. App. 4th 1, 9-10, 77 Cal. Rptr. 2d 581, 586-587 (Cal. Ct. App. 4th Dist. 1998)(junior easement holder's remedy to avoid judicial foreclosure is redemption); and *S. S. Kresge Co. v Shankman*, 212 S.W.2d 794, 802 (Mo. 1948)(foreclosure terminates easement holder's right of redemption so that junior easement is extinguished).

Second, Bossetta's brief fails to address Miss. Code Ann. § 65-7-201 and cases applying similar statutes cited by Davis and Nationwide which provide that if his land is deemed to be landlocked at any time, then his predecessors and now Bossetta have a means to obtain access to the Madison Land by petitioning the special court of eminent domain to establish a private road. *See, U.S. v. Roberts*, 788 F. Supp. 555, 556-557 (S.D. Fla. 1991) (similar Florida statute was "specifically designed to address" problem where a tract becomes landlocked as a result of a foreclosure which extinguished junior easement); *Ferguson Ranch, Inc. v. Murray*, 811 P.2d 287 (Wyo. 1991)(implied easements are no longer necessary because of the statutory remedy).

In *Broadhead v. Terpening*, 611 So. 2d 949 (Miss. 1992), a chancery court judgment awarding a common law way of necessity was affirmed by a four-to-four split among the justices of this Court, four of whom expressed the view that the remedy provided by Miss. Code Ann. § 65-7-201 renders unnecessary the common law easement by necessity. Today, this Court has another opportunity to revisit this issue.

### 3. The Madison Easement Was Junior To The Stickney Deed Of Trust And Thus Was Void As To Nationwide As Successor To The Purchaser Under The Foreclosure Of The Stickney Deed Of Trust

Since the Madison Deed was executed subsequent to the recording of the Stickney Deed of Trust, Madison and his grantees, including Bossetta, are strangers to and junior to Nationwide's prior chain of title to the Nationwide Land. Thus, the "grant" of an easement in the Madison Land chain of title is void as to Nationwide as the successor to First Bank, the purchaser under the foreclosure of the Stickney Deed of Trust. Bossetta does not dispute that the Madison Easement was junior to the Stickney Deed of Trust. He merely argues, without authority, that the Court should not apply the traditional rule that a foreclosure cuts off all junior encumbrances. *Peoples Bank and Trust Co. and Bank of Mississippi v. L & T Developers, Inc.*,

434 So. 2d 699, 708 (Miss. 1983); *Shutze v. Credithrift of America, Inc.*, 607 So. 2d 55, 65 (Miss. 1992).

### 4. The "Subject To Existing Easement" Clause Does Not Create An Easement In Favor Of Strangers

Bossetta's brief observes that various deeds in Nationwide's chain of title contain a statement to the effect that the deeds are made "subject to existing easements." He then argues that this clause had the effect of granting an easement to Bossetta and his predecessors in the Madison Land chain of title even though they are strangers to the Nationwide Land chain of title.

The law is well settled that the "subject to existing easement" clause merely protects a grantor from potentially breaching his warranty and never has the effect of creating an easement in favor of strangers to the deed. *See*, *Miller v. Lowery*, 468 So. 2d 865, 867 (Miss. 1985) ("subject to" language merely operates to protect a grantor's warranty of title); *Kelly v. Wallace*, 972 P.2d 1117, 1125 (Mont. 1998) ("It is well-established that 'subject to' language in a conveyance does not create an easement").

### 5. The Foreclosure Sale Extinguished The Madison Easement Even If Could Be Said That The Easement Was A Necessity

As predicted, Bossetta cites *Cox v. Trustmark National Bank*, 733 So. 2d 353 (Miss. Ct. App. 1999) for the proposition that the foreclosure of a deed of trust does not extinguish a junior easement where there is a "necessity" for the easement.

Davis and Nationwide respectfully submit that *Cox* was decided wrong, and the chancery court erred in following *Cox*, for the reasons stated in their principal brief.

Bossetta asks this Court to ignore the fact that numerous decisions of courts in other states have ***uniformly*** applied reasoning similar to that in *Rowell* in rejecting arguments that foreclosures do not extinguish easements, including ways of necessity. The *Cox* Court stated that "the issue is close" without setting forth any discussion of the numerous authorities

consistently to the contrary. *Cox*, 733 So. 2d at 358. When this observation is coupled with the fact that the actual dispute over an easement in the *Cox* case was moot at the time the decision was rendered, it is clear that *Cox* should not be viewed as setting forth an authoritative analysis of the issue.

### 6. Bossetta's Brief Offers No Evidence Of "Necessity" For An Implied Easement For Utilities

Even if this Court finds that Bossetta is entitled to a way of necessity for *access* to the Madison land, that does not mean Bossetta is entitled to an easement for utilities. Bossetta failed to address this Court's holding in *Rowell v. Turnage*, 618 So. 2d 81, 87 (Miss. 1993) that a chancellor properly denied an easement by necessity for utilities:

> The chancellor correctly restricted the private way of necessity by holding that it could not be used as an easement for water, sewage and electricity. *Sumrall v. United Gas Pipe Line Co.*, 232 Miss. 141, 148, 97 So. 2d 914, 916 (1957).
>
> A New York court held an easement created by grant of a right-of-way for ingress and egress to defendant's landlocked property does not carry with it by implication an easement to transmit electricity to the property over the right-of-way. *McCormick v. Trageser,* 24 N.Y.2d 873, 301 N.Y.S.2d 622, 249 N.E.2d 467 (1969).

Similarly, in *Fourth Davis Island Land Company v. Parker*, 469 So. 2d 516, 521 (Miss. 1985), the Mississippi Supreme Court held that a chancery court properly refused to grant a power line easement by necessity, particularly in a situation where generators had been used for years as a means of power. A similar situation exists here. Bossetta did not dispute any of the evidence listed in the statement of facts in Davis and Nationwide's initial brief which shows that to the present date generators have adequately provided the sole source of power for the Madison Land and all neighboring land in the vicinity. At best Bossetta merely argues that a power line would be more convenient.

Bossetta's brief does not offer any evidence to support a conclusion that utilities are in fact a strict necessity for the Madison Land now, much less in 1985 at the time of the Madison Deed.[1]

### 7. Bossetta's Brief Offers No Evidence To Overcome The Presumption That Any Utility Easement Was Abandoned

As noted in Davis and Nationwide's initial brief, *R & S Development, Inc. v. Wilson*, 534 So. 2d 1008, 1010 (Miss. 1988) holds that "the clear trend of authority in Mississippi is that protracted non-use for an extended period of time is sufficient in law to create a presumption of abandonment." Bossetta's brief does not even discuss this issue, much less offer any evidence to overcome the presumption of abandonment of any implied easement for utilities. As shown in *Columbus & G. Ry. Co. v. Dunn*, 185 So. 583, 585 (Miss. 1939) there is no prescribed time period needed to elapse before an easement is abandoned. *See also*, *Williams v. Patterson*, 198 Miss. 120, 131, 21 So. 2d 477, 480 (Miss. 1945).

Bossetta admits that no one in his chain of title sought to establish a utility easement until 1995, some ten years after the severance of the Madison Land from the Nationwide Land. Even then the Hughes later abandoned their request. It is patently unfair to impose a utility easement on Davis and Nationwide at this late date when they contracted to buy their land without any notice that anyone was even seeking to establish utilities.

### 8. Bossetta's Brief Does Not Offer Any Authority To Support The Chancery Court's Conclusion That Bossetta Had The Unilateral Right To Relocate The Easement 18 Years Later And To Cut Nationwide's Fence and Destroy Nationwide's Timber

Bossetta's brief mentions the Chancery Court's relocation of the alleged easement only in his "conclusion" at the end of the brief. Even if Bossetta was entitled to an access easement,

---

[1] It should be noted that an easement by necessity arises, if at all, only at the time the tract became landlocked, not years later. *Leaf River Forest Products, Inc. v. Rowell*, 819 So. 2d 1281, 1284 - 1285 (Miss. App. 2002) ("Finally, the claimant must demonstrate that the implicit right of way arose at the time of the initial severance from the common owner. *See Wills v. Reid,* 86 Miss. 446, 453, 38 So. 793, 795 (1905) (stating that an easement by necessity will not exist unless it is demonstrated that the necessity arose the exact moment of the conveyance or severance from the common tract)").

neither Bossetta nor the Chancery Court cites any authority for the proposition that Bossetta can change the location of the access route for the alleged easement 18 years later. Bossetta does not dispute the well-established authorities cited by Davis and Nationwide to the contrary. Even if this Court finds that Bossetta is entitled to a way of necessity, the Chancery Court clearly erred in relocating the easement from the way used by Bossetta's predecessors.

Moreover, Bossetta's brief admits he cut Nationwide's fence and trees but he fails to offer any authority for his actions. The Chancery Court erred in failing to grant Nationwide any relief for Bossetta's trespass and wrongful cutting of Nationwide's fence and trees.

### 9. The Chancery Court Erred In Citing Davis And Nationwide For Contempt

Bossetta relies principally upon the testimony of his road contractor, Daniel Vielee, to argue that Davis and Nationwide did not comply with the Chancery Court's directive to remove "berms" necessary for Bossetta to access the Madison Land. Davis and Nationwide are well aware of Mr. Vielee's testimony. The short response is that the undisputed pictorial evidence cited in Davis and Nationwide's principal brief plainly shows that his testimony is simply not true and should not be given any weight at all.

Alternatively, it is undisputed that Davis and Nationwide attempted compliance with the Chancery Court's preliminary injunction order in good faith. They should not be held in contempt merely because the Chancery Court found that their efforts did not technically meet all of the Court's requirements.[2]

### 10. The Chancery Court Erred In Awarding Attorney Fees To Bossetta

For the reasons stated in Davis and Nationwide's principal brief, Bossetta is not entitled to recover any attorney's fees, much less all of his attorney's fees.

---

[2] Importantly, it should be noted that Bossetta's brief does not even mention the "berms" to the ***west*** of his "green gate", which are the "berms" on which the Chancery Court based its finding of contempt. As noted in Davis and Nationwide's principal brief, even Bossetta did not desire for the westerly "berms" to be removed.

## CONCLUSION

WHEREFORE, PREMISES CONSIDERED, John W. Davis and Nationwide Management Limited Partnership pray that this Court will reverse the Final Judgment entered by the chancery court in this cause. Nationwide further prays that this Court will remand this cause to the chancery court with instructions to further consider Nationwide's counterclaims and remedies for wrongful injunction in light of this Court's decision. Nationwide alternatively prays that if this Court affirms the chancery court's judgment that Bossetta is entitled to an easement, then this Court will modify the chancery court's judgment to provide that Bossetta and his assigns are enjoined from using, accessing or entering upon any portion of the Nationwide land other than the specific easement area authorized by this Court.

Respectfully submitted, this the 23rd day of May, 2007.

JOHN W. DAVIS and NATIONWIDE
MANAGEMENT LIMITED PARTNERSHIP

BY: _____
PAUL N. DAVIS, MB No. [redacted]

OF COUNSEL:

BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
17th Floor, Deposit Guaranty Plaza
Post Office Box 22567
Jackson, Mississippi 39225-2567
(601) 948-5711

## CERTIFICATE OF SERVICE

I, PAUL N. DAVIS, one of the attorneys for John W. Davis and Nationwide Management Limited Partnership, do hereby certify that I have this day caused to be served a true and correct copy of the above and foregoing instrument by United States Mail to the following:

Honorable Debbra K. Halford
Chancery Court Judge
P. O. Box 578
Meadville, MS 39653

W. Stewart Robison, Esq.
P. O. Drawer 1128
McComb, Mississippi 39649-1128

And by e-mail to the said W. Stewart Robison at info@robison-harbour.com.

ATTORNEY FOR PATRICK R. BOSSETTA

THIS, the 23rd day of May, 2007.

PAUL N. DAVIS