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

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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v.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for all Appellants 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.

A. Interested Parties:

1. John W. Davis, Appellant
2. Nationwide Management Limited Partnership, Appellant
3. Patrick R. Bossetta, Appellee

B. Attorneys:

1. Paul N. Davis, Attorney for Appellants
2. Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Attorneys for Appellants
3. W. Stewart Robison, Attorney for Appellee

Dated: February 9, 2007.

PAUL N. DAVIS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

AUTHORITIES **PAGE(S)**

CASES

STATUTES

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the chancery court erred in concluding that the road easement and utility easement granted to Bossetta's predecessor-in-interest was not extinguished by the foreclosure of a superior deed of trust.[1]

2. Whether *Cox v. Trustmark National Bank*, 733 So. 2d 353 (Miss. Ct. App. 1999) should be overruled to the extent it holds that the release of a landlocked tract from a deed of trust impliedly subordinates the deed of trust to an implied easement by necessity over the remainder of the mortgaged property.

3. Whether the chancery court erred in concluding that Bossetta is entitled to an implied easement by necessity for access.

4. Whether the chancery court erred in concluding that Bossetta is entitled to an implied easement by necessity for utilities.

5. Whether the chancery court erred in failing to find that any easement for utilities was abandoned.

6. If Bossetta is entitled to either or both easements, then whether the chancery court erred in relocating the easement(s) to impose new burdens on the Nationwide Land.

7. Whether the chancery court erred in citing Davis and Nationwide for contempt.

8. Whether the chancery court erred in requiring Davis and Nationwide to pay a portion of Bossetta's attorney fees.

9. Whether this action must be remanded to the chancery court with instructions to further consider Nationwide's counterclaims.

10. Alternatively, whether the chancery court erred in failing to enjoin Bossetta from entering any portion of the Nationwide Land other than the court-authorized easement area.

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[1] An issue embedded within issues 1, 2, 3, 7, 8 and 9 is whether the chancery court erred in entering its preliminary injunction.

STATEMENT OF THE CASE

A. Nature Of The Case

This appeal challenges the existence of both a road easement and a utility easement. Patrick R. Bossetta ("Bossetta") commenced this action against John W. Davis ("Davis") and Nationwide Management Limited Partnership[2] ("Nationwide") on May 11, 2005, seeking injunctive relief and damages for alleged interference with an alleged deeded road easement and for refusal to permit the construction of utility lines across rural forested land adjoining the Tangipahoa River in Pike County, Mississippi. (R. 6-14.)[3] Bossetta later amended his complaint to add an alternative claim of entitlement to an implied easement by necessity.[4] (R. 92-101.)

Nationwide counterclaimed against Bossetta to remove the cloud from its title arising out of Bossetta's claimed easement, for injunctive relief, and for damages due to Bossetta's trespass and wrongful cutting of timber. (R. 137-143.)

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[2] Davis is the managing partner of Nationwide.

[3] For the purposes of this Brief, citations to the Chancery Clerk's Record will be in the following format: "(R. ____.)." Citations to the trial transcript will be in the following format: "(Tr. ___.)." Citations to trial exhibits admitted into evidence will be in the following format: "(Ex. ___.)" or "Exhibit __." Citations to the tabs in Appellants' Record Excerpts will be in the following format: "(R.E. ___.)."

[4] To assist this Court in visualizing the relative positions of the three tracts identified and discussed below, the Nationwide Land, the Madison Land and the Bossetta 65-acre tract, it is noted that the Nationwide Land is depicted on the map introduced as Exhibit 62 and the Madison Land is depicted on Exhibit 63. (R.E. 5 & 6.) Although the original exhibits do not show the tracts highlighted by colors, note that to assist this Court we show the Nationwide tract cross-hatched in green on Exhibit 62 and the Madison Land cross-hatched in red on Exhibit 63 in the Record Excerpts. (*Id.*) While the Madison Land and Bossetta 65-acre tract are not formally depicted on Exhibit 62, we have cross-hatched in red on this exhibit in the Record Excerpts the general area of the Madison Land and cross-hatched in blue the general area of the Bossetta 65-acre tract. (*Id.*) Finally, the line depicting the Madison Easement is colored yellow in the Record Excerpt. (R.E. 5.) It is important to note that Bossetta stipulated that Exhibit 62 was offered into evidence solely for the purpose of depicting these tracts and not for the purpose of establishing any subdivision easements which may be otherwise indicated thereon. (Tr. 221.) To the extent Bossetta may now argue the map is evidence of an easement, then Nationwide urges that the map was erroneously admitted into evidence over Nationwide's objection since the map was not authenticated and there is no evidence that any dedication was ever made. (*Id.*) Moreover, there is no evidence that the mortgagee of the Stickney Deed of Trust, discussed below, ever approved any dedication.

B. Course Of The Proceedings

On May 26, 2005, at the conclusion of a hearing on Bossetta's request for a preliminary injunction, the chancery court announced from the bench that the request would be granted. (Tr. 51; R.E. 7.) The chancery court directed that Davis and Nationwide "remove the berms and re-establish the path as it existed prior to its December '04- January '05 condition to allow plaintiff access along that road." (*Id.*) On June 17, 2005, a formal Preliminary Injunction order was entered. (R. 51-57; R.E. 2.)

Some four months later, on September 30, 2005, Bossetta filed a motion for citation for contempt in which he represented to the chancery court that Davis and Nationwide refused to comply with the preliminary injunction. (R. 116-117.) This motion was continued to the trial on the merits. (R. 361; R.E. 3.)

Trial of this action began on April 26, 2006, and concluded on April 28, 2006. A final judgment was entered on July 6, 2006 in which the chancery court cited Davis and Nationwide for contempt, held that Bossetta was entitled to both the road easement and utility easement based upon a grant as well as by implication, held that Bossetta was entitled to have the court relocate the easements which the court did, awarded Bossetta recovery of one-half his attorney fees, permanently enjoined Davis and Nationwide from interfering with the easements, and dismissed all of Nationwide's counterclaims. (R. 361-368; R.E. 3; Tr. 443-462; R.E. 4.) Davis and Nationwide gave timely notice of appeal filed August 1, 2006. (R. 370.)

C. Statement Of Facts

1. Madison Easements Created After The Stickney Deed Of Trust Was Recorded

By Warranty Deed (the "**Stickney Deed**") dated August 3, 1983, Jane Kramer Stickney, et al ("Stickney, et al") conveyed to Dale W. Hornsby and E. Lynn Singleton ("Hornsby and Singleton") 138.2 acres of land, more or less, in Pike County, Mississippi (the "**138.2-acre tract**").

(Ex. 1.) The Stickney Deed recited a list of "subject to" matters, including "Any existing right-of-ways for utility purposes and/or road purposes now existing across said lands." (*Id.*) However, it is undisputed that there is no evidence in the record that any easements across the 138.2-acre tract actually existed at that time.

On the same date, Hornsby and Singleton executed a Deed of Trust (the "**Stickney Deed of Trust**") conveying the 138.2-acre tract to Thomas H. Walman, as Trustee for the benefit of Stickney, et al, as security for a purchase money promissory note given by Hornsby and Singleton to Stickney, et al in consideration for the Stickney Deed. (Ex. 9; Tr. 11.) The Stickney Deed of Trust was recorded on August 17, 1983, in the deed of trust records of Pike County, Mississippi. (*Id.*) The Stickney Deed of Trust recited the same list of "subject to" matters, including "Any existing right-of-ways for utility and/or road purposes now existing across said lands." (*Id.*) However, again it is undisputed that there is no evidence in the record that any easements actually existed at that time.

More than two years after the Stickney Deed of Trust was recorded, Hornsby and Singleton executed a Warranty Deed (the "**Madison Deed**") dated October 10, 1985, conveying to John T. Madison et ux a certain 1.11-acre tract (the "**Madison Land**") carved out of the 138.2-acre tract. (Ex. 2; Tr. 11.) The Madison Deed also granted the following road easement and utility easement (the "**Madison Easements**") across the 138.2-acre tract to the Madison Land:

> 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 Tiger Enterprises, Inc., property also known as Chatawa Bluffs South, also being the beginning point of a road known 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.[5]

The Madison Deed is the sole deed in Bossetta's chain of title at issue in this action which purports to actually ***grant*** an easement to the Madison Land. (Tr. 253-254 & 259.)

2. Stickney Deed Of Trust Was Not Subordinated To Madison Easements

Stickney, et al and their successors released the Stickney Deed of Trust insofar only as it covered the Madison Land. (Exs. 37 & 38; Tr. 31.) The Partial Cancellations did not make any reference at all to a release or subordination of the Stickney Deed of Trust for the Madison Easements across the 138.2-acre tract. (*Id.*) Bossetta admits that he has no evidence that either Stickney, et al or their successors ever executed any instrument purporting to subordinate the Stickney Deed of Trust to the Madison Easements. (Tr. 254-255.)

3. Foreclosure Of Stickney Deed Of Trust And Subsequent Chain Of Title

By Substituted Trustee's Deed (the "**Trustee's Deed**") dated October 14, 1987, the Stickney Deed of Trust was foreclosed and Keith Starrett, Substituted Trustee, conveyed to First Bank the 138.2-acre tract less and except the Madison Land and less and except a number of other small tracts not at issue in this action (the land described in this Trustee's Deed is hereafter referred to as the "**Nationwide Land**" because it is undisputed that this land is now owned by Defendant Nationwide as shown below). (Ex. 11; Tr. 15.) Not surprisingly, the Trustee's Deed recited the same list of "subject to" matters as set forth in the Stickney Deed of Trust, including "Any existing right of way for utility and/or road purposes now existing across said lands." (Ex. 11.) However, the Trustee's Deed did not make any reference at all to the Madison Easements which were

[5] Although the Madison Deed suggests the existence of a formal subdivision known as "Chatawa Bluffs South" with "existing" roads and utilities, in fact no such subdivision has ever existed and no such utilities have ever existed. (Tr. 9-10, 42, 133-134, 292 & 323.) Moreover, the only actual "road" is a one lane vehicular path over a mile and one-half in length with only the first several hundred feet paved. (Tr. 134 & 194; Exs. 23-26; R.E. 8; Ex. 2; Ex. 55.) Much of the old "road" was simply a two tire-track path (with grass between the tracks) with tall trees near both sides. (Tr. 194; Exs. 23 & 26; R.E. 8.)

purportedly created by Hornsby and Singleton more than two years after the execution of the Stickney Deed of Trust.[6] (*Id.*)

By Special Warranty Deed dated March 29, 1993, First Bank conveyed to Michael Corbin and wife, Linda S. Corbin (the "Corbins") the Nationwide Land. (Ex. 12; Tr. 16.) This deed did not make any reference to the Madison Easements. (Ex. 12.) The Corbins immediately took possession of this land through their tenant, John W. Davis, under a lease agreement. (Tr. 315-316.) At the same time, the Corbins also entered into an agreement to sell this same land to Davis. (*Id.*)

By Warranty Deed dated March 2, 1998, the Corbins actually conveyed to John W. Davis and wife Sandra K. Davis the Nationwide Land. (Ex. 13.) This deed did not make any reference to the Madison Easements. (*Id.*) By mesne conveyances, title to the Nationwide land was transferred to Nationwide, a limited partnership of which Davis is the managing partner. (Exs. 13A & 14.) These deeds likewise did not make any reference to the Madison Easements. (*Id.*)

4. <u>Chain Of Title For The Madison Land</u>

In connection with their purchase of the Madison Land on October 10, 1985, John T. Madison and wife executed a Deed of Trust (the "Madison Deed of Trust") in favor of Robert G. Barnett, as Trustee for the benefit of Deposit Guaranty National Bank conveying the Madison Land to secure payment of a promissory note. (Ex. 3.) This Deed of Trust did not make any reference to the Madison Easements. (*Id.*)

On July 29, 1988, almost a year after the foreclosure of the Stickney Deed of Trust and the downfall of the planned subdivision, the Madison Deed of Trust was also foreclosed and the

[6] Bossetta does not claim that there were any irregularities in the foreclosure of the Stickney Deed of Trust. (Tr. 258-259.) Bossetta also has no evidence that the Madisons or their own mortgagee attempted to exercise their right of redemption under Miss. Code Ann. § 89-1-59 to avoid the foreclosure. (Tr. 259.)

Madison Land was conveyed to Deposit Guaranty National Bank. (Ex. 4.) This deed did not purport to convey the Madison Easements. (*Id.*)

By Quitclaim Deed dated October 31, 1988, John T. Madison and wife quitclaimed to Deposit Guaranty National Bank any right, title and interest they may have still had in the Madison Land and the Madison Easements. (Ex. 5.)

By Special Warranty Deed dated September 29, 1989, Deposit Guaranty National Bank conveyed to Charles J. Hughes and wife the Madison Land and purported to also convey the Madison Easements. (Ex. 6.) The purchase price paid by the Hughes for the 1.11-acre Madison Land was $3,500.00.[7] (Tr. 194-195.)

By Warranty Deed dated November 30, 2002, Charles J. Hughes and wife conveyed to St. Mary's Farms of Louisiana, Inc., a company owned and controlled by Bossetta, the Madison Land as part of a larger tract. (Ex. 7.) This Deed also purported to convey the Madison Easement. The purchase price for this land was $2000.00 per acre. (Tr. 43 & 45.) Thus, the purchase price for the 1.11-acre Madison Land at this time was only $2,220.00, little more than one-half the amount paid by the Hughes thirteen years earlier. By Warranty Deed dated November 5, 2003, St. Mary's Farms of Louisiana, Inc. conveyed the land to Patrick R. Bossetta individually. (Ex. 8.)

5. Use Of The Madison Easement For Road Purposes

It should be noted that while the description of the Madison Easements refers to a purported existing "road," it is undisputed that the only actual "road" is a one lane vehicular path over a mile and one-half in length with only the first several hundred feet paved. (Tr. 134 & 194; Exs. 23-26; R.E. 8; Ex. 2; Ex. 55.) Much of the old "road" was simply a two tire-track

[7] The Hughes later purchased some additional land adjacent to the Madison Land referred to as the "7.86-acre tract" and then conveyed a portion of this land to his brother, Robert Hughes. Bossetta does not claim that any easement has been granted to access this land. (Tr. 195 & 255-256.) Therefore, this additional tract is not material to the issues raised in this appeal.

pathway (with grass between the tracks) with tall trees near both sides. (Tr. 193-194; Exs. 23 & 26; R.E. 8.)

Upon the Corbin's closing of their purchase of the Nationwide Land in 1993, Davis immediately went into possession of the Nationwide Land under lease from the Corbins and under a contract to purchase the land from the Corbins. (Tr. 315-316.) At that time, there were existing fences bounding the land and there was only one entry point for vehicular access to the land. (Tr. 125-126 & 330-331.) This access point was from Kramer Lodge Road at the North boundary of the Nationwide Land. (Tr. 125-127; *see also*, Ex. 62, R.E. 5.) This same access point coincides with the beginning point of the route across the Nationwide Land to the Madison Land as described in the Madison Easements. (Tr. 125-127; Exs. 2 & 55.)

Immediately upon going into possession in 1993, Davis erected a gate at this only access point on the North boundary of the Nationwide Land in the Spring of 1993. (Tr. 317-320.) The gate has been maintained at all times from 1993 to the present date, although Davis did replace the gate in 1996. (*Id.*) Locks have been maintained on this gate and the gates have been kept closed at all times, except while actually entering, from 1993 to the present date.[8] (Tr. 320-322.) Prior to 1996, Davis installed a second gate in the interior of the Nationwide Land and has maintained locks on the gate at all times to the present date. (Tr. 319.)

Admittedly, Charles Hughes, Robert Hughes and their wives, being Bossetta's predecessors, used the one lane path of the Madison Easements to access their property for a number of years. They claim to have used the one lane path as a matter of right, a position

[8] The Hughes testified that from time to time they would have to cut the chain to add a new lock, but they admitted that they always complied with the requirement that the gates remain closed and locked. (Tr. 134-135, 171, 181 & 201.) Indeed, the Hughes' video shows them closing and locking the gates. (Ex. 55.)

disputed by Davis.[9] (Tr. 150, 180 & 329.) However, regardless whose position was correct, all of the Hughes admit that they installed their own locks and submitted to the practice of keeping the gates closed and locked at all times since 1993. (Tr. 134-135, 171, 181, 201 & 329.) This practice of maintaining closed and locked gates has continued for a period of more than ten years. (*Id.*) Davis testified that he had no objection to the Hughes using the one-lane path on this basis. (Tr. 329.)

6. Bossetta's Attempt To Alter Access To The Madison Land In Late 2003

In 1995, Patrick R. Bossetta purchased a 65-acre tract of land (the "Bossetta 65-acre tract") adjoining the northeast and east side of the southerly portion of the Nationwide Land near the vicinity of the Madison Land. (Tr. 245; Exs. 62 & 63; R.E. 5 & 6.) In fact, the southern boundary of the western portion of the 65-acre tract is situated about a quarter mile north of the northern boundary of the Madison Land, with the Nationwide Land situated between the Bossetta 65-acre tract and the Madison Land. (R. 368; R.E. 3.) This Bossetta 65-acre tract has frontage on Old Highway 51. (Tr. 246.) Bossetta admits there was no common source of title to the Bossetta 65-acre tract and the Nationwide Land. (Tr. 248.)

Nationwide has an old fence separating the Bossetta 65-acre tract from the Nationwide Land. (Tr. 186-188 & 260.) The location of the one-lane path described in the Madison Easements runs parallel to the fence, but, as plainly shown in photographs, Nationwide has numerous grown trees between the path and the fence. (Exs. 23 & 26.) Bossetta's own estimate is that the many pine trees forming a long row between the one-lane path and the fence are 15 to 17 years old. (Tr. 288.) In the past, Davis has harvested trees larger than 24 inch diameter from the area between the road and the fence. (Tr. 357.)

[9] This difference in positions is not material to this appeal since Bossetta does not claim any prescriptive right to an easement. (R. 92-101.)

Bossetta admits that in late 2003, after having purchased the Madison Land, he cut Nationwide's fence and cut and destroyed trees on the Nationwide Land between the fence and the one-lane path and installed a green gate so that he could access the one-lane path to the Madison Land directly from his 65-acre tract.[10] (Tr. 26-28 & 283-285; Ex. 27.) He says he did this in order to avoid having to go through the locked gates on the existing path and to avoid having to go a longer distance to access the one-lane path at the original beginning of the Madison Easement. (Tr. 291.) Bossetta admits that he did not obtain Nationwide's permission to cut the fence and trees on its land and install a gate. (Tr. 267, 291 & 327.) Instead, he claims the Madison Easements somehow gave him a legal right to cut the fence and trees simply because his 65-acre tract adjoins the Nationwide Land and the one-lane path is near the boundary. (Tr. 290.)

Davis and Nationwide were, and remain, adamant in their position that a new access route not be opened for several reasons. (Tr. 343.) Nationwide has had serious problems with poachers in this back woods area. (Tr. 329.) It is important to Nationwide to maintain just one access point into the Nationwide Land. (Tr. 330-331.) A second access point increases the difficulty in maintaining control of the land and invites unauthorized activity. (*Id.*) In short, the trees and fence formed a valuable buffer between the Nationwide Land and neighboring tracts, one of which is Bossetta's 65-acre tract.

7. Access to the Madison Land Via The Nationwide Land Is Not A Strict Necessity

The Madison Land has frontage on the Tangipahoa River, a public, navigable stream. (Tr. 214 & 293-296; R. 92-93; Ex. 63.) In paragraph XIII of his amended complaint, Bossetta

[10] Bossetta says he cut down at least two trees. (Tr. 29.) However, the photographs admitted into evidence show that he actually cut down and destroyed additional trees to gain this access. (Exs. 28-31.) Bossetta admits that he cut down all of the trees whose stumps are depicted in Exs. 28-31. (Tr. 284-285.) Davis testified that Bossetta cut one six inch diameter tree, three 4 inch diameter trees and some 15 one inch diameter trees between fence and the one lane path. (Tr. 344-345.)

alleged that the Madison Land is landlocked because he had no road access to his land. (R. 98.) Davis and Nationwide responded by admitting Bossetta has no road access, but denying the land is landlocked. (R. 133.) In the face of this denial squarely raising the issue as to whether the Madison Land is truly landlocked, Bossetta failed to offer any evidence that the Madison Land is inaccessible via the Tangipahoa River. To the contrary, he admitted that he frequently travels "pretty far" on the river via boat and motor. (Tr. 294.)

8. The Madison Easement For Utilities Was Never Used And Was Abandoned

Notwithstanding the grant of the Madison Easement for utilities in 1985, in fact there have never been any utility lines for power, water, sewer, gas or any other purpose whatsoever across the Nationwide Land. (Tr. 42, 133-134, 292 & 323.) Again, photographs and video admitted into evidence show that tall trees have grown up along and near both sides of much of the one-lane path, or "road," described in the Madison Deed as the location of the Madison Easements. (Tr. 134 & 193-194; Exs. 23-26; R.E. 8; Ex. 2; Ex. 55.) Charles Hughes admitted under cross-examination that the installation of utility lines at this time would require the destruction of numerous trees along the path. (Tr. 194.)

The Corbins and Davis purchased the Nationwide Land in reliance on the non-existence of any utility lines. (Tr. 317.)

9. The Madison Easement For Utilities Was Not A Strict Necessity In Any Event

In or about 1993, the Hughes constructed a small camp house on land adjoining the Madison Land. (Tr. 136.) From 1993 through 2002, Robert Hughes and wife spent an average of several days a week at the camp house, frequently spending the night. (*Id.*) Throughout that time, they used a generator to supply all electrical needs, including powering lights and even air conditioning and a water pump for showering with water drawn from the Tangipahoa River

which adjoins the Madison Land. (Tr. 137 & 147.) Other camps in the area have been powered by generators at all times. (Tr. 42.) There are no camp houses in the area powered through electric transmission lines. (*Id.*) Even Bossetta continues to use a generator for power. (Tr. 297.)

Even without power lines, Charles Hughes admitted under cross-examination that the Hughes were always able to use and enjoy the Madison Land as they intended it to be used and enjoyed.[11] (Tr. 198-199.)

10. Overwhelming Evidence Of Davis' and Nationwide's Good Faith Belief That Madison Easements Terminated

The chancery court found that Davis and Nationwide's conduct denying the continued existence of the Madison Easements warranted the imposition of punitive damages. (Tr. 457-458.) The following undisputed evidence shows that this finding was clearly wrong.

a. Davis Acted On Advice Of Counsel In Treating The Easements As Terminated

In connection with their purchase of the Nationwide Land in 1993, the Corbins obtained a legal opinion from a local real estate attorney, Robert S. Reeves, advising that the "big foreclosure" should have cut off the easements granted by Hornsby and Singleton. (Tr. 317; Ex. 65.) They did not contemplate any easements associated with the old Chatawa Bluffs putative subdivision as remaining in effect. (Tr. 317.) Upon closing the purchase in 1993, Davis immediately went into possession of the Nationwide Land under lease from the Corbins and under a contract to purchase the land from the Corbins. (Tr. 316-317.)

Davis acted in reliance on the opinion provided by his lessors' counsel in erecting and locking the gate at the only access point to the Nationwide Land in the Spring of 1993. (Tr. 317-320.) The gate has been maintained at all times from 1993 to the present date, although Davis

[11] In 1995, the Hughes filed a suit against the Corbins and Davis seeking to obtain an easement to install a power line across the Nationwide Land. (Tr. 139-141, 193.) The Hughes decided to no longer prosecute the suit by 1997 or 1998. (*Id.*)

did replace the gate in 1996. (*Id.*) Locks have been maintained on this gate and the gates have been kept closed at all times except for usage from 1993 to the present date. (Tr. 320-322.) Prior to 1996, Davis installed a second gate in the interior of the Nationwide Land and has maintained locks on the gate at all times to the present date. (Tr. 319.)

b. Bossetta Admits Davis' And Nationwide's Honest Belief

In October 2002, prior to purchasing the Madison Land, Bossetta entered into a contract to purchase the Nationwide Land for approximately $468,000.00. (Tr. 268.) In connection with these negotiations prior to purchasing the Madison Land, Bossetta became aware of: (1) the old Madison Easements, (2) Nationwide's position that these easements no longer existed after having been cut off by the foreclosure of the Stickney Deed of Trust and the erection of locked gates, and (3) Nationwide's position that the Hughes' continued use of the one-lane path to access the Madison Land was permissive. (Tr. 247 & 334.) Bossetta admits that Nationwide's position was at all times an honest belief. (Tr. 249.) Bossetta expressed his concern that Davis and Nationwide may be wrong, and he attempted to re-negotiate the purchase price down to $360,000.00 in part on that basis. (Tr. 277-278 & 332-334.) Bossetta argued that a lawsuit would be required to resolve whether the Madison Easement was extinguished. (Tr. 270-271.) Bossetta terminated the contract when Nationwide refused to renegotiate. (Tr. 278.) With full knowledge of Nationwide's position that the Madison Easements had been extinguished, Bossetta then made a contract to purchase the Madison Land. (Tr. 269-270.) Thus, at the time Bossetta purchased the Madison Land he clearly should have realized that litigation would be required to resolve the issue as to whether the Madison Easements continue to exist.

c. Bossetta Purchased The Madison Land Under Distress Conditions

When Deposit Guaranty sold the Madison Land to Charles Hughes in 1989, the purchase price was $3,500.00. (Tr. 194-195.) When Charles Hughes sold the Madison Land to

Bossetta's company 13 years later in 2002, the purchase price was only $2,200.00. (Tr. 43 & 45.) The substantial reduction in the value of the Madison Land clearly demonstrates that Bossetta purchased the land under distressed conditions due to the serious questions as to lack of access and utilities. These serious questions are also evident in the fact that Bossetta's own chain of title includes only a quitclaim of any right, title or interest the Madisons may have still had in the Madison Easements after the foreclosure.[12] (Ex. 5.) This quitclaim was executed on October 31, 1988, some three months after the Madisons no longer owned any interest in the Madison Land to convey. (*Compare* Ex. 5 *with* Ex. 4.)

11. Nationwide Made Windrows For Reforestation

In the early 2000s, Nationwide conducted logging operations and clear-cut an area between the Bossetta 65-acre tract and the Madison Land. (Tr. 363.) The old one-lane path between the Bossetta 65-acre tract and the Madison Land was used as a staging area and was substantially disturbed during this process. (*Id.*) After completing the timber cutting, Nationwide engaged in a routine and customary reforestation process to construct windrows every several feet throughout the clear-cut area including the old one-lane path. (Tr. 28, 57-59 & 347; Exs. 18-22.) The windrows traverse the entire reforested area, not just the old one-lane path. (Tr. 69; Exs. 20-22.) When asked by the Court to explain why the windrows were installed, the professional dozer operator who testified for Bossetta admitted it was not to "close the roadway" but rather was for planting pine trees. (Tr. 60-62.) Pine trees were then planted between the rows throughout the area, including the old one-lane path. (Tr. 367.)

[12] Neither the Madison Deed of Trust nor the foreclosure deed purported to convey the Madison Easements. (Exs. 3 & 4.)

12. Davis And Nationwide Complied With The Preliminary Injunction

Bossetta filed this action on or about May 11, 2005, claiming the Madison Easements still exist and seeking an injunction to require Nationwide to return the old one-lane path to the condition as existed prior to the construction of the windrows. (R. 6-14.)

At a hearing conducted on May 26, 2005, the chancery court ordered Nationwide and Davis to return the old one-lane path to the condition as existed prior to the construction of the windrows to allow Bossetta access. (Tr. 51; R.E. 7.)

On the same day without waiting for entry of the written order, Davis personally complied with the court's order by using his own tractor and implements to smooth and compact the rocky soil in the old logging road that had been used to construct the windrows. (Tr. 334-335.) Anthony Liuzza, Nationwide's hunting lessee, testified that Davis and Nationwide put the road back in the condition it was before the windrows were installed. (Tr. 99-103; Exs. 57-61; R.E. 9.) Exhibits 57-61 (R.E. 9), as compared with Exhibits 18-22 (R.E. 10), plainly show that the windrows were removed and the road was returned to a relatively smooth, passable condition for vehicles.[13,14,15] (Tr. 102-103 & 337-338.)

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[13] Exhibits 57-61 depict the pathway after the removal of the windrows whereas Exhibits 18-22 depict the pathway before the removal of the windrows. (Tr. 28 & 337.) Exhibits 57 and 58 depict the view north toward Bossetta's green gate. Exhibits 59-61 depict the view south from Bossetta's green gate. While the photos show grass is growing up along the pathway, the photos were taken some five months after the windrows were removed and the preliminary injunction did not require Davis and Nationwide to provide ongoing maintenance. (Tr. 51; R. 51-57; R.E. 3 & 4.) Indeed, Bosetta has his own tractor for bushhogging. (Tr. 30.)

[14] It should be noted that Darlene Hughes was called as a witness for Bossetta and testified that the entire one-lane path from Kramer Lodge Road to the Madison Land was so rough that vehicles could not travel more than 2 to 5 miles per hour. (Tr. 134.)

[15] Bossetta testified that the windrows or berms were still two feet high after Davis did his work on the path in response to the preliminary injunction order. (Tr. 303.) However, as they say, a picture is worth a thousand words - - the pictures, Exhibits 57-61, plainly show that there were no windrows remaining in the path that Bossetta had desired to be smoothed.

For more than four months thereafter, Bossetta voiced no objection at all to Davis' compliance with the Court's order. (Tr. 298-299.) Then, on September 28, 2005, without any prior suggestion to Davis that he was dissatisfied with Davis's efforts to remove the windrows, Bossetta filed a motion requesting that the Defendants be cited for contempt for not complying with the Court's order. (Tr. 297-299; R. 116-118.) The chancery court erroneously granted this motion at the conclusion of the trial. (Tr. 444-446; R. 361-362; R.E. 3.)

SUMMARY OF THE ARGUMENT

The easements granted to Bossetta's predecessors-in-title were terminated by the foreclosure of the Stickney Deed of Trust. The Madison Easements could not survive the foreclosure on a theory of easement by necessity. In this connection, *Cox v. Trustmark National Bank*, 733 So. 2d 353 (Miss. Ct. App. 1999) should be overruled to the extent it holds that the release of a landlocked tract from a deed of trust results in an implied subordination of the deed of trust to an implied easement by necessity over the remainder of the mortgaged property.

Alternatively, Bossetta and his predecessors were not entitled to an easement by necessity for access because the Madison Land fronts on the Tangipahoa River, a navigable stream. Moreover, Bossetta and his predecessors were not entitled to an easement by necessity for utilities because there is no strict necessity for utilities. Even if there had been such an easement for utilities at one time, the easement was abandoned.

If Bossetta is entitled to an easement, which Davis and Nationwide expressly deny, then the chancery court erred in relocating the easement to impose new burdens on the Nationwide Land.

The entry of the preliminary injunction order and citation for contempt was error because the Madison Easment was extinguished. Alternatively, Davis and Nationwide reasonably complied with the preliminary injunction order and should not have been cited for contempt.

Moreover, the chancery court should not have required Davis and Nationwide to pay any of Bossetta's attorney fees.

If this Court finds that the chancery court erred in any of the above respects, then this action must be remanded to the chancery court with instructions to further consider Nationwide's counterclaims.

Finally and alternatively, if this Court finds that Bossetta is entitled to an easement as stated in the Madison Easement or as relocated by the chancery court, then this Court should modify the judgment to enjoin Bossetta from entering any portion of the Nationwide Land other than such specific easement area.

ARGUMENT AND AUTHORITIES

Standard Of Review

The chancery court's interpretation and application of the law is reviewed under a de novo standard. *In re Carney,* 758 So. 2d 1017, 1019, ¶ 8 (Miss. 2000), *Isom v. Jernigan*, 840 So. 2d 104, 106, ¶ 6 (Miss. 2003). This Court has summarized the standard of review of a chancellor's fact findings in *In re Estate of Carter*, 912 So. 2d 138, 143, ¶ 18 (Miss. 2005) as follows:

> We employ a limited standard of review on appeals from chancery court. If substantial credible evidence supports the chancellor's decision, it will be affirmed. The Court will not interfere with the findings of the chancellor unless the chancellor was manifestly wrong, clearly erroneous or applied the wrong legal standard. Our standard of review is indeed deferential, as we recognize that a chancellor, being the only one to hear the testimony of witnesses and observe their demeanor, is in the best position to judge their credibility. [Internal citations omitted] [Emphasis added.]

This Court will reverse a chancellor's fact findings where this Court has "a firm and definite conviction that a mistake has been made." *Poole v. City of Pearl*, 908 So. 2d 728, 732, ¶ 12 (Miss. 2005).

1. The Chancery Court Erred In Concluding That The Madison Easement Was Not Extinguished By Foreclosure

The chancery court concluded that "the court does not find that the subsequent foreclosure did anything to extinguish the easement for right-of-way . . . nor the utility easement." (Tr. 448.) This was an erroneous application of law.

Bossetta, Davis and Nationwide all agree that Hornsby and Singleton are the common source of the title of both Nationwide to the Nationwide Land and Bossetta to the Madison Land. (Tr. 216; Exs. 1 & 2.) In that regard, the Stickney Deed of Trust, executed by Hornsby and Singleton and placed of record some two years before the execution of the Madison Deed, had priority over any purported easements granted in the Madison Deed. (*Compare* Exs. 2 & 9.) Thus, well-established Mississippi law requires the conclusion that the foreclosure of the Stickney Deed of Trust extinguished any easement rights conveyed in the Madison Deed.

As shown in the statement of facts, Nationwide claims its title from First Bank, the purchaser at the foreclosure sale under the Stickney Deed of Trust. (Exs. 11-14.) Bossetta claims his title and easement by virtue of a chain of title under the Madison Deed executed by Hornsby and Singleton subsequent to the recording of the Stickney Deed of Trust. (Exs. 4-8.) Thus Nationwide acquired ownership of the Nationwide Land land free and clear of any easement which Bossetta claims herein because the Stickney Deed of Trust was not burdened by the alleged easement.

Long ago the Mississippi Supreme Court settled any question as to the effect of a foreclosure sale under a deed of trust on ***all*** types of encumbrances junior to the recording of the deed of trust. In recent years this Court has re-affirmed the rule:

> The trustee's deed is a conveyance absolute as though the trustee held fee simple title. It cuts off the equity of redemption and ***any other rights*** in and to the property (all of which are transferred to the foreclosure sale proceeds), ***with the sole exception of rights perfected prior to the filing of the deed of trust*** under which the foreclosure sale is held. See *Hart v. Gardner,* 81 Miss. 650, 33 So. 497 (1902). (Emphasis added.)

Peoples Bank and Trust Co. and Bank of Mississippi v. L & T Developers, Inc., 434 So. 2d 699, 708 (Miss. 1983). Again in *Shutze v. Credithrift of America, Inc.*, 607 So. 2d 55, 65 (Miss. 1992), this Court held that "a valid and effective foreclosure extinguishes all subordinate rights. ***The foreclosing trustee has the exact same power to convey free and clear of junior liens or interests as though he held a deed absolute filed for record the day the deed of trust was recorded.***" (Emphasis added.)

The proper application of Mississippi law requires the conclusion that the Madison Easements terminated with the foreclosure of the Stickney Deed of Trust.

2. <u>The Foreclosure Sale Extinguished The Madison Easement Even If Could Be Said That The Easement Was A Necessity</u>

Bossetta will undoubtedly argue that a Mississippi Court of Appeals decision in *Cox v. Trustmark National Bank*, 733 So. 2d 353 (Miss. Ct. App. 1999) holds that the foreclosure of a deed of trust does not extinguish a junior easement where there is a "necessity" for the easement. Indeed, the chancery court adopted the *Cox* decision in making the following conclusions:

> [T]he court is going to squarely rule that Mr. Bossetta is entitled to the benefit of the easement as contained in his chain of title from the earliest severance and from the developers of the property; and he is entitled to that easement by virtue of the fact that even though the property was subject to the Stickney deed of trust, which was subsequently foreclosed, and from hence that foreclosure deed is the origin of the Davis [Nationwide] property, that Mr. Bossetta is entitled to his easement ***because his tract was released from the terms and conditions of the Stickney deed of trust.*** (Tr. 446.) (Emphasis added.)
>
> . . . .
>
> Clearly common sense would tell you that if you release a small tract and the corresponding deed on that small tract describes a road that is a part of your larger tract, common sense would tell you that you have subordinated your deed of trust to the use of that road. (Tr. 448.)
>
> . . . .
>
> [T]he court is going to find that the bank's position in granting the partial cancellation on the 1.11 acre, now Bossetta tract, in fact, would bind it to the same equitable position as if the bank had been the actual grantor of the 1.11 acre tract instead of just the mortgage holder on it and that,

therefore, they would have been required to have honored the grant of the easement." (Tr. 450.)[16]

It is true that in *Cox* the Court of Appeals held that by partially releasing a landlocked portion of a larger tract simultaneously with the conveyance of the landlocked tract to a third party, the mortgagee is deemed to have impliedly consented to an easement by necessity over the portion of the tract remaining subject to the mortgage. *See, Cox*, 733 So. 2d at 358, ¶22. At the outset, however, it should be noted that the *Cox* court made this holding in the context of a dispute over a right to attorney fees for a wrongful preliminary injunction; that is, but for the attorney fee issue, the question as to the existence of an easement had been mooted before the decision because title to both tracts had re-merged during the course of the appeal. *Id.* at 354, ¶1. Moreover, the court expressly noted that "the issue is close." *Id.* at 358, ¶22.

Davis and Nationwide respectfully submit that *Cox* was decided wrong, and the chancery court erred in following *Cox*, for at least three reasons.

A. Easements By Necessity Can Be Created Only By Conveyance, Not By Partial Cancellation

First, *Cox* is contrary to established real property law opinions of the Mississippi Supreme Court squarely holding that implied easements are established by a "conveyance." *See Rowell v. Turnage*, 618 So. 2d 81, 85 (Miss. 1993) ("An easement born of necessity . . . ***is created, if at all, by conveyance.***")(emphasis added.). A mere partial release of a deed of trust is far different. There is no just reason to imply that a mortgagee intended to release more than stated in his

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[16] As additional support for its judgment, the chancery court stated:

[T]he foreclosure deed and the other deeds in Mr. Davis's title opinion make reference to this, what the court is going to, the missing document. (Tr. 448.)

It is unclear exactly what the chancery court meant by this reference, but it appears that the court was suggesting that perhaps the Stickney Deed of Trust was subordinated to the Madison Easements in a "missing document." Bossetta had the burden to prove any subordination of the deed of trust to his predecessor's easement. The court's statements about a possible missing subordination document are clearly speculation and error.

release.[17] This is particularly true where, as here, the mortgagee specifically states in the release that "[e]xcept as stated above, the said deed of Trust shall remain in full force and effect." (Exs. 37 & 38.) Indeed, the Court of Appeals decision in *Cox* had the effect of altering or expanding Mississippi property law without citing any authority from the Mississippi Supreme Court for the holding and without reviewing cases from other jurisdictions.

B. The *Cox* Court Overlooked The Fact That Junior Easement Holders Have A Statutory Remedy Of Redemption And Thus Do Not Need The Protection Of The Court To Imply An Easement By Necessity

It is apparent that the court in *Cox* assumed that this Court would expand the common law rules concerning easements by necessity in order to give a junior easement holder a remedy in the event his land would otherwise become landlocked as a result of foreclosure of a senior deed of trust.[18] The fallacy here is that the court overlooked the fact that two statutory remedies were already available to protect his interest.

First, Miss. Code Ann. § 89-1-55 required that notice of the foreclosure be published and in turn Miss. Code Ann. § 89-1-59 provided the statutory means by which any "interested parties," including Bossetta's predecessor holder of the Madison Easement, could protect his easement from the foreclosure. In *Mechanics State Bank v. Kramer Service*, 184 Miss. 895, 186 So. 644, 645 (1939) the Court applied this same reasoning in holding that in suits seeking judicial foreclosure, "[i]t is an invariable rule that junior encumbrancers must be made parties defendant . . . as they have the right to appear and pay of [sic] the senior encumbrance."

This precise issue was recently addressed in Alabama in *Alabama Historical Com'n v. City of Birmingham*, 769 So. 2d 317, 320-321 (Ala. Civ. App. 2000) wherein the court held that

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[17] In the instant case, there is not any evidence in the record to show that the mortgagees even knew of the Madison Easements at the time the partial releases were signed.

[18] It is important to note that Davis and Nationwide do not agree that the Madison Land is in fact landlocked. See Section 3 below.

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:

> In Alabama, the general rule is that the foreclosure of a mortgage terminates an easement that is recorded after the mortgage, subject only to the junior easement holder's right to redeem under § 6-5-248, Ala. Code 1975.
>
> . . . .
>
> [T]his court has already concluded under *Bailey, supra,* that Turnipseed's foreclosure terminated the Commission's easement, subject only to its right to redeem. The trial court did not err in finding ***the Commission's only route to reestablishing its easement was by way of its statutory right of redemption***. (Emphasis added.)

See also, Prestwood v. Weissinger, ___ So. 2d ___, 2005 WL 3084890, *3 (Ala. Civ. App. 2005). Even if the junior easement is deemed a "necessity" to avoid a parcel from becoming landlocked, the sole remedy is exercise of the right of redemption by the easement holder. *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).

Bossetta should not now be permitted to complain that his own predecessors chose not to protect their easement through their right of redemption.

Second, if the Madison Land is found to be landlocked, then Miss. Code Ann. § 65-7-201 provided Bossetta's predecessors and now Bossetta an additional means to obtain access to the Madison Land by petitioning the special court of eminent domain to establish a private road. In *U.S. v. Roberts*, 788 F.Supp. 555, 556-557 (S.D. Fla. 1991) (applying Florida law) the court found that a somewhat similar Florida statute provided an adequate remedy to lack of access resulting from the extinguishment of an easement to a landlocked parcel after foreclosure of a senior lien:

> ***The government is correct in stating that Ribas' easement is extinguished upon foreclosure of the subject mortgage.*** The Notes and mortgage at issue were executed three years prior to establishment of the Ribas easement. "First in time, first in right" certainly applies to this situation.
>
> ***By extinguishing the easement we come upon a new problem: Ribas may have a landlocked tract, apparently with no alternative route for traveling to and from his land. Florida Statute 704.01(2) was specifically designed to address this problem.*** (Emphasis added.)

Moreover, at least one court has now declared that common law ways of necessity are no longer available in view of the statutory remedy. *See*, *Ferguson Ranch, Inc. v. Murray*, 811 P.2d 287 (Wyo. 1991). 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.

C. The *Cox* Court Failed To Consider The Overwhelming Weight Of Authorities

In *Cox*, the court founded its decision on the following proposition:

> [F]or the release of the 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 v. Trustmark Nat. Bank, 733 So. 2d 353, 358 (Miss. App. 1999). It should be noted that this statement improperly assumes that the mortgagee even knew about the junior easement. Equally important, the court did not cite any authority for this proposition. Instead, the court attempted to draw an analogy between a conveyance of a landlocked tract and a release of a landlocked tract without addressing whether other courts have directly addressed the proposition. *Id.* There are numerous authorities around the nation which have in fact addressed and rejected the proposition.

Courts in other states have uniformly applied reasoning similar to that in *Rowell* in rejecting arguments that foreclosures do not extinguish easements, even easements by necessity. *See, Penn Mut. Life Ins. Co. v. Nelson*, 132 P.2d 979, 981 (Or. 1943) in which the court squarely rejected the proposition that a release of a landlocked tract from a mortgage gives rise to an easement by necessity:

> The defendants, of course, could not, by any act of theirs subsequent to the date of the mortgage, create an easement or other encumbrance upon the mortgaged premises which would be paramount to the rights of the mortgagee. 42 C.J., Mortgages, 260, § 1913. ***If Mrs. Alexander became entitled to a way of necessity over the mortgaged premises when the defendants conveyed to her the west parcel, such easement was cut off by the decree in the foreclosure proceedings.*** (Emphasis added.)[19]

See also, *Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 962 P.2d 1041, 1045 (Idaho 1998) (partial release of deed of trust does not bind mortgagee to an implied access easement); *Vanderwerff v Consumers Gas Co.*, 71 A.2d 809, 812 (Pa. Super. 1950) (same); *Cousins v. Sperry*, 139 S.W.2d 665, 667 (Tex. Civ. App. 1940) (tract released from deed of trust lost its

[19] An even starker example was shown in an analogous case where a wall on lot A supported a building on lot B. However, the obviously necessary easement of support was held to have terminated upon foreclosure of a senior mortgage on lot A. *See, Frater Oklahoma Realty Corp. v Allen Laughon Hardware Co.*, 245 P.2d 1144 (1952). The court refused to imply an easement by necessity. *Id.*

easement over remaining mortgaged land by foreclosure since the partial release did not also subordinate the deed of trust to the easement over the remaining mortgaged land); *U.S. v. Roberts*, 788 F.Supp. 555, 556-557 (S.D. Fla. 1991) (foreclosure extinguished easement by necessity created by mortgagor's conveyance after deed of trust was placed of record); *Boyer v. Whiddon*, 589 S.E.2d 709, 711 (Ga. App. 2003) (if a way of necessity arises subsequent to a valid mortgage, then it is extinguished by foreclosure of the mortgage); *Bush v. Duff*, 754 P.2d 159, 164 (Wyo. 1988) *overruled on other grounds, Ferguson Ranch, Inc. v. Murray*, 811 P.2d 287, 290 (Wyo. 1991)) (way of necessity created after recorded mortgage is extinguished by foreclosure); *Leonard v. Bailwitz,* 166 A.2d 451, 455 (1960) foreclosure terminates way of necessity created subsequent to mortgage); *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); *Rhodes v. Anchor Rode Condominium Homeowner's Ass'n, Inc.*, 508 S.E.2d 648, 650 (Ga. 1998) ("foreclosure . . . divests all of the grantor's rights in the property as well as the rights of those claiming through the grantor that are subject to the security deed. . . . [Thus,] easement was extinguished by the foreclosure"); *Massey Assocs. Ltd. v. Whitehorse Inns, Inc.*, 454 S.E.2d 513, 514 (Ga. 1995) (easement was lost by foreclosure where security deed was executed prior to creation of easement and was not subordinated to the easement); *Motel Enterprises, Inc. v. Nobani*, 784 S.W.2d 545, 547 (Tex. App. 1990) (same).[20]

[20] See also, *Burlington & C. R. Co. v. Colorado Eastern R. Co.*, 88 P. 154, 155 (Colo. 1906) ("the lien of the trust deed attached prior to the granting of the right of way to Sigler & Co., and through the subsequent foreclosure of the trust deed whatever rights that company had were terminated"); *Euclid Plaza Associates, L.L.C. v. Roberts Plaza, L.L.C.*, 189 S.W.3d 649, 650 (Mo. App. 2006) (same); *Camp Clearwater, Inc. v. Plock*, 146 A.2d 527, 536 (N.J. Ch. Div. 1958), *judgment aff'd*, 157 A.2d 15 (N.J. App. Div. 1959)(same); *Kellogg v Illinois Cent. R. Co.*, 213 NW 253, 215 NW 258 (Iowa 1927)(same); *Great Cove Boat Club v. Bureau of Public Lands*, 672 A.2d 91, 94 (Me. 1996) ("An easement appurtenant can be terminated . . . by . . . foreclosure"); *Jackvony v. Poncelet*, 584 A.2d 1112, 1114 (R.I. 1991)(same); *Stickney v. City of Saco*, 770 A.2d 592, 607 (Me. 2001)(same); *Lavigne v. Holder*, 186 S.W.3d 625, 628 (Tex. App. 2006) (same).

In *Amstar/First Capital, Ltd. v. McQuade*, 856 S.W.2d 326, 327 (Ark. App. 1993) the Court stated:

> [N]othing can be done by the mortgagor, subsequent to the execution of a valid mortgage, which can impair the rights of the mortgagee. . . . The mortgagor can make no contract respecting the mortgaged property which would bind the mortgagee or prejudice his rights. . . . ***Furthermore, a mortgagee, after having his deed recorded, is not required to search the record from time to time to see whether other encumbrances have been put upon the land.*** (Emphasis added.) (Internal citations omitted.)

This case drives home the point that when a mortgagee releases a specific portion of mortgaged property he cannot be charged with notice that he may be ***unintentionally*** granting an easement by some act his mortgagor after the execution of the mortgage. If a mortgagee ***intends*** to subordinate his deed of trust to a junior easement, the simple, standard way to do so is to execute and record a subordination agreement. There is no subordination agreement in this case.

Sun Valley Hot Springs Ranch, Inc. v. Kelsey, 962 P.2d 1041, 1045 (Idaho 1998), explains that where a partial release of a landlocked tract from a superior mortgage does not include any reference to an easement, then the mortgage will be unaffected by any implied easement arising out of any act by the mortgagor:

> [T]he release specifically preserved First Federal's mortgage on all property in the subdivision property other than "Lot 44" with the language: "but said mortgage and the lien thereof is retained as to any other than the above described property." The release did not mention any common area or access easement rights. . . . . The clear language in the release indicates that First Federal was releasing its interest in only "Lot 44" and retaining its mortgage interest in all other property. The release did not, either expressly or by implication, include any common area or access easement rights.

Similarly, in this case the partial cancellation instruments at issue released the Stickney Deed of Trust only "insofar as the same pertains to the [Madison Land] . . . . Except as above stated, the said Deed of Trust shall remain in full force and effect." (Exs. 37 and 38.)

In *Prestwood v. Weissinger*, ___ So. 2d ___, 2005 WL 3084890, *3 (Ala. Civ. App. 2005) the court explained in simple terms the long-standing rule of real property law that gives priority to a senior encumbrance even where the junior encumbrancer may suffer loss of important rights:

> The plaintiffs also contend that to allow the Weissingers to develop Parcel A would violate public policy. They argue that the logical extreme of the trial court's ruling is that the entire plat is invalid, in spite of the fact that Farmers National Bank never treated the plat as invalid. They assert that the trial court's ruling results in "a host of innocent purchasers for value ··· who relied upon a perfectly valid [p]lat filed of record in the [p]robate [c]ourt, now hav[ing] their rights cut off."
>
> ***The plaintiffs' argument ignores the principle underlying the general rule that after-acquired interests are subject to the rights of the holder of a properly recorded, valid mortgage. Those who acquire an interest in real property are put on constructive notice by our system of recordation of previously filed interests in the same property.*** *See Haines v. Tonning,* 579 So. 2d 1308, 1310 (Ala. 1991) (holding that the proper recording of an instrument relating to an interest in real property constitutes constructive notice "to all the world" of the contents of the instrument). Accordingly, the plaintiffs were on constructive notice of the fact that the mortgagee in this case took an interest in the property prior to, and therefore superior to, any restriction created by the plat in question.

For all of these reasons, Davis and Nationwide respectfully submit that this Court should overrule *Cox,* and reverse the Chancery Court Judgment in this action.

3. The Chancery Court Erred In Concluding That There Is A "Necessity" For An Implied Easement For Access

The chancery court based its judgment in large part upon the erroneous finding that the Madison Land is landlocked and an easement should be implied. (Tr. 447; R.E. 4.)

Davis and Nationwide acknowledge that the Madison Land is not accessible by land without an easement. However, it is undisputed that the Madison Land fronts the Tangipahoa River. (Tr. 214 & 293-296; R. 92-93; Ex. 63.)[21] Thus, Bossetta has access to the Madison Land via a navigable stream open to the public. Bossetta did not offer any evidence at all to suggest that this means of

[21] Bossetta testified that he already has plans to build a boat dock. (Tr. 295-296.)

access to the Madison Land was prohibitive.[22] 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 Bossetta's personal preferred method of access and may be inconvenient, it is simply not accurate to say that Bossetta's Madison Land is truly landlocked so as to give rise to a ***strict*** necessity for an implied easement.

Mackie v. U.S., 194 F.Supp. 306, 308 (D.C. Minn. 1961) is a good case that demonstrates the principle that an easement by necessity will not be recognized where access to land is available by water even though the access is much longer and more difficult than access by a land route:

> Testimony regarding this point in the instant case, though conflicting as to degree of difficulty which would be encountered, clearly shows that plaintiff has access to an alternate route of ingress and egress. If permitted to use the Gun Lake Road, plaintiff can drive within one-third mile of the shore of Gun Lake. He then must carry his supplies on foot the one-third mile to Gun Lake, load everything into a boat and cross Gun Lake to his property. Using the alternate route, he can drive on the portion of the Gun Lake Road not within the roadless area, proceed easterly at the Fourtown Junction for one and one-half miles and be within one and one-half miles of Fourtown Lake. He can then travel by boat across Fourtown, Boot and Fairy Lakes to Gun Lake. He must make three short portages, between Fourtown and Boot, Boot and Fairy, and Fairy and Gun Lakes. The total distance from where he must leave his vehicle to his property at Gun Lake is not more than eight miles.
>
> The general rule of law herein applicable is that one cannot claim an easement by way of necessity over lands to which he has another mode of access, however inconvenient.
>
> The testimony here clearly indicates that plaintiff did have another mode of access to his property. Plaintiff, therefore, having no right to use the Gun Lake Road by application of any established rule of law, the acts of defendant in closing and destroying the Gun Lake Road have not resulted in infliction of any damage to plaintiff to which this Court can grant relief.

[22] Indeed, the only testimony Bossetta and his other witnesses offered regarding the Tangipahoa River was that they enjoyed boating, fishing and swimming in the river. (Tr. 293-296.)

Very recently, albeit in a different setting, the court in *McFarland v. Kempthorne*, ___ F.Supp.2d ___, 2006 WL 3335587, *4 (D. Mont. 2006) followed *Mackie*:

> Although accessing the Property by skis or snowshoes may be inconvenient, it defeats any necessity in this case. To obtain an easement by necessity, the claimant must demonstrate strict necessity; it is not sufficient to show other means of access are merely inconvenient. . . . McFarland may access the Property via Glacier Route 7 by foot, skis, snowshoes, or horseback during winter months. The 3.2 mile trip is much less burdensome than the alternative mode of access found to defeat necessity in *Mackie v. United States,* 194 F.Supp. 306, 308 (D. Minn. 1961). In *Mackie,* the court determined an alternate route which required the property owner to leave his automobile eight miles from his residence, walk one and one-half miles to a lake, and then travel by boat across three lakes with short portages between the lakes defeated any necessity for an easement. . . . Because motorized access via Glacier Route 7 during the winter is not strictly necessary for McFarland to access the Property, McFarland's claim to an easement by necessity fails.

Likewise, in *Welch v. State*, 908 A.2d 1207, 1210 (Me. 2006), the court recently re-affirmed the rule that land adjoining a navigable waterway does not qualify for an easement by necessity over neighboring land:

> Land abutting navigable water is generally not entitled to an easement by necessity over neighboring land because it is not considered to be landlocked. *Murch,* 2004 ME 139, ¶ 20, 861 A.2d at 652. This is true despite the fact that water access to the parcel is inconvenient. *Id.* "[N]o easement by necessity may be determined to exist benefiting a water-bounded and otherwise landlocked property absent evidence that access via the boundary water is unavailable." *Amodeo,* 681 A.2d at 466.

See also, Murch v. Nash, 861 A.2d 645, 652 (Me. 2004) ("land accessible by navigable water cannot be landlocked" and "is generally not entitled to an easement by necessity"); *Wiggins v. Short*, 469 S.E.2d 571, 578 (N.C. App. 1996) ("Pembroke Creek, which abuts Wiggins' property, is still navigable and is available as a means of access to his property . . . . Thus, the trial court did not err in its conclusion that Pembroke Creek provides adequate and proper access to Wiggins' property and he does not have an easement of necessity across appellees' property"); and *Flood v. Earle*, 71 A.2d 55, 57 (Me. 1950) (" If free access to the land over a public navigable water exists, a way by necessity cannot be implied.").

Davis and Nationwide urge this Court to uphold the long-standing requirement of ***strict*** necessity for an implied easement by necessity.[23] *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). The judgment below should be reversed because Bossetta failed to meet his burden to prove strict necessity.

4. The Chancery Court Erred In Concluding That There Is A "Necessity" For An Implied Easement For Utilities

Even if this Court finds that Bossetta is entitled to an easement by necessity for *access* to the Madison land, that does not mean Bossetta is entitled to an easement for utilities. In *Rowell v. Turnage*, 618 So. 2d 81, 87 (Miss. 1993) this Court held 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. The undisputed evidence listed in the statement of

[23] Davis and Nationwide recognize that there are some jurisdictions that permit an easement by necessity over land to a tract fronting on a public, navigable stream. However, these jurisdictions long ago adopted a more relaxed standard than "strict necessity" for implying easements by necessity and, thus, are distinguishable from Mississippi and the other authorities cited above.

facts, above, 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.

In announcing its findings, the chancery court did not state any factual findings to support a conclusion that utilities are in fact necessary for the Madison Land now, much less in 1985. (Tr. 443-460; R.E. 4.) Bossetta offered no evidence that a power line is truly a necessity today, much less a true necessity in 1985.[24] The fact that no one even attempted to construct power lines in the 1980s is powerful evidence of the lack of necessity. The fact that all camp owners in the area have used generators dating back to the 1980s and continuing to the present date should put an end to the inquiry. Thus, again the judgment below granting Bossetta an implied easement by necessity for utilities is manifestly wrong.

5. The Chancery Court Erred In Refusing To Find That Any Utility Easement Was Abandoned

Even if Bossetta could show the existence of an easement by necessity at one time for utilities, the facts plainly create the inescapable conclusion that any such easement has been abandoned. *See, R & S Development, Inc. v. Wilson*, 534 So. 2d 1008, 1010 (Miss. 1988) ("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.")

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:

> In 9 R.C.L. 813, Sec. 69 it is stated generally that "***an abandonment of an easement will be presumed where the owner of the right does, or permits to be done, any act inconsistent with its further enjoyment.***" In Scott v. Moore, 98 Va. 668, 37 S.E. 342, 81 Am.St.Rep. 749, it is said [page 348]:

[24] 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)").

> "A party entitled to a right of way or other mere easement in land may abandon and extinguish such right by acts in pais, and without deed or other writing; and a ceasure of the use, coupled with any act indicative of an intention to abandon the right, would have the same effect as an express release of the easement, ***without any reference whatever to time.***
>
> . . . .
>
> It is clear however that an abandonment for a shorter period than ten years will suffice under the principle announced in 1 Am.Jur., Page 7, Sec. 9, as follows: "***The moment the intention to abandon and the relinquishment of possession unite the abandonment is complete, for time is not an essential element of abandonment.***" We think that the rule enunciated in the quotations hereinbefore appearing are supported by the decisions generally, and since an understanding of the case at bar has necessitated a full statement of the facts in this opinion we shall not further prolong the same by a citation and discussion of the various decisions in point.

(Emphasis added). *See also*, *Williams v. Patterson*, 198 Miss. 120, 131, 21 So. 2d 477, 480 (Miss. 1945).

In this case, the record indicates that in the early 1980s Hornsby and Singleton planned to build a subdivision to be known as "Chatawa Bluffs South" and that they intended at that time to construct streets and install utilities for the subdivision. (Ex. 2.) However, they never followed through by recording a subdivision plat and dedicating any streets or easements. (Tr. 9-10.) The video and photographs placed in evidence plainly show that they never even constructed any streets at all. (Exs. 23-26 & 55.) They never installed any utilities. (Tr. 42, 133-134, 292 & 323.) Bossetta offered no evidence that they ever obtained any consent from the mortgagee to subordinate the prior deed of trust to the planned easements. By 1987 they allowed the land to be foreclosed. (Ex. 11.) Most importantly, Bossetta's predecessors, the Madisons as grantees of the Madison Easements, failed to exercise their right of redemption to protect the easements. Moreover, in 1985 when they bought the Madison Land, the Madisons obviously knew there were buying land that had no utilities - - because none are visible.

As shown in the statement of facts, above, a key factor in Davis's decision to contract to purchase the Nationwide Land in 1993 was the natural undeveloped setting which was amenable to abundant wildlife habitat. The Madisons and their successors allowed the alleged easement area to grow up in timber near both sides of the one-lane path for many years. Clearly, this fact alone conclusively demonstrates that in 1993 when Defendant Davis went into possession of the Nationwide Land, he had no notice that anyone was even claiming a utility easement. Moreover, Bossetta offered no evidence to even suggest that Davis had notice when he contracted to buy the Nationwide Land in 1993 that in future years his land would become burdened by utilities.

These facts clearly demonstrate that even if a utility easement ever existed at one time, it was abandoned.[25] Thus, again, the chancery court judgment is manifestly wrong.

6. Even If Bossetta Is Entitled To An Easement, The Chancery Court Erred In Concluding That Bossetta Had The Unilateral Right To Relocate The Easement 18 Years Later And To Cut Nationwide's Fence and Destroy Nationwide's Timber

After finding that Bossetta was entitled to the benefits of the old Madison Easements, the chancery court then granted his request to relocate the easements by approving, after the fact, Bossetta's cutting of Nationwide's fence and trees and installation of his "green gate" to provide access directly from the Bossetta 65-acre tract to the Madison Land. (Tr. 452-454; R.E. 4.) The chancery court declared that the Madison Easement is adjacent to the boundary between the Bossetta 65-acre tract and the Nationwide Land and that this gives Bossetta the right to cut the fence and trees on the Nationwide Land to create a new access point. (*Id.*) The court likened the situation to a "merger" of estates. (*Id.*)

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[25] Without admitting that Bossetta is entitled to any easement, Defendants would note that even if Bossetta is entitled to an easement, the chancery court erred in failing to require Bossetta to keep Nationwide's gates locked at all times, a practice that has been in place for more than 10 years. In *Board of Trustees of University of Mississippi v. Gotten,* 119 Miss. 246, 80 So. 522 (1919), this Court held that erection of gates is not an unreasonable interference with the enjoyment of a passage. *See also, Rowell v. Turnage*, 618 So. 2d 81, 86 (Miss. 1993).

Even if Bossetta is entitled to the benefits of the Madison Easements, which Davis and Nationwide deny for all of the reasons stated in previous sections of this brief, the chancery court's decision granting Bossetta's request to relocate the easements is erroneous for several reasons. First, Nationwide has a common law pre-existing property right to maintain a fence around the perimeter of its property. *Board of Trustees of University of Mississippi v. Gotten*, 80 So. 522, 523 (Miss. 1919) ("Generally speaking, every owner of lands has a perfect right to fence them, provided, of course, to do so will not appreciably interfere with vested rights of others."); *see also*, *Vice v. Leigh*, 670 So. 2d 6, 12 (Miss. 1995).

Second, Nationwide also has a statutory right to maintain fences around the perimeter of its property pursuant to Miss. Code Ann. § 89-13-1, et seq.

Clearly, Bossetta's predecessor in ownership to the 65-acre tract had absolutely no right to cut its neighbor's fence and cut its neighbor's trees. It goes against longstanding, fundamental principles of real property law to grant Bossetta these rights under the chancery court's theory of "merger" simply because ***today*** Bossetta coincidentally owns the Madison Land on the other side of the Nationwide Land from the 65-acre tract. To do so would be a giant expansion of the theory of merger which would unsettle well established real property law.

Third, it is well settled that once an easement has been located and fixed on the ground "by the practical location and use," it cannot be changed at the request of the owner of the dominant estate. *See*, *Capital Elec. Power Ass'n v. Hinson*, 226 Miss. 450, 461-462, 84 So. 2d 409, 412 (Miss. 1956) (stating further that "a definite location of an easement determines and limits the right of the grantee so that he cannot again exercise a choice.")

Fourth, "it is well established that a way [of] necessity should be located so as to be the least onerous to the owner of the servient estate . . . ." *Taylor v. Hays*, 551 So. 2d 906, 909 (Miss. 1989). The chancery court below failed to consider the fact that if Bossetta is truly

entitled to the benefits of the Madison Easements, then the owners of other small tracts in the area who received similar easements from Hornsby and Singleton will likely have the same entitlement thereby requiring Nationwide to keep the northern access point and pathway open for them. (Tr. 270-271; Ex. 65.) By allowing Bossetta a different access point and path, the chancery court erroneously created a new and additional burden on the servient Nationwide Land. The least onerous burden on Nationwide would be to require Bossetta to use the one and only access point to the established pathway at the north boundary of the Nationwide Land entering from Kramer Lodge Road.

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

At the preliminary injunction hearing on May 26, 2005, Bossetta testified that the windrows that were the subject of his complaint were the ones blocking access from his green gate on his 65-acre tract traversing in a southerly direction to the Madison Land. (Tr. 26 & 30.) Indeed, Bossetta testified that since late 2002 this was the only route he used to access the Madison Land. (*Id.*) This testimony is important because there are several additional windrows traversing the old portion of the Madison Easement pathway a few feet to the west or northwest of Bossetta's green gate which do not affect the pathway to the south towards the Madison Land. Bossetta specifically admits that he did not request the removal of such northwesterly windrows. (Tr. 305.)

At the conclusion of the preliminary injunction hearing, the chancery court announced from the bench that it was ordering Nationwide and Davis to "re-establish ***the path*** as it existed prior to its December '04 – January '05 condition to allow plaintiff access along ***that road*** . . . ." (Tr. 51; R.E. 7.)

Davis and Bossetta both thought "***the path***" and "***that road***" was a clear reference to the portion of the pathway from Bossetta's green gate heading south to the Madison Land since that

is "the path" that Bossetta specifically testified that he had been using and wanted to use. (Tr. 26, 30 & 305.) On the same day of the chancery court's bench ruling, without waiting for entry of the written order, Davis personally complied with the court's order by using his own tractor and implements to smooth out and compact the rocky soil in the old pathway. (Tr. 334-335.)

For more than four months thereafter, Bossetta voiced no objection at all to Davis' compliance with the Court's order. (Tr. 298-299.) Then on September 28, 2005, without any prior notice or suggestion of any nature that additional work was deemed to be needed, Bossetta filed a motion requesting that Davis and Nationwide be cited for contempt for not complying with the Court's order. (Tr. 297-298.)

Bossetta's contempt motion was continued to the trial of this cause provided that Davis and Nationwide were required to pay Bossetta $1200.00 and to permit him to use the money to perform additional improvements to the pathway. (R. 362; Tr. 444-445; R.E. 3 & 4.) Bossetta did in fact use the money to essentially build a brand new road by digging out the old pathway, cutting ditches and bringing in truck loads of new clay gravel. (Tr. 80-81; Exs. 48-50.)

At trial, Bossetta and his contractor testified that Davis had not removed the windrows from his green gate south to the Madison Land before they performed their construction. (Tr. 303.) However, several weeks prior to Bossetta's construction of the new road, Davis took several photographs of the old pathway which plainly show that he did in fact reasonably comply with the preliminary injunction order.[26] (Exs. 57-61; R.E. 9.) Bossetta could not offer any photos to refute Davis' photos or to support his claim that there were still windrows in the southerly pathway two feet high after Davis restored the pathway. (Tr. 303.)

[26] The pictures plainly show the pathway to be passable by vehicle. For comparison, it should be noted that Darlene Hughes was called as a witness for Bossetta and testified that the entire one-lane path from Kramer Lodge Road to the Madison Land was so rough that vehicles could not travel more than 2 to 5 miles per hour. (Tr. 134.)

Notwithstanding the clear photos showing that Davis and Nationwide reasonably complied with the preliminary injunction, the chancery court cited Davis and Nationwide for contempt based upon a finding that they did not remove the windrows across the pathway ***to the west or northwest of Bossetta's green gate.***[27] (Tr. 392-393 & 444-446.) The court drew this conclusion because the actual written preliminary injunction order which required Davis and Nationwide to remove windrows used a legal description taken from the old Madison Deed.[28] (Tr. 391-393.)

Davis candidly acknowledged then, and acknowledges now, that the windrows were not removed from the pathway west or northwesterly of Bossetta's green gate. However, it is patently unfair for the chancery court to use such a technicality to punish Davis and Nationwide. The unfairness is self-evident based upon Bossetta's own interpretation that the preliminary injunction order did not apply to the windrows west or northwesterly of his green gate. (Tr. 305.) Moreover, when given $1200.00 of Davis's money to do his own improvements to the pathway, Bossetta left the intact the windrows crossing the pathway west or northwesterly of his green gate because he did not view that area as being any part of the area that was the subject of his complaint. (Tr. 305 and Exs. Bossetta is a lawyer. (Tr. 223.) Davis is a layperson. It is also unfair to expect a layperson to have a better understanding of the requirements placed upon him than a lawyer-plaintiff.

This Court applies an abuse of discretion standard when reviewing a chancellor's citation for contempt. *In re E.C.P.*, 918 So. 2d 809, 819 (Miss. App. 2005) (finding a chancellor's citation for contempt to be "manifestly wrong and clearly erroneous"). However, a citation for

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[27] With respect to the pathway south from Bossetta's green gate to the Madison Land, the chancery court specifically refused to base a finding of contempt relating to Davis's removal of windrows in this area because "it's impossible to gauge what it was prior to that [Bossetta's] remediation." (Tr. 445; R.E. 4.).)

[28] This formal order was not signed until June 15, 2005, some 20 days after Davis had already complied with the bench ruling. (R. 51-57; R.E. 3.)

contempt must be based upon clear and convincing evidence. *Masonite Corp. v. International Woodworkers of America, AFL-CIO*, 206 So. 2d 171, 180 (Miss. 1967) (also holding that the burden of proof is upon the movant).

Bossetta clearly failed to prove by clear and convincing evidence that Davis and Nationwide failed to comply with the preliminary injunction order. With respect to the pathway south from Bossetta's green gate to the Madison Land, the chancery court specifically found that Bossetta did not meet his burden because "it's impossible to gauge what it was prior to that [Bossetta's] remediation." (Tr. 445; R.E. 4.) That is, even though the chancery court apparently gave little credit to Davis's photographs which plainly demonstrate compliance, the court nevertheless was correct in finding that Bossetta failed to meet his burden to show that the pathway south of his green gate was not passable.

The chancery court clearly and manifestly abused its discretion in citing Davis and Nationwide for contempt for failing to remove windrows from an area that even Bossetta admits he did not intend to be the subject of request for injunctive relief.

8. The Chancery Court Erred In Awarding Attorney Fees To Bossetta

The chancery court ordered Davis to pay attorney fees to Bossetta, concluding as follows:

> But again the court has previously found that Mr. Davis did not fully comply with the preliminary injunction in this matter in that he didn't remove the berms back west of where the green gate is. Now, in light of all of the equities of the situation of Mr. Bossetta being informed in advance prior to the time that he purchased the Hughes property [Madison Land] what Mr. Davis's position was but in light of the fact that Mr. Davis did not comply with the preliminary injunction, the court is going to find that it's fair to assess half of Mr. Bossetta's attorney's fees against Mr. Davis and direct that he pay those within 30 days of entry of the judgment. That would mean half of the $22,732.50. (Tr. 455; R.E. 4.)

At the outset it should be noted that the most basic reason the chancery court erred in awarding attorney fees to Bossetta is that the easements were extinguished and the preliminary injunction was improper.

There are a number of additional reasons the award was erroneous. Even if this Court were to find that the easements were not extinguished, the chancery court plainly erred in basing an attorney fee award upon the fact that Davis failed to remove windrows that even Bossetta did not want to be removed as discussed in the preceding section. Even if Davis had violated the preliminary injunction, that would not be a basis for requiring Davis to pay one half of all of Bossetta's attorneys fees because the chancery court acknowledged that "the issue of contempt . . . [is] a side issue." (Tr. 444; R.E. 4.) This is especially true since the chancery court also concluded that Davis should have "file[d] this suit for declaratory judgment that there was no easement," so that Bossetta would have incurred his attorney fees in any event. (Tr. 457; R.E. 4.) Moreover, "equities" and "fair[ness]" are not the correct test for the award of attorneys fees in any event. (Tr. 455; R.E. 4.)

In *Huggins v. Wright*, 774 So. 2d 408, 412-413 (Miss. 2000) this Court reaffirmed the long-standing principle that, absent a contract or statute, attorney fees are not recoverable as damages unless punitive damages are proper. Based upon this principle, Bossetta's counsel engaged in the following discussion with the chancery court:

> **Mr. Robison:** Does this court – I would ask this court to make a finding of fact. Even though this court may not award punitive damages, I would ask this court if or ask this court to make a finding of fact as to whether or not this court – this case, excuse me, Your Honor, is a case where punitive damages could be awarded even though no such damages are awarded by the court? . . . and my reasoning behind that is I believe the case law states that even though – that a court may award attorney fees where no punitive damages are awarded, even though punitive damages may be proper in the case. . . .
>
> **The Court:** The court did find that this is a case that if not for Mr. Bossetta's prior knowledge of Mr. Davis's position, if the plaintiffs in this case had been the Hughes, as opposed to the Bossettas, I would have awarded punitive damages in a dollar amount for the Hughes because I believe that Mr. Davis's actions were in absolute disregard of a dedicated right and, you know, the better way for him to have addressed this or for him to have advocated his position would have been for him to come in and file this suit for declaratory judgment that there was no easement prior

> to him buying the property if it was the opinion of counsel that the big foreclosure had cut off the easement. (Tr. 457-458; R.E. 4.)

While Bossetta's counsel was correct in raising his own concern that more was needed to support an award of punitive damages, this additional basis provided by the chancery court is still woefully insufficient. Miss. Code Ann. § 11-1-65 (1) (a) states the evidentiary burden which must be met to support the imposition of punitive damages:

> (1) In any action in which punitive damages are sought:
>
> > (a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought ***acted with actual malice***, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

This Court has observed that under this statute punitive damages, and hence attorney fees, cannot be awarded unless there is clear and convincing evidence of "insult, malice or gross negligence, evincing ruthless disregard for the rights of others." *Bradfield v. Schwartz*, 936 So. 2d 931, 936 (Miss. 2006); *Paracelsus Health Care Corp. v. Willard,* 754 So. 2d 437, 442 (Miss. 1999).

The undisputed evidence in this case is that Davis and Nationwide acted on the advice of counsel who expressed the opinion that the Madison Easements were extinguished by the foreclosure. (Ex. 65.) *See, Murphree v. Federal Ins. Co.*, 707 So. 2d 523, 533 (Miss. 1997)("good faith reliance upon advice of counsel may prevent imposition of punitive damages"); *Henderson v. United States Fidelity & Guar. Co.,* 695 F.2d 109, 113 (5th Cir. 1983). Thus, even if this Court finds that the Madison Easements were not extinguished, Davis' reliance on the advice of counsel cannot be said to have been reckless or malicious in this instance.

Even Bossetta squarely admitted that Nationwide's position was at all times an honest belief. (Tr. 249.) Bossetta himself argued that a lawsuit would be required to prove that the Madison Easements were not extinguished. (Tr. 270-271.) Bossetta had full knowledge of

Nationwide's position that the Madison Easements had been extinguished at the time he contracted to buy the Madison Land. *Huggins v. Wright*, 774 So. 2d 408, 412-413 (Miss. 2000) is a case similar to this case where this Court rejected a claim for attorney fees arising out of wrongful denial of easement rights. This Court said that attorney fees were not recoverable because "[t]he parties were simply asserting what each thought in good faith were valid property rights." *Id.*

Given Bossetta's own admission that Davis had an honest belief in his position and that a lawsuit would be necessary to establish the existence of the Madison Easements, it is clear that Davis lacked the malicious or reckless intent necessary to justify an award of attorney fees to Bossetta.

9. If This Court Reverses The Chancery Court, Then This Court Should Also Remand This Case To The Chancery Court With Instructions To Further Consider The Defendants' Counter-Claims And Damages

In light of its conclusions that Bossetta was entitled to the benefits of the Madison Easements and was further entitled to have the easements relocated, the chancery court dismissed all of Nationwide's counterclaims. If this Court finds that the chancery court's judgment was erroneous in that either the easements were extinguished or could not be altered, then Nationwide urges this Court to remand the case back to the chancery court with instructions to further consider Nationwide's counterclaims for injunction and damages, punitive damages and attorney fees for wrongful cutting of Nationwide's fence and timber as well as recovery of damages and attorney fees for the wrongful injunction and the wrongful construction of road improvements across the Nationwide Land and return of Davis's $1,200.00 paid pursuant to that injunction.

10. The Chancery Court Erred In Failing To Enjoin Bossetta

The chancery court stated in its findings that it would grant Nationwide's alternative request that Bossetta be enjoined from using or accessing any portion of the Nationwide Land other than the relocated easement area. (Tr. 458-459; R.E. 4.) However, the court erroneously failed to include this injunction in its Final Judgment. (R. 361-368; R.E. 3.) If this Court affirms the chancery court's judgment that Bossetta is entitled to an easement, then in that event Nationwide would urge this Court to modify the chancery court judgment to enjoin Bossetta and his assigns from using, accessing or entering upon any portion of the Nationwide Land other than the specific easement area authorized by this Court.

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 9th day of February, 2007.

JOHN W. DAVIS and NATIONWIDE
MANAGEMENT LIMITED PARTNERSHIP

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

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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 9th day of February, 2007.

PAUL N. DAVIS