IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-[redacted]-00102
CA

LEROY CALVERT, JR. **APPELLANT**

VS.

BRIAN D. GRIGGS AND TANYA N. GRIGGS **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of 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 disqualifications or recusal.

1. Leroy Calvert, Jr., Appellant
2. Brian D. Griggs, Appellee
3. Tanya N. Griggs, Appellee
4. Gary Street Goodwin, Esq., Attorney for Appellant
5. Thomas B. Storey, Jr., Esq., Attorney for Appellees
6. Michelle D. Easterling, Esq., Attorney for Appellees
7. Honorable Kenneth M. Burns, Chancellor.

SO CERTIFIED, this the 29th day of February, 2008.

Michelle D. Easterling, M[redacted]
Thomas B. Storey, Jr., M[redacted]
Attorneys for Appellees

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STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition of the Case Below.

This cause was commenced on April 15, 2006, in the Chancery Court of Clay County, Mississippi by Appellees' Brian D. Griggs and his wife, Tanya N. Griggs (hereinafter "the Griggs") by the their filing of a Complaint for Injunctive Relief, Damages and Declaratory Judgment against the Appellant, Leroy Calvert, Jr., (hereinafter "Calvert"). (R. 1-22). Specifically, the Griggs sought an order enjoining Calvert from interfering with their use of their property by removing a perimeter fence that they attempted to install around their property, which included that portion of their property that was subject to a forty (40) foot wide access easement in favor of Calvert. (R. 3-6). The Griggs further sought an award for compensatory damages, three (3) counts of statutory trespass, and for Calvert's unlawful damage to and removal of their fencing on three (3) separate occasions, in addition to attorney's fees. (R. 3-6). The Griggs also sought a declaratory judgment from the Court as to their right to construct a perimeter fence around their property, subject to Calvert's right of reasonable access, and a determination of the parties' rights of use, possession and enjoyment of, and duty to maintain and repair the subject easement. (R. 6-9). The Appellant, Leroy Calvert, Jr., the Defendant in the lower court proceedings, filed an Answer and Counter-Claim on May 25, 2005, in which he denied that the Griggs' were entitled to their requested relief, and sought an order enjoining the Griggs' from erecting a perimeter fence across the easement and mandating that the Griggs remove a gazebo and shrubbery from the easement, in addition to damages and attorney's fees, among other costs. (R. 12-15).

Following a hearing on the Griggs' Motion for Summary Judgment held on June 21, 2006, the Chancellor found that summary judgment was appropriate as to all of the Griggs' claims, with the exception of their request that Calvert remove utility poles erected for his

benefit over the easement, and entered its Judgment in favor of the Griggs' on June 21, 2006. (R. 105-108). Thereafter, upon consideration of the Griggs' Motion for Summary Judgment as to the Counter-Claim filed on October 12, 2006, the Court entered another Judgment on December 18, 2006 and dismissed Calvert's Counter-Claim with prejudice, referencing the Court's prior Judgment of June 21, 2006 and finally disposing of the matter in accordance with Rule 54 of the Mississippi Rules of Civil Procedure. (R. 125-126).

Calvert filed his Notice of Appeal of the June 21, 2006 Judgment and the December 18, 2006 Judgment on January 12, 2007. (R.127).

B. Statement of the Facts

The following facts are undisputed by the evidence in this cause:

The Griggs are the owners of a tract of land in Clay County, City of West Point, Mississippi, consisting of:

> Commencing at the Northeast corner of the Southwest Quarter of Section 17, Township 17 South, Range 6 East, Clay County, Mississippi, and from thence run West a distance of 20.0 feet to an existing iron pin and fence corner; thence run South along the West line of an existing county paved public road a distance of 105.0 feet to the Point of Beginning. From said Point of Beginning run thence West a distance of 622.29 feet; thence run South a distance of 140.0 feet; thence run East a distance of 622.29 feet to a point on the West line of said road 140.0 feet to the Point of Beginning, being located in the Southwest Quarter of Section 17, Township 17 South, Range 6 East, Clay County, Mississippi, and containing 2.00 acres, more or less.
>
> SUBJECT TO: Easement over and across the North 40 feet of above described property.
>
> SUBJECT TO: All prior mineral reservations, if any, and also subject to easements for public utilities and rights of way for public roadways, whether the same appear of record or not, if any. (R. 2; 43).

As reflected in the legal description above, the Griggs' property was subject to a forty (40) foot wide easement owned by Mr. Leroy Calvert, the adjacent landowner, for egress and ingress along the North side of the Griggs' property. (R. 2; 43). Calvert's property is located

to the North of the Griggs' property and adjacent to the referenced easement, and is more particularly described as follows:

> Commencing at the Northeast Corner of the Southwest quarter of Section 17, Township 17 South, Range 6 East, Clay County, Mississippi, run thence West 434.86 feet to the Northwest corner of that certain parcel conveyed to Ida May Quinn by Elden Dailey in a Warranty Deed dated March 10, 1978 and the Point of Beginning of this description; run thence South 105 feet; run thence West 414.86 feet; run thence North 105 feet; run thence East 414.86 feet to the point of beginning; being located in the Northeast quarter of the Southwest quarter of Section 17, Township 17 South, Range 6 East, Clay County, Mississippi and containing 1.0 acre, more or less.
>
> Also including is the following easement, to-wit:
>
> Commencing at the Northeast corner of the Southwest quarter of Section 17, Township 17 South, Range 6 East, Clay County, Mississippi, run thence West 20 feet; run thence South 105 feet to the Point of Beginning of this description; run thence West 1244.6 feet; run thence South 40 feet; run thence East 1244.6 feet; run thence North 40 feet to the point of beginning of this description. (R. 2; 43).

The easement gives Calvert access to Hamblin Road, across Griggs' property. (R. 49; 64; 66-67).

As reflected by the Affidavit of Mike St. Louis, Building Inspector for the City of West Point, this particular part of the City of West Point in which these properties are located and situated is a rural area which has been zoned as "A-O Zone," or Agriculture Open District, a District in which the permitted uses include farming, pasturing of cattle, horses and other livestock, hay farming and harvesting, and other related agricultural activities in accordance with the City of West Point Development and Zoning Code. (R. 61-62). In his deposition on January 4, 2006, Calvert acknowledged that there are farms on those properties surrounding the Griggs, along with cattle and horses. (R. 68-69). In his affidavit, Brian Griggs testified that he has had problems with his neighbor's cattle grazing in his yard. (R. 50). The Griggs also own a horse for their children, a fact which Calvert acknowledged. (R. 50; 69).

During the fall of 2004, following the Labor Day holiday, the Griggs hired Kevin Thompson of Green Acres Lawn Service to construct a perimeter fence around their home and property located at 743 Hamblin Road in West Point, Clay County, Mississippi. (R. 50; 70-71). During the construction of the fence, Griggs contacted Calvert and advised him that if at any time in the future gates were to be installed, keys would be furnished to him to assure him of full and reasonable access to Calvert within the forty (40) foot access easement in favor of Calvert. (R. 50-31). In his deposition, Calvert initially admits that Griggs made this assurance, but later denies it. Consider the following:

> Q. Did he ever tell you that when he put the gates up that he was going to give you keys to the gate?
>
> A. He hasn't said nothing about that. The only thing he asked me, said - only thing that he asked me, said, I'm going to box this in. That's what he said. I said, What are you talking about? **I'm going to box this in and give you keys.**
>
> He never said nothing about why he was doing or how he was. I don't care how you going to do it.

(R. 78) (emphasis added).

It is undisputed that at no time during the construction of the perimeter fence was Calvert ever denied access to his home or property. Consider the following admissions of Calvert:

> Q. All right. Did he put up a gate on the property line next to your house?
>
> A. No, he just left a gap there.
>
> Q. Left a gap there.

A. Um-hmm. [indicating yes]

(R. 77)

And this:

Q. So he had the fence post up and the wire across it -

A. Right. **He left me a gap right at the corner of my house** and said, This is for me to get in, back and forward to my house but they couldn't get in there because the big truck couldn't get in there. So what they did, they crossed - they crossed the road to get up in there...

(R. 72) (emphasis added).

The "big truck" to which Calvert refers was a truck used by his contractor in the construction of his home, and the construction company simply went across the road to get to Calvert's site. Despite the assurances given to Calvert by Griggs that he would be furnished a key in the event any locks were installed or any gates, and despite the fact that at no time during the construction of the fence was Calvert ever denied access to his property nor a gate installed, Calvert refused to permit the Griggs to complete construction of the perimeter fence by unlawfully entering Griggs' property and cutting wire and removing the fence posts and materials. (R. 35; 51). It is undisputed in the record that on one occasion during the construction, Calvert told Griggs in the presence of Kevin Thompson, who was installing the perimeter fence on the subject property, "the fence is coming down." (R. 56-60). And come down it did, and on more than one occasion.

On September 22, 2004, without authority of law or permission of Griggs, Calvert cut the fence wire that had been installed by the Griggs. (R. 4; 74). Thereafter, the Griggs repaired the fence on or about October 15, 2004. (R. 35; 49-55; 56-60). On December 15,

2004, without authority of law or permission of Griggs, Calvert again cut the fence wire that had been installed by Griggs and without permission, removed the fence posts from the easement and failed to return the posts to Griggs. (R. 4; 75). On or about December 29, 2004, the Griggs again installed new posts and repaired the wire fencing on their property. (R. 35; 49-55; 56-60). And once more, on January 10, 2005, without authority of law or permission of Griggs, Calvert again cut the fence wire that had been installed by Griggs and without permission, removed the fence posts from the easement and failed to return the posts to Griggs. (R. 4; 75). In all three (3) instances, Calvert removed and/or destroyed the fence, leaving it down after cutting the wire. (R. 51; 56-60). This despite the fact that Calvert was never denied access to his home or property. (R. 35-51). In his January 4, 2006 deposition, Calvert admitted to taking the fence down on September 22, 2004, stating "[a]nyway, I do – I just had to do – I did it. I took the fence down." (R. 74). When further examined, Calvert testified:

> Q. On September 22nd you took it down, is that correct?
>
> A. Well, I can tell you what. On September the 22nd, I started - I started taking the fence down. On September, I started taking the fence down. I didn't finish taking the fence down, I started taking the fence down. I took all I could take down.

(R. 74).

Calvert admitted to taking more fence down on December 15, 2004, stating "Only thing I took down in '04 is the posts, the posts they had there." (R. 75). But Calvert not only knocked the posts down, he later converted them:

> Q. So you did not remove them?

A. I did not remove them at the time. I did not remove them at that time. I did not remove them.

Q. Did you remove them later?

A. Later on - later on I went back to meet - to get the fence - to get the posts. I got some of the posts. I got them and put some of them behind - nine posts on the side of my house.

Q. Where are they today?

A. They still beside my house.

Q. On your property?

A. On my property.

(R. 75).

As set forth in the Affidavit of Kevin Thompson of Green Acres Lawn Service, Inc., as result of Calvert's wrongful acts as described above, the Griggs incurred $10,839.11 to erect the perimeter fence subject of this litigation, and to repair and/or replace posts and other materials on three (3) occasions in the fall of 2004 and early part of January, 2005. (R. 56-60). In addition to those expenses paid to Kevin Thompson and Green Acres, Griggs spent $497.12 on fencing materials from Clay County Co-Op, for a total of $11,336.23 (R. 49-55).

There is situated upon the property of the Griggs, within the forty (40) foot wide access easement in favor of Calvert, a wooden gazebo structure and various shrubbery. (R. 117). Said gazebo occupies approximately eighty (80) square feet along the south side of said forty (40) foot easement and the northernmost portion of the gazebo is more than twenty (20) feet from the south line of the driveway that Calvert constructed and uses for access to his home. (R. 117). The Griggs' shrubbery is also along the southern end of the forty (40) foot easement and is no more than fourteen (14) feet from the south line of Calvert's driveway. (R. 117).

As set forth above, in his deposition testimony of January 4, 2006, Calvert admitted that he has had unrestricted access to his property at all times during the construction of the perimeter fence. (R. 72; 77; 119). Additionally, in his Response to Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaim, Calvert stated in paragraph 3:

> The plaintiffs have responded in their Motion for Summary Judgment that the gazebo and the shrubbery are within the forty (40) foot wide easement, but do not presently interfere with the defendant's use and enjoyment of the easement. **Defendant agrees with this.**

(R. 122) (emphasis added).

The gist of Calvert's counter-complaint, however, was that in the future, the gazebo and shrubbery "may" interfere with his use of said easement if he should ever desire to improve the easement by paving the roadway, to accommodate "adequate shoulder width" or other city expectations or regulations for streets. (R. 123).

SUMMARY OF THE ARGUMENT

The June 21, 2006 Judgment granting summary judgment in favor of the Griggs on nearly all issues raised by them in their Complaint for Injunctive Relief, Damages and Declaratory Judgment, became a Final Judgment after the expiration of the thirty (30) days following entry of the Judgment. Therefore, the Appellant's January 12, 2007, Notice of Appeal of the June 21, 2006 Judgment is time barred pursuant to Rule 4 of the Mississippi Rules of Appellate Procedure, and should be dismissed with prejudice, and all costs of this appeal assessed to the Appellant, Leroy Calvert, Jr.

Thus, the only remaining issue between the parties to be determined by the lower court following entry of the June 21, 2006 Judgment was whether the Griggs' shrubbery and gazebo structure located and situated on the forty (40) foot wide easement in favor of Calvert constituted an unreasonable interference with Calvert's access easement. On considering the Griggs' second Motion for Summary Judgment as to that sole remaining issue, and considering Calvert's admissions that neither the shrubbery nor the gazebo impeded his access to his home or property, as set forth in his January 4, 2006 deposition testimony, the Chancery Court of Clay County, Mississippi correctly found that there was no genuine issue of material fact that Calvert's access to his property was not impeded by the shrubbery or the gazebo, and that the Griggs were entitled to a judgment as a matter of law. Accordingly, summary judgment in favor of the Griggs' on this remaining issue was appropriate under Rule 56(c) and applicable Mississippi law.

Alternatively, if this Court should find that the Judgment entered June 21, 2006, was not a final judgment until December 18, 2006, then the Appellees would show that in accordance with the admissions and affidavits contained in this record, there are no genuine issues of material fact:

(1) That in the fall of 2004, and early January 2005, the Griggs attempted to erect a perimeter fence around their property, including a part of their property that was subject to an easement for ingress and egress in favor of the Appellant, Calvert;

(2) That gates were never installed in the fence, and openings were left to permit Calvert full access to his home and property;

(3) That Calvert was never denied access to his home and property;

(4) That Griggs assured Calvert that if any gates or locks were installed, he would be furnished keys;

(5) That the Griggs' shrubbery and gazebo situated on the forty (40) foot wide easement did not interfere with Calvert's access to his home and property;

(6) That on three occasions during the fall of 2004 and early January 2005, Calvert cut the fence and/or removed the fence posts and other materials and retained them as his own property;

(7) That the Griggs, as owners of the fee had and have the right to erect a perimeter fence with gates and locks around their property, including the forty (40) foot wide easement in favor of Calvert, so long as Calvert was furnished keys to any such gates and/or locks and that such a fence did not and will not constitute an unreasonable interference with Calvert's right to use the access easement. Therefore, the Griggs' claims for injunctive and declaratory relief with regard to their right as owners of the fee to construct a perimeter fence with gates and locks, with keys to same to be furnished to Calvert, and for statutory trespass and conversion and damages, including statutory penalties, are well supported and undisputed as a matter of law, and summary judgment in accordance with MISS.R.CIV.P. Rule 56(c) is appropriate.

ARGUMENT

I. WHETHER THE APPELLANT'S APPEAL OF THOSE ISSUES ADJUDICATED BY THE CHANCELLOR'S JUNE 21, 2006 JUDGMENT AWARDING SUMMARY JUDGMENT IS TIME-BARRED BY RULE 4 OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE.

Rule 4 of the Mississippi Rules of Appellate Procedure sets forth the time in which to file appeals of civil cases.

> **Rule 4. Appeal as of Right – When Taken**
> **(a) Appeals and Cross-Appeals in Civil and Criminal Cases.**
> Except as provided in Rules 4(d) and 4(e), in a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from.

In *Redmond v. Miss. Dep't of Corrections*, the Mississippi Court of Appeals held that the failure to timely file a notice of appeal or to secure an extension from the trial court of the time in which to file a notice of appeal results in a loss of jurisdiction by the appellate court to hear any appeal of such an order or judgment. *Redmond v. Miss. Dep't of Corrections*, 910 So.2d 1211, 1212 ¶ 4 (Miss.Ct.App.2005).

The Official Comment to Rule 3 of the Mississippi Rules of Appellate Procedure provides that "the only absolutely necessary step in the [appeal] process is the timely filing of the notice of appeal." *Comment*, M.R.A.P. 3.

> If the notice of appeal is not filed within the time specified in Rule 4, either the Supreme Court or the Court of Appeals, on its own motion or on motion of a party, will dismiss it. *Comment*, M.R.A.P. 3.

In the case *sub judice*, the June 21, 2006 Judgment granting summary judgment in favor of the Griggs on nearly all issues raised by them in their Complaint for Injunctive Relief, Damages and Declaratory Judgment, became a Final Judgment after the expiration of the thirty (30) days following entry of the Judgment. Therefore, the Appellant's January 12,

2007, Notice of Appeal of the June 21, 2006 Judgment is time barred pursuant to Rule 4 of the Mississippi Rules of Appellate Procedure, and should be dismissed with prejudice, and all costs of this appeal assessed to the Appellant, Leroy Calvert, Jr. Thus, the sole issue left to be decided by the lower court following entry of the June 21, 2006 Judgment was whether the Griggs' shrubbery and gazebo structure located and situated on the forty (40) foot wide easement in favor of Calvert constituted an unreasonable interference with Calvert's access easement.

II. WHETHER THE CHANCELLOR CORRECTLY FOUND THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT THE APPELLEES' GAZEBO AND SHRUBBERY DID NOT UNREASONABLY INTERFERE WITH THE APPELLANT'S USE OF THE ACCESS EASEMENT, THUS ENTITLING THE APPELLEES TO A JUDGMENT AS A MATTER OF LAW PURSUANT TO MISS.R.CIV.P. RULE 56(C) AS PER ITS JUDGMENT ENTERED DECEMBER 18, 2006.

A. STANDARD OF REVIEW OF TRIAL COURT'S GRANT OF SUMMARY JUDGMENT

It is well established that this Court's standard of review of the lower court's award of summary judgment is *de novo*, that is, it is the same as that of the lower court –the standard set forth in Rule 56(c) of the *Mississippi Rules of Civil Procedure. Williamson v. Keith,* 786 So.2d 390, 393 ¶10 (2001). "This Court employs a *de novo* standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it – admissions in pleadings, answers to interrogatories, depositions, affidavits, etc." *Williamson*, 786 So.2d at 393 ¶ 10 (citing *Heigle v. Heigle*, 771 So.2d 341, 345 (Miss.2000)). See also, *Roebuck v. McDade*, 760 So.2d 12, 14 ¶9.

B. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment is proper where the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits," indicate that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Miss.R.Civ.P. 56(c).

When considering a motion for summary judgment, the Court in effect goes "behind the face of the pleadings to determine whether or not a triable issue exists." *Lattimore v. City of Laurel*, 735 So. 2d. 400, 402 ¶5 (Miss. 1999). A material fact, for purposes of reviewing a motion for summary judgment, is "one that matters in an outcome determinative sense." *Roebuck v. McDade*, 760 So.2d at 14, ¶9. Further, "the presence of fact issues in the record

does not *per se* entitle a party to avoid summary judgment." It must be a material issue of fact to defeat a motion for summary judgment. *Id.*

C. CALVERT'S COUNTER-CLAIM FOR MANDATORY INJUNCTION ORDERING REMOVAL OF THE GRIGGS' GAZEBO AND SHRUBBERY

In its Judgment of December 18, 2006, the lower court correctly found that there was no genuine issue of material fact as to the sole remaining issue before, that is, whether the Griggs' gazebo and shrubbery which were situated on the easement in question unreasonably interfered with Calvert's right of use of the easement to access his home and property. In his deposition taken on January 4, 2006, Calvert admitted that he had access to his home and property during Griggs' attempts to erect the fence. (R. 72; 77). Further, in his Response to the Plaintiff's Motion for Summary Judgment as to the Defendant's Counterclaim, Calvert stated in paragraph 3:

> The plaintiffs have responded in their Motion for Summary Judgment that the gazebo and the shrubbery are within the forty (40) foot wide easement, but do not presently interfere with the defendant's use and enjoyment of the easement. **Defendant agrees with this.**

(R. 122) (emphasis added).

Black's Law Dictionary defines "easement" as "a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general (interest) in the owner." *Black's Law Dictionary*, 6th Ed. (citing *Hollomon v. Board of Education of Stewart County,* 147 S.E. 882, 884 (Georgia). Black's further describes the easement owner's right as a "privilege, service, or convenience which one neighbor has of another....." *Id.*

As to the fee owners' continuing right to use easement as the servient owner, in *Leone v. Hess Pipeline,* the United States District Court applied Mississippi law and held that that the "[g]ranting of right of way over land does not pass any other right or incident" and that the

"owner of soil retains full dominion over his land subject to right of way, and owner may make any reasonable use of right of way." *Leone v. Hess Pipeline* 541 F.Supp. 466, 469 ¶2 (S.D.Miss.1982). This case is consistent with the holding of the United States District Court in *McDonald v. Board of Mississippi Levee Commissioners* where the District Court stated the same legal premise:

> While it is true that the owner of an easement obtained by grant or prescription has the implied right to work land to keep it in a reasonably useable condition for its intended purpose, the easement owner 'cannot lawfully take dominant possession and deal with [the land upon which the easement exists] as if he were the owner of land.'
>
> An easement, whether obtained by grant or prescription, is a limited interest in land; it does not include the right to occupy and enjoy the land itself. An easement gives no title to the land on which it is imposed . . . .
>
> *McDonald v. Board of Mississippi Levee Commissioners,* 646 F.Supp. 449, 466 (N.D.Miss.1986) (citing *Quin v. Sabine*, 183 Miss.375, 183 So. 701, 702 (Miss.1938)).

As to unreasonable interference by either servient or dominant owner, the courts consistently hold that neither may interfere with the other's use of the easement. In dealing with the relative rights of the owner of the fee and holder of the easement across the fee, the Mississippi Court of Appeals stated in *Kennedy v. Anderson* that:

> Where private right of way exists, the owners of the dominant and servient tenements must each use the way in such a manner as to not interfere with one another's utilization thereof.
>
> *Kennedy v. Anderson,* 881 So.2d 340, 346 ¶ 25 (Miss.Ct.App. 2004) (citing *Feld v. Young Men's Hebrew Ass'n.*, 208 Miss. 451, 458, 44 So.2d 538 (Miss.1950)). See also, *Lindsey v. Shaw,* 210 Miss. 333, 49 So.2d 580 (1950).

In *Quin v. Sabine, supra,* the Mississippi Supreme Court held that "[t]he owner of an easement in land for a roadway only may work roadway to keep it reasonably usable as a private way, but cannot take dominant possession and deal with it as if he were the owner of the land." *Quin v. Sabine,* 183 So. at 702. In *Lindsey v. Shaw, supra,* the Mississippi

Supreme Court addressed an easement dispute between the fee holder and easement holder. *Lindsey*, 49 So.2d at 581. The court found that where the owner of the servient estate planted tung trees and allowed them to grow to such an extent that branches overhung roadway and interfered with vehicles and persons walking that made motor travel impractical, said obstacles amounted to unreasonable interference with rights of owner of dominant estate and rendered owners of servient estate liable in damages and injunctive relief. *Id.* See also, *Shingleton v. State* 260 N.C. 451, 133 S.E. 2d 183 (N.C.1963) (Easement in general terms is limited to a use which is necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated).

Therefore, pursuant to applicable law set forth in the case of *Feld v. Young Hebrew,* 44 So.2d 538, 540 (Miss.1950), the Griggs were entitled to a judgment as a matter of law. In accordance with Miss.R.Civ.P. Rule 56(c), summary judgment in favor of the Griggs' on this issue was properly granted by the trial court.

III. ALTERNATIVELY, WHETHER THE CHANCELLOR WAS CORRECT IN AWARDING SUMMARY JUDGMENT TO THE APPELLEES ON ALL ISSUES RAISED IN THE COMPLAINT AND COUNTER-CLAIM IN ACCORDANCE WITH RULE 56(C) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE PER ITS JUDGMENT ENTERED DECEMBER 18, 2006.

A. APPELLEES' CLAIM FOR INJUNCTIVE RELIEF

There is no genuine issue of material fact that the Appellant – Calvert intentionally and persistently interfered with the Appellees-Griggs' use of their fee interest in the property subject of the access easement, by removing the perimeter fence which the Griggs' attempted to erect on three (3) separate occasions in the fall of 2004 and in early January, 2005. Due to consistent actions by Calvert in interfering with Plaintiff's reasonable use of his 'fee' interest within such easement, same being admitted by him pursuant to his deposition testimony on no less than three (3) separate occasions, there is no adequate remedy in the law, and therefore

the Griggs are entitled to injunctive relief in equity. Therefore, Calvert should be permanently enjoined from removing or interfering with the erection of Griggs' perimeter fence. Calvert should be permanently enjoined from using easement in a manner inconsistent with the rights of the Griggs, i.e., parking vehicles or equipment on said easement or otherwise interfering with the plaintiffs' right to use their property.

The Appellees reference, adopt and incorporate Section II (C) of this Brief, *supra*, herein, as to Mississippi law relative to easements for ingress and egress. See Section II (C), *supra*.

As shown more fully in the Itemization of Undisputed Facts, in the Affidavits of Brian Griggs and Mike St. Louis, and by Calvert's own admissions, it is undisputed that the area of the City of West Point where the property of both the Plaintiffs and Defendant is located is in a newly annexed portion of the City of West Point, an area which is zoned A-O Agricultural Open District, and that horses and cattle graze on other properties in the immediate vicinity of both Plaintiffs and Defendant's properties (as permitted under the A-O zoning district).

As to the issue of the use by the fee owner of the servient estate to the extent of erecting fences and gates, the Mississippi Supreme Court addressed this question early in the last century in *Board of Trustees of University of Mississippi v. Gotten,* where the court found that even though easement was for access to dominant estate homestead that notwithstanding an easement of a right of way, the owner of the servient estate may place a gate across the way and not appreciably interfering with the rights of the dominant owner. *Board of Trustees of University of Mississippi v. Gotten,* 80 So. 522, 523 (Miss.1919). The *Gotten* Court permitted this since the dominant estate owner could be furnished with a key to the gate and found that doing so was reasonable as the Court found:

> If it appears that the erection of gates will not unreasonably interfere with the enjoyment of the easement, it is our opinion that the owner of the servient

> estate is justified in erecting gates. 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.
>
> *Gotten,* 80 So. at 523.

See also, *Lindsey v. Shaw,* 210 Miss 333, 49 So.2d 580 (1950) (Following *Gotten* and holding that the erection of gates by appellees was not unreasonable obstruction of Appellant's use of easement)[1].

In *Rowell v. Turnage*, the Mississippi Court of Appeals specifically held that a "...locked gate did not unreasonably interfere with [the dominant owner's] use of private way as is supported by the record and applicable law." *Rowell v. Turnage* 618 So.2d 81 (Miss. 1993). See also, *Rogers v. Marlin,* 754 So.2d 1267, 1275, ¶23 (Miss.Ct.App.1999) (Court held that as to "private" ways, court cannot prevent the subservient landowner from erecting barriers across road so long as dominant easement owner was provided with keys to any locks placed on such the barriers).[2]

The above cited and discussed cases bear directly on the Griggs' right to continue using their land within the easement in favor of the Defendant, Calvert, so long as such use does not interfere with Calvert's access. That the erection of a fence and planned installation of gates with keys to be furnished to Defendant is a reasonable use of the land by the Griggs and is not an unreasonable restraint on the access to the easement by the Calvert as is amply shown by decisions from both Appellate courts of Mississippi, and beyond.

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[1] Here the Court found gates and fences should be allowed as non-interference with right of passage. See also *Lindsey v. Shaw* 210 Miss. 333, 49 So.2d 580 (1950) (where the Supreme Court discussed this "balancing standard" of non-interference by either and further found that the erecting of fence and gates was a reasonable use by the owner of the servient estate). *Lindsey* went further by placing a duty on the holder of the easement to keep gates closed when found open. As the fee owner was pasturing cattle, the court ordered the easement owner to "keep the gates closed when they are opened by herself or employees, or members of her family or persons under their control" and further warned that "[f]ailure in this respect will render her liable on damages and subject to injunctive relief." *Lindsey v. Shaw* 210 Miss. 333, 49 So.2d 850 (Miss.1950)

[2] The erection of fences and gates has also been upheld in other jurisdictions where there was no contrary intent and provided thjey did not unreasonably interfere with right of passage through ingress and egress. See, *Tanka v. Sheahan* 589 A.2d 391 (N.C.1991).

As to unreasonable interference by either servient or dominant owner, the courts consistently hold that neither may interfere with the other's use of the easement. See Section II (C) above and Footnote 1, *supra*.

The case of *Kennedy v. Anderson, supra*, provided that "[e]asement for ingress and egress is a straight forward concept that encompasses surface use and whatever improvements and maintenance to roadway that are necessary to permit continued travel..." *Id.* p.5. The Court in *Kennedy* went on to prohibit parking by dominant owner in the easement, stating that "...once easement became open and passable; there would be no further need to park vehicles on the easement itself." *Id.* p.6.

B. APPELLEES' CLAIMS FOR STATUTORY TRESPASS AND/OR CONVERSION

1. Statutory Trespass and Conversion

Section 95-5-23 of the Mississippi Code 1972 (as annotated and amended) provides in relevant part as follows:

> If any person shall put down any fence..... not his own, and leave same down or open, without permission of the owner or ***shall in any manner injure or deface any .... Or other structure not his own, he shall pay to the owner twenty dollars for every such offense and shall be liable for all damages that have resulted from such act.*** (emphasis added).

The Appellees submit that Calvert's undisputed testimony by deposition on January 4, 2006 makes a clear case for statutory trespass and conversion consistent with §95-5-23 above. Calvert admitted that on September 22, 2004, without authority of law or permission of Griggs, Calvert cut the fence wire that had been installed by the Griggs. (R. 4; 74). Thereafter, the Griggs repaired the fence on or about October 15, 2004. (R. 35; 49-55; 56-60). On December 15, 2004, without authority of law or permission of Griggs, Calvert again cut the fence wire that had been installed by Griggs and without permission, removed the fence posts from the easement and failed to return the posts to Griggs. (R. 4; 75). On or about

December 29, 2004, the Griggs again installed new posts and repaired the wire fencing on their property. (R. 35; 49-55; 56-60). And once more, on January 10, 2005, without authority of law or permission of Griggs, Calvert again cut the fence wire that had been installed by Griggs and without permission, removed the fence posts from the easement and failed to return the posts to Griggs. (R. 4; 75). In all three (3) instances, Calvert removed and/or destroyed the fence, leaving it down after cutting the wire. (R. 51; 56-60). This despite the fact that Calvert was never denied access to his home or property. (R. 35-51). In his January 4, 2006 deposition, Calvert admitted to taking the fence down on September 22, 2004, stating "[a]nyway, I do – I just had to do – I did it. I took the fence down." (R. 74). When further examined, Calvert testified:

> Q. On September 22nd you took it down, is that correct?
>
> A. Well, I can tell you what. On September the 22nd, I started - I started taking the fence down. On September, I started taking the fence down. I didn't finish taking the fence down, I started taking the fence down. I took all I could take down. (R. 74).

Calvert admitted to taking more fence down on December 15, 2004, stating "Only thing I took down in '04 is the posts, the posts they had there." (R. 75). But Calvert not only knocked the posts down, he later converted them:

> Q. So you did not remove them?
>
> A. I did not remove them at the time. I did not remove them at that time. I did not remove them.
>
> Q. Did you remove them later?

A. Later on - later on I went back to meet - to get the fence - to get the posts. I got some of the posts. I got them and put some of them behind - nine posts on the side of my house.

Q. Where are they today?

A. They still beside my house.

Q. On your property?

A. On my property. (R. 75).

2. Penalties and Damages

Pursuant to *Universal Underwriters Ins. Co. v. Bob Burham Pontiac Toyota, Inc.*, it has long been held that "the measure of damages in conversion is the value of the property at the time and place of its conversion." *Universal Underwriters Ins. Co. v. Bob Burham Pontiac Toyota, Inc.*, 408 So.2d. 1010 (Miss 1982). See also, §95-5-23, *supra.* As set forth in the Affidavit of Kevin Thompson of Green Acres Lawn Service, Inc., as result of Calvert's wrongful acts as described above, the Griggs incurred $10,839.11 to erect the perimeter fence subject of this litigation, and to repair and/or replace posts and other materials on three (3) occasions in the fall of 2004 and early part of January, 2005. (R. 56-60). In addition to those expenses paid to Kevin Thompson and Green Acres, Griggs spent $497.12 on fencing materials from Clay County Co-Op, for a total of $11,336.23 (R. 49-55).

Therefore, there is no genuine issue of material fact that Calvert committed trespass on no less than three (3) occasions, to-wit, September 22, 2004, December 15, 2004, and January 10, 2005, and there is further no genuine issue of material fact that Calvert converted the Griggs' property to his own, to-wit, fence posts and fencing materials on December 15, 2004 and January 10, 2005. Therefore, as a matter of law, Calvert's actions on constitute statutory trespass and common law conversion under

§95-5-23 so as to entitle the Griggs to statutory damages in the amount of $60.00 and actual or compensatory damages in the sum of $11,336.23, for a total of $11,396.23 in damages of, from and against Calvert.

CONCLUSION

The Judgment entered on June 21, 2006 by the Clay County Chancery Court became for all intents and purposes a Final Judgment following thirty (30) after entry. Therefore, the Appellant's Notice of Appeal filed on January 12, 2007 is time-barred as to the June 21, 2006 Judgment and should be dismissed with prejudice and all costs of this Appeal assessed to the Appellant.

Thus, the only remaining issue between the parties to be determined by the lower court following entry of the June 21, 2006 Judgment was whether the Griggs' shrubbery and gazebo structure located and situated on the forty (40) foot wide easement in favor of Calvert constituted an unreasonable interference with Calvert's access easement. On considering the Griggs' second Motion for Summary Judgment as to that sole remaining issue, and considering Calvert's admissions that neither the shrubbery nor the gazebo impeded his access to his home or property, as set forth in his January 4, 2006 deposition testimony, the Chancery Court of Clay County, Mississippi correctly found that there was no genuine issue of material fact that Calvert's access to his property was not impeded by the shrubbery or the gazebo, and that the Griggs were entitled to a judgment as a matter of law. Accordingly, summary judgment in favor of the Griggs' on this remaining issue was appropriate under Rule 56(c) and applicable Mississippi law.

Assuming, *arguendo*, that this Court determines that the June 21, 2006 Judgment did not become a Final Judgment until December 18, 2007, the Appellees submit that there were no genuine issues of material fact as to the issues remaining before the Clay County Chancery Court and that the Griggs' were entitled to a judgment as a matter of law. The Chancellor's Judgment of December 18, 2007 was correct and should be affirmed.

WHEREFORE, PREMISES CONSIDERED, the Appellees, Brian D. Griggs and Tanya N. Griggs, respectfully submit that the December 18, 2006 Judgment of the Clay County Chancery Court should be affirmed.

RESPECTFULLY SUBMITTED, this the 29th day of February, 2008.

BRIAN D. GRIGGS AND TANYA N. GRIGGS

BY: [redacted]
MICHELLE D. EASTERLING,
THOMAS B. STOREY, JR.,

EDWARDS, STOREY, MARSHALL, HELVESTON & EASTERLING, LLP
103 East Broad Street
P. O. Box 835
West Point, Mississippi 39773
Telephone: (662) 494-5184
Facsimile: (662) 494-4836

CERTIFICATE OF SERVICE

I, Michelle D. Easterling, Attorney for Appellees, Brian D. Griggs and Tanya N. Griggs, hereby certify that I have this day caused to be served by first class mail, postage prepaid a true and correct copy of the above Brief of Appellees on the following persons:

Gary Street Goodwin, Esq.
Goodwin Law Firm
P. O. Box 524
Columbus, MS 39703-0524

Hon. Kenneth M. Burns
Chancellor, 14th Chancery District
P. O. Drawer 110
Okolona, MS 38860

SO CERTIFIED, this the 29th day of February, 2008.

MICHELLE D. EASTERLING