IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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| **W.W. WARREN** | **APPELLANT** |
| **VS.** | **NO. 2007-CA-905** |
| **ROBERT DERIVAUX** | **APPELLEE** |

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# BRIEF OF APPELLEE, ROBERT DERIVAUX

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***Appeal From The Chancery Court For***
***The First Judicial District Of Hinds County, Mississippi***

**ORAL ARGUMENT NOT REQUESTED**

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. W.W. Warren, Appellant;
2. Robert Derivaux, Appellee;
3. Honorable Judge Denise Sweet Owens, Chancery Court Judge;
4. Honorable William Barnett, County Court Judge;
5. Stephen J. Carmody, Esq., Jonathan R. Werne, Esq., Brunini, Grantham, Grower & Hewes, PLLC, Counsel for Appellee; and
6. Roy H. Liddell, Esq., Clint D. Vanderver, Esq., Wells Marble & Hurst, PLLC, Counsel for Appellant.

Stephen J. Carmody
Attorney of Record for Appellee

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## STATEMENT OF THE ISSUES

1. The chancery court was correct in affirming the county court's ruling that Appellee Derivaux, and his successors in interest, have a perpetual easement for parking on Appellant Warren's property;

2. The chancery court was correct in affirming the county court's holding that Derivaux, and his successors in interest, have a perpetual easement for signage on Appellant Warren's property;

3. The chancery court ruled correctly in affirming the county court's award of damages for loss profits to Appellee Derivaux; and

4. The chancery court erred in reversing the county court's award of punitive damages to Appellee Derivaux for the egregious and contumacious conduct of Appellant Warren.

## STATEMENT OF FACTS

In November 1988, Appellee Preston Derivaux ("Derivaux"), purchased an office building located directly adjacent and to the south of the property of Appellant W. W. Warren ("Warren") on the I-55 North Frontage Road, on the west side of I-55, south of Northside Drive in the City of Jackson. (Ex. D-13 at 16, 22).[1] Before purchasing the property, Derivaux consulted with the previous owner of the property (Trustmark National Bank),[2] and a real estate attorney (Richard Lingle), (Tr. 39-44) about a Reciprocal Easement that stipulated parking and signage rights. The parking easement was described by an appraiser of the property as: "A front concrete parking area contains 8 spaces with a perpetual easement for 4 additional parking spaces in the adjacent Bennigan's parking lot." (Ex. P-27 at 7). Derivaux testified that he would not have purchased the property but for the understanding that he could erect and maintain a sign and that he would have additional parking spots for his employees and customers. (Tr. 58). Derivaux, before purchasing the property, reviewed the Reciprocal Easement, studied its terms, and relied on the fact that it contained rights to signage, parking, and ingress and egress and that these rights were vested in the successors in title to the property. (Tr. 58).

Shortly after the purchase, in December 1988, Derivaux met with Warren at the site of Derivaux's new sign. They discussed the Reciprocal Easement and the sign location. Derivaux and Warren mutually agreed on Derivaux's new sign and the cross parking (Tr. 64), and they then shook hands. Derivaux's sign stood in the exact same location from December 1988 until June 2005. (Tr. 60-61).

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[1] References to the transcribed trial testimony shall be designated as "Tr. ____." References to exhibits shall be the same as their marking as exhibits at trial (e.g., "P-1" for Plaintiff/Appellee exhibits and "D-1" for Defendant/Appellant exhibits). References to record excerpts are referred herein as "R.E. ___." References to the lower court record shall be designated as "C.R. ____."

[2] Trustmark National Bank became owner of the property after it foreclosed on a loan to Ronald C. Smith, the original signatory to the Reciprocal Easement. (Tr. 46-47).

Under the cover of pre-dawn darkness on Saturday, June 4, 2005, Warren, his son, and a welder assembled their articles of destruction. (Ex. D-13 at 128). They gathered a blow torch, heavy metal chains, a rope, a "come-along," and a truck. (Ex. D-13 at 128, 131-33). They drove up to the business sign owned by Derivaux which had stood undisturbed at the same location for over sixteen years. (Tr. 59-60). They parked their truck, and went to work with their tools of destruction. They cut through the sign's thick metal posts with a blow torch, hooked one end of the chain to the sign and the other end to the pickup truck and used ropes and the "come-along" to yank the twenty-foot-high sign down in the parking lot. (Ex. D-13 at 131-32). After they finished, they left the damaged sign behind. (Ex. D-13 at 131; P-11, P-12, P-13).

The destruction of the sign, a portion of which was located on Derivaux's property, (Tr. 20), was neither the first nor the last time Warren terrorized Derivaux with his malicious and grossly negligent acts. Warren tormented Derivaux's employees and customers causing one of Derivaux's employees to quit because of his harassment. (Tr. 77, 105-106, 115-116). Warren would lean on cars of Derivaux's customers and question them as to why they were in the parking lot. (Tr. 105-106). Warren used profanity in front of Derivaux's employees and customers (Tr. 77), and Warren "cussed" Derivaux numerous times regarding the easements. (Tr. 79-80, 84-85). Shortly before yanking the sign down, despite vehement protestations by Derivaux, Warren and his son intentionally ripped out the wiring for Derivaux's sign. (Ex. P-9, P-10, Tr. 79-80). Afterwards, Warren erected a fence, most of which was located on Derivaux's property, and the fence created a safety hazard for Derivaux, his employees and customers. (Ex. P-18, P-19, P-20, P-22, P-23, P-26, P-32, Tr. 16, 93-95, 96-97, 173). Warren placed concrete

parking barricades restricting Derivaux access to the parking spaces (Ex. P-17, Tr. 89-90), and after being ordered by the county court to remove them, refused to do so.[3]

On or about April 22, 1986, Warren and Derivaux's predecessor in title, Ronald C. Smith ("Smith"), signed a Reciprocal Easement (the "Reciprocal Easement") affecting the two properties. (Ex. D-13 at 35-36, P-1). The Reciprocal Easement was duly executed, notarized and filed with the Chancery Court Clerk at Book 3212, Page 195. (Ex. P-1). The Reciprocal Easement includes a survey which shows the location of the property and the business sign. (Ex. P-1). The survey was filed at Book 3212, Page 199. (Ex. P-1).

Under the provisions of the Reciprocal Easement, the owner of the north property, Warren, was granted perpetual rights of ingress and egress using the new curb cut to the south of Warren's property, which was then owned by Smith. (Ex. P-1). The ingress and egress easement was needed by Warren because his property lost four entrances off of the Frontage Road as a result of eminent domain proceedings instituted by the State Department of Transportation ("DOT") when the DOT renovated the Frontage Road, Northside Drive and Meadowbrook Drive interchanges of I-55. (Ex. D-13 at 25, 27). Smith and his successors in title also were allowed rights of ingress and egress through Warren's property pursuant to the terms of the Reciprocal Easement. (Ex. P-1). During the DOT eminent domain proceedings, in addition to losing four entrances off of I-55 Frontage Road, the Warren property also lost a considerable number of parking spaces. (Ex. D-13 at 33). As a result, reciprocal parking rights were included in the Reciprocal Easement.

[3] Warren's response to the Court order was to simply shuffle the barricades around and place them in different locations. (Tr. 90-92). The barricades – even after the shuffle – made it difficult to navigate the parking lot. (Ex. P-33, Tr. 92-93).

In the Reciprocal Easement, Smith and Warren, and **"their successors in title,"** were granted reciprocal rights[4] as follows:

> 3. As to property presently or hereafter owned by W. W. Warren, lying North and adjacent as to Parcel #1 – Fee of Ron C. Smith, it is agreed that parties with business interest may cross-park in four spaces owned by W. W. Warren located South of [Warren Building]; furthermore, that parties with business interest may cross-park in four spaces owned by Ron C. Smith, a part of Parcel #1 – Fee.
>
> 4. Business Sign. W. W. Warren vests in Ron C. Smith the legal right to erect, maintain and remove upon the property of W. W. Warren which lies 1.5 feet from said Ron C. Smith, North property line, and 35 feet Westward from the Southeast Corner of the W. W. Warren property, a business sign as mutually agreed upon.

(Ex. P-1). There are eight references to the word "easement" in the Reciprocal Easement. (Ex. P-1). **The words "*license*" or "*privilege*" do not appear.** (Ex. P-1). In fact, the only evidence supporting the claim of privilege or license is Warren's testimony that he and Smith had an oral "side agreement" that controlled the parking and signage issue. (Ex. D-13 at 41). Warren claims that the side agreement was extinguished when Derivaux became the landowner. (Ex. D-13 at 179-80, 182). However, the clear and unambiguous language of the Reciprocal Easement contradicts this oral "side agreement," and the alleged "side agreement" is not supported by any written documentation. (Ex. D-13 at 40-41).

After the execution of the Reciprocal Easement, and consistent with its terms, Smith erected a business sign within one and one-half feet from that north/south property line and thirty-three feet from the northeast/southeast corner of the property. (Ex. 6, Tr. 14, 60, 62-63).

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[4] The introductory language to the operative portions of the Reciprocal Easement confirms that the drafters desired to include ingress, egress, parking, and signage as reciprocal perpetual rights. In fact, the Reciprocal Easement contains a colon indicating a series of rights were to follow and be considered reciprocal and perpetual. "Ron C. Smith and W. W. Warren, by these presents, do hereby sell, convey and vest in each other, their successors in title, perpetual easement rights, to wit:" (P-1).

The Smith sign stood at this spot continuously until Derivaux purchased the property in 1988. (Tr. 60-61).

After his purchase, Derivaux took the Smith sign down and erected a new "two pole" sign with his name and the State Farm Insurance logo on it. (Ex. P-3, P-4, P-6, Tr. 59-60). One of the poles was placed near or on the spot left from the removal of the Smith's single-pole sign. (Tr. 62). The sign was erected with both poles either on or within inches from the north/south property line and within the thirty-five feet from the east boundary line – in other words, within the area designated for in the Reciprocal Easement. (Tr. 14, 20, 60, 62-63). Warren discussed the sign with Derivaux and requested that Derivaux get the sign "okayed" by Bennigans, Warren's tenant at the time. (Tr. 64-65). Bennigans' manager approved the sign. (Tr. 65).

After he purchased the property, Derivaux began using the property as his office for his insurance business. Pursuant to his rights under the Reciprocal Easement, Derivaux, his employees, and his customers used the ingress and egress easement as well as the four parking spaces north of his property. (Tr. 68). The parking spots they normally used were the ones closest to the front door of Derivaux's business. (Tr. 65-66).

From 1988 until approximately April 2002, Derivaux and his customers continuously used the four parking spaces. (Tr. 68). In or around April 2002, after more than fourteen years of continued uninterrupted use, Warren erected a chain and blocked Derivaux's access to the four parking spaces and demanded payment for parking. (Tr. 72-74). Derivaux made one $250 payment to Warren, and the chain was taken down. (Tr. 73, 75). Derivaux then consulted a lawyer, who confirmed that he had a legal right under the Reciprocal Easement to use the parking spaces without having to pay for them. (Tr. 74). Derivaux thereafter made no further payments to Warren, and he and his customers continued to use the parking spaces. (Tr. 75). Warren took no action to enforce his "purported" rights to payment.

From December 1988 until June 4, 2005, Derivaux's sign stood in place on the property, within the area designated by the Reciprocal Easement. On or about May 31, 2005, without notice to Derivaux, Warren disconnected the power to the sign. (Ex. P-9, P-10, Tr. 79-80). At the time Warren was disconnecting the power, Derivaux gave Warren a copy of the Reciprocal Easement and demanded that he stop tampering with the sign. (Tr. 79). Warren "cussed" Derivaux. (Tr. 79-80). Warren did not respond to Derivaux's statement that he could erect and maintain his business sign under the terms of the Easement. Instead, Warren took matters into his own hands. He yanked the sign down, damaging it, and curtly dumped it in the parking lot. (Ex. P-11, P-12, P-13, Tr. 82-85). Other than the 2001 letter[5] written four years before, there was no written complaint, and there was no written notice about the imminent removal of the sign. (Ex. D-5, Tr. 69-70).

The record evidence confirms that Derivaux's sign was located at least partially on his own property. (Tr. 20). Warren admitted there was a dispute as to who owned the property on which the sign was located. (Ex. D-13 at 171). Warren claimed that he believed he owned the property where the sign was located, and he acknowledged that Derivaux believed Derivaux owned the same. (Ex. D-13 at 171). In his sworn testimony, Warren admitted that the property line was in dispute: "[Derivaux has] always said he owned it. I'm not denying that. Every time I talked to him, [Derivaux stated,] I own that property." (Ex. D-13 at 171).

Warren also confirmed that he never obtained a survey after learning that the ownership was in dispute. Warren testified in his deposition, "[w]hen [Bennigan's] left, I got possession of the property within five weeks or so. I dropped them a letter asking [Derivaux] to move his sign.

[5] After Bennigan's terminated its lease with Warren and vacated the property, Warren sent a letter demanding the sign's removal within ten days. (Ex. D-5). Derivaux refused to move the sign and Warren shortly thereafter leased the property and nothing more was said about the sign until four years later when it was destroyed and removed by Warren.

. . . He still said he owned the property, though." (Ex. D-13 at 71-72). When asked if he ever obtained a "survey to determine whether or not he owned the property where his sign was located?" Warren responded, "[n]o, no, no. I already knew where my property line was." (Ex. D-13 at 71).

In or around July 2005, ignoring explicit written warnings from Derivaux's counsel, Warren negligently erected a fence on Derivaux's property. (Ex. P-18, P-19, P-20, P-22, P-23, P-26, P-32, Tr. 93-97). Warren's own expert admitted that the fence Warren erected was on Derivaux's property. (Ex. P-26, Tr. 173). The surveys admitted into evidence by both Derivaux and Warren confirm the trespass. (Ex. P-26, D-12). Warren admitted that he did not obtain a survey prior to constructing the fence. (Ex. D-13 at 150). Warren constructed the fence in direct violation of the county court's preliminary injunction order. (C.R. 59). The county court's injunction ordered Warren not to place "concrete barriers or any other structures or devices . . . . [that] interfere[d] with the ability of Derivaux's employees, customers, vendors or other licensees and invitees to use the [four parking spots] . . . ." (C.R. 60).

Throughout the litigation Warren continued to ignore the Orders of the county court and the warnings of Derivaux's counsel. (C.R. 182, C.R. 184). After tearing down Derivaux's sign, Warren erected and tore down no less than three fences along or near the boundary line. Moreover, during this lawsuit, Warren has seen fit to thumb his nose at court orders, attorney's letters and has generally acted beyond the boundaries of common decency. This Court should not reward or condone such conduct. As set forth in the following sections of this brief, the county court's judgment should be affirmed *in toto*.

## SUMMARY OF THE ARGUMENT

The county court's decision is supported by substantial evidence. The Reciprocal Easement expressly and unambiguously provides for Derivaux to cross-park in any four spaces south of the Warren Building and to erect a business sign. It is further evident that the Reciprocal Easement expressly provides these rights to any successors in interest. Contrary to Warren's interpretation, the parking and signage easements are not invalid simply because they fail to employ a "metes and bounds" description. It is clear from the Reciprocal Easement that any third party who came across the Reciprocal Easement at issue in this case would be able to identify the location of the land and easements involved.

The Reciprocal Easement is not ambiguous. However, even if it were ambiguous, any ambiguity should be construed against Warren, the drafter of the document. Warren is an experienced commercial property landowner. Warren admitted to owning "millions and millions of dollars of property." (D-13 at 4-5). Further, the parking and signage easements are not void as "variable." Derivaux designated the placement of the sign and the parking spaces he intended to use after Warren failed to designate them himself.

The principles of equity further bolster Derivaux's argument. Derivaux clearly understood the Reciprocal Easement to provide him with a parking and signage easement. Derivaux would not have purchased the property otherwise. Furthermore, this Court should not reward Warren's dilatory conduct in delaying any action on his "purported" rights provided by the Reciprocal Easement.

Finally, the county court properly assessed punitive damages and attorneys' fees against Warren examining the totality of the circumstances and the aggregate conduct of Warren. Warren did not have the right under the Reciprocal Easement or any other state statute to demolish Derivaux's sign which was located in part on Derivaux's property. Moreover, Warren

did not have the legal authority to erect a fence on Derivaux's property, which in addition to being in direct contravention of the county court's preliminary injunction order and the terms of Reciprocal Easement, also created a safety hazard. Clearly, Derivaux was entitled to punitive damages after establishing actual damages resulting from Warren's malicious and/or grossly negligent behavior.

## ARGUMENT

### I. STANDARD OF REVIEW

The county court is the finder of fact in this matter, and this court is bound by the judgment of the county court if it is supported by substantial evidence and not manifestly wrong. *Patel v. Telerent Leasing Corp.*, 574 So. 2d 3, 6 (Miss. 1990)(citation omitted). Insofar as its findings of fact and conclusions of law are concerned, the judgment of a circuit or county court in a non-jury trial is entitled to the same deference on appeal as a chancery court decree. *Patel*, 574 So. 2d at 6 (citing *Rives v. Peterson*, 493 So. 2d 316, 317 (Miss. 1986)). It will be assumed the trial judge made all necessary findings of fact in favor of appellee, whether stated or not. *Id.* (citation omitted). If the judgment of such court can be sustained for any reason, it must be affirmed, and even though the trial judge based it upon the wrong legal reason. *Id.* (citation omitted).

Here, the county court held that the language contained in the "Reciprocal Easement," dated April 22, 1986, drafted by the Warren's attorney, and executed by Warren and by Derivaux's predecessor in title, constitutes a valid and enforceable easement that runs with the land. The county court further held that Derivaux and his successors in title have the right to use for business purposes four of the parking places south of the building formerly known as Bennigan's ("Warren Building"). The county court ordered that Warren, and his successors in

title, shall do nothing to impede Derivaux's full access to this area with none of the parking places located being blocked or otherwise made unavailable to Derivaux. Derivaux, his employees, and his customers may park in whatever available parking places they choose south of the building.

The county court further held that Derivaux, and his successors in title, have the right to erect and maintain a sign like or similar to the sign which was removed by Warren, located at or in close proximity to the location of the sign which was removed. Finally, the county court found Warren's actions toward Derivaux and his property, both real and person, were malicious in most instances or were possibly only grossly negligent in some instances, but in any event, the actions of Warren entitled Derivaux to punitive damages in addition to his actual damages.

## II. THE COUNTY COURT AND CHANCERY COURT CORRECTLY INTERPRETED THE RECIPROCAL EASEMENT UNDER MISSISSIPPI LAW.

It is well established that courts apply the same rules of construction to easement grants as to contracts. *Tubb v. Monroe County Elec. Power Ass'n*, 912 So. 2d 192, 197 (Miss. Ct. App. 2005)(citation omitted). First, the court will examine the language contained within the "four corners" of the easement in dispute in an attempt to ascertain the intent of the parties. *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352 (Miss. 1990)(citation omitted). "[P]articular words, phrases, clauses, or sentences [should] not necessarily control[; rather,] the instrument must be considered as a whole." *Mounger v. Pittman*, 108 So. 2d 565, 567 (Miss. 1959). The court should apply the "correct English definition and language usage" when examining the "four corners" of the easement. *Pursue*, 558 So. 2d at 352 (citing *Thornhill v. Sys. Fuel, Inc.*, 523 So. 2d 983, 1007 (Miss. 1988).) In other words, the court should construe an easement in a manner "which makes sense to an intelligent layman familiar only with the basics of English language." *Id.* The parties' intent must be effectuated when an instrument that is clear, definite,

explicit, harmonious in all its provisions and free from ambiguity. *Id.* (citing *Pfisterer v. Noble & Cities Serv. Oil Co.*, 320 So. 2d 383, 384 (Miss. 1975)).

Here, the language[6] contained in the "Reciprocal Easement" grants Derivaux the right to cross-park in four spaces south of the Warren Building and to erect a business sign.[7] Examining the document as a whole, the document itself is entitled "Reciprocal Easement," and it specifically states that Ron Smith and W.W. Warren "do hereby sell, convey and vest in each other, **their successors in title, perpetual easement rights** . . . ." (Ex. P-1). The language of the Reciprocal Easement is clear that the document vests perpetual easement rights – not one right, but multiple rights – in each party and their successors in title.[8] In fact, the perpetual easement rights of ingress, egress, parking and signage are preceded by a colon when listed in the Reciprocal Easement. Surely, the parties and the drafters of the document intended for all rights following the colon to be both reciprocal and perpetual. Furthermore, there are eight references to the word "easement" in the filed document. (Ex. P-1). The words "license" or "privilege" do not appear anywhere whatsoever in the Reciprocal Easement. (Ex. P-1).

In paragraph number 3 of the Reciprocal Easement, Smith and Warren agree "that parties with business interest may cross-park in four spaces owned by W.W. Warren located South of

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[6] The mere fact that Warren disagrees as to the meaning of the provisions at issue in the document does not make the Reciprocal Easement ambiguous as a matter of law. *Facilities, Inc. v. Rogers-Usry Chevrolet*, 908 So. 2d 107, 111 (Miss. 2005)(citation omitted).

[7] Even if the Court does not find that Derivaux has an easement for the cross-parking and the sign, then Derivaux has acquired an easement by prescription for such use. In order to establish a prescriptive easement, the evidence must show that possession is: (1) under claim of ownership, (2) actual or hostile, (3) open, notorious, and visible, (4) continuous and uninterrupted for a period of ten years, (5) exclusive, and (6) peaceful. *Webb v. Mearns*, 944 So. 2d 917, 921 (Miss. Ct. App. 2006). All the elements of a prescriptive easement have been met. Derivaux has consistently maintained a sign on or near the property line for over sixteen years, between 1988 and 2005. Warren stated in his deposition that he never gave permission for Derivaux to erect the sign. (Ex. D-13 at 56-58). Warren also stated Bennigan's never approved the placement of the sign. (Ex. D-13 at 59). Further, Derivaux, his employees and customers used the parking spaces south of the Warren building for over ten years. (Tr. 68).

[8] A permanent easement does not violate public policy. *See Hearn v. Autumn Woods Office Park Prop. Owners Ass'n*, 757 So. 2d 155, 159 (Miss. 2000). There is a constructional preference for easements appurtenant over easements in gross. JAMES W. ELY, JR. ET AL., LAW OF EASEMENT AND LICENSES IN LAND § 2:3 (Oct. 2005).

[the Warren Building]; furthermore, that parties with business interest may cross-park in four spaces owned by Ron C. Smith . . . ." (Ex. P-1). This interest is unmistakably reciprocal and is free from ambiguity. Under this paragraph, Smith and his customers had the right to cross-park in four spaces south of the Warren Building, and Warren and his customers had the right to cross-park in the four spaces owned by Smith. Thus, this paragraph unambiguously grants Derivaux, as a successor in title, the right to cross-park on the same basis as originally granted to Smith.

In paragraph number 4, Warren grants Smith "the legal right to erect, maintain and remove upon the property of W.W. Warren which lies 1.5 feet from said Ron C. Smith's North property line, and 35 feet Westward from the Southeast Corner of the W.W. Warren property, a business sign as mutually agreed upon." (Ex. P-1). Once again, this paragraph unambiguously vests Smith with "the legal right to erect, maintain and remove upon the property of" Warren a business sign. This easement right provides the location of where the business sign must be erected, and it further requires both parties to agree upon the location. Thus, consistent with the interpretation of paragraph 3, this paragraph grants Derivaux, as a successor in title, the right to erect a business sign on the same basis as originally granted to Smith.

### A. *The Parking Easement Provided by the Reciprocal Easement Is Not Void For Vagueness.*

Appellant cites an Arizona Supreme Court case, *Dunlap Investors Limited v. Hogan*, for the proposition that the parking easement is void for vagueness since the "servient estate [was] not identified with reasonable certainty as to the exact location of parking rights." Brief of Appellant at 13. However, this argument is specious. The Arizona Court in *Dunlap Investors* held that the easement before it was void since the deed "conveyed an easement and land that was at the time **neither described by the grantor or in which the grantor held legal title.**" *Dunlap Investors Ltd. v. Hogan*, 650 P.2d 432, 434 (Az. 1982)(emphasis added). Furthermore,

the Court noted that "even if the person searching the record came across the grant of easement, they **could not, from the instrument, identify the land involved.**" *Dunlap Investors*, 650 P.2d at 434 (emphasis added). Clearly, a third party who came across the Reciprocal Easement at issue in this case would be able to identify the land involved. The Reciprocal Easement states "[a]s to property presently . . . lying North and adjacent as to Parcel #1 – Fee, it is agreed that parties with business interest may cross-park in four spaces owned by W.W. Warren located South of [the Warren Building] . . . ." (Ex. P-1). Furthermore, the Reciprocal Easement included a survey of the property involved. (Ex. P-1).

Here, the Reciprocal Easement and the attached documents clearly identify and define the property subjected to the terms of the Reciprocal Easement. The easements granted by the Reciprocal Easement are not invalid simply because they fail to employ a "metes and bounds" description. *Moran v. Sims*, 873 So. 2d 1067, 1070 (Miss. Ct. App. 2004). Courts have accepted a variety of methods for describing real property. *Moran*, 873 So. 2d at 1070. For example, natural or artificial monuments[9] can be used in a description for an easement. *Id.* Using these so-called "courses and distances" descriptions do not invalidate the easement. *Id.* The parking easement clearly identifies the properly lying "North and adjacent to Parcel #1 – Fee" and it identifies "four spaces owned by W.W. Warren located South of [the Warren Building] . . . ." (Ex. P-1). Any person searching the records of this property could, from the easement, easily identify the land involved and the areas subjected to the parking easement. Thus, the parking easement is not void for vagueness.

[9] Natural monuments include rivers, lakes, streams, or trees; artificial monuments include such landmarks as fences, walls, houses, streets, or ditches. *Moran v. Sims*, 873 So. 2d 1067, 1070 (Miss. Ct. App. 2004).

### B. *The Court Should Interpret Any Ambiguity in Favor of Derivaux.*

Warren is an experienced commercial property landowner. He admits to having owned "millions and millions of dollars of property." (D-13 at 4-5). Although the county court properly determined (and the Chancery Court affirmed) the Reciprocal Easement is not ambiguous, any uncertainty or ambiguity contained in the Reciprocal Easement must be construed against Warren. *See Crum v. Butler*, 601 So. 2d 834, 839 (Miss. 1992)(construing vague or ambiguous contract terms more strongly against the party preparing it); *Stampley v. Gilbert*, 332 So. 2d 61, 63 (Miss. 1976). Warren and his attorney drafted the document (Ex. D-13 at 31, 34-35); thus, any ambiguity should be interpreted in favor of Derivaux.

Appellant has cited *Capital Electric Power Association v. Hinson*, 84 So. 2d 409, 461 (Miss. 1956) to support his theory of how a court should interpret an ambiguous instrument. Brief of Appellant at 14-15. Appellant argues that the parking easement is void because the locations of the parking spots are variable.[10] *Id.* As the Appellant correctly quoted, "where there is any uncertainty or ambiguity in the scope of the easement . . . [i]t may be interpreted by reference to the attendant circumstances, to the situation of the parties, and especially to the practical interpretation put upon the grant by the acts of the parties in the use of the easement immediately following the grant." Brief of Appellant at 14 (citing *Capital Elec. Power Ass'n v. Hinson*, 84 So. 2d 409, 412 (Miss. 1956)). However, the Court went on to state that "[w]hen the grant is ambiguous the construction given by the parties themselves, as proved by the manner in which they exercise their rights under the conveyance, is legal evidence." *Hinson*, 84 So. 2d at 412.

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[10] The Court in *Hinson* did **not** hold the easement right granted in this case as void, but simply limited the rights granted by the easement. *Capital Elec. Power Ass'n v. Hinson*, 84 So. 2d 409, 413 (Miss. 1956).

The *Hinson* Court recognized the general rule that "if an easement is granted in general terms which do not fix its location, the owner of the servient estate has the right, in the first instance, to designate the location of such easement." 84 So. 2d at 412; *see also* 25 AM. JUR. 2D *Easements and Licensures in Real Property* § 66. Further, "if the owner of the servient estate does not designate the location, the person entitled to an easement may select a suitable route taking into consideration the interest and convenience of the owner of the land over which the easement passes." *Id.*; *see also* 25 AM. JUR. 2D *Easements and Licensures in Real Property* § 66 (stating "[i]f the grantor of an easement fails to designate its location, the grantee or owner of the dominant estate has the right to determine its location.").

This is exactly what was done in this case. When asked which specific parking spaces Smith (the predecessor in title to Derivaux) was allowed to use south of the Warren Building, Warren stated that he did not specify which parking spaces for Smith to use. (Ex. D-13 at 51-52). Derivaux stated in his testimony that he, his employees and his customers "always used the four places closest to [his] front door, which would be the four most eastern places." (Tr. 65-66) (emphasis added). After he purchased the property, Derivaux began using the property as his office for his insurance business. From 1988 until approximately April 2002, Derivaux and his customers continuously used the four parking spaces until Warren placed a chain barricade to block Derivaux's access to the four parking spaces and demanded payment for parking. (Tr. 68, 72-74). In accordance with *Hinson*, Derivaux has selected the location of the parking easement and "once selected cannot be changed by either the landowner or the easement owner without the other's consent." *Hinson*, 84 So. 2d at 412. Thus, the Reciprocal Easement should be construed to provide Derivaux (as successor in title from Smith) with a parking easement for the four parking spaces south of the Warren Building.

*Hinson* is further distinguishable from this case. In *Hinson*, the Court noted that the easement "did not fix the location of the right of way, its length, or its terminal points." *Hinson*, 84 So. 2d at 411. However, this is not the situation with the parking easement. The Reciprocal Easement specifically provides "[a]s to property presently . . . lying North and adjacent as to Parcel #1 – Fee, it is agreed that parties with business interest may cross-park in four spaces owned by W.W. Warren located South of [the Warren Building] . . . ." (Ex. P-1).

The parking easement is not ambiguous. It clearly provides Derivaux, as a successor of title, with the right to cross-park in any available four spaces south of the Warren Building. Further, any ambiguity should be construed against Warren, the drafter of the Reciprocal Easement. Finally, Derivaux designated and used the parking spaces subject to the easement and Warren never objected to Derivaux, his employees and customers using those spaces. Thus, this Court should affirm the county court's holding allowing Derivaux to cross-park on four spaces south of the Warren Building.

### C. *The Sign Easement Is Not Void As Variable.*

Appellant argues that the sign easement is void because it is based on variable locations. The sign easement is not based on variable locations. Even if this Court interprets the sign easement as variable, this fact would not render the easement void as previously discussed in the preceding section. After Derivaux purchased the property, he took the Smith sign down and erected a new "two pole" sign with his name and the State Farm Insurance logo on it. (Ex. P-3, P-4, P-6, Tr. 59-60). One of the poles was placed near or on the spot left from the removal of the Smith's single-pole sign. (Tr. 62). The sign was erected with both poles within inches from the north/south property line and within the thirty five feet from the east boundary line – in other words, within the area designated in the Reciprocal Easement. (Tr. 14, 60, 62-63).

Warren did not specify a location for the sign; therefore, Derivaux erected the sign in as close proximity to the original sign location as he could. Pursuant to the terms of the Reciprocal Easement, Warren deferred approval of the sign location to the manager of Bennigan's, and the manager consented to the location of the sign. (Tr. 64-65). The location of an easement cannot change, once selected, without the other's consent. *Hinson*, 84 So. 2d at 412. In fact, from December 1988 until June 4, 2005, a period of over sixteen years, Derivaux's sign stood in same place on the property until Warren yanked the sign down, curtly dumping it in the parking lot. Thus, the sign easement is not void as variable.

**D.** ***Sign Location Does Not Violate Signage Easement.***

Warren argues in his Brief that even if Derivaux is entitled to erect a sign under the Agreement, the sign location violates the Agreement because it is within thirty-five feet of the southeast property line of Warren. *See* Brief at 15. However, Warren's own expert agreed with Derivaux's interpretation of the Agreement that it permitted Derivaux to erect a sign *within* thirty-five feet of the southeast corner of Warren's property line. (Tr. 176). Derivaux's interpretation of the sign location is confirmed by the fact that the previous sign (Randall's Formal Wear) was actually 32½ feet from Warren's Southeast Corner, and not 35 feet as Warren contends. (Tr-12, Ex. 24). Finally, the Bennigan's manager consented to location of the sign as requested by Warren, where it stood erected for over sixteen years. It is without question that Derivaux's sign stood within the location designated in the Reciprocal Easement for over sixteen years.

## III. PRINCIPLES OF EQUITY DEMAND AFFIRMATION OF THE COUNTY COURT'S DECISION.

The Chancery Court is a court of equity. MISS. CONST. art. VI, § 159. As such, there are certain maxims that are foundational to the concept of equity. GRIFFITH MISSISSIPPI CHANCERY

PRACTICE § 34 (2000 ed.)(hereinafter referred to as GRIFFITH). The Court should apply these maxims so that justice may be accomplished in this case.

### A. *Equity Looks To The Intent And Will Regard Substance Rather Than Form.*

One of the maxims foundational to the concept of equity is: Equity looks to the intent and will regard substance rather than form. GRIFFITH at § 34, 39. Under this maxim, equity focuses on the actual substance of the matter and regards form as a secondary concern. *Id.* at § 39. "Courts of equity endeavor to look through the forms and incidents of a transaction to the actual and intrinsic reality and truth and considers results rather than the means of obtaining them." *Id.* (citing *Davis v. Pearson*, 44 Miss. 508 (1870); *Savage v. Dowd*, 54 Miss. 728 (1877)). This maxim further means "that rules, when they do not go to the substantial rights of one of the parties in a given situation, are not to be allowed to subvert, to mere technical form, the actual right of another." *Id.*

It is clear from the language of the Reciprocal Easement that the original parties to the document intended to provide for a parking and signage easement. The document unambiguously provides a perpetual easement for Derivaux to erect a sign and cross-park on four parking spaces south of the Warren Building. Similarly, Derivaux's property is forever burdened by the access easement in favor of Warren's property. Nevertheless, Derivaux should not be punished for following the intent of the parties. Derivaux previously testified that he would not have purchased the property except for the easements. (Tr. 58). Derivaux testified that a sign was critical to his business as an insurance agent. (Tr. 58). The appraisal to the property stated that the property had "a perpetual easement for 4 additional parking spaces in the adjacent Bennigans lot." (Ex. P-27 at 7). Further, the appraisal noted that "[t]he lack of parking spaces is considered a limitation to the property as a retail building." (Ex. P-27 at 7). Thus, this principle of equity demands this Court to affirm the county court's decision.

### B. *Equity Aids The Vigilant And Not Those Who Slumber On Their Rights.*

Another maxim foundational to equity is: Equity aids the vigilant and not those who slumber on their rights. GRIFFITH at § 34, 41; *see also Romans v. Fulgham*, 939 So. 2d 849, 860 (Miss. Ct. App. 2006). Equity will always be willing to extend just aid to the diligent, but not the slothful. *Id.* at § 41. It is a universal fact "that parties will generally use diligence to get what rightfully belongs to them and will unreasonably delay only as to false or inequitable claims in the hope that fortuitous circumstances may improve their otherwise doubtful chances." *Id.* Rights that are not asserted within a reasonable time are treated as abandoned or as surrendered. *Id.* (citing *Magee v. Catching*, 33 Miss. 672 (1857)). If a party delays in taking of some particular step "for such an unreasonable time that to allow him so late to proceed would work an injustice and injury upon the opposite party, it would required a much stronger case to move the court to action than if the matter had been seasonably presented." *Id.*

This Court should not be willing to aid Warren in this situation. Derivaux purchased the adjacent property in 1988 and promptly erected a sign. (Ex. P-3, P-4, P-6, Tr. 59-60). Warren never objected to the placement of the sign. Ten years after the sign was erected, Warren attempted to charge Derivaux rent for the sign. (Tr. 68-69). Three years later Warren's attorney sent Derivaux a letter demanding Derivaux remove the sign within ten days. (Ex. D-5, Tr 69-70). Despite the ten-day demand, Derivaux refused to remove the sign - - just as he refused to continue to pay Warren rent for parking and signage three years earlier. Four years after sending the demand letter, Warren attempted to disconnect the power to the Derivaux sign. (Ex. P-9, P-10, Tr. 79-80). Derivaux asked that he stop tampering with his sign and gave him a copy of the Reciprocal Easement. (Tr. 79). Shortly after tampering with the sign, Warren and his son demolished Derivaux's sign. (Ex. P-11, P-12, P-13, Tr. 82-84). Under the principles of equity,

Warren abandoned his rights by not asserting them in a reasonable time period. Thus, the Court should affirm the county court's decision based upon the principles of equity.

## IV. EVIDENCE IN RECORD SUPPORTING DAMAGES OF LOST PROFITS

The county court awarded Derivaux $7,580.00 as the cost of erecting a new sign[11] and $14,580.00[12] in loss of income. The Mississippi Supreme Court has held that "[i]t is primarily the province of the jury [and in a bench trial the judge] to determine the amount of damages to be awarded and the award will normally not be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Mickalowski v. Am. Flooring, Inc.*, No. 2005-CA-01864-COA, 2007 WL 1532564, at *12 (Miss. Ct. App. May 29, 2007) (internal quotation marks omitted).

In order to recover for lost profits, a plaintiff must establish the claim with reasonable certainty. *Cain v. Cain*, No. 2005-CA-00251-COA, 2007 WL 1816047, at *10 (Miss. Ct. App. June 26, 2007). "Where it is reasonably certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages." *Cain*, 2007 WL 1816047, at *10 (citation omitted). When loss has occurred but "the extent of the injury and the amount of damage are not capable of exact and accurate proof," damages may be awarded if the evidence lays "a foundation which will enable the trier of fact to make a fair and reasonable estimate of the amount of damage." *Id.* (citation omitted). The Mississippi

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[11] The county court also awarded Derivaux the cost of a permit fee and seven percent sales tax.

[12] The county court awarded Derivaux "the sum of $1,350.00 per month beginning on June 4, 2005, until such time as Warren removes the fence located on Derivaux's real property and, thereafter, until a new sign is erected by Derivaux or 31 days have passed, whichever is the lesser time, as the monthly loss of income suffered by Derivaux because of Warren's removal of the sign . . . ." (C.R. at 251). On March 28, 2006, the county court sent a letter by fax informing the parties of its decision. On or about that same day, Warren removed the fence and thirty-days passed without Derivaux erecting a new sign. Thus, the county court calculated the amount of loss of income from June 4, 2005 to April 28, 2006 (almost eleven full months). The county court awarded Derivaux $13,500.00 for each full month ($1,350.00 x 10 months) and then $1,080.00 for the last partial month ($1,350.00 x 80% of last month) for a total award of $14,580.00.

Supreme Court "has recognized the use of past earnings to estimate lost profits." *Id.* (citation omitted).

In this case, Derivaux suffered damages as result of Warren maliciously destroying his State Farm sign. Derivaux testified during trial that the sign is vital to his business: "State Farm is a large national company. It's like a McDonald's franchise in a way. We depend so heavily on our sign being out there with the big State Farm trademark. It's just so vital to our business." (Tr. 103-104). Derivaux further testified, "There are about 30 [other State Farm agents] in the metro area. We've all got the same price. We sell the same products. And it's like real estate: Location, location, location. Without the signage you just can't find the office, and it's just critical. It's very critical for our large national trademark to be out there visible for the public." (Tr. 107).

Derivaux's testimony laid a sufficient foundation to enable the judge to reach a fair and reasonable estimation of damages for lost profits. Derivaux prepared a report detailing his lost income calculations and testified during trial regarding his calculations. (Ex. P-34). Warren's counsel also cross-examined Derivaux regarding his loss profit calculation and any potential speculation on the lost profits. (Tr. 157-159). Regardless, this Court has recognized that "[s]ome speculation must be involved in an attempt to compute unrealized profits." *Benchmark Health Care Ctr., Inc. v. Cain*, 912 So. 2d 175, 180 (Miss. Ct. App. 2005).

Similar to *Benchmark Health Care*, Derivaux's lost income calculation report and his testimony presented at trial provided "ample evidence for the [county] court to examine [his] methodology and then determine the estimate to be reasonably certain." 912 So. at 180. Thus, this Court should affirm the county court's award of damages.

## V. THE COUNTY COURT CORRECTLY ASSESSED PUNITIVE DAMAGES AGAINST WARREN.

Punitive damages are permitted by statute.[13] Punitive damages, as a general rule, should be assessed in addition to actual or compensatory damages when there has been a "violation of a right or the actual damages sustained, import insult, fraud, or oppression and not merely injuries, but injuries inflicted in the spirit of wanton disregard for the rights of others." *Bradfield v. Schwartz*, 936 So. 2d 931, 936 (Miss. 2006)(citation omitted). In other words, there must be "some element of aggression or some coloring of insult, malice or gross negligence, evincing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule." *Bradfield*, 936 So. 2d at 936. Finally, the Court must examine the totality of the circumstances and the aggregate conduct of the defendant before assessing punitive damages. *Id.* (citation omitted).

The county court awarded Derivaux the sum of $5,000.00 as lump sum punitive damages and an additional sum of $100.00 per day for each day that Warren failed to remove the fence he placed on Derivaux's property after the date of the Judgment and all reasonable attorneys' fees, expenses and costs in bringing this action or in enforcing the Judgment of the Court. Mississippi law requires the appellate court to view the evidence in a light most favorable to support the lower court's assessment of punitive damages. *See Ivy v. Gen. Motors Acceptance Corp.*, 612 So. 2d 1108, 1117 (Miss. 1992).

There are numerous facts to support the county court's award of punitive damages. Warren harassed Derivaux's customers on numerous occasions (Tr. 77, 105-106, 115-116). Derivaux testified, "[Warren] would sit out there like a terrorist and just as people drove up, he

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[13] Mississippi Code Section 11-1-65(a) provides, "[p]unitive 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 [1] actual malice, [2] gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or [3] committed actual fraud."

would lean on their car, ask them what they're doing here. He would virtually run off business." (Tr. 106). Derivaux further testified, "[c]ustomers would come in and he would be out there harassing them, more or less running them off, and it's damaging." (Tr. 115-116). Warren harassed Derivaux employees as well: "I've seen him harass employees. . . . I've actually witnessed it myself." (Tr. 77, 105-106). In fact, one of Derivaux's employees quit because of Warren's harassment. (Tr. 105). Further, Warren used profanity in front of employees and customers: "[Warren] would harass my employees. He would harass our customers. He would curse, use profanity." (Tr. 77). Warren "cussed" Derivaux numerous times regarding the easements: "I [Derivaux] handed him the easement document, and [Warren] hit the roof. He cussed. He cussed and - GD, MF, you name it. He was slinging the words pretty hot and heavy." (Tr. 79-80, 84-85).

In addition, Warren and his son intentionally ripped out the wiring for Derivaux's sign (Ex. P-9, P10, Tr. 79-80). At the time, Warren threatened to tear the sign down: "[Warren] did say in his cussing rage that he was going to tear [the sign] down or something." (Tr. 79). Later, Warren acted upon his threat and in the wee hours of the morning on June 4, 2005, he and his son cut through the sign's thick metal posts with a blow torch, hooked one end of the chain to the sign and the other end to the pickup truck and used ropes and a "come-along" to unceremoniously yank the twenty foot high sign down in the parking lot. (Ex. D-13 at 131-32, Ex. P-11, P-12, P-13, Tr. 82-85). After they finished, they left the damaged sign behind. (Ex. D-13 at 131; P-11, P-12, P-13).

After Warren destroyed the sign, Warren placed parking bumpers restricting Derivaux access to the parking spaces: "[Warren] put some concrete bumper barricades on the Bennigan's parking lot blocking all access to the parking from my property. They were like four or five inches tall . . . . And they're designed to prevent cars from - you can't drive over them. . . . He

blocked off as much as he could to be hurtful to us . . . ." (Ex. P-17, Tr. 89-90). In response, the county court judge entered a temporary restraining order ordering Warren to remove the concrete barricades. (C.R. at 52). The county court judge also entered a preliminary injunction requiring Warren to "remove all concrete barriers and any other structures or devices preventing access to the four parking spots [south of the Warren Building] . . ." (C.R. at 59). However, Warren refused to remove the parking bumpers in accordance with the court's orders, but simply shuffled them after being ordered to do so by the county court: "The judge issued an order to move the barricades, and the barricades were not removed in a timely fashion, but they eventually were moved around a little bit." (Tr. 90-92). Warren angled the barricades so that Derivaux, his customers and employees could only get into the four spaces. (Tr. 92). Again, Warren moved the barricades to restrict access to the parking spaces, which made it difficult for customers to navigate the parking lot. (Ex. P-33, Tr. 92-93).

In September 2005, Warren erected a fence - a majority of which was erected on Derivaux's property - a fact affirmed by Warren's expert. (Ex. P-18, P-19, P-20, P-22, P-23, P-26, P-32, Tr. 16, 93-95, 96-97, 173). The fence directly violated the preliminary injunction entered by the county court judge in this matter. (C.R. at 59). The preliminary injunction specifically ordered Warren not to place "concrete barriers or any other structures or devices . . . in, the parking lot . . . [that] interfere[d] with the ability of Derivaux's employees, customers, vendors or other licensees and invitees to use the [four parking spots] . . . ." (C.R. at 60). The fence created a traffic hazard for Derivaux, his employees and customers: "[Warren] put up a tall, six-foot fence. And you can see now it's created a traffic hazard because if you try to back out, it's completely a blind spot. . . . [Y]ou back up into that, and there are hundreds of cars that go through there everyday and you're backing up into a very dangerous situation." (Tr. 95). The

fence also created a pedestrian hazard for employees and customers that parked in spaces provided by the Reciprocal Easement. (Tr. 95-96).

Warren also ignored correspondence from Derivaux's counsel dated June 20, 2005 requesting Warren to replace the destroyed sign and to only construct a fence that ended at the point located due north of the northeast corner of Derivaux's existing property. (Ex. P-18, Tr. 90-91, 94). Warren again ignored correspondence from Derivaux's counsel dated September 23, 2005 requesting Warren not to construct the fence since it would create a safety hazard and violate the Reciprocal Easement and the Court's preliminary injunction order. (C.R. 182). On October 5, 2005, Derivaux's counsel again sent correspondence to Warren to express his concerns regarding the construction of the fence. (C.R. 184).

Warren displayed a pattern of this malicious behavior every time his property lost a tenant and became vacant. (Tr. 43-45). Warren's abusive behavior escalated every time his rental income ceased (Tr-73). Richard Lingle was the closing attorney on the property purchased by Derivaux. (Tr. 37-38). Lingle testified at trial, "I think this issue comes up fairly often when Mr. Warren's property becomes, you know, without a tenant." (Tr. 44). Lingle recounted how Derivaux requested a copy of the Reciprocal Easement when Bennigan's lease ended and again when Mean Mallard's lease ended: "Approximately . . . 10 years ago, 1998 or so, I was called by Mr. Derivaux and . . . Mr. Derivaux was questioning me with regards to this easement issue and the sign issue. At that point in time I think there was some issues with the Bennigan's lease or something, and Mr. Warren was calling and giving Mr. Derivaux some trouble with regard to the removal of a sign or paying a lease fee or blocking his entrance . . . ." (Tr. 43). Lingle further testified, "[o]nce again it came up when the Mean Mallard [the tenant following Bennigan's] lease had gone up and they moved out. . . . . [I]f I recall correctly it was that time when Mr. Warren actually put up a chain and barricade, and then later on I think he actually

removed the sign . . . ." (Tr. 44-45). Clearly, the county court had substantial evidence to support its award of punitive damages and attorneys' fees.

### A. *The Breach of Peace Standard Is Inapplicable To This Case.*

Warren has argued previously that punitive damages are unwarranted because Warren had used proper self-help to remove the sign. However, these self-help cases are distinguishable from this case. In each of the self-help cases, the defendant-lender had the right under a contract and Mississippi law to repossess the defaulted property. *See Ivy*, 612 So. 2d at 1108 n.1, 1117. Under Mississippi law, a lender may repossess default property as long as it can be done without a breach of peace. MISS. CODE ANN. § 75-9-503. This standard is used in repossession cases, and this is not a repossession case.

Warren had every opportunity to use the court system to address his concerns about the Reciprocal Easement. He knew the rights of the parties were in dispute, but despite this knowledge, he took matters into his own hands.

Warren did not have the legal authority to remove and destroy Derivaux's sign which stood in part on Derivaux's property for over sixteen years. The county court assessed punitive damages based on the totality of circumstances and in light of all of Warren's shocking conduct. Accordingly, the punitive damage award should be reinstated.

### B. *The Recent Case of Biglane v. Under the Hill Corporation is Distinguishable.*

Warren previously in his Brief to the Chancery Court relied on the recent Supreme Court decision, *Biglane v. Under the Hill Corporation*, to support his claim that the trial court erred in assessing punitive damages and attorneys' fees against Warren because he was only reasonably asserting his property rights. In *Biglane*, Biglane "blocked off two nearby parking lots that served the [Under the Hill's] Saloon, using a cable over the entrance of one and crafting a metal gate over another." *Biglane v. Under The Hill Corp.*, 949 So. 2d 9, 13 (Miss. 2007). The

Supreme Court noted that Biglane owned one of the parking lots outright and the other part of the property blocked by the iron gate was owned by the city. *Biglane*, 949 So. 2d at 15-16. The Court further recognized the general rule that "it cannot be malicious for a person to refuse access to others to their private property." *Id.* at 16. However, the Court also said "[i]t is a basic tenet of property law that a landowner or tenant may use the premises they control in whatever fashion they desire, **so long as the law is obeyed**." *Id.* at 16 (emphasis added).

Here, Warren prohibited Derivaux and his customers access to the parking space they were entitled to use under the Reciprocal Easement. Although Warren owned the parking spaces, he did not have the right to prohibit Derivaux from using them as provided in the Reciprocal Easement. Furthermore, Warren did not have the legal right take down Derivaux's sign, which was located in part on Derivaux's property. Finally, Warren did not have legal authority to erect a fence on Derivaux's property. In each of these instances, Warren denied a legal right of Derivaux. Clearly, this case is distinguishable from facts before this Court.

Furthermore, punitive damages were not awarded in *Biglane*, not because the Biglane reasonably asserted his property rights, but instead because the Under the Hill was unable to demonstrate any **actual damages** as a result of the actions of Biglane. *Biglane*, 949 So. 2d at 17. Here, Warren acted outside his property rights in harassing Derivaux, trespassing on Derivaux's property by erecting a fence, destroying his sign and block off parking spots. Without question, Derivaux has established actual damages resulting from Warren's malicious and/or grossly negligent behavior. *Biglane* is therefore easily distinguished from the facts and law applicable in this case.

## CONCLUSION

The county court and the chancery court were correct in holding that Derivaux and his successors in title have the right to use for business purposes any four of the parking places south of the building formerly known as Bennigan's, and Warren, and his successors in title, shall do nothing to impede Derivaux's full access to this area. The county court and the chancery court properly held that Derivaux, and his successors in title, have the right to erect and maintain a sign like or similar to the sign which was removed by Warren, located at or in close proximity to the location of the sign which was removed. The chancery court erred in overruling the county court's holding that Warren's actions toward Derivaux and his property, both real and personal, were malicious in most instances or were possibly only grossly negligent in some instances. Derivaux is therefore entitled to punitive damages in addition to his actual damages for Warren's reprehensible conduct.

The county court's holdings are supported by substantial evidence. Thus, the county court's holdings should be affirmed in all respects. The Court should reverse the chancery court's reversal of the punitive damage and reinstate the county court's ruling on punitive damages.

This the 10th day of December, 2007.

Respectfully submitted,

ROBERT DERIVAUX

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## CERTIFICATE OF SERVICE

I, one of the attorneys for Robert Derivaux, do hereby certify that I have this date served a true copy of the above and foregoing Brief of the Appellant, via United States Postal Service, postage prepaid, on the following:

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THIS, the 10th day of December, 2007.

Stephen J. Carmody