

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

W.W. WARREN

APPELLANT

VS.

NO. 2007-CA-905



ROBERT DERIVAUX

APPELLEE

REPLY BRIEF OF CROSS-APPELLANT, ROBERT DERIVAUX

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

ORAL ARGUMENT NOT REQUESTED

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SUMMARY OF THE ARGUMENT

The lower court properly assessed punitive damages against Warren for his collective actions against Derivaux and the court itself. The trial court's assessment is supported by substantial evidence in the record which, under Mississippi law, must be viewed in a light most favorable to support the assessment of punitive damages. On multiple occasions, especially when Warren's property became vacant, Warren ignored the rights of Derivaux, his customers and employees, under the banner of "self help." Among other things, Warren intentionally tore down Derivaux's business sign, a portion of which was on Derivaux's property and which stood in the same place undisturbed for sixteen years. Warren then erected a fence on Derivaux's property, and he also purposely placed concrete parking barricades to restrict Derivaux's access to the parking spaces provided under the Reciprocal Easement.

Warren also refused to comply with the lower court's orders. He refused to remove the concrete barricades as ordered by the court, and simply shuffled them around. Furthermore, Warren erected a fence on Derivaux's property in direct violation of the trial court's order. Thus, the trial court clearly had substantial evidence to assess punitive damages against Warren.

Warren argues that the trial court cannot assess punitive damages since he was protecting his legal rights. However, this is contrary to the decision of the trial court and inconsistent with the rule of law. The trial court held that Warren **did not have** the legal right to tear down the sign, erect the fence, or place and shuffle the concrete barricades. Warren **was not** standing on his legal rights when he took these actions against Derivaux. Thus, the trial court properly assessed punitive damages against Warren for his actions and this Court should affirm the trial court's assessment of punitive damages against Warren.

The lower court also properly awarded attorneys' fees to Derivaux in compliance with Mississippi law; thus, this Court should also reinstate the trial court's award of attorneys' fees.

ARGUMENT

I. WARREN ACTED IN WANTON DISREGARD FOR THE LAW AND THE RIGHTS OF DERIVAUX.

Punitive damages should be assessed when there has been “some element of aggression or some coloring of insult, malice or gross negligence, **evinced ruthless disregard for the rights of others**, so as to take the case out of the ordinary rule.” *Bradfield v. Schwartz*, 936 So. 2d 931, 936 (Miss. 2006)(emphasis added). Here, Warren exhibited a pattern of behavior by continuously disregarding the rights of Derivaux. In fact, Warren exhibited such behavior every time his property lost a tenant and became vacant. (Tr. 43-45, 73).¹ More importantly, Warren repeatedly disregarded the orders of the trial court. (Tr. 89-90, 93-97, C.R. at 52, 59). Based upon this behavior by Warren, the trial court correctly assessed punitive damages against Warren.

A. Warren Repeatedly Disregarded The Rights Of Derivaux.

The record is clear that Warren repeatedly disregarded the rights of Derivaux. First and foremost, Warren and his son tore down and damaged Derivaux’s business sign that had stood in the exact same location from December 1988 until June 2005. (Tr. 60-61). Astonishingly, Warren in his Reply Brief argues that “Warren did not damage the sign in taking it down[, but] Derivaux damaged it in the manner he hauled it to storage.” *See* Reply Brief at 1 n.1, 11. Not surprisingly, Warren does not cite to any portion of the record in support of this contention. Contrary to this assertion, Warren and his son damaged Derivaux’s sign by cutting through the sign’s thick metal posts with a blow torch and yanking the sign down to the concrete parking lot below. (Ex. D-13 at 131-32, Ex. P-11, P-12, P-13, Tr. 82-85). The evidence clearly shows that Warren damaged the sign by yanking it down to the ground. (Tr. at 83, 85-86, P-11, P-12, P-13).

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 the lower court record shall be designated as “C.R. ____.”

Photographs of the sign while it was still in the parking lot where it was unceremoniously dumped after being torn down confirm the sign was destroyed by Warren and his accessories. (P-11, P-12, P-13). To make matters even worse, he has absolutely no remorse for destroying Derivaux's sign and steadfastly denies that he damaged the sign.

Warren not only destroyed Derivaux's sign, but he also disregarded Derivaux's right to erect and maintain a sign as provided by the Reciprocal Easement. Pursuant to the terms of the Reciprocal Easement, Derivaux erected a sign in December of 1988. (Ex. P-3, P-4, P-6, Tr. 59-61). Ten years after Derivaux erected the sign, Warren attempted to charge Derivaux for the placement of the sign. (Tr. 68-69). Twelve years after Derivaux erected the sign, Warren's attorney in a letter demanded Derivaux to remove the sign. (Ex. D-5, Tr 69-71). Four years after sending the demand letter² (and sixteen years after Derivaux erected the sign), Warren disconnected the power to the Derivaux sign and, shortly thereafter, Warren and his son tore the sign down. (Ex. P-9, P-10, P-11, P-12, P-13, Tr. 79-80, 82-86).

Warren has admitted that the parties disputed who actually 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: "[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). In fact, according to the survey performed by T.E. McDonald, a portion of the sign was on Derivaux's property. (Tr. at 20, P-15, P-16). Although Warren never confirmed his ownership of the property, Warren chose not to

² Warren in his Reply Brief states that Derivaux "does not deny that Warren notified him of removal of the sign before taking it down" and thus, Warren did not slumber on his rights. See Reply Brief at 2. Derivaux does admit that he received notice from Warren demanding removal of the sign. However, Warren inexplicably ignores the fact that Derivaux received this demand four years before Warren and his son tore down Derivaux's business sign. Derivaux never received any further written notice about the removal of the sign. (Ex. D-5, Tr. 69-71). Warren even admits to this fact in his Reply Brief: "When Bennigan's lease expired in 2001, Warren demanded removal of the sign and revoked parking privileges within five weeks of the lease termination." See Reply Brief at 7-8.

obtain a survey to confirm his ownership, but simply decided to take matters into his own hands and tear down Derivaux's business sign. (Ex. D-13 at 71-72).

Warren also disregarded Derivaux's rights to parking as set forth in the Reciprocal Easement. In or around April 2002, after more than thirteen years of continuous and uninterrupted use of the parking spaces by Derivaux, Warren erected a chain and blocked Derivaux's access to the four parking spaces and demanded payment for parking. (Tr. 72-74). Again, after tearing down Derivaux's business sign, Warren placed concrete parking barricades that restricted Derivaux's and his customers' access to the parking spaces provided under the Reciprocal Easement. (Ex. P-17, Tr. 89-90). The trial court ordered Warren to remove the parking barricades, but he failed to do so. (Tr. 91). Instead, Warren continually shuffled them around making it very difficult for Derivaux and his customers not only to access the parking spaces, but also to navigate the parking lot. (Ex. P-33, Tr. 91-93).

Finally, Warren disregarded Derivaux's rights when he erected a fence on Derivaux's property. (Ex. P-18, P-19, P-20, P-22, P-23, P-26, P-32, Tr. 16, 93-95, 96-97, 173). According to Warren's Reply Brief, "[t]he fence erected by Warren was on the property line but did [sic] touch Derivaux's property." See Reply Brief at 10. The fence more than touched Derivaux's property line; in fact, Warren's own expert admitted that the fence in that particular area **was entirely located on Derivaux's property** – south of Warren's property line: "Q. As far as this fence that's built right here that you denoted on your survey, that fence is on whose property? A. In this area it's on the property to the south." (Ex. P-26, Tr. 173). The fact was supported by the testimony of T.E. McDonald: "Q. So this fence that was constructed is on whose property, except for the few feet? A. On the Derivaux property." (Ex. P-26, Tr. 16). Warren admitted that he did not obtain a survey prior to constructing the fence on Derivaux's property: "Q. [I]mmediately before, let's say a week or ten days before or anytime within a year or two years

before, you didn't have a survey done on the property to determine where – to determine if where you were locating the fence was indeed on your property? A. No.” (Ex. D-13 at 150).

Warren not only erected the fence on Derivaux's property, but it also created a traffic hazard for Derivaux and his customers. (Ex. P-18, P-19, P-20, P-22, P-23, P-26, P-32, Tr. 16, 93-97, 173). The fence created a blind spot for Derivaux and his customers. (Tr. 93-96). Derivaux and his customers could not see cars using the ingress and egress provided by the Reciprocal Easement while backing up. (Tr. 93). Furthermore, the fence created a pedestrian hazard for anyone who parked in the spaces provided by the Reciprocal Easement. (Tr. 95-96).

Based upon these actions, it is clear that Warren continuously harassed Derivaux and disregarded his property rights provided under the Reciprocal Easement. Thus, the trial court had more than sufficient evidence to assess punitive damages against Warren.

B. *Warren Repeatedly Ignored Court Orders From The Trial Court.*

According to Warren, there is not “a shred of evidence that Warren ‘thumbed his nose’ at any court order.” See Reply Brief at 10. However, the record is replete with evidence of Warren “thumbing his nose” at the trial court order. Warren placed concrete parking barricades restricting Derivaux's and his customers' access to the parking spaces provided under the Reciprocal Easement. (Ex. P-17, Tr. 89-90). The trial court judge entered a temporary restraining order ordering Warren to remove the concrete barricades. (C.R. at 52). The trial 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 concrete barriers as ordered by the trial court, and simply shuffled them around the parking lot, which ultimately made it very difficult for Derivaux and his customers to navigate the parking lot. (Ex. P-19, P-33, Tr. 90-93, 95-96).

In September 2005, Warren erected a fence - all but a couple of feet of which was located on Derivaux's property - in violation of the preliminary injunction entered by the trial court. (Ex. P-18, P-19, P-20, P-22, P-23, P-26, P-32, Tr. 16, 93-95, 96-97, 173, CR. 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)(emphasis added). The fence was simply another attempt by Warren to restrict Derivaux and his customers' ability to cross park as permitted by the Reciprocal Easement.

The fence created a blind spot for Derivaux and his customers. (Tr. 95). Derivaux and his customers could not see the oncoming traffic due to the six-foot fence erected by Warren. (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 clearly thumbed his nose at the trial court by not removing the concrete barricades (and simply moving them around) and erecting a fence. These actions demonstrate that Warren not only disregarded the rights of Derivaux, but he also disregarded the trial court's orders. Thus, these actions support the trial court's assessment of punitive damages against Warren.

II. THE EVIDENCE WHEN VIEWED IN A LIGHT MOST FAVORABLE TO DERIVAUX SUPPORTS THE TRIAL COURT'S ASSESSMENT OF PUNITIVE DAMAGES.

Mississippi law requires the Mississippi Supreme Court to view the evidence in a light most favorable to the plaintiff in its assessment of whether a preponderance of evidence supports the trial court's punitive damages award. *See Ivy v. Gen. Motors Acceptance Corp.*, 612 So. 2d 1108, 1117 (Miss. 1992). Warren chose to ignore this maxim in his Reply Brief and simply argues that the evidence presented by Derivaux was sensationalized and nothing more than "smoke and mirrors." However, the record clearly demonstrates the actions taken against

Derivaux: (1) **harassment** – Warren harassed Derivaux, his employees and customers (Tr. 77, 105-106, 115-116); one of Derivaux’s employees quit because of Warren’s harassment (Tr. 105); Warren would lean on cars of Derivaux’s customers and question them as to why they were there (Tr. 105-106); (2) **profanity** – Warren “cussed” in front of Derivaux, his employees and customers (Tr. 77-80, 84-85); (3) **sign** – Warren and his son intentionally ripped out the wiring for Derivaux’s sign, and later tore the sign down (Ex. P-9, P10, P-11, P-12, P-13, Tr. 79-80, 82-85); (4) **fence** – Warren erected a fence on Derivaux’s property which 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); (5) **parking spaces** – Warren placed concrete parking barricades restricting Derivaux’s and his customers’ access to the parking spaces and refused to remove them completely when ordered to do so by the trial court (Ex. P-17, P-33 Tr. 89-93); and (6) **pattern of behavior** – Warren exhibited hostile aggression towards Derivaux whenever his property became vacant; during times when his property became vacant, Warren, among other things, attempted to coerce Derivaux into paying him monthly rent for the signage and parking (Tr. 43-45, 68-69, 72-74). When this evidence is viewed in a light most favorable to Derivaux, it is more than sufficient to support the trial court’s assessment of punitive damages and thus, the trial court’s award of punitive damages should be affirmed.

III. WARREN INCORRECTLY APPLIES MISSISSIPPI LAW TO THE FACTS OF THIS CASE.

Warren in his Reply Brief argues that “[r]easonable self-help remedies, as Warren used in this case to remove the sign, cannot support an award of punitive damages.” *See* Reply Brief at 9-10. And later, Warren argues, “[s]tanding on one’s rights is not malicious.” *Id.* at 10. These assertions assume that which Warren is attempting to prove; that is, Derivaux only had a license and not an easement for the signage and parking. According to Derivaux and the trial court, Warren did not have exclusive property rights and also had no justification to employ the

destructive actions he used. Thus, Warren was neither using “reasonable self-help remedies” nor “standing on [his] rights” when he tore down Derivaux’s business sign, part of which was located on Derivaux’s property. Warren was also not “standing on [his] rights” when he erected a fence on Derivaux’s property or when he placed concrete parking barricades on the spaces permitted by the Reciprocal Easement. If Warren was truly interested in his “rights,” he should have hired an attorney or requested a survey to determine his rights, but instead Warren decided to take action into his own hands and now must accept responsibility for his wrongful and destructive actions.

Interestingly, Warren in his Reply Brief argues that Derivaux fails to distinguish the recent Supreme Court decision, *Biglane v. Under the Hill Corp.*, 949 So. 2d 9 (Miss. 2007), because Derivaux “assumes the existence of an easement which is denied by Warren and the subject of this action.” See Reply Brief at 11. Warren, however, fails to recognize that he makes an assumption as well. Warren assumes that the Reciprocal Easement does not provide an easement for parking and signage rights to Derivaux. Ultimately, this Court will determine whether the Reciprocal Easement provided Derivaux with easement rights for parking and signage or not. If the Court agrees with Derivaux and affirms the decision of the trial court, then Warren did not have any “rights” to tear down Derivaux’s business sign, erect a fence on Derivaux’s property, or place concrete parking barricades in the parking lot used by Derivaux. Accordingly, the Court should affirm the trial court’s assessment of punitive damages for Warren’s blatant and intentionally destructive and malicious behavior.

IV. TRIAL COURT’S AWARD OF ATTORNEYS’ FEES SHOULD BE REINSTATED.

If this Court determines that the trial court properly assessed punitive damages for Warren’s behavior against Derivaux, then the Court should also reinstate the trial court’s award of attorneys’ fees to Derivaux. Mississippi law permits an award of attorneys’ fees if an award

of punitive damages is proper. *Smith v. Dorsey*, 599 So. 2d 529, 550 (Miss. 1992). Furthermore, “the allowance and the amount of [the attorneys’ fees] is a matter committed to the sound discretion of the trial judge.” *Smith*, 599 So. 2d at 550.

Here, after the trial court assessed punitive damages against Warren, Derivaux petitioned the court for attorneys’ fees. (C.R. 84-116, 194-242). In his petition, Derivaux presented an affidavit of C. Victor Welsh, III in support of the attorneys’ fees accumulated in the prosecution of his case. (C.R. 108-114, 234-240). The court also heard oral argument in support of the motion for attorneys’ fees. Based upon the evidence and arguments presented, the trial court granted Derivaux’s motion for attorneys’ fees and made “specific findings relative to the novelty and difficulty of the case, requisite skill in performing the proper legal services, preclusion of other employment while engaged in this case, etc.” *Smith*, 599 So. 2d at 550. (C.R. 257-261). As recognized by the Supreme Court, “[t]his is the correct approach which trial courts are to take in ascertaining fair and reasonable fees” *Id.* More importantly, during this appeal process, Warren has not once contested the amount of the attorneys’ fees awarded by the lower court; however, on appeal, Warren has simply argued that the attorneys’ fees award was not warranted since the punitive damages award was improper. Thus, the trial court properly awarded Derivaux attorneys’ fees and this Court should reinstate the attorneys’ fees award if the award for punitive damages is reinstated.


CONCLUSION

The chancery court erred in overruling the trial court's assessment of punitive damages and attorneys' fees. The trial court properly assessed punitive damages based upon Warren's continuous disregard for the rights of Derivaux, his customers and employees, and the trial court's orders. Furthermore, the evidence viewed in a light most favorable to Derivaux fully supports the trial court's assessment of punitive damages. If this Court finds in favor of Derivaux, then Warren acted outside of his legal rights in damaging Derivaux's business sign, erecting the fence, and placing the parking barricades. Finally, the lower court's award of attorneys' fees to Derivaux should be reinstated; the lower court properly followed Mississippi law in making such award. Thus, the chancery court's reversal of the punitive damages and attorneys' fees award should be reversed and the trial court's ruling on punitive damages and attorneys' fees should be reinstated.

This the 9th day of April, 2008.

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 Reply Brief of the Cross-Appellant, via United States Postal Service, postage prepaid, on the following:

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THIS, the 9th day of April, 2008.



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