IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-00905

W. W. WARREN

Appellant/Defendant

vs.

ROBERT DERIVAUX

Appellee/Plaintiff

On Appeal from the Chancery Court for the First Judicial District
of Hinds County, Mississippi

BRIEF OF APPELLANT W. W. WARREN

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant W. W. Warren certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

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Respectfully submitted,

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FORM OF CITATIONS TO THE RECORD

References to transcribed 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, "D-1 ..." for Defendant/Appellant exhibits.) References to record excerpts are referred to herein as "RE-___."

STATEMENT OF THE ISSUES

The following issues are presented by this appeal:

1. Whether the chancery court erred in affirming, in part, the judgment in favor of Derivaux and against Warren, and in awarding Derivaux any relief;

2. Whether the chancery court erred in affirming that Derivaux and his successors in title have the right under the Agreement to park on four unspecified parking spaces in the lot south of the building formerly known as Bennigans;

3. Whether the chancery court erred in affirming that Derivaux and his successors in title have the right to erect a sign on Warren's property under the Agreement;

4. Whether the chancery court erred in affirming that the Agreement creates an easement for parking and signage rights to Derivaux and his successors in title;

5. Whether the chancery court erred in affirming an award of lost profits damages to Derivaux; and

6. Whether the chancery court erred in affirming the trial court's dismissal of Warren's counterclaim and not enjoining Derivaux and his successors in title from attempting to erect a sign or park on Warren's property, Warren having revoked all such privileges.

STATEMENT OF THE CASE

Defendant/Appellant W. W. Warren ("Warren") appeals the ruling of the chancery court to the extent it upheld a clearly erroneous decision of the lower court construing a document titled "Reciprocal Easement" (hereinafter, the "Agreement") that was entered into in 1986 by Warren and a predecessor-in-title of Plaintiff/Appellee Robert Derivaux ("Derivaux").

The chancery court erred by affirming the lower court to the extent it construed the Agreement to grant *three perpetual easements* (one for access, one for cross-parking and one for signage) when the Agreement, according to its terms, only establishes *one perpetual access easement* for which Warren separately paid $85,000 and *two revocable privileges* (for parking and signage) which were separately agreed to between Warren and Ron Smith, Derivaux's predecessor-in-title.

Warren respectfully asks that this Court reverse and render the judgment of the chancery court to the extent relief was granted in favor of Derivaux.

STATEMENT OF THE FACTS

Warren owned a tract of commercial property near the southwest corner of the intersection of I-55 and Northside Drive in Jackson, Mississippi. In 1981, Warren leased his property to Bennigan's restaurant. (RE-024-037) Warren's property includes a building that housed the Bennigan's restaurant and an adjacent parking lot. At the time, Warren's property could be accessed directly from the frontage road beside I-55. Thereafter, as part of a highway construction project, 450 feet of Warren's frontage was taken for public use, leaving no means of ingress and egress to Warren's subject property and the Bennigan's restaurant that was situated thereon. (D-13 at p. 30) Out of necessity, Warren negotiated the purchase of an access easement with Ron Smith, who owned the property abutting the south border of Warren's property. (*Id.*) Warren paid $85,000 for this easement. (*Id.* at p. 30)

After the easement was negotiated, Smith realized that he needed permission to erect a sign on the easement Warren had agreed to buy, and discussed this with Warren. (D-13 at p. 32) Warren had no right to give such permission, as Bennigan's controlled such rights during the pendency of its lease of Warren's property. (*Id.* at 33-34) Bennigan's, however, authorized Warren to negotiate with Smith permission to put up a sign on a certain location in exchange for the right to use certain parking spaces on Smith's property. (*Id.*) Bennigan's had the right to approve any encroachment on the property, including sign placement that could obscure sight of the Bennigan's sign that was on Warren's property. Smith and Warren also agreed as part of this deal that Smith could use four parking spaces on Warren's property. This permission arrangement between Warren and Smith concerning a sign and parking was never meant to create a conveyance of property and was never set forth in a conveyance with any specific property description, but was merely a grant of permission for signage placement and cross-parking to which Smith and Warren

agreed. Nor was the parking and signage rights given in exchange for the easement. Instead, the terms of the easement were reached before any understanding was reached regarding signage and parking.

On April 22, 1986, Warren and Ron Smith reduced their understandings to a written agreement styled "Reciprocal Easement" (the "Agreement"). (RE-038-042; Exh. D-1) This Agreement between Warren and Smith, which was approved by Bennigan's, established a single reciprocal "*easement*" over a specifically described parcel of property therein for purposes of providing ingress and egress to both properties. The Agreement also memorialized certain *privileges* of cross-parking between the properties and, in addition, permission for Smith to erect a sign at a particular location on Warren's property "as mutually agreed upon." (D-1). It is significant that the location of the sign, in terms of the distance from the boundary of the property, was specified in the Agreement, as per Bennigan's concern about signage blocking its sign. (D-1 at ¶ 4).

References in the Agreement to the easement created are clearly and separately identified in the Agreement as "Parcel #2-Easement" (*see* Exh. D-1 at Book 3213, Page 196 at ¶¶ 2 and 6) and, significantly, the easement is specifically described in a legal description attached to the Agreement (*see* Exh. D-1 at Book 3213, Page 198), also under the heading "Parcel #2-Easement". Specifically, the access easement language in the Agreement reads as follows:

> **"2. Parcel #2-Easement. This description shall be used only for ingress and egress purposes, and for no other reasons. Said description in Parcel #2-Easement shall never be blocked to impair it's [sic] continuous use for ingress-egress by all parties lawfully upon the lands, Parcel #1-Fee, and W.W. Warren property lying to the North, as shown by the plat attached. Said Parcel #2-Easement shall be kept "clear" at all times.**

(Exh. D-1 at Book 3212, Page 196)

In contrast, the sign and cross-parking privileges are *not* identified in the Agreement as easements and are not accompanied by any metes and bounds legal description in the attachment to the Agreement. (*See* paragraphs 3. and 4. at Book 3212, Page 195 of the Agreement.) Indeed, the cross-parking privileges do not even specify the particular four parking spaces among over twenty on Warren's property on which Smith could park. (Tr. 53, 54, 128) The paragraph in the Agreement concerning the sign privilege is clearly marked "Business Sign" with no mention of any "easement," and it does not contain a metes and bounds description. In fact, none of the property descriptions attached to the Agreement apply to the signage or parking privileges. Instead, the Agreement merely marks the location where Warren gave Smith permission to erect a business sign.

Hence, as reflected in the Agreement, Warren and Smith created: (a) an access easement over described property; (b) a privilege for Smith to erect a sign on a partial or location on Warren's property; and (c) a privilege for Smith to use four of Warren's parking spaces which were not specifically described on the property or otherwise enumerated. The privileges granted by Warren to Smith were intended to be personal to Smith given the context in which Smith and Warren were using their respective properties at the time.

Derivaux bought the Smith parcel in 1988 through a foreclosure. In 1991, Derivaux removed the existing sign and erected a new business sign *on a different location*, without securing any "mutual agreement" from Warren. (Tr. 59-60) In fact, this was done without Warren's permission or that of Warren's tenant, Bennigan's, who was in possession of the property. (Tr. 138-139)

Derivaux admits that his new sign was in a different location from that specified in the

Agreement. (Tr. 62-63) Derivaux testified he "had to scoot over a little bit" and put the sign "within a couple of feet probably". *Id.* (In fact, the sign was not within a couple of feet from the location designated in the Agreement, but 10 to 12 feet for the designated location.) (RE-043) (survey of original location of sign and location where "new" sign was erected).

It is thus uncontroverted in the record that Derivaux's sign is *not* at the location specified in the Agreement and thus violates the terms of the Agreement outright. (The Agreement does not speak in terms of an "approximate" location for the sign; it is precise.) Nor was the new location of Derivaux's sign "mutually agreed upon" as per the Agreement. Derivaux's excuse for violating the sign location in the Agreement is that he did not want to bear the expense of removing the concrete base of the original sign. (Tr. 63)

Moreover, without Warren's or Bennigan's permission, Dr. Handley, who shares Derivaux's building, attached his own sign to Derivaux's sign under a representation from Derivaux that Handley was permitted to do so. (Exh. D-14 at p. 9) Handley also took the position that he and his employees had parking rights on Warren's property. (Exh. D-14 at p. 18) The Agreement does not provide Handley with any rights of any kind in Warren's property. (D-1) Thus, both Handley and Derivaux were using Warren's property in violation of the spirit and terms of the Agreement, insofar as signage and parking was concerned. Handley claims his permission was granted by Derivaux, but such indirect rights are nowhere mentioned or provided for in the Agreement.

Warren initially extended continuing permission to Derivaux for the sign. (Tr. 64) In 1998, Warren notified Derivaux that he could not continue to have the sign on Warren's property unless Derivaux paid a reasonable rent. (Tr. 69) In 2001, the Bennigan's lease terminated (and

with it Bennigan's possession and control of Warren's property), and within five weeks of such termination, Warren, through his counsel, sent Derivaux a certified letter demanding removal of the sign. (Tr. 70; RE-044-045) Derivaux did not respond to the letter (Tr. 142), and refused to comply with Warren's request. (Tr. 71) Warren also revoked parking privileges for Derivaux and Dr. Handley, and demanded payment. (Tr. 73) Warren merely demanded $250 per month for the parking privilege to defray maintenance costs of over $1,000 per month for the lot.

Derivaux agreed to pay Warren for parking (Exh. D-13 at p. 103; Tr. 73)[1] but then broke that agreement and stopped payments. (Tr. 74).

Then, in 2005, Warren advised Derivaux that if Derivaux did not remove the sign, Warren was going to remove it. (Tr. 78-79) Derivaux failed to remove the sign. In May of 2005, Warren disconnected electrical power to the sign. In June of 2005, early on a Saturday morning and outside business hours, as was his right in the context of the privilege or license relating to parking or signage, Warren removed the sign. Derivaux filed suit and Warren counterclaimed.

The chancery court erroneously affirmed the following parts of the trial court's ruling: which was based on numerous erroneous findings of fact and conclusions of law including, among others, the following:

1. That the cross-parking and sign privileges granted in the Agreement are really easements that are perpetual and applicable to "successors and assigns," **notwithstanding that such personal privileges/licenses are revocable by law and are not permanent**;

2. That the sign Derivaux erected was "on the same site,"**despite Derivaux's own**

[1]Derivaux's agreement is dispositive of his understanding that he had nothing more than a reasonable parking privilege pursuant to the Agreement

admission that the sign was erected in a different location from the sign erected by Derivaux's predecessor-in-title;

3. That Derivaux is entitled to erect a sign "at or in close proximity to the location of the sign that was removed," **despite indisputable evidence at trial that the removed sign is not at the same location as the original sign, even if one assumes contrary to law that there is some perpetual right of Derivaux to have a sign on Warren's property;** and

4. That Derivaux suffered a loss of business income, **despite the lack of sufficient, probative evidence to demonstrate same.**

In doing so, the lower court failed to properly construe the Agreement to provide an access easement and, in addition, revocable parking and sign privilege, as is clear from the four corners of the Agreement. The chancery court's ruling should be reversed and rendered to the extent relief was granted in favor of Derivaux, and this Court should declare the parties' rights under the Agreement to include an access easement and revocable licenses or privileges for signage and parking.

SUMMARY OF ARGUMENT

The lower court erred in holding that the Agreement created three easements (one for access, one for signage and one for parking). The terms of the Agreement reflect that it created a single, described access easement for ingress and egress to the properties and, in addition, two licenses or privileges for erection of a business sign and cross-parking.

To create an easement, the document must reflect an intent that is manifest on the face of the instrument such that no other construction can be placed on it. This clearly is not the case with regard to the Agreement's provision for signage and parking. Easements must be described with accuracy and clarity. This is not the case as regards the parking rights established in the agreement. Indeed, the parking rights as to Warren's property are not specifically identified at all and could not be ascertained with specificity in a title search.

To determine what was intended by the parties, the Agreement must be reviewed as a whole and in the context in which it was entered. To the extent there is any ambiguity, these circumstances in which the Agreement was entered must be reviewed, as well as the manner in which the Agreement has been treated by the parties. Derivaux's admitted cavalier treatment of the location of the signage rights as variable is compelling evidence (that stands uncontradicted) that the parties intended to create a sign privilege and not a permanent sign easement. Likewise, as for parking, the absence of a specific description of the parking spaces burdened by the supposed and alleged easement is dispositive of the parties' (Smith's and Warren's) intention to create parking privileges and not a permanent easement. This is further buttressed by the absence of a property description in the Agreement for anything other than the access easement that was created.

In any event, the location of the sign Derivaux erected on Warren's property materially and substantially violates the terms of the Agreement as it relates to signage. Derivaux readily admits he varied the location of his sign from the location provided in the Agreement for his own convenience. The survey in evidence indicates that the sign Derivaux placed on Warren's property is 10 to 12 feet closer to the boundary than specified in the Agreement. The violation is major and cannot be justified in any way.

The lower court further erred in recognizing alleged "lost profits" damages on the record of this case. There was insufficient evidence or testimony of any kind to support such an award. The award was based on evidence that was purely speculative and not legally sufficient to support the court's finding in this regard.

Warren therefore requests that the court reverse and render the lower court's finding that the Agreement created three easements, and order instead that the Agreement created one access easement and, in addition, signage and parking privileges that are revocable by law. Warren further requests that the court reverse and render the lower court's finding that Derivaux is entitled to recover for alleged lost profits. Finally, Warren asks that the court affirm the chancellor's finding that there is no basis for imposition of punitive damages or the related award of attorney fees to the extent that issue is cross-appealed by Derivaux.

ARGUMENT

1. Distinction Between Agreement and License. In order to decide the issues in this case, the Court must interpret the Agreement. Under real property law, a distinction is made between an easement and a personal privilege or license. The Mississippi Supreme Court has clearly differentiated the two:

> "Generally, an easement is an interest in the land in and over which it is to be enjoyed and is distinguishable from a license which merely confers a personal privilege to do some act or acts on the land." *Logan v. McGee*, 320 So. 2d 792, 792-93 (Miss. 1975).

Additionally, the court has stated that a license is:

> "Nothing more than an excuse for the act, which would otherwise be a trespass." *Hotel Markham, Inc. v. Patterson*, 451 So. 2d 255, 256 (Miss. 1947).

The authors of 25 Am. Jur. 2d, Easements and Licenses, § 15 define the differences as follows:

> "A grant of an easement should be drawn and executed with the same formalities as a deed to real estate. Thus, although one can grant an express, irrevocable easement, it must be evidenced by a writing manifesting a clear intent to create an interest in the land. An easement is created if the owner of the servient estate either enters into a contract or makes a conveyance intended to create a servitude that complies with the Statute of Frauds or falls within an exception to the Statute of Frauds."
>
> "As a general rule, to constitute a grant of an easement, any words clearly showing the intention to grant an easement are sufficient. The intent to grant an easement must be so manifest on the face of the instrument, however, that no other construction can be placed on it. Thus, to create an easement by express grant, there must be a writing containing plain and direct language evincing the grantor's intent to create a right in the nature of the easement rather than a license." (Footnotes omitted).

In other words, there must be clear and direct language reflecting unambiguously an intent to create an easement. Mississippi law is in accord with this principle. In *Crawford v. Butler*, 2005 WL 3163511 (Miss. App. 2005) while construing the language of an easement, the

court stated that the rules for the interpretation of deeds and other written instruments apply. Further in *Moran v. Sims*, 873 So.2d 1067 (Miss. App. 2004), the court held that what is needed in any description of an easement is accuracy and clarity.

In this case, the Agreement creates a *single* identified reciprocal easement of ingress and egress on the property of the specifically described servient estate. This access easement is indeed accurate and clear. The document also creates personal privileges or licenses for a sign and parking spaces. However, there is no clear description of four specific parking spaces allegedly subject to an easement under the Agreement. The absence of a specific description for the parking spaces is a compelling indication that parking was a privilege and not an easement, since there can be no accuracy or clarity of location. Indeed, Derivaux admitted at trial that the four particular spaces cannot be identified in the Agreement out of the more than twenty spaces on the lot. (Tr. 128) In other words, one checking title could not determine from the Agreement the precise four parking spaces that are covered by the Agreement.

The absence of a specific description, whether via metes and bounds or monuments, is fatal to Derivaux's characterization of the parking privilege as an easement. *Moran*, 873 So.2d 1067 (holding that what is needed in any description is accuracy and clarity); *McDonald v. Board of Mississippi Levee Commissioners*, 646 F.Supp 449 (N.D. Miss. 1986)(easement must be definite and certain as to property described). In this case, the Agreement contains no property description at all concerning the property over which the alleged parking easement exists. Instead, the cross-parking is permitted "in four spaces owned by W. W. Warren South of" a building owned by Warren. Neither the particular spaces nor the servient estate is described. Given the lack of specificity in the description of the parking privilege, it cannot as a matter of Mississippi law be deemed an easement.

The Agreement is entitled, "Reciprocal Easement" in the singular, not plural. The word "easement" is consistently referred to in the singular throughout the document. (*See* ¶¶ 1, 2 and 6 of Exh. D-1) In other words, there is only *one easement* created by the document. The only property description of the servient estate for the access easement, "Parcel #1-Fee" (the property of Derivaux's predecessor), and the access easement itself, "Parcel #2-Easement" (a portion of the Fee), are contained in the document. Although Derivaux claims separate easements for parking and for a sign on Warren's property, there is no description of Warren's property which could be the servient estates of any such easements.

A purported easement for parking privileges is void-for-vagueness if the servient estate is not identified with reasonable certainty as to the exact location of parking rights. *Dunlap Investors Ltd. v. Hogan*, 650 P. 2d 432, 434 (Az. 1982) (holding that an easement must contain a description of the servient estate to be valid). The Agreement is similarly imprecise as to the servient estate for parking. Without a description, there can be no easement. As the court in *Dunlap Investors* aptly noted, the servient estate could not be identified from a title search, making the purported easement void. *Id.*

2. <u>Intent is Determined From the Whole Instrument</u>. Easements constitute a burden on a servient estate that benefits the dominant estate. In *Bivens v. Mobley*, 724 So. 2d 458, 462 (Miss. Ct. App. 1998), the court stated:

> "Such contracted-for intrusion into the normal bundle of property rights owned by the [servient estate] should be read consistently with the purpose of the easement. As with interpreting other grants and reservations of rights in real property, we start with the requirement to consider the instrument as a whole and determine the intent of the document's language if it is possible to do so."

In this case, a reading of the entire document at issue makes it clear that the sign and parking rights are not referred to in the agreement as "easements" and are not accompanied by

descriptions of the servient estate they would burden if they were easements. The intent of the Agreement was for Warren and Smith (Derivaux's predecessor) to "mutually agree" on a sign, which itself implies the right not to agree. As for parking, the Agreement says nothing more than the parties have cross-parking privileges as to four unspecified spaces on Warren's and Smith's property. There is no indication of an intent to permanently burden specifically described property, as is necessary to create an easement.

Use of the word "Easement" in the title of the Agreement does not determine the nature of the Agreement as to parking and sign privileges. *Binder v. Weinberg*, 48 So.2d 1013 (Miss. 1909). This is particularly so when the Agreement does contain an easement with regard to ingress and egress. Reading the Agreement as a whole, it is clear that the parties intended an easement only for ingress and egress, but not as to sign and parking privileges.

3. <u>To the Extent There is Uncertainty or Ambiguity Concerning Scope, the Court Should Review the Circumstances</u>. In *Capital Elec. Power Assoc. v. Hinson*, 84 So. 2d 409, 461 (Miss. 1956), the court stated there where there is any uncertainty or ambiguity in the scope of an easement:

> "It 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."

Further, the court in *Hinson* stated:

> "Treating the location as variable would incite litigation and depreciate the value and discourage the improvement of land upon which the easement is charged." 84 So. 2d at 462.

A review of the circumstances in which the Agreement was entered into provides compelling evidence that an easement for ingress and egress was intended, but that the signage and parking agreement was intended as a revocable privilege. As stated hereinabove, Warren

paid $85,000 for the access easement. The sign/parking arrangement was separately discussed between Warren and Smith and ultimately agreed to. The fact that only the access easement contains a description is indicative of an intent to convey and interest in land (the easement) with regard to access, but not as to the sign and parking rights.

The parking privilege in this case does not specifically locate any four parking spaces, but designates only the area "located south of Bennigan's." Derivaux readily admitted at trial that there was no specific description of four parking places as necessary to create an easement. (Tr. 128) It was further admitted by Derivaux at trial that he treated the location as variable for his own convenience. (Tr. 62-63). Such variable location depreciates land value and discourages improvement. It is also a clear and unmistakable indication that parking is a privilege, not an easement. Derivaux's attempted treatment of cross-parking privileges as an easement has "incited litigation" in the manner predicted by *Hinson, supra* at 462.

The same is true of Derivaux's cavalier treatment of the sign location as variable. (Derivaux's illicit placement of his new sign was 10 to 12 feet closer to the boundary than explicitly authorized by the Agreement. (RE-038-042) Derivaux admits he created a new sign supposedly near, but not on, the location of the original sign. (Tr. 62-63) Derivaux's variable treatment of the sign location is antithetical to the treatment of the sign privilege as an easement.

4. <u>Sign Location Violates Agreement</u>. Even if Derivaux were somehow entitled to claim a contract right under the Agreement to erect and maintain a sign on Warren's property (which Warren denies), the location of the sign is not in accord with the agreement. Derivaux admits his sign was located well *within* 35 feet of the southeast property line of Warren, a clear violation of any right or privilege granted to Derivaux's predecessor. The Agreement plainly requires the sign to be "35 feet Westward from the Southeast Corner of [Warren's] property."

The lower court apparently noted this but erroneously failed to recognize that easements, if they exist, cannot be based on variable locations. *See Moran v. Sims*, 873 So. 2d 1067 (Miss. Ct. App. 2004). Derivaux's treatment of the sign location as variable--by putting a sign 10 to 12 feet closer to the boundary than specified--is compelling evidence that the sign rights are a privilege and not an easement. *Id.* In any event, though, the sign violated the Agreement in a material way that cannot and should not be ignored.

Finally, even if correctly located, Warren reserved the right in the Reciprocal Easement document to approve any such sign which--logically--carries with it the right to disapprove of any such sign. In the absence of such approval, Derivaux had no right under the document or otherwise to erect a new sign on Warren's property, and has no basis for doing so now.

5. No Finding or Evidence of Prescriptive Easement. Although there was no finding of a prescriptive easement, the chancery court erred to the extent it considered Warren's permitting Derivaux's business sign and parking for a period of time as "indicative" of Warren's alleged conveyance of easement rights. Although Derivaux had previously made alternative claims for easements by prescription with respect to parking and signage, easements may not be procured by prescription where the use is by permission. *Sharp v. White*, 741 So. 2d 41, 42 (Miss. 1999) (holding that prescriptive easement cannot originate from permissive use because it would not be hostile). Similarly, in *Dethlefs v. Beau Maison Dev. Corp.*, 511 So. 2d 112 (Miss. 1987), the Mississippi Supreme Court stated:

> "However, use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since adverse use, as distinguished from permissive use, is lacking."

Derivaux admitted at trial that he was initially given permission by Warren and his tenant, Bennigan's, to leave the sign in place after it was erected without Warren's permission.

(Tr. 64) Such permissive use cannot, as a matter of law, be adverse. *Sharp* and *Dethlefs, supra.* The fact that Derivaux initially erected the offending sign without permission of either Warren or Bennigan's is inconsequential to any adverse possession analysis, given Derivaux's admission of later-granted permission.

Moreover, an element of any easement procured by prescription is that its use be exclusive. The Mississippi Supreme Court in *Keener Properties, L.L.C. v. Wilson*, 912 So. 2d 954, 956-57 (Miss. 2005), adopted the definition of "exclusive" as stated by the Mississippi Court of Appeals in the case of *Lynn v. Soterra Inc.*, 802 So. 2d 162, 168 (Miss. Ct. App. 2001) as follows:

> "It was not necessary for [claimants] to exclude others from the use of the road, but only that there was "an intention to possess and hold land to the exclusion of, and in opposition to, the claims of all others, and the claimant's conduct must afford an unequivocal indication that he is exercising dominion of a sole owner."

Accordingly, that Warren and Bennigan's allowed cross-parking for a period of time (until that privilege was revoked) does not aid any adverse possession theory. Warren was unable to discern in any event that Derivaux (and Derivaux's next door neighbor, a dentist) was parking on his property until Bennigan's closed and no longer had patrons parking on the property, given the absence of specific identification of the spaces subject to the Agreement. Warren did in any event exclude Derivaux when Warren learned of the parking after Bennigan's vacated. Derivaux himself testified that Warren demanded that Derivaux cease parking on Warren's property in 2001, and Derivaux did as Warren requested. (Tr. 121-122)

It is impossible to exhibit sole dominion over parking which is indefinite and subject to use by multiple and numerous individuals. Therefore, there is no merit to a claim of adverse possession over the four parking spaces which were or are jointly used by Warren's tenants and their patrons. Additionally, when their parking on his property became apparent to Warren, he

demanded that they cease parking on his property or pay him rent for the privilege.

6. No Evidence in Record Supports Affirmance of Lost Profits Damages.

The chancery court's affirmance of damages for $14,580 in loss of income and a monthly loss of income in the amount of $1,350 beginning on June 4, 2005, is not supported by evidence in the record and should be reversed. Derivaux's testimony as to his loss of income was simply an estimate based on the difference between average policies written in two years and an average compensation associated with each policy. (Tr. 105, 110). Based on his own estimates and calculations, Derivaux determined that he averaged 27 fewer policies written each month after the signage was no longer in place and that the average gross compensation per policy was $50. (Tr. 102-110). However, no evidence in the record demonstrates that the removal of the sign was causally related of Derivaux's estimated loss of income, and Derivaux's self-serving testimony was not supported by the best evidence or adequate documentation.[2] Nor was any expert testimony offered to support this baseless opinion. Derivaux therefore cannot establish his lost profits damages with reasonably certainty, and any award for loss of income is too speculative. "[D]amages awards *must* be supported by evidence, and such evidence *must* be reflected in the record if it is to be affirmed on appeal." *Rich ex rel. Brown v. Nevels*, 578 So. 2d 609, 617 (Miss. 1991); *see also IndymacBank, F.S.B. v. Young*, No. 2006-CA-01175-COA, 2007 WL 3076928, at *4 (Miss. Ct. App. Oct. 23, 2007). As a result, the chancery court erred in affirming an award of lost profits damages to Derivaux.

[2]It is common knowledge that State Farm agents like Derivaux experienced a decline in policy issuance in the post-Katrina environment in Mississippi. This most likely is the root cause of Derivaux's reduced production.

CONCLUSION

The chancery court erred in affirming the trial court's holding that the "Reciprocal Easement" document actually creates three easements: one perpetual and reciprocal easement of egress and ingress as particularly described on Derivaux's property, and two additional easements on Warren's indefinitely described property for parking and for signage. This ruling is contrary to the terms of the Reciprocal Easement and Mississippi law distinguishing easements from privileges or licenses and requiring sufficiently specific descriptions of the servient estates. This ruling is also plainly contrary to the intent as reflected in the circumstances surrounding Warren's purchase of the easement and his separate dealings with Smith regarding parking and signage. Warren had every right under the Agreement and under Mississippi law to revoke the sign and cross-parking privileges.

Ultimately, Derivaux is misconstruing the Agreement in an effort to permanently place a sign and park on Warren's property. This would seriously devalue Warren's property and was not contemplated by the signatories to the Agreement, Warren and Smith. There is no inequity in viewing the sign and parking rights as privileges, since nothing would preclude Derivaux from putting his sign on his own property. The Agreement and the interpretational law of Mississippi do not support Derivaux's effort to use Warren's property for parking and signage forever.

Warren respectfully asks that the judgment allowing Derivaux permanent rights to erect a sign and park in Warren's property be reversed and rendered, and that the sign and parking privileges be declared terminated. Warren also asks that the chancellor's decision overturning the trial court's award of attorney fees and punitive damages be affirmed.

Respectfully submitted,

W. W. WARREN

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CERTIFICATE OF SERVICE

I, Roy H. Liddell, hereby certify that a true copy of the foregoing Brief of Appellant W. W. Warren was served on the following counsel by being deposited in the U.S. Mail, first-class postage prepaid, on this 7th day of November, 2007:

Honorable Denise Sweet Owens
Chancery Judge
316 S. President Street
Jackson, Mississippi 39201

Chancellor of Hinds County

Stephen J. Carmody
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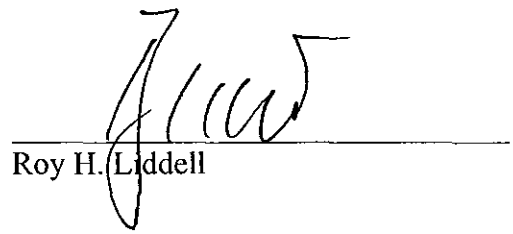

Roy H. Liddell