2009-CA-01842

CERTIFICATE OF INTERESTED PARTIES

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. D. L. Harkness, Appellant;
2. Mary P. Harkness, Appellant;
3. The D. L. and Mary P. Harkness Family Trust, Appellant;
4. Trustmark National Bank, Trustee of said Trust;
5. Kathy Glyne H. Powell, Beneficiary of said Trust;
6. Jon Kevin Karkness, Beneficiary of said Trust;
7. Rachell Harkness, Beneficiary of said Trust;
8. Grandchildren of D.L. and Mary P. Harkness, Benificiaries of said Trust;
9. Michael D. Simmons and the law firm of Cosmich Simmons & Brown, PLLC, attorney for Appellants;
10. Roosevelt Daniels, II, attorney for Appellant;
11. Butterworth Hunting Club, Inc., Appellee;
12. Harold D. Hammett, Appellee;
13. Richard D. Hammett, Appellee;
14. Robert F. Hammett, Appellee;
15. John M. Gilmore, attorney for Appellees; and
16. Honorable Chancellor Janace Harvey-Goree, Trial Court Chancellor.

Respectfully submitted this the 18th day of June, 2010.

JOHN M. GILMORE

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would assist the Court in understanding the facts relevant to the Trial Court's finding and would show unto this Court that the Trial Court 's opinion and order were supported by substantial credible evidence. Oral argument would permit the parties to ensure that the relevant supporting evidence and documentation is recognized to support that Appellees did have a proper easement by necessity, also called an easement by implication.

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STATEMENT OF THE CASE

I. INTRODUCTION.

Plaintiffs/Appellants, D. L. Harkness, Mary P. Harkness and the D.L. and Mary Harkness Family Trust (collectively referred to herein as "Harkness") brought this action in an attempt to stop Defendants/Appellees Butterworth Hunting Club, Inc., Harold D. Hammett, Richard D. Hammett, and Robert F. Hammett (collectively referred to herein as "BHC") from allegedly trespassing and having disregard for Harkness's rights and sought to quiet title to their land. (R. at 7-12, 43-50). BHC filed Answers, Affirmative Defenses, and a Counter-claim, seeking alternative methods to show the rights of BHC to use the road, path, Indian trail or wagon trail that exits [and has existed for over One Hundred Eighty-four (184) years] across a small corner of Harkness's property to access their landlocked property. (R. at 23-42)(R.E. at 1-20).

Following discovery, this action was tried before the Honorable Chancellor Janace Harvey-Goree in the Chancery Court of Holmes County, Mississippi on June 2, 2009. The Trial Court issued an Opinion and Order dated September 24, 2009 (R. at 358-365) (R.E. at 21-28) from which Harkness filed this appeal. (R. at 366).

II. STATEMENT OF THE FACTS.

In the Chancellor's Opinion and Order dated September 24, 2009, she found the following *Findings of Fact*, to-wit:

> 1. The Plaintiffs, D. L. Harkness and Mary P. Harkness are adult resident citizens of the State of Mississippi. Plaintiff, the D. L. Harkness and Mary P. Harkness Family Trust is a revocable inter vivos trust created and existing under the laws of the State of Mississippi.
> 2. The Defendants, Butterworth Hunting Club, Inc., is a corporation in good standing in the State of Mississippi. Defendants, Harold D. Hammett, Richard D. Hammett, and Robert F. Hammett are adult resident citizens of Holmes County, Mississippi.
> 3. The Court has jurisdiction over the parties and subject matter.

4. The Plaintiffs purchased a 296 acre-parcel of land in 1987. The said land is located and situated on Hebron Road in Holmes County, Mississippi. Subsequently, they acquired an additional 50 acres and a 139 acre-tract, for a combined total of 485 acres of land. This land is primarily used for timber and recreational purposes.

5. The Defendants owned a parcel of land adjacent and to the West of the parcel of land owned by the Plaintiffs. The Defendants also leased 16 Section land from the Holmes County Board of Education that borders the Southern boundary of the Plaintiffs land.

6. A controversy arose over a path that traverses the Southwest corner of the Plaintiff's land. The Defendants had been using said path for egress and ingress over the objections of the Plaintiff.

7. To prevent the continued use, the Plaintiffs erected a barbed wire fence, placed a locked gate at the entry of his property, and cut trenches across the path to deny access to the Defendants.

8. The Defendants cut the barbed wire fence and lock on the gate. They also filled in the trenches and continued to use the land despite the protest of the Plaintiffs. Defendants claimed that they had a right to use the land because it was a public road. People had used the path for egress and ingress for many years, therefore, if it was not a public road, they had a prescriptive easement or easement by necessity.

9. The Defendants contended that their land is landlocked. The title to the tracts of land owned by both parties were derived from a common grantor. The only other access to a public road by the Defendants to their land would be over the land of a person who is a stranger to the title.

10. Kenneth Reese, a certified land surveyor, offered testimony regarding some dotted lines on an 1823 plat containing the roads of Holmes County, Mississippi, which the Defendants are contending constitute a public road. According to Kenneth Reese, the dotted line could represent a road, an Indian trail or a wagon trail. He said that the dotted line on the 1823 plat, when overlaid on a current survey, was approximately 1200 feet from the location of the path/road which is the subject matter of this controversy.

11. According to the Holmes County Board of Supervisors, the path/road is not considered by it to be a public road.

(R. at 358-360) (R.E. at 21-23).

The Chancellor further found and discussed her findings of fact, as it related to the easement by necessity, in her *Analysis* of said Opinion and Order dated September 24, 2009 as follows, to-wit:

> Thirdly, the Court must consider whether the Defendants have acquired an easement by necessity. Plaintiffs claim that the Defendants are not entitled to an easement by necessity because their parcel of land did not become landlocked in

the process of being severed from a larger tract." (*Quoting,* Wilson v. McElyea, 815 So.2d 462, 463 (Miss. App. 2002). The Defendants, on the other hand, claimed that they are entitled to an easement by necessity because the right of way is highly convenient or essential to full enjoyment of their land.
The Mississippi Court of Appeals stated in Sturdivant v. Todd, 956 So.2d 977, 993 (Miss. Ct. App. 2007),:

> An easement by necessity is an easement that arises by implication whenever part of a commonly owned tract of land is severed such that one portion of the property has been rendered inaccessible except bypassing over the other portion, or by trespassing on the lands of another. The burden of proof is on the claimant seeking an easement by necessity; the party must establish that he is implicitly entitled to the right of way across another's land. . . . Our cases establish that an easement by necessity may be created by proving only reasonable necessity rather than absolute physical necessity. **An easement by necessity will be granted when the land is not necessarily landlocked but would be "highly convenient or essential to the full enjoyment of the land.**" (*Citations Omitted/Emphasis Added.*)

In the case at bar, when the Holmes and Carroll Land Company, Inc., conveyed the property to the Defendants, the land was rendered inaccessible, except by passing over the portion of the land that was titled to the Plaintiff or by trespassing on the land of strangers.

Hebron road is the closest paved road to the North of the property owned by the Defendants. The Defendant would have to build a bridge across Williams Creek to reach Hebron Road. The closest paved roads to the South is Brozville Road and to the West is Richard Travis Road. In order to reach Brozville Road, Nabors Road or Richard Travis by going in a Southerly direction, the Defendants would have to build a bridge across one of the several creeks or ravines and cross over the land of several other landowners. To go to the East, the Defendants would have to cross the Plaintiff's land or build a new road and bridge across several deep ravines. Both routes to the East would give Defendants access to the existing road that crosses 16 Section land. However, the access across 16 Section land will only give the Defendant access to about 20 acres of their land. The Defendants would still have to build a bridge or deep culvert across a ditch in order to reach the remaining 240 acres. The building of such a bridge or culvert would be very expensive.

The Mississippi Court of Appeals in Daley v. Hughes, 4 So.3d 364, 369-370 (Miss. COA 2008), quoting *Alpaugh* stated that an easement is reasonably necessary if the landowner's only alternative route is building a bridge.

As stated above, the Defendants only alternative route is across 16 Section land. However, access across 16 Section land would only give the Defendants access to 20 acres of their land. It would be necessary for the Defendant to build a bridge or culvert to acquire access to their remaining 240 acres. Like the landowner in *Alpaugh,* the Defendant would be forced to build a bridge. The

> *Alpaugh* Court, has made it clear that the building of a bridge is inherently unreasonable, and the Court will not require a landowner to make such an undertaking. Therefore, this Court finds that it would be unreasonable to require the Defendants to build a bridge to access the remaining 240 acres of land. This Court further finds that the Defendants have met their burden proof establishing an easement by necessity across the path/road located on the Southwest corner of the Plaintiffs' land.
> (R. at 362-364) (R.E. at 25-27)

BHC contends that these findings of fact (except those relating to whether the road in question was a public road and BHC's rights to a prescriptive easement) by the Trial Court are supported by substantial evidence, as shown hereafter. BHC would aver that, if the Trial Court was manifestly wrong, then it was when the Chancellor ruled that the road was not public and/or when the Chancellor ruled that BHC did not have a prescriptive easement.[1] Mississippi became a state in 1817. In December 1823, John Boyd, Deputy Surveyor prepared a plat of Township 14 North, Range 2 East, in Holmes County, Mississippi. (Tr. Ex. P-7, D-24) (R.E. at 170). According to said plat, there was a road, path, Indian trail, or wagon trail across land (now owned by Harkness) in Section 9. Said road has been used by the general public at least since 1823, as evidenced by the road, path, Indian trail, or wagon trail marked on the Plat and Survey dated December 1823 and recorded in Government Township Plat Book 2 at page 25 on file and of record in the office of the Chancery Clerk of Holmes County, Mississippi. (Tr. Ex. P-7 and D-24) (R.E. at 170). Harkness's Expert Witness and Surveyor, Kenneth L. Reece, testified that he had compared other pages from said Government Township Plat Book with the 2006 General Highway Map of Holmes County (Tr. Ex. P-9) (R.E. at 193) and concluded that the dotted lines on said 1823 plats were consistent with the locations of other public roads currently found on the 2006 Highway Map. (T. at 52)(R.E. at 57). He also testified that his survey of the road in

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For a recital of the facts and relevant law regarding public road and prescriptive easement, *See* (R. at 340-345).

question was close enough to the location of the dotted line to be consistent as the same road. (T. at 51-52) (R.E. at 56-57). He further testified that it was his opinion that the 1823 surveyor had estimated the location of the dotted line on the plat. He further indicated that surveying methods had improved and were more accurate that those of the time of the 1823 plat. (T. at 51-52) (R.E. at 56-57) / (Tr. Ex. P-16) (R.E. at 198).

Mississippi Code of 1972, Section 65-7-1(2) [and the prior codes at least back to the Code of 1930] states, "All roads now laid out and opened or hereafter laid out and opened according to law **shall be deemed public roads and highways** . . .". (*Emphasis Added.*) At the time the first Statute regarding roads, this road was laid out, therefore it is a public road according to statute. In Leo Sheep Co. v. U.S., 99 S.Ct. 1403, 440 U.S. 668, 669 (1979) the United States Supreme Court stated, "courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it." Therefore, whether the dotted lines on the 1823 plat referred to a road, path, Indian trail or wagon trail should not matter. Even in the 1930s, wagons, a normal mode of transportation for that time period, would have used this "wagon trail". "[U]ses that are reasonable necessary for enjoyment of an easement change over time as technology changes and as use of the dominant and servient estates changes." Crawford v. Butler, 924 So.2d 569, 575 (Miss. COA 2005). In the over 184 years since the plat of the "wagon trail", technology has brought the age of the automobile, tractor and four-wheeler. Also both the BHC property and the Harkness property have changed, because a gravel pit is located in the approximate location of the "wagon trail"; the road changed locations; bridges were built and washed away; and a damn was built by the US Army Corp of Engeneers across Williams

Creek. (*See* Tr. Ex. D-24, D-25, D-33, D-34, D-39, and D-40) (R.E. at 170, 171, 177-179, 201,202).

In 1899, the property, now owned by BHC, was conveyed unto James Owens by Deed recorded in Deed Book16 at page 253 of the land records Holmes County, Mississippi. (Tr. Ex. D-1) (R.E. at 103). Said property became known as the Owens Place. The Owens family used said road through Section 9 to get to their property in Section 8 and 17. Rommel Benjamin, descendent of James Owens and grandson of Rosa Owens, testified that his family had used the road as long as he could remember. He further testified that his family as well as other families that lived on the Owens Place used the road on a daily basis for many years. He also testified that the road was used by persons going to and from the Stigler Chapel School House for school and church services. He testified that the road was only blocked with a gate on one occasion by Mr. Pat Barrett, but his grandmother was given a key to the gate. Mr. Benjamin also testified that he was aware of the County working the road on at least three occasions. (T. at 112-122) (R.E. at 58-70).

As evidenced by Deed Book 20 at page 105 of the land records of Holmes County, Mississippi, on or about October 8, 1901, W. H, Stigler, et al conveyed unto the Board of Supervisors of Holmes County, Mississippi one acre of land in Section 9, Township 14 North, Range 2 East, Holmes County, Mississippi upon which the Stigler Chapel School House stood and immediately surrounding it. "This being the school for Colored People located during the year 1900 by the School Board." (Tr. Ex. D-2) (R.E. at 104).

On December 12, 1949, Pat M. Barrett, Sr. was conveyed the property which is currently owned by Harkness in the South ½ of Section 9, Township 14 North, Range 2 East, subject to such right, title and interest as Holmes County may have in and to one acre thereof conveyed by

W. H. Stigler, Et al to the Board of Supervisors of Holmes County, Mississippi, by the aforementioned Deed. Said Deed was recorded in Deed Book 71 at page 265 of the land records Holmes County, Mississippi. (Tr. Ex. D-3) (R.E. at 105). During the time that the property was owned by Mr. Barrett, the road was used by the general public and the Owens across Section 9. The Honorable Don Barrett, son of Pat M. Barrett, Sr., testified that during his many visits to the property, he always knew the road to be a public road. He also knew of the use of the road by the Owens and other persons living on the property. He also testified that his father had problems with unknown persons using the road to steal cattle from his father's cattle farm. He testified that the gate was put up to stop the cattle theft. (T. at 124-130) (R.E. at 71-76). Mr. Barrett's gate was a 'practical hindrance' and not an 'unreasonable obstacle". Pat M. Barrett, Sr. owned said property until he conveyed it to Bobby Kirk on or about December 30, 1969, as evidenced by Deed recorded in Deed Book 100 at page 441. Said Deed was "Subject to any and all rights-of-way for roads, canals, and all public utilities." (Tr. Ex. D-4) (R.E. at 107).

In January 12, 1973, Bobby Kirk conveyed said property unto Joel E. Smith. (Tr. Ex. D-5) (R.E. at 109). Reverend Smith testified that during the several years that he owned the property, the road was used by the general public and the Owens across Section 9. He considered the road to be a public road. He indicated that no one had asked him for permission, but did not feel that permission from him would be required. (T. at 131-137) (R.E. at 77-82).

In November 1978, the last of the Owens ancestors conveyed the property unto Malcolm E. Phillips, Jr., as evidenced by Deed recorded in Deed Book 137 at page 696 of the land records Holmes County, Mississippi. (Tr. Ex. D-8) (R.E. at 111). Mr. Phillips testified that he farmed the Owens Place a few years prior to purchasing it. He further testified that he and his workers had driven their farm equipment over the road to get to the farm land. He also testified that

Floyd Malone had used the road for years to get to his property located on the other side of the Owens Place. He testified that he never had to ask permission to use the road. He considered the road to be open to the public. (T. at 146-151) (R.E. at 91-96).

In 1979, Troy D. Parkison, Jr. conveyed all of that part of the South ½ lying South of Williams Creek in Section 9 unto St. Regis Paper Company, as evidenced by Deed recorded in Deed Book 141 at page 159 of the land records Holmes County, Mississippi. (Tr. Ex. D-9) (R.E. at 113). At this time it would appear that the road crossing Williams Creek was unpassable. The only way to access by vehicle that property South of the Creek was to use the road that remained South of the creek to Brozville road across Sections 9 and 16. During this time Harkness' predecessors in title used said road as evidenced by the testimony. Billy Causey, who has lived in the area for more than fifty (50) years testified that he knew that the road had been used by the Owens family and members of the general public as well as other adjacent land owners and persons living along said road. He was not aware of there being any conflict with the use of the road until Harkness's actions in 2007. He and his father had used the road, but had never asked permission. (T. at 138-145) (R.E. at 83-90).

In April 1992, the Defendant, Butterworth Hunting Club, Inc., became the owner of property in Sections 8 and 17. (Tr. Ex. D-16) (R.E. at 135) Prior to that time, BHC had been using the road. BHC continuously used the road, especially during hunting season. Robert Hammett, Richard Hammett and Harold Hammett, each testified that they had used the road for many years. They had never asked anyone for permission to use the road. They had used the road for many years before they leased the property for hunting. They had always considered the road to be public and were aware of the use of the road by the Owens family for many years.

Harkness set forth a title abstract from First American Abstract which shows their deraignment of title. (Tr. Ex. P-4) (R.E. at 188). Harkness admitted that a simple search of the deraignment or chain of title for its land would have disclosed several references to easements. (Tr. Ex. D-37) (R.E. at 180). Plaintiff, D. L. Harkness, testified that although currently retired, he had worked many years in the oil and real estate business. He testified that he had conducted many land transactions. (T. at 24) (R.E. at 35). He was also familiar with easements and land locked property. He testified that he had inspected the property several times prior to purchasing it. (T. at 25) (R.E. at 36). He further testified that he was familiar with the road and knew that it crossed the property he currently owns and connected the 16th Section to the BHC property. (T. at 26) (R.E. at 37). He testified that he knew people were using the road because he had seen and heard them crossing the road.

The Harkness property, where the road is situated, was part of that property conveyed from St. Regis Corporation to Rex Timber, as evidenced by Deed Book 153 at page 60 of the land records Holmes County, Mississippi. (*Tr. Ex. D-13*) (R.E. at 116). Plaintiff, D. L. Harkness, admitted and testified (T. at 35-36) (R.E. at 40-41) that said Deed reads as follows:

> This conveyance and warranty hereof are made subject to the following: . . .
> (4) Encroachments, overlaps, boundary line disputes, easements or other matters which would be disclosed by an accurate survey or inspection of the property.
> (5) Title to that portion, if any, of the subject property which may be embraced within the boundaries of public roads, highways, easements and rights-of-way for public utilities.

The Harkness property was part of that property conveyed from Holmes and Carroll Land Company, Inc. to M. V. Cooley, as evidenced by Deed Book 178 at page 594 of the land records Holmes County, Mississippi. (Tr. Ex. D-15) (R.E. at 133). Plaintiff, D. L. Harkness, admitted and testified (T. at 38) (R.E. at 43) that said Deed reads as follows:

> There is excepted form the warranty of this instrument the following: . . .
> (4) Encroachments, overlaps, boundary line disputes, easements or other matters which would be disclosed by an accurate survey or inspection of the property;
> (5) Any public roads, easements and rights of way for public utilities and drainage districts;

The Harkness property was part of that property conveyed from Sea of Pine Timberlands, LLC to Sovereign, LLC, as evidenced by Deed Book 229 at page 324 of the land records Holmes County, Mississippi. (Tr. Ex. D-19) (R.E. at 148). Plaintiff, D. L. Harkness, admitted and testified (T. at 39) (R.E. at 44) that said Deed reads as follows:

> This conveyance and any warranty contained herein are subject to all existing rights of way and easements for roadways and utilities, and outstanding hunting leases, whether or not of record.

Although Harkness complained that BHC had no recorded easement and therefore no right to cross Harkness' property, Mr. Harkness admitted that he knew that there could be easements without the necessity of it being recorded. He admitted (T. at 40) (R.E. at 45) that his own Deed in which he conveyed his property to The D. L. And Mary P. Harkness Family Trust stated that the conveyance was "Subject to any outstanding mineral rights and easements of record or in use." (Tr. Ex. D-20 and D-21) (R.E. at 157, 159).

The Harkness property was part of that property conveyed from Sovereign, LLC to Southern Land & Timber Company, LLC, as evidenced by Deed Book 2006 at page 2873 of the land records Holmes County, Mississippi. (Tr. Ex. D-22) (R.E. at 162). Said Deed reads as follows:

> The above warranty is subject to all outstanding right-of-ways for public roads and utilities and to all prior reservations of oil, gas and minerals, if any.

In March 2007, Plaintiff, The D.L. and Mary P. Harkness Family Trust was conveyed that part of the property South of the Creek upon which the Road lies, as evidenced by Deed

Book 2007 at page 726 of the land records Holmes County, Mississippi. (Tr. Ex. P-25 and D-23) (R.E. at 164). This document states that "This conveyance is made subject to all applicable building restrictions, restrictive covenants, easements, and mineral reservations of record."

Mr. Harkness testified that he knew people were using the road, because he could hear them from his house on his property. He indicated that he heard them more often during hunting season. (T. at 18-19) (R.E. at 33. 34).

After Harkness acquired the property, BHC continued to use the road as they, their predecessors in title, and the general public had done for more than fifty (50) years. In 2007, Harkness decided to take action into their own hands and stop BHC's rightful use to said road. In an attempt to stop travel by the BHC, its members and the general public, Harkness constructed a fence and a locked gate and later cut trenches across the road. (Tr. Ex. P-10, D-28, D-29, and D-30)(R.E. at 194, 172, 173, 174). Plaintiff, D.L. Harkness testified that he put a gate on his South property line and a fence across the road on his West boundary line. He testified that he did not know who had moved the fence and cut the chain on his locked gate. (T. at 34). When persons continued to traverse the road, Harkness cut a trench across said road. Plaintiff, D. L. Harkness, testified that neither Richard Hammett, Robert Hammett nor Harold Hammett, did any of the acts for which he brought this suit. He stated that Teddy Moses came onto his property and filled in the trenches that he had cut across the roads. Plaintiff, D. L. Harkness, did not testify that BHC or the members of Butterworth did anything wrong, but cross over the existing road. (T. at 34). Harkness did not offer any testimony or evidence about any actual damage that he suffered.

It is clear from the review of the entire record that the findings of fact made below, together with all reasonable inferences which may be drawn therefrom clearly support the Trial Court's finding BHC had an easement by implication, also known as an easement by necessity.

SUMMARY OF THE ARGUMENT

The doctrine of easement by necessity / easement by implication is very alive today. The road used by BHC across Harkness' property is a classic example. The property owned by BHC was severed from a common source. At the time of this severance, the property became landlocked. Several Deeds of record in the chain of title to Harkness' property clearly set forth that this property is subject to an easement whether recorded or in use. Therefore, BHC clearly has an easement, not only by necessity but also of implication. The Chancellor correctly applied the facts and the laws and ruled that BHC was entitled to an Easement by Necessity.

ARGUMENT

I. STANDARD OF REVIEW.

The Supreme Court has held that "[a] chancellor's findings of fact will not be disturbed unless they are manifestly wrong or clearly erroneous, or unless the chancellor applied an erroneous legal standard." Wright v. Roberts, 797 So.2d 992 (Miss.2001). The Court will not reverse unless the chancellor's findings are not supported by substantial evidence in the record. *Id.* "This Court must examine the entire record and accept that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower courts findings of fact. . . . And, finally, the trial judge, sitting in the bench as the trier of fact, has sole authority for determining credibility of the witnesses. This Court must examine assignments of error presented in light of the aforementioned principles." Mullins v. Ratcliff, 515 So.2d 1181, 1189 (Miss. 1987).

II. WHETHER THE CHANCELLOR'S FINDING THAT BHC HAS AN EASEMENT BY NECESSITY ACROSS HARKNESS' LAND IS CLEARLY ERRONEOUS AND MANIFESTLY WRONG.

The Chancellor in her Opinion and Order dated September 24, 2009 clearly and precisely stated her findings of fact. (R. at 358-365) (R.E. at 21-28). The findings of fact were supported by substantial evidence in the record and were not manifestly wrong. The Chancellor also applied the correct standard of law, which she also clearly and precisely cited. Therefore, this Court should affirm the ruling of the Trial Court.

This Court in Cox v. Trustmark Nat'l Bank, 733 So.2d 353, 358 (Miss. COA 1999), stated:

> **Easements by necessity reverse the normal rules of conveyancing. Normally, a deed conveys only the property described therein and which it manifests an**

> **intention to convey by express terms. Quite differently, the only means for the owner of the entirety to prevent the creation of an easement by necessity when a landlocked tract is created, is by specific language in the conveyance or by other evidence to show the intent that no easement be created.** (*Citations Omitted/Emphasis Added.*).

Harkness claims that "an easement by necessity may properly arise only when a parcel of property becomes land locked in the process of being severed from a larger tract." (*Quoting*, Wilson v. McElyea, 815 So.2d 462, 463 (Miss. App. 2002). However, in Sturdivant v. Todd, 956 So.2d 977, 993 (Miss. Ct. App. 2007), the Mississippi Court of appeals stated:

> An easement by necessity is an easement that arises by implication whenever part of a commonly owned tract of land is severed such that one portion of the property has been rendered inaccessible except by passing over the other portion, or by trespassing on the lands of another. The burden of proof is on the claimant seeking an easement by necessity; the party must establish that he is implicitly entitled to the right of way across another's land. . . . Our cases establish that an easement by necessity may be created by proving only reasonable necessity rather than absolute physical necessity. **An easement by necessity will be granted when the land is not necessarily landlocked but would be "highly convenient or essential to the full enjoyment of the land."** (*Citations Omitted/Emphasis Added.*)

All parties agreed that BHC's property is landlocked. The closest paved roads are Hebron Road to the North and Brozville Road to the South. BHC's land touch neither of these Roads. The closest road to the West is Richard Travis Road. BHC maintains that the closest road to the East is the Road in question across Harkness's land. To reach Hebron Road to the North, the BHC would have to cross Williams Creek. (Tr. Ex. D-33) (R.E. at 177). The bridge across Williams Creek that was once on property now owned by Harknesss, is now gone. Said bridge can be seen on the 1965 aerial photograph of this land. (Tr. Ex. D-39) (R.E. at 201). However, there is now a road across the damn built by the U. S. A. Corp of Engineers's. To go North BHC would still have to either cross lands of the Harkness or that of H. V. Brock; and they would still have to build a bridge or cross said road on the damn located on Williams Creek. In

order to go to the West, BHC would have to either cross lands of the Estate of Floyd Malone or that of H. V. Brock; and they would still have to build a bridge across either Williams Creek or Butterworth Creek. In order to reach Brozville Road, Nabors Road or Richard Travis Road by going in a Southerly direction, the BHC would have to build a bridge across one of the several creeks or ravines and cross over the land of several other land owners. In order to go to the East, BHC could continue on the existing Road across Harkness land. The only other alternative would be for the BHC to build a new road and bridge across several deep ravines. Both routes to the East would give BHC access to the existing road that crosses 16th Section land.

A cursory review of the Government Plats and the general terrain in the area will clearly show why the existing road was place in its location. (Tr. Ex. D-24 and D33) (R.E. at 170, 177). The only access for BHC's land without crossing a natural boundary such as a creek is to travel across the ridge that runs in a Northwesterly direction from Brozville Road in Section 16 and continues across Section 9 and into Section 8. This area presents ideal conditions for ingress and egress. All other methods of reaching BHC' land involves the cost and expense of building a bridge. A copy of the LEXINGTON SOUTH, Mississippi topographical map edited 1982 published by the USGS was admitted as Exhibit "D-33". (R.E. at 177) Said map shows the topography, the section lines and the road in question. The Mississippi Supreme Court in Crawford v. Butler, 942 So.2d 569 at 574 (Miss. 2005) stated, "Generally, an easement by necessity arises by implied grant when a part of a commonly-owned tract of land is severed in such a way that either portion of the property has been rendered inaccessible except by passing over the other portion or by trespassing on the lands of another." "The uses that are reasonably necessary for enjoyment of an easement change over time as technology changes and as use of the dominant and servient estate changes." *Id at 575.* Harkness claims that the BHC property

did not become landlocked as a result of severance from its grantor's land. However, this is not entirely true. The road crossing Harkness connecting BHC with the 16th Section land and on to Brozville Road has been the route used by all of the predecessors in title. There is no issue of trespassing across the 16th Section land. Therefore, even if the severance by the common owner did not cause the property to be landlocked it also did not cause either the dominant tenement or the servient tenement to trespass across the lands of another. This Court defined a trespasser as "one who enters upon another's property without license, invitation, or other right, and intrudes for some definite purpose of his own, or at his convenience, or merely as an idler with no apparent purpose, other than perhaps, to satisfy his curiosity." Simcox v. Hunt, 874 So.2d 1010, 1018-1019 (Miss. COA 2004). BHC had a right and definite purpose to use the road to get to their own property.

Harkness infer that the BHC have reasonable alternative access to their property. The claim that BHC "can easily and inexpensively access their land through the Sixteenth Section land by way of an existing road that connects the defendants' land to their leased Sixteenth Section Land." (R. at 162). Harkness contradict themselves by stating that BHC can use this other road, but deny that the road across their property is a road. Both originate from Brozville Road, but split approximately 500 feet South of Harkness's boundary line. The road in question continues Northeast approximately 790 feet to the South Boundary of Harkness's property. The road that Harknesss say BHC could use splits off in a Southeasterly direction for approximately 2,500 feet to a point approximately 100 feet North of the Southeast corner of their property. This road gives them access to approximately 20 acres of their property that lies South of a couple of ravines/creeks that runs Southwesterly across the NE ¼ NE ¼ of Section 17. In order to access their remaining 240 acres of land, the BHC would have to build a road with either large culverts

or bridges across said ditch. The cost would be outrageous. Swan v. Hill, 855 So.2d 459, 463-464 (MSCOA 2003) states:

> Mississippi case law establishes that an easement by necessity may be created by proving only a reasonable necessity rather than an absolute physical necessity. Therefore, the court will grant an easement where the land is not necessarily landlocked but would be highly convenient or essential to the full enjoyment of the land. The concern of the court is only whether alternative routes exist. If none exist then the easement will be considered necessary. Where other alternatives exist, the court will grant an easement over the neighboring landowner's property if it is the only reasonably necessary alternative available.... In determining what is reasonably necessary, the court looks to whether an alternative would involve disproportionate expense and inconvenience. . . . If the land would be useless and valueless without the easement then the landowner is entitled to an easement. An easement is reasonably necessary if the landowner's only alternative route is by building a bridge.

Huggins v. Wright, 774 So.2d 408 at 411 (Miss. 2000) states that "[a] way of necessity is an easement arising from an implied grant or implied reservation, and it is the result of the application of the principle that whenever a person conveys property, he conveys whatever is necessary for the beneficial use of that property, and retains whatever is necessary for the beneficial use of the land he still possesses." When the property was conveyed to BHC by the Holmes and Carroll Land Company, Inc., the rights to cross over that land eventually titled to Harkness was necessary for the beneficial use of the property and therefore went with the land.

In Daley v. Hughes, 4 So.3d 364, 369-370 (Miss. COA 2008), the Mississippi Court of Appeals stated:

> In Alpaugh [v. Moore, 568 So.2d 291 (Miss. 1990)], the Mississippi Supreme Court held that the landowners seeking an easement by necessity met their burden of establishing reasonable necessity "by a showing that they have no other dry access to their land." Alpaugh, 568 So.2d at 295. In reaching this decision, the court reasoned as follows: [The burden of proving reasonable necessity] is met by the Moores based upon the fact that their property is bound on three (3) sides by water and on the fourth side by the Alpaugh property. The Alpaughs erroneously contend that the Moores cannot show "necessity" because they have failed to explore the option of building a bridge to their land. This burden, however, will

> not be required due to the unreasonableness inherent in such an undertaking. Rotenberry v. Renfro, 214 So.2d 275 (Miss.1968).
> The Alpaugh decision, citing Rotenberry, essentially holds that the act of building a bridge is inherently unreasonable. *Id.* Consistent with Alpaugh, this Court has cited Fairchild, Rotenberry, and Alpaugh for the proposition that "[a]n easement is reasonably necessary if the landowner's only alternative route is by building a bridge." Swan, 855 So.2d at 464(22) (citations omitted). Additionally, we note that the supreme court in Rotenberry did not inquire into the costs associated with building a bridge or compare those costs with the value of the land for which access was sought. (*Citations Omitted*).

It is clear that BHC is entitled to an easement by necessity. Harkness's argument was that the BHC did not have a recorded ingress and egress easement. However, as set forth above, an easement by necessity does not have to be recorded. "An easement by necessity requires no written conveyance because it is a vested right for successive holders of the dominant tenement and remains binding on successive holders of the servient tenement. . . . A 'way of necessity' is an 'easement' arising from an implied grant or implied reservation and it is the result of the application of the principle that whenever a person conveys property, he conveys whatever is necessary for the beneficial use of that property, and retains whatever is necessary for the beneficial use of the land he still possesses. Huggins v. Wright, 774 So.2d 408, 411 (Miss. 2000). (*Citations Omitted.*)

Although Harkness claims that there is not recorded ingress and egress easement, it is clear from the Deeds recorded as part of chain of title to both Harkness' land and BHC's land that there were recorded easements. Pat M. Barrett, Sr. owned said property until he conveyed it to Bobby Kirk on or about December 30, 1969, as evidenced by Deed recorded in Deed Book 100 at page 441. Said Deed was "Subject to any and all rights-of-way for roads, canals, and all public utilities." (Tr. Ex. D-4) (R.E. at 107). The Harkness property was part of that property conveyed from St. Regis Corporation to Rex Timber, as evidenced by Deed Book 153 at page 60

of the land records Holmes County, Mississippi. (Tr. Ex. D-13) (R.E. at 116). Plaintiff, D. L. Harkness, admitted and testified that said Deed reads as follows:

> This conveyance and warranty hereof are made subject to the following: . . .
> (4) Encroachments, overlaps, boundary line disputes, easements or other matters which would be disclosed by an accurate survey or inspection of the property.
> (5) Title to that portion, if any, of the subject property which may be embraced within the boundaries of public roads, highways, easements and rights-of-way for public utilities.

The Harkness property was part of that property conveyed from Holmes and Carroll Land Company, Inc. to M. V. Cooley, as evidenced by Deed Book 178 at page 594 of the land records Holmes County, Mississippi. (Tr. Ex. D-15) (R.E. at 133). Plaintiff, D. L. Harkness, admitted and testified that said Deed reads as follows:

> There is excepted form the warranty of this instrument the following: . . .
> (4) Encroachments, overlaps, boundary line disputes, easements or other matters which would be disclosed by an accurate survey or inspection of the property;
> (5) Any public roads, easements and rights of way for public utilities and drainage districts;

The Harkness property was part of that property conveyed from Sea of Pin Timberlands, LLC to Sovereign, LLC, as evidenced by Deed Book 229 at page 324 of the land records Holmes County, Mississippi. (Tr. Ex. D-19) (R.E. at 148). Plaintiff, D. L. Harkness, admitted and testified that said Deed reads as follows:

> This conveyance and any warranty contained herein are subject to all existing rights of way and easements for roadways and utilities, and outstanding hunting leases, whether or not of record.

Although Harkness complained that BHC had no recorded easement and therefore no right to cross Harkness' property, Mr. Harkness admitted that he knew that there could be easements without the necessity of it being recorded. He admitted that his own Deed in which he conveyed his property to The D. L. And Mary P. Harkness Family Trust stated that the

conveyance was "Subject to any outstanding mineral rights and easements of record or in use." (Tr. Ex. D-20 and D-21) (R.E. at 157, 159).

The Harkness property was part of that property conveyed from Sovereign, LLC to Southern Land & Timber Company, LLC, as evidenced by Deed Book 2006 at page 2873 of the land records Holmes County, Mississippi. (Tr. Ex. D-22) (R.E. at 162). Said Deed reads as follows:

> The above warranty is subject to all outstanding right-of-ways for public roads and utilities and to all prior reservations of oil, gas and minerals, if any.

In March 2007, Plaintiff, The D.L. and Mary P. Harkness Family Trust was conveyed that part of the property South of the Creek upon which the Road lies, as evidenced by Deed Book 2007 at page 726 of the land records Holmes County, Mississippi. (Tr. Ex. P-25 and D-23) (R.E. at 164). This document states that "This conveyance is made subject to all applicable building restrictions, restrictive covenants, easements, and mineral reservations of record."

It is clear that the BHC have an implied easement and right to use the road. Mississippi Courts have long held that the implied easement or easement by necessity "goes with the land". Therefore, this Court should affirm the BHC's rights to the road as an easement by necessity.

A. Whether BHC's Land Became Inacessible as a Result of Being Severed from its Grantor's Land.

This argument is without merit, because as set forth above in Sturdivant, *Id.* "An easement by necessity will be granted when the land is not necessarily landlocked but would be highly convenient or essential to the full enjoyment of the land."

At the time that Harkness was conveyed the property in Deed Book 2007 at page 726 from Southern Land & Timber Company, LLC, this property was also "landlocked". (Tr. Ex. at

P-1 and D-23) (R.E. at 164). The only readily available access to this property was over the road across the 16th Section from Brozville Road. If Harkness did not own the adjoining land to the North and have access across the new U.S. Army Corp of Engineers damn on Williams Creek, then Harkness would have had to use the same road that BHC was using.

This claim is also without merit, because BHC could have chosen to enforce it's rights to cross the Harkness property to the North and access Hebron Road. BHC would have this right because of the following transactions. The property now owned by Harkness is that same property that was owned by Pat M. Barrett described as the NW ¼ and the S ½ of Section 9, Township 14 North, Range 2 East, and the NE ¼ of the NE ¼ of Section 17, Township 14 North, Range 2 East, Holmes County, Mississippi. This property was conveyed unto Bobby L. Kirk. (Tr. Ex. D-4) (R.E. at 107). Through mense conveyances the property was conveyed unto Troy D. Parkinson, Jr., et ux. Mr. & Mrs. Parkinson conveyed NE ¼ of NE ¼ of Section 17, Township 14 North, Range 2 East and all that part of the S ½ of Section 9, Township 14 North, Range 2 East, lying South of Williams Creek unto St. Regis Paper Company. (Tr. Ex. D-9) (R.E. at 113). The said property in Section 9 cornered with the property in Section 17. The access from Section 9 to Section 17 was across the SE corner of Section 8. (*See photos in* Tr. Ex. D-31 and D-32) (R.E. at 175, 176). At this time (if there was no Indian trail, wagon trail, path or road), all the property South of Williams Creek would have become land locked. St. Regis would have an easement by necessity to cross that property North of Williams Creek, because it was severed from the larger tract. St. Regis also became the owner of the property now owned by BHC described as the E ½ of SE ¼ and SW ¼ of SE ¼, Section 8, and SE ¼ of NW ¼ and N ½ of NW ¼ of NE ¼ and NE ¼ of NW ¼ of Section 17, Township 14 North, Range 2 East . (Tr. Ex. D-10). When St. Regis became the owner of the property South of Williams Creek in Section 9, the

property located in the NE ¼ of NE ¼ of Section 17, and the property located in the W ½ of SE ¼ of Section 8, it still held an easement by necessity across that property North of Williams Creek. Therefore, when through mense transactions, the property was conveyed unto BHC an easement by necessity would have followed the land and BHC would have had rights to cross Harkness land to the North of Williams Creek to get to Hebron Road. BHC chose to use the road that would cause less intrusion over the property of Harkness. Instead of requesting the Court allow BHC to travel across the new damn on Williams Creek and along the road past Harkness's home to Hebron Road, BHC merely requested to be allowed to continue across the Southwest corner of the Harkness property. This is consistent with Vinoski v. Plummer, 893 So.2d 239, 244 (Miss. COA 2002) which stated, "It is well establised hat a way of necessity should be located so as to be the lease onerous to the owner of the sevientestate while, at the same time, being a reasonable conveinience to the owner of the dominent estate."

B. Whether BHC Failed to Prove Necessity.

This claim is without merit as previously set forth herein. The Honorable Chancellor below also clearly set forth her determination of and easement by necessity.

C. Whether the Trial Court Could Grant Appellees an Easement by Necessity Without Proof of When or How Appellees' Land Became Landlocked.

This argument is without merit, because as set forth above in Sturdivant, *Id.* "An easement by necessity will be granted when the land is not necessarily landlocked but would be highly convenient or essential to the full enjoyment of the land." Also as set forth above, this argument is without merit, because of the easement by necessity that St. Regis held.

D. If Appellees proved necessity, whether the Trial Court could burden Appellants' land with an easement in favor of Appellees where Appellants' and Appellees' did not have the same grantor.

In Pitts v. Foster, 743 So.2d 1066, 1069 (Miss. App. 1999), this Court said "An easement by necessity is appurtenant to the dominant tenement. The easement requires no written conveyance because it is a vested right for successive holders of the dominant tenement and remains binding on the successive holders of the servient tenement." Because the easement was appurtenant to the land, it did not matter if BHC and Harkness has the same grantor or that Harkness did not convey any easement to BHC. The Cox Court, *(Id.* at 357), said,

> We emphasize a few facts about easements by necessity. The arise because of the implication that someone who owned a large tract would not intend to create inaccessible smaller parcels. A subsequent conveyance of the servient estate necessarily carries with it the burden of the easement, as a grantor of the servient estate cannot give his grantee more rights that the grantor himself owned. Therefore, a deed of the servient estate would not need to refer to the easement in order to burden the conveyance with it.

Therefore, Harkness's argument is without merit.

III. WHETHER THE TRIAL COURT'S GRANT OF AN EASEMENT TO APPELLEES WAS A VOID EXERCISE OF EMINENT DOMAIN POWER.

BHC in its Answers, Defenses and Counterclaim claimed to have an easement by necessity, along with other claims. (R. at 23-42) (R.E. at 1-20). The parties have submitted several Memos in this case. Harkness has never claimed that the Trial Court was exercising eminent domain power nor raised this as a defense. Harkness never objected during the numerous claims throughout the trial to BHC's claim for an easement, that the Trial Court did not have the right to grant BHC an easement. "It is well-settled law that the failure to make a

contemporaneous objection waives the right of raising the issue on appeal." Daley v. Hughes, 4 So.3d 364, 367 (Miss. App. 2008)

Harkness' Appellant Brief at page 12 incorrectly cites authority for this misguided belief. First, Harkness sets forth a quote reportedly from Quinn v. Holly, 244 Miss. 808, 146 So. 357 (1962), but cannot be found therein. It is probable that Harkness meant to cite Oughton v. Gaddis, 683 So.2d 390, 393 (Miss. 1996), where the quote can be found. Both Quinn and Oughton differ from this case, because they both were based upon Petitions to the Board of Supervisors for a private road across property pursuant to Mississippi Code of 1972, § 65-7-201, *et seq*. Those cases also differ in that there were no dominent and servient estates because the properties did not derive from a common source. Those cases also differ because they are akin to the eminent domain powers, because value is paid for the "taking". The Mississippi Supreme Court distinquished the actions before the Board of Supervisors and a Chancellors grant of an easement by implication in Broadhead v. Terpening, 611 So.2d 949 at 953 (Miss. 1992). The payment of a reasonable price for the right to establish a private road over the land of another "is not consistent with the claim for an easement implied by the grant of landlocked property because such an easement is by implication supported by the consideration paid for the original grant." (*See also* Pleas v. Thomas, 75 Miss. 494, 500, 22 So. 820 (Miss. 1897)).

Second, Harkness makes a first year law student error in citing, City of Greenwood v. Gwin, 153 Miss.517, 121 So. 160 (1929). The quote cited by Harkness was not from the Court's opinion, but from the Appellant's argument located at the beginning of said cite. This case also does not apply because that case was based on an eminent domain petition filed by the City of Greenwood.

Harkness somehow thinks that the Two (2) cases cited above did away with easements by necessity. However, this Court in 1999 found " the easement by necessity principle to be alive and well." Cox, *Id at 357.*

Harkness claims that the Trial Court below did not have jurisdiction to grant BHC an easement by necessity, becaue it would be "tantamount to an exercise of eminent domain. The power of eminent domain extablished in Miss.Code Ann. § 11-27-3 (2010). However, this is not the case. In Leo, *(Id.* at 679), the United States Supreme Court stated, "Where a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at **common law** that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property. These rights-of-way are referred to as 'easements by necessity'." It is clear that the Trial Court had jurisdiction to rule as it did.

The Constitution of the State of Mississippi, Art. 6, § 160, states,

> And in additon to the jurisdiction heretofore exercised by the chancery court in suits to try title and cancel deeds and other clouds upon title to real estate, it shall have the jurisdiction in such cases to decree possession, and to displace posession; to decreee rents and compensation for improvements and taxes; **and in all cases where said court heretofore exercised jurisdiction, auxiliary to courts of common law**, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have ben exhausted or the legal title established by suit at law. (*Emphasis Added.*)

CONCLUSION

The findings of the Chancellor are supported by substantial evidence in the record; therefore her rulings must stand. The Trial Court had jurisdiction over the parties and the subject matter, including the right to acknowledge BHC's easement by necessity. The

Chancellor applied the evidence to the current standard of law and ruled correctly and justly, therefore her RULING SHOULD BE **AFFIRMED**.

Respectfully Submitted,

BHC, ET AL

By:_____
JOHN M. GILMORE
Attorney for Appellee

CERTIFICATE OF SERVICE

Pursuant to Miss. R. App. P. 25 and 31, I, John M. Gilmore, Attorney for the BHC, et al, Appellees, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing document in a manner prescribed by law to :

Honorable Chancellor Janace Harvey-Goree
Post Office Box 39
Lexington, Mississippi 39096

Honorable Michael D. Simmons
Post Office Box 22626
Jackson, Mississippi 39225-2626

This service effective this the 22nd day of June, 2010, by depositing a copy thereof in the United States Mail, postage pre-paid and addressed as indicated above.

JOHN M. GILMORE
Attorney for Appellee