IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS
NO. 2010-CA-02038

JOHN STOREY, BATTLEFIELD EXPRESS DRUGS, INC. AND BATTLEFIELD COMPOUNDING CENTER **APPELLANTS**

VS.

GENE ABBOTT AND BILLY WILLIAMSON **APPELLEES**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following interested persons and entities 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. Gene Abbott, Plaintiff/Appellees
2. Billy Williamson, Plaintiff/Appellees
3. John Storey, Battlefield Express Drugs, Inc, and Battlefield Compounding Center
4. David M. Sessums and Penny B. Lawson, Attorneys for John Storey, Battlefield Express Drugs, Inc. and Battlefield Compounding Center
5. Mark W. Prewitt, Attorney for Gene Abbott and Billy Williamson
6. Honorable Isadore W. Patrick, Warren County Circuit Court Judge

This the 2nd day of August, 2011.

Mark W. Prewitt
Attorney for Appellees/Cross-Appellants

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND AUTHORITIES

CASES

STAUTES

RULES

ADDITIONAL AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL AND CROSS APPEAL

I. In Response to Appellants' appeal: Whether the Circuit Court was correct in granting summary judgment against Defendants and ruling Plaintiffs did not violate section (m) of the parties' December 15, 2000 contract when Plaintiffs brought their lawsuit against Defendants to enforce the parties' contract.

II. In considering Appellees' Cross Appeal: Whether Defendant Storey, acting individually and/or on behalf of his solely owned entities (Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc.) violated and breached the parties' December 15, 2000 agreement when Plaintiff obtained a new pharmacy in a new location with a very similar name during the 2009 dissolution of Battlefield Discount Drugs.

STATEMENT OF THE CASE

This case concerns a contract - a purchase agreement entered into by the Plaintiffs, Defendant John Storey, and Chad Barrett on December 15, 2000 for the purchase of SuperCo, Inc, d/b/a "Battlefield Discount Drugs". (C.R. 5-14; R.E. 1)[1]. On October 28, 2009, Plaintiffs, Gene Abbot and Billy Williamson (hereinafter referred to as "Plaintiffs")[2] filed suit in the Circuit Court of Warren County against Defendants John Storey, (sometimes hereinafter referred to as "Defendant Storey") Battlefield Express Drugs, Inc. and Battlefield Compounding Center (sometimes hereinafter collectively referred to as "Defendants") alleging Defendant Storey breached an agreement prohibiting the acquisition of another pharmacy location in Warren County in competition with SuperCo, Inc. d/b/a/ "Battlefield Discount Drugs", without Plaintiffs' consent. (C.R. 5-11; R.E. 1). On October 28, 2009, Plaintiffs sought a preliminary and permanent injunction enjoining and prohibiting Defendants from opening and operating a new pharmacy contrary to the parties' contract. (C.R. 7, ¶¶ 8-10; R.E. 2). Plaintiffs further sought such relief against any person acting in concert with Defendants. (C.R. 7, ¶10; R.E. 2). On

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1 Citations to the record are made throughout Appellees' Brief as (C.R. __, ¶__); and citations to Appellants" record excerpts are in the following format (R.E. __,), and Appellee's Record Excerpts as (A.R.E. ___) pursuant to Rule 28(e) Miss. R.App. P.

2 Appellants have in their Brief referenced the Appellees as "Plaintiffs" and Appellees follow suit throughout this Brief, pursuant to Rule 28(d) *Miss. R. Civ. P.*, with the exception of references to parties in the Statement of Facts, for the purpose of clarity in explaining the underlying facts of the case.

corporate entities (Defendants Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc.) for the purpose of establishing a pharmacy, (C.R. 19, ¶6; R.E. 3), but otherwise denying any new pharmacy location had been "b[ought]" in violation of the parties' contract. (C.R. 18-19; R.E. 3). Defendants counterclaimed that Plaintiffs' suit was an intentional and tortious interference with Defendants' business and moved for sanctions to be levied against Plaintiffs. (C.R. 20, ¶¶ 1-7; R.E. 3). On November 2, 2009, Defendants moved to dismiss Plaintiffs' suit and moved for a Judgment on the Pleadings and filed a memorandum of law in support of such request. (C.R. 23-34; R.E. 4); On November 19, 2009, Defendants requested leave to amend their counterclaim to add: (1) a breach of contract claim against Plaintiffs alleging a failure to develop marketing and business plans as consultants; (2) an intentional interference with Defendants' business warranting liquidated damages under the contract terms; and (3) an abuse of process claim warranting punitive damages. (C.R. 36, 38-42, 59-63; R.E. 5,7). The Court granted the request and on November 24, 2009 Defendants filed their amended counterclaim. (C.R. 59–69; R.E. 7). Plaintiffs additionally amended their complaint on December 9, 2009, seeking declaratory judgment and interpretation of the terms of the parties' contract. (C.R. 83-86; R.E. 11). On August 17, 2010, Defendants filed a supplemental brief in their motion to dismiss Plaintiffs' suit, alternatively moving for summary judgment (C.R. 110-158; R.E. 13). On September 8, 2010, Plaintiffs responded and likewise moved for summary judgment (C.R. 163-233; A.R.E. 3). On December 2, 2010 the Circuit Court of Warren County entered its order dismissing Plaintiffs' complaint, but granting Plaintiffs' motion for Summary Judgment as to Defendants' counterclaim. (C.R. 255-56; R.E.17). Defendants noticed their appeal on December 14, 2010. (C.R. 260-63; R.E. 18). Aggrieved as well regarding the dismissal

of their claims, Plaintiffs cross-appealed the Circuit Court's decision.[3] (C.R. 264; R.E.19).

STATEMENT OF FACTS[4]

On December 15, 2000, Plaintiffs, Gene Abbot and Billy Williamson were the owners of SuperCo, Inc., a pharmacy doing business as "Battlefield Discount Drugs, Inc." (C.R. 6, ¶ 4; 18, ¶ 4; R.E. 2, 3). Plaintiffs agreed to sell their company to Defendant John Storey and Chad Barrett (a non-party hereto and referred to hereinafter as "Barrett"). The terms of the buy-sale agreement were contained in a six page contract (hereinafter sometimes referred to as the "Agreement"). (C.R. 6, ¶ 4, 9-14; R.E. 1,2), wherein the purchasers were to pay a total of $900,000.00 for 100% of all shares of stock in SuperCo., Inc. Storey and Barrett were to pay $200,000 at the time of purchase and finance the remaining $700,000 over a period of twelve (12) years. (C.R. 9; R.E. 1). Additionally, Storey and Barrett agreed to pay Abbot and Williamson a consulting fee of $250,000 and a non competition fee of $600,000 amortized over the twelve year indebtedness period. (C.R. 10 at ¶ (n); R.E. 2).

Storey and Barrett agreed in Item (cc) that they would not "buy" another location in Warren County without the consent of Abbott and Williamson. (C.R. 12 at ¶(cc); R.E 1).

According to Item (m) of the Agreement, Abbot and Williamson, as "Sellers" agreed that they would not become "a manager, member permit holder or owner of any pharmacy, close door retail or nursing home business" in a thirty (30)-mile radius during the term of Barrett and

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3 Rule 28(h)of the Miss. Rules of App. P. dictates that cross appeals of an Appellee shall be addressed in briefs responsive to Appellants' brief to this Court, and Plaintiffs as Appellees have complied with this rule, providing their cross appeal of the lower court's decision and response to Appellant in one consolidated brief, however, addressing initially in this brief, their response Defendants' appeal (Paragraph II.) and then secondly their issue on cross appeal (Paragraph III).

4 Appellants have declared a portion of their Argument as "Itemization of Undisputed Facts" (Appellants' Brief p. 9-12). Appellees dispute the facts cited by Appellants in their Argument section, and Appellees previously disputed by itemization in the record (C.R. 165-167; A.R.E 3) and further object to the factual recantation without citations to the record as required by Rule 28(a)(4) and (6) of the Miss. Rules of App. Procedure. Additionally, Appellees object to Appellants' statement of facts without citing appropriate references to the record, and contend further, that many of the facts do not either appear in the record, or cannot be found in the record, due to the lack of citation.

Storey's indebtedness from the purchase. (C.R. 9-10, R.E. 1). Abbot and Williamson also agreed to develop marketing and other business plans as consultants for the company for the remainder of the indebtedness. (C.R. 9-10; R.E. 1).Upon any breach by either Abbott or Williamson, the remaining indebtedness would immediately be reduced by Fifty percent (50%) and the consulting fee and non-competition payments would terminate. (C.R. 10 at ¶ (m) ; R.E. 1).

In 2008, Storey and Barrett consulted with Abbot and Williamson about opening a new pharmacy in Vicksburg across I-20 from Battlefield Discount Drugs on 2080 Frontage Road under the name of "Battlefield Clinic Drugs". Abbot and Williamson consented to Storey and Barrett obtaining the new pharmacy and even agreed to work at the new location. (C.R. 121, 136-37; R.E. 20, 21). In the late Fall of 2008 or early Spring of 2009, Storey and Barrett formed a new entity, "Battlefield Clinic Drugs, Inc." and leased the 2080 Frontage Road location for their new pharmacy. (C.R. 184; A.R.E. 4). Discovery in this case revealed that throughout the period of 2000 through 2009, Storey and Barrett opened other pharmacies outside of Warren County, (C.R. 183-84; A.R.E. 4).

Storey and Barrett, for whatever reason, decided to end their business relationship and dissolve their joint business interests. In April 2009, Storey filed a Complaint in Chancery Court of Warren County to dissolve his corporate and other interests shared with Barrett. (C.R. 53). The Chancery Court proceeding was not made a part of the record in the Circuit Court case. To defend him in the Chancery Court matter, Barrett hired Attorney Mark W. Prewitt as counsel. (C.R. 73; A.R.E. 2). Thereafter, in July of 2009, the lease of 2080 Frontage Road expired and terminated for lack of payment of rent. (C.R. 185; A.R.E 4). By August 3, 2009, John Storey, individually, had formed two corporations of which he was sole shareholder and officer: "Battlefield Express Drugs, Inc." and "Battlefield Compounding Center, Inc." (C.R. 184-186;

A.R.E. 4) . Storey formed the corporations for the sole purpose of opening and operating a pharmacy at the same 2080 Frontage Road location, but instead of "Battlefield Clinic Drugs" Storey named his pharmacy "Battlefield Express Drugs and Compounding Center". (C.R. 185-186; A.R.E. 4). Storey, individually and on behalf of his newly formed companies, secured a leasehold, in order to operate his pharmacy. (C.R. 185-86; A.R.E. 4). At no time during the dissolution of his and Barrett's partnership, did Storey inform Abbott or Williamson of his intentions to operate a pharmacy under a similar name at the same location to which Abbot and Williamson had previously verbalized their consent. (C.R. 186; A.R.E. 4). At no time during the dissolution of his and Barrett's relationship, did Storey obtain Abbot 's or Williamson's consent to operate a pharmacy in Warren County. (C.R. 186; A.R.E. 4). However, in July of 2009, Storey took out a YellowBook ad, in order to notify the public of his new pharmacy name and location. (C.R. 188; A.R.E. 4). In October, 2009, Storey then erected a sign, publicizing his new pharmacy which would open in November, 2009. (C.R. 188-89; A.R.E. 4). At that time, Barrett and Storey were still litigating over the division of their business interests. The trial on the division of their interests was set for November 2009. (C.R. 193-94; A.R.E. 4). In October, 2009, it was uncertain whether Barrett or Storey, or anyone, would walk away from that trial as the owner of SuperCo., Inc. (C.R. 5-9; Appellants' Brief at p. 30). In October, 2009, it was possible that Storey would not obtain SuperCo. Inc., in the division of business interests and his new pharmacy "Battlefield Express Drugs and Compounding Center" would be in direct competition with "Battlefield Discount Drugs". (Appellants' Brief at p.30). After seeing Storey's erected sign for "Battlefield Express Drugs and Compounding Center", Abbott and Williamson filed for injunctive relief, naming Storey and his newly formed corporations as defendants and citing their fear of irreparable harm from Storey's intent to operate his new pharmacy and citing a

violation of item (cc) of their 2000 purchase agreement with Barrett and Storey that stated "Purchasers agree that they will not buy another location in Warren County without the consent of the sellers hereto." (C.R. 9 ¶(cc); R.E. 1). On November 2, 2009, Storey answered the complaint, admitting he had formed the new corporations for the purpose of opening and operating a pharmacy under the name "Battlefield Express Drugs and Compounding Center". (C.R. 19, R.E. 3). In his response, Storey counterclaimed for anctions under Rule 11, *Mississippi Rules of Civil Procedure* and sanctions under the Mississippi Litigation Accountability Act based on: (1) the fact Abbott and Williamson had given their consent to Storey to open a pharmacy at that location prior to April 2009; (2) Storey's contention that he did not violate the parties' contract because he did not "buy" another pharmacy location; and (3) his allegation that Abbot and Williamson were in collusion with Barrett to secure Barrett's interest in SuperCo. Inc, because: (a) Barrett, Abbot and Williamson were represented by the same attorney; and (b) Barrett had allegedly opened a pharmacy in Warren County and Abbot and Williamson did not sue him. (C.R. 19-20, R.E. 3). Storey counterclaim rested on the fact that Abbott and Williamson sued him and his newly formed corporations. (C.R. 59-63, R.7). Storey claimed that because he was required to defend Abbot and Williamson's request for injunctive action, Abbot and Williamson violated Item (m) of the parties agreement which specifically states:

> Sellers agree that they will not become a manager, member, permit holder or owner of any pharmacy, closed door retail or nursing home business during the term of indebtedness described herein, within a thirty (30) mile radius of the location of Battlefield Discount Drugs . . . Additionally, Sellers agree that they will develop marketing and other business plans as consultants for the Company on a continued basis for the period of the indebtedness. Upon the breach of this provision by either of the Sellers, the remaining indebtedness of Purchasers shall immediately be reduced by fifty (50%) and payments identified in the following paragraph will be terminated as of the date of said breach.

(C.R. 10 at ¶(m); R.E. 1). In November of 2009, Barrett and Storey's dissolution suit

proceeded to trial as scheduled. On the first day of their trial in Chancery Court, Barrett and Storey settled their dissolution litigation, whereby Storey obtained 100% interest of SuperCo., Inc. (T. 19; A.R.E. 6). However, in the injunction action, Storey and his new corporations had on November 2, 2009, filed a Motion for Judgment on the Pleadings (C.R. 23; R.E. 4) and on November 24, 2009, Abbot and Williamson had responded to that motion, requesting leave to amend their complaint. Thereafter, Storey and his corporations filed amended counterclaims, and in defense of the request for injunctive relief filed a motion to dismiss, and an alternative motion for summary judgment. (C.R. 52-55, 71-75; R.E. 8; A.R.E. 2). Responding to the motion to dismiss and motion for summary judgment, Abbot and Williamson asserted their request for injunctive relief was legitimate at the time of its filing and was based on Storey's actions of acquiring a new pharmacy in Warren County without their consent, actions they contended were jeopardizing the financial interest of SuperCo., Inc. and themselves as creditors. (C.R. 52-55, 71-75; R.E. 8; A.R.E. 2).

Over the course of several months, the parties conducted discovery, which revealed the following additional facts:

1. Barrett requested consent from Abbot and Williamson before he opened a pharmacy called "Vicksburg Special Care" on Hwy 61 South in Vicksburg (across from Wal-Mart and across town from Battlefield Discount Drugs location). (C.R. 125-127; R.E. 20)
2. Abbot and Williamson denied Barrett's request to open a new pharmacy during the dissolution of Barrett's and Storey's business interests. (C.R. 125-126; R.E. 20)
3. Storey did not provide sworn testimony of the basis for the amounts of his damages caused by his defense of Plaintiffs' injunctive action. (C.R. 182-227, A.R.E. 4)
4. Williamson and Abbot did not suffer any damages from the opening of Storey's new

pharmacy. (C.R. 134, R.E. 20)

Upon the conclusion of the hearing on the pending motions before the Circuit Court, and the argument of Abbott and Williamson's attorney that their request for injunctive action was essentially rendered a non-issue because of Storey's buy-out of SuperCo. Inc., the Court dismissed Abbott and Williamson's complaint for injunctive relief, but declared the Storey had not violated the parties' agreement. The Circuit Court also granted Plaintiffs' motion for summary judgment on Defendants' counterclaims. (C.R. 256; R.E. 17).

SUMMARY OF THE ARGUMENT

The trial court was correct in determining that as a matter of law, Plaintiffs did not breach their Agreement with Defendant Storey by seeking to enjoin Defendants from operating a new pharmacy in Warren County. Plaintiffs' suit was an effort to enforce their contract with Defendant Storey based on Defendants' actions in obtaining a lease for the purpose of opening a pharmacy in Warren County without Plaintiffs' consent. Plaintiffs had a legitimate reason, and even a duty, to sue Defendants' in order to protect their financial interest and the interest of SuperCo., Inc. Defendants provided no evidence to dispute Plaintiffs' contention that their election to sue Defendants, and not Barrett, was not a conspiracy against Defendants, but was based on Defendant Storey's violations of the parties' Agreement. Therefore, Plaintiffs' actions in bringing suit cannot, under the law, be viewed as malicious. Therefore, as a matter of law, there is no basis for Defendants' abuse of process claim. Furthermore, because Plaintiffs clearly did not violate the Agreement, there is no legal basis for liquidated damages under the Agreement. Lastly, because there is no basis for any of Defendants' claims, punitive damages are certainly not warranted. Thus, the trial court was correct in its grant of summary judgment.

On cross appeal, Appellees argue that Defendant Storey violated and breached Item (cc)

of the parties' purchase Agreement by *obtaining* and operating a new pharmacy named "Battlefield Express Drugs and Compounding Center" in a new location during the 2009 dissolution of Battlefield Discount Drugs. Defendant Storey bought the right to possess by leasehold to operate another pharmacy in Warren County, without the Plaintiffs' consent, which violated the plain language of parties' agreement that Defendant Storey would not "buy another location in Warren County" until the completion of the indebtedness to Plaintiffs. In considering the spirit and intent of the parties' entire Agreement, Item(cc) – and applying well-established contract construction and interpretation, the subject provision was an agreement for the parties' not to engage in competition in Warren County without prior consent and approval. Regardless, the purchase Agreement was breached by Defendant Storey because of Defendants' acquisition of a lease for the purpose of opening a pharmacy in Warren County. Plaintiffs did not consent to Defendant Storey negotiating for, obtaining, or opening a new pharmacy by wholly different company(ies) with a similar name, in direct competition with Battlefield Discount Drugs. Not only did Plaintiffs have a legitimate basis for bringing their lawsuit, but there was no basis for the dismissal of their complaint. Plaintiffs provided sufficient evidence to the trial court to demonstrate a survival of their claim. Furthermore, Plaintiffs requested and did not receive a declaratory judgment as to the parties' intent of the "no buy" Agreement. Therefore, the trial court's dismissal of Plaintiffs' complaint was erroneous.

ARGUMENT

It is clear that in applying the appropriate law to the undisputed facts on record and before the trial court, as set out herein above, this Court should determine that the trial court was correct in granting summary judgment on Defendants' counterclaims for breach of contract and abuse of process. Defendants were unable to show to the trial court that any genuine issue of material fact

existed that would allow a jury to consider that Plaintiffs' lawsuit against Defendants was a violation of Item (m) of the parties' Agreement or that Plaintiffs' request for injunction was an abuse of process.

However, this Court should determine that the trial court was in error to: (1) dismiss Plaintiffs' complaint without ruling on Plaintiffs' request for declaratory judgment; and (2) determine that Defendant Storey did not violate Item (cc) of the parties' Agreement by ***acquiring a leasehold*** on behalf of the Defendant corporations for the purpose of operating a pharmacy without Plaintiffs' consent.

I. Standard of Review

In reviewing a trial court's grant or denial of summary judgment, the well-established standard of review is *de novo*. *See One South, Inc. v. Hollowell,* 963 So. 2d 1156, 1160 (Miss. 2007) *(citing Hubbard v. Wansley,* 954 So. 2d 951, 956 (Miss. 2007)). To succeed on a motion for summary judgment, the moving party must show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Thomas v. Columbia Group, LLC,* 969 So.2d 849, 849 (Miss. 2007) (quoting Rule 56(c) *Miss. R. Civ. P.*). Therefore, as to the trial court's grant of Plaintiffs' motion for summary judgment on Defendants' counterclaim, this Court should employ a *de novo* standard of review. *See id.*

Traditionally, the Court employs an abuse of discretion standard of review for grants or modifications of an injunction. *Moses v. Washington Parish School Board,* 379 F.3d 319, 327 (5th Cir. 2003). However, when the grant or denial of an injunction involves a question of law, the Court applies a *de novo* standard of review. *St. Paul Mercury Ins. Co. v. Williamson,* 332 F. 3d 304, 308 (5th Cir. 2003). Because the denial of Plaintiffs' claim was in the form of a dismissal, it involved a question of law and thereby requires a *de novo* standard of review. *See id.*

Additionally, an appellate court employs a *de novo* standard of review of a motion to dismiss under Mississippi Rules of Civil Procedure 12(b)(6). *Rose v. Tullos,* 994 So. 2d 734, 737 (Miss. 2008).[5]

The trial court (1) dismissed Plaintiffs' complaint for injunctive relief and ruled that Defendants did not violate the parties' Agreement prohibiting the purchase of a new pharmacy location; and (2) granted summary judgment in favor of Plaintiffs and ruled that Plaintiffs, by filing suit against Defendants, did not violate the parties' Agreement to market and develop business plans for the parties' company, thereby dismissing Defendants' claim for liquidated or punitive damages. (C.R. 255-56; R.E. 17). Therefore, the proper standard of review for this Court on all issues on appeal and cross-appeal is *de novo.*

II. The trial Court was correct that Plaintiffs did not violate Item (m) of the Agreement because their lawsuit was an effort to enforce their contract with Defendant Storey, entitling Defendants to neither liquidated damages under the Agreement or punitive damages under state law.

The trial court found that Plaintiffs did not violate Item (m) of the agreement. (C.R. 256; R.E. 17). The trial court found that the Plaintiffs' disagreement concerning the acquisition of a lease for a new drug store could be interpreted as developing marketing and business plans as contemplated by Item (m). (C.R. 256; R.E. 17).

Aggrieved by this decision, Defendants argue that there exists a genuine issue of material fact for the jury to determine that (1) Plaintiffs had a duty "to develop marketing and other business plans" and (2) filing the injunction to prevent the opening of Defendants' new pharmacy

5. Defendants initially moved for a judgment on the pleadings, (C.R. 23-35; R.E. 4), but after Plaintiffs amended their Complaint, and the parties conducted discovery, Defendants simply supplemented their memorandum in support of their motion to dismiss Plaintiffs' claims and alternatively moved for summary judgment, citing matters outside the pleadings, thereby apparently abandoning their motion for judgment on the pleadings. (C.R. 110–158; R.E. 13). However, Defendants did not specifically cite their basis for their motion to dismiss under Rule 12 of the *Mississippi Rules of Civil Procedure.* (C.R. 23-36, 110-116; R.E. 4,13), but it has been the position of the Plaintiffs that the basis of Defendants' argument is that the pleadings allegedly failed to state a cause of action. (C.R. 168; A.R.E. 3).

was a "clear breach" of item "m". (Appellants' Brief, p. 21). Defendants also argue that Plaintiffs, as parties to the Agreement concerning SuperCo, Inc., owed a duty to Defendant Storey and his new companies, Defendants Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc., under the terms of of Item (v)[6] of the Agreement. (Appellants' Brief at p. 22). As the trial court correctly ruled, all of Defendants' claims, as a matter of law, cannot survive summary judgment due to the lack of any genuine issue of material fact.

A. Plaintiffs' claims against Defendants, at the time of filing, were legitimate, regardless of Defendant Storey later acquiring sole ownership of SuperCo., Inc.

On October 28, 2008, at the time Plaintiffs filed their suit to enjoin Defendants from harming Plaintiffs' interest in SuperCo., Inc., Defendant Storey was not determined to be the successor in interest to SuperCo., Inc. (C.R. 183 ; A.R.E. 4; Appellants' Brief at p. 30). As Defendants pointed out in their brief, the question of who and to what extent would be the successor in interest had not yet been determined as the trial on the dissolution of Storey's and Barrett's business interests was set to begin in November 2009.[7] (C.R. 183; A.R.E. 4; Appellants' Brief at p. 30). As Plaintiffs demonstrated to the trial court, several facts supported the basis for Plaintiffs bringing their injunctive action on October 28, 2009: (1) Defendant Storey had filed the dissolution suit against his SuperCo., Inc. business partner, Barrett; (2) Defendant Storey and Barrett failed to pay rent on the lease at 2080 Frontage Road, causing the lease to which Plaintiffs had consented to expire in July 2009; (3) On August 3, 2009, Defendant Storey formed two new corporations, completely separate from SuperCo, Inc., with names similar to "Battlefield Discount Drugs" for the purpose of opening and operating a pharmacy under the

6 Item (v) states that the Agreement "shall inure to the benefit of the parties to this agreement and . . . successors in interest." (C.R. 12; R.E. 1).

7 The record is devoid of the actual trial date of the Chancery Court matter in Storey v. Barrett; however, by all accounts Plaintiffs filed their suit prior to the trial date of the Chancery Court matter.

name "Battlefield Express Drugs and Compounding Center"; (4) Defendant Storey placed an advertisement in YellowBook for his new pharmacy, without knowing whether he would obtain SuperCo, Inc's interest; (5) Defendant Storey erected a sign for his new pharmacy in October 2009 in preparation to open his new pharmacy in November 2009; (6) As creditors of SuperCo. Inc, Plaintiffs could have suffered financially had Defendant Storey not acquired sole ownership of SuperCo, Inc. d/b/a "Battlefield Discount Drugs" because of the competing business of "Battlefield Express Drugs and Compounding Center". (C.R. 183 -189; 134; R.E. 20).

1. Plaintiffs had a duty to protect and promote the welfare of SuperCo, Inc. and therefore had a duty to bring the action to enjoin the opening of a pharmacy by Defendants that could potentially irreparably harm SuperCo., Inc.

Storey and Barrett were engaged in a suit for dissolution of their company/partnership at the time Storey obtained the new lease and formed two new corporations with names similar to Battlefield Discount Drugs (i.e., "Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc.")(C.R. 185; A.R.E. 4). The Defendants have provided no evidence for a fact-finder to consider that Plaintiffs breached Item (m) by filing an injunctive suit against separate companies, in competition with their company. As required by Rule 56(e), *Miss. Rule Civ. P.* , Defendants have offered no evidence to support a conclusion that Plaintiffs breached their duty to Defendant Storey as a party to the Agreement in bringing their action in October 2009. Defendants have only offered evidence that: (1) Plaintiffs suffered no irreparable harm or damages from Defendants opening their pharmacy; and (T. 7; A.R.E. 6)(2) Plaintiffs previously gave consent to Storey and Barrett for the opening of a new pharmacy at that location, upon which Defendant Storey relied. (T. 42; A.R.E. 6). As argued herein below, Plaintiffs' lack of sustaining damages after their injunctive action does not render their request for injunctive relief a breach, because the very nature of a request for injunctive relief is to *prevent* harm. *See*

Littleton v. McAdams, 60 So. 3d 169, 171 (Miss. 2011)(considering appeal of a request for injunctive relief which requires a finding of (1) substantial likelihood that the plaintiff will prevail on the merits; (2) injunction is necessary to prevent irreparable harm; (3) threatened injury outweighs the harm an injunction might do to defendants; and (4) granting a preliminary injunction is consistent with public interest); *Miss. R. Civ. P.* 65(a). Additionally, there was no question that Plaintiffs did not give consent to Defendant Storey, individually and on behalf of his new companies, to acquire a lease in order to open and operate a pharmacy under a similar trade name. (C.R. 185-188; A.R.E. 4). The evidence presented to the trial court was that Plaintiffs gave consent for Storey and Barrett to operate a pharmacy under their company "Battlefield Clinic Drugs". (C.R.183; A.R.E. 4). The evidence, even construed in the light most favorable to Defendants, showed that SuperCo, Inc. was not the owner or operator of Defendants' new pharmacy on the date of Plaintiffs' filing for injunctive relief. (C.R.5, 185-186; A.R.E. 4; R.E. 1). Defendants offered no contradictory evidence to the trial court, and none exists.

Plaintiffs however, attached to their motion for summary judgment the deposition of Defendant John Storey, in which he testified the following:

Q. And what steps did you take after that lease [with Battlefield Clinic Drugs, Inc] was terminated to secure the location for your - - for any other entity or yourself?

A. ***I incorporated Battlefield Express Drugs and called Citadel up, told them I was willing to pay the back payments that were not paid and renegotiated the lease.***

Q. Okay. And when - - do you recall when that lease was entered into?

****

Q. Okay August 11th, 2009, is when you say you entered into the new agreement with them. You agree with that representation made by you.

A. ***That sounds about right.***

Q. Okay. And that would have been in keeping with your new corporations, Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc.

A. ***Yes.***

Q. And that lease was for the purpose of operating those entities out of that location

A. ***Yes.***

****

Q. Okay. Now, tell me for the record, before securing the lease in August of 2009, your contact with either Gene Abbot or Billy Williamson about your intent to open a store under the name of Battlefield Express Drugs.

A. ***I had no contact with them prior to that time -***

Q. Okay

A. ***---about opening an entity called Battlefield Express Drugs.***

******

Q. And you were issued licenses to operate from that location by the State Board of Pharmacy, is that correct?

A. ***Yes, sir.***

(C.R. 185-187; A.R.E. 4). Defendant Storey also testified in his deposition that he was the only shareholder and officer of his newly formed companies on August 3, 2009, at the time the dissolution suit with Barrett was pending. (C.R. 187; A.R.E. 4).

The burden rests upon the Defendants as appellants to see that the record contained all data essential to an understanding and presentation of matters relied upon for reversal on appeal. *Shelton v. Kindred,* 279 So.2d 642, 644 (Miss. 1973). Therefore, no evidence existed at the trial

court or on the record for this Court to determine that there is an issue of fact as to whether Plaintiffs did not have a duty to bring their suit for the protection of SuperCo,Inc. at the time of filing. Therefore, the trial court was correct in granting summary judgment.

2. Item (m) of the Agreement does not inure to Defendant Storey's new companies and therefore Plaintiffs had no duty to Defendant Storey's new companies.

Defendants contend: (1) Plaintiffs failed to develop marketing or consult with Defendants by virtue of requiring Defendants to defend Plaintiffs' injunctive action; and (2) Plaintiffs, by virtue of naming Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc., have claimed these Defendants are "alter egos" of Defendant Storey. Neither argument is supported by the record.

Defendants include in their Appellant Brief "**Response to Plaintiffs' Corporate Argument**" in which they argue a preemptive response to Plaintiffs' expected argument that Defendant corporations are the alter-ego of Defendant Storey. (Appellants' Brief 21-24). However, no such argument was ever presented to the trial court by Plaintiffs and therefore is not properly before this Court. *See Mills v. Nichols,* 467 So 2d. 924, 931(Miss. 1985)(explaining ("[t]he well-recognized rule is that a trial court will not be put in error on appeal for a matter not presented to it for decision")(*citations omitted*). Therefore this argument is not properly before this Court on appeal.

It is true that the Defendant corporations were joined as parties in interest (C.R. 165; A.R.E. 3). In fact, Plaintiffs stated in their Complaint that all Defendants were named pursuant to Rule 65 of *Miss. R. Civ. P.* to enjoin any person in "active concert" or participation with Defendants, including Defendant Storey, who was the owner (as sole shareholder and officer) and creator of his new companies. (C.R.7; R.E.2). Further, Plaintiffs have offered in their

Response to Defendants' motion to dismiss that the Defendant corporations were joined as necessary parties as both were under the exclusive control of Defendant Storey as sole or majority stockholder. (C.R. 50; A.R.E. 1). However, Plaintiffs bringing their action against Storey's new companies is not necessarily a contention that the new corporations are bound by the Agreement. (Appellants' Brief at p. 22). The lawsuit against Defendants was to prevent the opening of the new pharmacy which could have caused irreparable damage to Plaintiffs and SuperCo.Inc. (C.R. 5-8; R.E. 2). The newly formed corporations were the owners and lessees of the new pharmacy and were formed by Defendant Storey, who was still a party to the Agreement concerning Battlefield Discount Drugs. (C.R. 5-8, 185-6; R.E. 2; A.R.E. 3). Therefore, Defendant corporations were a necessary party to the injunction action.

Defendants point to Item (d)[*sic*][8] of the Agreement for support that Plaintiffs owed a duty to John Storey's newly formed companies in October 2009. Item (v) also states "Otherwise this Agreement is not intended to create any right or benefit in favor of any third party." (C.R. 12 ; R.E. 1) At the time of the filing of Plaintiffs' lawsuit, on October 28, 2009, the newly formed entities would have rightfully been considered third parties and would not have benefitted from the Agreement. Defendant Storey's purchase of Barrett's shares of stock afterwards, rendering him sole owner of SuperCo.Inc., cannot - under any theory of law, create a *retroactive* duty of the Plaintiffs to the Defendant corporations.

Defendants have put forth no evidence that at the time of the filing of Plaintiffs' suit, Plaintiff owed a duty to Defendant Storey's newly formed companies, which could possibly create a question of fact for the jury to determine Plaintiffs breached Item (m) of the parties' Agreement.

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8 The reference to Item (d) appears to be a typographical error, as the quotation of the contract provision mirrors that of Item (v). (C.R. 9 ¶¶'s (d), (v)).

3. Plaintiffs' lack of proof of harm after filing suit is irrelevant, because a request for injunctive relief, by its very nature, is to prevent harm.

Defendants argue that Plaintiffs breached their duty under Item (m) because they filed a complaint "knowing that they had suffered no injury nor had any payments for the indebtedness been delayed or missed." (Appellants' Brief at p. 20). The record before the trial court showed that Plaintiffs cited in their complaint a request for preliminary and permanent injunction for *fear* of suffering irreparable harm and injury because the opening and operating of Defendants' pharmacy would be in competition with SuperCo., Inc. d/b/a "Battlefield Discount Drugs" thereby potentially harming Plaintiffs' financial interests secured by the Agreement. (C.R. 7, ¶¶8-10; R.E. 2). Plaintiffs also cited the harm Defendants' actually suffered – legal costs and attorneys fees. (C.R. 7, ¶10; R.E. 2). Even considering the fact, as alleged by Defendants, that the Plaintiffs in their depositions admitted that they suffered no irreparable harm or injury, (C.R. 143; R.E. 21; T. 7, L. 3-13; A.R.E. 6), Defendants' claims are without merit. Plaintiffs admitted in the hearing before the trial Court that their claim for injunctive relief was essentially rendered a non-issue by the settlement of the business dissolution suit by Storey and Barrett because Defendant Storey became the sole owner of SuperCo, Inc., causing all "Battlefield" pharmacies to come under one umbrella (T. 13; A.R.E. 6). When Storey became the sole owner of SuperCo, Inc., any concern of competition between Defendants Storey's businesses and SuperCo, Inc. dissipated. Despite any proof that Plaintiffs suffered no damages, the Court must consider that injunctive relief is preventative in nature. *See Littleton,* 60 So.2d at 171. Therefore, even if Plaintiffs suffered no damages, other than their legal costs, at the time of their lawsuit, they had a legitimate concern and need to protect their financial interests and the interests of SuperCo. Inc. from possible competition of Defendant Storey's newly formed companies. Therefore,

Defendants' argument that Plaintiffs breached their duty under Item (m) of the Agreement because after filing suit, they had no damages is without merit. Defendants failed to show there exists a jury issue as to whether the Plaintiffs' request for injunctive relief was frivolous at the time of its filing.

Plaintiffs, however, demonstrated to the trial court that (1) the would-be owner of SuperCo, Inc./Battlefield Discount Drugs was unknown at the time Plaintiffs sought injunctive relief; (2) Defendant Storey admitted to forming new corporations for the purpose of operating a pharmacy with the name of "Battlefield Express Drugs and Compounding Center";

(3) Defendant Storey admitted he did not have consent of the Plaintiffs to operate the new pharmacy; (4) Defendant Storey admitted that he placed a YellowBook Ad to promote his new pharmacy prior to knowing whether SuperCo, Inc. would have any interest in the new pharmacy; (5) Defendant Storey, in October, 2009 erected a sign for the new business, not knowing whether SuperCo, Inc. would have any interest in the new pharmacy. (C.R. 184-189; A.R.E. 4; T. 36 -37; A.R.E. 6); Therefore, there was no question in fact, that at the time of filing the lawsuit, Plaintiffs' concerns for irreparable harm and damage were legitimate. The fact Plaintiffs actually suffered no greater damages than legal costs and fees is irrelevant given that injunctive relief is preventive in nature. *See R.65(a), Miss. R. Civ. P.* Plaintiffs demonstrated that they had standing at the time of their suit. Therefore, the trial court's grant of summary judgment was also proper as to this issue.

B. Plaintiffs demonstrated to the trial court that their election to sue Defendants was based on Defendants' actions breaching the Agreement, and not a conspiracy in collusion with and for the benefit of Barrett, and therefore cannot be the legal basis for Defendants' abuse of process claim.

Defendant speculates to a great extent, and argues without citing any support from the

record, that Plaintiffs, in bringing their suit to enjoin Defendant, was "collusion" in support of Barrett in his recovery from Defendant Storey and Barrett's dissolution suit in Chancery Court. (Appellants' Brief, p. 26-31). Defendant relies on the fact that Plaintiffs did not sue and have not sued Defendant Storey's business partner, Barrett. (Appellants' Brief, p. 26, 27). However, Defendant admits that at the time of Plaintiffs' lawsuit it was "uncertain whether Storey or Barnett, or neither, would end up with Battlefield Discount Drugs, Inc. aka SuperCo, Inc." (Appellants' Brief at p. 30). Furthermore, the facts before the trial demonstrated that there is a great difference in the drug stores that Barrett opened, as to the name and location and timing. Barrett's store was called "Vicksburg Special Care" and was located across town, across from Wal-Mart on Hwy 61 South, and not across from the existing pharmacy, on the I-20 Frontage road, like Defendants' new pharmacy. (C.R. 125-127; R.E. 20). Even more telling is that the record reflects that at the time of Plaintiffs' filing, Barrett had requested consent from the Plaintiffs in opening a new store, which Plaintiffs did not grant. (T:29-30; A.R.E. 6). Plaintiffs contended at trial that Barrett did not open his individually owned pharmacy until after the dissolution agreement with Storey was reached. (T. 29-30; A.R.E. 6). However, Defendants point out that both Barrett and the Plaintiffs were represented by the same counsel. (Appellants' Brief at 28-29). This fact, although true, is not sufficient evidence of collusion between the Plaintiffs and Barrett or evidence of an abuse of process.

Abuse of process claims require a showing that (1) the party has made an illegal and unwarranted use of the legal process (2) for an ulterior motive and (3) damages have resulted from the perverted use of the process. *Franklin Collection Services, Inc. v. Stewart,* 863 So.2d 925, 929 (Miss. 2003) . Defendant supports their abuse of process claim with the fact that Plaintiffs treated him differently than Barrett. Defendant speculates that Plaintiffs "allowed

Barrett to continue with his plans to open his own pharmacy, which would ensure that he would have a pharmacy to go to in the event Storey obtained Battlefield Discount Drugs in the dissolution partnership suit, while at the same time, sought to prevent Storey from having an alternate pharmacy to go to in the event Barrett prevailed on his claim for Battlefield Discount Drugs." (Appellants' Brief at p. 30). There is no basis in fact on the record to support this argument, and Defendants cite no basis in the record. To say the facts before the trial court have basis in law, stretches credulity beyond the bounds of acceptability.

C. Under no theory of law are Defendants entitled to liquidated damages or punitive damages.

There is no basis to support an award of either liquidated or punitive damages.

1. Plaintiffs' exercise of their legal rights does warrant punitive damages.

Defendants have provided no legal or factual support for an award of punitive damages in this matter. Punitive damage considerations and awards are now controlled by *Miss. Code. Ann.* § 11-1-65, which require clear and convincing evidence and "actual malice, gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others," or "actual fraud. *Tideway Oil Programs, Inc. v. Serio,* 431 So.2d 454, 467 (Miss. 1983); *Beta Beta Chapter v. May,* 611 So.2d 899, 895 (Miss. 1992)(concluding that "willfulness and wantonness connote knowingly and intentionally doing a thing or wrongful act. This means actual knowledge . . ."); *Strickland v. Rossini,* 589 So.2d 1268, 1272-73 (Miss. 1991)(stating that "careless disregard" is insufficient to justify punitive treatment, rather there must be "willful or malicious wrong" or "gross reckless disregard for the rights of others"). This Court has required more than just the commission of an intentional tort in order to submit a punitive damages question to the jury. *See Bonds. v. Watts,* 131 So. 804, 805 (Miss. 1931). Further, it is well-established that an award of punitive damages cannot be awarded in the absence of actual

damage. *See Southern R.R. v. Kendrick,* 40 Miss. 374, 393 (1866). "[T]here simply is no independent cause of action for punitive damages under Mississippi law." *Alcorn County v. U.S. Supplies, Inc.*, 731 F.2d 1160, 1170 (5th Cir. 1984). Even with an award of nominal damages, punitive damages are not allowable because nominal damages are not actual or compensatory damages. *See Cook Indus., Inc. v. Carlson,* 334 F.Supp. 809, 817 (N.D. Miss. 1971) and *Hopewell Enterprises, Inc. v. Trustmark National Bank,* 680 So.2d 812 (Miss. 1996).

Defendants, without any basis of fact, contend in the record that Plaintiffs' legal action alone warrants punitive damage and, with lack of evidence, seek to have this Court reverse the trial judge. (Appellants' Brief at 30). In this assertion, Defendants rely on *Harvey Latham Real Estate v. Underwriters at Lloyds London, infra,* which held an award of punitive damages was an issue for the jury when an insurance company initially denied payment, but later determined the factual basis upon which it based its denial was without merit. *See Harvey-Latham Real Estate v. Underwriters at Lloyds London,* 574 So. 2d 13 ,15-16 (Miss. 1990). Although cited, Defendant fails to apply the case to the facts of this case or explain how the case supports their argument for Plaintiffs' alleged abuse of process.

In *Harvey-Latham,* the defendant insurance company was denied an insurance claim. Plaintiffs, sub judice, have , as a counter-defendant, denied Defendants' counterclaims of abuse of process. *See id.* Plaintiffs represented to the trial court that their claims of injunctive relief were essentially rendered a non-issue by the settlement of the dissolution suit between Storey and Barrett (T. 13; A.R.E. 6). This statement was made based on the facts that developed after the filing of Plainitffs' suit. That does not mean the suit was without merit.

Howwever, it is without merit that Defendants represent in their brief to this Court that Plaintiffs "are of record to this moment pressing forward in their efforts to shut Storey down".

(Appellants' Brief at p. 27). Appellants are inviting this Court to enter the field of speculation and conjecture and assume a nonexistent fact in order to reverse the trial court. The trial court cannot be put in error on appeal for facts or matters to which it was not privy.

See Mills, 467 So 2d. at 931.

Plaintiffs' actions in cross appealing the trial court's decision is required due to Defendants' counterclaims for breach of contract and abuse of process and tortious interference with Defendants' business. Because Defendants are attacking in their counterclaims that Plaintiffs had no basis to bring injunctive relief, Plaintiffs are **forced** to defend the legal legitimacy of their claims against Defendant Storey and his defendant corporations. Defendants' Answer contains Rule 11, M.R.C.P. sanctions, and sanctions under the Mississippi Litigation Accountability Act – asserting Plaintiffs' injunction action was frivolous. (C.R. 18-22; R.E. 3). Therefore, Plaintiffs were required, by Defendants' actions, to demonstrate that their claim against Defendants was legitimate. Moreover, there was no proof before the trial judge to support either the appellants' allegation or argument in order to hold the lower court in error.

Defendants' claim for damages is at best highly speculative and purely subjective. Storey's' deposition transcript in which he testified about his damages was provided to the trial Court . (C.R. 184-227; A.R.E. 4). Storey did not produce any evidence of his actual damages to support his counterclaims, or support an award of punitive damages. (C.R. 184-227; A.R.E. 4). Defendants have provided no proof under the law that Plaintiffs claims were not legitimate at the time filing. Defendants have not provided even a scintilla of evidence that Plaintiffs acted with malice in bringing their action. In fact, Defendants acknowledged to the trial Court that punitive damages was "basically a non issue given that the true question is the liquidated damages clause . . ." of the parties Agreement. (C.R. 234; A.R.E. 5).

2. Liquidated damages are not warranted.

Even assuming Item (m) of the Agreement was intended to be a "liquidated damages" provision for the parties, Defendant Storey would only be entitled to invoke such provision, if Plaintiffs violated the agreement according to the terms of the Agreement. As argued herein above, and as the trial court has correctly determined, there is no evidence for a jury to consider that at the time of filing, by bringing the request for injunctive relief against Storey or his newly formed, separate companies, Plaintiffs violated the parties' Agreement.

Therefore, the trial court was imminently correct in granting summary judgment in favor of Plaintiffs. Defendants did not show to the trial court that any material facts existed for a jury to determine Plaintiffs breached the parties' Agreement. Defendants have not pointed to any support in the record for this Court as well. Thus, the trial Court's grant of summary judgment must be affirmed.

CROSS-APPEAL

Having set forth Appellees' response to Appellants' appeal to this Court of the trial court's ruling on Plaintiffs' Motion for Summary Judgment as to the alleged violation of Item (m) and abuse of process claim, Appellees' now request the Court's consideration of the issue brought by the Appellee on cross-appeal.

III. Defendant Storey violated and breached Item (cc) of the parties' Agreement by *obtaining* a new pharmacy named "Battlefield Express Drugs and Compounding Center" in a new location during the 2009 dissolution of Battlefield Discount Drugs without Plaintiffs' consent.

Plaintiffs respectfully suggest that the trial court was incorrect in dismissing Plaintiffs' claims that Defendants breached Item (cc) of the parties' Agreement. Defendant Storey's actions of negotiating for and obtaining a lease for the purpose of operating a new pharmacy, and operating a drug store with a very similar name to the parties' company during the dissolution of

Defendants' business was in complete violation of the parties' agreement not to operate competing business in Warren County and a violation of the plain language of the agreement that Defendant Storey would not "buy another location in Warren County". Plaintiffs' position on this issue is clearly supported by applicable law and the facts on record in this matter and Plaintiffs respectfully request that the trial court was in error in dismissing Plaintiffs' claims against Defendants.

Plaintiffs demonstrated to the trial court a genuine issue as to a material fact. *See Miss. R. Civ. P.* 56(c). Defendants, as the moving party were not entitled to a dismissal of Plaintiffs' claim. The trial court was required to view the evidence in the light most favorable to the Plaintiff, as the non-movant. *See One South, Inc.* 954 So. 2d at 1160 (citing *Green v. Planting Co.*, 954 So. 2d 1032, 1037(Miss. 2007).

Defendants, as the moving party had the burden in the trial court of demonstrating that no genuine issue of material facts existed for the trier of fact. *Id.* Plaintiffs, as the non-moving party should have been given the benefit of the doubt concerning the existence of a material fact. *Id.* Further, the trial court should have considered the factual allegations contained in Plaintiffs' Amended Complaint as true. *See HeartSouth, PLLC v. Boyd,* 865 So. 2d 1095, 1102-103 (Miss. 2003) (holding that the chancery trial court was obliged to take the factual allegations made in the complaint as true).

A. By the plain language of Item (cc) and the interpretation of the parties' Agreement, it is clear that the intent of the parties' agreement in Item (cc) was for neither the purchasers or sellers to engage in direct competition with Battlefield Discount Drugs.

1. Defendant Storey violated the plain language of the Agreement when he as sole shareholder of a newly formed corporations "bought" a lease for purposes of operating a pharmacy in Warren County.

Item (cc) of the parties Agreement specifically states "**Purchasers agree that they will**

not *buy* another location in Warren County without consent of the sellers hereto. " (C.R. 12: R.E. 1)(*emphasis added*).

Regarding Defendants' violation of Item (cc), the trial court specifically ruled,

> **"that since at the time of the filing of [Plaintiffs'] complaint that the Defendant[s] had not *actually purchased* another location, but were *in negotiations to obtain a lease* for another location . . . ",**

then Defendants did not violate Item (cc) of the agreement. (*emphasis added*)(C.R. 255-56; R.E. 17). This ruling begs the question of whether the trial court viewed *negotiations* of obtaining a lease as coming just shy of a violation of Item (cc) whereby Defendants would have *actually obtained a lease.* The Court did not rule that Defendant Storey did not "purchase" or "buy" a new pharmacy by virtue of either negotiating to obtain or obtaining a leasehold for a new drug store. [9] However, either negotiating a lease or obtaining a lease to operate a new drug store in a new location would constitute a violation of Item (cc) of the parties' Agreement.

Defendant Storey breached the plain language of the Agreement when he "bought" a leasehold for the purpose of operating a pharmacy. "Buy" is defined by as "to acquire possession, ownership or rights to the use or services of by payment or money." *Webster's New Collegiate Dictionary Merriam-Webster* at http://www.merriam-webster.com/dictionary/buy. "Buy" is also interpreted as the exchange of something of value, such as money, giving the right to use and the right to possess, as in a lease. *Id.* Defendant Storey admitted that he, individually, and on behalf of the Defendant corporations, purchased the right to operate a pharmacy in the 2080 Frontage Road Location. (C.R. 185-86; R.E. 4). He testified that "money changed hands" to secure the lease. (C.R. 185-86: A.R.E. 4). Therefore, Defendants' acquisition of a leasehold in order to open a pharmacy in Warren County, without Plaintiffs' consent, was a violation of the

9 Nor did the Court rule specifically on Plaintiffs' request for declaratory relief, as to the meaning of the parties' Agreement. (C.R. 255-56; R.E. 17).

parties' Agreement, and Plaintiffs' clams should not have been dismissed by the trial court.

2. Whether Defendants Purchased "Goodwill" for its new location is irrelevant and immaterial to the pending issues because "buy" does not necessarily include the purchase of "goodwill".

Defendants devote a great amount of their argument in support of the trial court's ruling on this issue that Defendant Storey did not "buy" another location in violation of Item (cc) because Defendant Storey did not "buy" goodwill when he obtained the new drug store.

First, Defendant did not have to buy goodwill when he opened his new pharmacies as "Battlefield Express Drugs and Compounding Center". Defendant Storey and his new companies were siphoning the goodwill of the not yet dissolved "Battlefield Discount Drugs" through the similarity of the name to "Battlefield Discount Drugs". As Plaintiffs argued to the court below, Defendants adopting "Battlefield" into the newly formed business could have mislead the general public that the new drug store was the same as "Battlefield Discount Drugs." (C.R. 171: A.R.E. 3). Second, whether or not Defendants bought an existing business or opened a drug store under a newly formed company does not negate the fact that his actions in obtaining another pharmacy location in Warren County violated Item (cc). Defendants' new drug store was in the same location as that previously leased by Battlefield Clinic Drugs, and Defendants' new pharmacy was in close proximity to the existing Battlefield Drug Store (across I-20 on South Frontage Road) which was in the midst of litigation to determine ownership interests. (C.R. 184, 186; A.R.E. 4);

Defendants argue that Plaintiffs sold the goodwill of SuperCo, Inc. to Defendant Storey in December 2000. However, even if Plaintiffs sold the goodwill of SuperCo. Inc. to Defendant Storey and Barrett, that does not necessarily require that the parties' agreed prohibition against "buy[ing]" in Item (cc) encompassed the purchase of goodwill regarding another location. In

other words, simply because Defendant Storey did not purchase goodwill in opening his new location, does not mean he did not violate or "buy" another location in Warren County. Therefore, Defendants' attempt to inject "goodwill" into the definition of "buy" contemplated in Item (cc) is without merit. Furthermore, there appears to be no cited legal support for Defendants' argument that "buy" as contemplated by the parties necessarily includes "goodwill". Therefore, the Court is not obliged to rule on such issue and the argument should be dismissed. *See Carter v. Miss. Dep't of Corr.*, 860 So.2d 1187, 1193 (Miss. 2003)(explaining this Court routinely holds an appellant's failure to cite any legal authority to support his argument will procedurally bar that issue from being considered on appeal).

3. Interpretation of the Agreement yields the result that the term "buy" in Item (cc) meant "obtain" or "secure" another pharmacy in Warren County.

Even if this Court interpreted the meaning of the parties' "no-buy" Agreement, an application of established canons of contract interpretation and construction would show the parties' intended to create a prohibition against direct competition by another pharmacy in Warren County. Direct competition would include "obtaining" or "securing" another pharmacy and paying money to acquire a leasehold.

The well-established rule in Mississippi is that in the absence of ambiguous terms, the intent of parties to a contract is deemed from the wording of the contract. *Yazoo Manufacturing Co. v. Lowes' Companies, Inc.*, 976 F. Supp. 430 (S.D. Miss. 1997)(applying Mississippi law). When contracts are clear and unambiguous, Courts will enforce contract language strictly as written. *Mississippi Farm Bureau Cas. Ins. Co. v. Britt,* 826 So.2d 1261, 1265-66 (Miss. 2002). Whether a contract is ambiguous is a question of law. *Wood v. Wood,* 35 So.3d 507, 513 (Miss. 2010). While mere disagreement about the meaning of a contract clause does not make it

ambiguous as a matter of law, *Gulfside Casino P'ship v. Miss. State Port Auth. at Gulfport,* 757 So.2d 250, 257 (Miss. 2000), it is also true that when contract terms can be interpreted as having two or more reasonable meanings, the terms are ambiguous. *Britt,* 826 So. 2d at 1265 (explaining that ambiguity exists in insurance contracts when the policy can be interpreted as having two or more reasonable meanings).

Courts are required to use a three-step process in contract interpretation. *Wood,* 35 So.3d at 513. First, courts look to to the "four corners" of the agreement to attempt to translate a clear understanding of the parties' intent. *Id.* If that intent remains illusive, a court may apply the canons of contract construction or turn to parol evidence. *Id.* (citing *Harris v. Harris*, 988 So.2d 376, 378-79 (Miss. 2008). Where terms of a contract are ambiguous, the contract will be interpreted in a reasonable manner. *Id.*

The first rule of contract interpretation is to give effect to the intent of the parties; however, the words utilized are "the best resources for ascertaining intent and assigning meaning with fairness and accuracy." *Herring Gas Company, Inc. v. Pine Belt Gas, Inc. et al.,* 2 So. 3d 636, 639 (citing *Farm Servs. v. Okibbeha County Bd. Of Supervisors,* 860 So.2d 804, 807 (Miss. 2003). Applying these principles of law, the context of the "no buy" agreement must be interpreted from the context of the words in the provision itself and the entire Agreement. *See id.*

The brief wording of the parties' Agreement in Item (cc): **"Purchasers agree that they will not buy another location in Warren County without the consent of the Sellers hereto"** combined with the vast amount of restrictions for the Sellers/Plaintiffs in Item (m) of the Agreement demonstrate the parties' intent that all parties benefit fiscally from the Agreement. Plaintiffs had a substantial investment in SuperCo, Inc., owned partially by Defendant Storey.

The spirit and intent of Item (cc) was for another location in Warren County not to compete with SuperCo, Inc. so that SuperCo.,Inc would thrive and enable the payment of monthly installments as financed by Plaintiffs.

While there is no doubt that the word "buy" is contained in the subject phrase, its meaning must be construed in light of the entire phrase in which it is contained. "Buy another location" must be viewed in light of the "four corners" of the parties' Agreement. *See Wood,* 35 So.3d at 513. Because Item (m) specifically discusses a covenant for the Plaintiffs, as "Sellers" not to compete, in a 30-mile geographic area, it is clear that the parties had the financial health of SuperCo. Inc. in mind when agreeing that Storey and Barrett, as Purchasers would not endanger the financial health of SuperCo. Inc. Defendant Storey admits that he was not certain that he would be the resulting owner in the dissolution between himself and Barrett. (Appellants' Brief at p.30). Therefore, Defendant Storey's actions in securing a pharmacy location, whether he purchased another pharmacy with goodwill, or whether he purchased a lease to operate another pharmacy was against the intent of the parties' "no buy" provision in Item (cc).

This position is even bolstered by the recent *Aegler v. Gambrell* opinion provided by Defendants in their Brief. (Appellants' Brief at p. 14). The holding of this recent case requires an application of "common sense" interpretation of contract provisions. *See Aegler v. Gambrell,* Miss. Ct. App. #2010-CA-00215-COA. Given the "four corners" of the parties' Agreement, even without a strict "definitionary" meaning of "buy another location" a logical reading of the "no buy" provision is that Defendant Storey would be prohibited from leasing another location, in Warren County, because it would directly compete with "Battlefield Discount Drugs".

B. Plaintiffs did not consent to Defendant Storey negotiating for, obtaining, or opening a new pharmacy under a wholly different company(ies) with a similar name, in direct competition with Battlefield Discount Drugs.

Defendants claim that Plaintiffs consented to Defendants opening a new pharmacy at 2080 Frontage Road and therefore, Defendant did not violate the Item (cc) of the Agreement. Plaintiffs admit that they consented to Barrett and Defendant Storey opening a new pharmacy at this location. (C.R. 163-64: A.R.E. 3). Plaintiffs have argued before the trial court and do so herein that the Plaintiffs' consent was granted for the opening of Battlefield Clinic Drugs, Inc., not for the pharmacy owned and operated by Defendant Storey, individually or by his solely owned entities. Defendants have argued that based on the consent granted to Defendant Storey by the Plaintiffs, Storey "relied" upon the consent and spent money to open a pharmacy. (T. 11-12; A.R.E. 6). The evidence presented to the trial court showed that Storey did not know if he would be come the owner of SuperCo., Inc. (C.R. 184-88; A.R.E. 4). Therefore, Defendants have not provided any evidence that Plaintiffs consented to Storey, individually, and on behalf of his newly formed companies, opening and operating a similarly named pharmacy which very well could have been in direct competition with "Battlefield Discount Drugs", aka SuperCo., Inc.

CONCLUSION

The trial court erred in granting Defendants' motion to dismiss Plaintiff's complaint for injunctive relief. A genuine issue of material fact exists as to whether Defendant John Storey violated Item (cc) of the Agreement by virtue of the clear language of the Agreement prohibiting Defendant Storey's acquisition of a new pharmacy location and the spirit and intent of the parties' agreement against direct non-competition by either party.

The trial court correctly ruled in favor of the Plaintiffs by granting summary judgment on the issue of whether Plaintiffs violated Item (m) of the parties' Agreement. Plaintiffs did not fail

to develop marketing and business plans for a dissolving and defunct company. Further, the trial Court correctly ruled that Plaintiffs' disagreement with Defendants' acquisition of a new pharmacy could be interpreted by a jury as *compliance* with Item (m) of the Agreement. Therefore, the trial court was correct in ruling that as a matter of law neither liquidated damages or punitive damages were warranted under Items (m) and (n) of the Agreement.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, MARK W. PREWITT, Attorney for Plaintiffs, do hereby certify that I have this day caused to be served a true and correct copy of the above and foregoing document on the following counsel of record:

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This the 2nd day of August, 2011.

MARK W. PREWITT