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

BRIEF OF APPELLANTS

APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY

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IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS
NO. 2008-CA-01173-COA

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 persons have an interest in the outcome of this case:

1. John Storey, Battlefield Express Drugs, Inc., and Battlefield Compounding Center.

2. David M. Sessums and Penny B. Lawson, Attorneys for John Storey, Battlefield Express Drugs, Inc., and Battlefield Compounding Center.

3. Gene Abbott.

4. Billy Williamson.

5. Mark Prewitt, Attorney for Gene Abbott and Billy Williamson.

6. The Honorable Isadore W. Patrick.

This the 10th day of May, 2011.

DAVID M. SESSUMS
PENNY B. LAWSON,
Attorney for Appellants

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II **Whether the Plaintiffs' filing of this lawsuit constitutes a breach of Item (m) of said Agreement entitling Defendant John Storey to liquidated damages.**

III. **Whether the actions of the Plaintiffs in filing their lawsuit constitutes an abusive process and an intentional tort, which warrants the imposition of punitive damages and attorneys fees against the Plaintiffs.**

STATEMENT OF THE CASE:
FACTS AND PROCEEDINGS IN THE CIRCUIT COURT

This is an action for breach of contract. On December 15, 2000, Gene Abbott and Billy Williamson executed a an Agreement for the sale of a pharmacy in Vicksburg, Mississippi operating as SuperCo, Inc. and doing business under the trade name Battlefield Discount Drugs, Inc. to John W. Storey and Mitchell Chad Barrett. (C.R. 9-14 R.E. 1). The Agreement expressly provides under Item (s) that the Agreement, "Shall be interpreted according to the application of the general rules and laws regarding arms lengths transactions" and Item (y) "This agreement shall be subject to and governed by the laws of the State of Mississippi..."

In 2008, John Storey and Chad Barrett planned on opening, as opposed to purchasing, a new pharmacy location to which Abbott and Williamson were in complete agreement with and they both had agreed to work at the new pharmacy. Storey and Barrett jointly obtained a lease on 2080 Frontage Road for the new location with plans to open a new pharmacy from the ground up.

On April 22, 2009, Storey filed a dissolution of partnership suit against Barrett in the Chancery Court of Warren County, Mississippi. After the dissolution suit was filed, Barrett attempted to obtain the lease on 2080 Frontage Road after it expired on its initial terms in his individual name but was unsuccessful. However, Storey also attempted to obtain the lease individually and was

successful.

After the filing of the dissolution suit Storey formed Battlefield Express Drugs, Inc., and Battlefield Compounding, Inc., of which he is the sole owner, director and officer. During this same time period Barrett was also opening his own new pharmacy called Vicksburg Special Care Pharmacy. Neither Storey nor Barrett bought their new pharmacies from any sellers but instead opened pharmacies from the ground up.

Once Storey successfully obtained the lease on 2080 Frontage Road, Abbott and Williamson filed suit naming Storey, Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc. as Defendants (hereinafter "Defendants"). They did not file suit against Barrett although at the time that suit against Storey was commencing Storey and Barrett were still partners and operators of SuperCo., Inc. Abbott and Williamson admitted in their depositions that they had no intentions of bringing suit against Barrett even though they admitted that Barrett had done the same thing as Storey. At all times while the suit against Storey was ongoing, and to date, all payments due and owing to Abbott and Williamson under the December 2000, Agreement were timely and properly made.

On October 28, 2009, Abbott and Williamson filed their Complaint against Storey, Battlefield Express Drugs, Inc., and Battlefield Compounding Center, Inc. in the Circuit Court of Warren County, Mississippi alleging that they had secured another location in competition with SuperCo, Inc. d/b/a Battlefield Discount Drugs, Inc. without the consent of Abbott and Williamson and that was in violation Item (cc) of the December 2000, Agreement. (C.R. 5-8 R.E. 2). Under the agreement Item (cc) states:

> "Purchasers agree that they will not buy another location in Warren County without the consent of the Sellers into."

However, Abbott and Williamson alleged in Paragraph 5 of their Complaint:

"That the Agreement included a provision that the Purchasers (Defendant Storey and Mitchell Chad Barrett) would not secure another location in competition with SuperCo., Inc., d/b/a Battlefield Discount Drugs, Inc., in Warren County during the term of said Agreement without the consent of the Sellers (Plaintiffs) hereto. That said Agreement currently remains in full force and effect."

Abbott and Williamson brought suit only against Storey and his closely held corporations, although Barrett was in the process of opening Vicksburg Speciality Care Pharmacy.

On October 30, 2009, Storey filed his Answer, Affirmative Defenses and Counter Complaint and Motion for Sanctions. (C.R.18-22 R.E. 3). He asserted that he had not bought another location in Warren County from any seller and, that Abbott and Williamson were aware of this and had consented to the new store located at 2080 South Frontage Road, and had in fact, had both been scheduled to work at the new store once it opened. Additionally, Barrett, a non party to this suit, was a party to the Agreement and was also opening Vicksburg Speciality Care Pharmacy and that Abbott and Williamson had not filed any action against Barrett and that disparate treatment was a tortuous indifference with Storey's business interests and contract rights and abuse of process.

On November 2, 2009, Storey filed their Motion to Dismiss and for Judgment on the Pleadings, asserting that the Abbott and Williamson's lawsuit was premised on violation of Item (cc) of the Agreement not because they had bought another location but because they had opened another location moving further that the Abbott and Williamson's Complaint did not allege that the Defendants Storey had bought anything, and moved for the Court's entry of a judgment as a matter of law. (C.R. 23-25; R.E. 4)

On November 17, 2009, a Motion for Leave to Assert Counter-Complaint was filed (C.R. 36; R.E. 5) and on November 20, 2009, an Order Allowing Motion for Leave to Assert Counter-Complaint was entered. (C.R. 49; R.E. 6)

On November 24, 2009, Abbott and Williamson filed their Response to the Motion to Dismiss

and for Judgment on the Pleadings asserting:

> ...that Plaintiffs allege that Storey secured "another location in Warren County" in violation of the Agreement attached to the Complaint.

On November 24, 2009, Storey filed his Counter-Complaint asserting that it was Abbott and Williamson who were in violation of Item (m) of the Agreement by filing their lawsuit against Storey and therefore Storey is entitled to liquidated damages per Item (m) which provides:

> 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 percent (50%) and payments identified in the following paragraph will be terminated as of the dated of said breach.

The payments identified in Item (n) of the Agreement were:

> Following closing, Purchasers may cause the Company to offer either or both of the Sellers a Position of full-time employment. In addition, Purchasers will pay Sellers collectively a consulting fee of $250,000, and a non-competition fee of $600,000. Payments for said fees will be amortized over a twelve (12) year period and will be paid on a monthly basis beginning seventy (70) days after closing.

The Counter-Claim also asserted that the Abbott and Williamson filed their lawsuit in collusion with Barrett in an attempt to assist him in his dissolution litigation with Storey. The Counter Complaint also asserts that the lawsuit filed by Abbott and Williamson caused damage the economic interests of Storey as evidenced by the Abbott and Williamson not taking any similar action against Barrett or his new pharmacy, Vicksburg Speciality Care Pharmacy. (C.R. 59-69; R.E.7)

Abbott and Williamson filed their Reply to the Counter-Complaint denying the allegations and asserting that the Agreement was subject to the Court's interpretation of the four corners of the parties Agreement. Further, the Abbott and Williamson asserted that they had a vested interest in the financial health of SuperCo., Inc. so as to insure payments of the purchase price. (C.R. 52-56; R.E. 8). Abbott and Williamson also filed a Motion to Amend Complaint to include a Rule 57 Declaratory

Judgment to determine any question of construction. (C.R. 57-58; R.E. 9) and on November 30, 2009, an Order was entered allowing Abbott and Williamson to amend their Complaint in the manner requested. (C.R. 70; R.E. 10).

On December 9, 2009, Abbott and Williamson filed their Amended Complaint adding their Motion for Declaratory Judgment pursuant to M.R.C.P. 57. They moved the court to grant a permanent injunction prohibiting Storey from opening and/or operating another pharmacy business contrary to the Agreement so as to prevent further present and/or future irreparable harm. (C.R. 83-86; R.E.11). On December 14, 2009, Storey filed his Answer to Amended Complaint. (C.R. 87-89; R.E. 12).

After a brief period of time for discovery, Storey filed his Supplemental Brief in Support of Motion to Dismiss or in the Alternative for Summary Judgment. (C.R. 110-117; R.E. 13)

On July 28, 2010, Storey filed a Notice of Hearing for all outstanding motions filed on behalf of the parties. (C.R. 108-109; R.E. 14). On August 17, 2010, Storey filed a Supplemental Brief in Support of Motion to Dismiss and/or in the Alternative for Summary Judgment. Storey asserted that he had not violated the plain terms of Item (cc) of the Agreement as Storey had not "bought" another pharmacy; and that Abbott and Williamson by their own sworn deposition testimony admitted that they had suffered no irreparable harm or injury. (C.R.110; R.E. 13).

On August 18, 2010, Abbott and Williamson filed their Motion for Continuance (C.R. 159-160 R.E. 15) and subsequently on September 8, 2010, filed their own Motion for Summary Judgment claiming that Storey's Counter Claim was without merit both factually and as a matter of law. Abbott and Williamson asserted that in order for Defendants Storey to make out their case they would have to prove that the Abbott and Williamson acted with actual malice, gross negligence, which evidences a willful, wanton or reckless disregard for the safety of others, or actual fraud.

On October 14, 2010, a hearing was held before the Honorable Isadore W. Patrick in the Circuit Court of Warren County, as which time the Court took all motions under advisement pending a ruling. (T:1-49) On December 1, 2010, the Administrative Office of Court issued a notice of filing Pursuant to M.R.A.P. 15. (C.R. 254; R.E. 16) On December 2, 2010, an Order was entered which held that Storey had not violated section (cc) of the contract and therefore the complaint by the Plaintiffs was dismissed. Further, the Court held that Abbott and Williamson did not violate section (m) and found that their Motion for Summary Judgment as to Storey's Counter Claim should be granted. (C.R. 255-256; R.E.17)

Storey timely filed his Notice of Appeal on December 13, 2010, (C.R. 258 ; R.E.18) and Abbott and Williamson filed their Notice of Cross Appeal on December 15, 2010 (C.R. 264-265; R. E. 19).

SUMMARY OF THE ARGUMENT

On December 15, 2000, Gene Abbott and Billy Williamson signed an agreement selling SuperCo, Inc. (a pharmacy business) which was doing business as Battlefield Discount Drugs, on Indiana Avenue in Vicksburg, Mississippi, selling same to John Storey and Chad Barrett.

The agreement of December 15, 2000, contained Item (cc) which provided, in toto;

> "Purchasers agree that they will not buy another location in Warren County without the consent of the Sellers hereto."

In 2008 Storey and Barrett consulted with Abbott and Williamson regarding their plans to open a brand new pharmacy from the ground up to be located at 2080 Frontage Road, Vicksburg, Mississippi. Abbott and Williamson were in complete agreement to open the new pharmacy and in fact agreed to personally work at this new pharmacy location.

Pursuant to their plans to open a new pharmacy from the ground up at 2080 Frontage Road,

Vicksburg, Mississippi, Storey and Barrett leased the 2080 Frontage Road location from the owner thereof. This was with the complete agreement of Williamson and Abbott.

On April 22, 2009, Storey filed a suit for dissolution of partnership against Barrett in the Chancery Court of Warren County, Mississippi. During the pendency of the dissolution suit the lease which Storey and Barrett had taken out on 2080 Frontage Road expired without any new pharmacy actually being opened at said location.

Thereafter, Barrett attempted to lease the premises located at 2080 Frontage Road solely in his own name but was unsuccessful in doing so. Similarly, Storey attempted to lease the premises located at 2080 Frontage Road and was successful in obtaining a new lease in his name only.

During this time Barrett began his own plans to open his own new pharmacy from the ground up at another location on Highway 61 South in Vicksburg, Mississippi. Barrett's new pharmacy is called Vicksburg Special Care Pharmacy and opened on Highway 61 South in Vicksburg, Mississippi.

Storey formed two (2) new corporations, Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc. to operate at the 2080 Frontage Road location.

With the trial of the dissolution of partnership suit set to begin trial in Chancery Court in November 2009, Abbott and Williamson filed their Complaint on October 28, 2009, against John Storey, Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc. claiming that they would be irreparably damaged by the opening of the new pharmacy at 2080 Frontage Road and requested injunctive relief and damages.

Thereafter, before the Chancery partnership dissolution suit could be concluded Storey was able to purchase Barrett's interest in SuperCo a/k/a Battlefield Discount Drugs.

Item (m) of the Agreement of December 15, 2000, provided in pertinent part:

"Sellers agree that they will develop marketing or other business plans as consultants

> for the company on the 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 percent (50%) and payments identified in the following paragraph will be terminated as of the date of said breach."

Once Abbott and Williamson filed their suit for injunctive relief and damages against Storey (but not Barrett), Storey filed his counter-claim alleging that Abbott and Williamson had breached Item (m) of the December 15, 2000, agreement claiming that filing an injunctive lawsuit was directly contrary to Abbott and Williamson's duty to develop marketing or other business plans as consultants on a continued basis for the period of the indebtedness owed to them.

Neither Barrett nor Storey purchased a pharmacy from anyone. (ie: did not "buy" a pharmacy from anyone). Both Barrett and Storey opened a new pharmacy from the ground up without paying any Seller for goodwill or a covenant not to compete.

Abbott and Williamson sued only Storey and never interfered in any way with Barrett's opening of and operating a new pharmacy at another separate location in Warren County.

It is Defendants Storeys position that the Circuit Court of Warren County, Mississippi was correct in granting their Motion for Summary Judgment against Abbott and Williamson because the Defendants Storey "did not buy another location in Warren County" without the consent of Abbott and Williamson. Williamson and Abbott actually consented to the opening of the new location of 2080 Frontage Road, Vicksburg, Mississippi and planned to work at the store.

In their depositions both Abbott and Williamson admitted under oath that they had sustained no damages and knew of no irreparable damage that they had or would suffer or would be likely to suffer and all payments by the Purchaser under the December 15, 2000, agreement had and have been made timely to Abbott and Williamson.

In contrast a jury issue exists on whether or not Abbott and Williamson violated Item (m) of

the agreement of December 15, 2000, as it is inconceivable that filing a lawsuit seeking injunctive relief and damages to prevent the new location from opening at 2080 Frontage Road is in furtherance of Abbott and Williamson's duty to "develop marketing and other business plans as consultants" on a continued basis for the period of the indebtedness owed to them.

The lower court was in error in granting Abbott and Williamson's Motion for Summary Judgment on this issue.

ARGUMENT

ITEMIZATION OF UNDISPUTED FACTS

On December 15, 2000, Gene Abbott and Billy Williamson signed an Agreement selling SuperCo., Inc. d/b/a Battlefield Discount Drugs on Indiana Avenue in Vicksburg, MS to Chad Barrett and John Storey.

Pursuant to said Agreement of December 15, 2000, Abbott and Williamson sold to Storey and Barrett all their stock in SuperCo, together with all other assets of the on going pharmacy business being sold by Abbott and Williamson including the "goodwill" value of the established business.

Contained in the agreement of December 15, 2000, was item (cc) which provided:

> "Purchasers agree that they will not **buy** another location in Warren County without the consent of the Sellers hereto."

In the Agreement of December 15, 2000, Abbott and Williamson specifically sold "goodwill" in the ongoing Battlefield Discount Drug enterprise to Barrett and Storey. (See Item (g) of said agreement)

As early as 2008, Storey and Barrett planned, instead of buying an existing pharmacy from someone else, to open a brand new pharmacy located at 2080 Frontage Road, Vicksburg, MS. Such opening did not require the purchase by Storey and Barrett of any goodwill or other nontangible

assets.

Abbott and Williamson were in complete agreement with the plan to open the new pharmacy at 2080 Frontage Road. Abbott and Williamson were so enthusiastic in their agreement with the plans to open a new pharmacy at 2080 Frontage Road, that they both planned to work at the new pharmacy at 2080 Frontage Road. Abbott admitted in his deposition that as late as January 2009, he was still planning to go work at the new pharmacy when it opened at 2080 Frontage Road.

On April 22, 2009, Storey filed a dissolution of partnership suit against Barrett in the Chancery Court of Warren County Mississippi. During said dissolution suit, Barrett attempted to buy all of Storey's interest in Battlefield Discount Drugs and SuperCo. During said partnership dissolution proceedings, Storey likewise attempted to buy all of Barrett's interest in Battlefield Discount Drugs and SuperCo.

During all times, and to date, all payments due and owing to Abbott and Williamson under the agreement of December 15, 2000 were timely and properly made and no payments have ever been missed.

Pursuant to their plans to open a new pharmacy at 2080 Frontage Road, Barrett and Storey had taken out a lease with the landlord of the premises located at 2080 Frontage Road. The lease on 2080 Frontage Road expired in July 2009 while the partnership litigation between Barrett and Storey was ongoing. Barrett attempted to acquire a new lease on the premises at 2080 Frontage in his own individual name but was unsuccessful. Storey attempted to acquire a new lease on the premises at 2080 Frontage Road and was successful.

Thereafter Storey formed Battlefield Express Drugs, Inc., and Battlefield Compounding, Inc., of which he is the sole owner, director and officer. Battlefield Express Drugs entered into the lease with the landlord and leased the premises at 2080 Frontage Road in August 2009.

During this same time period Barrett also was planning to open his own new pharmacy called Vicksburg Special Care Pharmacy located on Highway 61 South in Vicksburg, MS. Said pharmacy was opened by Barrett with no interference from Abbott and Williamson.

Barrett did not buy his new pharmacy from anyone but instead opened a new pharmacy from the ground up. Barrett did not pay anyone any goodwill to open his new pharmacy called Vicksburg Special Care Pharmacy.

Storey did not pay anyone any goodwill to open the new Battlefield Express Drugs Inc. Pharmacy at 2080 Frontage Road and did not buy a pharmacy from anyone.

The dissolution of partnership case between Storey and Barrett was set to go to trial before the Chancery Court of Warren County in November 2009. On October 28, 2009, Abbott and Williamson chose to file their Complaint in this case against John Storey, Battlefield Express Drugs, Inc. and Battlefield Compounding Center seeking to shut down and prevent the opening of the new pharmacy at 2080 Frontage Road claiming irreparable injury and damages.

In their complaint Abbott and Williamson contended that Storey, Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc. were all bound by the terms of the December 15, 2000 agreement.

Abbott and Williamson claimed that because Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc. are closely held corporations they are the alter ego of Storey and thereby bound by the agreement of December 15, 2000. SuperCo, Inc. is also a closely held corporation and was the alter ego of both Storey and Barrett and now Storey owns it as the sole owner.

Trial began in the partnership dissolution suit in Chancery Court in November 2009, but a settlement was reached on the date of trial and Storey bought the interest of Barrett in Battlefield Discount Drugs and SuperCo.

On November 19, 2009, the closing was held and Storey purchased all of Barrett's interest in Battlefield Discount Drugs and SuperCo.

To date Abbott and Williamson have not filed suit against Barrett for opening a new pharmacy on Highway 61 South called Vicksburg Special Care Pharmacy and have no plans to do so.

Both Billy Williamson and Gene Abbott testified in their depositions on March 12, 2010 that they suffered no irreparable injuries by the opening of Storey's new pharmacy at 2080 Frontage Road.

Both Abbott and Williamson both testified that they have no evidence that Storey purchased goodwill or a covenant not to compete from any Seller when opening the new pharmacy at 2080 Frontage Road.

Both Storey and Barrett have each opened brand new pharmacies without purchasing same from anyone, Barrett opening Vicksburg Special Care Pharmacy on 61 South and Storey opening Battlefield Express Drugs at 2080 Frontage Road, yet Abbott and Williamson have sued only Storey.

The Agreement of December 15, 2000, grants individual rights to John Storey and Battlefield Express Drugs and Battlefield Compounding Center as the Agreement of December 15, 2000, specifically states:

> "This agreement shall be binding upon and shall inure to the benefit of the parties to this agreement and to their respective legal representatives, heirs, executors, administrators, and successors in interest."

The obligation of Abbott and Williamson to "develop marketing or other business plans as consultants for the Company on the continued basis for the period of the indebtedness" inures to the individual benefit of John Storey and his successors in interest.

ARGUMENT

A. The Defendants leasing of a building to open a pharmacy, to which Plaintiff's had previously consented does not constitute buying another location and is not in violation of Item (cc) of the

Agreement.

Courts are bound to enforce contract language as written and give to it its plain and ordinary meaning if such is clear and unambiguous. *Mississippi Farm Bureau Cas. Ins. Co. V. Britt*, 826 So.2d 1261 (Miss. 2002). The Agreement entered into between the parties on December 15, 2000 contained a provision Item (cc) of the Agreement which simply states:

> "Purchasers agree that they will not buy another location in Warren County without the consent of the Sellers hereto."

Both Williamson and Abbott admitted in their depositions that they had entered into this Agreement after full and mature deliberation and that neither had requested any change to the language of Item (cc) prior to their executing the Agreement. (CR 122-124; R.E. 20)(C.R. 141-142; R.E. 21). Both Williamson and Abbott admitted that when they sold the pharmacy to Storey and Barrett they were selling "goodwill" and that was specifically addressed in Item (g) of the Agreement as follows:

> "All assets of the business, including the name of the store and all goodwill, are included as part of this purchase price."

Abbott admitted that when a new business is started there is no goodwill to buy from anybody. (C.R. 147-148; R.E. 21). Williamson testified in his deposition that when he and Abbott sold the pharmacy to Storey and Barrett that part of what they were selling and part of what Barrett and Storey were "buying" was goodwill. (C.R. 129-130; R.E. 20). The primary purpose of all contract construction principles and methods is to determine the intent of the contracting parties. See *Houston v. Willis*, 24 So.3d 412 (Miss. Ct. App. 2009). The intent of both Abbott and Williamson is clear that when selling the pharmacy that goodwill was a part of the purchase price and was reflected in the sales price paid by Storey to Barrett.

In the recent case of *Aegler v. Gambrell*, Miss. Ct. App. #2010-CA-00215-COA the parties got into a squabble over the meaning of the word "furnishings." The Chancellor disagreed with the Aegler's argument that some sort of strict "definitionary" meaning of the term "furnishings" should control and upheld the Chancellor's "only logical reading of the addendum" that allowed the Gambrells to remove some of the furnishings in the premises under consideration, stating:

> "The Aeglers filed a motion to reconsider, arguing the chancellor failed to apply the dictionary definition of "furnishings."
>
> * * *
>
> Both parties agree the chancellor correctly applied the "four-corners" test to interpret the contract and addendum. But they disagree with her definition of "furnishings" and her finding that the contract was unambiguous. We are not persuaded the Aegler's asserted definition of "furnishings" - the movable items in a house, including furniture, that makes a house livable - dictates a different outcome. Thus, we affirm the chancellor's award granting Gambrell her personal property because the addendum is clear that the ownership of these items was not intended to transfer to the Aeglers with the sale of the house."
>
> * * *
>
> Further providing the chancellor's ruling the appellate court stated:
>
> "But the chancellor found the only logical reading of the addendum is that it allowed Gambrell to remove some of the furnishings. Further, as a matter of common sense, the chancellor reasoned "furnishings" could not include some items the Aeglers had claimed they now owned, like Gambrell's golf cart."

In this matter the parties after careful deliberation, and after rewording other items of the agreement of December 15, 2000, chose to use the word "buy" in item (cc) of the agreement. For someone to buy something, someone has to sell something and in this case John Storey did not buy the new pharmacy at 2080 Frontage Road from anyone. He did not pay anyone for "goodwill" or a covenant not to compete.

Beyond the plain and ordinary meaning of the word "buy" the original intent of Abbott and Williamson was obvious; they did not want Storey and Barrett to "buy" another pharmacy in Warren

County because to "buy" another pharmacy from someone else Storey and Barrett would be buying an existing pharmacy and not only the inventory and equipment, but the existing goodwill of an ongoing business. This is made all the more obvious from the testimony of both Williamson and Abbott that when Storey and Barrett first began talking about opening the new pharmacy at 2080 Frontage Road, that both Abbott and Williamson were in agreement with this decision and that they in fact, had both agreed to work at the new pharmacy.

The agreement is very precise about what each party agrees with and does not agree. Under Mississippi law, words of a contract are to be given their ordinary meaning. *Mississippi Power Light Co. V. United Gas Pipeline Co.*, 760 F.2d 618 (5th Cir. 1985). The Mississippi Supreme Court has held that all courts are bound to enforce contract language as written and give it its plain and ordinary meaning. *Anglin v. Gulf Guaranty Life Insurance Co.*, 956 So.2d 853 (Miss. 2007). There is nothing unclear or unambiguous about the word "buy." In order for one to buy something, someone else must sell something.

Both Abbott and Williamson have testified under oath that they have suffered and know of no irreparable injury caused them by the opening of the pharmacy. Yet in Paragraph 7 of their Complaint, they contend that, "as a result of Defendant Storey's actions, Plaintiffs have been and will be caused to sustain and suffer irreparable harm and injury and will continue to suffer irreparable harm and injury unless this court enjoin Defendant Storey from opening and operating a pharmacy at another location contrary to the terms as set forth in the agreement." (C.R. 5-14; R.E.2).

When the agreement was entered into between the parties on December 15, 2000, Plaintiffs Abbott and Williamson were by their own admissions experienced businessmen having run a very successful pharmacy business in Vicksburg for some twenty (20) years.

In his deposition of March 12, 2010, Billy Williamson admitted that he entered into this

agreement after full and mature deliberation (C.R. 122; R.E. 20) and that at closing he did not object to any language of the contract. (C.R. 123; R.E. 20). He specifically stated that he did not request any change to the language of Item (cc) before he signed it. (C.R. 124; R.E. 20).

Gene Abbott in his deposition of March 12, 2010, likewise admitted that he agreed that the December 15, 2000, agreement had been entered into by him, "after full, mature deliberation," (C.R. 141; R.E. 21) and that he signed the agreement on December 15, 2000, without requesting any further changes to Item (cc). (C.R. 142; R.E. 21).

Gene Abbott also testified that he did in fact request some changes in other provisions in the preliminary drafts of the agreement of December 15, 2000. In particular Abbott and Williamson requested a change in Article (o) of the Agreement prior to its finalization (C.R. 144-145; R.E. 21). This in direct contrast to not requesting any changes to Article (cc).

The very precise and very explicit term "buy" as used in Article (cc) is significant because when someone "buys" an existing business they are not only buying inventory and equipment they are also buying such things as good will and covenants not to compete. Indeed, when Storey and Barrett bought Battlefield Discount Drugs from Abbott and Williamson they paid Abbott and Williamson a consulting fee of $250,000.00 and $600,000.00 for a covenant not to compete. (See Item (n) of agreement of December 15, 2000)

In point of fact Item (g) of the Agreement of December 15, 2000, expressly provided that Abbott and Williamson were selling "goodwill" to Storey and Barrett and it is admitted that this is part of the purchase price. (C.R. 146; R.E. 21).

Abbott admitted that when a person starts up a brand new business that there is no good will to buy from anybody as he admitted "that is correct on a new business." (C.R. 147-148; R.E. 21) John Stgorey did not pay anyone any "goodwill" to set up the new pharmacy at 2080 Frontage Road.

Abbott had no information that John Storey paid anyone anything for good will in starting up the new pharmacy or that Storey paid anyone for a covenant not to compete. (C.R. 149-150; R.E. 21).

Williamson explained that "goodwill" is something that is hard to put a dollar value on but that goodwill is something that has definite value whether it can be quantified or not. He also confirmed that when he and Abbott sold Battlefield Discount Drugs to Storey and Barrett on December 15, 2000, that part of what they were selling and part of what Barrett and Storey were "buying" was goodwill. (C.R. 129-130; R.E. 20).

Williamson, like Abbott, admitted that when John Storey opened the new pharmacy at 2080 Frontage Road that he did not pay any "goodwill" to anyone as far as Williamson knew. (C.R. 131-132; R.E. 20).

Williamson explicitly agreed as an experienced businessman who had run a very successful business and understood what goodwill was, that when a person "buys" an existing business from someone else that part of what the purchaser is "buying" is goodwill. (C.R. 133; R.E. 20).

Abbott also admitted that if he and Williamson had intended to prevent Storey and Barrett from opening another pharmacy in Warren County that it would have been a very easy thing to so provide in the agreement of December 15, 2000; or as stated by Abbott, "I guess it would have been an easy thing to do. I never thought anything about it." (C.R. 151; R.E. 21).

Beyond the plain and ordinary meaning of the word "buy" the original intent of Abbott and Williamson was obvious. They did not want Storey and Barrett to "buy" another pharmacy in Warren County because to "buy" another pharmacy from someone else Storey and Barrett would be buying an existing pharmacy and to "buy" such existing pharmacy they would pay not only for inventory and equipment but would also have to buy the existing goodwill of the pharmacy being purchased, not to mention also potentially buying a non compete clause from any seller should they wish for the

selling pharmacy owner(s) not to compete with them. (ie: It is cheaper to open a new pharmacy than to buy an existing pharmacy from someone else.)

Storey and Barrett paid Abbott and Williamson for just such a covenant not to compete when they purchased the existing, Battlefield Discount Drugs from Abbott and Williamson.. See Item (n) of the December 15, 20000, agreement; (non-competition fee of $600,000.00 paid to Abbott and Williamson C.R. 10; R.E. 1)

This is made all the more obvious from the testimony of both Williamson and Abbott that when Storey and Barrett first began talking about opening the pharmacy at 2080 Frontage Road in 2008, that both Abbott and Williamson were in agreement with this decision (C.R. 119-120; R.E. 20) and (C.R. 136-138; R.E. 21). Abbott and Williamson thought it was such as good idea to open a new pharmacy that both Williamson and Abbott agreed to work at the new pharmacy (C.R. 121; R.E. 20) and (C.R. 139; R.E. 21).

Abbott testified that he planned to go to work at the new pharmacy at 2080 Frontage Road in January 2009 (C.R. 139; R.E. 21). He testified that he never voiced any objection to John Storey opening the pharmacy at 2080 Frontage Road and that both he and Williamson had previously consented to its opening. (C.R. 140; R.E. 21).

As early as 2008 both Williamson and Abbott consented to the opening of the new pharmacy (but not of the buying of an existing pharmacy from someone else) at 2080 Frontage Road and both agreed to work at this new location.

Item (cc) is very plain and uncomplicated. It says that Storey/Barrett will not "buy another location" and John Storey has not done so.

In Paragraph 7 of their Complaint Abbot and Williamson contended that, "as a result of Defendant Storey's actions, Plaintiffs have been and will be caused to sustain and suffer irreparable

harm and injury and will continue to suffer irreparable harm and injury unless this court enjoin Defendant Storey from opening and operating a pharmacy at another location contrary to the terms as set forth in the agreement." (Plaintiff's Complaint, paragraph 7; R.E. 2)

In paragraph 9 of their Complaint Abbot and Williamson requested, "this Court grant a permanent injunction prohibiting Defendant Storey from opening and/or operating another pharmacy business contrary to the agreement so as to prevent further pertinent and/or irreparable harm and injury to Plaintiffs or their financial economic interest secured by said agreement." (Plaintiff's Complaint, paragraph 9; R.E. 2)

By their own sworn deposition admissions Abbot and Williamson have admitted that they had no factual basis for the allegations contained in paragraphs 7 and 9 of their Complaint.

While admitting under oath that there is no irreparable injury being caused by the new pharmacy at 2080 Frontage Road in contrast Abbott and Williamson have not sued Chad Barrett for doing the exact same thing by him opening his Vicksburg Special Care Pharmacy on Highway 61 South.

Both Williamson and Abbott admitted that Chad Barrett had done the same thing as John Storey (ie: opened a new pharmacy at another location) and yet both admitted that they had filed no lawsuit similar to the instant matter against Chad Barrett seeking to stop him from starting and opening and running his own new pharmacy.

Abbott admitted that they became aware that Chad Barrett was possibly opening Vicksburg Specialty Care Pharmacy in the fall of 2009 (C.R. 142; R.E. 21) yet testified they did not have any plans to sue Chad Barrett over his opening of Vicksburg Special Care Pharmacy. (C.R. 142; R.E. 21).

Williamson likewise admitted in his deposition that Chad Barrett had talked openly about opening Vicksburg Special Care Pharmacy (C.R. 125-126; R.E. 20) and even though Chad Barrett

has opened Vicksburg Special Care Pharmacy and has a new pharmacy up and running over on Highway 61 South across from Walmart that he and Abbott did not have any plans to sue Chad Barrett similar to how they have sued John Storey in this matter. (C.R. 127-128; R.E. 20).

Item (cc) of the agreement has not been breached and the lower court was correct in so ruling.

B. Whether the Plaintiffs' filing of this lawsuit constitutes a breach of Item (m) of said Agreement entitling Defendant John Storey to liquidated damages.

Williamson and Abbott had a duty and solemn obligation under the December 15, 2000, agreement to assist the purchasers and the company on a continued basis for the period of the referenced indebtedness by developing marketing and other business plans as consultants. Pursuant to Item (m) of the Agreement:

> "...Sellers agree that they will develop marketing and oth er 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 percent (50%) and payments identified in the following paragraph will be terminated as of the date of said breach."

Liquidated damages are those damages which are specifically provided for by the terms and provisions of a contract. Filing of the Complaint by the Plaintiffs while knowing that they had suffered no injury nor had any payments for the indebtedness been delayed or missed, constituted a breach of their duties under the Agreement and entitles Defendant John Storey to liquidated damages. Plaintiffs had agreed upon the sale of Battlefield in December 2000 that they would help develop marketing and other business plans. Instead they filed the instant lawsuit. Under Mississippi law the intention of parties controls whether a provision is a penalty or a valid liquidated clause, and where damages are difficult to estimate in advance, and it appears that intent was to assess damages as

compensation for harm caused, such clause will be upheld. See *PYCA Industries, Inc. v. Harrison County Waste Water Management District*, 177 F. 3d 351 (5th Cir. 1999). Both Williamson and Abbott testified under oath that they entered into this agreement after full and mature deliberation, and by their own admissions experienced businessmen having run a very successful pharmacy for twenty (20) years.

As early as 2008 both Williamson and Abbott consented to the opening of the new pharmacy (but not of the buying of an existing pharmacy from someone else) and both had agreed to work at this new location. After the dissolution suit between Barrett and Storey was commenced, Storey established Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc. with the intent of opening under this name at the location Abbott and Williamson had previously agreed to. In fact, the only difference between what Abbott and Williamson had agreed to and what they are now suing over, is the name. Williamson and Abbott as sellers under the December 2000, agreement had an obligation and duty to develop marketing and other business plans, and the filing of an injunction suit seeking to prevent Storey from opening the new location is a clear breach of Item (m) of the Agreement. At a minimum it is a jury issue.

Merely requiring Storey to have to defend this frivolous lawsuit is a breach of Abbott and Williamson's obligations under Item (m). This alone is harm at the hands of Williamson and Abbott and is a breach of their obligation and duty under the agreement and entitles Storey to liquidated damages.

Abbott and Williamson will no doubt claim a distinction between John Storey, Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc. However, such a claim flies directly contrary to the law, the facts and even their own theory of the case.

Response to Plaintiffs' Corporate Argument

Abbott and Williamson's claim that Storey and his corporations cannot claim the benefit of Item (m) is premised entirely upon the erroneous concept that because SuperCo, Inc. is a separate Mississippi corporation distinct from both Abbott and Williamson on the one hand and Storey and his companies on the other that the duties and liabilities of Abbott and Williamson owed to SuperCo, Inc. are not owed to John Storey in this matter.

Abbott and Williamson's expected erroneous concept fails for at least two (2) reasons.

First is that the agreement of December 15, 2000, specifically articulates that all agreements, right and liabilities contained in said Agreement are for the benefit of all parties to the agreement, or as spelled out in Item (d):

> "This agreement shall be binding upon and shall inure to the benefit of the parties to this agreement and to their respective legal representatives, heirs, executors, administrators and successors in interest."

John Storey was a party to the agreement, the agreement specifically and explicitly provides that the agreement and all terms thereof are binding upon and shall endure to the benefit of John Storey who is a party to the agreement and any successor in interest. The agreement specifically provides that it is binding on Abbott and Williamson as parties to the agreement.

Secondly, Abbott and Williamson themselves by bringing this action against Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc. contend that such new corporations are bound by the terms and conditions of the December 15, 2000, agreement.

Article (cc) of the agreement does not state that Purchasers can not set up a corporation which will in turn open another location in Warren County. Yet, Abbott and Williamson have sued Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc. claiming that these corporations have violated Article (cc) of the agreement of December 15, 2000 and are bound by it.

In doing so Abbott and Williamson claim that Battlefield Express Drugs, Inc. and Battlefield

Compounding Center, Inc. are the "alter ego" of Storey and are also thus bound by the agreement. Unfortunately for Abbott and Williamson this same argument works both ways.

In his deposition on March 12, 2010, Billy Williamson testified about and explained his response to his sworn Answer to Interrogatory No. 11 (in which response Williamson claimed that Storey was the alter ego of Battlefield Express Drugs, Inc. and Battlefield Compounding Center, Inc.):

"Q: Well, I mean, are you saying that he is - - because it is a closed corporation, that he is one and the same as the corporation?

A: Yeah, he's, as far as I know - - I'm not a lawyer, but as far as I know, he's the only one involved.

* * *

"Q: Now, the question is simply this: Can you tell me what you meant when you said that these corporations were the alter ego of John Storey.

A: Well, to me, it looks self - explanatory, again, that he is an officer, that he is the sole proprietor of both ones, and that's - - that's what I think out of it.

Q: Ok. And is this the same thing you mean when you say that these corporations were the counter part of John Storey?

A: I would say so. (Williamson Depo. Pg. 66)"

Gene Abbott likewise testified in his deposition on March 12, 2010:

"Q: You see the word in there "alter ego" ?

A: Uh-huh (Affirmative).

Q: Ok. Did you have an understanding of that term before you signed your response to these interrogatories?

A: I just thought that alter ego is kinda similar to what Billy said. (Abbott sat in on Williamson's deposition) It's - -

Q: That John and his corporations are one and the same thing?

A: All - - one and the same thing, that's . . .

Q: Ok. And that's - - where it says in there about the corporation being the counter-part of John Storey, that's, again, saying the corporations and John are one and the same thing?

A: Yes, sir." (Abbott Depo. Pgs. 53-54)

Under Abbott and Williamson's theory of the agreement and its binding effect on John Storey, Battlefield Express Drug, Inc. and Battlefield Compounding Center, Inc. these separate corporations and John Storey are the alter ego of each other and are thereby bound by the terms and conditions of the December 16, 2000, agreement. Abbott and Williamson as parties to the agreement are likewise bound by it. (See Item (d))

Abbott and Williamson can not have it both ways. Under their version of the facts their theory is that John Storey is SuperCo. and SuperCo is the alter ego of John Storey.

Thus, when Article (m) of the December 15, 2000, agreement provides that "Sellers agree that they will develop marketing and other business plans as consultants for the Company" this obligation clearly inures to the benefit of John Storey as one of the parties of the agreement pursuant to Article (d) of the agreement and Abbott and Williamson themselves make no distinction between John Storey and any corporation.

The Liquidated Damages Clause

Item (m) of the December 15, 2000, Agreement provides:

"... 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 percent (50%) and payments identified in the following paragraph will be terminated as of the date of said breach.

(n) Following closing, Purchasers may cause the Company to offer either or both of the Sellers a position of full-time employment. In addition, Purchasers will pay Sellers collectively a consulting fee of $250,000.00, and a non-competition fee of $600,000.00. . . ."

The contract specifically calls for liquidated damages upon Abbott and Williamson's breach of their duty to develop marketing and other business plans on a continued basis, which breach was occasioned by the filing of this suit. Obviously filing a suit to shut down John Storey's business is not in furtherance of developing marketing or other business plans for the benefit of John Storey.

Upon Abbott and Williamson's breach Item (m) of the Agreement it mandates that the remaining indebtedness due to the Abbott and Williamson be reduced by fifty percent (50%) and, additionally, payments of the consulting fees of $250,000.00 and payments on the non competition fee of $600,000.00 are immediately terminated as of the date of breach.

This is not a punitive damage provision but a liquidated damages provision.

In Mississippi parties to a contract may agree to liquidated damages for breach of contract and our courts will enforce such agreement. *Maxey v. Glindmeyer*, 379 So. 2d 297 (Miss. 1980), *Chicago Investment Co. of Mississippi v. Hardtner*, 148 So. 214 (Miss 1933).

In this case the parties have expressly agreed to liquidated damages in the event Abbott and Williamson breach their duty to provide marketing and other business plans as consultants. It is hard to imagine a more grievous breach of their duty to "help" than filing an injunctive suit to prevent the opening of a pharmacy to which they had already consented. Certainly this does not constitute the proper "development by Sellers of marketing and other business plans on a continued basis," for the period of the indebtedness. The action by Abbott and Williamson in filing the instant suit is a direct breach of Item (m) of the contract. At a minimum it is a jury issue.

Once Abbott and Williamson breached their obligation under Item (m), Item (n) in turn provides the measure of Storey' s damages. (ie: the reduction of fifty percent (50%) of the remaining indebtedness plus termination of the balance of the $250,000.00 consulting fee and balance of the $600,000.00 non competition fee.)

Under Mississippi law liquidated damages clauses are deemed enforceable in cases in where (1) the actual damage resulting from the breach are not readily ascertainable and (2) the contract discloses an intention to fix the sum as liquidated damages.

In this case Items (m) and (n) are very explicit (ie: fifty percent (50%) and "terminated").

In Mississippi liquidated damage clauses in contract cases are necessary and are held reasonable where actual damages are difficult to assess and where the contract demonstrates that a preset amount of damages is the intention of the parties. *Culbreath Revokable Trust v. Sanders*, 979 So. 2d 704 (Miss. App. 2007)

In this case the contract is clear that if a jury finds that if Abbott and Williamson breached their duty to provide and develop marketing and other business plans on a continued basis for the period of the indebtedness the agreement expressly and specifically spells out the measure of Storey's damages.

Punitive Damages

In this case we have John Storey and Chad Barrett doing the identical thing after dissolution of their partnership (ie: running new, separate and independent pharmacies). Yet Abbott and Williamson have sued only Storey notwithstanding the fact that Barrett is doing the exact same thing as Storey.

Even after testifying in their depositions where they admitted that they had suffered no irreparable injury Abbott and Williamson still pressed their suit and continued, even to this date, their efforts to shut Storey down.

It is well settled and long standing Mississippi law that where a party continues to press a position that they know is not factually or legally well taken that punitive damages apply in breach of contract cases.

In a case originating from Warren County the Mississippi Supreme Court in *Harvey-Latham Real Estate v. Underwriters at Lloyds London*, 574 So. 2d 13 (Miss. 1990), held that where an insurer originally withheld payment pending determination of apportionment of damages, yet continued to deny the claim even after the apportionment issue had been resolved, that punitive damages should go to the jury.

In *Harvey-Latham*, supra, the insurance company initially denied payment of a claim but after suit was filed subsequently determined that the factual basis upon which it had originally denied the claim was without merit, yet still pressed forward in the litigation denying the claim.

The Mississippi Supreme Court reversed the decision of the Circuit Court of Warren County granting summary judgment to Lloyds of London, stating:

> "The fire occurred in the spring of 1986, and according to Lloyd's brief, it appears that the apportionment issue was resolved the first week of September, 1986. After that week the reason for refusal to pay the claim is not apparent to us, and despite the language of the contract and despite the fact that the amount became certain in September 1986, the claim remained unpaid.
>
> * * *
>
> Surely, after September 1986, it must have dawned on Lloyds that it owed Harvey-Latham the money claimed in the suit, and we do not see in this record any justification to failure to pay until August 1987." 574 So. 2d at Page 15

In this case Abbott and Williamson claim that they initially had a good faith reason to file their suit against Defendants in this matter. However, once it became apparent that Chad Barrett was doing the exact same thing that Storey was doing Abbott and Williamson did not similarly sue Barrett.

Also, once it became apparent that Abbott and Williamson had not suffered any irreparable injury (they both conceded and admitted this in their deposition testimony) they still are of record to this moment pressing forward in their efforts to shut Storey down and "surely it must have dawned on Abbott and Williamson that they were not and are not entitled to the relief requested" and punitive

damage are proper in this matter.

C. Whether the actions of the plaintiff in filing the lawsuit constitute an abuse of process and an intentional tort, which warrants the imposition of punitive damages and attorneys fees against Abbott and Williamson.

Conduct may be subject to punitive damages where the defendant acts with malice and with gross negligence or reckless disregard for the rights of others. *Weems v. American Security Insurance Company*, 486 So.2d 1222 (Miss. 1986))(holding that there were two distinct circumstances wherein one's conduct may subject him to punitive damages: where the defendant acted with malice and where the defendant acted with gross negligence or reckless disregard for the rights of others).

On April 22, 2009, Storey filed a dissolution of partnership suit against Barrett. During the dissolution suit, Barrett attempted to buy all of Storey's interest in Battlefield Discount Drugs and SuperCo and likewise, Storey attempted to buy all of Barrett's interest. At all times, the payments due and owing to Abbott and Williamson under the December 15, 2000 agreement were timely and properly made and no payments were ever missed and have not been missed to date.

During the dissolution suit the lease on the new pharmacy location at 2080 Frontage Road expired. Both Barrett and Storey attempted to acquire the lease on the 2080 Frontage Road premises and Storey was successful while Barrett was not. Thereafter Storey formed Battlefield Express Drugs, Inc., and Battlefield Compounding while at the same time Chad Barrett was in the process of creating and opening Vicksburg Special Care Pharmacy at a separate location in Vicksburg, Mississippi. Barrett did not buy his new pharmacy from anyone but instead opened a new pharmacy from the ground up as did Storey.

Abbott and Williamson filed the instant lawsuit using Mark W. Prewitt as their attorney.

Chad Barrett was at the same time being represented by Mark W. Prewitt in the dissolution suit between him and Storey over the ownership and control of Battlefield Discount Drugs. Upon filing the present suit against Defendants Storey, Abbott and Williamson took no similar action whatsoever against Chad Barrett and Vicksburg Special Care Pharmacy and filed no suit similar to the instant action against Barrett and Vicksburg Special Care Pharmacy seeking to prevent Barrett from opening Vicksburg Special Care Pharmacy.

Abuse of process consists of the misuse or application of a legal process to accomplish some purpose not warranted and is a perversion of a regularly issued civil process for purposes to obtain a result not lawfully warranted or properly obtainable thereby. *Ayles ex rel Allen v. Allen*, 907 So. 2d 300 (Miss. 2005)

The elements of abuse of process are (1) the party has made an illegal use of the process, a use neither warranted nor authorized by the process, (2) the party has 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 (Miss. 2003)

In the dissolution of partnership pleadings in Chancery Court Chad Barrett was represented by the Honorable Mark W. Prewitt. Said dissolution matter was set to begin trial November 2010. On October 28, 2010, Abbott and Williamson secured the services of Mr. Prewitt and singled John Storey and his two (2) corporations out for treatment very different than that afforded to Mr. Barrett and his new pharmacy.

Even though Abbott and Williamson represented to the Circuit Court that they would suffer irreparable injury and damages if the Court did not enjoin the opening of Mr. Storey's new pharmacy at 2080 Frontage Road, when deposed both Abbott and Williamson admitted that they knew of no irreparable injury that they had sustained, knew of no irreparable injury that they would sustain and

admitted that no payments to them had been missed.

With the dissolution suit going forward between Storey and Barrett it was uncertain whether Storey or Barrett, or neither, would end up with Battlefield Discount Drugs, Inc. a/k/a SuperCo, Inc. By suing only Storey and seeking to enjoin his opening of his new pharmacy Abbot and Williamson put extreme pressure on Storey to settle the partnership dissolution suit in Chancery Court on terms favorable to Barrett.

Stated differently Abbott and Williamson allowed Barrett to continue with his plans to open his own new 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.

Abbott and Williamson used their Circuit Court lawsuit for an improper and perverted use in their request for an injunction and damages which was neither warranted by the process nor by the facts they later admitted in their depositions and they had an ulterior motive or purpose in exercising such abuse of the process with resulting injury and damages, at a minimum in the form of incurring attorneys fees, expenses and costs to defend, to John Storey and his corporations.

The accepted theory is that exemplary or punitive damages may be imposed as a punishment upon the wrongdoer, as a restraint on the transgressor. See *Yazoo & Miss. Valley Railroad Co. V. May*, 61 So. 449 (Miss. 1913). Such damages are assessed as a warning and example to deter not only the offender but others similarly situated from committing like offenses in the future. *West Bros. Inc. V. Barefield*, 124 so.2d 474 (Miss. 1960).

The actions of the Abbott and Williamson in filing this lawsuit were done in collusion with Barrett in an attempt to assist Barrett in his dissolution litigation with Storey and further, to damage

the economic interests of Storey. The actions of Abbott and Williamson in filing the instant lawsuit amount to abuse of process.

CONCLUSION

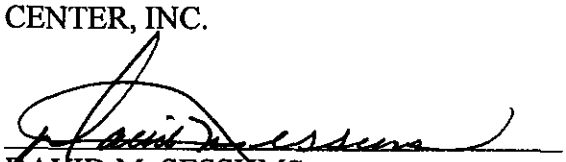
In short, the trial court was imminently correct in dismissing the bogus complaint for injunction and damages especially with Abbott and Williamson admitting under oath that they knew of no damages that they had sustained or would sustain and further on the basis that, applying the plain language of the agreement and basic rules of contract interpretation, John Storey did not "buy" a pharmacy from anyone and did not violate item (cc) of the agreement of December 15, 2000.

On the other hand, a jury issue exists as to whether or not Abbott and Williamson violated items (m) and (n) of the December 15, 2000, agreement by breaching their duty to help, rather than hinder, John Storey who was a party to the December 15, 2000, agreement and/or whether they breached their obligations under said agreement by filing an injunctive lawsuit against him while at the same time favoring Chad Barrett by not filing a similar injunctive relief/damages suit against Barrett.

The lower court was in error in granting Abbott and Williamson's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED:

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

BY: 

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CERTIFICATE OF SERVICE

I, DAVID M. SESSUMS, Attorney for Defendants, 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:

Mark W. Prewitt, Esquire
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Honorable Isadore W. Patrick
Warren County Courthouse
P.O. Box 351
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This the 10th day of May, 2011.

DAVID M. SESSUMS
PENNY B. LAWSON