2011-CA-00197 T

CERTIFICATE OF INTERESTED PERSONS

Gaw v. Seldon, No. 09-0705 R

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Daniel A. Gaw	Plaintiff and Appellant
Jennifer L. Shackelford	Attorney for Daniel A. Gaw
Davie Seldon	Defendant and Appellee
Neal Labovitz	Attorney for Davie Seldon
Chancellor Edwin H. Roberts, Jr.	Chancery Court Judge

JENNIFER L. SHACKELFORD

Attorney of Record for Daniel A. Gaw

TABLE OF CONTENTS

TABLE OF AUTHORIRITES

Mississippi Supreme Court Cases

Mississippi Court of Appeals Cases

Other States' Supreme Court Cases

Federal District Court Cases

STATEMENT OF THE ISSUES

I. THE CHANCELLOR WAS MANIFESTLY WRONG IN FINDING THAT MR. SELDON'S BRICK WALL COULD REMAIN STANDING AND THAT DAMAGES WERE NOT WARRANTED AFTER THE BRICK WALL WAS FOUND TO ENCROACH UPON MR. GAW'S EASEMENT.

II. THE CHANCELLOR WAS MANIFESTLY WRONG IN FINDING THAT MR. SELDON'S WASTE WATER DID NOT CONSTITUTE A NUISANCE OR TRESPASS WARRANTING DAMAGES.

III. THE CHANCELLOR WAS MANIFESTLY WRONG IN ADMITTING EVIDENCE AND TESTIMONY AT TRIAL THAT WAS NOT PROVIDED DURING DISCOVERY.

STATEMENT OF THE CASE

Mr. Gaw purchased and owns an express forty foot easement for ingress and egress across Mr. Seldon's property. (Exhibit 6.) In November 2009, Mr. John Seldon knowingly built a brick entrance to his home which encroached upon the easement by nine and one-half feet. (Trial Tr. 113.) Also, Mr. Seldon's septic tank malfunctioned and allowed untreated waste water to flow to, and accumulate on, Mr. Gaw's property for over six months, disrupting his usage of the land. (Trial Tr. 122, 158.) Thus, Mr. Gaw filed suit against Mr. Seldon for injunctive relief for trespass, nuisance, and the loss of quiet enjoyment of his property. (Complaint.)

A hearing was held on August 16, 2010, where the chancellor found that Mr. Gaw did not need the full forty feet of his easement and stated that Mr. Gaw could come back to court when he could show that he used the full forty feet. (Opinion.) Thus, the chancellor found that Mr. Gaw was not entitled to damages for the encroachment. (Opinion.) Also, the chancellor found that because Mr. Seldon had repaired his septic tank by the time of the hearing, Mr. Gaw was not entitled to damages for the temporary loss of use of his property. (Opinion.)

In addition, Mr. Seldon and his attorney did not respond to discovery motions propounded upon them. (Trial Tr. 10.) Mr. Gaw and his attorney discovered numerous facts and details the day of the hearing, including the discovery of an otherwise indispensible party and the basis for Mr. Seldon's allegation that Mr. Gaw interfered with Mr. Seldon's ownership of his property. (Trial Tr. 9-11.) However, the chancellor allowed the testimony and evidence to be heard and discussed during the hearing. (Trial Tr. 11.) Mr. Gaw filed a motion for reconsideration on December 10, 2010, which was overruled by the chancellor. (Motion for Reconsideration, Order Overruling Motion for Reconsideration.) Mr. Gaw, through his attorney, perfected his appeal on January 25, 2011. (Notice of Appeal.)

STATEMENT OF FACTS

In January 2001, Daniel Gaw purchased real property located in Marshall County, Mississippi, from Lois Anderson who resided at 440 Anderson Lane, Red Banks, Mississippi. The purchase from Lois Anderson consisted of 60 acres of land and an easement across real property located at 440 Anderson Lane, Red Banks, Mississippi. (Trial Tr. 126.) Mr. Gaw purchased adjoining property located at 437 Anderson Lane, Red Banks, Mississippi, in 2003 from Doug Anderson, and he has lived on said property since 2004. (Trial Tr. 126.) The easement purchased by Mr. Gaw was described and recorded on the deed to the property he bought from Mrs. Anderson. (Trial Tr. 126.) The easement is more particularly described as follows, to-wit:

> "A perpetual easement for ingress and egress of 40 foot extending across property owned by Lois Anderson in the East one-half of the Northeast one-fourth of Section 16, Township 2 South, Range 3 West extending Anderson Lane to Tract #1 described above and is granted to Dan Gaw, his heirs-at-law and successors in title."

(Trial Tr. 37; Exhibit 6.) Mr. Gaw stated he used the easement to access his property to bail hay and that he hoped to build a barn and a home on the property using the easement. (Trial Tr. 136.)

In July 2006, Davie and John Seldon, prospective buyers of Mrs. Anderson's property which adjoined Mr. Gaw and on which the easement in question is located, came to view the property. (Trial Tr. 126.) Mr. Gaw testified that he spoke to the Seldons while they were looking at the property and told them that the property for sale was subject to an easement which he owned. (Trial Tr. 126.) Mr. Gaw said he gave them a copy of the easement, which John dismissed, and told the Seldons that they would all be working together on the easement if they purchased the property. (Trial Tr. 127.) Furthermore, Mr. Gaw had marked the corners of his easement with t-posts, clearly identifying same. (Trial Tr. 128-129).

At trial, both John and Davie Seldon denied ever being told about the easement before purchasing the property. (Trial Tr. 90, 99.) Yet, John admitted Mr. Gaw told him about the easement in 2007. (Trial Tr. 99.) He stated he never went to the courthouse to verify the easement. (Trial Tr. 100.) John testified that he did not definitively learn about the easement until he hired a surveyor and was told of the easement on March 6, 2009. (Trial Tr. 101, 103.)

In 2006, Davie purchased the property in question from Mrs. Anderson but stated his deed did not show an easement. (Trial Tr. 89.) In connection to the sale, Jim Helton surveyed the property. (Trial Tr. 127.) Mr. Gaw stated that he gave Mr. Helton a copy of his easement and told him that the easement should be referenced on the deed to Davie Seldon. (Trial Tr. 127.) Nevertheless, the easement was not referenced on Mr. Seldon's deed. (Trial Tr. 127.)

While Davie Seldon admitted that he held title to the property in his name, Davie stated he gave his son, John Seldon, power of attorney to control the property. (Trial Tr. 97, 166.) John has lived on the property since Davie purchased it. (Trial Tr. 99). Mr. Gaw testified that he sent John Seldon a letter on June 15, 2007, stating the easement needed to be recorded in John's deed and that he valued John as a friend and neighbor. (Trial Tr. 128, Exhibit 12.) However, Mr. Gaw received no response from John. (Trial Tr. 130.) Davie stated he did not find out about the easement until John hired an attorney to check into the matter. (Trial Tr. 90.)

Since buying the easement in 2001, Mr. Gaw stated he always maintained the easement by bush hogging, clearing brush, etc. (Trial Tr. 143.) He testified to using the easement to enter his property for farming and other purposes. (Trial Tr. 136.) John Seldon stated he never saw Mr. Gaw use the easement prior to this dispute and that he had let the easement grow up. (Trial Tr. 177.) Mr. Gaw did admit to allowing parts of the easement to "grow up" as the years passed but only to help with an erosion problem. (Trial Tr. 144.) Mr. Gaw continued to use the

easement until 2008 when erosion began causing problems to the road on the easement. (Trial Tr. 130.) In November 2008 before Mr. Gaw took action to correct the erosion on the easement, he hired Mike Akins, a registered land surveyor, to survey and stake the easement for clarification as to the easement's exact location. (Trial Tr. 19, 130.)

Mr. Akins testified he surveyed the land on November 25, 2008, and flagged the forty foot easement, making it plainly visible. (Trial Tr. 20-21.) While surveying the property, Mr. Akins stated John Seldon confronted him for being on the property and cussed at him to get off his property. (Trial Tr. 27-28.) John Seldon called the sheriff's department, who came and allowed Mr. Akins to finish the survey. (Trial Tr. 27-28.) John Seldon denied talking to Mr. Akins in a derogatory manner during the 2008 survey but stated that he did get in an argument with Mr. Akins and that Mr. Akins talked ugly to him. (Trial Tr. 104-05.) John Seldon testified that he later removed the flags from the survey, even though the sheriff's department told him to leave them alone. (Trial Tr. 102.)

Mr. Gaw testified that in November 2008, he realized some grading and graveling of the road needed to be done to help with the erosion problem and because the easement was becoming rutted and impassible. (Trial Tr. 130, 164.) On January 26, 2009, John Seldon admitted to receiving a letter from his attorney stating Mrs. Shackelford, Mr. Gaw's attorney, notified him that Mr. Gaw was going to do some work on the easement. (Trial Tr. 108.) Accordingly, Mr. Gaw hired Hubert Riddle in February 2009 to spread gravel on the easement. (Trial Tr. 75.) Mr. Riddle stated he moved some dirt from the easement to Mr. Gaw's property. (Trial Tr. 78-79.) However, he testified that he only moved the dirt to make room for gravel, which was improving the road. (Trial Tr. 79-80.) Mr. Gaw testified that the dirt was only moved to allow gravel to be placed on the road and that if the gravel had been placed on top of the road

without the initial dirt being removed, it would have caused problems to the road. (Trial Tr. 146.) Mr. Riddle stated the sheriff's department was called to the scene and that he was never able to complete the job for Mr. Gaw because of the the actions of Mr. Seldon. (Trial Tr. 76-77.)

On April 23, 2009, Eddie Todd, a contractor hired by Mr. Gaw, obtained a permit to build a barn on Mr. Gaw's property. (Trial Tr. 70.) Mr. Todd testified that he would have had to use the easement to access the property on which the barn was to be constructed. (Trial Tr. 68.) He stated that the easement would have had to be ditched for proper drainage to ease erosion before he could travel the across the easement to build the barn. (Trial Tr. 71.) However, Mr. Todd was never able to begin construction on the barn because of interference by John Seldon and John's arguing with Mr. Gaw. (Trial Tr. 68.) Mr. Todd stated that he felt concerned for his safety if he were to proceed with the construction for which he was hired. (Trial Tr. 69.)

Around November 2009, John Seldon built a brick wall or entrance to his driveway. (Trial Tr. 113.) On November 11, 2009, Mr. Gaw hired Mike Akins to come back to the property and re-flag the easement. (Trial Tr. 20.) Mr. Akins stated the brick wall encroached upon the easement by nine and one-half feet. (Trial Tr. 22.) Mr. Akins testified that the two flags he placed on either side of the wall had been removed when he revisited the property. (Trial Tr. 29.) Mr. Gaw paid Mr. Akins $350.60 for the November 11th survey. (Trial Tr. 26.) Also, Mr. Akins was being paid $65 an hour, plus mileage, to testify in court (Trial Tr. 27.), which resulted in expense to Mr. Gaw in the amount of $365.00.

John Seldon testified that the exact location of the easement was in dispute when he erected the entrance. (Trial Tr. 113.) However, he admitted the surveyor flags were in place at the time of construction, but he stated the flags were not where the entrance was placed until Mr. Akins came back after the wall was erected and placed flags inside the entrance. (Trial Tr. 114.)

Mr. Gaw testified that the flags were in place where they could be lined up to see the wall would be well inside the easement but stated that John Seldon disregarded them when erecting the entrance. (Trial Tr. 137.) John Seldon stated his driveway connected to the easement and that on several occasions, Mr. Gaw parked his car on the easement, blocking his driveway, for which he called the sheriff's department, although no legal action was ever taken or initiated by John Seldon and Mr. Gaw was never charged with any wrongdoing (Trial Tr. 179.)

Mr. Akins testified that the easement was recorded and filed on January 18, 2001. (Trial Tr. 36.) Mr. Akins stated the description of the easement was specific as to the easement's location and was not ambiguous. (Trial Tr. 37.) He testified that he studied the easement description and the warranty deed from Anderson to Seldon and found no room for a discrepancy as to the easement's location. (Trial Tr. 37.)

Mr. Gaw used the easement to transport his dozer, bush hog, tractors, etc. (Trial Tr. 150.) Mr. Gaw stated that after traveling the easement, he must pass through a twelve foot gate on his property, and he must raise the wings of his sixteen foot bush hog to fit through the gate. (Trial Tr. 152.) However, he stated that in the future, he may remove the gate in order to build a barn and house on the property. (Trial Tr. 153.) He explained a wider width will be needed for equipment and trusses to enter the property. (Trial Tr. 153.) Mr. Gaw admitted that something thirty foot wide could pass through the easement now, but only with lots of turns and great difficulty. (Trial Tr. 154.)

Aside from the easement issue, Mr. Gaw also raised an issue with John Seldon's waste water flowing onto his property. (Complaint.) Mr. Gaw discovered the problem in June 2009, when he tried to bail hay on his property and almost sunk his tractor. (Trial Tr. 135.) The issue kept him from being able to cut parts of his field for hay that summer. (Trial Tr. 158.) Mr. Gaw

stated he never knew of the problem before because 2009 was the first year he had bought a cutter and cut his own hay. (Trial Tr. 159.)

On June 26, 2009, Mr. Gaw filed a complaint with the Marshall County Health Department ("MCHD"). (Trial Tr. 42.) The MCHD was able to determine that the waste water on Mr. Gaw's property was flowing from two of his neighbors' homes, namely John Seldon's and Patricia Marley's. (Trial Tr. 43.) However, Mr. Gaw believes one hundred percent of the waste water in his field was from the Seldon tank because Ms. Marley's was discharging further down his property line. (Trial Tr. 159.)

On July 8, 2009, the MCHD sent enforcement notices to John Seldon and Patricia Marley that stated they each had thirty days to contact the health department and fix the systems. (Trial Tr. 44.) Davie Seldon signed for the certified enforcement notice on July 11, 2009. (Trial Tr. 44, 55.) Davie Seldon denied signing for the notice and stated that someone at the property, 440 Anderson Lane, which was occupied by John Seldonn, signed his name. (Trial Tr. 95.) On August 13, the MCHD sent a second notice to Ms. Marley and Mr. Seldon, stating they had until September 25 to fix their systems. (Trial Tr. 46.) Ms. Marley corrected her system on September 29. (Trial Tr. 46.) On October 5, the MCHD filed suit against Mr. Seldon in justice court for his non-compliance. (Trial Tr. 47.)

Mr. Seldon finally corrected his waste water problem on December 29, 2009. (Trial Tr. 46.) Therefore, from the time the Complaint was filed, waste water flowed untreated onto Mr. Gaw's property for six more months before the problem was corrected. (Trial Tr. 47.) John Seldon testified that he did not replace his septic tank because it was too rainy and muddy for the truck to deliver the tank to his backyard. (Trial Tr. 121.) John Seldon stated that he was a licensed septic tank installer, certified by the State of Mississippi, and he agreed that waste water

was flowing onto Mr. Gaw's property the whole time, possibly even before he bought his home in August 2006. (Trial Tr. 122.) John Seldon testified that he knew there was a problem with his septic system, that he knew waste water could have been running onto Mr. Gaw's property, and that he never tried to find out where his waste water was flowing. (Trial Tr. 123-24.) He was never sure where the water was flowing and thus, did not know it was a problem to Mr. Gaw until he received the complaint. (Trial Tr. 181-82.) He stated that he took preparations to fix the system the summer of 2009 before he received the complaint, but he never got around to fixing it. Furthermore, he made no attempts to mitigate the damage being caused or to redirect the flow, even though he had the means and ability to do so since he is a licensed wastewater installer(Trial Tr. 123, 159.)

Mr. Sullivan of the MCHD did not feel that six months was unreasonable under the circumstances, namely the weather. (Trial Tr. 52.) However, he stated that the MCHD would usually work with people on deadlines when there are legitimate reasons why the problem has not been corrected. (Trial Tr. 49.) Yet, he stated the MCHD felt like they had to file suit against Mr. Seldon in this case. (Trial Tr. 49.) Despite the argument that the wastewater system could not be timely corrected because of the weather, there were 212 wastewater systems installed in Marshall County, Mississippi from July 1, 2009 through December 31, 2009 (specifically, 37 in July, 44 in August, 40 in September, 37 in October, 33 in November and 21 in December). Mr. Sullivan also stated that waste water could be a safety hazard, but the MCHD did not make an assessment to consider danger in this case. (Trial Tr. 49, 64.) Mr. Gaw testified that, depending on the wind, you could smell the waste water at his home. (Trial Tr. 142.)

During the course of his dispute with Mr. Seldon, Mr. Gaw paid for surveys by Mr. Akins and paid Mr. Akins for testifying in court. (Trial Tr. 26-27.) He incurred damages by being

threatened by John Seldon, having the police called to his home numerous times, and because the actions of John Seldon caused Mrs. Gaw to be fearful for her safety while home alone. (Trial Tr. 136.) Mr. Gaw paid his attorney $1,500 and anticipated having to pay further fees after trial. (Trial Tr. 138.) Also, he paid $15.90 for state health department records. (Trial Tr. 139.)

Before trial, Mrs. Shackelford propounded discovery to Mr. Seldon through his attorney on February 22, 2010. (Trial Tr. 10.) However, she never received a response, a witness list, or any piece of evidence from Mr. Seldon or his attorney, as properly requested (Trial Tr. 10.) Mrs. Shackelford did not learn that John Seldon had a power of attorney to the property or should have been included as an indispensible party to the action until the day of the hearing. (Trial Tr. 10.) The chancellor offered to continue the hearing, but Mrs. Shackelford asked the court to institute other remedies, such as not allowing undisclosed evidence to be admitted or undisclosed witnesses to testify, as she stated that she followed the correct channels in asking for discovery and contempt charges, and because the matter had already been continued twice, both times at the request of the Defendant. (Trial Tr. 9, 11.) However, the chancellor overruled her objection and merely made John Seldon stay sequestered with other witnesses and did not allow him to stay at counsel's table. (Trial Tr. 11.) During the hearing, the chancellor also allowed Mr. Seldon's attorney to question witnesses, over the objection of Mrs. Shackelford, about another survey and easement, which again, was not disclosed to Mrs. Shackelford before trial. (Trial Tr. 32-33.)

The hearing was held on August 16, 2010, and Chancellor Roberts issued his findings and opinion on November 8, 2010. (Opinion.) The court found that both Mr. Gaw and John Seldon had interfered with each other's rights regarding the easement. (Opinion.) The court decided that Mr. Gaw had removed soil from the easement without Mr. Seldon's permission,

although this information was never provided to Mrs. Shackelford in response to her discovery requests. (Opinion.) The court ruled that the brick wall does encroach upon the easement by nine and one-half feet but that it does not interfere with a reasonable use of the way. (Opinion.) The court stated that the brick wall could remain until Mr. Gaw shows it impedes his use of the easement for ingress and egress. (Opinion.)

The court found that Mr. Seldon's waste water system was repaired as soon as practicable. (Opinion.) Thus, the court did not believe the water draining onto Mr. Gaw's property constituted a nuisance or trespass for which damages are warranted. (Opinion.) The court found Mr. Gaw did not need or use the full forty feet granted by the easement. (Opinion.) Thus, the court decided Mr. Gaw was not entitled to damages for the loss of the use of the quiet enjoyment of his property. (Opinion.) The court found Mr. Gaw removed an excessive amount of soil in repairing the road, but also continued to say that there was no testimony as to how much soil was removed. (Opinion.) Also, the court found that John Seldon had hindered Mr. Gaw's ability to repair the easement, at the cost of Mr. Gaw. (Opinion.) Yet, the court awarded no damages to either party. (Opinion.) Mr. Gaw's Motion for Reconsideration was overruled by the chancellor, and Mr. Gaw has now filed this Appeal. (Motion for Reconsideration, Order Overruling Motion for Reconsideration, Notice of Appeal.)

SUMMARY OF THE ARGUMENTS

An obstruction created by a servient tenement owner encroaching upon an easement constitutes a private nuisance and may be removed by the dominant tenement owner, provided there is no breach of the peace. *Sumrall v. United Gas Pipe Line Co.*, 97 So. 2d 914, 917 (Miss. 1957). An injunction is available, despite the absence of demonstrable harm, to prevent a trespass or abate a nuisance. *Gulf Park Water Co., Inc. v. First Ocean Springs Development Co.*, 530 So. 2d 1325, 1334 (Miss. 1988).

The brick wall built by Mr. Seldon, which encroaches upon the easement, constitutes a nuisance. Mr. Seldon knew of the easement and its location when he built the entrance but completely disregarded Mr. Gaw's rights in the easement. (Trial Tr. 22, 137.) The brick wall serves no purpose to Mr. Seldon and was placed on the easement merely for spiteful purposes, and as such, the entrance should be removed. *See Calvert v. Griggs*, 992 So. 2d 627 (Miss. 2008) (stating two gates could remain standing where they served a useful purpose to the servient tenement owner); *Green Acres Trust v. Wells,* 2011 WL 590855 (Miss. Ct. App. 2011) (requiring the removal of a fence that served no purpose and was built only to annoy the dominant tenement owner).

The easement was expressly for the usage of forty feet when Mr. Gaw purchased the easement. (Exhibit 6.) Thus, whether Mr. Gaw immediately needs the full forty feet is irrelevant. Where a structure encroaches upon any portion of an easement and renders a portion of the easement unusable, the structure should be ordered to be removed. *See Williams v. Lantz*, 242 N.W. 269 (Neb. 1932); *Tauscher v. Andruss*, 401 P. 2d 40 (Or. 1965). The easement should

remain clear from obstruction for the enjoyment of both the servient and dominant tenement owners' current uses and possible future uses. In addition, any non-usage of the easement was a direct result of interference from Mr. Seldon. (Trial Tr. 27-28, 68-69, 76-77, 102, 113.) Thus, Mr. Gaw should not be penalized for his alleged infrequent use of the easement.

The brick wall creates a nuisance and an unjust taking of Mr. Gaw's rights to property, both of which warrant damages. *See Fratesi v. City of Indianola*, 972 So. 2d 38, 43-44 (Miss. Ct. App. 2008). Mr. Gaw presented ample evidence to prove Mr. Seldon was responsible for the nuisance and taking and that this dispute was not Mr. Gaw's fault. Mr. Gaw presented expert testimony that gave specific amounts of damages he has incurred up to this point. (Trial Tr. 26-27, 136, 138-39, 142, 158-59.) As such, the case is distinguishable from *Kennedy v. Anderson* and should warrant an award of damages to Mr. Gaw. 881 So. 2d 340 (Miss. Ct. App. 2004) (stating evidence presented was insufficient to determine an amount of damages or what portion of damages belonged to which party).

Mr. Gaw suffered mental anguish and distress as a result of his dealing with Mr. Seldon and having had the sheriff's department called to his home on multiple occasions by Mr. Seldon. (Trial Tr. 136.) The sheriff's department never ticketed, charged or arrested Mr. Gaw, nor did the Seldons ever initiate any legal proceedings against Mr. Gaw. Mr. Gaw's mental distress is reasonably foreseeable from the actions taken by Mr. Seldon, and as such, damages are warranted. *See Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736 (Miss. 1999).

Also, Mr. Seldon's untreated waste water which accumulated on Mr. Gaw's property created a nuisance and caused Mr. Gaw to lose the quiet enjoyment of his property. A landowner burdened by a nuisance created by salt water or oil flowing onto his property is entitled to at least nominal damages and any special damages he suffers as a direct result of the

nuisance. *Love Petroleum Co. v. Jones*, 205 So. 2d 274, 275 (Miss. 1967). A defendant should be held strictly liable for damages caused by his created nuisance. *See Town of Fulton v. Mize*, 274 So. 2d 129 (Miss. 1973) (holding Fulton strictly liable for damages caused to Mize's property from the city's waste water flowing onto his property); *City of Jackson v. Filtrol Corp.*, 624 F.2d 1384, 1389 (5th Cir. 1980).

Because of Mr. Seldon's untreated waste water, portions of Mr. Gaw's property were rendered useless for a period of time, specifically during the time period in which to grow hay. (Trial Tr.135.) Mr. Gaw suffered damages from the waste water by not being able to cut portions of his property for hay for his cattle and having to buy hay elsewhere, by smelling the waste water in his home, and by sinking his tractor in the sewage when he tried to cut his hay. (Trial Tr. 135, 142, 158.) Thus, nominal and special damages are warranted in this case.

Lastly, the chancellor committed reversible error at the hearing by allowing the defense to discuss evidence and admit testimony related to facts not disclosed during discovery. (Trial Tr. 9-11.) While excluding evidence is an extreme measure which is discouraged, the Court has stated that "if the trial court determines that the defendant's discovery violation is 'willful and motivated by a desire to obtain a tactical advantage," the newly discovered evidence or witnesses may be excluded. *Williams v. State*, 2011 WL 322407, *2 (Miss.) (quoting *Darby v. State*, 538 So. 2d 1168, 1176 (Miss. 1989)). Despite being granted two (2) continuances and therefore having ample time in which to respond, Mr. Seldon and his attorney did not answer a single discovery request propounded upon them. (Trial Tr. 10.) Mr. Gaw learned John Seldon was an indispensable party at the hearing, as well as the basis for Mr. Seldon's allegation that Mr. Gaw was interfering with Seldon's ownership of his property, namely the removal of dirt on the easement. (Trial Tr. 10.) Obviously, their actions were intentional and resulted in their having a

distinct advantage at trial. Thus, the chancellor should have excluded the evidence presented by Mr. Seldon.

ARGUMENTS

I. THE CHANCELLOR WAS MANIFESTLY WRONG IN FINDING THAT MR. SELDON'S BRICK WALL COULD REMAIN STANDING AND THAT DAMAGES WERE NOT WARRANTED AFTER THE BRICK WALL WAS FOUND TO ENCROACH UPON MR. GAW'S EASEMENT.

"An easement for ingress and egress is a straightforward concept that encompasses surface use and whatever improvements and maintenance to the roadway that are necessary to permit continued travel." *Kennedy,* 881 So. 2d at 346 (quoting *Bivens v. Mobley*, 724 So. 2d 458, 464 (Miss. Ct. App. 1998)). The servient tenement owner retains full possession and dominion over his land, subject only to the right of way. *Sumrall*, 97 So. 2d at 916. Determining whether an obstruction encroaching upon an easement constitutes an "unreasonable obstruction" depends upon the individual facts of the case. *Stone v. Lea Brent Family Investments, L.P.*, 998 So. 2d 448, 454 (Miss. Ct. App. 2008) (quoting *Bd. Of Trs. of Univ. of Miss. v. Gotten,* 119 Miss. 246, 255, 80 So. 522, 523 (1918)).

"Damages may be recovered only where and to the extent that the evidence removes their quantum from the realm of speculation and conjecture and transports it through the twilight zone and into the daylight of reasonable certainty." *Kennedy*, 881 So. 2d at 347 (citing *Adams,* 744 So. 2d at 740). Also, damages should not be awarded when no evidence is presented to determine what portion of the damages is the result of the plaintiff's actions and what portion is the result of the defendant's actions. *Id.* (citing *Ciba-Geigy Corp v. Murphree*, 653 So. 2d 857, 869 (Miss. 1994)).

The Court "shall not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous, or there was an application by the chancellor of an

erroneous legal standard." *Kennedy*, 881 So. 2d at 345 (quoting *Buford v. Logue*, 832 So. 2d 594, 600 (Miss. Ct. App. 2002)).

A. The Encroachment of the Brick Wall Upon Mr. Gaw's Easement Constitutes a Trespass or Nuisance Upon the Easement Requiring Removal.

In dealing with an easement for ingress and egress, the owners of the dominant and servient tenements must not use the easement in ways which will interfere or disrupt the other owner's use or utilization of the easement area. *Kennedy*, 881 So. 2d at 346 (quoting *Field v. Young Men's Hebrew Ass'n*, 208 Miss. 451, 458, 44 So. 2d 538 (Miss. 1950)). However, an obstruction created by a servient tenement owner encroaching upon an easement constitutes a private nuisance and may be removed by the dominant tenement owner, provided there is no breach of the peace. *Sumrall*, 97 So. 2d at 917.

When the servient tenement owner creates a structure which encroaches upon the easement, the dominant tenement owner is "entitled to a mandatory injunction ordering the removal [of the structure] unless it would be inequitable to require such removal." *Tauscher,* 401 P. 2d at 42. An injunction is available, despite the absence of demonstrable harm, to prevent a trespass or abate a nuisance. *Gulf Park Water Co., Inc.*, 530 So. 2d at 1334.

The Court has continuously held that a servient tenement owner has the right to erect a gate on an easement located on their property as long as the gate does not unreasonably interfere with the dominant tenement owner's right-of-way. *See Bd. Of Trs. of Univ. of Miss.*, 119 Miss. at 255, 80 So. at 523 (allowing a servient tenement owner to erect a gate that does not interfere with the enjoyment of the easement); *Rowell v. Turnage*, 618 So. 2d 81, 86 (Miss. 1993) (holding that a gate did not unreasonably interfere with the dominant tenement owner's right-of-way); *Lindsey v. Shaw*, 210 Miss. 333, 49 So. 2d 580 (1950) (holding that a gate over a right-of-way did not

have to be removed but that it could not be locked or nailed shut). "Unless the creators' intent indicates otherwise, the owner of a servient estate 'may erect gates or bars across a way provided they are so located, constructed, and maintained as not unreasonably to interfere with the right of passage and they are *necessary for the preservation and use of the servient estate.*'" *Calvert,* 992 So. 2d at 632 (quoting *Rowell*, 618 So. 2d at 86).

However, a gate or fence cannot remain standing when it creates an unreasonable obstruction. *See Dunaway v. Busbin*, 498 So. 2d 1218, 1221-22 (Miss. 1986) (holding that a fence around an easement constituted an unreasonable obstruction). In *Calvert v. Griggs*, the Court held that whether two gates constituted an unreasonable hindrance to the dominant tenement owner was for the chancellor to decide. 992 So. 2d at 634. Also, the Court was skeptical as to whether the servient tenement owner's fencing and gates were necessary for the preservation and use of the servient tenement owner's property. *Id.* (stating the timing and circumstances surrounding the installation of fences and gates is suspect when they are not installed until four years after the purchase of the estate and right at the time the dominant tenement owner began building a home).

Although the dispute between Mr. Gaw and Mr. Seldon does not involve a gate or fence, but rather a brick column or wall, the arguments and discussion is quite the same. Mr. Seldon purchased his property in August 2006 and did not construct the brick wall until November 2009. (Trial Tr. 89, 113.) Between the time of purchase and when the brick wall was constructed, Mr. Seldon questioned the existence of the easement, the location of the easement and whether Mr. Gaw had the right to maintain the easement, despite notification several times by Mr. Gaw, including through counsel, and three (3) surveys, clearing marking the easement. (Trial Tr. 27-28, 76-77, 68-69, 113, 137, 139.) The brick wall built by Mr. Seldon is distinguishable from a

gate and is more damaging, since a gate can be opened to enter an easement but a brick wall permanently obstructs a right-of-way.

The brick wall was not built in consideration of Mr. Gaw's utilization of the easement and in fact, was in blatant disregard of Mr. Gaw's rights regarding the easement. This is evidenced by Mr. Seldon disregarding the easement's location, despite his own survey and two (2) obtained by Mr. Gaw, and constructing a wall that blocks nine and one-half feet of the expressly granted forty foot easement. (Trial Tr. 22, 137.) Mr. Seldon was warned about the easement numerous times by Mr. Gaw. (Trial Tr. 99, 127, Exhibit 12.) Mr. Akins, a professional surveyor, told the court that the easement's language left no room for confusion as to the easement's location. (Trial Tr. 37.) Thus, Mr. Seldon's actions in constructing the brick entrance on the easement were clearly intentional and unreasonable, as it has rendered almost twenty-five percent of the easement useless.

The Court has established that an obstruction encroaching upon an easement, such as is in the present case, constitutes a private nuisance and that an injunction is available in these circumstances. *Sumrall*, 97 So. 2d at 917; *Gulf Park Water Co., Inc.*, 530 So. 2d at 1334. The Court in *Sumrall* stated that there is almost a unanimous denial of a right to use the easement in such a way as would "materially interfere with the free right to use the easement as contemplated by the parties." 97 So. 2d at 919 (quoting *Central Kentucky Natural Gas Co. v. Huls*, 241 SW. 2d 986, 987 (Ky. Ct. App. 1951)). Obviously, the brick entrance built by Mr. Seldon materially interferes with Mr. Gaw's free right to fully use the full forty feet of the easement.

Also the language in *Calvert*, suggests the Court should consider whether the brick entrance built by Mr. Seldon was necessary for the preservation and use of his property. 992 So. 29 at 634. Obviously, a brick wall, that could have been moved nine and one half feet to

accommodate the easement, is not necessary for the preservation and use of Mr. Seldon's property. Gates and fences have been allowed by the Court to remain standing to preserve the previous uses of the land by the owners, such as for raising cattle. *See Calvert*, 992 So. 2d 627; *Rowell*, 618 So. 2d 81. However, a brick wall serves no true purpose for Mr. Seldon. Mr. Seldon's brick wall is more closely related to the fence erected in *Green Acres Trust v. Wells*, where the Court of Appeals found that a fence must be removed where it served no real purpose or benefit to the servient tenement owner and was erected solely to annoy the dominant tenement owner, therefore creating a "spite fence." 2011 WL 590855, *2 (Miss. Ct. App. 2011). Testimony clearly showed that the easement's width and location was unambiguous, that Mr. Seldon knew or should have known of the easement, that Mr. Seldon interfered with Mr. Gaw's usage of the easement, and that Mr. Seldon's construction of the brick entrance on the easement was intentional and spiteful. (Trial Tr. 27-28, 37, 76-77, 126-27, 137.)

In *Tauscher v. Andruss*, the Oregon Supreme Court held that, if not inequitable to do so, an encroaching structure upon an easement should be ordered to be removed. 401 P. 2d at 42. In *Tauscher*, the parties were arguing over water frontage rights and the fact that the defendant's marina was expanded to encroach upon the plaintiff's property by 250 feet. *Id.* at 41-41. The Court stated that the law of easements was applicable, although the rights were incident to riparian ownership and not by grant, prescription, or implication. *Id.* at 42. The Court weighed the hardship of the defendant in removing the structure and the benefit to the plaintiff of having it removed. *Id.* The Court stated, "It is not enough for the defendants to show that their damage will outweigh the plaintiffs' benefit; they must go further and show that their damage would be great and the plaintiffs' benefit would be relatively small." *Id.*

In comparison to the case at hand, Mr. Seldon has clearly not shown that he would incur great damages by removing the brick wall. Mr. Seldon built the brick column in complete disregard of the easement and the rights of Mr. Gaw. Mr. Gaw testified that he had plans to build a barn and home on the property, requiring him to use the full forty feet of the easement in the future. (Trial Tr. 153.) Thus, any damage to Mr. Seldon would be a result of his own actions in disregarding the easement, and the damages would not substantially outweigh the benefit to Mr. Gaw of retaining the full forty feet of the easement for which he paid.

In *Williams v. Lantz*, the Nebraska Supreme Court held that "if by the terms of the grant or reservation the way must be of a certain width, no structures can be erected which encroach upon the width stated." 242 N.W. at 270. In *Williams*, a sorority built, over the objection of the adjoining owner, an areaway and stairway that encroached upon three feet of an easement for a driveway. *Id.* The Court stated that neither party had the right to encroach upon the easement and deprive either party of the full width created by contract. *Id.* The Court ordered the stairway removed from the sixteen foot easement. *Id.*

The Nebraska Court ordered the structure removed when it obstructed eighteen percent of the easement. *Id.* In comparison, Mr. Seldon's brick wall obstructs almost twenty-five percent (25%) of Mr. Gaw's easement, leaving this portion unusable. (Trial Tr. 22.) Mr. Gaw's forty foot easement was expressly granted to him. (Exhibit 6.) Thus, no one should be allowed to encroach upon the stated width. Also, a portion of Mr. Gaw's purchase price of this property was for the easement. Thus, the nine and one-half feet of the easement blocked by the brick entrance has value for which Mr. Gaw previously paid, and he should be compensated for that portion, if the brick entrance is allowed to remain.

This Court has stated,

> "The general rule is that a landowner is entitled to an injunction directing the removal of a trespassing structure on his land erected thereon by the owner of the adjoining land. The facts that the aggrieved owner suffers little or no damage from the trespass, that the wrongdoer acted in good faith and would be put to disproportionate expense by the removal of the trespassing structures, and that neighborly conduct as well as business judgment would require acceptance of compensation in money for the land appropriate, are ordinarily no reasons for denying an injunction."

Gulf Park Water Co., Inc., 530 So. 2d at 1334 (quoting *Turner v. Morris*, 196 Miss. 297, 17 So. 2d 205 (1944)). Although the case at hand is distinguishable since Mr. Gaw is not the landowner, but an easement owner, the analysis and law from *Gulf Park Water* should apply. A landowner is entitled to relief for an improper taking of his property. As such, Mr. Gaw, as the owner of an easement, who has given proper consideration and money for the easement, should also be awarded proper relief for the taking of his rights in the usage of his easement. Mr. Gaw should have been granted an injunction ordering the removal of the encroaching structure. To hold otherwise would be unjust.

B. Whether Mr. Gaw Presently Used the Full Forty Feet of the Easement Is Irrelevant.

The Chancellor found that Mr. Gaw could resume his action against Mr. Seldon once he showed that he needed usage of the full forty feet of the easement. (Opinion.) However, the chancellor erred in applying this standard because whether Mr. Gaw needed the full forty feet is not relevant since the easement to Mr. Gaw is an express grant and not one of necessity. An implied easement is created "if it is strictly necessary for the enjoyment of the property." *Fourth Davis Island Land Company v. Parker*, 469 So. 2d 516, 520 (Miss. 1985). Yet, Mr. Gaw purchased an express easement, unambiguously granting him forty feet on Mr. Seldon's property. (Exhibit 6.) The fact that Mr. Gaw wants to use the full forty (40) feet of his easement

is all that is required under the stated intent of the easement to extend Anderson Lane to Mr. Gaw's property. Mr. Gaw requires the full forty (40) feet to turn around his equipment.

The Court of Appeals has stated that the owner of a dominant tenement is limited to the width of an easement that is unambiguously granted to them, even if the width is insufficient for their intended purposes. *Tubb v. Monroe County Electric Power Association*, 912 So. 2d 192, 197 (Miss. Ct. App. 2005). In *Tubb*, the Court held that where a width is not expressly stated, the easement's width "will be held to be of such width as is suitable and convenient for the ordinary uses of free passage." *Id.* (quoting *Zettlemoyer v. Transcontinental Gaw Pipeline Corp.*, 540 Pa. 337, 657 A.2d 920, 924 (1995)). The analysis in *Tubb* shows that the owner of a dominant tenement cannot extend the width of an easement that's width is specifically stated. This reasoning also should be read to disallow the owner of a servient tenement to encroach upon and render useless a portion of an easement that's width is specifically stated. The owner of the servient tenement is not entitled to permanently keep the dominant tenement owner from using a portion of an easement whose width is unambiguous.

Other courts have clearly held that where an express easement's width is unambiguously stated, no structure may be placed on the easement that renders any portion of the easement useless. *See generally Williams*, 123 Neb. 67, 242 N.W. 269; *Tauscher*, 240 Or. 304, 401 P.2d 40. In *Williams*, the two parties entered into an agreement establishing an easement for a driveway. 242 N.W. at 270. One party encroached upon the easement by building a stairway. *Id.* However, the court stated that the stairway must be removed because no structure may be erected that would deprive either party of the full width of the easement stated in the agreement. *Id.*

In *Tauscher*, one party encroached upon an easement that's width was not specifically stated. 401 P.2d at 42. Once the court determined the boundaries of the easement, the court

reversed the trial court's opinion and ordered the encroaching structure to be removed, even though the dominant tenement owner did not currently need the piece of the easement encroached upon. *Id.* The court stated that "an easement owner has the right not only to be free from interference with his actual use, but also his possible prospective uses." *Id.* The court held that the dominant tenement owner did not have to show future uses of the easement that would be interfered with if the encroachment remained. *Id.* The court held that all that was necessary for a cause of action requiring the removal of the structure was that the dominant tenement owner show there had been an encroachment, nothing else. *Id.*

While the law established in *Williams* and *Tauscher* is not binding on this Court, their reasoning and analysis is sound and applicable to Mississippi. The chancellor's ruling would have Mr. Gaw filing additional litigation to request the court to deem use of the entire easement necessary and await a ruling by the court. This is overly burdensome on the court system and on Mr. Gaw. There is no reason he should have to come back to court and cause a delay in his usage of the easement once the remaining ten feet is needed. After all, he has plans to build a home and barn and will need the extra footage to maneuver equipment. He has paid for the right to use the full forty feet of his easement (Trial Tr. 126) and now has been denied use of said easement by John Seldon and the court. Thus, allowing the structure to remain and limit him to only thirty feet is unjust. The analysis in *Williams* and *Tauscher* should be adopted and used in this case to allow Mr. Gaw the opportunity to the full usage of his easement for any future purposes of ingress and egress.

The chancellor focused upon whether Mr. Gaw currently used the entire forty feet of the express easement. (Opinion.) However, the Connecticut Supreme Court stated a response to this issue best in saying:

> "A person who acquires title by deed to an easement appurtenant to land has the same right of property therein as he has in the land and it is no more necessary that he should make use of it [the easement] to maintain his title than it is that he should actually occupy or cultivate the land. Hence his title is not affected by nonuser, and unless there is shown against him ... lost of title in some of the way recognized by law, he may rely on the existence of his property with full assurance that when occasion arises for its use and enjoyment he will find his rights therein absolute and unimpaired."

Smith v. Muellner, 283 Conn. 510, 528, 932 A.2d 382, 395 (2007) (quoting *American Brass Co. v. Serra*, 104 Conn. 139, 145, 132 A. 565 (1926)). Testimony at trial clearly showed that any non-use of the easement by Mr. Gaw was the direct result of Mr. Seldon's actions and harassment. Mr. Seldon kept Mr. Gaw from using the easement to build a barn. (Trial Tr. 68-70.) Also due to Mr. Seldon, Mr. Gaw was unable to fix erosion problems on the easement. (Trial Tr. 76-77). Obviously, Mr. Gaw's use and enjoyment of the easement was continuously hampered by Mr. Seldon's unreasonable actions, threats, and calling of the sheriff's department. (Trial Tr. 27-28, 68-69, 76-77, 128, 136.)

C. The Encroachment Warrants the Award of Damages to Mr. Gaw.

As stated earlier, "damages may be recovered only where and to the extent that the evidence removes their quantum from the realm of speculation and conjecture and transports it through the twilight zone and into the daylight of reasonable certainty." *Kennedy*, 881 So. 2d at 347 (citing *Adams,* 744 So. 2d at 740). "In addition, damages are not recoverable where it is impossible to say what of any portion of the damages resulted from the fault of the plaintiff and what portion from the fault of the defendant themselves." *Id.* (citing *Ciba-Geigy Corp.*, 653 So. 2d at 869).

When dealing with an unjust taking, a party is entitled to compensation for the taken property, as well as for the damage done to the remainder of the property. *Fratesi,* 972 So. 2d at 43-44 (quoting *Miss. State Highway Comm'n v. Franklin County Timber Co.*, 488 So. 2d 782,

785 (Miss. 1986)). In *Fratesi*, the City of Indianola had a prescriptive easement for a road. *Id.* at 42. In maintenance of the road, the City widened a side ditch, which created a taking of Fratesi's property. *Id.* at 43. The chancellor found no damages were warranted but the Court of Appeals reversed. *Id.* at 44. The Court found that Fratesi was entitled to damages for the physical occupation of his property, if not further damages for the diminution of value to the remaining property. *Id.* at 44.

Also, Fratesi argued he should be awarded damages for mental distress in being cursed at by city employees. *Id.* The Court found Fratesi was not entitled to mental distress damages because the action by the city employees were not extreme or outrageous, nor were the emotional injuries foreseeable consequences of the city's actions. *Id.* In *Adams v. U.S. Homecrafters, Inc.*, the Court stated that a party may recover damages for mental anguish or distress, unaccompanied by physical or bodily harm, where the conduct is intentional or simply negligent, as long as the mental distress is reasonably foreseeable from the conduct. 744 So. 2d at 743; *see also Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290 (Miss. 1992); *Southwest Miss. Reg'l Med. Ctr. v. Lawrence*, 684 So. 2d 1257 (Miss. 1996).

The taking of Mr. Gaw's rights to his easement is comparable to the taking in *Fratesi*. While an implied easement or easement by prescription might not require compensation for an encroachment, an express easement where a dominant tenement owner has paid for the easement in purchasing his property should require compensation for a permanent encroachment. While the land on which the easement is located is not owned by Mr. Gaw, the land is subject to an easement which is owned by Mr. Gaw, and the easement is valuable, separate from the land. Mr. Gaw's rights to his easement have been altered and a portion, specifically nine and one-half feet, of the easement has been "taken" by Mr. Seldon's brick wall. Because of this obstruction, if the

wall is not ordered to be removed from the easement, Mr. Gaw is entitled to adequate compensation for the unjust taking of almost twenty-five percent (25%) of his easement.

In contrast to *Fratesi*, Mr. Gaw is entitled to damages for emotional distress. Mr. Seldon not only cursed Mr. Gaw and workers of Mr. Gaw's, but he also called the sheriff's department to visit Mr. Gaw or disrupt his work many times and threatened Mr. Gaw. (Trial Tr. 27-28, 76-77, 136.) Then, after dismissing Mr. Gaw's claim of an easement and the evidence of an easement, Mr. Seldon intentionally built a brick wall on nine and one-half feet of the easement. (Trial Tr. 114, 137) While mere cursing might not rise to foreseeable emotional damages or be extreme, threatening someone, continuously calling the sheriff's department and bothering someone, and then intentionally taking away someone's rights to a portion of their easement should cumulatively rise to extreme and outrageous conduct under the circumstances. In the least, Mr. Seldon's actions constitute negligence, for which damages are recoverable under *Adams*. Also, being harassed and threatened, having the police sent to your home on many occasions, and having a portion of your easement disrupted, can clearly be expected to lead to emotional distress and injuries and are thus foreseeable.

In *Kennedy v. Anderson*, the two parties fought over who should maintain the easement. 881 So. 2d 340. Evidence was presented that Mr. Kennedy had disrupted Mr. Anderson's use of the easement by digging holes and making the easement impassible. *Id.* at 344. Also, threats were made by each party, and Mr. Anderson poisoned Mr. Kennedy's cedar trees and made obscene gestures at Mr. Kennedy on several occasions. *Id.* No expert witnesses were called, and the only witnesses were the two parties and their spouses. *Id.* The Court found that no damages should be awarded to either party since the evidence was insufficient to determine who was

responsible for what damages and what value the possible damages might hold. *Id.* at 347. Also, the Court found attorney's fees should not be awarded to either party. *Id.* at 348.

In *Kennedy*, the Court focused on the value of damages and who was responsible for them, and found that too little evidence was presented on this issue to award damages. *Id.* at 347. The chancellor in the case at hand also focused on who was responsible for damages, and found that since both parties had caused harm, neither party was entitled to damages. (Opinion.) However, little to no evidence was presented at trial showing Mr. Gaw caused any harm to Mr. Seldon. The chancellor found that Mr. Gaw had removed more dirt from the road than was necessary to repair the easement. (Opinion.) However, at trial, no testimony was presented as to how much dirt was removed from the road, or the value of said dirt, but testimony did show that any dirt which was removed was only improving the road, not diminishing it. (Trial Tr. 78-80.) Admittedly, any dirt which was located on the road was owned by Mr. Seldon. However, Mr. Seldon was notified by Mr. Gaw through Mr. Gaw's attorney that he planned on making improvements to the easement, and Mr. Seldon had ample opportunity to direct Mr. Gaw as to the extent of improvements and where the dirt could be placed after removal. (Trial Tr. 108.) Furthermore, Mr. Gaw offered to return the dirt to Mr. Seldon, and said offer was refused. So, the chancellor erred in stating this as a reason for not awarding Mr. Gaw damages.

Also in contrast to *Kennedy*, Mr. Gaw presented evidence of the costs he incurred in having a survey completed because of Mr. Seldon's brick wall. (Trial Tr. 26.) Mr. Gaw hired a contractor to build a barn and obtained a permit for the work which was disrupted by Mr. Seldon. (Trial Tr. 68-70.) Mr. Gaw hired someone to bring and spread gravel on the easement and grade the easement to help with erosion and improve the easement. (Trial Tr. 75-80.) However, the work was disrupted and never completed because of Mr. Seldon. (Trial Tr. 76-77.) Unlike in

Kennedy where evidence was insufficient as to damages or their dollar amounts, more than enough evidence was presented by Mr. Gaw to show he was continuously damaged by Mr. Seldon, and specific dollar amounts were presented. Thus, the chancellor should have awarded Mr. Gaw damages based upon Mr. Seldon's interference. Also, the chancellor was presented with ample evidence to award attorney's fees, court costs, and punitive damages to Mr. Gaw since Mr. Seldon's actions were clearly intentional in disrupting Mr. Gaw and injuring him. *See Kennedy*, 881 So. 2d at 348 (stating attorney's fees may be awarded where punitive damages are proper).

II. THE CHANCELLOR WAS MANIFESTLY WRONG IN FINDING THAT MR. SELDON'S WASTE WATER DID NOT CONSTITUTE A NUISANCE OR TRESPASS WARRANTING DAMAGES.

"This Court has held in several cases that an oil drilling contractor or the owner of a mineral estate is liable for permitting waste to flow upon the lands of another upon the theory of nuisance." *Blue v. Charles F. Hayes & Associates, Inc.*, 215 So. 2d 426, 429 (Miss. 1968) (citing *Love Petroleum Co.*, 205 So. 2d 274; *Central Oil Co. v. Shows*, 149 So. 2d 306 (1963)). An oil company can also be guilty of negligence and owe damages in the construction and maintenance of their slush pits. *Id.* (citing *Dapsco, Inc. v. Reynolds*, 254 Miss. 111, 180 So. 2d 319 (1965); *Jett Drilling Co. v. Jones*, 251 Miss. 332, 169 So. 2d 463 (1964)). The Court "shall not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous, or there was an application by the chancellor of an erroneous legal standard." *Kennedy*, 881 So. 2d at 345 (quoting *Buford*, 832 So. 2d at 600).

A landowner burdened by a nuisance created by salt water or oil flowing onto his property is entitled to at least nominal damages and any special damages he suffers as a direct result of the nuisance. *Love Petroleum Company*, 205 So. 2d at 275. A defendant should be held

strictly liable for damages caused by his created nuisance. *See Town of Fulton*, 274 So. 2d 129; *City of Jackson*, 624 F.2d at 1389. Also to recover under the theory of nuisance, no form of negligence has to be proven. *City of Jackson*, 624 F.2d at 1391 (stating the city did not need to prove any form of negligence on the part of Filtrol in order to show that Filtrol was responsible for the acid that escaped onto the city's property and to recover damages under a theory of strict liability for the created nuisance).

In *Town of Fulton v. Mize*, sewage escaped from the town's sewage lines during a malfunction and flowed into Mize's pasture, where it contaminated his ground and poisoned his cattle. 274 So. 2d at 130. A verdict was rendered in favor of the plaintiff. *Id.* The Court held that any allegation of the town's negligence was mere surplusage because negligence is not an element of liability for a nuisance. *Id.* The Court held that evidence was presented that Fulton was responsible for the sewage which flowed onto Mize's land and was consumed by his cattle. *Id.* at 131. Thus, the Court held that Mize had a case of absolute liability against Fulton. *Id.*

In *Love Petroleum Company v. Jones*, a company's well, which contained oil and salt water from an oil operation, leaked into a nearby creek. 205 So. 2d at 274-75. The creek flowed through Jones's property and caused trees to die along the bank of the creek. *Id.* The Court held that Love Petroleum created a nuisance upon Jones's land, for which he was entitled to at least nominal damages. *Id.* at 275. The Court further stated that he was "entitled to the difference between the rental value of the property before the nuisance and the rental value of the land after the creation of the nuisance" and "such other special damages as may accrue to him as a direct result of the nuisance." *Id.* Similarly, in *Blue v. Charles F. Hayes & Associates*, the plaintiff alleged oil and salt water had escaped the defendant's well and had covered portions of his pasture. 215 So. 2d at 428. The Court held these allegations did state a claim to be litigated and

that the plaintiff could recover damages under the theory of nuisance for the leaked oil and water and under the theory of negligence in the construction and function of the well. *Id.* at 429.

Mr. Gaw's situation and issue is very similar to the cases discussed above. Mr. Seldon's waste water system malfunctioned and allowed untreated waste water to flow onto and accumulate on Mr. Gaw's pasture and farm. (Trial Tr. 43, 158-59.) The Marshall County Health Department directed Mr. Seldon to fix his system within thirty days of July 8, 2009. (Trial Tr. 44.) However, Mr. Seldon did not fix his system until December 29, 2009, after the Health Department filed suit against him in justice court. (Trial Tr. 46-47.) Thus, Mr. Seldon, a state licensed wastewater installer, knowingly allowed his untreated waste water to flow upon Mr. Gaw's property for over six months before fixing the wastewater problem. Mr. Seldon made no attempts to mitigate the damage to Mr. Gaw during this time period or to redirect the flow of his untreated wastewater. Mr. Seldon is a certified wastewater installer and would therefore certainly have the means and ability to correct his wastewater system and clearly understood the ramifications of non-compliance with state law.

Mr. Seldon admitted that he knew there was a problem with his system before he ever received the initial complaint from the Health Department, but he stated that he never tried to determine where the water was flowing since it was not on his property. (Trial Tr. 123-24.) Mr. Seldon stated that he had made plans to repair the wastewater system before he ever received the initial complaint, but he said that he never began work on the project. (Trial Tr. 123.) Later, he tried to say that he never repaired the system in the fall of 2009 because of rainy conditions. (Trial Tr. 121.) However, again, he admitted to knowing the system was malfunctioning for some time before a complaint was ever initiated. (Trial Tr. 123.)

Mr. Gaw discovered the problem when trying to bail his hay on the land, when he almost sunk his tractor in the sewage accumulation. (Trial Tr. 135.) Admittedly, there was water draining onto Mr. Gaw's property from another neighbor, as well, but Mr. Gaw stated that her water was draining onto a different portion of his property and that the main problem came from Mr. Seldon's water. (Trial Tr. 44, 159.) Also, the other neighbor's water problem was fixed in a timely manner, unlike Mr. Seldon's. (Trial Tr. 46.) Mr. Gaw stated that he often smelled the sewage on his property, and the Health Department admitted that the water could have posed a safety hazard. (Trial Tr. 49, 142.)

Under the analysis in each of the cases discussed above, Mr. Seldon's untreated waste water which flowed onto Mr. Gaw's property clearly created a nuisance on Mr. Gaw's property. Obviously, Mr. Seldon was negligent in knowingly allowing his septic tank to remain unrepaired for a long period of time. Mr. Seldon is a professional licensed septic tank installer licensed by the State of Mississippi and had the knowledge and skills to know something was wrong with the system and to timely fix the issue. (Trial Tr. 122.). Thus, Mr. Gaw is entitled to damages arising from Mr. Seldon's negligence, as referenced in *Blue*. However, even if the Court finds Mr. Seldon was not negligent, Mr. Seldon is strictly liable for his untreated sewage flowing onto Mr. Gaw's property, and Mr. Gaw is entitled to nominal and special damages as a result.

Mr. Gaw's property was affected by the sewage for quite some time, causing a portion of his hay field to be unusable during the entire growing season of 2009. (Trial Tr. 158.) Also, Mr. Gaw was inconvenienced by the sewage and bothered in his home, as he could clearly smell the sewage. (Trial Tr. 135, 142, 158.) and was financially harmed. Mr. Gaw should be awarded damages for the temporary taking of his property and special damages for the cost of his uncut hay and loss of the quiet enjoyment of his home and property due to the smell during this time.

III. THE CHANCELLOR WAS MANIFESTLY WRONG IN ADMITTING EVIDENCE AND TESTIMONY AT THE HEARING THAT WAS NOT PROVIDED DURING DISCOVERY.

Excluding evidence or testimony "for a discovery violation is an extreme measure, and lower courts should exercise caution before doing so, because our courts are 'courts of justice [and] not of form.'" *Bolden v. Williams*, 17 So. 3d 1069, 1072 (Miss. 2009) (quoting *Caracci v. Int'l Paper Co.*, 699 So. 2d 546, 556 (Miss. 1997)). Once a court knows of a discovery violation, the court has the discretion to "admit the evidence, grant a continuance, or 'enter such an order as it deems just under the circumstances.'" *Williams v. State*, 2011 WL 322407, *2 (quoting *Morris v. State*, 927 So. 2d 744, 747 (Miss. 2006)). Since a trial court is granted considerable discretion in making discovery rulings, in reviewing the admittance or exclusion of evidence, the Court must decide whether the trial court abused its discretion. *Bolden*, 17 So. 3d at 1072.

While excluding evidence is an extreme measure which is discouraged, the Court has stated that "if the trial court determines that the defendant's discovery violation is 'willful and motivated by a desire to obtain a tactical advantage," the newly discovered evidence or witnesses may be excluded. *Williams*, 2011 WL 322407, *2 (quoting *Darby*, 538 So. 2d at 1176). In the present case, Mr. Seldon's attorney did not produce a single piece of evidence during discovery, or answer any discovery requests. (Trial Tr. 10.) The discovery requests were clearly intentionally disregarded, and the unanswered discovery resulted in the defense having an incredibly large tactical advantage at trial, since the plaintiff was unaware that John Seldon was an indispensible party or had a power of attorney over the land, or the basis of the defendant's allegation that the plaintiff interfered with defendant's ownership of his property. (Trial Tr. 9-11.) As such, the Chancellor abused his discretion in allowing John Seldon to testify and by

allowing any testimony regarding the removal of the dirt or by considering same in rendering his Opinion.

Also, the Chancellor abused his discretion in allowing a witness to be questioned about and discuss a previously undisclosed land survey. (Trial Tr. 32-33.) However, not only was the survey undisclosed, but every bit of evidence presented by the defense was undisclosed to plaintiff's counsel until it was heard for the first time during questioning. Since the discovery requests were obviously intentionally unanswered, despite having ample time in which to respond due to two (2) continuances granted to defendant, and they led to the defense having a distinct advantage at trial, the Chancellor should not have allowed the defense's evidence to be presented.

CONCLUSION

The brick structure built by John Seldon unreasonably encroaches upon twenty-five percent (25%) of the forty foot easement owned by Mr. Gaw. Mr. Seldon intentionally placed the brick wall on the easement to annoy and hinder Mr. Gaw. The brick wall is not necessary for the preservation of Seldon's property, and as it creates a nuisance and hindrance to Mr. Gaw, an injunction should have been granted ordering its removal. The easement contains an express, unambiguous width, and as such, no one can encroach upon the easement and disrupt the current or possible future uses of the easement. The brick structure should be ordered to be removed from the easement, or Mr. Gaw should be reasonably compensated for the taking of twenty-five percent of his easement. Mr. Gaw should not be forced to come back to court at a future date to make a claim that he needs the extra ten feet of the easement which is being encroached upon. Such an order would be unduly burdensome on Mr. Gaw and the courts.

The brick structure constitutes an unjust taking of Mr. Gaw's property, where compensation or removal is warranted. The conflict between Mr. Gaw and Mr. Seldon was in no way attributable to Mr. Gaw, and the chancellor erred in finding otherwise. Mr. Gaw established the foundation to recover damages for Mr. Seldon's actions in forcing Mr. Gaw to hire a surveyor twice, for not allowing Mr. Gaw's work by his contractor to be finished in graveling and grading the easement, and for disrupting Mr. Gaw's plans to build a barn. Also, Mr. Gaw established the necessary facts to recover damages for mental and emotional distress due to Mr. Seldon's intentional or, in the least, negligent acts by Mr. Seldon threatening Mr. Gaw, calling the police on multiple occasions, and taking Mr. Gaw's rights to portions of the easement. As Mr. Seldon's acts were intentional, punitive damages and attorney's fees should also be proper.

Mr. Seldon should be held strictly liable for the damages caused by his untreated waste water which accumulated on Mr. Gaw's property. It is undisputed that the water flowed uninterrupted for over six months on Mr. Gaw's property, from the time Mr. Gaw became aware of the waste water flowage until eventually corrected by Mr. Seldon, and interrupted and interfered with his enjoyment and usage of his property. Thus, Mr. Seldon should be held liable for the specific damages of Mr. Gaw's lost hay from the drowned portion of the field and the loss of the quiet enjoyment of his home from the smell of the sewage, for nominal damages in temporarily taking this portion of Mr. Gaw's property, and for the negligence of Mr. Seldon in not having fixed the system timely.

Also, the Chancellor erred in allowing Mr. Seldon's attorney to question witnesses about evidence not disclosed in discovery. Mr. Seldon's attorney did not answer properly and timely propounded discovery requests or provide a single shred of evidence during discovery. Mr. Gaw's attorney heard every piece of evidence for the first time, including the fact that John

Seldon was essentially an indispensable party, the day of the hearing during testimony. Mr. Seldon's attorney's lack of response clearly gave the defense a tactical advantage and was done maliciously and intentionally. Thus, the Chancellor should have struck the questioning and admittance of their evidence.

Respectfully,

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CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

This will certify that I, JENNIFER L. SHACKELFORD, attorney of record for Appellant Daniel A. Gaw, have this day filed the original Brief of Appellant Daniel A. Gaw and three (3) copies thereof, by placing the original brief and copies in the United States Mail, first class, postage prepaid, addressed to Kathy Gillis, Clerk, Supreme Court of Mississippi and Court of Appeals of the State of Mississippi, at her customary and usual mailing address of Post Office Box 249, Jackson, Mississippi 39205-0249.

I further certify that I have this day served by United States Mail, first class, postage pre-paid, a true and correct copy of the Brief of the Appellant to the following:

1. Chancellor Edwin H. Roberts, Jr.

   Post Office Drawer 49

   Oxford, MS 38655

2. Neal Labovitz, Esq.

   Attorney for Appellee

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   1625 Main St., Suite B

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SO CERTIFIED, this the 26th day of May, 2011.

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