

**NEWSLETTER OF THE REAL PROPERTY SECTION
OF THE MISSISSIPPI BAR**

JANUARY 2012

2011 – 2012 REAL PROPERTY SECTION OFFICERS

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SECTION TELECONFERENCE ON KINWOOD CASE

The Real Property Section and the Business Law Section will be holding a teleconference on the recent case of *Northlake Development, L.L.C. v. BankPlus*, 60 So. 3d 792 (Miss. 2011). In this case the Mississippi Supreme Court held that a deed of trust was void because the deed into the grantor of the deed of trust had been conveyed in violation of a restriction in a remote vendor's unrecorded LLC operating agreement. The panelists will be Bridgforth Rutledge and Matt Grenfell. The panelists will discuss the facts of this case, the Mississippi statute on which the case turned, how title insurance companies are responding to this case, steps that attorneys representing owners and lenders can take to protect their clients, and whether legislative action is warranted. The teleconference will begin at noon on **Wednesday, January 18** and will last approximately one hour. The conference has been approved for one hour of CLE credit. The teleconference is free of charge to members of the Real Property and Business Law Sections. A flyer with more information is attached to this Newsletter.

MESSAGE FROM THE CHAIR

It is a real pleasure to chair the Real Property Section of our Bar. I would first like to thank Rod Clement, who continues to update us with real estate law cases and developments. He volunteers his time and considerable experience – be sure to thank him when you see him!

There are currently 8,709 active Mississippi Bar members – 4068 of those members belong to one or more of our sections. We have the 2nd largest section with 468 members. (Litigation has the most members with 902).

One of our biggest successes has been the 1 hour CLE that Don Odgen implemented last year. Please be sure to sign up for the upcoming “Lunch and Learn CLE” on the Kinwood case offered by our Section (free to members) on January 18th (more details above.) We have two more 1 hour CLEs coming up in the future – we are paring up with SONREEL in late February, and in March or April with Trust & Estates. Be sure to take advantage of these great learning sessions and free credits!

We could not offer Section services without members’ participation and time. Please consider helping our section by taking part in one of the following committees:

- Committee to prepare for the 2012 Bar Convention (2 hour CLE program). Need ideas for subjects and speakers (ideas: IRS Section 1031 Tax Exchanges; Landlocked parcels and easements – How to get access)
- Scholarship Committee (for MC and Ole Miss law students – we have previously given \$1000 scholarships to each school yearly)
- Committee to adopt charitable and promote *pro bono* project(s) – ie, Habitat for Humanity, homes through the Wounded Warrior foundation, Ronald McDonald House, etc.

Please email me directly at juliewbrown@msn.com to volunteer or present ideas! It is my honor to serve as the chair of your section – let’s work together to learn from another and increase our knowledge to better serve our clients.

Julie W. Brown, Chair

NEW CASES

Removal of Spite Fences

Green Acres Trust v. Wells, 72 So. 3d 1123 (Miss. App. 2011). Dan and Ann Wells bought land in Oktibbeha County. The only access to the land was an easement over land owned by Green Acres, a trust of which the Bazzills were the beneficiaries. Relations between the Welles and the Bazzills became hostile. The Bazzills built a fourteen-foot tall wire mesh fence with green slats that blocked the Welles’ view of a lake. The only gap in the fence gave a view of a septic tank on the Bazzills’ property. The Welles filed a petition in Oktibbeha County Chancery Court against the Bazzills seeking injunctive relief and damages. The chancellor determined that the fence was a “spite fence,” and in absence of any Mississippi law on this subject, relied on a treatise, *Powell on Real Property*, which defines a spite fence as “... a structure of no beneficial use to the erecting owner or occupant of the premises, but erected or maintained by him solely for the purpose of annoying the owner or occupier of the adjoining property.” The chancellor, further relying on the Powell treatise, noted that if the fence serves a useful purpose, the motive for building the fence is immaterial. The chancellor determined that the fence served no purpose other than to limit contact with the Wellses. The chancellor ordered the fence removed. On appeal the Mississippi Court of Appeals, in an *en banc* decision by Justice Lee, affirmed. The Bazzills argued that Dan Wells threatened and taunted Ray Bazzill, and that these threats

justified building the fence. The Court of Appeals, in an opinion by Justice Lee joined by four justices, found that the evidence of taunts and threats was insufficient, and affirmed the chancellor's order that the Bazzills remove the fence.

Note 1: Justice Griffis dissented in an opinion joined by four other justices. He wrote that he could not join in the majority opinion because it granted relief "for a claim or cause of action that has no authority or precedent under Mississippi jurisprudence. The question, according to Justice Griffis, was whether the fence was a private nuisance. Justice Griffis quoted the definition of a private nuisance from *Leaf River Forest Products, Inc. v. Ferguson*, 662 So. 2d 648, 662 (Miss. 1995):

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Justice Griffis wrote that whether one used the test for spite fences used by the chancellor, or the test for private nuisances, the conclusion should be the same: the facts did not support the chancellor's order to remove the fence. The record showed that Dan Wells had repeatedly threatened the elderly Ray Bazzill. Among other things, Wells threatened to burn down Ray Bazzill's house, threatened to throw Bazzill in a sewage lagoon, told Bazzill to "watch his back", threatened to shoot Bazzill, and repeatedly screamed profanities at Bazzill. While the fence was being constructed, Dan Wells told Ray Bazzill that he'd better "build a real tall fence." The evidence showed that Dan Wells had been taking prescription drugs, and that he was acting "berserk" as a result of the medication. Justice Griffis wrote that under these circumstances, constructing the fence served a useful purpose, and thus was reasonable and not a nuisance.

Note 2: So we have five justices who have joined in an opinion to affirm, and five justices who dissent, a five-to-five split. The result is that the lower court's decision is affirmed. What is the precedential value of this decision? Perhaps one could say that all of the judges would agree that a fence built with the sole intent of annoying a neighbor could be removed whether the fence was a spite fence or a private nuisance.

Note 3: Municipal ordinances limiting the height and composition will prevent the construction of a "spite fence" in cases.

Note 4: The editor feels a little uneasy about a holding that one constructing a fence on his own land, for whatever reason but not in violation of any laws or contractual rights (for example, a view easement), could be required by a court to remove the fence at the behest of a neighbor. What about an alternative rationale, that a really tall fence like the one built by the Bazzills is a nuisance because it interferes with the adjoining neighbor's easement of light and air that other states recognize? But as far as the editor has been able to tell, the jurisprudence in Mississippi regarding the existence of an easement of air and light is limited to what may be Mississippi's first nuisance case, *Gwin v. Melmoth*, 1 Freeman Chancery 505 (Miss. 1842), and that case only

suggests that an obligation may exist not to block a neighbor's air and light, not an affirmative easement for air and light. In this case the court declined to enjoin the construction of a house right next to the plaintiff's house. The court stated, "It is true that a party has no right to build a house so near his neighbor as to immediately obstruct the passage of either light or air, but the mere tendency to obstruct the free passage of one or the other has never been considered sufficient to warrant the restraining process of a court of equity."

Upcoming Effective Date for New ADA Standards

On September 15, 2010, the US Department of Justice issued new guidelines for implementing the Americans with Disabilities Act. A copy of the new standards, all 250 pages, can be downloaded from the ADA homepage, www.ada.gov/2010ADASTandards_index.htm, A summary of the changes is at www.ada.gov/regs2010/factsheets/2010_Standards_factsheet.html. The changes become effective on March 15, 2012. Federal regulations state that both landlords and tenants are responsible for compliance, although they can allocate responsibility for compliance between themselves in the lease. 28 CFR § 36.201(b).

Does Landlord have Duty to Warn of "Atmosphere of Violence" Around Property?

InTown Lessee Associates, LLC v. Howard, 67 So. 3d 711 (Miss. 2011). Howard and Poole were guests at InTown Suites, an extended stay motel near Interstate 55 in Jackson. On June 27, 2008, three men burst through their door and assaulted and robbed Howard and Poole. Howard and Poole brought an action in Hinds County Circuit Court against InTown, alleging negligence and asserting that InTown had a duty to warn Howard and Poole that "an atmosphere of violence existed on and around the property, had failed to warn Howard and Poole of the atmosphere of violence that existed on and around the property, had failed to provide notice of the prior crimes occurring on and around the property, and had failed to warn the plaintiffs of the previous assaults and robberies occurring on and around the property." (quoting from the published opinion). Evidence at the trial showed that there had been numerous crimes at and around the property, that police had advised the manager to hire security, and that the manager had requested that InTown hire a security guard and was told that money was not available for a security guard. One of the jury instructions stated that the jury could find against InTown if the jury found that InTown had failed "to warn Michael Keith Howard and Shannon Poole of the existence of a known dangerous condition." The jury awarded \$2 million each to Howard and Poole. On appeal, InTown argued, among other things, that this jury instruction improperly permitted the jury to find InTown liable if the jury believed the plaintiff's "novel theory" that InTown had breached a duty to warn the plaintiffs of the "atmosphere of violence" around the property. The Mississippi Supreme Court, in a unanimous en banc decision by Justice Kitchens, held that since InTown had not objected to this jury instruction, InTown could not raise this issue on appeal. The Court affirmed the jury's verdict in favor of the plaintiffs.

Note 1: The claim that the owner has a duty to warn of an "atmosphere of violence" caught the editor's eye. Under existing law, a business owner has a duty to keep its premises in a reasonably safe condition, including the duty to warn of dangerous conditions not readily apparent which the

owner knew, or should have known, in the exercise of reasonable care. *See Pigg v. Express Hotel Partners, LLC*, 991 So. 2d 1197, 1200 (Miss. 2008). The editor's quick review of premises liability cases seem to limit this duty to physical defects in the premises, such as door locks that do not work, a loose mirror that shatters, and the infamous banana peel on the grocery store floor. A duty to warn of an "atmosphere of violence" seems to suggest a duty beyond these prior cases. Since this aspect of the case was decided on a procedural rather than a substantive basis, this case does not establish that the owner has such a duty. But given the fact that this substantial jury verdict was affirmed, and that the court did not say that this duty does not exist, we can expect to see the claim of the existence of such a duty in future premises liability cases.

Note 2: As a practical matter, how would an owner of this motel warn prospective guests that an "atmosphere of violence" exists around the property? Post a sign in the lobby?

Note 3: If a duty exists to warn of an "atmosphere of violence" exists, nothing in the discussion of this case would appear to limit the duty to owners of extended stay motels. Arguably this duty would apply to owners of apartments, restaurants and shopping centers as well.

Liquidated Damages Clause in Lease Not Enforceable

In re Premier Entertainment Biloxi, 413 B.R. 370 (Bankr. S.D. Miss. 2009). On August 1, 2005, the owner of land in Biloxi entered into a lease for thirty-six months. The tenant, the owner of the Hard Rock Café casino, intended to use the land for offsite employee parking. The lease provided in relevant part:

tenant also agrees that should such default occur during the first thirty six (36) months of the initial Term, Tenant agrees to pay the remaining unpaid balance of the Lease Agreement as in for [sic] liquidated damages. Any liquidated damages amount that remains unpaid thirty (30) days following the written notice of termination shall bear interest at a rate of twelve percent (12%) per year compounded daily from the date of the written notice of termination until the date of collection, and Tenants [sic] shall bear all reasonable costs, including but not limited to legal fees, involved in such collection.

After Hurricane Katrina struck the Coast on August 29, 2005, the tenant failed to pay the rent, and the landlord terminated the lease and then filed bankruptcy. The landlord filed a proof of claim for the liquidated damages. The United States Bankruptcy Court for the Southern District of Mississippi held that the clause was unenforceable. The Bankruptcy Court quoted a Fifth Circuit case which stated that in Mississippi, liquidated damages clauses are deemed to be unenforceable penalties when the actual damages resulting from the breach can be easily ascertained. The Bankruptcy Court held that under Mississippi law, the landlord's damages from the termination of the lease were easily ascertainable by multiplying the monthly payment by the number of months left on the lease. Since the landlord's actual damages were readily ascertainable, the liquidated damages clause in the lease was unenforceable.

Note 1: This is a small slice of a much larger and complicated case arising out of the Hard Rock Café's bankruptcy after Hurricane Katrina. According to the case, the hotel was scheduled to open

two days after the hurricane hit Biloxi. Those who want to learn more about this case can read the Bankruptcy Court's decision in 445 B.R. 582 (Bankr. S. D. Miss. 2010).

Note 2: While it's a stretch to call a case decided in 2009 a "new case," the editor thought it was worthy of note because, as far as the editor can tell, this is the only case in Mississippi that addresses liquidated damages in a true lease. The Mississippi Court of Appeals held that a liquidated damages provision in a lease was unenforceable as penalty in *Thomas v. Scarborough*, 977 So. 2d 393 (Miss. Ct. App. 2007). But that case involved a lease-purchase agreement, and the owner/landlord was claiming all of the purchaser/lessee's equity credit as liquidated damages, so it was not a typical lease.

Note 3: The landlord argued that since its damages were valid "liquidated damages," they were not "rent", and therefore were not subject to the statutory cap on rent in Section 502(b) of the Bankruptcy Code. Even if the liquidated damages provision had been enforceable, the Bankruptcy Court stated that the rent would have been subject to the cap. According to the tenant/debtor's calculations, the landlord's claim of \$136,429.40 would have been capped at \$48,000.

GENERAL

This Newsletter is a publication of the Real Property Section of The Mississippi Bar for the benefit of the Section's members. Members are welcomed and encouraged to send their corrections, comments, articles or news to the editor, Rod Clement, by mail to 188 East Capitol Street, Suite 400, Jackson, Mississippi 39201, or by email to rclement@babar.com. Although an earnest effort has been made to ensure the accuracy of the matters contained herein, no representation or warranty is made that the contents are comprehensive or without error. Summaries of cases or statutes are intended only to bring current issues to the attention of the Section's members for their further study and are not intended to and should not be relied upon by readers as authority for their own or their clients' legal matters; rather, readers should review the full text of the cases or statutes referred to herein before relying on these cases or statutes in their own matters or in advising clients. All commentary reflects only the personal opinion of the editor and does not represent a position of the Real Property Section, The Mississippi Bar or the editor's law firm.

BUSINESS LAW AND REAL PROPERTY SECTIONS JOINT CLE TELESEMINAR

As added value to your membership in the Business Law and Real Property Sections, the officers are offering the following teleseminar to Section members free of charge.

Kinwood: Off-Record Land Mine or One-Off Quirk?

The Real Property Section and the Business Law Section of The Mississippi Bar will present a teleconference CLE seminar on January 18, 2012, addressing a recent case, Northlake Development, L.L.C. v. BankPlus, 60 So. 3d 792 (Miss. 2011). In this case, the Mississippi Supreme Court held that a deed of trust was void because the deed into the grantor had been conveyed in violation of a restriction in the unrecorded operating agreement of a limited liability company that was a prior record owner of the property. The panelists will discuss the facts of this case, the Mississippi statute on which the case turned, how title insurance companies are responding to this case, steps that attorneys representing owners and lenders can take to protect their clients, and whether legislative action is warranted. The panelists are Bridgforth Rutledge of Phelps Dunbar LLP, and Matt Grenfell of Butler, Snow, O'Mara, Stevens & Cannada PLLC.

Location: Your office or home telephone

Date: Wednesday, January 18, 2012

Call-in Time: 11:45 am

Cost: FREE of charge to Business Law and Real Property Sections members

CLE Hours: One (1) hour of CLE credit has been approved by the Mississippi Commission on CLE

Call-In Info: The day prior to the teleseminar, you will receive by email the written materials and the call-in information.

Registration: All registrations must be received two days prior to the teleseminar.

For additional information contact René Garner at 601-355-9226 or rgarner@msbar.org

Kinwood: Off-Record Land Mine or One-Off Quirk?

Circle the Section of which you are a member. Business Law Real Property

Name: _____ Bar #: _____

Firm/City: _____

Phone: _____

Email (required to register): _____

Please send this form to Rene' Garner at The Mississippi Bar by email at rgarner@msbar.org or fax to 888-497-8305.