IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARY GRIFFIN STONE — APPELLANT

VS. — NO. 2007-CA-01168

LEA BRENT FAMILY INVESTMENTS, L.P.,
a Mississippi Limited Partnership — APPELLEE

APPEAL FROM THE CHANCERY COURT
OF
WASHINGTON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

Submitted by:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for the Appellee, Lea Brent Family Investments, L.P., a Mississippi Limited Partnership, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the court may evaluate possible disqualifications or recusal. The persons are:

1. Mary Ann Griffin Stone - Appellant
   196 N. Lake Ferguson Road
   Greenville, MS 38703

2. Clifford Stone – husband of Appellant
   196 N. Lake Ferguson Road
   Greenville, MS 38703

3. Lea Brent Family Investments, L.P. - Appellee
   210 Highway 1 North
   Greenville, MS 38703

4. Collins Brent – General Partner in Lea Brent Inv., L.P.
   1160 V F W Road
   Greenville, MS 38701

5. Nathan P. Adams, Jr.
Mansour & Adams
143 North Edison
Greenville, MS 38701

Attorney for Appellee

6. John J. Crow, Jr.
203 Wagner Street
Water Valley, MS 38965

Attorney for Appellant

7. Honorable Marie Wilson
Chancery Court Judge
P. O. Box 1762
Greenville, MS 38702-1762

This 13th day of May, 2008.

Nathan P. Adams

NATHAN P. ADAMS, JR.

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STATEMENT OF THE ISSUES

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1. The Chancellor did not impose a higher burden of proof as to notice of adverse possession upon Mrs. Stone and correctly imposed ordinary standards of proof with regard to adverse possession. The Chancellor was correct in finding that Mrs. Stone had not satisfied the statutory period of adverse possession for ten years required for adverse possession to mature.

2. The Chancellor correctly held that Lea Brent Family Investments, L.P. had not abandoned the easement across the north side of Mrs. Stone's property and correctly held that Lea Brent Family Investments, L.P. was entitled to ingress and egress the road across the north end of the Stone property.

STATEMENT OF THE CASE

Lea Bent Family Investments, L.P., a Mississippi Limited Partnership, filed a Complaint in the Chancery Court of Washington County, Mississippi on February 17, 2006 seeking a permanent injunction prohibiting Appellant, Mary Ann Griffin Stone, from blocking a road for ingress and egress to Brent land, compelling her to remove certain obstructions from the easement, and to restore to Brent rights of ingress and egress over and across the road and easement as it had existed previously across a 3.08 acre tract of land, the property of Mary Ann Griffin Stone, and for other relief. Defendant filed an Answer and Affirmative Defenses on March 22, 2006 and claimed that she had adversely possessed the Brent easement and, in consequence, it was extinguished and further that Brent had abandoned the easement. The Chancery Court of Washington County found Appellant had not proven the elements of adverse possession, the easement was not extinguished nor had it been abandoned, and issued an injunction. The Defendant and Appellant here, Mary Ann Griffin Stone, appeals the decision of the Chancery Court of Washington County, Mississippi.

STATEMENT OF FACTS

The Brent chain of title to the easement consists of six (6) instruments which have been recorded with the Chancery Clerk of Washington County, Mississippi

and were received into evidence at trial. The chain of title reveals the following documents entered as exhibits:

1. Deed from P. B. Griffin, Jr. and wife, Ruth D. Griffin, Jamie W. Griffin, a single man, and Mary Etta Griffin, a widow, to M. E. Tate and wife, Duane Garrett Tate, Clifford A. Tate, Jr. and wife, Nancy DeLoach Tate, and Rex Livingston and wife, Nell Tate Livingston dated December 1, 1962 and recorded in Book 864 at Page 32, conveys farm acreage on lake, but reserves to the grantors 3.08 acres of land with the proviso that grantees Tate has ingress and egress over and across the North end of the 3.08 acres so as to reach other land conveyed to the Tates in the deed. Plaintiff's Exhibit 1, T. R. 6.

2. Partition Deed from C. A. Tate, Jr. and wife, Nancy DeLoach Tate, M. E. Tate and wife, Duane Garrett Tate, and Rex Livingston and wife, Nell Tate Livingston dated December 31, 1970 and recorded in Book 1230 at Page 627. Plaintiff's Exhibit 2, T. R. 6.

3. Warranty Deed from Nancy DeLoach Tate, a widow, and Joe F. Miller and Cooper Joe DeLoach, as Trustees of the Clifford A. Tate, III Trust, Gaila Tate McCaskill Trust, Robert Joe M. Tate Trust and Trudy L. Tate Trust, to Lea Brent dated March 12, 1984 and recorded in Book 1522 at Page 535. Plaintiff's Exhibit 3, T. R. 6 (Plaintiff's Exhibit 4 relates to other land of the Plaintiff and not to the particular 3.08 acre tract involved). T. R. 7

4. Warranty Deed from Edwin Lea Brent to W. Ashley Hines and Jeff R. Tarver, Trustees of the Edwin Lea Brent Insurance Trust dated March 24, 1993 and recorded in Book 1788 at Page 521. Plaintiff's Exhibit 5, T. R. 7

5. Certificate of Trust from Edwin Lea Brent to W. Ashley Hines and Jeff R. Tarver, Trustees of Edwin Lea Brent Insurance Trust dated July 20, 1996 and recorded in Book 1923 at Page 620. Plaintiff's Exhibit 6, T. R. 7

6. Special Warranty Deed from W. Ashley Hines and Jeff Tarver, Trustees of the Edwin Lea Brent Insurance Trust, to Lea Brent

Family Investments, L.P. dated October 24. 1996 and recorded in Book 1942, Page 404 – 80 acres. Plaintiff's Exhibit 7, T.R. 8

Each of the above conveyances specifically including the P. B. Griffin, Jr., et al., Deed to Nancy DeLoach Tate, et al., Book 864, Page 32, Plaintiff's Exhibit 1, contain the following language:

> "LESS AND EXCEPTING, however, a 3.08 acre-tract of land reserved by Grantors, P. B. Griffin, Jr., Jamie W. Griffin, and Mary Etta Griffin, situated in the Southwest Quarter of Section 14, Township 19 North, Range 9 West, more particularly described as follows, to-wit:
>
> > Commencing at the center of Section 14, Township 19 North, Range 9 West, thence South 89 degrees 37 minutes West 1,324.0 feet; thence South 1,794.0 feet to the center of an old levee; thence along the center of said old levee South 70 degrees 03 minutes West 234.04 feet to an iron pipe at the Northwest corner of the Brent lot and the point of beginning on the tract herein described; thence South 407.96 feet to an iron pipe on the High Bank of Lake Ferguson; thence along the High Bank of Lake Ferguson South 84 degrees 55 minutes West 160.0 feet; thence continue along the High Bank of Lake Ferguson South 57 degrees 57 minutes West 140.31 feet to an iron pipe at a fence; thence along the said fence North 3 degrees 23 minutes West 466.24 feet to an iron pipe at the corner of said fence; thence continue along said fence North 71 degrees 23 minutes East 322.71 feet to an iron pipe; thence South 71.86 feet to the point of beginning containing 3.08 acres, more or less, located in the Southwest Quarter of the Southwest Quarter of Section 14, Township 19 North, Range 9 West, Washington County, Mississippi.
>
> Provided, however, Grantees, their heirs and assigns, shall have right of ingress and egress over and across the North end of the above

described lot for purpose of having access to other portions of Black Beauty Plantation as herein conveyed."

Griffin/Stone Chain of Title. Warranty Deed dated February 28, 1991 and recorded in Book 1726, Page 35, from Lawrence Adams and wife, Sally Clausen, successors in title to P. B. Griffin, Jr., et al., conveyed to Richard B. Griffin and wife, Mary Ann Griffin, as joint tenants with right of survivorship and not as tenants in common, the identical 3.08 acre tract of land in the Southwest Quarter of Southwest Quarter of Section 14 North, Range 9 West, Washington County, Mississippi, which was excepted and reserved in the Griffin, et al. to Tate deed in Book 864, Page 32 conveyance. Plaintiff's Exhibit 8, T. R. 8

The Lawrence Adams Deed contains the following language:

> This conveyance is made subject to right of ingress and egress granted to M. E. Tate, et al, in deed recorded in Book 864 at Page 32 of the land records of Washington County, Mississippi. This conveyance is also subject to rights of the Mississippi Levee Board, if any and any easements for road, drainage and utility purposes.

Answer of Defendant, T. R. 14, Clerks' papers 1-68, states as follows:

> In regard to the allegations of Paragraph 4 of the Complaint, Defendant admits that on February 28, 1991, she and Richard B. Griffin, now deceased, acquired approximately 3.08 acres located in the Southwest Quarter of the Southwest Quarter of Section 14, Township 19 North, Range 9 West, Washington County, Mississippi, from Lawrence Adams and Sally Clauson who were successors in title to said property to P. B. Griffin, et al. Defendant denies she is the present owner of the entire 3.08 acres described in Paragraph 4 of the Complaint. Defendant asserts she and Richard B. Griffin conveyed 0.41 acres of tract described in Paragraph 4 to Blythe E. Huntley by Quitclaim Deed dated August 19, 1992.

Survey of Civil Engineer Marcus Hooker. The Survey of Marcus Hooker, civil engineer, dated June 1989 contains a description of the identical 3.08 acres of land located in the Southwest Quarter of the Southwest Quarter of Section 14, Township 19 North, Range 9 West, Washington County, Mississippi. The survey shows the names of Lawrence Adams and Sally Clausen. Plaintiff's Exhibit 15, T. R. 69

The Hooker Survey locates the Brent road for ingress and egress on the north side of the Griffin lot with certainty. By use of the scale on the survey the width, length and location of the road may be located with certainty. T. R. 65. Mrs. Stone testified at trial that when she and Dr. Griffin, now deceased, acquired the 3.08 acre lot, they constructed a driveway over the north end of the property. T. R. 86-87, lines 24-5. However, Mr. Hooker testified that in performing the survey he saw the gravel road on the north end of the lot in 1989 prior to the Griffin's purchase of the land. T. R. 69, 73. He stated that his survey crew measured the road as to width, length and location. T.R. 61-74. Hooker's testimony is that the road was well defined and located in 1989. He further describes the protection levee (old levee) which appears in the land description. T. R. 71.

Lea Brent. Lee Brent, former owner of certain portions of Black Beauty Plantation and a previous owner of the Brent land involved in this suit testified that

Brent land was located both to the north and west of the Stone 3.08 acre tract of land. Mr. Brent testified unequivocally as to the location of the road over and across the Stone tract of land and also as to the use made of the road and activities with respect to the road (i.e. horses, feed for horses, hunting activities). T. R. 9-35. If no road is available to access the land to the west of the Stone tract of land then its utility and value will be greatly reduced. The land fronts on Lake Ferguson and is extremely valuable for future lots on the lake. T. R. 33-34. The Griffins shared a common boundary with Brent along the north and west sides of the Griffin lot, Plaintiff's Exhibit 10, T.R. 14-15, lines 12-28. Lea Brent testified that he operated a horse business and accessed a portion of the Black Beauty Plantation, his property, through an easement located on the north end of Mrs. Stone's land. T. R. 15, lines 4-20. When the Mississippi River rises and floods, Brent cannot reach his property except by use of the easement. T. R. 19, 20. When Brent's property was flooded by the Mississippi River emptying into Lake Ferguson in December 2004, Brent asked Mrs. Griffin for access across the north end of Mrs. Stone's property to go duck hunting. T. R. 19-20, lines 18-13. Mrs. Stone refused use of the easement to Brent. T. R. 20, lines 13-21; T. R. 97, lines 8-13. At this point Lea Brent Family Investments, L.P. filed suit, T.R. 22, lines 1-23.

SUMMARY OF THE ARGUMENT

Lea Brent Family Investments, L.P. possesses a written easement contained in deed records which grant to Appellee the right of ingress and egress over and across the north end of the Stone 3.08 acres of land for the purpose of having access to other portions of Black Beauty Plantation, Brent property. The easement is well documented and not essentially denied by Appellant. Appellant claims the Chancery Court of Washington County was in error in holding the ten year period of statutory adverse possession had not run. Appellant claims that *Cummins v. Dumas*, 113 So. 332 (Miss. 1927) settles the issue and that the construction of the gate by Griffin across the easement triggered the adverse possession. The uses being made of the Griffin/Stone land were consistent with ownership and not such acts as were calculated to notice Brent of adverse possession of his easement. The Griffin/Stone owners had the right to use their land for any purpose that did not interfere with the enjoyment of the easement. The use of the land being made by the Griffin/Stone parties was consistent with their ownership of the land and not adverse notice of their intent to extinguish the easement until such time as notice was given to Brent. The Washington County Chancery Court concluded the time of possession did not begin to run until access across the easement was refused and therefore ten years had not elapsed.

Additionally, Appellant claims Brent had abandoned the easement because of nonuse, use of other routes of access to Black Beauty, and allowing Griffin to block the easement with a locked gate. The Appellant relies upon *Columbus & G. RY. CO. v. Dunn*, 185 So. 583 (1939) to support its position. The Brents contend the Chancery Court was eminently correct in finding abandonment had not occurred.

STANDARD OF REVIEW

The Mississippi Supreme Court in *Cole v. National Life Inc. Co.*, 549 So.2d 1301, 1303 (Miss. 1989) announced the following standard of review for a Chancellor's Decree:

> I. What is the Standard of Review for a Chancellor's Decree?
>
> When presented with what is essentially a question of law, the familiar manifest error/substantial evidence rules have no application to our appellate review of such questions. The principle of "manifest error" applies only to a factual situation. If the chancellor is manifestly wrong in basing his decision upon the facts, then this Court will reverse; otherwise, we will affirm. This rule does not apply on questions of law. *Boggs v. Eaton*, 379 So.2d 520, 522 (Miss. 1980); *Mississippi State Highway Commission v. Dixie Contractors, Inc.* 375 So.2d 1202, 1206 (Miss. 1979); *S & A Realty Co. v. Hilburn*, 249 So.2d 379, 382 (Miss. 1971); *see also, Pullman-Standard, a Division of Pullman, Inc. v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66, 79 (1982).
>
> With regard to a pure question of law this Court shall conduct a *de novo* review.

ARGUMENT

PROPOSITION I

THE CHANCELLOR DID NOT IMPOSE A HIGHER BURDEN OF PROOF AS TO NOTICE OF ADVERSE POSSESSION UPON MRS. STONE AND CORRECTLY IMPOSED ORDINARY STANDARDS OF PROOF WITH REGARD TO ADVERSE POSSESSION. THE CHANCELLOR WAS CORRECT IN FINDING THAT MRS. STONE HAD NOT SATISFIED THE STATUTORY PERIOD OF ADVERSE POSSESSION FOR TEN YEARS REQUIRED FOR ADVERSE POSSESSION TO MATURE.

The Chancery Court found in its Order dated June 26, 2007, R.E. 45, Clerks' papers 1-68, pp. 45, 46, as follows:

> *Continuous and Uninterrupted for Ten Years* - The relationship between a servient estate owner and a dominant estate owner is acutely different from the relationship between two general landowners. In the case of general landowners, if A puts up a gate or fence on B's property, B had clearly been noticed that A is claiming ownership of and is excluding B from B's property. However, the servient estate owner has the right to use his or her land for any purpose that does not interfere with the enjoyment of the easement. Proper use by the servient estate owner is generally a question of fact that depends largely on the extent and mode of the use. Bivens v. Mobley, 724 So.2d 458 (Miss. App. 1998). In the case sub judice, the "driveway" still afforded ingress and egress to that 5-10 acre portion of Black Beauty Plantation. Although the Defendant possessed the disputed "driveway" in the manner described above since 1994, it wasn't until December of 2004 or January of 2005 that Plaintiff was put on notice that *Plaintiff* could no longer use the easement. Up until that time, the Defendant's use and treatment of the disputed property did not necessarily conflict with Plaintiff's easement. In other words, general prevention of people coming and going across land, and turning the crossing into a driveway which still allowed ingress and egress as contemplated by the easement, is an appropriate and reasonable use by the servient estate owner. There was no direct evidence that the Defendant ever affirmatively indicated her

possession was hostile to Plaintiff's easement, or that it was exclusive as to Plaintiff. Ftn. 1 The Defendant took no explicit steps to indicate that she considered the easement at an end. This did not occur until December 2004 at the earliest. Bivens (supra). Thus, in this case, Defendant's possession of this "driveway" was not adverse to the Plaintiffs' easement until 2004/2005 when Plaintiff was refused access. Therefore, this requirement is not satisfied.

Ftn. 1. Although Brent was aware of Defendant's driveway, gate and wooden archway, he apparently did not know that the Defendant's gate was locked or electrified since he attempted to go through the gate without informing the Defendant. In addition, the disputed property ws not fenced in until after he had found the Defendant's gate locked.

The Chancellor was correct in making the above finding. In *Greve v. Caron*, 206 N.W. 334 (Mich. 1925) the court held as follows:

> In considering the question of whether the easement has been lost by adverse possession, it is well to have in mind the fact that 'easements do not carry any title to the land over which the easement is exercised, and work no dispossession of the owner.' 19. C. J. 966. Defendant and her predecessors had an undoubted right to make any use of the premises not inconsistent with the easement. The maintenance of a gate across the way at the street, even though continuous would not constitute an obstruction of the way or result in the loss of the way by ouster or adverse possession. ***267** Murphy Chair Co. v. Radiator Co., 172 Mich. 14, 29, 137 N. W. 791. The grant of the way did not prevent the owners of the servient estate from maintaining a gate.
>
> As owner of the soil, defendant and her predecessors had all the rights and benefits of ownership consistent with the easement. Placing a gate at the street entrance to the way was the exercise of a right consistent with ownership of the soil if the gate permitted use of the way. While v. Bartz, 88 Wis. 424, 60 N. W. 789; Dyer v. Walker, 99 Wis. 404, 75 N. W. 79.
>
> The fact that owners of the servient estate used some portion of the way for a garden, built a cesspool under the way, put up a clothes pole, a boy's toboggan slide, and used the alley in other ways for their own convenience, but not in such a way as to prevent use thereof by

the owners of the dominant estate, established no prescriptive right as against the easement. As stated by plaintiff's attorney in the brief:

'The owner of the servient estate retains the right to use it in any manner that does not interfere with the easement.' Harvey v. Crane, 85 Mich. 316, 48 N. W. 582, 12 L. R. A. 601; Murphy Chair Co. v. Radiator Co., supra.

At no time could the owner of the dominant estate exclude the owner of the servient estate from using the way in any manner desired so long as there was no serious interference with the reasonable exercises of the easement. Plaintiff and his predecessors never had title to the land included in the way, and it was none of their concern what use was made thereof by the owner of the soil so long as such use did not obstruct the way. We find no evidence establishing any hostile prevention of use of the way by any acts or constituting abandonment of the way because of them.

In 28A Corpus Juris Secundum §§ 223 and 224, pages 439-441, the encyclopedia provides as follows:

§ 223 Rights of owner of servient estate—Use of burdened land

Barring an agreement to the contrary, an owner of land burdened with a right-of-way may use the land in any manner which does not materially impair or unreasonably interfere with its use as a way.

Typically, the owner of a servient estate may continue to use the land encumbered by an easement. The owner of land burdened by the easement retains the right of full dominion and use of the land affected by the easement, and retains all rights in the property, subject only to the easement.

Without expressly reserving the right, the servient owner may him or herself use the way, or permit others to do so, unless the rights of the owner of the easement are exclusive, and, subject to the easement, the servient owner may also utilize the space above or beneath the surface of the way.

§ 224 Rights of owner of dominant estate

The owner of the dominant estate has the right to use and enjoy the easement to the fullest extent possible, not inconsistent with the rights of the owner of the servient estate, although his or her use must be reasonable, and should be as limited a burden on the servient estate as the nature and purpose of the easement will allow.

While the rights of the owner of the dominant estate are not determined by the legal rights of the owner of the servient estate, the rights of the owner of the dominant estate must be exercised with reference to the rights of others. The owner of the dominant estate may not exercise the rights granted to him or her without regard to the rights of the servient owner. The owner of a dominant tenement is entitled to use an easement only in such manner as is fairly contemplated by his or her grant, whether expressly or implied. An easement owner is entitled to full enjoyment of the easement, and to the degree privileges are expressly granted, the easement owner's rights are paramount to those of the servient owner. The dominant estate is not required to obtain permission from the owner of the servient estate to do what he or she is already legally entitled to do.

The dominant estate owner's use of an easement must be reasonable, in light of all the facts and circumstances, and should be as limited a burden on the servient estate as the nature and purpose of the easement will allow.

The Appellant relies upon the case of *Cummins v. Dumas*, 113 So. 332 (Miss. 1927). The *Cummins* case involved a dispute over adverse possession of an alley. The *Cummins* opinion provides in part on page 333 as follows:

> [1] It is undisputed in this record that the appellants, the Cummins, openly and affirmatively denied Dumas, the appellee, the right of way in this alley by constructing a new gate, putting a new lock thereon, and notifying him to stay out of the alley; that Dumas

> acquiesced in this situation and had not used the ground in controversy as an alley for more than ten years next preceding the filing of this suit.

The *Cummins* court further held on page 333:

> . . . That until 1911, he used a horse and buggy, and in that year he bought an automobile; that one night, about 11 o'clock in that year, they had an altercation or some trouble regarding the gate. That he took an axe and cut down the post to which the gate was fastened, whereupon she told him to stay out of the alley. Prior to 1911, Dr. Dumas had a gate on the side of the alley leading into his lot. Immediately after this trouble, he took down the gate and nailed up the gap, making it a part of his fence. (Emphasis added.)

See also *Board of Trustees of University of Mississippi v. Gotten*, 80 So. 522 (Miss. 1919) gate across way and *Rogers v. Marlin*, 754 So.2d 1267 (Miss. 1999) preventing use of the roads by persons other than dominant estate owners who had keys to gates.

The Appellee contends the *Cummins* case bolsters the opinion of the Chancellor by its facts in that *Cummins* specifically finds that Dr. Dumas was told to stay out. For these reasons the *Cummins* court held that possession and adverse holding were in such a manner as to notify Dr. Dumas of the adverse claim.

The Defendant, Mary Ann Griffin Stone, testified on cross-examination that she recognized the Lee Brent Family Investments, L.P. rights in and to the easement. T. R. 105, lines 7-30. She further testified that her disagreement to the easement was to the location of the easement. T. R. 106, lines 14-22. She did not want the easement to be located on the road covered by white rock or slag. The

proof was without question that Mrs. Stone moved and shifted the easement that was to be used by Lee Brent Family Investments, L.P. to the north, constructed a chain length fence on an east-west axis so as to separate her Brent proposed easement from her remaining property, further constructed the proposed Brent easement so that it did not intersect at its western terminus with the double gate located on the west side of the property which feeds into the old road across the Brent property on the west side of the Stone property, and then she put up a new gate to the north of the old Black Beauty Gate. T. R. 103, 104. She further furnished a key to the new gate to Brent. T. R. 106

The thrust of her testimony was that she recognized the Brent claim to the right of way over and across the north end of the Stone lot for purposes of ingress and egress. Adverse possession is largely a question of intent. *Simmons v. Cleveland*, 749 So.2d 192 (Miss. App. 1999) holds adverse possession must be established by clear and convincing evidence. Clear and convincing evidence is not present here.

Mrs. Stone shifted the easement to the extreme north side of the lot. In doing so she, of course, changed the long-standing location of the easement without permission from the easement owner, Lee Brent Family Investments, L.P. and in violation of the general easement law of the State of Mississippi preventing shifting easements. *Capital Electric Power Association v. Mrs. Emma Hinson*, 84

So.2d 409 (Miss. 1956). The rationale of the rule is obvious in that it prevents litigation such as has occurred here.

The Washington County Chancery Court correctly determined that the time of possession did not begin to run until access of the easement was refused and therefore ten years had not elapsed. The record conclusively shows Mrs. Stone recognized the Brent right to access the easement and to use the easement. There is simply no intent to adversely possess in the face of the recognition of the Brents' right to access and use the easement. The use certainly could not be deemed exclusive. The use of the property by exercising those rights, benefits and acts which an owner normally does and are consistent with his ownership (i.e., garden, driveway), are not sufficient to put a written easement owner on notice of claim of adverse possession.

PROPOSITION II

THE CHANCELLOR CORRECTLY HELD THAT LEA BRENT FAMILY INVESTMENTS, L.P. HAD NOT ABANDONED THE EASEMENT ACROSS THE NORTH SIDE OF MRS. STONE'S PROPERTY AND CORRECTLY HELD THAT LEA BRENT FAMILY INVESTMENTS, L.P. WAS ENTITLED TO INGRESS AND EGRESS OVER THE ROAD ACROSS THE NORTH END OF THE STONE PROPERTY.

The Chancery Court found in its Order dated June 26, 2007, R. E. 47, Clerks papers 1-68, pp. 47, 48, as follows:

ABANDONMENT

"Abandonment requires protracted non-use for an extended period of time, which creates a presumption of abandonment. That presumption becomes stronger if there is an intent to abandon that is also shown". Bivens (supra). "A ceasure of the use, coupled with any act indicative of an intention to abandon the right, would have the same effect as an express release of the easement without any reference whatever to time". Columbus & G. RY. Co. v. Dunn, 184 Miss. 706; 185 So. 583 (1939).

"Abandonment is a question of fact, based primarily on intent and on such circumstantial evidence that reflects on intent". Bivens, (supra). "The evidence must be full and clear. Proof of abandonment must be direct or affirmative, or must reasonably beget the exclusive inference of the intentional relinquishment of the property right involved. To justify the conclusion that there has been an abandonment, there must be some clear and unmistakable affirmative act or series of acts indicating a purpose to repudiate ownership". Columbus, (supra).

In the instant case, there was a protracted non-use of the easement for an extended period of time. Thus, there is a presumption of abandonment. However, there has been no evidence of intent by Plaintiff to abandon, and there was no act done which was inconsistent with further enjoyment of the easement; Ftn. 2 there was no act done which was inconsistent with further enjoyment of the easement; there was no act or series of acts indicating a purpose to repudiate ownership.

Ftn. 2. To this day, ingress and egress as contemplated by the easement can still be acquired by use of the "driveway".

The Appellant relies upon the case of *Columbus & G. RY. CO. v. Dunn*, 185 So. 583 (Miss. 1939) for the proposition that an abandonment will be presumed where the owner of the right does or permits to be done acts inconsistent with his further enjoyment. The *C & G* court held on page 586 as follows:

> [4-8] In 1 Am.Jur., Sec. 11, it is said: "Since abandonment is so largely a question of intention, all the facts and circumstances, and particularly the acts and conduct of the parties, tending to show or disprove the intention to abandon may be taken into consideration, as the intention is ordinarily a question of fact, although the situation of the property and conduct of the former owner may in certain cases be sufficient to imply in law an abandonment. In determining claims of abandonment the courts have generally announced that each case must depend mainly on its own particular circumstances, the evidence of which must be full and clear. Proof of abandonment must be direct or affirmative, or must reasonably beget the exclusive inference of the intentional relinquishment of the property right involved." Also, in 1 Am. Jur., Page 9, Sec. 13, it is said: "As in other cases involving the ascertainment of a particular intent, direct evidence of an intent to abandon property or rights of property is not required, but it may be inferred from all the facts and circumstances of the case which are competent to go to the jury as evidence by which that fact may be established. It may be inferred from the conduct of the owner and the nature and situation of the property, without the positive testimony of the owner in affirmation of the fact. However, to justify the conclusion that there has been an abandonment, there must be some clear and unmistakable affirmative act or series of acts indicating a purpose to repudiate ownership. For instance, an intentional abandonment of a right of way by a railway company was shown by its removal of tracks, ties, rails, and bridges, and the neglect and nonuser of the right of way for a period of ten years." It is clear however that an abandonment for a shorter period than ten years will suffice under the principle announced in 1 Am. Jur., Page 7, Sec. 9, as follows: "The moment the intention to abandon and the relinquishment of possession unite the abandonment is complete, for time is not an essential element of abandonment." . . .

Appellee contends it is has done nothing factually in this case to evidence intent to abandon the easement as is shown by the standard of the *C & G* case (i.e. removal of tracks, ties, rails, bridges, etc.). In fact, the proof from Mr. Brent is to the effect that he did not intend to abandon the easement. T. R. 33, lines 23-25.

The Chancery Court correctly found no evidence of intent to abandon the easement by Brent.

CONCLUSION

The Appellee respectfully submits the Chancellor was correct in the judgment that she rendered, did not apply an erroneous legal standard, and correctly held that adverse possession had not been proven nor had Brent Family Investments, L.P. abandoned the easement. For the foregoing reasons, the Appellee, Lea Brent Family Investments, L.P. respectfully request that the judgment of the Chancery Court be affirmed and judgment here rendered in favor of the Appellee, Lea Brent Family Investments, L.P. and Appellee awarded its cost and attorney fees.

Respectfully submitted this 13th day of May, 2008.

Nathan P. Adams

NATHAN P. ADAMS, JR., Attorney for Appellee

CERTIFICATE OF SERVICE

I, Nathan P. Adams, Jr., attorney of record for Appellee, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to John J. Crow, Jr., 203 Wagner Street Water

Valley, MS 38965, Honorable Marie Wilson, Chancery Court Judge, P. O. Box 1762, Greenville, MS 38702-1762.

This 13th day of May, 2008.

NATHAN P. ADAMS, JR.