2007-CA-01186-SCT RT

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STATEMENT OF THE ISSUES

1. Whether the Chancery Court interpreted the law of adverse possession of easements correctly when it ruled that a higher burden of proof of notice is required by the possessor to start the running of the ten-year statute of limitations.
2. Whether Lea Brent Family Inv. L.P. abandoned the easement across the North end of Mrs. Stone's property when they ceased to use it, did not dispute the construction of an obstacle across the easement despite having notice of it, and used alternate access points to their 222.7 plus acre property for a period of twelve years.

STATEMENT OF THE FACTS

[The following facts are identical to those stated in Appellant's initial brief and are recited for the convenience of the Court.]

On February 28, 1991, Mrs. Stone and her deceased husband, Dr. Richard Griffin, acquired a 3.08 acre lot along Lake Ferguson from Lawrence Adams and wife Sally Clausen. Plaintiff's Exhibit 8[1]. They shared a common boundary to the North and West with Edwin Lea Brent, a predecessor in title to the Plaintiff. P-10; Transcript p.14-15, lines 12-28. Edwin Lea Brent acquired these 222.7 acres from Nancy DeLoach Tate on March 12, 1984. P-3, Transcript p. 12, lines 13-24. Edwin Lea Brent then deeded this property to the trustees of the Edwin Lea Brent Insurance Trust on March 24, 1993. P-4, Transcript p. 6-7, lines 29-8. On October 24, 1996, the trustees of the Edwin Lea Brent Insurance Trust deeded the property to Lea Brent Family Investments, L.P. P-7, Transcript p. 7-8, lines 28-8. Despite the numerous name changes, Edwin Lea Brent has remained in control of the property. Transcript p. 46, lines 17-28.

In connection with the operation of a horse business, Brent accessed a portion of his property through an easement located on the North end of Mrs. Stone's land. Transcript p.15, lines 4-20. Brent began to regularly use the easement in 1987. Transcript p. 49-50, lines 24-10. Brent acknowledged that he knew that Mrs. Stone and Dr. Griffin had moved on to their property in 1991. Transcript p. 38, lines 3-9.

When Dr. Griffin and Mrs. Stone moved onto their new property, Brent was in the process of moving his horse operation to Colorado. Transcript p.36-37, lines 13-

[1] Hereafter for brevity all Exhibits will be listed as P-1 for Plaintiff's Exhibit 1 or D-1 for Defendant's Exhibit 1

12. This transition lasted into the middle of 1992. Transcript p.36, lines 25-26. After Brent moved the horses, the 222.7 acres reverted to being solely used as farmland for soybeans and rice. Transcript p.34, lines 22-29. Brent nor anyone else except Mrs. Stone, Dr. Griffin, and her family has used the easement since Brent finished moving in 1992 despite the 222.7 acre dominant estate surrounding Mrs. Stone's property being continually used as farmland. *Id.*; Transcript p.28-29, lines 25-20.

In 1991, when Dr. Griffin and Mrs. Stone acquired their 3.08 acre lot, their access to the parcel was by a driveway on the east end of the property. Transcript p.86, lines 17-25. After moving onto the property, Dr. Griffin and Mrs. Stone decided they wanted to access their land in a different way, and chose to construct a driveway through the north end of their property. Transcript p.86-87, lines 24-5. After building up a driveway, Dr. Griffin and Mrs. Stone put a chain across the drive that obstructed the use of the easement as used by Brent in the past. Transcript p.89 lines 29-2. In 1992, Dr. Griffin and Mrs. Stone erected an electric gate system that required a clicker to open, much like a garage door opener. P-11; Transcript p.89, line 12-14; p. 25 lines 22-24, p. 102 lines 6-7. This gate system was and still is posted with "No Trespassing" signs. Transcript p.89, lines 26-30. Once finished, the gate system was adorned with a large Black Beauty sign. Transcript p. 90, lines 8-14.

During the time of the gate system's construction and completion, Brent was coming and going between his new residence in Colorado and his barns that are in sight of Mrs. Stone's gate. Transcript p.39, lines 12-23. During these trips to Greenville, Lea Brent would spend the night with the Crowley's, who live three houses down from Mrs. Stone; and at these visits, Lea Brent stated that he saw the

new gate system. Transcript p.39-40, lines 24-8. Even though Brent acknowledges he saw the new gate system, he chose not to approach Mrs. Stone or Dr. Griffin about access. Transcript p.40, lines 27-29. Brent stated two reasons for not confronting Dr. Griffin or Mrs. Stone about his rights. Transcript p.41, lines 8-26. First, he had no occasion to go up there, and secondly, he states that he assumed that the gate was erected to protect against trespassing hunters. *Id.* He based this latter reasoning on a brief conversation he had with Dr. Griffin in the early 1990's, despite also stating that, during this conversation, Dr. Griffin never mentioned building a gate. *Id.* In the twelve years between the completion of the gate and December of 2004, Brent asked for neither a key nor an opener to the gate obstructing the previous easement. Transcript p.45, lines 14-22.

In December of 2004 when part of Brent's property flooded, Brent asked for access across the North end of Mrs. Stone's property, the previous easement, to go duck hunting. Transcript p.19-20, lines 18-13. Mrs. Stone informed him that the road ended at his Barn, and that he would have to use one of the many other access points he enjoys to his 225 acre property, which he did. Transcript p.20, lines 13-21; Transcript p.97, lines 8-13. It was at this point that each party retained counsel and Brent filed suit. Transcript p.22, lines 1-23.

SUMMARY OF THE ARGUMENT

Most of the facts used in the Chancellor's Judgment, in the case sub judice, to show that Mrs. Stone had fulfilled the elements of adverse possession, save the element of time, were facts which occurred at the time the electric gate was constructed. This electric gate was kept locked by Mrs. Stone, and required a special

electronic clicker to open, much like a garage door opener. Despite these facts, the Chancellor ruled that the element of time did not begin to run until Mrs. Stone verbally refused Brent access. However, verbal notice is not required by Mississippi law to start the running of the statute of limitations, and is a heightened burden of notice that this Court should not allow to be propagated into this State's common law.

The Chancellor was correct in stating that 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. Additionally, Brent was correct when he stated in the Appellee's Brief that maintenance of a gate does not constitute an action that interferes with the enjoyment of an easement. However, as held by the Court in *Cummins v. Dumas* and the Supreme Courts of at least six (6) other states, a servient estate owner maintaining a locked gate does interfere with the enjoyment of an easement.

ARGUMENT

It is Mrs. Stone's position that there is adequate Mississippi precedent available to the Court to base its decision in this case as illustrated by the rules of law cited in Appellant's initial brief. Nevertheless, in order to show the Court a more expansive view of the subject, we wade out into the vast body of common law on adverse possession in our sister states.

Also, although we feel it is outside the necessary review of this Court, we feel that a reexamination of Mrs. Stone's testimony is required in order to dispel any delusory impressions of her past actions and intentions.

I. THE CHANCELOR ERRED IN FINDING THAT MRS. STONE HAD NOT SATISFIED THE STATUTORY PERIOD OF POSSESSION REQUIRED FOR ADVERSE POSSESSION.

Rule of Law

In a New York Appellate case, the defendants argued that the easement that burdened their property had been terminated by twenty years of adverse possession. *Zeladon v. MacGillivray*, 263 A.D.2d 904, 905 (N.Y.A.D. 1999). The plaintiffs, in that case had sought to use a footpath granted to them for accessing a lake on the opposite side of defendants' property. *Id.*, at 904. The lower court held that the defendants' regular maintenance of the boathouse and docks, to the exclusion of all others, and their construction of a bulkhead and gate across the stairs leading to the easement, which operated to exclude all others, was sufficient proof to maintain the termination of plaintiff's easement by adverse possession. *Id.*, at 905. The appellate court stated:

> As to their open, notorious, exclusive and continuous use of the easement and docks during the relevant time period, defendant...averred that he regularly maintained his property to the exclusion of all others beginning in 1975, and ...averred that plaintiffs...and all others were physically barred from using or accessing the boathouse and docks by a bulkhead and gate that defendants maintained from 1975 to 1995 across the stair leading thereto. In our view, such proof is sufficient to establish the extinguishment of plaintiff's easement by adverse possession. *Id.*

The plaintiffs in their appeal alleged that the period of possession should not have begun to accrue until they attempted to use the easement and were denied. *Id.* The

plaintiffs relied on the case of *Spiegel v. Ferraro*. *Id.*, citing 73 N.Y.2d 622 (N.Y.A.D. 1989).

In *Spiegel*, the court discussed the development of a narrow exception to the rules of termination of easements by adverse possession. 73 N.Y.2d 622, 626. In this discussion, the court cited *Castle v. Schwartz*, which held that in instances involving easements never before used or located, the statutory period for adverse possession does not begin to accrue until the need to use the right of way arises, the dominant estate owner demands the servient estate owner to open an easement, and such demand is denied, *i.e.* verbal notice. *Id.*, citing, 63 A.D.2d 481, 492 (N.Y.A.D. 1978). The court in *Zeledon*, refused to apply a higher burden of notice, however, stating that the proof was sufficient that the easement in dispute was in "functional existence" before the period of adverse possession. 263 A.D.2d 904, 905.

In Oregon, a plaintiff sued his grantee to enjoin him from interfering with the Plaintiff's 20' right-of-way. *Horceny v. Raichl*, 280 Or. 405, 408 (1977). The grantee contended that he had adversely possessed the easement by fencing it in and installing a gate. *Id.*, at 407. The Oregon Supreme Court stated that the rule as to adverse possession of an easement was that the adverse use must be inconsistent with the easement. *Id.*, at 408. The Court stated that until the use of the land became inconsistent the statutory time of possession did not begin. *Id.* The Court determined that defendant's time of possession did not begin until the defendant locked the gate, thereby blocking the easement. *Id.*, at 409. The gate had only been locked, however, in the past four years, so the defendant had not met the ten-year statutory burden, and the plaintiff was entitled to use the easement. Id.

One of the issues before the Montana Supreme Court in *Dome Mountain Ranch, LLC v. Park County* was whether a ranch owner had terminated the local County's prescriptive rights to an easement across his property by reverse-adverse possession. 37 P.3d 710, 713 (Mont. 2001). The easement in question had been depicted on various Government maps since 1909. *Id.*, at 712. In 1965, the previous owners of the property had to reroute the road after a dam washout destroyed part of it. *Id.* After the relocation of the road, the old owners placed "no trespassing" signs and locked gates at the entrance. *Id.* After a review of the facts and a summary of the countervailing arguments by the parties, the Court agreed with the rancher and stated,

> we conclude that the relocation of the subject road in 1965 coupled with Park County and the public's acquiescence of a locked gates being place thereon for approximately 30 years extinguished Park County's public prescriptive easement, if one existed, on the subject road. *Id.*, at 715.

In 1919, the Supreme Court of Pennsylvania was confronted with a similar issue of whether a property owner had adversely possessed an alley appurtenant to his land. *Hibberd v. Greenstein*, 263 Pa. 527, 529 (1919). When reviewing the facts, the Court focused on the testimony of prior tenants about whether a gate that afforded entrance to the alley was fastened or not during the time required for adverse possession. Id. The Court expounded that the right to use the alley was not lost "by the maintenance of gates at the ends thereof, but when locked they tend to support a claim of adverse possession. The problem here is that there is no evidence that either gate was kept fastened prior to Shoneman's possession." *Id.*, at 530. The Court then overruled the lower court's holding that the property owner had adversely

possessed the easement due to an insufficiency of evidence to support possession for the full statutory period. *Id.*, at 531.

In *Popovich v. O'Neil*, the California Court of Appeals reviewed whether there were sufficient facts presented to the trial court, in order for them to hold that a servient estate owner had extinguished an easement burdening his land through adverse possession. 219 Cal.App. 2d 553, 555 (1963). The plaintiffs sought to use an abandoned county road that ran through the defendant's property. *Id.* The defendants had installed a locked gate, which forced the plaintiffs to use alternate means of access for ingress and egress. *Id.* Witnesses testified that permission was required to use the gate and that at no time had the plaintiffs ever had a key. *Id.*, at 556. One of the issues that the plaintiffs raised to overturn the lower court's ruling was that defendant's locked gate was not on defendant's property but several feet off thereof, although it was concededly built and maintained by them. *Id.*, at 557. The appellate court dismissed this issue, stating that, "the determinative fact on this appeal is that there is evidence in the record which supports the court's finding that the gate and fence maintained by [defendants] actually prevented [plaintiffs] from gaining access...for a period exceeding" the time required for adverse possession before the action was filed. *Id.*, (words in brackets changed for clarity). The appellate court then upheld the trial court's ruling that the defendants had adversely possessed the easement. *Id.*, at 558.

In *Gandy Company v. Freuer*, the trial court held that the servient estate owner had adversely possessed the easement burdening his property by keeping a gate padlocked at the entrance to it. 313 N.W.2d 576, 578 (Minn. 1981). On review

the Minnesota Supreme Court stated that the evidence showed that the gate was not locked before 1973, and as such the servient estate owner had not met the statutory period of possession. *Id.*, at 579.

> The majority rule is that the mere construction or maintenance of a gate or fence across a right of way easement is not an adverse possession. Annot. 25 A.L.R.2d 1265, 1325 (1952). Even assuming the Gandy gate was kept padlocked from 1963 forward, the statutory period would not have run at the time this action was commenced in January, 1977...The intermittent or occasional locking of a gate is not sufficient to establish adverse possession because, if for no other reason, the possession is not continuous." *Id.*

The Court then bolstered the fact that the gate was not continuously locked by pointing out that the servient estate owner had at least once unlocked the gate upon the dominant estate owner's request. *Id.* Due to the insufficiency of proof and a lack of showing of clear and convincing possession of the easement, the Minnesota Supreme Court reversed. *Id.*, at 579.

More importantly though than all the foreign cases cited above is the specific language stated in the Mississippi Supreme Court case *Cummins v. Dumas*.

> When a new lock was put on the gate and Dumas was deprived of the right of use of the key and of the alley, the cause of action here begun accrued to Dumas. He had, on the day this hostile claim was set up, the privilege of asserting his right to the use of the alley, which he possessed under his deed. For reasons unknown to us, he acquiesced in this open demonstration of the adverse claim of the Cummins...for more than 10 years... "and while actual notice that the grantor is claiming title in himself is of course sufficient to set the statute of limitations in motion, express, written, or verbal notice to the grantee that the grantor is claiming title in himself is not necessary. Knowledge of the adverse claim may be brought home to the grantee by acts so open, notorious and hostile as to clearly show that the grantor is claiming adversely, and such acts will suffice to initiate adverse possession by the grantor." *Cummins v. Dumas*, 113 So. 332, at 333-34. (Miss. 1927), citing *2 Corpus Juris*, p. 145 § 251.

Argument

The Chancellor delineated her Judgment on Adverse Possession into six (6) parts wherein she set forth whether Mrs. Stone had satisfied each separate element of adverse possession.

For "Under Claim of Ownership", the Chancellor cited Mrs. Stone's posting of no trespassing signs, the construction of the electric gate, and her eventual fencing in of the property, and stated, "This is substantial evidence of claim of ownership." Judgment p.5, June 26, 2007.

Under "Actual or Hostile", the Chancellor pointed to Mrs. Stone's construction and upgrade of the driveway, her erection of a large wooden archway at the entrance to the easement, and stated that "it is clear that the Defendant actually possessed the disputed crossing." *Id.*, at 6.

In the paragraph entitled "Open, Notorious, and Visible", the Chancellor stated that, "The Defendant's driveway, gate, and wooden archway were visible to the Plaintiff for 12 years. Brent testified that when he saw these things he knew this was done to keep the public out. He just didn't think it applied to him! Thus, this requirement is satisfied." *Id.*

For "Exclusive", the Chancellor looked to Mrs. Stone's construction of the driveway, its fencing in, and the fact that permission was required to use it. *Id.* Thus the Chancellor declared that "It is clear that the Defendant exercised the dominion of a sole owner." *Id.*

Under "Peaceful", the Chancellor cited that there was undisputed evidence that "no one ever contested or disputed the Defendant's possession of the disputed property." *Id.*

Lastly, under "Continuous and Uninterrupted for Ten Years", the Chancellor held that despite "the Defendant possess[ing] the disputed 'driveway' in the manner described above since 1994," Mrs. Stone did not trigger the running of the statute of limitations until she verbally refused Brent access. *Id.*, at 7, (suffix changed for clarity).

The facts shown to the trial court and the facts recounted by the Chancellor are ample to prove adverse possession. We argue that the Chancellor made an erroneous legal conclusion, not a factual one. The Chancellor was wrong in regard to adverse possession in holding that a locked gate posted with no trespassing signs, admittedly noticed by Brent, did not start the running of the statute of limitations. To require otherwise diverges from Mississippi stare decisis, and the common law of New York, Oregon, Montana, Pennsylvania, California, and Minnesota as cited above.

The New York Appellate case *Castle* held that an owner trying to adversely possess an unused and un-located easement must give actual notice to begin the statutory period. 63 A.D.2d 481, 492 (N.Y.A.D. 1978). *Zeledon* made it clear, though, that this heightened notice has not been extended to easements that had been in use by the dominant estate owner and have since fallen into a state of nonuser. 263 A.D.2d 904, 905.

The case sub judice does not involve the necessary facts to apply the rule from *Castle v. Schwartz.* Brent had used the easement regularly in the years prior to Mrs.

Stone's construction of the locked gate. Additionally, there was no question as to where the easement was located.

The facts in this case are a veritable paradigm of *Zeledon*. Both involve a dominant estate owner who ceased to use their easement. 263 A.D.2d 904, 905. Both servient estate owners then maintained and restricted access to the easements by use of a gate. *Id.* Both involve the dominant estate owner approaching the servient estate owner, demanding access, and then being refused. *Id.*, at 904. Finally, both include the argument that the statutory period did not begin to run until the dominant estate owner asserted their right to use the easement. *Id.*, at 905. As the New York Court in *Zeledon* found however, neither the facts of that case nor the facts here present the necessary criteria to apply a higher burden of notice to start the period of limitations. *Id.*

The above cases, from a myriad of jurisdictions, all apply the rule that if a dominant estate owner had free and unfettered access to an easement, the construction and maintenance of a locked gate over it serves as sufficient notice so as to start the statute of limitations. The action of maintaining a gate and the action of constructing a locked gate and posting it with "no trespassing" signs are drastically different in the eyes of the law. One does not interfere with the enjoyment of an easement, and the other destroys it.

We now turn to Mrs. Stone's testimony raised by Appellee's Brief. We would disclaim in the beginning, that we feel this discussion is outside the required review of this Court and delves into a factual discrepancy that the Chancellor did not review

in her Judgment on the issue of Adverse Possession. Unfortunately, though, we feel that Mrs. Stone's testimony was misrepresented in Appellee's Brief.

First, Mrs. Stone under cross-examination by Counsel for the Plaintiff was asked and answered as follows: Transcript p. 102, lines 10-16.

> Q: And you objected to Mr. Brent having a clicker to the gate?
> A: Yes.
> Q: It was not an objection to Mr. Brent coming across the road, it was an objection to him having unlimited access to the road?
> A: Yes, sir.

Later on redirect, Mrs. Stone stated the following: Transcript p. 107, lines 8-13.

> I'm referring to the fact that, you know, for example, if he has no way to get across because of a flood, because that field does flood, and he needed to get across, then I would let him get across. I mean, that's the neighborly thing to do.

The above two excerpts reflect the dichotomous relationships of owner and neighbor that Mrs. Stone is trying to maintain. First, as the owner, she has acted with the firm belief that she has every right to bar and grant access to her property at will as an unburdened property owner is allowed. Second, as a neighbor, she feels that she has an obligation to those that live around her and those she has known for years to be as hospitable and accommodating as common sense allows.

The cross-examination then moved to the topic of the alternate access Mrs. Stone built after the legal dispute arose between her and Brent, which is also after, we argue, the running of the statute of limitations. Transcript p. 102, lines 21-24. The brunt of the following disjointed questions and testimony boils down to the simple statement that Mrs. Stone cordoned off her driveway, the old easement, and offered to Brent a <u>new</u> route running along the North end of her property. Transcript p. 103-5, lines 24-10.

After fourteen (14) questions regarding this proposed new route, Mrs. Stone was questioned and answered as follows: Transcript p. 105-6, lines 15-1, italics added for emphasis.

> Q: All right. Do you recognize that Mr. Brent has the right to go across that property?
> A: Do I recognize he has a right to go across *there?*
> Q: To go across that property.
> A: I recognize that he has a right to use it, yes.
> Q: So, what your arguing about then, is the location of his right to go across?
> A: My argument is that I do not want him to have access to my property of value. He can use the lane that has been provided for him because that will secure my property and he would have easy access at his own bidding. He wouldn't have to contact me. Now, if he wants to use my driveway, then he would need to contact me.
> Q: Well, do you recognize, mam, that there are differences between the road of access that you offered across the north side and your driveway?
> A: Yes, sir.

Mrs. Stone in the preceding testimony is delineating between the old easement, which she has adversely possessed as the owner, and the proposed new route she tried to give Brent as a good neighbor. Brent has a right in the proposed new route in Mrs. Stone's opinion because she gave him permission to use it as a sole owner can. The right she refers to is not to the old easement, her driveway, which we argue has been adversely possessed and is the source of this appeal. She clearly states "Now, if he wants to use my driveway, then he would need to contact me." *Id.*

At no time since the construction of the locked gate and "no trespassing" signs has Brent had access to the old easement. All access, keys, and any rights Mrs. Stone gave to Brent to her property were to the proposed new route created after the old easement had been terminated.

Conclusion

The Chancellor committed error when she failed to hold that the construction of a locked gate upon an easement that had been in regular use, noticed by the dominant estate owner, started the running of the statute of limitations. Such a conclusion is buttressed by the opinions of seven (7) different appellate courts from seven (7) diverse jurisdictions.

II. THE CHANCELOR ERRED BY USING AN ERRONEOUS LEGAL STANDARD IN HER ANALYSIS OF THE FACTS AND BY SUBSEQUENTLY FINDING THAT BRENT HAD NOT ABANDONED THE EASEMENT.

Appellee simplifies Mrs. Stone's position on this issue to the point that it ignores the brunt of her argument. Equally as informative, as the Court's opinion in *Columbus & G. RY. CO.* is, are the law and opinions stated in *R & S Development, Inc.* and *Picayune Wood Products Co.*

Rule of Law

The Court, in *R & S Development, Inc. v. Wilson,* in determining whether the City of Jackson had abandoned an alley in which the Defendant developer sought to improve and use, stated the following:

> The complete, continuous and unexplained non-use of the alley by the general public for a period exceeding ten years gives rise to a presumption of abandonment, and the absence of dominion by the city, and the city's acquiescence in the placement of physical obstructions on the subservient alley, is inconsistent with any hypothesis other than that of an intent to abandon. The evidence combined to raise a very strong presumption of abandonment in favor of the landowners which was not overcome by Saxton.

534 So.2d 1008, 1010 Miss 1988).

Similarly, in *Picayune Wood Products Co.*, the Court stated:

> The trend of authority seems to be that mere nonuser for the period fixed by the statute of limitations for acquiring title by adverse possession affords a presumption, though not a conclusive one, of extinguishment, even in a case where no other circumstances indicating an intention to abandon appear; and if there has been in the meantime some act done by the owner of the land charged with the easement, inconsistent with or adverse to the right, a much stronger presumption of extinguishment will arise.

Picayune Wood Products Co., v. Alexander Manufacturing Co., 227 Miss. 593, 596 (Miss. 1956), citing 25 Am.Jur. p. 401, Highways, par. 112.

Lastly, *Columbus & G. RY. Co., v. Dunn*, states that abandonment "may be inferred from all the facts and circumstances of the case," and more importantly, "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 facts." 185 So. 583, 586 (Miss. 1939).

Argument

The Appellee would urge the Court to hold that *Columbus & G. RY. Co.* applied a standard of abandoning an easement that equates to the removal of tracks, ties, rails, bridges, etc. However, as seen in the facts and opinion of the more recent case, *R & S Development, Inc.*, abandonment does not require overt acts by the owner to abandon. It is sufficient that the owner inexplicably sleep on their rights to use and preserve the use of the easement for a period of ten years, and then offer no rebuttable evidence as to why they did so.

The facts presented to the Court, in the case sub judice, have satisfied this standard. Just prior to Mrs. Stone and her deceased husband's acquisition of their property, Brent had used the easement regularly in the operation of his business.

Transcript p. 49-50, lines 24-10. Then inexplicably he ceased using said right of way for a period beyond ten years. Brent then slept on his rights by allowing Mrs. Stone to build an obstruction across the easement. At trial, Brent's only rebuttable evidence as to the strong presumption of abandonment raised by Mrs. Stone was that he had no occasion to use the easement. Transcript p. 41, lines 8-26. Evidence that he has continued to farm the neighboring property, however, undermine this conclusion. Transcript p. 34, lines 22-29. Lastly, Brent's declaration that he did not intend to abandon the right of way is worthless in the eyes of the law after the abandonment has occurred. Transcript p. 33, lines 23-25.

In the lower court's Judgment on Abandonment, the Chancellor analyzed the facts of the case sub judice as follows:

> 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[2]; there was no act or series of act or series of acts indicating a purpose to repudiate ownership. Therefore there was no abandonment by the Plaintiff.
>
> Ftn. 2. To this day, ingress and egress as contemplated by the easement can still be acquired by use of the "driveway".

First, the Chancellor's statement that there "was no act done which was inconsistent with further enjoyment of the easement", along with her footnote, is patently wrong. It is wrong because the Chancellor failed to include in her analysis the acts of the property owner upon the easement that the easement holder had acquiesced to, as the Court in *R & S Development, Inc.* had done. Mrs. Stone's construction and maintenance of a locked gate

destroyed the intended purpose of the driveway as contemplated by the easement. Second, the Chancellor's statement that there was a protracted non-use of the easement contradicts her later conclusion that there were no facts evidencing Plaintiff's intent. Brent's non-use was circumstantial proof as to his intent.

While the Chancellor acknowledged that the presumption of abandonment had been established, she failed to address whether the presumption was rebutted, and therefore her legal conclusion and her holding were wrong.

Conclusion

Appellant respectfully requests that the Chancellor's holding on Abandonment be reversed, and that the Appellee's easement be deemed abandoned.

Dated: June 25, 2008

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Certificate of Service

I, John J. Crow, Jr., attorney for Defendant/Appellant hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Appellant's Reply Brief to Nathan P. Adams, 143 North Edison Street Greenville, Mississippi 38702-1406, and to the Honorable Marie Wilson, Chancery Court Judge, P.O. Box 1762, Greenville, MS 38702-1762.

This the 25th day of June, 2008.

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