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REBUTTAL

It is the opinion of the Appellants that the arguments raised in the brief of the Appellees in no way defeats the arguments, issues and case law presented in the Appellants brief. However, there are points raised in the brief of the Appellees that must be addressed.

Appellants, Barbara Patton Webb, Melvin Eugnene Johnson and Floyd Micheal Johnson do not dispute the standard of review in this matter. The law is clear that an appellate court "will not disturb the findings of a Chancellor when supported by substantial evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Apperson v. White*, 950 So.2d 1113, 1116 (Miss. App. 2007). Therefore, even when substantial evidence is presented, if the Chancellor uses the wrong legal standard when considering that evidence or his or her ruling is in direct opposition to the evidence presented, that Chancellor's findings may be reversed. In this matter, the Chancellor not only made findings based on insubstantial evidence but also misconstrued the evidence presented and failed to consider it in light of applicable case law.

One finding in particular which Appellees rely on throughout their brief is erroneous and not in any way supported by the evidence. Appellees repeatedly refer to "car tags on an old fence" and cite portions of the trial transcript. This is important to the issue because it was one witnesses testimony that her father, one of the Appellant's predecessors in title, tacked up car tags along the boundaries of the Patton family property. (Test. Izetta Berringer Tr. at 200-201). It suits Appellee's purposes for there to be car tags along the line of the abandoned fence. That would evidence that the Patton family acknowledged the former fence as the boundary of the property. However, not one single witness testified that there were car

tags along the alleged fence line. The portions of the transcript cited do not say there were car tags on or along the abandoned fence line. The only person to suggest that there were car tags on the alleged fence line was counsel for the Appellees. While questioning one of the Patton family members he asked "But, now, there is a car tag on a tree that's near one of the cabins, on the east or the west side, and that would have been one that was put up by your Daddy. Right?" to which the witness replied, "if it's a car tag, he put it up." (Test. Izetta Berringer Tr. at 208). Prior to Ms. Berringer's testimony, not one witness for the Drewerys testified that there was a car tag by the cabins or that there were car tags along the abandoned fence line. Quite to the contrary, Leon Drewery testified to seeing an old car tag on a tree which, based upon his description of where it was located, was likely on the boundary line of record between the Patton and Drewery properties. (Test. Leon Drewery Tr. at 144). Thus, the Chancellor's finding that there was a car tag tacked up on the fence line right behind Fort Drewery which indicated that the Patton family recognized the abandoned fence line as the property boundary was clearly erroneous and not supported by any evidence.

Regardless of the presence or absence of old car tags, it would appear that prior case law was disregarded when it came to reviewing evidence regarding the fence itself. Appellees cite as authority that "[i]f a fence encloses the property for a period of at least ten years, under a claim of adverse possession, title vests in the claimant and possessor, even though the fence was subsequently removed or fell into disrepair. *Roy v. Kayser*, 501 So.2d 1110 (Miss. 1987). This very issue was addressed in *Ellison v. Meek* in 2002. In *Ellison*, as in the instant case, the claimants were attempting to claim ownership of property up to an old fence by adverse possession. *Ellison v. Meek*, 820 So.2d 730 (Miss. Ct. App. 2002). It was the Appellate Court's finding that:

> The Ellisons, who have the burden of proving by clear and convincing evidence that they have gained ownership by adverse possession, have not shown such evidence to establish that the fence ever enclosed the property, when the fence was erected, the property was exclusive to the Brights and Ellisons or that the party erecting the fence was making a claim of ownership.

Id. at 735. In deciding *Ellison*, the Court considered the prior case of *Stewart v. Graber* in which they found as follows:

> While the Stewarts claimed that they used the contested area to enclose livestock, cut hay and garden, they did not meet the burden of proof that there was ever an enclosure. (Citation omitted). The chancellor aptly found that even if livestock were permitted to graze on this area, cut hay and garden, occasional use of someone else's property without an enclosure does not pass the test of adverse possession. (Citation omitted) Sporatic use of another's property does not constitute open and notorious possession. (Citation omitted).

Id. at 736 (citing *Stewart v. Graber*, 760 So.2d 868 (Miss. Ct. App. 2000)). There was no evidence presented as to who erected the abandoned fence or for what reason the fence at one time existed. There was also no evidence presented that John and Glenda Drewery or their predecessors in title maintained the fence in any way. The case law would suggest that an abandoned fence could be relied upon as a basis for an adverse possession claim provided that the fence once enclosed the property for a period of ten years and the activity within the disputed area was sufficient to "fly the flag" of ownership. However, in the absence of proof of enclosure, it can be argued that a fence must be maintained if it is to relied upon for a claim of adverse possession. The alleged fence in the instant case is at best a partial fence with much of it no longer standing or visible. (Test. Robert McCain Tr. at 49-50, 53-54). The Chancellor herself referred to it as "the remnant of a fence line." (Op. Of Court Tr. at 240). A partial fence, that does not enclose the disputed property and has not been maintained is not sufficient evidence that Appellees were exercising a claim of ownership of the Appellant's

land. It also does not appear that prior case law regarding fences was even considered by the Chancellor prior to her ruling.

Additionally, the Chancellor concluded that although John and Glenda Drewery were not living in Mississippi, the acts of their son and others were sufficient to declare the disputed property to be owned by John and Glenda Drewery. Appellants previously provided legal authority by way of *Norris v. Cox* which makes that conclusion erroneous as a matter of law as none of these people were acting as agents of John and Glenda Drewery. *Norris v. Cox*, 860 So.2d 319 (Miss. Ct. App. 2003). In their brief, Appellees provided no legal authority or response to this assignment of error. Failure of an appellee to respond to an appellant's argument in his brief "is tantamount to a confession of error and will be accepted as such." *Turner v. State*, 383 So.2d 489 (Miss. 1980). Therefore, in order to uphold the Chancellor's decision, there must be substantial evidence that John and Glenda Drewery's activity on the disputed land was sufficient to declare to the world that they were claiming ownership of that property.

It is undisputed that John and Glenda Drewery lived in Huntsville, Alabama until approximately 2002. (Test. John Bill Drewery Tr. at 159). Their claim of adverse possession is based primarily on the cutting of trees and bushogging. Mississippi case law is clear on this point. "Sporadic and temporary activity on the property is not sufficient to give notice of an adverse possession claim, nor is an owner put upon such notice by occasional . . . cutting of timber." *Davis v. Clement*, 468 So.2d 58, 63 (Miss. 1985). The act of cutting timber is insufficient to constitute open and hostile possession for the purpose of an adverse possession claim. *Ellison*, So.2d at 735. "Mere possession is not sufficient to satisfy the requirements of open and notorious possession." *Id.* at 734-735. "Appearing occasionally to inspect the land

and allowing a fence to fall into disrepair are insufficient to make clear that [claimant] was attempting to fly his flag over the lands and to put the record title holder upon notice that the lands are held under an adverse claim of ownership." *Askew v. Reed*, 910 So.2d 1241, 1245 (Miss. Ct. App. 2005). As the activities of others and the activities engaged in by John and Glenda Drewery are clearly insufficient under the common law of Mississippi to support a claim of adverse possession, the Chancellor's ruling should be reversed.

Appellees have attempted to shift the burden in this matter to the Appellants. It is the Drewery's argument that the Patton family should have done more to assert their own claim of ownership of the disputed property. Once again, the case law is clear on this matter. "The burden of proof is on the adverse possessor to show by clear and convincing evidence that each element of adverse possession is met." *Ellison*, So.2d at 735. The possessory acts of the title owners of the disputed property are immaterial to the analysis of an adverse possession claim. *Apperson*, So.2d at 1117. What must be determined is whether the possessory acts of the claimant, if any, were sufficient to place the record title owner on notice of a claim of adverse ownership over the disputed property. *Id.* Therefore, the Appellants cannot be deprived of almost half of their property solely because they did not do enough. The mere fact that they paid the taxes and attempted to notify the Drewerys and others of their trespass is sufficient to defeat both the exclusive and peaceful elements of adverse possession.

CONCLUSION

It is not enough for John and Glenda Drewery to say that they believed that they owned property south of the abandoned fence line in order to own the disputed property. If that were enough, there would be no need for the remaining five (5) elements of adverse possession. Adverse possession should only be granted when all six (6) elements have been proven by clear and convincing evidence. In the instant case, not only is the evidence less than clear and convincing, it fails to prove the elements of adverse possession when considered in light of previously established case law. Therefore, the Chancellor's ruling should be reversed and legal title to the disputed property restored to Barbara Patton Webb, Melvin Eugene Johnson and Floyd Michael Johnson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence L. Little, Attorney at Law, Oxford, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a copy of the above and foregoing Appellants Brief to:

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THIS, the 4th day of June, 2008.

LAWRENCE L. LITTLE