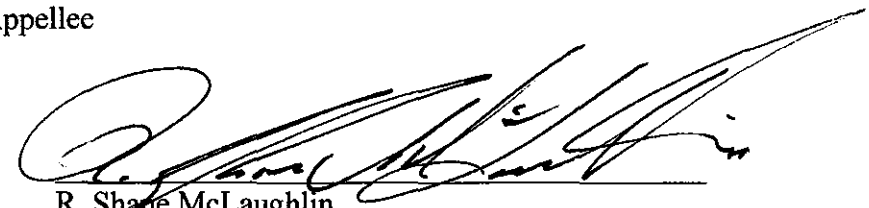
2009-CA-01962 E

CERTIFICATE OF INTERESTED PERSONS

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

1. Martha J. Stancil, Appellant
2. James Terry Farris, Appellee
3. Michael D. Cooke, attorney for Appellant
4. R. Shane McLaughlin, attorney for Appellee
5. Nicole H. McLaughlin, attorney for Appellee
6. D. Kirk Tharp, attorney for Appellee



R. Shane McLaughlin
Attorney of record for Appellee

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STATEMENT REGARDING ORAL ARGUMENT

While Appellee's counsel would welcome the opportunity to present this case orally, Appellee does not believe oral argument would be helpful to the Court in light of the straightforward nature of the issues on appeal.

STATEMENT OF THE ISSUES

1. Whether the Trial Court erred by finding that Terry Farris had not abandoned an express easement where the evidence established that Farris continuously used the easement and never intended to abandon it.
2. Whether the Trial Court erred in finding that Terry Farris had adversely possessed a small piece of property where the property had been treated as part of a home-site owed by Farris for over forty (40) years and Farris had himself claimed and maintained the property during his ownership for over ten (10) years.

STATEMENT OF THE CASE

Martha Stancil ("Stancil") filed a "Complaint for Modification" against James Terry Farris ("Farris") on November 6, 2008. (R. p. 38).[1] Farris filed an Answer February 2, 2009. (R. p. 53). Farris filed a Counter-Complaint on April 6, 2009. (R. p. 57). Farris filed an Amended Counter-Complaint on November 2, 2009, and Stancil simultaneously filed her Answer. (R. p. 91, 107).

The Trial Court rendered its opinion on November 2, 2009, following a day of trial. (T. p. 171-188). The Court entered a final Order on November 10, 2009. (R. p. 115). Stancil filed a Notice of Appeal on December 8, 2009. (R. p. 118).

[1] Clerk's Papers are cited as "R." and the trial transcript is cited as "T."

STATEMENT OF FACTS

James Terry Farris ("Farris") acquired a parcel of real property in Itawamba County, Mississippi from Dr. Thomas McDonald on October 15, 1997. (*See* T. p. 150; Exhibit 23). The property was known as "the Old Thrasher Place." (*See* T. p. 136). Mattie Thrasher, known generally as Aunt Mat, had lived in a house on the property for many years before Dr. McDonald bought the property (T. p. 24, 88).

Sybil Prestage Wilburn, Appellant Martha Stancil's mother, owned property adjoining the Old Thrasher Place. (*See* R. p. 6-7). Sybil Prestage Wilburn filed an action against Farris over the ownership of a portion of property in December 2002. (R. p. 4). A settlement was reached in the boundary-line dispute between Sybil Wilbrn and Terry Farris and an Agreed Order was entered. (R. p. 34). The Agreed Order provided that the property line between the properties would be "the old fence line that runs in a north/south direction and lies west of the section line which runs in a north/south direction." (R. p. 34-35). The Agreed Order also provided as follows:

> The Defendant, Terry Farris, shall have an easement more particularly described as follows:
>
> > Commencing on an iron pin (found) at the Northeast Corner of the Northwest Quarter of Section 28, Township 8 South, Range 8 East; thence south 01 degrees 00 minutes 08 seconds West for a distance of 134.87 feet to the South right-of-way line of Thrasher Public Road; thence North 68 degrees 58 minutes 35 seconds West along said South right-of-way line for a distance of 13.73 feet for a Point of Beginning; thence in a Southerly direction parallel to an old fence line as follows: South 11 degrees 02 minutes 51 seconds West for a distance of 123.89 feet; thence South 04 degrees 34 minutes 23 seconds West for a distance of 283.58 feet; thence South 03 degrees 07 minutes 42 seconds West for a distance of 191.28 feet; thence South 01 degrees 00 minutes 16 seconds East for a distance of 72.14 feet to the backwater of a certain pond as it lay on August 21, 2003; thence South 88 degrees 59 minutes 44 seconds West for a distance of 10.00 feet to a point on the extension of the aforementioned old fence line; thence along said old fence line and

> the extension thereof as follows: North 01 degrees 00 minutes 16 seconds West for a distance of 72.50 feet; thence North 03 degrees 07 minutes 42 seconds East for a distance of 191.77 feet; thence North 04 degrees 34 minutes 23 seconds East for a distance of 284.27 feet; thence North 11 degrees 02 minutes 51 seconds East for a distance of the aforementioned Thrasher Public Road; thence South 64 degrees 21 minutes 04 seconds East along the South right-of-way line for a distance of 10.33 feet to the Point of Beginning. All lying and being in the Northwest Quarter of Section 28, Township 8 South, Range 8 East, Itawamba County, Mississippi.
>
> This easement shall not run with the land, but applies to Terry Farris and any of his heirs through testate or intestate succession. The Defendant shall not cause ruts to be left in the easement as a result of traversing over the easement. The Defendant shall not allow any equipment to be left on the easement. The use of the easement is for the Defendant only and applies only to the Defendant's heirs as aforementioned above.

(R. p. 35-36).

At some point after 2003 Martha Stancil acquired the property from her mother. (R. p. 58; T. p. 28). Stancil acknowledge at trial that in the 2003 Order her mother had "agreed to give [Farris] an easement so that he could come down our side and cross over to get to his side of the property to continue on through his property." (T. p. 28).

Farris used the easement set out by the Agreed Order continuously after 2003. (*See, e.g.,* T. p. 130, 159). J.T. Farris, Terry Farris' father, testified that Terry Farris used the easement continuously and there were never long periods of time when he had not accessed the easement since 2003. (T. p. 130). Similarly, Terry Farris testified that he used the easement regularly, at least four (4) or five (5) times a year. (T. p. 159). In fact, traveling along the easement continued to be the only reasonable way of accessing part of Farris' property. (T. p. 167). Without the easement, in order to access part of his property, Farris would have to "take a dozer and . . . tear down trees and build me a road." (T. p. 167). Other witnesses acknowledged that

the only other route to part of Farris' property, other than the easement, was impassible even by walking. (T. p. 139).

Aside from the 2003 easement, the testimony at trial pertained to the ownership and maintenance of a small triangular piece of property near the Parties' property line. (*See, e.g,* Exhibit 25).[2] The evidence established that a fence line existed along the southern line of the triangle. (T. p. 84). Allen Stancil, Martha Stancil's ex-husband, claimed he had moved the fence from the northern line of the triangle to the southern line around the 1980s. (T. p. 83-84). Martha Stancil claimed that regardless of location of the fence, she owned the triangular area north of the fence line. (T. p. 23). Martha admitted, however, that the fence line had been on the south line of the triangular area since around 1973-1975. (T. p. 23).

Martha Stancil denied that the fence line was the accepted boundary line between her property and the Old Thrasher Place. (T. p. 24). She claimed the fence had been moved south merely so that Aunt Mat could see down the road. (T. p. 24). However, this testimony was disputed by other witnesses. (*See* T. p. 122, 158). These witnesses testified that the triangle portion north of the fence was always considered part of the Old Thrasher Place and the various occupants of the house on the property used the area as a yard for many years before Farris acquired the land. (*Id.*)

Terry Farris knew some of the people who lived in the house before he bought it and he was frequently in the area. (T. p. 157-58). In fact, one of his cousins had lived in the home for a while. (*Id.*). Terry Farris explained of the occupants of the house:

> A: They always kept that little triangle mowed there that's in question because if they didn't, it would make the rest of their yard look bad because it was considered part of the yard.

[2] The triangular area in dispute, referenced throughout the Record and briefing as the "triangle shaped property" or "triangular area," is shown on Exhibit 25.

Q: Okay. So this area [the triangle] was maintained in the fashion as the area around this home?

A: Right.

(T. p. 158). Further, when Farris purchased the property from Dr. McDonald, he and Dr. McDonald actually walked the property lines of the Old Thrasher Place. (T. p. 146-47). Terry understood from this that the location of the fence, on the southern line of the triangle, was the boundary line. (*Id.*). That is, that the triangular area was part of the Old Thrasher Place. (*see id.*). Ever since Terry acquired the property in 1997, he considered the fence line the property line such that he owned the triangle. (*Id.*).

J.T. Farris, who was previously a County supervisor for the area and had lived in the area for forty (40) years, testified that the fence had been along the southern line of the triangle for as long as he had lived in the area. (T. p. 122). Everyone who was familiar with the area knew that the fence had always been on the southern line of the triangle, not the northern side. (T. p. 121). J.T. Farris explained that the triangular-shaped area had been used and maintained as the yard for the house on the Old Thrasher Place for many years prior to Terry Farris acquiring the property. (T. p. 118-19). Other witnesses likewise testified that the triangular area had been maintained as the yard for Aunt Mat's house on the Old Thrasher Place for several years. (T. p. 137-38).

When Terry Farris acquired the Old Thrasher Place in 1997 he continued to maintain the triangular area. (*See, e.g.,* T. p. 119, 138, 170). Terry Farris unequivocally testified that he maintained the triangular area by bushhogging it since he bought the property. (T. p. 170). Terry testified that "I mowed and maintained it [the triangular area] since '97, I know that." (T. p. 170). Terry further explained:

Q: Now, when you purchased [the property] in '97, have you maintained this area [the triangle] in the same fashion around that home?

A: Every bit of it. I always bushhogged it the same. When I come through there, I bushhog the triangle area, I bushhog the house area, and I also bushhog my logging roads and logging land.

Q: How long have you been doing that?

A: Ever since I've owned it.

Q: In 1997?

A: Yeah.

(T. p. 158). No one ever said anything to Farris about his maintenance of the triangular area. (T. p. 158).

J.T. Farris likewise testified that he personally observed Terry Farris bushhogging the property since 1997. (T. p. 119). Similarly, Gerald Moody echoed this and testified that Terry Farris maintained the triangular area. (T. p. 136). Moody explained:

Q: Do you have any knowledge or have you observed anyone maintaining this triangular area here by bushhogging, mowing, anything like that?

A: That who section as well as the old – I guess it's the old Thrasher Place, where the old home place was, was all kept bushhogged. Terry bushhogged it every year all the way around his property as a matter of fact.

(T. p. 136).

Martha Stancil and her ex-husband Allen Stancil both testified that they did not know whether Terry Farris had mowed the triangular area since he bought the Old Thrasher Place in 1997. (T. p. 59, 79). Allen Stancil claimed he might have mowed the area in the 1980s. (T. p. 90). The Stancils' son, Destry, testified that he had mowed the area with a riding lawnmower. (T. p. 109).

However, neither J.T. Farris nor Terry Farris ever observed that anyone other than Terry maintained the triangular area since Terry acquired the land in 1997. (T. p. 119, 162). The

triangular area is clearly visible from a public road. (T. p. 119). Both of the Farrises hunted in the area and frequently saw the triangle area. (T. p. 119-20). They would have noticed if someone else had bushhogged or mowed the area other than Terry. (T. p. 127-28, 161-62). Terry Farris would have noticed if someone had done anything to the property and would have inquired about it. (T. p. 161).

Further, it was undisputed at trial that there was a noticeable difference between the appearance of the triangular area and the Stancil's land south of the southern line of the triangle. (T. p. 59, 161). The triangular area that Terry maintained was bushhogged grass, but the area on the south side of the fence line consisted of large pine trees. (*Id.*). In contrast to Stancil's land, there were no large pine trees inside the triangular area. (T. p. 59). Even a casual review of the land made it "very obvious" that the triangular area was maintained as part of the home on the Old Thrasher Place. (T. p. 160). Terry Farris' maintenance of the area was clearly visible to anyone who drove down the public road. (T. p. 66). Even Martha Stancil admitted that the property was not hidden from her view and any use of the property would have been "open and notorious." (T. p. 66).

Farris' use and maintenance of the triangular area continued from October 1997 until June 19, 2008. (T. p. 62). On June 19, 2008, the Stancils put up yellow posts in concrete which blocked Farris' access to the triangular area. (*Id.*). Even Martha Stancil admitted that there were never any disputes about the triangular property until June 19, 2008. (T. p. 66-67). The Stancils did not live near the triangular area and never argued with Farris or any of the previous owners about maintenance of the property. (T. p. 65-66).

This dispute ensued after the Stancils blocked Farris' access to the property on June 19, 2008. As discussed fully below, the Chancellor's decision in this case was manifestly correct and supported by the evidence produced at trial. The Chancellor's decision should be affirmed.

STANDARD OF REVIEW

A Chancellor's findings of fact will not be disturbed where they are supported by substantial evidence. *Cooper v. Crabb*, 587 So. 2d 236, 239 (Miss. 1991). The Mississippi Court of Appeals has held:

> The resolution of disputed questions of fact is a matter entrusted to the sound discretion of the chancellor. On appeal, we are limited to searching for an abuse of that discretion; otherwise, our duty is to affirm the chancellor. Our job is not to reweigh the evidence to see if, confronted with the same conflicting evidence, we might decide the case differently. Rather, if we determine that there is substantial evidence in the record to support the findings of the chancellor, we ought properly to affirm.
>
> The chancellor, by his presence in the courtroom, is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witnesses and what weight ought to be ascribed to the evidence given by those witnesses. It is necessarily the case that, when conflicting testimony on the same issue is presented, the chancellor sitting as trier of fact must determine which version he finds more credible.

Carter v. Carter, 735 So. 2d 1109, 1114 (Miss. Ct. App. 1999). That is, the Appellate Court "does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder." *Bower v. Bower*, 758 So. 2d 405, 412 (Miss. 2000). Rather, the Court has stated "[i]f there is substantial evidence in the record to support the chancellor's findings of fact, no matter what contrary evidence there may also be, we will uphold the chancellor." *Bower*, 758 So. 2d at 412.

The Chancellor's factual findings are affirmed so long as they are not "manifestly wrong" or "clearly erroneous." *Ferrara v. Walters*, 919 So. 2d 876, 881 (Miss. 2005). Regarding such factual findings, the Supreme Court has explained:

> The trial judge saw these witnesses testify. Not only did he have the benefit of their words, he alone among the judiciary observed their manner and demeanor. He was there on the scene. He smelled the smoke of battle. He sensed the interpersonal dynamics between the lawyers and the witnesses and himself. These are indispensable.

Clark v. Clark, 754 So. 2d 450, 462 (Miss. 1999).

SUMMARY OF THE ARGUMENTS

The Chancellor correctly determined that Terry Farris had not abandoned the easement across the Stancil property. Terry Farris and Sybil Wilburn, Stancil's mother who previously owned the property, agreed that Farris would have an express easement over the property in an Agreed Order entered on August 4, 2003. Farris had never commenced any proceedings seeking an easement by necessity from Wilburn. The easement was an express easement, not an easement by necessity.

Farris' express easement could be lost only by actions taken inconsistent with the easement and non-use for an extended period of time. There was no evidence in the record of such abandonment. Farris continued to use the easement several times per year. Moreover, contrary to Stancil's assertions, the easement continued to be the only reasonable access which Farris had to portions of his property. The Chancellor was correct in refusing to set the easement aside as Farris had not abandoned the easement.

Second, the Chancellor was likewise correct in finding that Terry Farris, and his predecessors in title, had adversely possessed the triangular area. The evidence established that all of the owners of the Old Thrasher Place had maintained the triangular area and treated it as part of the yard for the house on the property for approximately forty (40) years. The fence line on the south line of the triangle was always treated as the boundary line. Moreover, Terry Farris

himself had openly maintained the area as his own property for over ten (10) years with no objection from the Stancils.

The Chancellor properly considered each element necessary for a claim of adverse possession and found each met based on the credible evidence produced at trial. The record manifestly supports the Chancellor's factual findings. The Chancellor correctly determined that Farris had acquired the property by adverse possession.

ARGUMENT I.

THE CHANCELLOR CORRECTLY FOUND THAT FARRIS HAD NOT ABANDONED THE EASEMENT.

An easement may be abandoned by actions taken inconsistent with the easement and non-use for an extended period of time. *See Columbus & G. R. Co. v. Dunn*, 185 So. 583 (Miss. 1939); *COR Devs., LLC v. College Hill Heights Homeowners, LLC*, 973 So. 2d 273, 286 (Miss. Ct. App. 2008). There must be acts indicating an intention to abandon an easement before abandonment can be found. *Dunn*, 185 So. at 586. The Supreme Court has explained:

> 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.

Id. at 586.

The Court has held that "[o]nce the easement is properly created . . . abandonment requires 'protracted non-use for an extended period of time,' which creates a 'presumption of

abandonment.'" *Bivens v. Mobley*, 724 So. 2d 458, 461 (Miss. Ct. App. 1998) quoting *R & S Development, Inc. v. Wilson,* 534 So. 2d 1008, 1010 (Miss. 1988).

In this case, there is no question that Terry Farris did not abandon the easement he was granted over the Stancil property by the Agreed Order in 2003. The evidence established that Farris continued to use the easement at least four (4) or five (5) times per year to access some portions of his property. There is no evidence of any action undertaken by Farris indicating an intent to abandon the easement.

The Trial Court specifically found that there was never any protracted period of non-use of the easement and that there was no intent by Terry Farris to abandon the easement. (T. p. 177, 179). These factual findings are supported by the overwhelming record-evidence. In fact, there is no evidence to the contrary in the record. The Chancellor was correct in finding that the easement had not been abandoned.

Stancil, however, argues that the easement should have been set-aside because Farris no longer had any "necessity" of its use. This argument fails for multiple reasons. First of all, the 2003 easement was not an "easement by necessity." (*See* R. p. 35) (providing that "Defendant, Terry Farris, shall have an easement more particularly described as follows . . ."). The easement does not reference any necessity and is not limited by any necessity. Terry Farris had an ***express*** easement across the Stancil property, not an easement by necessity. An express easement, of course, is an easement granted by an express written instrument. *See, e.g., Evanna Plantation, Inc. v. Thomas*, 999 So. 2d 442, 446 (Miss. Ct. App. 2009) (differentiating between express easement, easement by necessity and prescriptive easement). An easement by necessity does not contemplate an easement by an express written conveyance. *Cf. Huggins v. Wright*, 774 So. 2d 408, 411 (Miss. 2000).

Further, the proper manner for seeking a private way across neighboring land is by petitioning the County board of supervisors. *Alpaugh v. Moore*, 568 So. 2d 291, 295 (Miss. 1990); MISS. CODE ANN. § 65-7-201. There were no such proceedings in this case further rebutting the claim that the 2003 easement was an easement by necessity. Similarly, Farris had filed no claim for an easement by necessity in the Chancery Court prior to the August 4, 2003, Agreed Order. Thus, the easement established by the Agreed Order could not have been an easement by necessity.

By virtue of the 2003 Agreed Order, Farris has an express easement over the Stancil property. Martha Stancil's mother, Sybil Wilburn, agreed to grant Farris the express easement in exchange for the boundary-line settlement. (R. p. 34-35).

Stancil asserts, without citation to any record-evidence, that Terry Farris "had a problem with water backing up on his property" in 2003, and that this must have been the reason for the easement provided for in the 2003 Agreed Order. (Brf. of Appellant at 14). Nothing in the record supports this. No testimony established that Farris claimed any necessity for an easement. Farris never filed a counter-claim for an easement by necessity in the case which Sybil Wilburn filed against him. No claim for an easement by necessity was pending before the Court at the time the August 4, 2003, Agreed Order was entered.

In fact, when questioned as to whether necessity was the reason for the 2003 easement in the Agreed Order, Terry Farris testified that he did not believe that was the reason for Sybil Wilburn agreeing to the easement. (T. p. 166). The testimony is as follows:

> Q: And that was really the original reason of the agreement for the easement because you needed to get across and you couldn't get across that water, wasn't it?

> A: Well, I don't know whether that was the original – I really don't know whether that was the original agreement or not. I didn't take it that was the original agreement.

(*Id.*). The 2003 Agreed Order established a compromise: The Parties agreed on the north-south boundary line between their properties and Terry Farris got the easement set out in the Order. This compromise did not establish a temporary easement limited by some phantom necessity. Rather, by its own terms, the Order established an express easement for Terry Farris and his heirs.

Finally, Stancil is likewise incorrect, in any event, in arguing that that the easement in favor of Farris was no longer reasonably necessary. The evidence showed that use of the easement was indeed the only reasonable way that Farris could access part of his property. Without using the easement, Farris would have to use a bulldozer to clear a path of travel. According to the evidence at trial, the alternate means of accessing Farris' property was impassible even for walking.

In short, Terry Farris never sought an easement by necessity over the Stancil property by any means. Rather, Farris obtained an express easement by agreement as part and parcel of the settlement embodied in the August 4, 2003, Agreed Order. The evidence irrefutably showed that Farris had not abandoned the easement. Accordingly, the Trial Court correctly refused to set the easement aside. The Trial Court' decision should be affirmed.

ARGUMENT II.

THE CHANCELLOR CORRECTLY FOUND THAT FARRIS HAD ADVERSELY POSSESSED THE SUBJECT PROPERTY.

Mississippi Code section 15-1-13 provides as follows:

> Ten (10) years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten (10) years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy

> may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten (10) years after the removal of such disability, as provided in Section 15-1-7. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one (31) years.

MISS. CODE ANN. § 15-1-13. The Supreme Court has announced a six-part test to determine whether property has been adversely possessed. *Rice v. Pritchard*, 611 So. 2d 869, 871 (Miss. 1992). The elements for adverse possession are that the property has been possessed as follows:

1. Under claim of ownership;
2. Actual or hostile;
3. Open, notorious, and visible;
4. Continuous and uninterrupted for a period of ten years;
5. Exclusive; and
6. Peaceful.

Rice, 611 So. 2d at 871. The rule of "tacking" provides that a predecessor's possession of the property may be combined with a subsequent possessor's possession to meet the requirements for adverse possession. *Buford v. Logue*, 832 So. 2d 594, 606 (Miss. Ct. App. 2002).

Each element of adverse possession must be proven by clear and convincing evidence. *Thornhill v. Caroline Hunt Trust Estate*, 594 So. 2d 1150, 1153 (Miss. 1992). "A finding that the proof was sufficient to sustain a claim of adverse possession is a fact-finding that requires our application of the substantial evidence/manifest error test." *Sturdivant v. Todd*, 956 So. 2d 977, 982 (Miss. Ct. App. 2007). As long as the Chancellor's fact-findings are supported by substantial evidence this Court will affirm. *Sturdivant*, 956 So. 2d at 982.

The Trial Court in this case found, as a factual finding, that each of these elements was proven by clear and convincing evidence. In making these findings the Court noted:

> Now, we get down to the matter of the triangle. This, of course, is where the bur comes under the saddle. The testimony to some degree is conflicting here, but this Court cited at the beginning that this Court is one who weighs the credibility of the witnesses, the demeanor of the witnesses. I'm going to be frank with you, I was impressed by J.T. Farris and by Terry Farris and the type of responses and answers that they gave in this case. I was impressed by their credibility in this case.

(T. p. 181). As discussed below, there was ample evidence from which the Chancellor could, and did, find that each element was satisfied such that Farris had adversely possessed the triangular area.

A. Under Claim of Ownership

The record is replete with evidence that Terry Farris possessed the triangular area under claim of ownership and that his predecessor in title, Dr. McDonald, likewise possessed the area under claim of ownership. The evidence demonstrated that Farris, and Dr. McDonald before him, claimed that the boundary line of the Old Thrasher Place extended to the fence line, and that they thus owned the triangular area. From October 1997 to present, Terry Farris claimed he owned the property.

In fact, Farris and Dr. McDonald actually walked the boundary lines of the Old Thrasher Place before Farris bought it from Dr. McDonald and indicated that the property included the triangular area. The triangular area was treated like part of the yard for the house on the property (Aunt Mat's house) by occupants over the years. Terry Farris continued this and mowed the triangle as part of the yard to the house.

There is no question that Farris claimed ownership of the triangle. He unequivocally testified to as much at trial. Further, previous owners of the Old Thrasher Place claimed the area as part of the property for at least forty (40) years before trial. Dr. McDonald had claimed ownership of the area. The Trial Court properly found this element satisfied.

B. Actual or Hostile

"Actual possession has been defined as 'effective control over a definite area of land, evidenced by things visible to the eye or perceptible to the senses'". *Sturdivant*, 956 So. 2d at 987 (Miss. Ct. App. 2007) quoting *Blankinship v. Payton*, 605 So.2d 817, 819-20 (Miss. 1992). Possession is actual and hostile whenever a person intends to claim ownership. *Id.*

The testimony at trial manifestly established that Terry Farris had actual and hostile possession of the triangular area. The area was outside the fence line which separated the properties. Terry Farris claimed ownership of the land and maintained the land just as he did all of the other property which comprised the Old Thrasher Place. Farris' control was undisputedly visible to the eye. Not only did Farris mow the land as part of the yard to the house on his property, the land looked obviously different from the other land in that it was clear of large pine trees.

Similarly, Dr. McDonald who owned the property before Terry Farris had actual and hostile possession of the property. Again here, the testimony established that the property had been actually possessed by owners of the Old Thrasher Place for about forty (40) years.

The Chancellor correctly concluded that Terry Farris had actual and hostile possession of the property. There is substantial evidence to support this finding.

C. Open, Notorious and Visible

"[A]n adverse possessor 'must unfurl his flag on the land, and keep it flying, so that the (actual) owner may see, and if he will, that an enemy has invaded his domains, and planted the standard of conquest." *Blankinship v. Payton*, 605 So. 2d 817, 820 (Miss. 1992). The Court has explained as follows regarding this element:

> Both the quality and quantity of possessory acts necessary to establish a claim of adverse possession may vary with the characteristics of the land. Adverse

> possession of "wild" or unimproved lands may be established by evidence of acts that would be wholly insufficient in the case of improved or developed lands. The question in the end is whether the possessory acts relied upon by the would be adverse possessor are sufficient 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.

Lynn v. Soterra Inc., 802 So. 2d 162, 167 (Miss. Ct. App. 2001).

There is overwhelming evidence in the Record to support such a finding. Terry Farris, J.T. Farris and Gerald Moody all testified that Terry Farris openly maintained the triangular area as part of the Old Thrasher Place. Terry openly maintained the triangular area as part of the yard for the house on the property. The land inside the triangular area was mowed and maintained simultaneously with Farris' other property. The property even looked different than the neighboring property, in that it was mowed grass rather than large pines.

There was essentially no dispute at trial that Farris' maintenance and possession had been open, notorious and visible. In fact, Martha Stancil admitted as much during her testimony. The property is just off a public road and it was obvious to any passer-by that Farris was maintaining the property.

Further, the testimony established that the previous occupants of the Old Thrasher Place had openly maintained the area as the yard for the home on the property for many years prior to Terry Farris acquiring the property. At all times, this maintenance of the property was open, notorious and visible. The Chancellor properly found this element satisfied.

D. Continuous and Uninterrupted for Ten Years

The record evidence shows that the possession of the triangular area was continuous and uninterrupted for over forty (40) years by Farris and his predecessor owners. Again, the critical fact is that the owners of the Old Thrasher Place had maintained the triangular area as part of the yard for the house on the property for at least forty (40) years, as long ago as J.T. Farris could

remember. All of the occupants of the home occupied, possessed and maintained the area in question as part of Old Thrasher Place. The then-existing fence line was always treated as the property boundary.

Further, Terry Farris' possession of the property was, of itself, continuous and uninterrupted for over ten (10) years. Terry Farris bought the property from Dr. McDonald on October 15, 1997. Farris' possessed and maintained the property until the Stancils put posts blocking his access on June 19, 2008. Farris testified, and the Stancils admitted, that there was never any objection to his maintenance of the property until June 19, 2008.

Accordingly, the evidence likewise supported the Chancellor's finding as to this element.

E. Exclusive

The element of exclusivity contemplates "an intention to possess and hold land to the exclusion of, and in opposition to, the claims of all others, and the claimant's conduct must afford an unequivocal indication that he is exercising dominion of a sole owner." *Rawls v. Parker*, 602 So. 2d 1164, 1169 (Miss. 1992) quoting 2 C.J.S. *Adverse Possession* § 54 (1972). However, "exclusive" possession does not mean that the adverse possessor must keep all others off the property. *Keener Props., L.L.C. v. Wilson*, 912 So. 2d 954, 957 (Miss. 2005). Rather, the element of exclusivity is met where the possessor claims a right in the land above the general public. *Keener Props.*, 912 So. 2d at 957. The element is satisfied where the possessor exercises dominion over the land as its sole owner. *Lynn v. Soterra Inc.*, 802 So. 2d 162, 168 (Miss. Ct. App. 2001).

The evidence clearly supports the Chancellor finding that the element of exclusivity was satisfied. Farris, and the owners of the Old Thrasher Place before him, possessed the triangular area as part of the property. Farris testified that he possessed the land with the intention that he

owned it. Farris treated the land just like he treated all of the other property on the Old Thrasher Place which he owned. Farris testified that he never observed that anyone else maintained the triangular property. Farris never observed that it had been bushhogged since he had last bushhogged the property himself. Further, as avid deer hunters of the area, he or his father J.T. Farris would have noticed any such maintenance and would have inquired about it, since Farris claimed the property as his own. Farris did not claim any joint right to the property, but rather exercised exclusive control over the triangular area just like he did for all of his other property in the area.

The element of exclusivity was unquestionably satisfied and the Chancellor's factual finding was correct in this regard.

F. Peaceful

This element is satisfied by evidence that the possession was "marked by, conducive to, or enjoying peace, quiet, or calm." *Biddix v. McConnell*, 911 So. 2d 468, 477 (Miss. 2005). The requirement of peacefulness is satisfied where no one disputed the possessor's possession of the property. *Sturdivant*, 956 So. 2d at 992.

This element was undisputed at trial. Martha Stancil admitted that she did not object to Farris' possession of the property from October 15, 1997, until June 19, 2008. Stancil claims she did not know about his maintenance and possession, even though it was open and obvious to her and any other passer-by and despite that the owners of the Old Thrasher Place had maintained the area for many years prior.

Regardless of Stancil's contentions, there is no dispute that Farris' possession was peaceful, and met with no objection, for more than ten (10) years. Moreover, the previous

owners of the Old Thrasher Place had enjoyed similar peaceful possession of about forty (40) years.

This element was obviously satisfied at trial and the Chancellor's finding was correct.

CONCLUSION

The Trial Court correctly found that Terry Farris had not abandoned the easement provided for in the August 4, 2003, Agreed Order. Terry Farris continued to use the easement several times per year. The easement was an express easement, not an easement by necessity.

The Trial Court also correctly found that Terry Farris had adversely possessed the triangular area. Each of the elements for adverse possession was proven by clear and convincing evidence. The Trial Court, sitting as the finder of fact, properly found that Terry Farris had proven the elements for adverse possession.

Accordingly, for the above and foregoing reasons, Appellee Terry Farris respectfully requests the Court to Affirm the Chancellor's decision in all respects.

RESPECTFULLY SUBMITTED, this the 2d day of September, 2010.

MCLAUGHLIN LAW FIRM

By: _____

R. Shane McLaughlin (Miss. Bar No [redacted]
Nicole H. McLaughlin (Miss. Bar No [redacted]
338 North Spring Street Suite 2
P.O. Box 200
Tupelo, Mississippi 38802
Telephone: (662) 840-5042
Facsimile: (662) 840-5043
E-mail: rsm@mclaughlinlawfirm.com

ATTORNEYS FOR APPELLEE

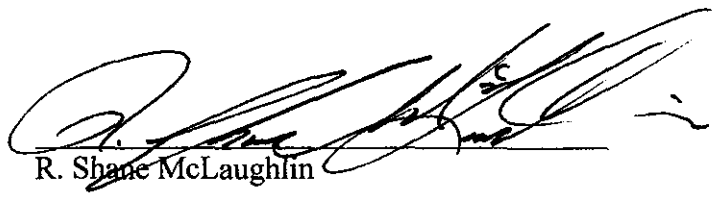
CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellee in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellee** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

Michael D. Cooke
Attorney at Law
Post Office Box 625
Iuka, Mississippi 38852

Hon. Talmadge Littlejohn
Chancellor
P.O. Box 869
New Albany, MS 38652

This the 2d day of September, 2010.



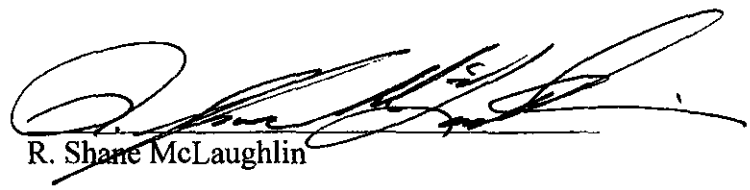
R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellee in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellee** by mailing the original of said document and three (3) copies thereof via First Class Mail, postage pre-paid, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 2d day of September, 2010.



R. Shane McLaughlin