

IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-01185 COA

MARY R. BENTZ AND A. WILLIAM BENTZ

APPELLANTS

v.

JEAN PATTERSON MILLER AND HUSBAND EMMETT P. MILLER

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. B. REEVES

COURT FROM WHICH APPEALED: CHANCERY COURT OF AMITE COUNTY

ATTORNEY FOR APPELLANTS:

JAMES F. NOBLE, JR.

ATTORNEY FOR APPELLEES:

WAYNE SMITH

NATURE OF THE CASE: REAL PROPERTY - QUIET TITLE ACTION

TRIAL COURT DISPOSITION: RULING IN FAVOR OF APPELLEES - BOUNDARIES SET
WHERE APPELLEES CONTENDED THEY SHOULD BE SET; APPELLEES ALSO
DECLARED OWNERS OF 4.3 ACRE PARCEL OR PROPERTY

BEFORE FRAISER, C.J., BARBER, AND McMILLIN, JJ.

BARBER, J., FOR THE COURT:

The Appellants, Mary R. Bentz and A. William Bentz ("the Bentzes"), appeal from a final decree of the Chancery Court of Amite County declaring the location of a boundary line between land belonging to the Bentzes and land belonging to the Appellees, Jean P. Miller and Emmett P. Miller ("the Millers"). The chancellor found that certain fences separating the two properties were located at or near the actual location of the boundary line. In addition, the chancellor awarded ownership of a 4.3 acre parcel of property located directly to the east of one of those fences to the Millers on the ground of adverse possession. Finding no error in the chancellor's findings, we affirm.

I. BACKGROUND

This case involves two sets of owners of adjacent parcels of real property, both of which are located in Amite County. The two parcels of property are separated by a boundary, the exact location of which provided the basis of this litigation. For the sake of reference, the relevant parts of this boundary are described as follows: Between point 1 (located in the west) and point 2 (located in the east), the boundary runs in an east-west direction. At point 2, the boundary makes a ninety degree turn to the north and runs to point 3. At point 3, the boundary makes an approximate ninety degree turn to the east and proceeds to point 4. At point 4, the boundary again turns in an approximate northerly direction and proceeds to point 5. In addition, a 4.3 acre parcel of property with a fence for a western boundary running between point 4 and point 5 lies directly east of this fence. In summary, from its most southwestern point, the boundary runs diagonally in a northeasterly direction in an irregular, "zig-zag" pattern. The Millers own the property located to the south and to the east of this boundary. The Bentzes own the property located to the north and to the west of this boundary.

Mary R. Bentz and A. William Bentz, the plaintiffs below, are the widow and son respectively of Alvin W. Bentz, who, in the early 1950's, acquired title to seventy-three acres of land located to the north and to the west of the above-described boundary. The Bentzes acquired title to this property in 1966, the year Alvin Bentz died. The Millers, the defendants/counter-plaintiffs below, acquired title to their land in 1982 from the heirs of Kemp Miller. Prior to his death in 1975, Kemp Miller was the owner the land to the south and to the east of the boundary.

Prior to 1971, Kemp Miller grazed his cattle on all of the seventy-three acres belonging to the Bentzes. In 1971, A. William Bentz, wrote Kemp Miller a letter telling him that he and his mother were going to develop their land and that it would therefore be necessary for Kemp Miller to withdraw his cattle from grazing upon it. Kemp Miller complied with the Bentzes request, but withdrew his cattle behind a fence which ran from point 4 to point 5 and which formed the western boundary of the 4.3 acre parcel. According to title records, this 4.3 acre parcel was also part of the Bentz property. After Kemp Miller died in 1975, his heirs continued to use this 4.3 acre parcel in a manner consistent with that use by Kemp Miller.

In 1985 and again in 1990, Willie Moak was hired to conduct surveys of the boundary separating the Miller and Bentz properties from one another. The 1985 survey was commissioned by the Millers, and the 1990 survey was commissioned by the Bentzes. In addition, in 1991, the Millers hired L. W. Guy, Jr. to conduct a third survey of the boundary. As a result of the apparent discrepancies between these three surveys, the alleged discrepancies between the locations of certain fences separating the Bentz and Miller properties, and the boundary lines as represented in the Moak surveys, a number of points of contention respecting the true location of the boundary line emerged. Questions arose as to

the exact location of the boundary line between point 1 and point 2, point 2 and point 3, and point 3 and point 4. Specifically, with respect to the line between point 1 and point 2, the issue was whether the fence located on that line was located on the true boundary line or was instead located north of that line such that it encroached onto the Bentz property.

With respect to the line between point 2 and point 3, an old buggy lane runs between those two points. This lane is bounded on both the west and east sides by fences. The issue with respect to this part of the boundary was whether the true location of the boundary was on the east side or the west side of the lane (i.e., whether the eastern or western fence represented the true boundary line.) Viewed another way, the main controversy with respect to the boundary between point 2 and point 3 was whether the lane running between these points belonged to the Bentzes or the Millers. With respect to the boundary between point 3 and point 4, the issue was whether a fence erected by the Millers and running between these two points was actually located to the north of the true boundary line such that it encroached upon the Bentzes' property. The final question was whether the 4.3 acre parcel of property, which had as its western boundary the fence located on the line between point 4 and point 5, belonged to the Millers or to the Bentzes.

As a result of the various surveys and the ensuing controversies generated by them, the Bentzes brought suit against the Millers charging the Millers with having trespassed upon their property by wrongfully removing various stakes and markers and by erecting fences which were actually located on and encroached upon the Bentz property. Additionally, with respect to the lane running between point 2 and point 3, the Bentzes claimed that this lane belonged to them by reason of adverse possession.

In their answer to the Bentzes' complaint, the Millers denied the Bentzes' allegations and asserted a counter-claim for the possession of the 4.3 acre parcel. They predicated this counter-claim upon their allegations that they and their predecessors in title (Kemp Miller and his heirs) had adversely possessed this parcel for the period of time required by statute.

After a five-day trial, the chancellor found for the Millers. Specifically, he found that the fences that the Millers had erected between points 1 and 2, between points 2 and 3, and between points 3 and 4 were located on or near the true boundary line. With respect to the segment of the boundary between point 2 and point 3, the chancellor found that the Bentzes' claim of adverse possession of the land was without merit. With respect to the line between points 3 and 4, the chancellor set the boundary at a fence running eastward from point 3 up to the point that that fence crossed a boundary line represented in the Moak surveys. From that point of intersection to point 4, the chancellor held that the line drawn on the Moak survey represented the true boundary line. Finally, with respect to the 4.3 acre parcel, the chancellor found that the Millers were its true owners by virtue of their claim of adverse possession. The Bentzes now appeal the chancellor's decree.

II. DISCUSSION

In the "Statement of Issues" section of their appellate brief, the Bentzes raise eleven issues. Quoted verbatim, these are:

1. Whether Kemp Miller ever claimed legal title to the 4.3 acres or to the boundaries contented [sic] by the Millers.

2. Whether Kemp Miller ever intended to hold adversely to the Bentzes.
3. Whether, if Kemp Miller did intend to hold adversely, he made this known to the Bentzes by actions sufficient to support imputing knowledge to them.
4. Whether, if Kemp Miller did hold adversely, he did so for the statutory prescription period of ten (10) years.
5. Whether Kemp Miller's use of the 4.3 acres was permissive and therefore not adverse to Bentzes [sic].
6. Whether the heirs of Kemp Miller ever held adversely to the Bentzes.
7. Whether the Millers themselves had adverse possession of any of the land in dispute before they had their lines surveyed by Moak in 1985.
8. Whether, if Kemp Miller held adversely against the Bentzes but his heirs did not do so, the Millers can tack their claimed adverse possession to that of Kemp Miller.
9. Whether Kemp Miller's possession was exclusive.
10. Whether Kemp Miller's knowledge of the corners and lines as he pointed them out to A. William Bentz, which did not conflict with the corners and lines claimed by the Bentzes, amounting to disclaimer, as testified to by said Bentz without contradiction, would estop the Millers from claiming contrary thereto. not being a licensed surveyor and the plat (Exhibit 24) being a 7-8-93 revision (as shown by notation at the bottom thereof) of the first L.W. Guy survey plat dated 12-17-91, when L.W. Guy, Sr., was not the one who made the revision.
11. Whether the testimony of L.W. Guy, Jr., and Exhibit 24 thereto are admissible over plaintiffs' objection based on his not being a licensed surveyor and the plat (Exhibit 24) being a 7-8-93 revision (as shown by notation at the bottom left thereof) of the first L.W. Guy survey plat dated 12-17-91, when L.W. Guy, Sr., was not the one who made the revision.

Although the Bentzes set forth these various issues as individual points of contention, these issues are organized under and argued within the context of the following two headings:

A. THE JUDGMENT OF THE LOWER COURT IS CONTRARY TO THE WEIGHT OF THE CREDIBLE EVIDENCE AND TO THE LAW AND MUST BE REVERSED AND RENDERED.

B. THE FACTS AND AUTHORITIES SHOW THAT THE DEFENDANTS [THE MILLERS] FAILED TO MEET THEIR BURDEN OF PROOF IN ESTABLISHING TITLE BY ADVERSE POSSESSION.

After carefully considering the Bentzes' brief, we believe that the two headings encapsulate the main points of contention raised by the Bentzes and that the first ten issues that the Bentzes claim to be

raising under their statement of issues are no more than the specific factual issues implicated and encompassed by these two headings. Thus, the Bentzes are doing no more than making specific arguments as to correctness of each of the factual findings implicated in issues one through ten.

Our system of jurisprudence requires that we review a trial judge's factual findings under the manifest error or clearly erroneous standard. *See Murphy v. Murphy*, 631 So. 2d 812, 815 (Miss. 1994); *Barnes v. A Confidential Party*, 628 So. 2d 283, 290 (Miss. 1993); *Sweet Home Water & Sewer Ass'n v. Lexington Estates, Ltd.*, 613 So. 2d 864, 872 (Miss. 1993); *see also Patel v. Telerent Leasing Corp.*, 574 So. 2d 3, 6 (Miss. 1990) (stating that the findings of fact and conclusions of law of a circuit or county court in a non-jury trial is entitled to the same deference on appeal as a chancery decree). Therefore, great deference will be accorded the chancellor's factual findings unless we determine that there was clear error. After reviewing the chancellor's findings, we are of the opinion that there was no clear error and that they were not against the weight of the evidence.

Before we continue with our discussion of the specific findings, however, we pause to state the elements that a party claiming adverse possession must prove before title can be said to vest in him or her. To establish title by adverse possession, the claimant must prove by clear and convincing evidence actual possession and that such possession was characterized by the following six elements: 1) under claim of ownership; 2) actual or hostile; 3) open, notorious, and visible; 4) continuous and uninterrupted for a period of ten years; 4) exclusive; and 6) peaceful. *Blankenship v. Payton*, 605 So. 2d 817, 819 (Miss. 1992).

1) Whether Kemp Miller Ever Claimed Legal Title to the 4.3 Acres or to the Boundaries Claimed By the Millers.

The Bentzes assert that there is no evidence on the record that Kemp Miller, the Millers' predecessor in title and the owner of the Miller property prior to 1975, ever verbally claimed that he was the owner of the 4.3 acre parcel such that his period of occupancy could be tacked onto the Millers' period of occupancy. We find this contention without merit. Assuming for the sake of argument that there is no evidence that Kemp Miller ever actually made a verbal claim to the 4.3 acres, such a lack of verbal assertion of right is irrelevant:

[Terms] such as 'claim of right,' 'claim of title,' and 'claim of ownership' . . . mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others. To make a disseisin it is not necessary that the disseisor should enter under color of title, or should either believe or assert that he had a right to enter. It is only necessary that he enter and take possession of the lands as if they were his own, and with the intention of holding for himself to the exclusion of all others.

Carpetner v. Coles, 75 N.W. 423, 424 (Minn. 1898).

After the 1971 letter from A. William Bentz asking Kemp Miller to stop grazing his cattle on *all* of the Bentz property, Kemp Miller continued to graze his cattle behind the fence forming the western boundary of the 4.3 acre parcel. This 4.3 acre parcel was described on the relevant records as being part of the Bentz property. Furthermore, the undisputed evidence showed that Kemp Miller enjoyed

complete and total use of this parcel. We think that these factors are sufficient to support a finding that Miller was claiming legal title to that parcel, even though he may not have verbally stated as much. Moreover, we think it entirely within the prerogative of the chancellor to disbelieve any testimony offered by the Bentzes to the effect that Kemp Miller acknowledged that the 4.3 acre parcel, along with other disputed property, belonged to the Bentzes. Accordingly, we find this contention without merit.

2) Whether Kemp Miller Ever Intended to Hold Adversely to the Bentzes.

The Bentzes dispute whether Kemp Miller subjectively intended to hold the 4.3 acre parcel adversely to the Bentzes. However, "[w]herever the proof is that the one in possession [of land] entered and holds for himself to the exclusion of all others, the possession so held is adverse . . ." *Id.* As was just stated, there is adequate proof on the record that Kemp Miller entered upon the 4.3 acre parcel and held it for himself to the exclusion of all others. Thus, there is adequate proof that his possession of the 4.3 acre parcel was adverse. Any contentions raised by the Bentzes regarding an absence of evidence showing his *subjective intent* to do so is therefore irrelevant.

3) Whether, If Kemp Miller Did Intend to Hold Adversely, He made This Known to the Bentzes by Sufficient Actions.

The Bentzes also dispute whether Kemp Miller's adverse holding of the 4.3 acres was done in a manner sufficient to provide the Bentzes with adequate notice of such holding. We think, however, the fact that in 1971, A. William Bentz wrote Kemp Miller a letter notifying him that he would have to stop grazing his cattle on the Bentz property -- an area of land that included the 4.3 acre parcel -- and the fact that Kemp Miller nevertheless continued to openly graze his cattle on the 4.3 acre parcel, were sufficient to provide the Bentzes with adequate notice of Kemp Miller's holding the 4.3 acres adversely.

4) Whether Kemp Miller Held Adversely For the Statutory Prescription Period of Ten (10) Years.

The Bentzes argue that even if Kemp Miller held adversely after the 1971 letter from A. William Bentz, his death in 1975 amounted to a period of adverse holding of only four years, six years short of the statutorily mandated ten year period. However, we find this line of reasoning fruitless. Even if Kemp Miller's adverse holding was for only four years, Mississippi allows adverse periods of holding of predecessors and successors in interest to be tacked on to other periods of adverse holding. The chancellor found that there was adequate evidence on the record showing that Kemp Miller's heirs (who held the property from 1975 to 1982) as well as the Millers (who held the property from 1982 to the time of trial) continued to hold the land adversely after Kemp Miller died, and that such periods of holding, when added to the four year period of Kemp Miller, were sufficient to comply with the requisite ten year period.

5) Whether Kemp Miller's Use of the 4.3 Acres Was Permissive.

The Bentzes argue that Kemp Miller's use of the 4.3 acres was permissive and therefore not adverse

to the Bentzes. We think, however, that the fact that Kemp Miller continued to use the 4.3 acre parcel even after his receipt of the 1971 letter informing him that he would have to remove his cattle from the Bentz property was sufficient evidence to support a finding that Kemp Miller's use of the parcel was not in fact permissive.

6) Whether the Heirs of Kemp Miller or the Millers Ever Held Adversely to the Bentzes.

Assuming that the period of adverse possession of the 4.3 acre parcel began in 1971, then it would be necessary to show that the heirs of Kemp Miller also held the 4.3 acre parcel adversely to the Bentzes from the time of Kemp Miller's death in 1975 to the time when Jean and Emmett Miller obtained title to the Miller property in 1982. Such a showing would be necessary in order to satisfy the statutory period of ten years of continuous, adverse use. The chancellor found that the heirs of Kemp Miller held the 4.3 acre parcel adversely after his death. Jean Miller testified that after Kemp Miller died, his heirs continued to keep Kemp Miller's animals on that parcel. The Bentzes point to nothing on the record contradicting or undermining this testimony. Accordingly, we hold that the finding that Kemp Miller's heirs adversely possessed the 4.3 acre parcel after he died is not erroneous.

7) Whether the Millers Had Adverse Possession of Any of the Land in Dispute Before They Had Their Lines Surveyed in 1985 by Willie Moak.

The chancellor found that the Millers adversely possessed the 4.3 acre parcel after they succeeded to the Miller property in 1982. Even assuming for the sake of argument that this finding was erroneous, such a finding is not necessary to support the ultimate conclusion that title to the 4.3 acres vested in the Millers by way of adverse possession. The chancellor also found that the Jean and Emmett Miller's predecessors in interest had adversely possessed the 4.3 acre tract for a period of time fulfilling the ten year statutory period, i.e., that the 4.3 acre parcel was possessed adversely by Kemp Miller and his heirs from the time of the 1971 Bentz letter until the time that Kemp Miller's heirs conveyed title to the Miller property to Jean and Emmett Miller in 1982. Accordingly, we find this contention without merit.

8) Whether If Kemp Miller Held the 4.3 Acre Parcel Adversely, But His Heirs Did Not Do So, Jean and Emmett Miller Can Tack Their Adverse Possession to That of Kemp Miller.

The chancellor determined that Kemp Miller's heirs held the 4.3 acre parcel adversely after Kemp Miller died in 1975 until such time as these heirs conveyed the property to Jean and Emmett Miller in 1982. We have already held that this finding was not erroneous. Accordingly, we find that the issue of tacking Kemp Miller's possession to that of Jean and Emmett Miller, in the face of the supposed absence of adverse possession on the part of Kemp Miller's heirs, is without merit.

9) Whether Kemp Miller's Possession Was Exclusive.

The chancellor found that Kemp Miller possessed the 4.3 acres exclusively. There was testimony on

the record that in addition to grazing his cattle on this parcel, Kemp Miller kept chicken pens on it and kept his motor vehicles on it. The Bentzes point to no evidence showing that during the time that Kemp Miller lived, the Bentzes made any use of the 4.3 acre parcel. Therefore, we also find this issue without merit.

10) Whether Kemp Miller's Supposed Acknowledgment of the Location of the Boundary Between the Two Properties Estops the Millers From Claiming Contrary Thereto.

At trial, A. William Bentz testified that at the time that Kemp Miller was alive, he verbally acknowledged that the boundary between the Bentz and Miller properties was located or conformed to the location that the Bentzes contend represents the true boundary. We note, however, that there is contradictory evidence on the record that could lead the trier of fact to the conclusion that Kemp Miller never acquiesced to or believed that the boundary was so located. Moreover, it was within the prerogative of the chancellor, as the trier of fact and ultimate weigher of the evidence, to put little stock in A. William Bentz's testimony. Accordingly, we also hold this contention to be without merit.

III. CONCLUSION

For the foregoing reasons, we hold that the chancellor's findings that the boundary between the Miller and Bentz properties conformed to the location advocated by the Millers as representing the true boundary, and that the Millers were entitled to the 4.3 acre parcel by virtue of the adverse possession of their predecessors in interest, should be affirmed.

THE FINAL DECREE OF THE CHANCERY COURT OF AMITE COUNTY IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANTS.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.