

IN THE COURT OF APPEALS 5/16/95
OF THE
STATE OF MISSISSIPPI
NO. 93-CA-00020 COA

E.L. MCAMIS AND MARY G. MCAMIS APPELLANTS

v.

R.L. RITCHEY, SR., R.L. RITCHEY, JR., AND BECKY RITCHEY APPELLEES

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

TRIAL JUDGE: ;HON. HYDE RUST JENKINS II

COURT FROM WHICH APPEALED: CLAIBORNE COUNTY CHANCERY COURT

ATTORNEY(S) FOR APPELLANT(S): KENNIE E. MIDDLETON

ATTORNEY(S) FOR APPELLEE(S): SIM C. DULANEY

NATURE OF THE CASE: NUISANCE

TRIAL COURT DISPOSITION: APPELLANTS REMOVE AND PAY ALL COSTS FOR
REMOVAL OF THE NUISANCE

BEFORE THOMAS, P.J., BARBER AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

R.L. Ritchey, Sr., R.L. Ritchey, Jr., and Becky Ritchey alleged that E.L. and Mary McAmis' fence constituted a nuisance. The Chancery Court of Claiborne County held that the fence constituted a nuisance that prevented the Ritcheys from adequately maintaining their property. The Chancery Court ordered Mr. and Mrs. McAmis to move the fence at least three feet from the property line, at their own expense. The McAmis' appeal asserting the following error:

I. WHETHER THE CHANCERY COURT HAD THE EQUITABLE OR LEGAL RIGHT TO REQUIRE THE REMOVAL OF THE EXISTING FENCE.

FACTS

In the spring of 1990, Mr. and Mrs. McAmis erected a fence near the property line between their home and the Ritchey home. The Ritchey home is located approximately ten inches from the McAmis property line. A dispute arose as to whether the Ritcheys could adequately maintain their property with the fence in question so close to their home.

There were numerous disagreements between these parties. In fact, each party previously had been granted a permanent restraining order and injunction against the other forbidding each party from intimidating, harassing or threatening the other party. Moreover, according to the Ritcheys' brief, one of the McAmises (the brief is unclear as to who) filed a criminal complaint against R.L. Ritchey, Sr.

The McAmis' argued that for over a year that the Ritcheys used a string trimmer to cut the grass between the fence and their house, and that the Ritcheys only ceased maintenance of the property between the Ritchey house and the fence after the McAmises filed the case sub judice against them. The Ritcheys contend that they only tried to cut this area twice with a string trimmer because of the inaccessibility to the area. The Ritcheys also claimed that they had been constantly harassed by the McAmises whenever they were near the fence. The McAmises deny that they ever harassed the Ritcheys. Furthermore, the McAmises contend that they built the fence only after their relationship with the Ritcheys deteriorated so that they deemed it necessary to build the fence to maintain peace.

The Chancery Court held a hearing after the Ritcheys' filed a motion for summary judgment and the McAmis' entered a response thereto. After the hearing on this motion, the court remanded the case to the Mayor and Board of Alderman of the Town of Port Gibson, Claiborne County, for certification of the following questions:

(1) is the residence now occupied by Robert L. Ritchey, Jr., and his wife Becky Ritchey in violation of the non-conforming use provisions of the Zoning Code regulations of the Town of Port Gibson; and

(2) if in violation, will the Mayor and the Board of Alderman permit the substitution of the new non-conforming use for the previous non-conforming use?

The Mayor and Board of Alderman certified and determined the above questions. At the hearing, a factual dispute arose concerning whether the Ritchey residence had been enlarged, extended or structurally altered after passage of Port Gibson's present zoning ordinance on May 14, 1975.

The Mayor and the Alderman of the City of Port Gibson determined that the residence now occupied by Ritchey, Jr., and his wife, Becky Ritchey, was not in violation of the non-conforming use provisions of the zoning code regulations of the City of Port Gibson. Moreover, the Board found that "although the Ritchey residence is closer to the McAmis property line than is allowed under the City's zoning laws, it had been so located since well before the passage of said zoning code on May 14, 1975, and had not been enlarged, extended, reconstructed, or altered since that time, so that the present use was allowable under the grandfather clause of the City's zoning code."

An agreed order was entered in chancery court and all the parties agreed to the following:

- (1) the only issue to be decided is whether the chancery court has the equitable or legal right to require removal of the existing fence;

- (2) briefs will be filed on whether removal is required for adequate maintenance and to abate the nuisance;

- (3) the fence in question is a six foot cyclone fence erected on the McAmis side of the property line in the spring of 1990;

- (4) the distances of the fence from the Ritchey house are as follows: (a) average distance = 16.13 inches; (b) largest distance = 18 inches; and © smallest distance = 14 inches.

The distance of the fence posts from the building located in back of the Ritchey house are as follows: twenty-six inches, twenty-six inches; twenty-nine inches; and twenty-nine inches.

The Chancery Court entered an order stating that the issue before the court was whether the court had the legal right to require Mr. and Mrs. McAmis to remove the existing cyclone fence which had been placed by Mr. and Mrs. McAmis on the property line between the McAmis property and the Ritchey property. The Chancery Court inspected the property and held that the fence was so close to the home of the Ritcheys as to prevent them from adequately maintaining their property. The Chancery Court further held that it had the power to require the Mr. and Mrs. McAmis to move the fence in question pursuant to the law of nuisance. The Chancery Court ordered that Mr. and Mrs. McAmis remove the cyclone fence at least three feet from the property line, at their own expense.

LAW

The Ritcheys cited numerous cases in their brief alleging that the chancery court had the power to order removal of the fence. All of the cases are factually distinguishable from the case sub judice. Each of the cases cited involved an "invasion" onto the property of another. *See Love Petroleum Co. v. Jones*, 205 So. 2d 274 (Miss. 1967) (salt water and oil to escape on the land of another is a nuisance); *Laurel Equip. Co. v. Matthews*, 67 So. 2d 258 (Miss. 1953) (obnoxious odors caused by

negligent distribution of paint onto land of another).

This Court employs a de novo standard of review used by the Mississippi Supreme Court when reviewing questions of law and will reverse for an erroneous interpretation or application of the law. *Bank of Mississippi v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992). Findings of facts will be affirmed where there is substantial evidence in the record to support the chancellor's findings. *Id.* (cites omitted).

The Mississippi Supreme Court has defined a private nuisance as a "nontrespassory invasion of another's interest in the use and enjoyment of his property." *Bowen v. Flaherty*, 601 So. 2d 860, 862 (Miss. 1992) (cites omitted). One cannot use his land so as to "unreasonably annoy, inconvenience, or harm others." *Bowen*, 601 So. 2d at 862.

A nuisance is the use of one person's property that improperly interferes with neighbors' legal rights as to their own property. The only complaint here is that the fence deprives the Ritcheys' from being able to use the *McAmis* property as necessary to maintain a strip of land too narrow to be maintained otherwise. The fence was built so as to give the Ritcheys an extra six to eight inches of access, and even that is inadequate.

The problem is not the fence, which actually blocks the McAmis' from using a narrow strip of their own property. The problem is that the Ritchey house was built so close to the property line that it was necessary to trespass on the McAmis property to maintain a strip next to their house. Interference with the ability of a neighbor to trespass is not a nuisance. It does not interfere with a right to use one's own property, but blocks the unauthorized use of adjoining property.

Some jurisdictions might analyze the fence in question under cases dealing with spite fences. In *Sundowner, Inc. v. King*, an enormous fence, which also served as a sign, was erected between two adjoining motels. *Sundowner, Inc. v. King*, 509 P.2d 785 (Idaho 1973). The fence or sign was built sixteen inches from property line, two feet from the motel on the adjacent property, and was described as the largest such structure in a three-state area. *Id.* at 785. The fence had no value for advertising purposes. *Id.* The *Sundowner* Court noted that the "English rule" which was followed by most 19th century American courts, held that erection of a spite fence was not an actionable wrong. *Id.* Many of the older cases based this holding on the premise that a property owner has an absolute right to use his property in any manner he desires. See *Letts v. Kessler*, 42 N.E. 765 (Ohio 1896). The *Sundowner* Court held that because the fence or sign served no useful purpose and was erected for the sole purpose of injuring the adjoining property owner then that fence may be abated and enjoined as a spite fence. *Id.* at 787.

In *Brittingham v. Robertson*, the Court defined a spite fence as one "which is of no beneficial use or pleasure to the owner, and which is erected for the purpose of annoying his neighbor." *Brittingham v. Robertson*, 280 A.2d 741, 744 (Del. Ch. 1971). There is substantial evidence in the record of the ill will between these neighbors. The intent of the McAmises in building the fence might have been a fact question, but it was relevant only if the alleged injury to the Ritcheys was in their ability to use their own property.

A right such as the Ritcheys claim can be acquired if they had through a trespass on the McAmis property over a sufficient number of years, acquired an easement by prescription. *Miss. Code Ann.* §

15-1-13 (1972). There is nothing in the record before us to permit such a finding. *See Patrick v. Myers*, 234 Miss. 41, 103 So. 2d 370; *Browder v. Graham*, 204 Miss. 773, 38 So. 2d 188; *Wills v. Reed*, 86 Miss. 446, 38 So. 793. In fact, the stipulation of the parties was that the only issue to be decided concerned a nuisance.

The chancellor had no legal or equitable power to deprive the McAmis' of the use and enjoyment of their property, unless that use improperly interfered with the Ritcheys' use of their property. That precludes the chancellor from finding the fence to be a nuisance and requiring removal of the same from its present location.

To hold otherwise would allow the Ritcheys to enforce a "right" to trespass on Mr. and Mrs. McAmis' property, a right they did not have before the fence was built, and the propriety thereof, by easement or agreement, was not an issue presented in this appeal.

THE JUDGMENT OF THE CHANCERY COURT OF CLAIBORNE COUNTY IS REVERSED AND RENDERED. APPELLEES ARE TAXED WITH COSTS OF APPEAL.

FRAISER, C.J., BRIDGES, P.J., COLEMAN, DIAZ, KING, MCMILLIN, AND SOUTHWICK, JJ., CONCUR.

PAYNE, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY BARBER, J.

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PAYNE, J., CONCURRING:

I concur in the opinion of the Court on technical legal grounds, but I believe that this is the type of case -- among neighbors who will see each other on a daily basis -- that could be handled best by the

alternative dispute resolution mechanism called mediation. Mediation takes place when, with the help of a disinterested third party mediator, the parties fashion a solution to govern future action. The order requiring the McAmises to move their fence three feet back from their property line within forty-five days was signed December 2, 1992, more than two years ago. Under today's opinion they may move it back to its original position. Surely, neighbors have found a way to live together successfully over that period of time.

The attorneys for the parties might want to consider Rule 2.1 and the second paragraph of the comments thereunder:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

* * *

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

2.1 Mississippi Rules of Professional Conduct.

Perhaps now would be a good time to have what Professor Thomas L. Shaffer (former Dean of Notre Dame University's law school) calls "the lawyer's moral discourse" to help them reside peacefully as neighbors.

BARBER, J., JOINS IN THIS SEPARATE OPINION.