

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 101530

DC CHAPMAN VENTURES, INC.

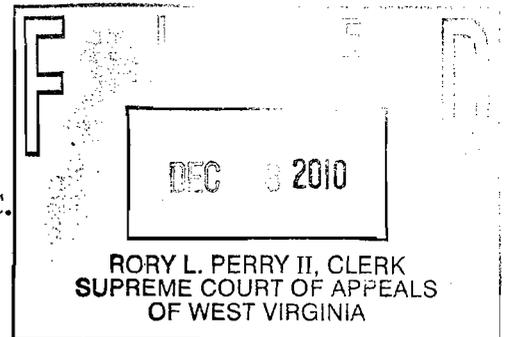
A West Virginia Corporation,

Plaintiff-Respondent,

v.

J.D. HOPKINS and DAVID HOPKINS,

Defendants-Petitioners.



Appeal from the Circuit Court of Nicholas County, West Virginia

Civil Action No. 05-C-195, Judge Gary L. Johnson

**BRIEF OF RESPONDENT, DC CHAPMAN VENTURES, INC., IN OPPOSITION TO
PETITION FOR APPEAL OF PETITIONERS, J.D. HOPKINS AND DAVID HOPKINS**

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I. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This civil action arose as a result of a boundary line dispute between the Respondent/Plaintiff, D. C. Chapman Ventures, Inc., a West Virginia corporation and the Petitioners.

This matter eventually proceeded to a Bench Trial which occurred over a five (5) day period on September 19, 20 and October 10, 11 and 12, 2007. After reviewing all of the evidence and viewing the subject real estate, Judge Gary L. Johnson, on December 5, 2007, entered his Order Following Bench Trial Establishing Real Estate Boundaries ("Bench Trial Order") in which he found that a survey performed by Craig Dunlap, the surveyor employed by the Respondent, most accurately represented the disputed boundary line. In the Bench Trial Order Judge Johnson also found that the Petitioner, J.D. Hopkins, had adversely possessed a certain area within the real estate actually owned by the Respondent. Contrary to the assertions by the Petitioner that Judge Johnson found the Petitioner, J.D. Hopkins, was entitled to the entirety of an area defined as the "Encroachment Tract", Judge Johnson found that the adversely possessed area "consisted of an area including (1) a ten (10) foot parameter of land immediately surrounding all encroaching sides of the 40's building and (2) the land west of the encroachment tracts eastern boundary as shown on the Dunlap survey.¹ (Plaintiff's Exhibit Number "1)". (See, Bench Trial Order, pgs 22-23, Exhibit "A")

The Petitioner appealed the entirety of Judge Johnson's Bench Trial Order to this Honorable Court, including the finding which limited the adversely possessed area which the Petitioner was entitled to occupy. This appeal was refused by this Honorable Court. The Respondent thereafter appealed to the United States Supreme Court, which likewise refused the Petitioner's appeal.

¹ The Petitioner, David Hopkins, conveyed his interest in the area in dispute to the Petitioner, J.D. Hopkins, before the Bench Trial. The Petitioners are therefore hereinafter referred to as "Petitioner".

Thereafter, based upon a directive contained in the Bench Trial Order, the Petitioner caused a survey to be performed by Kevin Schafer of the adversely possessed area. Mr. Schafer was the second surveyor which was employed by the Petitioner, J.D. Hopkins, in the underlying case and whose original survey had been found by Judge Johnson to not accurately depict the real estate owned by the parties. The Respondent disagreed with the survey of Mr. Schafer, and the area which he depicted as the adversely possessed area, and filed a Motion to Compel the Defendant to Perform an Accurate Survey.

A hearing was held on the Respondent's Motion to Compel the Defendant to Perform an Accurate Survey on May 3, 2010. At this hearing, Judge Johnson found that Mr. Schafer's survey did not accurately reflect his findings of the area which the Petitioner was entitled to occupy by virtue of adverse possession and his findings in the Bench Trial Order. The Order from which the Petitioner appeals was entered based upon Judge Johnson's findings at this hearing.

A review of the May 3, 2010 hearing transcript clearly supports the finding of Judge Johnson regarding the area in question and shows that the Petitioner's interpretation of Judge Johnson's Bench Trial Order relating to this area is incorrect. Judge Johnson did not change the portion of his Bench Trial Order which defined the adversely possessed area, but merely clarified his intent relating to the language in this Order of the area in question. A review of this transcript shows that when Judge Johnson found that the Petitioner had adversely possessed the land to the west of the Encroachment Tract's eastern boundary he intended to include only a small parking area for cars and not the entirety of the Encroachment Tract as depicted on the survey plat prepared by Craig Dunlap.

The issue of the boundary of the area which Judge Johnson found to have been adversely possessed by the Petitioner was initially addressed at a hearing held on February 19, 2008 hearing where the Court, on nine (9) separate occasions, indicated that the area the Defendant was entitled to occupy by virtue of adverse possession was primarily an area of ten feet (10') around the 40's building. In order to establish the final boundary line of the adversely possessed tract, Judge Johnson had to establish a line which ran from the ten foot (10') parameter around the 40's building to the property line established by Craig Dunlap in his survey. This is what the Court indicated he intended to do in his Bench Trial Order.

The area referred to as the "Encroachment Tract" is an area which Craig Dunlap placed on his survey as the boundary of a tract conveyed by the Petitioner, J.D. Hopkins, to his son, the Petitioner, David Hopkins, by a deed dated March 15, 1994 and recorded on May 16, 1994. (A portion of Mr. Dunlap's survey showing the Encroachment Tract is attached as Exhibit "B"). A significant portion of this area was clearly outside the boundary of the real estate then owned by the Petitioner, J.D. Hopkins. Likewise, a significant portion of this tract was never part of the area which Judge Johnson found had been adversely possessed by either of the Petitioners. The reference to the Encroachment Tract boundaries in the Bench Trial Order was explained by Judge Johnson to have been used to define a small area which would connect the ten foot (10') perimeter around the 40's building to the boundary line of the parties real estate. The Petitioner now asserts that Judge Johnson changed the adversely possessed area. A review of the relevant transcript shows that Judge Johnson merely clarified the intent of his Bench Trial Order when he entered the Order from which the Petitioner appeals.

A review of Exhibit "B", and the annotated and colored copy of Exhibit "B" included in the Petitioner's Petition for Appeal, shows that the line established by Judge Johnson as the line which extends from the ten foot (10') perimeter around the 40's building to the boundary line of the parties, as established by Craig Dunlap, which the Court found to be the boundary line of the parties, ends at the same point.

II. RELEVANT LAW

Standard of Review

In reviewing challenges to the findings and conclusions of the circuit court, the Supreme Court applies a two-prong deferential standard of "review," reviewing the final order and the ultimate disposition under an abuse of discretion standard and the circuit court's underlying factual findings under a clearly erroneous standard. Syl. Pt. 2, *Walker v. West Virginia Ethics Com'n*, 201 W. Va. 108 (1997). "An abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon or when all proper and no improper factors are assessed by the circuit court makes a serious mistake in weighing them. *State v. Calloway*, 528 S.E. 2d 490 (W. Va. 1999) "A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223 (1996). Conclusions of law are reviewed *de nova. Id.*

III. ARGUMENT

A. JUDGE JOHNSON DID NOT AMEND, CHANGE OR MODIFY THE DECEMBER 5, 2007 ORDER FOLLOWING BENCH TRIAL ESTABLISHING REAL ESTATE BOUNDARIES AFTER THIS ORDER WAS ENTERED

The Petitioner is simply incorrect when he asserts that Judge Johnson amended, modified or changed his Bench Trial Order regarding the tract which the Petitioner was entitled to occupy based upon adverse possession.

In his Bench Trial Order Judge Johnson clearly found that the Petitioner was entitled only to occupy an area of ten feet (10') surrounding a building known as the "40's building" and a small area extending from the point which is ten feet (10') to the right of the 40's building, as one faces this building, in a line which intersects with the line of the Dunlap survey. The Petitioner now wishes to expand the area which Judge Johnson found he was entitled to occupy as a result of adverse possession.

This issue which the Petitioner now contests was first addressed by Judge Johnson in a February 19, 2008 Order where the Court, on nine (9) separate occasions, indicated that he intended to grant to Petitioner the right to occupy an area of ten feet (10') around the 40's building. In order to establish the final boundary line of the adversely possessed tract, Judge Johnson had to establish a line which intersected with the ten feet (10') parameter line around the 40's building to the property line established by Craig Dunlap in his survey. This is what the Court intended to do in his Bench Trial Order and which he clarified to the parties at the February 19, 2008 hearing and May 3, 2010 hearing.

The Petitioner now wants to know re-litigate the entirety of the issue before Judge Johnson and also assert that Judge Johnson's directive from the May 3, 2010 hearing somehow altered or

modified the Bench Trial Order. It is totally improper to attempt to again argue the issue of the area the Petitioner is entitled to occupy in this appeal. It is likewise totally wrong to assert that Judge Johnson amended, modified or changed his Bench Trial Order, after its entry, when he merely clarified the intent of his Order at both the February 19, 2008 hearing and a May 3, 2010 hearing.

Although the Petitioner cites various West Virginia Rules of Civil Procedure and case law to support his position, neither the rules cited by the Petitioner nor the case law interpreting these rules applies to this matter. Judge Johnson did not modify, amend or change his Bench Trial Order. He simply clarified his ruling because the parties could not agree on the intent of his Order.

The argument by the Petitioners that they somehow relied upon a misplaced interpretation of Judge Johnson's Order is of no consequence. The Petitioner was fully aware, after the February 19, 2008 hearing, that Judge Johnson's intent was to find that the adversely possessed area around the 40's building was limited to an area of ten feet (10') surrounding the 40's building and an area, within the Encroachment Tract which connected this ten foot (10') parameter to the Craig Dunlap survey line. Although Craig Dunlap identified an area on his survey as the "Encroachment Tract" a significant portion of this tract was the outside boundary of the real estate which was actually owned by J.D. Hopkins when he conveyed a tract of land to his son, David Hopkins.

The reliance by the Petitioner on a survey performed by Kevin Schafer of the area which he interpreted to be the finding of Judge Johnson of the adversely possessed tract is likewise misplaced and inappropriate. First of all, when Mr. Schafer, or his employees, initially surveyed the area which Judge Johnson found to have been adversely possessed by the Petitioner, the outside parameter was exactly as Judge Johnson found it to be as a result of the May 3, 2010 hearing. (See, Transcript of May 3, 2010 hearing.) Thereafter, Mr. Schafer changed this survey and presented this inaccurate

survey to the Court. Secondly, Mr. Schafer performed a survey on behalf of the Petitioner and then testified at the Bench Trial before Judge Johnson. The survey performed by Mr. Schafer was found by Judge Johnson to not accurately reflect the boundary lines of the property for various reasons. For example, on pages 15 and 16 Judge Johnson found that Mr. Schafer's testimony indicated that he did not adjust for any secular change, despite his own testimony that a one degree (1°) adjustment is required for every twenty (20) years that passes. Further, Mr. Schafer testified that he identified and followed the present day "meanderings" of the north side of Duffy Lane to a center section with Route 41, without relying on any evidence of the roads alterations or the courses and distances on Duffy Lane as called for in the 1934 Snodgrass Deed. Judge Johnson further found that Mr. Schafer testified that he did not investigate whether there had been any changes to Duffy Lane and placed no significance on monuments located on the boundaries of the Taylor tracts. Judge Johnson further found that Mr. Schafer testified that he significantly relied on a 1924 Department of Highways map which had inconclusive indicators of road and their surrounding objects because they are designed simply for making road plans, which could have been altered after the map was made. These findings clearly support the Respondent's position that Mr. Schafer's surveying and mapping are not accurate as they pertain to this tract.

The Petitioners now ask this Honorable Court to ignore the portion of the Bench Trial Order which clearly established the adversely possessed area around the 40's building to be a perimeter of ten feet (10'). If this Honorable Court were to accept this Petition for Appeal and reverse Judge Johnson's Order from the May 3, 2010 hearing the first portion of the Bench Trial Order regarding the area at issue would be meaningless.

The Petitioner is therefore simply wrong when he asserts that Judge Johnson modified, amended or changed his finding regarding the area the Petitioner was entitled to occupy as a result of adverse possession. To argue that the Court was without jurisdiction to clarify the intent of its Bench Trial Order is totally without merit. Consequently, the Petitioner's Petition for Appeal should be refused.

**B. RESPONDENT DID NOT WAIVE ANY ARGUMENT
REGARDING THE ADVERSELY POSSESSED AREA**

The Petitioner's assertion that the Respondent waived its right to contest the Petitioner's assertion of the correct location of the adversely possessed area is also without merit.

The Respondent always believed that the interpretation which Judge Johnson made of the area in dispute at both the February 19, 2010 and May 3, 2010 was what he meant in the Bench Trial Order. Consequently, there was no need or reason for the Respondent to address this issue before this Honorable Court when the Respondent filed its response to the Petitioner's Petition for Appeal. The Petitioner's reliance on selected portions of the Respondent's response to the Petitioner's appeal to argue that the Respondent somehow waived its right to correctly establish the area in dispute ignores the fact that the issue of the exact area which constituted the adversely possessed area was not the issue raised in the Petitioner's appeal. In reality, the Petitioner did not assert that the area he now claims was the entirety of the Encroachment Tract until the May 3, 2010 hearing. To claim that the Respondent waived its right to correctly identify the adversely possessed area is simply wrong and the Petitioner's Petition for Appeal should be refused on this ground.

IV. CONCLUSION

The Respondent, D. C. Chapman Ventures, Inc., respectfully requests that this Honorable Court refuse the Petitioner's Petition for Appeal and grant it such other and general relief as it may deem proper.

**Respectfully submitted,
D. C. Chapman Ventures, Inc.,
By counsel,**



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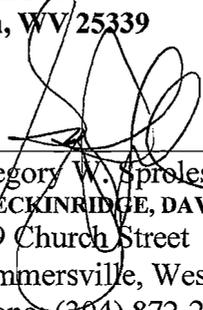
J.D. HOPKINS and DAVID HOPKINS,

Defendants-Petitioners.

CERTIFICATE OF SERVICE

I, Gregory W. Sproles, Counsel for the Plaintiff-Respondent, do hereby certify that I have served a true copy of the foregoing *Brief of Respondent, DC Chapman Ventures, Inc., in Opposition to Petition for Appeal of Petitioners, J.D. Hopkins and David Hopkins* by mailing a true copy thereof by United States Mail, postage prepaid, to the following on this the 7th day of December, 2010.

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EXHIBITS

ON

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CLERK'S OFFICE