IN THE SUPREME COURT OF MISSISSIPPI
2011-TS-00296

VIRGINIA MASSEY — APPELLANT

VERSUS

RONALD E. LAMBERT, PATRICIA RENEE LAMBERT AND ANY AND ALL PERSONS OR PARTIES HAVING OR CLAIMING TO HAVE AN INEREST IN THE PROPERTY HEREIN DESCRIBED — APPELLEES

APPEAL FROM THE CHANCERY COURT OF GREENE COUNTY, MISSISSIPPI
GREENE COUNTY CHANCERY COURT CAUSE NO. 2007-50CB

APPELLEES BRIEF
(ORAL ARGUMENT IS NOT REQUESTED)

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VIRGINIA MASSEY **APPELLANT**

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RONALD E. LAMBERT, PATRICIA RENEE LAMBERT AND ANY AND ALL PERSONS OR PARTIES HAVING OR CLAIMING TO HAVE AN INTEREST IN THE PROPERTY HEREIN DESCRIBED **APPELLEES**

STATEMENT OF INTEREST PARTIES

1. Appellant: Mrs. Virginia Massey.

2. Appellees: Ronald E. Lambert and Patricia Renee Lambert Rouse.
John Edsel Lambert.

3. Chancellor: Judge Charles Bordis.

RESPECTFULLY submitted this the 22d day of August, 2011.

GERALD A. DICKERSON
Attorney for Appellees

CERTIFICATE

This will certify that I, GERALD A. DICKERSON, have on this date mailed to the the Attorney for the Appellant, Honorable HARVEY BARTON, and a copy to the Chancellor in the lower court, Judge CHARLES BORDIS this **STATEMENT OF INTERESTED PARTIES.**

WITNESS my signature this the 22d day of August, 2011.

GERALD A. DICKERSON
Attorney for Appellees

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I. STATEMENT OF ISSUES:

1. Can an existing landowner and his successor in title who is unhappy with the legal description in a deed dated June 7, 1961, claim adverse possession when the appellees grantors received title in December, 1967 and they received title on July 21, 1969?

2. Permissive use does not require clear and convincing evidence, but adverse possession does require clear and convincing evidence.

3. Does a general conveyance with out a metes and bounds description meet clear and convincing proof of a claim of right?

4. Does the requesting of a "correction deed" from a third party who has no privity or common title with the original grantor constitute, claim of title, actual or hostile, open, notorious and visible, exclusive, continuous and uninterrupted for 10 years; and peaceful possession by clear and convincing proof?

II. STATEMENT OF THE FACTS:

J.D. Massey received a deed from appellant's uncle and aunt in 1961. (R40). The Deed is a part of composite exhibit 7. (R40). All surveys introduced into evidence clearly shows that one of the calls in this deed runs to the centerline of Mississippi State Highway 63 in Greene County, Mississippi.

John E. Lambert, father of the appellees obtained title to land west of appellant's land in December, 1967 and had it surveyed in 1969. (R.72)

The appellant received a deed from her children after J. D. Massey died and that deed was introduced as exhibit number 7. (R.37). This deed was a general conveyance and had no metes and bounds description. The intent of the deed was to given to the appellant for "all of the property that my husband owned". (R.37).

At some point the appellant claims that she and her husband discovered that "there was a mistake made in the deed". (R.39).

Appellant filed suit because "I was being harassed. Mr. Lambert come (sic) over there, Edsel would come over there and put stobs up in my--measure and put stobs in my yard" (R.44).

Appellees denied adverse possession and plead that when the issue was brought up in 1969 that the parties would swap "foot for foot" and that usage was "permissive use of said land". (Answer filed August 5, 2009).

Appellees's fact witness was John Edsel Lambert. He discussed in detail permissive use.

"And you had an understanding of what was going to happen, did you not?" "Yes I did." (R.75)

"And what was that?" "That we would swap footage, foot by foot, for equal Value." (R.76)

"Now, throughout the years, Mr. Massey continued to do his shop; is that correct."

"That's right."

""Did you ever object to that?"

"No sir."

"Did he ever come over to you and say, stay off of this disputed property, it's soley mine.?"

"Not so ever."

"Did he ever tell you, I've got–I may not have a deed, but I' ve got title to this Land?"

"No."

"Did you, over these years, always know that it was you, as a life tenant, and your children's land?"

"Right." (R.76).

"Your understanding over the years, was it ever carried out?"

"About what."

"Foot for foot."

"No. I was never, ever approached." (R.77).

"I don't ever, at any time, recall any fence being around the shop?"

"But had he done that, would you have cared?"

"No."

"About the land, we had a thorough understanding; he and I did." (R.78).

"Okay. At any time, did anybody on the Massey side of the family ever tell you, stay off this land, we own it adversely to the Lamberts?"

"No, sir."

"Did they ever take any hostile acts towards you, or any member of your family, preventing you from free traverse of the property, including surveyors, over the entire period of time:"

"No."

"Did , at any time, to your knowledge, they maintain any claim of ownership for a period of greater than ten years."

"No."

"And was it clearly understood, when you got your 1967 deed, he had a problem where he had put his shop?"

"Yes."

"And did the McLeods that you acquired the title from ever come to you and say, We made a mistake when we sold Dennis his acre of land?"

"No, sir." (R.80).

Benjamin Tate Proctor testified as an expert witness for the appellees and he was not challenged as an expert. (R.64).

Mr. Proctor discussed exhibit no. 6 introduced into evidence by agreement and discussed the Massey deed of 1961 and the appellees deed and this exhibit clearly shows that the Massey deed goes to the centerline of Mississippi Highway 63 in Greene County, Mississippi and the record title owner of the disputed property is the appellees. (R.64-65).

Mr. Proctor did a field survey. (R.64)

The appellant had a problem with distances from the centerline of highway 63 (R66-69), but on redirect established that:

"Monuments control over distances."

"And that would be back to the point of beginning?"

"That's correct."

"Otherwise the description would not close and we'd just have a big hole there, wouldn't we?"

"That's correct."

This description, back to the point of beginning, indeed, closes; does it not?"

"It does."

III. BRIEF OF THE ARGUMENT:

1. THE FINDINGS OF THE CHANCELLOR ARE NOT MANIFESTLY WRONG OR CLEARLY ERRONEOUS.

The Appellant was a sweet elderly lady, but she was stuck on the theme that when her husband got his deed in 1961 there was a mistake in the deed. In the real world one of the calls in the deed went to the centerline of Mississippi Highway 63 and continued north alone the centerline of said highway. (Composite exhibit 7, R.40.)

Her children talked about snow ball fights, some sort of fence, cutting grass, and other facts, but the appellees chose not to question them. The reason is simple; there was no showing by the appellant or her children that there was a duty by appellees to give their father a corrected deed. The exhibits show with out doubt that John Edsel Lambert got his deed some six (6) years later from the heirs of the grantor to appellant's husband. John Edsel's explanation that they would exchange land foot for foot and value for value is the only logical conclusion that the chancellor could reach.

2. THE PROOF DOES NOT CONFORM WITH THE STANDARDS SET FORTH IN DEAN V. SLADE.

The appellant court's in recent years have given chancellors templates in determining what proof based on the facts have to be met in making a final findings of facts and conclusions of law. At the present time in an adverse possession case that template is the case of Dean v. Slade, 2009-CA-01793-COA.

<u>THE ADVERSE POSSESSION FACTORS</u>

Mississippi Code of 1972, Section 15-1-13(1), as revised in 2003, provides the following: Ten (10) years' actual averse 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. Thus, the party claiming adverse possession must prove by clear and convincing evidence that his/her possession was "(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." Stringer v. Robinson, 760 So.2d 6, 9 (Miss Ct. App. 1999) (citing Rice v. Pritchard, 611 So. 2d 869, (Miss 1992). The ultimate question is whether the possessory acts relied upon by the would be adverse possessor are sufficient enough to place the record title holder on notice that the lands are under an adverse claim of ownership. Id. (citing Johnson v. Black, 469 So. 2d 88, 90-91 (Miss. 1985).

Appellees have already established that the appellant only wanted a corrected deed. However, compare the testimony of the appellant's surveyor who testified over objection: " I said, other than surveys and the recapitulation of your father's old field notes, surveys, you know nothing of the circumstances of the usage of any agreements concerning this real estate, do you?" No, sir." R.34. In admitting that his father's survey did not come within the metes and bounds of the description of the 1961 deed, Mr. Brewer admitted that "But it does not come within the meets (sic) and bounds of the old '61 deed, does it?" "No, sir." (R.34).

Ronnie Massey does not lend facts to help the appellant. "And do you see here, on Mr. Proctor's exhibit, the foot print of the slab of the old building?" "Yes, sir." "Does it exist inside or outside the legal description from the 1961 deed?" "The outside." (R.56-57) Proctor was the appellees' surveyor.

THE EVIDENTIARY STANDARD

Clear and convincing evidence has been defined as follows: that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations

sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case. Moran v. Fairley 919 So.2d 969, 975 (Miss. Ct. App. 2005) (quoting Travelhost v. Blandford, 68 F.3d 958, 960 (5th Cir. 1995). "Clear and convincing evidence is such a high stand of proof that even the overwhelming weight of the evidence does not rise to the same level," Id. (Citing In re C.B., 574 So.2d 1369, 1375 (Miss. 1990).

The evidence of the appellant is fuzzy at best and certainly does not meet the test of being overwhelming much less as being clear and convincing. Nor only is the evidence of the appellees overwhelming and undisputed, it probably meets the test of clear and convincing. There is not a single dispute as to the testimony of John Edsel Lambert. The appellant, in addition to what was testified to on direct, chose to enforce permissive use. By Mr. Barton:"Well, and to be clear, your position is that you don't want Mrs. Virginia Massey to have the property where the old shop is" "No, that's not–because I agreed with Mr. Massey that we would swap land of equal value. They had property on the–" All right. Now, when you–" "First place, let me answer your question. I never made any claims against any of them because he and I agreed. And where you see that they had their original plot laid out, I have never taken any trees down because he and I agreed to swap land. That's the reason I didn't take any of the trees out." (95-96).

CONFLICTING EVIDENCE

Absent a finding of an abuse of discretion or manifest error, a chancellor is the sole judge of the credibility of witnesses and the weight to give to the evidence. Webb v. Drewrey, 4 So.2d 3d. 1078, 1081 (Miss Ct. App. 2009).

The conflicting evidence in this case is that the appellant wants a correction deed and the appellees state permissive use. There is no abuse of discretion or manifest error, just overwhelming

evidence that there is no adverse possession. Foot for foot and value for value is within it self permissive use.

ACTUAL OR HOSTILE

"Actual possession is' effective control over a definite area of land, evinced by things visible to the eye or perceptible to the senses.'" Warehousing Mgmt., v. Haywood Props. LP, 978 So.2d 684, 688 (Miss. Ct. App. 2008) (quoting Wicker v. Harvey, 937 So.2d 983, 993-94 (Miss. Ct. App. 2006). The adverse possessor must hold the property without the permission of the true title owner since "permission defeats adverse possession." Gillespie v. Kelly, 809 So.2d 702, 706-07 (Miss. Ct. App. 2001) (citing Myers v. Blair, 611 So.2d 969, 971 Miss. 1992)). "Adverse use is defined as such a use of the property as the owner himself would exercise, disregarding the claims of others entirely, asking permission from no one, and using the property under a claim of right. "Peagler v. Measells, 743 So.2d 389, 391 Miss. Ct. App. 1999) (quoting Cummins v. Dumas, 147 Miss. 215, 113 So. 332, 334 (1927).

The Massey and Lambert lands were contiguous. By John Edsel Lambert: "Which, from the slab of your present home, is a matter of yards, is it not?" "Right" "And the lawns all run together there?" "And the land all runs together; is that correct?" "Yes". "Now, you acquired record title to a tract of land in 1967, did you not?" "Yes sir."....."From whom did you get your land?" "I bought it from the heirs of Mr. Elliott McLeod." Would that be the same grantor to Mr. Dennis Massey—" "Yes, sir." (R.71-72).

OPEN, NOTORIOUS AND VISIBLE

The mere possession of land is not sufficient to satisfy the requirement that the adverse possessor's use be open, notorious, and visible. Wicker, 937 So.2d at 994 (citing Craft v. Thompson, 405 So.2d 128, 130 (Miss. 1981)). A claim of adverse possession cannot begin unless

the landowner has actual or constructive knowledge that there is an adverse claim against his property. Scrivener v. Johnson, 861 So.2d 1057, 1059 (Miss. Ct. App. 2003) (citing Peoples's Realty & Dev. Corp. V. Sullivan, 336 So.2d 1304, 1305 (Miss. 1976)). An adverse possessor 'must unfurl his flag on the land, and keep it flying, so that the (actual) owner may see, and if he will, know that an enemy has invaded his domains, and planted the standard of on conquest.'" Wicker, 937 So.2d at 994 (citing Blankinship v. Payton, 605 So.2d 817, 820 (Miss. 1992)).

Once again all the appellant wants is a correction deed. The appellees are under no duty to give a correction deed; however, it appears that the foot for foot and value for value is still on the table;"You'r still willing to do the deal, are you not?" "Right". (R.82).

CONCLUSION

Maybe John Edsel Lambert and Dennis Massey should have traded "foot for foot and value for value" back in 1967 when John Edsel's survey showed that the little shop was on his land. No body will never know. There are no facts that favor the appellant to assist her in getting a correction deed. The McLeods and their heirs were the common source of both the Massey and Lambert deeds. All the property was joined yard to yard and maintained as such. John Edsel had a garden and mowed his property into his present age of 80 plus years. There was no duty requiring John Edsel to give to the appellant a correction deed. It is probably true that Dennis and others got out and pulled tapes and walked out what he wanted, but the 1961 deed goes to the centerline of Mississippi State Highway 63 and that is what he got. The appellees acquired title six (6) years after the 1961 deed and it is simply not logical that one can adverse possess a third party after being given notice that "you are on me" and we will swap "foot for foot and value for value" to resolve, but you have "my permission to keep your little shop on my property" and as the record shows they were all kin folks. In common country language "this dog will not hunt" when one considers the claim of the appellant.

Permissive use kills it all and permissive use is undisputed by the player with all the knowledge, John Edsel Lambert.

The learned chancellor had to labor with this and his careful findings of fact and conclusions of law are in line with the evidence, as the Irish would say "right straight away".

RESPECTFULLY submitted this the 22d day of August, 2011.

GERALD A. DICKERSON
Attorney for Appellees

CERTIFICATE

This will certify that I, GERALD A. DICKERSON, have on this date mailed to the Supreme Court of the State of Mississippi the original and three copies of this brief of the Appellees and copies to the Attorney for the Appellant, Honorable HARVEY BARTON, and a copy to the Chancellor in the lower court, Judge CHARLES BORDIS.

WITNESS my signature this the 22d day of August, 2011.

GERALD A. DICKERSON
Attorney for Appellees

CERTIFICATE OF FILING
THE BRIEF OF THE APPELLEES AND
RECORD EXCERPTS WITH BRIEF OF APPELLEE

COMES NOW, GERALD A. DICKERSON, Attorney for Appellees and certifies that pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure that on the 22d day of August, 2011, that I have mailed postage prepaid the original of this brief and three (3) copies and four (4) copies of the Record Excerpts to the clerk of the Court.