

**IN THE SUPREME COURT OF MISSISSIPPI
2011-TS-00296**

VIRGINIA MASSEY

APPELLANT

VERSUS

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

APPELLEES

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

**APPELLANT'S BRIEF
(ORAL ARGUMENT IS NOT REQUESTED)**

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ATTORNEYS FOR APPELLANT

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 may evaluate possible disqualification or recusal.

Chancery Court Judge: Honorable Charles Bordis

Appellant: Virginia Massey

Appellees: RONALD E. LAMBERT and PATRICIA RENEE
LAMBERT *and any and all person or parties
having or claiming to have
an interest in the property described herein*

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This the 27th day of June, 2011.

Respectfully submitted,

BY: 
W. HARVEY BARTON, MSB #2104
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I. STATEMENT OF ISSUES

1. Whether the trial court erred in ruling that the Plaintiff's use of Defendants' land was neither under claim of ownership nor hostile.

II. STATEMENT OF THE CASE

A. Statement of Facts

The Plaintiff, Virginia Massey, was married to Jacob Massey who was also known to family, friends, and associates as J.D. Massey. On June 7, 1961, J.D. Massey acquired real estate from Elliot McLeod and Mable McLeod as described below:

Township 1 North, Range 6 West, Section 25

Begin at Southwest corner of Northeast Quarter (NE 1/4 of NE 1/4) and run thence North along the West line of said forty a distance of 10 chains, or to the center of said forty; thence run East along the center line of said forty a distance of 288 feet to the point of beginning; thence run South 210 feet; thence run East parallel to the center line of said forty, to the center line of Highway No. 63; thence in a Northerly direction along the center line of said Highway to a point where the center line of said Highway intersects the center line of said forty; thence West along the center line of said forty a distance of 210 feet, or back to the point of beginning, less and except therefrom the Highway right-of-way.

(R.58)

On July 21, 1969, Defendants, Ronald E. Lambert and Patricia Renee Lambert, acquired the following real estate directly west of the above property from John E. Lambert and Ima Jean Lambert:

Township 1 North, Range 6 West, Section 25

Beginning at the Southwest corner of the Northeast Quarter of the Northeast Quarter (Southwest corner of the NE 1/4 of the NE 1/4) of Section 25, Township 1 North, Range 6 West, Greene County, Mississippi and from thence run North 660 feet; thence South 210 feet; thence East 202 feet; thence South 450 feet; thence West 210 feet; thence South 440 feet; thence West 274 feet; thence North 22 feet; thence West 418 feet and thence run East 418 feet back to the Point of Beginning.

(R.58)

Following J.D. Massey's death on September 3, 1979, his estate was administered in the Chancery Court of Greene County, Mississippi in Cause No. 4977. On September 7, 1979, the

heirs of J.D. Massey executed a Quitclaim Deed conveying their interest in the real estate owned by J.D. Massey to the Plaintiff, Virginia McLeod Massey. (R.58)

J.D. Massey and his family constructed a workshop in which they operated a repair business for many years. The business was operated by J.D. Massey until his death and then by one of his sons for about five (5) years thereafter. The business was ultimately discontinued and around 2003, the repair shop was torn down. (R. 58-9) After the workshop was constructed, it was discovered that the shop was constructed on that parcel owned by the Defendants and described above.

B. Course of Proceedings Below

This matter was originally filed in the Chancery Court of Greene County on April 30, 2007. (R. 6) The trial of this matter was conducted before the Honorable G. Charles Bordis, IV on February 22, 2010 and March 26, 2010. (R. 83)

In preparation for trial, the parties commissioned surveys. A November 14, 2007 survey by Benjamin Proctor depicts the above property belonging to the Plaintiff. N.W. Brewer also completed two (2) surveys. The first survey seeks to show the same property belonging to the Plaintiff and the second survey depicts the legal description sought by the Plaintiff pursuant to her adverse possession claim.

Three (3) of Plaintiff's children testified during trial. The children were Kenneth Massey, Ronnie Massey, and Judy McLeod. Kenneth testified that he and his uncle, Elliot McLeod, assisted his father, J.D., in marking the land when it was purchased. His testimony revealed that the group's intention was to ensure that J.D. Massey had a true acre of land and that he assisted his father in measuring an acre out of the field.

Ronnie Massey testified that J.D. Massey fenced his property within two (2) or three (3) weeks after purchasing it from Elliot McLeod and that the fencing remained for more than ten

(10) years. During his testimony, Ronnie Massey added that the Massey family maintained the area under fence. (R. 77)

Judy McLeod corroborated Ronnie Massey's testimony testifying that she assisted the family in maintaining the area under fence for more than ten (10) years. (R. 61)

During trial, Defendants attempted to introduce evidence that Plaintiff's possession of the property was not adverse but permissive. Each time these attempts were made, Plaintiff's counsel offered objections which were sustained by the trial judge. (R. 86-91)

Following trial and on or about June 4, 2010, the trial court issued its Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court. In its Findings of Fact, Conclusions of Law, Ruling and Judgment, the court ruled, among other things, that the Plaintiff did not institute her action to recover land within the ten (10) year statute of limitations as required under Miss. Code Ann. §§ 15-1-7 and 15-1-9 (R. 63-4); that the Plaintiff did not pay taxes on the property in question (R. 61); and that the Plaintiff did not establish adverse possession because the Plaintiff's use of the property in question was permissive and therefore neither under claim of ownership nor hostile. (R. 64)

In response to the trial court's findings, Plaintiff, on June 11, 2010, filed its Motion to Reconsider or, in the alternative, a New Trial, or, in the alternative, a Judgment Notwithstanding the Verdict. (R. 66) In the Court's Order, dated February 2, 2011, the trial court acknowledged that it was in error in its conclusion regarding the ten-year statute of limitations. (R. 97) The court also acknowledged its error with respect to the taxes paid by the Plaintiff. (R. 97-8) The court, however, remained unmoved in its position that the Plaintiff's use of the property in question was permissive and therefore was neither under claim of ownership nor hostile. (R. 98) The question of whether the Plaintiff's use of the property in question meets the requirement for a claim of adverse possession under Mississippi law is the only issue that remains for this

Court's consideration. It is important, therefore, that this Court note the portion of the trial court's order that relates to the only outstanding issue:

The proof has shown that Plaintiff made use of the property in question for a continuous and uninterrupted period of ten years. However, Plaintiff's late husband, J.D. Massey, acknowledged Lambert's ownership and, therefore, the use was neither under claim of ownership nor hostile. Finally, the use by Plaintiff and her family was with permission of Lambert and permissive use does not ripen into adverse possession. The evidence submitted does not support Plaintiff's position. To the contrary, the proof has shown that Plaintiff's use was permissive.

(R. 64) To support this conclusion, the Court relied on the following finding:

Mr. John Edsel Lambert testified that he and J.D. Massey discussed the problem and agreed that the workshop was constructed on the parcel owned by Defendants. To resolve the problem, Massey and Lambert discussed the possibility of exchanging parcels of land of equal size and value in a manner which would allow Massey to obtain title to the parcel upon which the workshop was situated. Lambert and Massey were unable to finalize such a transaction prior to the death of Massey. However, Lambert did give Massey permission to use the land upon which the workshop was situated.

(R. 59)

III. SUMMARY OF THE ARGUMENT

The only evidence presented to the Court that would indicate that the Plaintiff's use of the land in question was permissive is a conversation between John Lambert and J.D. Massey that allegedly occurred before the latter's death. Each attempt to introduce this impermissible hearsay was greeted by the appropriate objection by Plaintiff's counsel. Each of these objections was sustained by the Court. Because the only evidence that could support the trial court's conclusion was not properly before the court, the trial court's ruling was in error.

IV. ARGUMENT

A. THE TRIAL COURT ERRED IN RULING THAT THE PLAINTIFF'S USE OF DEFENDANTS' LAND WAS NEITHER UNDER CLAIM OF OWNERSHIP OR ACTUAL OR HOSTILE.

Mississippi Code Annotated section 15-1-13(1) (Rev. 2003) provides the following:

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[.]

Thus, a 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 (¶13) (Miss. Ct. App. 1999) (citing *Rice v. Pritchard*, 611 So.2d 869, 871 (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)).

In its Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court, the trial court indicated that the Plaintiff had met each of the elements required to prove adverse possession save the requirement that possession be "under claim of ownership" and "actual or hostile":

The proof has shown that Plaintiff made use of the property in question for a continuous and uninterrupted period of ten years. However, Plaintiff's late husband, J.D. Massey, acknowledged Lambert's ownership and, therefore, the use was neither under claim of ownership nor hostile. Finally, the use by Plaintiff and her family was with permission of Lambert and permissive use does not ripen into adverse possession. The evidence submitted does not support Plaintiff's position. To the contrary, the proof has shown that Plaintiff's use was permissive.

(R. 64) Thus, according to the trial court Plaintiff's action failed on the basis that J.D. Massey "acknowledged Lambert's ownership" and that use of the property "was with permission of Lambert".

The only evidence offered to support these findings is an alleged conversation between John Lambert and J.D. Massey which was presented in the form of hearsay testimony and not properly before the trial court.

Rule 801(c) of the Mississippi Rules of Evidence defines “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

When reviewing a trial court's decision to admit or exclude evidence, this Court's standard of review is whether the court committed an abuse of its discretion. *Miller v. State*, 996 So.2d 752, 756 (¶ 12) (Miss.2008). As this Court has explained, “a trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, [an appellate court] will not reverse this ruling.” *Williams v. State*, 991 So.2d 593, 597 (¶ 8) (Miss.2008) (quoting *Shaw v. State*, 915 So.2d 442, 445 (¶ 8) (Miss.2005)). In order to preserve such an error for appeal, “a timely objection or motion to strike [must appear] of record, stating the specific ground of objection....” M.R.E. 103(a)(1). *McCray v. State*, 44 So.3d 1046, 1049 (Miss. App. 2010).

At trial, Defendants attempted, on several separate occasions, to introduce evidence of an alleged conversation between John Lambert and J.D. Massey:

First Attempt

Mr. Dickerson: What did you discover?

Mr. Lambert: We discovered that Mr. Massey's shop was--needed to go East to be on the property that he had a deed to.

Mr. Dickerson: All right. And was there any discussion at that point about that?

Mr. Lambert: Yes, there was.

Mr. Barton: Objection, Your Honor.

Mr. Lambert: At the time we found it out, Mr Massey had a business--

The Court: Hold tight when you hear somebody object.

Mr. Barton: Objection Number 1, hearsay. Objection Number 2, the statute of frauds; any discussions or anything pertaining to oral agreements that would not be documented by writing, or a part of the deed or transactions, would be inadmissible.

Mr. Lambert: No hearsay between the party, between --excuse me. I'm sorry, sir.

The Court: What do you say, Mr. Dickerson?

Mr. Dickerson: Please the Court, first of all, we're at the point of disproving a veil of adverse possession. There has been no proof of adverse possession, just a request for correction of deed. What I'm going to establish through this witness is that every one had knowledge that the shop was on Mr. Lambert's land. And then I'm going to go into events over the years of what occurred about possession of the land, paying the taxes, and things of that nature. And then, of course, at the conclusion of that, I certainly have a motion.

The Court: Well, he can testify about what he did. But I don't want you to testify about when somebody else was telling you, okay. Go ahead."

(R. 86-8)

Second Attempt

Mr. Dickerson: Okay. Mr. Lambert, without telling what Dennis, or anybody else, said, what did you attempt to do at the very minute, within ten years you found out that the shop was on your property, what did you attempt to do?

Mr. Lambert: Well, the agreement between Mr. Massey and I – we found it out. He had a good business going there, and he got upset when he found it out, the property wasn't – that the shop was not on his deeded land. So I waited to discuss it, I said, Dennis, don't get too upset about it, you've got property to the North of me, and you've got – your wife has got property to the East of me, I said. We agreed to swap foot for foot.

Mr. Barton: Objection. Objection. Any agreements would be violative of the statute of frauds, any agreements would violate hearsay objections. I object. Also--

Mr. Dickerson: I can ask him what his understanding was.

The Court: He can just testify about what he did.

(R. 88-9)

Third Attempt

Mr. Dickerson: When he first got his acre, was there ever any discussion that Curtis Breland had made a mistake in the legal description of his 1961 deed?

Mr. Lambert: Yes. At the time, the survey was made, Mr. Breland told me, himself, later on, that Mr. Massey came to him and wanted to make a corrected deed. And his answer was, he Mr. Massey--

Mr. Barton: Objection. Hearsay.

Mr. Lambert: No.

The Court: Sustained.

(R. 90)

Fourth Attempt

Mr. Dickerson: Okay. Don't tell us what Curtis Vann said. He's gone.

Mr. Lambert: Mr. Breland told me that--

Mr. Barton: Objection:

The Court: Stop. Stop. You can't tell me what somebody told you, okay?

(R. 90)

Fifth Attempt

Mr. Lambert: No, because he and I agreed it. And he was—I know one thing. His attorney at the time suggested it to me and--

Mr. Barton: To which I object as being hearsay Your Honor, object to this testimony .

Mr. Lambert: Well, I'm trying to tell you what the story was.

The Court: Don't tell me what somebody said, a lawyer, or anybody else, okay?

Mr. Lambert: yes, sir. Okay.

(R. 91)

Despite the objections of Plaintiff's counsel and the trial court's response, the court still considered this impermissible evidence in paragraph 5., in Findings of Fact, Conclusions of Law,

Ruling and Judgment:

The proof has shown that Plaintiff made use of the property in question for a continuous and uninterrupted period of ten years. However, Plaintiff's late husband, J.D. Massey, *acknowledged* Lambert's ownership and, therefore, the use was neither under claim of ownership nor hostile. Finally, the use by Plaintiff and her family was with permission of Lambert and permissive use does not ripen into adverse possession. The evidence submitted does not support Plaintiff's position. To the contrary, the proof has shown that Plaintiff's use was permissive.

(R. 64) (emphasis added)

Mr. John Edsel Lambert testified that he and J.D. Massey *discussed* the problem *and agreed* that the workshop was constructed on the parcel owned by Defendants. To resolve the problem, Massey and Lambert *discussed* the possibility of exchanging parcels of land of equal size and value in a manner which would allow Massey to obtain title to the parcel upon which the workshop was situated. Lambert and Massey were unable to finalize such a transaction prior to the death of Massey. However, *Lambert did give Massey permission* to use the land upon which the workshop was situated.

(R. 59) (emphasis added)

The above excerpts from the trial transcript and the trial court's order make clear that 1) Defendants only evidence that the Plaintiff's use of the subject property was permissible was in the form of impermissible hearsay and 2) that the trial court, despite sustaining Plaintiff counsel's objections at trial, considered this hearsay in making its decision. Therefore, this Court should reverse the trial court's decision and render judgment in favor of the Plaintiff.

Even if this Court were to conclude that the impermissible evidence described above were properly a part of the record, this "agreement" would be barred by the statute of frauds.

Miss. Code Ann. § 15-3-1 states in pertinent part:

An action shall not be brought whereby to charge a defendant or other party:

(c) upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year;

(d) upon any agreement which is not to be performed within the space of fifteen months from the making thereof

unless, in each of said causes, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing.

As the alleged agreement between John Lambert and J.D. Massey involved land and was not to be performed within the space of fifteen months, the agreement should have been committed to writing and signed by the parties. Therefore, even if the hearsay evidence were deemed to be a proper part of the record, the agreement would fail under the statute of frauds.

V. CONCLUSION

Because the only evidence that could support the trial court's conclusion was not properly before the court, the trial court's ruling was in error.

Respectfully submitted this the 27th day of June, 2011

VIRGINIA MASSEY

BY:


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**CERTIFICATE OF FILING
THE BRIEF OF THE APPELLANTS AND
RECORD EXCERPTS WITH BRIEF OF THE APPELLANT**

COMES NOW, the undersigned attorneys of record for the Appellant, Virginia Massey, and certifies to this Honorable Court, pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure, that on the 24th day of June, 2011, they have delivered to the Clerk for filing in the above-referenced cause, via US Mail, postage prepaid the original and three (3) copies of the Brief of Appellants, and four (4) copies of the Record Excerpts Filed With Brief of Appellants, to the Clerk. Upon this certification, pursuant to the aforementioned Rule, the Brief of Appellants and Record Excerpts Filed With Brief of Appellants, are timely filed this the 24th day of June, 2011.

SO CERTIFIED, this the 27th day of June, 2011.

VIRGINIA MASSEY

BY:


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CERTIFICATE OF SERVICE

I, W. HARVEY BARTON, do hereby certify that I have this day served, via US Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellants and Record Excerpts Filed with Brief of Appellants to the following:

The Honorable Charles Bordis
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SO CERTIFIED, this the 27th day of June, 2011.


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