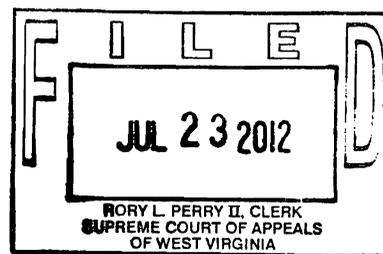


IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA



DAVID A. WALLACE, Respondent Below,

PETITIONER

v.

APPEAL NO. 12-0227
(Civil Action No. 99-P-19)

JOHN PACK, DARLO PACK,
DELLO PACK, DON PACK, DELSO
PACK, and MINNIE HARRIS,
Petitioners Below,

RESPONDENTS.

BRIEF OF PETITIONER, DAVID A. WALLACE

Respectfully submitted by:

William S. Winfrey, II (WVSB #4093)
Attorney at Law
1608 West Main Street
P. O. Box 1159
Princeton, WV 24740
(304)487-1887
Fax: (304)425-7340
bill@winfreylaw.com
Counsel for Petitioner, David A. Wallace

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred and was clearly wrong in finding that the Respondents' predecessors-in-title acts constituted adverse possession of land that is characterized as "wild lands." There was insufficient evidence to support a claim of adverse possession, and the Circuit Court further failed to consider the character of the disputed land in considering elements of adverse possession.

2. The Circuit Court erred and was clearly wrong in excluding the testimony of David Huffman, licensed land surveyor, in a discovery dispute under W.Va.R.Civ.P. 26.

STATEMENT OF THE CASE

This case concerns a critical element of Adverse Possession of land that may be characterized as woodlands or "wild land" and, according to Counsel's research, is an issue of first impression in West Virginia.

The Petitioner and Respondents own adjoining property in Summers County, West Virginia, which consists of two farms which have cultivated and uncultivated areas. The property is both flat and hillside. The hillsides are forests. In August, 1999, the Respondents Pack family filed an action against the Petitioner alleging that the Petitioner had blocked a roadway that was used by the Respondents and their predecessors-in-title for over 100 years (App. 35). The Respondents were represented by David Parmer. The Petitioner filed a response through his counsel Wade Watson. Discovery was begun, and a trial date was set.

Wade Watson died in 2001, and Thomas S. Lilly succeeded to representing Dr. Wallace, the Petitioner herein. A trial was held in 2002, and trial memoranda were filed. Prior to a decision being issued, Dr. Wallace filed a motion to amend his response to the original petition, alleging that the Respondents were, since the trial, setting up a camp on land claimed by Dr. Wallace – the land now in dispute. A series of scheduling conferences were set, and motions for summary judgment were made.

In 2005, the Pack Respondents filed an Amended Petition alleging “a claim of title to real estate by adverse possession which is involved in the present proceeding.” The claim was supported by a survey by SCS Surveyors and contained a tract described by courses and distances as containing 27.995 acres. (App. 86) Memoranda were filed, and in 2006, the Circuit Court entered an order permitting use of the roadway but made no mention of the claim of adverse possession by the Packs. No activity occurred in the case for over two years, and the Clerk served a notice of intent to dismiss. A motion to reinstate and an objection thereto were filed, and the Court reinstated the action and permitted the

amended complaint. E. Kent Hellems appeared at that hearing on behalf of the Pack Respondents. Discovery began again, and witnesses were disclosed.

The Respondents disclosed as experts “any surveyors hired and/or fired by Packs.” Subsequently, the Respondent and his attorney interviewed surveyor David Huffman, the surveyor of SCS Surveyors, whose survey was the basis of the 2005 amended petition to establish a claim to 27.995 acres. The Respondents objected to the interview and moved to exclude David Huffman as a witness for the Petitioner. Cross memoranda were filed, and an evidentiary hearing was held. By order entered May 26, 2009, the Circuit Court ordered the testimony excluded and sanctioned the Petitioner in an amount to be later determined. (App. 128) Trial was set for September 1, 2009, but was continued. The case again had no activity until May 9, 2011, when a trial date was set for September 20, 2011. Trial was held September 20 and 21, 2011. At the trial, the Court received both survey and fact witnesses. The Respondents testified about intermittent use of land in question, which will be further discussed below.

Thomas S. Lilly was diagnosed shortly after trial with Guillian-Barre Syndrome, and the Circuit Court extended his time to comment on the preparation of the Final Order until December 20, 2011. The final order was entered January 20, 2012, finding that the Petitioner had a superior paper title and that the Pack Respondents had established their claim to disputed property by adverse possession. (App. 1) The Circuit Court described the case in part as a boundary dispute and in part as a claim for adverse possession.

SUMMARY OF ARGUMENT

The evidence of adverse possession was insufficient as a matter of law to establish the elements of adverse possession. The evidence presented did not show that the

Respondents' predecessor-in-title possessed the property continuously, openly and notoriously, hostilely, actually and exclusively for a period in excess of ten years; further, the Circuit Court did not make findings about the character of the land as affecting the doctrine of adverse possession, which is a matter of first impression in West Virginia. No case found by Counsel in West Virginia discusses the character of the disputed land as affecting the elements of adverse possession, including the doctrine of adverse possession of what may be characterized "wild lands." The Petitioner raised in the Circuit Court that the nature and character of the land remained in a state of nature, with no change in its condition. (Trial Transcript, p.13)

The exclusion by the Circuit Court of the testimony of David Huffman, the surveyor of SCS Surveyors, was unnecessary. The Survey was pleaded by the Respondents and, as such, the surveyor was both a fact witness and his testimony in the form of his survey was placed into evidence by the pleading.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that oral argument is necessary under W.Va.R.App.P. 19. This case involves an evidentiary weight issue and a legal issue which is a narrow application of law. The Petitioner believes both that there is insufficient evidence to support a claim of adverse possession and, further, that the Circuit Court did not consider the issue of "wild lands" as an element of adverse possession. The case may be appropriate for a memorandum decision after a Rule 19 argument. Ten minutes for argument will be sufficient to the Petitioner.

ARGUMENT

1. The Circuit Court erred and was clearly wrong in finding that the Respondents' predecessors-in-title acts constituted adverse possession of land that is characterized as "wild lands." There was insufficient evidence to support a claim of adverse possession, and the Circuit Court further failed to consider the character of the disputed land in considering elements of adverse possession.

Neither the law nor the facts of this case support the Circuit Court's findings of fact and conclusions of law. At the outset, the burden of proof in an adverse possession case is by clear and convincing evidence. Brown v. Gobble, 196 W. Va. 559, 474 S.E.2d 489 (1996). Further, though, the Petitioner has the burden of showing that the Circuit Court's findings of fact are clearly wrong by showing (1) a relevant factor that should have been given significant weight was not considered; (2) all proper factors, and no improper factors were considered, but the Circuit Court in weighing those factors committed an error in judgment; or (3) the Circuit Court failed to exercise any discretion at all in issuing its decision. Brown v. Gobble, Syl. 1. Based on the evidence here, no reasonable fact finder could have gone the way of the Circuit Court. The Petitioner will show herein that the Circuit Court's findings of fact are clearly wrong, with the force of a "five-week-old, unrefrigerated dead fish." Brown v. Gobble, 474 S.E.2d at 563. Further, the Circuit Court failed to consider in the doctrine of adverse possession the character of the land to go to the element of adverse possession of "exclusive."

The Circuit Court's findings were that the Petitioner had a senior or superior paper title to the Respondents. Accordingly, any claim the Respondents may have to the disputed property must be by adverse possession. The Circuit Court considered the testimony of conflicting surveyors, then, for the purpose of determining whether the Respondents' claim to the disputed property was based on "claim of right" or "color of title,"

and, further, to determine if adverse possession occurred, the description of the property adversely possessed.

The elements of adverse possession are well settled.

One who seeks to assert title to a tract of land under the doctrine of adverse possession must prove each of the following elements for the requisite statutory period: (1) that he has held the tract adversely or hostilely; (2) that the possession has been actual; (3) that it has been open and notorious (sometimes stated in the cases as visible and notorious); (4) that possession has been exclusive; (5) that possession has been continuous; (6) that possession has been under claim of title or color of title.

Somon v. Murphy Fabrication and Erection Co., 160 W. Va. 84, 232 S.E.2d 524 (1977)

Syl. 3. The Respondents claim under their parents by inheritance; tacking is not in dispute.

Brown v. Gobble, 474 S.E.2d at 566.

The evidence of these elements at trial is summarized as follows:

Stewart Coffman testified that he had known the Packs for 32 years, that he had been going to the farm since he was 5 years old and that he cut firewood on the property for his home and hunted there for the last 15-20 years, in the fall and spring. He was familiar with the area where the camper was parked, on a "flat." (Tr. 82-84) His belief that this property was on the Packs' property came from the Packs. (Tr. 84) He liked hunting the area because it was not heavily hunted. He could not recall cutting firewood with the Packs in the disputed area; rather, it was more down toward the creek, which was not in dispute. (Tr. 87) The only firewood he cut was dead and seasoned. (Tr. 90)

Troy Dale Pack testified that he is a son of Delso and Marsha Pack and that he was familiar with the family property. (Tr. 105) He was told of the boundaries by his

father (Tr. 106) and hunted on the Buck Knob and flat areas. (Tr. 107) He only cut dead fall trees. (Tr. 108) When he went camping, he left no traces. (Tr. 115)

Minnie Harris testified that she is one of the children of Ralph and Lydia Pack, and lived on the Pack property from 1932 until 1953. (Tr. 117) She was shown the boundaries of the family farm by her father. (Tr. 122) She stated a rail fence was the line between the Packs and Earl Shrader. (Tr. 123) The area in question is very steep to the right of the road. Her father cut wedges when she was a teenager. (Tr. 126) Her father cut wedges for a month in that location because he moved the machine around. (Tr. 128) Otherwise, the family hunted and picked berries in the area. (Tr. 129) She said her father sold timber off before her time. (Tr. 130) She personally did not go down in the woods, she just saw the wedge machine set in its location. (Tr. 130)

Dello Pack testified that his father showed him the property boundaries. (Tr. 137) He helped cut wood for firewood and wedges below Buck Knob. (Tr. 138) His father cut wedges in this area about a year and a half. (Tr. 141) He helped his brothers cut firewood in the area to the house for firewood. (Tr. 141) He did not know of anyone else making use of the flat or Buck Knob area growing up. (Tr. 142) He testified that his family used the disputed property "continuously" for at least 19 years. (Tr. 146) In response to a question by the Court, he stated his father supported the family by selling wedges. (Tr. 147)

Darlo Pack also testified his father showed him the property boundaries. (Tr. 150) He also helped cut wood, some from the Buck Knob area, and took it to the wedge machine. (Tr. 151) He also said the wedge machine was located in this area for a "little over a year." (Tr. 153) All the firewood cut was for their home. (Tr. 154) They cut

wedges and timbers all over the farm. (Tr. 156) Their use of the flat was to have a picnic. (Tr. 159) Since he left the farm at 19, he has returned to hunt. (Tr. 159-160)

Don Pack testified he hunted in the Buck Knob area and the flat area. (Tr. 166) He helped haul dead wood out and had picnics on the flat area. (Tr. 167)

Delso Pack is the youngest child of Ralph Pack. He lived on the farm 14 years. (Tr. 168-69) His father told him the boundaries of the farm. (Tr. 169) The family mainly used the Buck Knob area to cut timber. He recalled the wedge machine being set at the head of the hollow. (Tr. 171) He believes it was around that area for 2 years. He helped cut mine timbers off the top portion of the Buck Knob area for "two or three years." (Tr. 173) No one in the family helped him, and he sold them to a third party. (Tr. 172) The family cut wood and picnicked on the flat area. (Tr. 174) He said he had used this property all his life. (Tr. 175) He said there were barbed wire fences, but they were not boundary fences; they were for cattle. (Tr. 177) He cut firewood to use at his home. (Tr. 177) His son put a camper on the flat for 6-7 years. (Tr. 177-78) He said he talked to Dr. Wallace about 25 years ago and showed him what the Packs believed the boundaries to be, and he said Dr. Wallace had no issue with his belief. (Tr. 180-81) Jack Pack cut some posts on the Buck Knob property, and he had Jack Pack leave. (Tr. 181) Guy Basham also cut some mine props to a mine. (Tr. 185)

The Respondents called Dr. Wallace to talk about the conversation with Delso Pack and rested.

The Petitioner called Benny Basham, who claimed he had cut timber for Guy and Finley Basham in this area about 30 years ago. (Tr. 199-200) He also worked for

Dr. Wallace. (Tr. 198) When he was working on behalf of the Petitioner and his predecessors-in-title, he did not see anyone else on the property. (Tr. 201)

Herman Pack testified that his father worked for Guy and Finley Basham about 1977 cutting timbers on this property. He found posted signs at Buck Knob with Finley's name on them. (Tr. 288) He saw Dr. Wallace's signs on the left side of the road going up. (Tr. 289) Delso Pack informed him that Delso's family owned the pine flat. (Tr. 291) He could not tell if Delso had told him before this suit began. (Tr. 292)

To establish the element of "actual" possession, the Respondents testified that their family cut wedges, cut firewood, picnicked, hunted and camped on the disputed property. They placed a camper on the property sometime after this action began in 1999, as shown by the supplemental pleading filed in 2002. To establish the element of "hostile" possession, they again testified about removing wood, mostly wedges and seasoned firewood, and hunting on the property twice a year. To establish the element of "exclusive" possession, they testified that they saw no one else on the property. Notably, they only offered the testimony of one non-family witness who testified that it was known that the Packs owned the "flat." To establish the element of "exclusive," the Respondents testified that to their knowledge, no one other than their family claimed the disputed property. To establish the element of "continuous" possession, they testified that they hunted on the property and cut firewood all over their farm for over 30 years. To establish their claim to title, they presented first the survey of David Huffman, which the Circuit Court excluded, and the survey of David Holz. The Circuit Court found that the title of the Petitioner was senior in title, so the survey of David Holz to the Respondents' deed was to establish the boundary for color of title, not claim of right.

First, the Respondents' possession was not continuous. In Dustin v. Miller, 180 W.Va. 186, 375 S.E.2d 818 (1988), the Court considered a claim of adverse possession and discussed the evidence below attempting to establish continuous possession:

As previously discussed, the evidence relating to when and how the appellants took possession of the property in dispute is not altogether clear or uncontradicted. While they claim that they engaged in timbering operations in the 1960's, the appellees' forester indicated that no timbering was done in that time period. While they claim they fenced the area in dispute, there is some question as to whether the fence was of such a character to make their claim notorious. While there is evidence they hunted on the property and crossed a road on it on occasion, there is some question as to whether the hunting and road use were sufficiently continuous to establish adverse possession. In the early case of Core v. Faupel, 24 W.Va. 238, 246-247 (1884), this Court stated:

It is not sufficient for the wrongdoer to show an act of adverse possession at a point more than ten years prior to the bringing of the action against him. He must show that such adverse possession has been continued, consecutive and unbroken for the statutory period. It is something done by him not merely that which is left undone by the owner that is to be considered. There can be no constructive adverse possession against the owner, when there is no actual possession which he could treat as a trespass and bring an action for; unless the adverse claimant is so in possession of the land that he may at any time be sued as trespasser the statute will not run in his favor; and although he may have taken actual possession, if he does not continue there so that he may be sued at any time as a trespasser during the prescriptive bar, he cannot rely on the statute of limitations.

375 S.E.2d at 821.

In this action, the only time that the Respondents could have been sued as a trespasser was during the arguably 2-year period when the wedge machine was seated

on a portion of the disputed property. Their use of the flat was intermittent; that they believed it was theirs is not of significance. Their belief is different than their actions.

The failure of the element of open and notorious, or visible and notorious, is the most clear. At the trial, counsel for the Petitioner raised the issue in his opening statement:

I submit that in an adverse possession case, the cases indicate that in timberland and wild and rugged land, needs to be so obvious as to put the real title holder, which would've been Dr. Wallace in the last 20 years, on notice.

(Tr. 13)

The issue to which Mr. Lilly referred was the issue of notice of possession of wild lands. Counsel could find no West Virginia case which specifically addressed this issue. Other jurisdictions have, however, looked specifically at the character of land to go to whether the possession of someone adverse to the senior title holder is visible and notorious. Virginia has considered this issue. In Calhoun v. Woods, 246 Va. 41, 431 S.E.2d 285 (1993), the Calhouns filed a complaint to quiet title in 3 tracts of unimproved mountain land. In Virginia, the burden of proof of a claimant seeking to establish adverse possession is, as in West Virginia, by clear and convincing proof. Also in Virginia, the elements of adverse possession are actual, hostile, exclusive, visible and continuous possession for the requisite period under a claim of right. 431 S.E.2d at 286. Presumptions favor the holder of the legal title. In looking at the elements of adverse possession, the Virginia Supreme Court held:

And, wild and uncultivated land cannot be made the subject of adverse possession while it remains completely in a state of nature; a change in its condition to some extent is

essential. Craig-Giles Iron Co. v. Wickline, 126 Va. 223, 233, 101 S.E. 225, 229 (1919).

431 S.E.2d at 287.

The only evidence of visible possession here is the Respondents' testimony that the disputed property was a) hunted by family and some friends 2 times a year for many years – there was no testimony that the hunting occurred every year; b) the subject of having mostly downed wood cut and hauled for house firewood; c) used to cut wedges– but for a period which did not exceed 2 years; and d) the flat was the subject of picnics. The ownership of land by adverse possession is different from the acquisition of a prescriptive easement which may be obtained by its character. Compare the prescriptive easement case of O'Dell v. Stegall, 226 W. Va. 590, 703 S.E.2d 561 (2010), wherein this Court distinguished the standard of “continuous” possession related to an *easement* (emphasis added):

Easements that are seasonal or periodical may be acquired by prescription. For example, one may obtain a prescriptive easement by driving cattle to and from a summer range, by using a beach or a driveway only during the summer, by traveling a roadway in the haying season, or by making seasonal use of a path. Likewise, intermittent but recurring use of a rural roadway for hauling wood and other purposes constitutes the required continuity. Further, in an unusual case,...a country club acquired a prescriptive easement to use adjacent land as a rough when several poorly hit golf balls landed on the servient estate each day. In an equally unusual circumstance, the continuity requirement was satisfied by the existence and infrequent use of a fire escape between two buildings. It has also been held that infrequent use of a roadway to visit lots purchased for eventual retirement living was continuous. Moreover, in assessing the continuity requirement courts will consider use by visitors, service providers, and family members attributable to the claimant.

Citations omitted. 703 S.E.2d at 587.

To establish ownership of land by adverse possession is to assert complete dominion and control over the land, not occasional and sporadic use. The Respondents herein have established their use of the disputed property only intermittently and sporadically. There has been no visible and notorious use of the disputed property by any change in character of the wild lands to place any property on notice, real or constructive, of the intention of the Respondents to own it.

2. The Circuit Court erred and was clearly wrong in excluding the testimony of David Huffman, licensed land surveyor, in a discovery dispute under W.Va.R.Civ.P. 26.

The Circuit Court, by order entered May 26, 2012, excluded the testimony of David Huffman as an expert in this case for what was described as a violation of W.Va.R.Civ.P. 26. A transcript of the hearing on the motion to exclude held on April 8, 2009, is not yet available due to a misunderstanding between counsel as to who would order that transcript. It is being ordered and will be filed with a motion to supplement the appendix.

David Huffman is the licensed surveyor of SCS Surveyors. When the Respondents filed an amended pleading in 2005, the basis for their claim under color of title was the survey of SCS Surveyors. Apparently, there was a disagreement between the surveyor and the Respondents, for the Respondents had yet another survey performed. After Mr. Holtz was hired, the Petitioner talked to David Huffman about his survey of the Pack farm, among other topics, and arranged a meeting with Mr. Huffman and Mr. Lilly, his counsel, for March 5, 2009, at Mr. Lilly's office where the survey was discussed, along with James Wentz, the Petitioner's surveyor. In discovery, the Respondents listed as witnesses

“any surveyors hired and/or fired by Packs.” Clearly, the SCS Survey was the basis of the amended pleading in 2005.

The Circuit Court found, after testimony, that W.Va.R.Civ.P. 26(b)(4)(B) permits the discovery of an opinion of an expert by interrogatories or deposition. The Circuit Court cited as a basis for its conclusion that the testimony of Mr. Huffman should be excluded was the decision of State ex rel. Billups v. Clawges, 218 W. Va. 22, 620 S.E.2d 162 (2005), citing Syllabus point 3:

3. In cases where disqualification of an expert witness is sought, the party moving for disqualification bears the burden of proving that at the time the moving party consulted with the expert: (1) it was objectively reasonable for the moving party to have concluded that a confidential relationship existed with the expert; and (2) confidential or privileged information was disclosed to the expert by the moving party. Disqualification is warranted only when the evidence satisfactorily demonstrates the presence of both of these conditions.

It is objectively reasonable to believe that Mr. Huffman may have had a confidential relationship with the Respondents. The second portion, however, states that the expert must have received confidential information, which the Circuit Court found was the case here. Billups, however, made further explanation of this requirement when analyzing whether a Doctor who had once evaluated a medical malpractice case for the Plaintiff and determined that there was no merit to the claim could be retained by the Defense in the same case. The Plaintiffs moved for the exclusion of that Doctor, and a hearing was held.

This Court examined the evidence which was sealed, and came to this conclusion:

We turn now to consider whether the lower court correctly reviewed the evidence involving the second prong of the test. Petitioners claim that the lower court was incorrect in finding that no confidential information was disclosed to Dr. Schulman because sealed documents in the record reveal that Dr. Schulman was privy to such details as Petitioners' theory of the case, the weaknesses of each side's case and other mental impressions of their legal advisors. While we obviously are not at liberty to reveal the contents of the sealed documents, upon completion of our review of the documents we are in agreement with the lower court's conclusion that "[m]ost, if not all, of the information contained in those submissions, is contained in the medical records of the infant Plaintiff, the notice of claim, the screening certificate of merit, Plaintiffs' Complaint and other pleadings ... or would be discoverable under the Rules of Civil Procedure."⁸ This being the case, the second condition of the test herein announced is not satisfied. Consequently, we find no abuse of discretion by the lower court in applying the law to the facts of this case, as well as no basis to issue a writ of prohibition in order to force the disqualification of Dr. Schulman as an expert witness for Respondents.⁹

620 S.E.2d at 168.

In this case, the Circuit Court's order did not address whether the information obtained by the Petitioner and his counsel was information that was not contained in the court file (his opinion of the boundary) or was evidence of what information the Respondents may have told Mr. Huffman about their beliefs of the location of the lines. Indeed, they testified that they had been shown the lines by Ralph Pack and believed certain corners were located in certain directions. In short, if the evidence known to the

surveyor was otherwise disclosed or discoverable, it is not confidential for the purpose of the remedy of excluding the opinion of the expert.

CONCLUSION

For the foregoing reasons, the Circuit Court of Summers County was clearly wrong in finding that the Respondents possessed any land to which the Petitioner was entitled by his senior title by adverse possession. Further, the exclusion of David Huffman as a witness was plain error.

Respectfully submitted,



William S. Winfrey, II (WVSB #4093)
Attorney at Law
1608 West Main Street
P. O. Box 1159
Princeton, WV 24740
(304)487-1887
Fax: (304)425-7340
bill@winfreylaw.com

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CERTIFICATE OF SERVICE

I, WILLIAM S. WINFREY, II, of counsel for the Appellant/Petitioner, David A. Wallace, do hereby certify that a true and correct copy of the foregoing Motion to Extend Time to Perfect Appeal was this day served upon the following interested parties/counsel of record, by mailing same to them, United States mail, postage prepaid:

E. Kent Hellems, Esquire
P. O. Box 1229
Hinton, WV 25951
Counsel for Respondents

This the 20th day of July, 2012.



William S. Winfrey, II (WVSB #4093)
Attorney at Law
1608 West Main Street
P. O. Box 1159
Princeton, WV 24740
(304)487-1887 Fax: (304)425-7340
bill@winfreylaw.com