IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0036

SANDY M., AND SANTANA M.,
CO-GUARDIANS AND
CO-CONSERVATORS OF DONALD M.,
DEFENDANTS BELOW
PETITIONERS

vs.

DONALD M.,
PLAINTIFF BELOW,
RESPONDENT.

Hon. James H. Young, Jr., Judge
Circuit Court of Wayne County
Civil Action No. 19-C-66

RESPONDENTS' BRIEF ON APPEAL

Submitted by:

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While the Statute of Frauds is a procedural to the enforcement of oral contracts for the sale of lands and a deed or will is typically required create an interest in real estate, the statute of fraud is not absolute. Considerations of equity by the Courts keep the Statute of Frauds from being imposed. Following testimony and evidence introduced through the Plaintiff/Respondent and witnesses, the Lower Court replied upon the Lost Document Theory and Adverse Possession to declare the Plaintiff/Respondent the owner in fee to the property in question.

Equity allows for the grantee to establish said lost deed when necessary to protect his rights to the land. While the Pleadings in this case did not address the theory of the Lost Document, the Plaintiff/Respondent Son claimed the Defendant/Petitioner Father gave the land to the Plaintiff/Respondent Son in 1989 when the Plaintiff/Respondent Son bought an adjacent piece of property to the property in question. The Plaintiff/Respondent Son began to make significant use and improvements to the land. Further, the Defendant/Petitioner Father deeded the property in question to the Plaintiff/Respondent Son, and the deed is now lost or stolen. This was an issue of material fact before the Court. While the Lost Document Theory was not plead, a significant portion of the witness testimony in front of the Lower Court addressed the missing deed, and The Lower Court found the Plaintiff/Respondent Son established the execution, contents, and loss of the deed conclusively, by clear and strong evidence on all of the required elements, and as such granted title to the subject property under the Theory of Lost Document. Further, the Defendant/Respondent Father failed to put forward any evidence or witnesses to the contrary and proceeded to cross examine the witnesses regarding these issues.

Again, while the Theory of Lost Document was not explicitly in the pleadings, the Plaintiff/Respondent Son met the elements of a lost document by clear, strong and conclusive

evidence at trial. The Plaintiff/Respondent Son went to an attorneys' office to prepare a deed to the subject property, and before the first deed was executed, the family requested the deed be prepared and executed at a second attorney's office. Both the Plaintiff/Respondent Son and the Defendant/Petitioner Father went to the second attorney's office to sign and execute the deed. The Plaintiff/Respondent Son paid for the preparation and recording of the deed, and the deed was left at the attorney's office for recording purposes. Plaintiff/Respondent' sisters took the deed from the attorney's office before it was recorded. The Plaintiff/Respondent's sister was a corroborating and competent witness who testified as to both seeing the executed and notarized deed from the Defendant/Petitioner to the Plaintiff/Respondent at the attorney's office when the deed was retrieved. The witness further testified that the Defendant/Petitioner expressed that he had conveyed the land in question to the Plaintiff/Respondent. Furthermore, the first unsigned deed containing the property description from a Survey of the land in question, and the Survey itself which was done on the property following stakes placed upon the property by the Defendant/Petitioner.

Furthermore, the Plaintiff/Respondent Son established by clear and convincing evidence all elements of Adverse Possession. The Plaintiff/Respondent Son has adversely and hostilely possessed the land in question to the detriment of the Defendant/Petitioner Father. Since 1989, the Plaintiff/Respondent Son relied upon the mistaken belief that the word of his father was sufficient to ensure the land was his. The Plaintiff/Respondent purchased land adjacent to the land in question. The land in question was the only roadway access into said adjacent property. Then the Plaintiff/Respondent Son relied upon a deed which is now lost, stolen, or destroyed. Since 1990, the defendant has fenced in the land in question. The Plaintiff/Respondent Son has continued to use and maintain the land as his own to this day. The Plaintiff/Respondent Son has

made improvements upon the land which were open and notorious and included major additions such as a road, power lines, buildings, three gates, fencing, and placed his livestock upon said land. The gates prevented access to the property, aside from expected visitors and the Plaintiff/Respondent Son's immediate family. The Plaintiff/Respondent has done so under color of title through these actions. Further, as the trial court found Plaintiff/Respondent has a claim of title to the subject property by his showing of clear and convincing evidence that a deed from the Defendant/Respondent to the Plaintiff/Respondent was prepared, executed, and delivered, but now lost.

I. Statement Regarding Oral Argument and Decision

In this case, oral argument may be both helpful and appropriate under Rule 19 insomuch as that this case involves, "(1) cases involving assignments of error in the application of settled law; (2) cases claiming an unsustainable exercise of discretion where the law governing that discretion is settled; (3) cases claiming insufficient evidence or a result against the weight of the evidence…" Revised Rule of Appellate Procedure 19(a). The Respondent in this case request their right to oral argument be preserved pursuant to Rule 19. Revised Rule of Appellate procedure 19.

II. ARGUMENT

A. Standard of Review

"In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the

ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. Pt. 1, Pub. Citizen, Inc. v. First Nat. Bank in Fairmont, 198 W. Va. 329, 480 S.E.2d 538 (1996). Walker v. Fazenbaker, No. 18-1062, 3 (W. Va. Feb. 7,2020). Moreover, Justice Checkley explained while reviewing a Circuit Court's bench trial that:

> "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 part, In re Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996) (emphasis added).

In this present case, the Findings of Fact are subject to a clearly erroneous standard, while Court's decision relating to the Questions of Law are subject to de novo review. The Court's final ruling and the ultimate disposition of this case fall under the abuse of discretion standard. Further, a recent case in the Supreme Court of Appeals of West Virginia clarified when addressing a lost document that "although the circuit court's findings are contained in the order under the heading "conclusions of law," its findings with regard to the existence and content of the subject stock purchase agreements are plainly findings of fact, subject to a clearly erroneous standard." Estate of Bossio v. Bossio, 237 W.Va. 130, 785 S.E.2d 836 (W. Va. 2016).

B. **The Lower Court's Finding of Fact and Conclusions of Law are supported by the weight of the evidence relating to the Theory of Lost Documents, the Statute of Frauds, and Adverse Possession.**

i. Statute of Frauds

W. Va. Code Section 36-3-4 abolished previous legal distinctions to define a deed as "any instrument which shows on its face a present intent to pass the title to, or any interest, present or future, in real property." W. Va. Code Section 36-3-4. Further, any such instrument "shall, if properly executed be given according to its manifest intent." W. Va. Code Section 36-3-4. As the Lower Court noted, the elements of a valid deed are 1) a written instrument, 2) adequate description of the land, 3) executed by the grantor, and 4) delivery. App. Record at 450. Additionally, it should be noted that, "if a deed of real property is in other respects valid, it shall not fail for want of a payment of consideration, or the recital of a consideration in the deed. W. Va. Code Section 36-3-6. No resulting or other trust in favor of the grantor in such deed shall arise from the mere fact that no consideration was paid or recited, if no trust was in fact intended." W. Va Code Section 36-3-6.

The "Statue of Frauds" does generally require a deed or will to create an estate of inheritance or interest in real estate. W. Va. Code Section 36-1-1. However, the Statute of Frauds is not absolute. While the statute of frauds regarding contracts for sale of lands is a procedural bar to prevent enforcement of oral contracts, considerations of equity may result in the statute not being imposed. Timberlake v. Heflin, 180 W. Va. 644, 379 S.E.2d 149 (1989). For example, "when there has been a part performance of a contract for the sale of land by the purchaser being put into possession of the property, and payment of the purchase money, or a part thereof, and an offer to pay the residue according to contract, and valuable improvements have been [made] on the land by the purchaser on faith of the contract, the Statute of frauds cannot be successfully pleaded in bar to the performance in a Court of Equity." Syl. pt. 1, Lowrey v. Buffington, 6 W. Va. 249 (1873). In this case, the Plaintiff/Respondent has been in possession of the land in question for over thirty (30) years, and while no consideration was

given, the Plaintiff has paid all expenses for the land with the exception of property taxes to which the Plaintiff/Respondent offered to pay any all property taxes and has clearly improved upon and maintained the land in clearing the property, building a road on the property, installing and clearing the land to add utilities such as power and electric lines, as well as build numerous structures and fences. App. Record 296, see also App. Record at 365-368

"A party to an oral contract for the sale of land, to which the statute of frauds is applicable, may, by conduct on his part, be estopped in equity to assert the statute of frauds as a defense to such contract." Meade v. Slonaker, 394 S.E.2d 50, 183 W.Va. 66 W. Va. (1990) quoting Syllabus Point 1, Ross v. Midelburg, 129 W.Va. 851, 42 S.E.2d 185 (1947). "An oral contract for the sale of land, as to which a party to it is estopped to assert in equity the defense of the statute of frauds, but which is in all other respects sufficient, is a binding and enforceable contract." Meade v. Slonaker, 394 S.E.2d 50, 183 W.Va. 66 (W. Va. 1990) quoting Syllabus Point 2, Ross v. Midelburg, 129 W.Va. 851, 42 S.E.2d 185 (1947). Further, numerous cases in West Virginia have addressed the enforceability of oral agreements to convey property See, e.g., Berry v. Berry, 83 W.Va. 763, 99 S.E. 79 (1919); Crim v. England, 46 W.Va. 480, 33 S.E. 310 (1899); Frame v. Frame, 32 W.Va. 463, 9 S.E. 901 (1889).

Finally, "equity will entertain the suit of a grantee of real estate to establish a lost deed when such relief is necessary for the protection of his rights in respect to the land granted, although no other relief be demanded by his bill." Cartright v. Cartright et at., 74 S.E. 655, 70 W.Va. 507 (W. Va. 1912). Concerns of equity are especially important in cases such as this. The Plaintiff/Respondent here cannot put forth an executed deed to the property in question not because it does not exist, but because it is simply not in his possession. Moreover, the deed in question is either lost or stolen and unable to be presented due to the actions of one of the named

co-guardian and co-conservators of the Defendant/Petitioner. In doing so, said co-guardians and co-conservators seek to use the statute of frauds to their own benefit, and should be estopped in equity from doing so.

ii. Lost Document

Under Rule 1004(a) of the West Virginia Rules of Evidence, an "original writing is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if... all the originals are lost or destroyed, and not by the proponent acting in bad faith." In such situations, ""secondary evidence" is permitted to prove the existence and content of a writing. Estate of Bossio v. Bossio, 237 W.Va. 130, 785 S.E.2d 836 (W. Va. 2016). In addressing secondary evidence, the Supreme Court of Appeals of West Virginia recently addressed:

"In that regard, we acknowledge that commentators on the federal equivalent of Rule 1004 have noted that there is no particular "hierarchy" of secondary evidence and that any and all such evidence must be afforded its due regard as determined by the trier of fact: [O]nce Rule 1004's conditions are met, the party seeking to prove the contents of a writing ... may do so by any kind of secondary evidence ranging from photographs and handwritten copies to oral testimony of a witness whose credibility is suspect. Of course, the opponent may attack the secondary evidence's sufficiency, including the witness's credibility. This attack, however, goes not to the evidence's admissibility but to its weight and is a matter for the trier of fact to resolve."5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1004.02[1] (1996) (emphasis added). Estate of Bossio v. Bossio, 237 W.Va. 130, 785 S.E.2d 836 (W. Va. 2016).

In addressing secondary evidence, the Supreme Court of Appeals of West Virginia further noted examples which have been found sufficient by other Courts to address this issue.

"The original proposed version of a lost agreement has been held to be sufficient circumstantial evidence of its contents. American Sav. and Loan Ass'n of Florida v. Atlantic Inv. Corp., 436 So.2d 442 (Fla.Dist.Ct.App.1983). Moreover, production of a comparable agreement drafted by the same attorney for a related party has been found sufficiently corroborative. Jurek v. Couch–Jurek, 296 S.W.3d 864 (Tex.App.2009). Finally, evidence of an unsigned document, where the parties acted in accordance with its terms, has been found to be sufficient corroborative evidence. Farmers Co–op. Ass'n v. Cooper, No. 05–1042, 2006 WL 1231663 (Iowa Ct.App. Apr. 26, 2006)." Estate of Bossio v. Bossio, 237 W.Va. 130, 785 S.E.2d 836 (W. Va. 2016).

In Bossio, like in this case, the Petitioner's attempt to paint the Respondent's evidence to be "wholly uncorroborated and self-serving" regarding the lost document, however the Lower Court's decision in that case was not found to be clearly erroneous, in light of the corroborating secondary evidence of the lost document, the Respondent's testimony regarding the existence and contents of the agreement, and the Petitioner's lack of witnesses denying the existence of the document. Estate of Bossio v. Bossio, 237 W.Va. 130, 785 S.E.2d 836 (W. Va. 2016). Like in Bossio, this case deals with a lost document to which the Plaintiff/Respondent put forth significant corroborating secondary evidence namely an unexecuted deed which, while drafted by a different attorney, the Lower Court found it was substantially identical to the purported lost document. App. Record at 447. Further, the description of the property in said unexecuted deed matched a property description done for the Plaintiff/Respondent. App. Record at 206-208. A Survey map was admitted into evidence regarding the same property in the unexecuted deed and the property description, with additional testimony from a corroborating witness who testified to seeing her brother, the Plaintiff/Respondent, and her father, the Defendant/Petitioner. Plaintiffs exhibit 4, see also App. Record at 400. Furthermore, the Plaintiff/Defendant was given a life estate interest in two properties which were encompassed within the property question in two different executed and recorded deeds from the Defendant/Petitioner to the children of the Plaintiff/Respondent. Plaintiffs exhibit 7, see also Plaintiff exhibit 8.

While Bossio addressed a stock purchase agreement, rather than a deed, the Court in Bossio held that a "proponent of a lost or missing instrument must prove its existence and contents with clear and conclusive evidence." Estate of Bossio v. Bossio, 237 W.Va. 130, 785 S.E.2d 836 (W. Va. 2016). This standard is the same for lost deeds. "To establish or set up a lost instrument rising to the dignity and importance of a muniment of title, the evidence of its former

existence, loss and contents must be clear, strong, and conclusive." Syl., Telluric Co. v. Bramer, 76 W.Va. 185, 85 S.E. 177 (1915). In cases which see to establish title of land through parol testimony of a lost document, "proof of its execution, content and loss must be conclusive." Syl., Drake v. Parker, 122 W.Va. 145, 7 S.E.2d 651 (1940). Furthermore, in addressing a lost or missing deed, the Court has noted that "delivery of a deed is an essential element of its due execution, and the burden is on him who claims title under a lost deed to prove its delivery. But it may be established by proof of the grantor's declarations and admissions." Cartright v. Cartright et at., 74 S.E. 655, 70 W.Va. 507 (W. Va. 1912). "If delivery of a deed to the grantee be fully proven by other competent witnesses, the grantee is then competent to prove its subsequent loss." Cartright v. Cartright et at., 74 S.E. 655, 70 W.Va. 507 (W. Va. 1912).

While "in a suit to establish a lost deed, brought by the grantee against the heirs at law of the deceased grantor, the heir is not a competent witness to prove a conversation between himself and the deceased grantor, relating to the alleged nondelivery or destruction of such lost deed." Cartright v. Cartright, 70 W.Va. 507, 74 S.E. 655 (W. Va. 1912). "The husband of a deceased wife, who joined her in the making of a lost deed conveying her separate real estate, although a party to the suit, is a competent witness against the heirs at law of his wife-to prove delivery of the deed to the grantee, after the same was signed and acknowledged by himself and wife. The delivery, in such case, is not a personal transaction between himself and wife, but a transaction between his wife and the grantee." Cartright v. Cartright, 70 W.Va. 507, 74 S.E. 655 (W. Va. 1912).

The Plaintiff/Respondent's witness in this case was competent to prove the delivery of the deed from the Defendant/Petitioner to the Plaintiff/Respondent. While C.S. was listed in this suit, as she was a co-guardian and co-conservator of her father, the Defendant/Petitioner, her testimony did not address any personal transactions between the Defendant/Petitioner and herself. Further, the Defendant/Petitioner's declarations and admissions described by the witness indicate delivery of the lost deed. C.S. testified regarding the deed and conveyance by the Defendant to the Plaintiff, and the court found that "C.S. was present when Defendant/Petitioner and the Plaintiff/Respondent discussed ownership of the real estate in question, and

Plaintiff/Respondent expressed he had conveyed the real estate unto Plaintiff/Respondent." App record at 448. C.S. witnessed conversations between the Plaintiff/Respondent and the Defendant/Petitioner regarding the property in question and was a competent witness to testify in this case regarding the discussions of ownership and conveyance of the property. Furthermore, while the Defendant/Petitioner calls into question the witness's credibility considering her "change of heart" regarding the issue at hand, the witness believed when she answered the complaint that the property in question was a different parcel being used by her sister Santana. App. Record at 402. Once the witness saw the Survey, the witness realized the property in question, as represented by the Survey Map, was in fact the land given to and later deeded to the Plaintiff/Respondent. App. Record at 403. It should be noted that in providing her testimony, she was subject to cross examination by the Defendant. The Defendant did not present any witnesses in this case. App. Record at 420.

Further, the Defendant/Petitioner contends the Lower Court disregarded W. Va. Code Section 57-3-1 which provides that:

> No person offered as a witness in any civil action, suit or proceeding shall be excluded by reason of his interest in the event of the action, suit or proceeding, or because he is a party thereto, except as follows: No party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such person, or the assignee or committee of such insane person or lunatic.

However, the Court specifically addressed this issue following what was primarily a hearsay objection. App. Record at 177. To which the Lower Court addressed testimony by Defendant/Petitioner to Plaintiff/Respondent by stating, "I'm not so much concerned about the hearsay issue as I am about his capacity, I mean, that he is incompetent...he needs to restrict his

testimony" with certain exceptions, such allowing for testimony regarding what the Plaintiff did based on conversations but "not words that were spoken." App. Record at 177. Furthermore, the Court denied the guardian ad litem's involvement in this case, as the guardian ad litem's involvement with Defendant/Petitioner was regarding any agreements which would have been subject for court approval but not in a case which the judge was to "listen to the evidence and make a decision on what I think the facts of law would be." App. Record at 147-148. Counsel for the Defendant/Petitioner did not disagree with the Court's analysis on the issue. App. Record at 148. It is also important to note that the Defendant/Petitioner elicited testimony of conversations between the Defendant/Petitioner and Plaintiff/Respondent during cross examination without objection. However, the Lower Court's Ruling on this case clearly took account of the Defendant/Petitioner's mental incapacity at the time of trial. Furthermore, a competent witness, namely C.S., established that the deed was delivered to the Plaintiff/Defendant, as required in cases such as this.

While the Court in Cartright did not allow evidence of the survey to be used in support of the deed in that case, it is important to note that the Survey in question was factually different from the Survey in this case. There, the Plaintiff's Survey and plat of land was made long after the death of the grantor. Cartright v. Cartright, 70 W.Va. 507, 74 S.E. 655 (W. Va. 1912). The Court however saw "no reason why the court may not adopt it as a proper description of the land to be made when it directs the making of a new deed to take the place of the lost one." Cartright v. Cartright, 70 W.Va. 507, 74 S.E. 655 (W. Va. 1912). In this case, the Plaintiff's "testimony of witnesses and evidence were both found to be uncontroverted, as the Defendant's presented no evidence." App. Record 445. The Lower Court found in this case that in 2012, the Defendant "signed a deed regarding the subject property." App. Record at 447. Both the Defendant walked

the property during the Survey process, and the Defendant drove stakes into the ground. App. Record at 261-262. This Survey was acknowledged by the Surveyor of Wayne County, Randy Thompson. App. Record at 261-262. Said Survey was admitted into evidence without objection App. Record 261-262. In this present case, the Plaintiff and Defendant were both present with the Surveyors at the time of the Survey. App. Record at 400. C.S. testified that while she was not present with her father and brother during the surveying process, she personally witnessed the Plaintiff, the Defendant, and the Surveyors on the subject property. App. Record at 400. Plaintiff in this case provided a document, which while unsigned, was found by this court to be substantially identical to the lost or stolen deed in question. App Record at 447. This lost or stolen deed in question was signed by the Defendant, Donald Maynard, but is now missing. App. Record at 447. The Plaintiff paid David Lycan's office for the recording and filing fees of said deed. App. Record at 447. The Plaintiff testified he and his father then left the signed deed at David Lycans office to be recorded. App. Record at 275. The Deed was never recorded. App record at 275. C.S. during both cross examination and redirect, testified that she saw the deed, which was from her father to her brother, when it was taken from David Lycan's office by Sandy M. App Record at 395 and 401-402. The missing deed in question was both signed and notarized. App. Record 395. C.S. further testified that she drove Sandy M. to David Lycans' office and was present during the retrieval of said deed. App Record at 401.

While the Defendant in this case argues that the stolen document could easily be viewed as a "failure of delivery," such argument clearly misrepresents both the evidence and the testimony given in this case. As the trial court found the signed deed was left by the Plaintiff at the attorney's office to be recorded. App record at 447. The Defendant testified that following his payment of the recording fees to Pilar at David Lycans Office, he left the deed with Pilar.

App Record at 275. Then the Plaintiff and his father left the office. App. Record at 275. Cherrie Stevens testified that she and her sister, Sandy Maynard, went to David Lycan's office after the signed deed was left to be recorded to retrieve the deed. App. Record at 401. It is clear from the uncontroverted testimony that the deed in question was signed by the Defendant, as Cherrie Stevens testified the deed was both signed and notarized, and that the deed was given to the Plaintiff by the Defendant. App. Record at 395. Furthermore, while there is testimony that the deed was retrieved by Sandy M. and C.S., the retrieval was following the signing and delivery of the deed to the Plaintiff from the Defendant. While the Defendant here argues that the testimony of the Plaintiff stating that both the Defendant and the Plaintiff were aware that the deed was retrieved, and that in and of itself indicates "the Petitioner gather knew it had been retrieved and not delivered for purposes of recording," completely and utterly disregards the bulk of the testimony regarding the deed.

Further, the Defendant here is essentially arguing that a signed and delivered deed which was left at the office of an attorney, who was paid by the grantee, and entrusted with the safekeeping and recording of said document by both the grantor and the grantee is somehow a failure of delivery when a third party retrieves the document from said attorney. Delivery is such an essential element of a valid deed as "without delivery, title does not pass." Cartright v. Cartright, 70 W.Va. 507, 74 S.E. 655 (W. Va. 1912). Furthermore, in Cartright, while addressing a lost deed allegations of a grantor destroying a deed following delivery were raised, and the court found it not necessary to address the issue as "title passed upon delivery; and the subsequent loss or destruction of the deed could not divest title." Cartright v. Cartright, 70 W.Va. 507, 74 S.E. 655 (W. Va. 1912). The Defendant's argument that this scenario is a "failed delivery" undermines the importance of the delivery of the deed and completely disregards the

legal understanding and meaning of delivery in regard to deeds and the passing of title. While the deed in this case was not recorded, title had already passed from Defendant to the Plaintiff before the unauthorized retrieval of the deed occurred. The Deed was in the Plaintiff's control and was left at the attorney's office for recording purposes. App record at 275. Further, even after the unauthorized retrieval, the deed in question was said to be kept with the will of the Defendant and returned to the Plaintiff once the will was read. App Record at 405. While the will of Defendant was read at a later hearing, the deed was neither included with the deed nor returned to the Plaintiff at that time. App Record 275. The Plaintiff has not seen the deed since the day he left the will to be recorded, and the Defendant and/or his guardians and conservators have failed to return the deed to him. App Record at 277.

While the Defendant's argument and primary contention is that the only evidence while was based on the "uncorroborated" and "self-serving" testimony of the Plaintiff, here, the Plaintiff provided uncontroverted testimony as to the location of the deed at the office of the attorney David Lycans to be recorded. App record at 275. The Plaintiff's sister then provided corroborating evidence that the deed in question was retrieved by Sandy Maynard at the Law Office of David Lycans. App. Record at 406-407. While the testimony of the plaintiff in Cartright was not competent to prove what took place between herself and her grandmother, who was deceased at the time, the court allowed her testimony to be read for the purposes of where "where she kept her deed when she last saw it, and when she discovered that it was missing." Cartright v. Cartright, 70 W.Va. 507, 74 S.E. 655 (W. Va. 1912). Like in Cartright, the Plaintiff here testified as to the Law Office in which he left the Deed and which was the location from which the Deed went missing. App. Record at 275-276. Further, the Plaintiff testified that the deed was later being held with the Defendant's will at the home of the Defendant. App Record at

277. C.S. provided corroborating testimony that the day in which the deed in question was retrieved by Sandy Maynard, the following individuals C.S., the Plaintiff, the Defendant, and Sandy Maynard were at the home of the Defendant. App. Record at 407. The four determined that the deed was going to be held and maintained with the will. App Record at 407. C.S. further testified that the only deed picked up that day from David Lycans office was the deed to the Plaintiff. App Record at 394.

Adverse Possession

Under West Virginia Code 55-2-1, there is a minimum ten (10) year period of occupation on land before action or suit may be brought to recover any of the land. Once the requisite statutory period is met, the following elements must be proven by the adverse possessor: 1) that the tract has been held adversely or hostilely, 2) that there has been actual possession of the land, 3) that said possession has been open and notorious, 4) that the possession has been exclusive, 5) that the possession of the land has been continuous, and 6) that possession of the land was under claim of title or color of title. Brown v. Gobble, 196 W. Va. 559, 566 (1996). Further, the burden is "upon the party who claims title by adverse possession to prove by clear and convincing evidence all elements essential to such title." Syl. Pt. 2, Brown v. Gobble, 196 W. Va. 559 (1996). Additionally, it is important to note that while some states do require that the adverse possessor pay property taxes on the property, West Virginia does not have that requirement.

To establish the first element of a legitimate adverse possession claim, the adverse possessor much show by clear and convincing evidence that the tract has been held adversely or hostilely in that "his possession of the property was against the right of the true owner and is inconsistent with the title of the true owner. " Somon v. Murphy Fabrication & Erection Co., 232

S.E.2d 524, 160 W.Va. 84 (W. Va. 1977). "Where one by mistake occupies land up to a line beyond his actual boundary, believing it to be the true line, such belief will not defeat his right to claim that he holds such land adversely or hostilely under the doctrine of adverse possession." Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524, 160 W.Va. 84 (W. Va. 1977).

To establish that there was actual possession of the land, the adverse possessor must show by clear and convincing evidence, there was "an exercising of dominion over the property and the quality of the acts of dominion are governed by the location, condition and reasonable uses which can be made of the property." Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524, 160 W.Va. 84 (W. Va. 1977) citing State v. Morgan, 75 W.Va. 92, 83 S.E. 288 (1914); 3 Am.Jur.2d [160 W.Va. 91] Adverse Possession §§ 13, 14; 2 C.J.S. Adverse Possession § 33.

To establish that the possession was open and notorious, "it is generally meant that the acts asserting dominion over the property must be of such a quality to put a person of ordinary prudence on notice of the fact that the disseisor is claiming the land as his own." Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524, 160 W.Va. 84 (W. Va. 1977) citing Parkersburg Industrial Co. v. Schultz, 43 W.Va. 470, 27 S.E. 255 (1897); 3 Am.Jur.2d Adverse Possession § 47. However, "proof of actual knowledge on the part of the true owner is ordinarily not required." Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524, 160 W.Va. 84 (W. Va. 1977) citing Talbott v. Woodford, 48 W.Va. 449, 37 S.E. 580 (1900); 2 C.J.S. Adverse Possession § 49.

To establish the element of 'exclusive' possession,

> "relates to the fact that the disseisor must show that others do not have possession, although this does not mean that sporadic use by others defeats this element since it only need be the type of possession which would characterize an owner's use. Point Mountain Coal and Lumber Co. v. Holly Lumber Co., 71 W.Va. 21, 75 S.E. 197 (1912); Norgard v.

> Busher, 220 Or. 297, 349 P.2d 490 (1960); 3 Am.Jur.2d Adverse Possession § 50; 2 C.J.S. Adverse Possession § 54. Exclusivity has also been applied to the concept of dominion over the entire tract, but this may not in all circumstances be essential. Compare State v. Morgan, supra, with Parkersburg Industrial Co. v. Schultz, supra." Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524, 160 W.Va. 84 (W. Va. 1977)

To establish that the possession has been continuous is "merely to state that it must last for the statutory period, which, as we have seen, is the fundamental basis for the doctrine of adverse possession." Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524, 160 W.Va. 84 (W. Va. 1977) citing Parkersburg Industrial Co. v. Schultz, supra; 2 C.J.S. Adverse Possession § 149.

In regard to the final element color or code of title:

> "While the courts have not been entirely consistent in observing the distinction between the concept of claim of right and color of title, there is a generally recognized difference. See 3 Am.Jur.2d Adverse Possession §§ 100, 105; 2 C.J.S. Adverse Possession §§ 60, 67. A claim of title has generally been held to mean nothing more than that the disseisor enters upon the land with the intent to claim it as his own. Heavner v. Morgan, supra. Whereas, [160 W.Va. 92] 'color of title' imports there is an instrument giving the appearance of title, but which instrument in point of law does not. In other words, the title paper is found to be defective in conveying the legal title. Stover v. Stover, 60 W.Va. 285, 54 S.E. 350 (1906). It has been said that the office of claim of title or color of title is to define the area which can be claimed by adverse possession. Generally, where one asserts adverse possession under a claim of title, the extent of his possession is limited by the area over which he has exercised actual dominion. Under color of title, the limit is determined by the description contained in the title paper, as long as the disseisor has exercised some dominion over a portion thereof and the other elements are satisfied. Core v. Faupel, supra." Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524, 160 W.Va. 84 (W. Va. 1977)

In the present case, the Plaintiff, D.G.M., established by clear and convincing evidence all six elements for well beyond the statutory time requirement of ten (10) years. Immediately following the purchase of the Plaintiff's adjacent land on or about February 9, 1989, the Plaintiff, relying on his mistaken belief that his father's word was sufficient to transfer the property began construction on the tract of property in question. App Record at 367. In 1989, the Plaintiff

immediately undertook significant steps to build a gravel road throughout the property. App. Record at 446. This was a large undertaking which required the Plaintiff to clear an abundance of trees, use dynamite to clear portions of the land, and supplied and hauled massive amounts of gravel to the property. App. Record at 446. The Plaintiff did so at his own expense and testified he has continued to maintain the gravel road to this day. App. Record at 156. Further, the Plaintiff in or around 1990 fenced in the property in question and constructed a total of three (3) gates on which restricted access to the property. App. Record at 446. The Plaintiff has retained exclusive access to the property in question. App. Record at 447. For over thirty years, the Plaintiff has improved upon and maintained this property. App. Record at 156. The Plaintiff has used this property not only to access his home, but also to provide water, by way of multiple relay stations, and electricity, through power lines, to himself and his children. App record 365. The Plaintiff cleared a 75 foot right of way just for the electric company to run lines. App Record 290. The Plaintiff/Respondent testified that approximately 85% of the property was fenced in. App. Record at 166. Further, the Plaintiff used the land itself to raise livestock and did maintenance upon the land including the clearing of brush, payment of people to weed eat the areas, and upkeep of fencing to keep the cattle in. App Record at 290 and 374.

While the Defendant argues that the Plaintiff's claim was not hostile, but instead was with the Defendant's "blessing," the uncontroverted evidence and testimony clearly indicate otherwise. While the Defendant herein raises a competency argument regarding the Plaintiff's testimony regarding conversations, during cross examination, the Defendant's counsel asked and elicited testimony from the Defendant regarding such conversations. The Plaintiff was asked the following in regard to the work the Plaintiff undertook on improvements of the land and when referring the Defendant, "just gave you permission to cut the road up through there?" to which

the Plaintiff replied his father had "told me it was mine," App record at 365. No objection was raised by the Defendant as to such testimony. Further, in regard to the property in question during direct examination, C.S. testified, "my dad gave that to my brother, yeah." App Record at 394. C.S. also testified that she originally believed when the lawsuit was filed a different portion of property that her sister, Santana M., was using was at issue. App. Record at 402. After seeing the Survey, she indicated the "proves that that was not the case at all." App. Record at 402-403. Further, C.S. testified during cross examination, "Sandy led me to believe that Donald Gene was trying to take Santana's farm and that wasn't the case. After I seen the Survey and stuff, anybody can see that's plainly not the case." App. Record 405. While the Defendant argues that a portion of the land in question was not being used by the Plaintiff, C.S. identified the land as represented in the Survey in question as belonging to her brother. Further, she testified during cross examination that she saw the surveyors present with her father and brother, and that "my dad had said that that was my brother's farm." App Record at 401.

C. The Lower Court did not err in its decision to amend the pleadings to conform to the evidence and recognize a claim for "lost or stolen document" when the claim was tried with the consent of the parties and a significant portion of the Plaintiff/Respondent's evidence at trial was presented to establish that a deed to the subject property was executed by the Defendant/Petitioner but is now lost or stolen.

Amendment by the Court's Final Order

Rule 15 of the West Virginia Rules of Civil Procedure addresses the issue of amendments when used to conform evidence to the pleadings and provides as follows:

> When issues not raised by the pleadings are tried by *express or implied consent of the parties*, they shall be treated in all respects as if they had been raised in the pleadings.

> Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; *but failure so to amend does not affect the result of the trial of these issues*. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The Supreme Court of Appeals of West Virginia noted that rules which govern amendments to confirm to the pleadings are to be liberally construed. Holiday Plaza, Inc. v. First Federal Sav. and Loan Ass'n of Clarksburg, 285 S.E.2d 131, 168 W.Va. 356 (W. Va. 1981) citing Tennant v. Craig, 156 W.Va. 632, 195 S.E.2d 727 (1973)."

> Under both the old trial procedure in effect in West Virginia prior to July 1, 1960, and the new procedure in effect on and after that date as Rules of Civil Procedure, pleadings could be amended under control of the court during the trial of a case to encompass an issue raised by the evidence although not in the pleadings; but if an issue is so raised in trial and trial by consent of the parties without such amendment, it is treated as if it had been raised in the pleadings and the failure to amend will not affect the verdict. Floyd v. Floyd, 133 S.E.2d 726, 148 W.Va. 183 (W. Va. 1963).

In this case, the Trial Court found that the "issue of lost document was tried by the implicit consent of the parties." App. Record at 449. Therefore, the issue of the lost document "shall be treated in all respects as if it had been raised in the pleadings." App. Record at 450. The initial pleadings in this case set forth a factual background to the case in which the Plaintiff relied upon representations made by his father in 1989 that the land in question was his and began to improve upon and use the land. App. Record at 4. The complaint then outlined that in 2012, the Plaintiff and Defendant walked off the land and drove steel spikes into the land that was to be deeded to the plaintiff. App. Record at 4. True Line Surveys surveyed the land. App. Record 4. The Plaintiff then paid for David Lycans for the deed, as well as the filing and recording fees of the deed. App. Record at 4. The Complaint then outlines that the signature of the Defendant was notarized, but the Law Office of David Lycans failed to record the deed.

App. Record at 4. The Complaint outlined the counts of Adverse Possession of the tract and Unjust Enrichment. App. Record at 5. In an order denying the Defendant's motion for summary judgement, the court noted that there "remain disputed issues of material fact, the most notable of which at this time are questions as to whether the deed Plaintiff claims to have had was taken by one of the Defendants and refused to be returned." App. Record at 68.

Further, as the Court noted that a "significant portion of Plaintiff's evidence was presented to establish that the deed conveying the subject property from Donald Maynard (Father) to Plaintiff was lost or stolen." App. Record at 449. This is clearly supported by the record. The Plaintiff admitted into evidence an unsigned deed prepared by another attorney which the Court found to be substantially identical to the lost or stolen deed in question. App. Record 446-447. The first deed was admitted into evidence without objection. App. Record at 271. The Plaintiff then submitted into evidence a property description and Survey map of the property which matched the first deed. App. Record 206-208, see also Plaintiff exhibit 4. Further, the Plaintiff/Respondent and especially witness C.S. spent a good majority of their time on the witness stand detailing the execution, delivery and subsequent loss of the purported lost deed. Witness M.S. also provided testimony on said issue. While at the beginning of the bench trial, when addressing the different counts as addressed in the complaint, the Lower Court did inquire into the listed causes of action. The Court indicated, "we'll just take a look at the evidence" and proceeded with the Bench Trial. App. Record at 150.

Again, in response to the motion for summary judgment which the Defendant/Plaintiff alludes to, the Court previously indicated that a material fact at issue was the deed in which the Plaintiff/Respondent claimed the Defendant/Petitioner had taken. The Defendant/Petitioner cross examined all three (3) witness regarding the purported lost or stolen deed at length without

objection to any evidence or testimony regarding the lost document. Additionally, the Defendant/Petitioner failed to put any witnesses on the stand to controvert the evidence put forth by the Plaintiff/Respondent. In fact, the Defendant/Petitioner failed to put forth any witnesses nor evidence at all. App. Record at 445. Further, Defendant/Petitioner continuously relies upon the Statute of Frauds in citing their continued requests for summary judgement/directed verdict, but continuously disregards any and all exceptions to the Statute of Frauds which may be found by a court of equity. Finally, it should be noted that the Plaintiff/Respondent's did in fact raise the issue of a deed that was "lost or destroyed" in regards to the Proposed Findings and Conclusions of Law addressing the Hostile element of Adverse Possession as follows. App. Record at 427.

It is clear from the evidence that the Defendant/Petitioner gave implied consent at the Bench Trial by not failing to object to the evidence, but also by directly cross-examining witnesses regarding the issue. Further, the Defendant/Petitioner did not put forth any witnesses nor evidence contrary to the evidence and testimony presented by the Plaintiff/Respondent.

Made on Motion of the Party

While the Plaintiff/Respondent admittedly did not explicitly raise the issue of amending the pleadings, a significant amount of testimony and evidence related to the issue of a Lost Document. Further, that while the rule allows for a party to motion to amend, it clearly does not require the party to do. The Rule is clear on the Court's discretion in the matter.

Continuance to Objecting Party to Meet the Amendment

While the Defendant/Petitioner argues that the stage of which the issue of amendment was raised prevented the ability to ask for a continuance, the rule does not guarantee a

continuance for an objecting party. Instead, this is a rule which is to be liberally construed and clearly allows for Court's *discretion* in that, "the court may grant a continuance to enable the objecting party to meet such evidence." Furthermore, the Rule clearly allows the motion to amend to be raised at any time, "even after judgement." This clearly goes against the Defendant/Petitioner's argument that it implicitly contemplates notice to the parties, in that a continuance is not guaranteed but instead up to the discretion of the court, and that the issue may be raised even after all evidence was presented in the case, including after the court has ruled. Further, the court addressed prior to trial that the issue of an alleged deed being taken by one of the Defendants was an issue of material fact in this case, and an executed deed on the subject property was referenced in the complaint. App. Record at 68, see also App Record at 4. The Defendant was clearly put on notice that this was a material issue in the case, prior to the Bench Trial, and failed to either object to the evidence presentment on such issue, nor put on evidence to the contrary. Finally, it is clear the Defendant/Petitioner relied upon cross-examination of the witnesses to address this issue. Therefore, the Lower Court's amendment under Rule 15 of the West Virginia Rules of Civil Procedure was not an abuse of discretion.

III. CONCLUSION

Wherefore, the Plaintiff Below/Respondent Here respectfully requests that this Court deny the Petitioner's petition for appeal and relief requested, and affirm the decision of the Circuit Court as set forth in it's final order which adjudged, ordered and decreed the Plaintiff/Respondent herein the owner in fee of all of the property and all appurtenances situate, and for any and all other relief this Court deems fit.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SANDY M., and SANTANA M.,
CO-GUARDIANS and
CO-CONSERVATORS OF DONALD M.,
Defendants below Petitioners herein.

vs. Supreme Court Case No. 22-0036

DONALD M.,
Plaintiff below Respondent herein.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she served the foregoing **"Respondent's Response to Petitioner's Appeal"** on the following via electronic mail and by U. S. Mail on the 13th day of June 2022 to:

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Signed: _____
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