IN THE SUPREME COURT OF APPEALS OF WEST VIRGINA

Robert P. Martin and Melanie A. Martin,
Defendants Below,

Petitioners,

v.

Appeal No: 19-0745
Circuit Court of Pocahontas Co. (18-C-9)

Donald W. Lovelace and Ardel A. Lovelace,
Plaintiffs Below,

Respondents.

PETITIONERS' BRIEF

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MARTIN, ET AL. V. LOVELACE, ET AL.

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PROCEDURAL HISTORY AND STATEMENT OF THE FACTS OF THE CASE

The underlying action was filed in the Circuit Court of Pocahontas County on March 7, 2018. The verified Complaint filed by the Plaintiffs sought to take by adverse possession a tract of ¾ of an acre from the legal title owners thereof. The Plaintiffs' verified Complaint stated therein that the "Plaintiffs have 27 Affidavits attesting to the fact that Plaintiffs have met the requirements for adverse possession," and Plaintiffs also attached to their verified Complaint Exhibit A which is an aerial photograph that "included" "the claimed property by the Defendants east of Cummins Creek and fenced by the Plaintiffs as indicated in Exhibit A." (Appendix, p. 4 and p. 6). Exhibit A not only has a heavy black line running along the undisputed boundary fence of the parties drawn thereon by the Plaintiffs and it runs through "the claimed property" along the concourse of Cummins Creek to State Route 39 which is and has been the line contended by Defendants. Further, the Plaintiffs caused to be typed on Exhibit A language identifying the ownership of each side of the heavy black line which was likewise in accord with the record ownership of the Defendants. (Appendix, p. 6). Furthermore, the 27 affidavits adopted by the Plaintiffs in their verified Complaint contained a rudimentary description which was based upon at least 3 meetings held on the property with Plaintiff Donald W. Lovelace, his attorney and the 27 affiants. These were form affidavits provided by Plaintiffs' counsel and drafted by him and sworn, under oath, by all 27 affiants. The description set forth in the 27 affidavits however establishes a completely different "eastern boundary" line than Exhibit A. (Appendix, pp. 139-165).

At the deposition of Donald W. Lovelace on July 9, 2018, Plaintiff, under oath, testified that the description in the affidavits was incorrect and that Exhibit A was incorrect. (Appendix, p. 57). At deposition Donald W. Lovelace drew a third line on Exhibit A that he then testified was the correct boundary line. (Appendix, pp. 166-167). Thereafter, within the next 20 days Donald

W. Lovelace and his counsel again met with 19 of the 27 affiants, walked the property, reviewed maps and heard "the story" from Plaintiffs' counsel and signed new affidavits wherein all 19 affiants claim that when they singed their original affidavits they did not understand the rudimentary description contained in their first affidavit and all 19 affiants claimed therein that they needed their recollection refreshed despite the fact that they were at the property when they signed their original affidavit and swore to it. (Appendix, pp. 168-206). Finally, each of the 19 affiants claim a new line on an aerial photograph to be the correct boundary line between the parties. (Appendix, p. 170). This was the fourth line advocated by Plaintiffs within the first 6 months of this litigation.

On October 26, 2018, Plaintiffs filed a Motion to Amend Complaint the essence of which was an attempt to replace the original Exhibit A to Plaintiffs' Complaint with the Exhibit A from the 19 "refreshed" affidavits. (Appendix, pp. 23-28). Thereafter, Plaintiffs filed an unverified Amended Complaint (Appendix, pp. 31-36). Plaintiffs also filed a Second Amended Complaint that was identical to Plaintiffs' Amended Complaint save for the addition of a sworn verification of Plaintiffs. (Appendix, pp. 37-44). Both the Amended Complaint and the Second Amended Complaint specifically refer to the original 27 affidavits which were rejected by Donald W. Lovelace in his deposition and are in conflict with the "new" Exhibit A marked at "Exhibit A-1" attached to Plaintiffs' Amended Complaint and Second Amended Complaint. (Appendix, pp. 34 and 40).

After the close of discovery and on or about February 12, 2019, Defendants filed a properly supported Motion for Summary Judgment containing "pleadings, depositions, answer to interrogatories, and admissions on file" showing "that there is no genuine issue as to any material fact and that [Defendants] [were] entitled to a judgment as a matter of law." (Appendix, pp. 45-215). Rule 56(d), W.V.R.C.P. In response, the Plaintiffs filed a verified response which contained nothing but allegations, references to deeds, plaintiffs' theory of the case and certain legal authority. Such response failed to raise a genuine issue as to the Plaintiffs' inability to

establish the elements of adverse possession. (Appendix, pp. 217-271). Plaintiffs' response was merely a regurgitation of their arguments in their case and "cherry picked" facts. Plaintiffs' continually reference therein the "water gap" which is Plaintiffs' counsel's euphemism for the 1.25 out conveyance from the 66 acres. Specifically, Plaintiffs state disingenuously that, "there was no exception, made in said deed of trust for any 'water gap.'" However, in point of fact, the deeds of trust signed, sworn and recorded by Plaintiffs clearly except therefrom the 1.25-acre tract. (Appendix, p. 95 and p. 103). This alleged "water gap" constituted almost the entire basis of Plaintiffs' defense to Defendants' Motion for Summary Judgment. Simply speaking, there is no recognized legal document titled a "water gap." Incredulously, Plaintiffs also contended when referring to the deeds of trust signed, sworn and recorded by the Plaintiffs that, "[S]aid notice in the deeds of trust is in error and basically did nothing to put the Lovelaces on notice of such a claim." (Appendix, p. 231). They were the ones giving notice that the 66-acre tract did not include the 1.25 acre disputed tract.

Unfortunately, Judge Henning, after holding a hearing on Defendants' Motion for Summary Judgment, entered no Order thereon but simply directed the Clerk to email counsel that such was denied. (Appendix, p. 272). This is a serious problem and issue created by Judge Henning as "a court speaks only through its orders." State ex rel. Kaufman v. Zakaib, 207 W.Va. 662, 535 S.E.2d 727 (2000).

Also, prior to trial, the Court ordered that counsel could not use aerial photographs of the property in dispute maintained by the Assessor that clearly demonstrated that Defendants and their predecessors in title paid the ad valorem real estate taxes on the property in dispute. The Court also ordered that counsel could not use the Exhibit A attached to Plaintiffs' Complaint without redacting the language typed thereon as to what each of the parties owned that was created and verified by Plaintiffs. No written order was ever entered by the trial court.

Finally, although finding that the Defendants committed no wrong of any kind the Court assessed court costs against Defendants. The only rationale of the Court for such assessment

was the Court's belief that he had no discretion and that Rule 54(d) W.V.R.C.P. mandated that he do so. Such order constitutes an unwarranted sanction against innocent litigants.

V

SUMMARY OF ARGUMENT

Petitioners assert three (3) separate grounds for appeal and argue same as follows:

The Plaintiffs failed to establish at the summary judgment stage of this case that there was a genuine issue of material fact that they could meet and establish all of the elements of adverse possession. Petitioners contend that at summary judgment the Plaintiffs failed to present "pleadings, depositions, answers to interrogatories, and admissions on file" or by "affidavits" to defeat Defendants' Motion for Summary Judgment. By all of the evidence at summary judgment the Plaintiffs could not establish by objective evidence that they met or even could meet the essential elements of adverse possession of "claim of title" or "color of title" as well as "hostile" or "adverse."

The Defendants were entitled at trial to introduce into evidence Exhibit A to Plaintiffs' Complaint without redaction as it was permissible under the West Virginia Rules of Evidence as a prior sworn statement of Plaintiffs. Also, the Defendants were entitled to introduce at trial the Assessor's aerial tax map photographs of the disputed property to demonstrate that Plaintiffs paid ad valorem real estate taxes on such property.

Finally, Defendants should not have been assessed and taxed court costs as they were innocent litigants that committed no wrongful act and inflicted no injury and were simply defending the legal ownership of their property.

VI

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request oral argument as Petitioners believe that the Court's decisional process would be significantly aided by oral argument.

This case is suitable for oral argument pursuant to Rule 19 of the West Virginia Rues of Appellant Procedure as it is a case involving assignments of error in the application of settled law, as well as an issue of the trial court not exercising its discretion when the law permits the trial court discretion. Also, Petitioners believe this case is appropriate for a memorandum decision.

VII

ARGUMENT

A. STANDARD OF REVIEW

As to Petitioners' Assignment of Error based upon the failure of the trial court to grant Defendants' Motion for Summary Judgment, the standard of review by This Court is de novo. Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995); Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

As to Petitioners' Assignment of Error based upon the failure of the trial court to admit Defendants' otherwise admissible exhibits, the standard of review by This Court is an abuse of discretion. Shafer v. Kings Tire Service, Inc., 215 W.Va. 169, 597 S.E.2d 302 (2004).

As to Petitioners' Assignment of Error based upon the trial court's assessment and taxation of costs against Defendants', normally the standard of review would be an abuse of discretion, however, due to the trial court's belief that it had no discretion and none was exercised by the trial court, the standard of review of This Court is de novo particularly given the trial court's request for guidance from This Court on this issue.

B. POINTS OF FACT AND LAW PRESENTED

A.

THE TRIAL COURT ERRRED BY FAILING TO GRANT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WHEN THERE EXISTED NO GENUINE ISSUE OF MATERIAL FACT THAT THE PLAINTIFFS COULD NOT MEET THE ESSENTIAL ELEMENTS OF ADVERSE POSSESSION AS A MATTER OF LAW.

The focus hereof is on the essential element of "claim of title" and "color of title." It revolves around the specific nature of the basic claim of the Plaintiffs and is factually driven.

The second area of this assignment deals tangentially with the Plaintiffs' "claim of title" and "color of title" but specifically involves the actual boundaries of the claimed property and is heavily weighted on the facts. At the outset it is necessary to review the record title history of the Plaintiffs' property. It is important to note that H.V. Pierson and Mable G. Pierson at a time in the past prior to the purchase of the respective tracts of land by the Defendants and the Plaintiffs owned both tracts. Obviously, they later became two contiguous tracts of land.

However, by deed dated August 10, 1965 and of record in the Office of the Clerk of the County Commission of Pocahontas County in Deed Book 113 at page 385, H.V. Pierson and Mable G Pierson sold a tract of sixty-six (66) acres to Lloyd William Waugh and Flossie G. Waugh. (Appendix, pp. 76-77). What would be Plaintiffs claimed 66 acres. The deed contained a metes and bounds description of the sixty-six (66) acres and it is noteworthy that such description is the same metes and bounds description as contained in Plaintiffs' deed and described as containing sixty-six (66) acres. (Appendix, pp. 76-77 and pp. 85-87). This deed from the Piersons to the Waughs also contained a reservation in favor of the Piersons as follows:

> "The said parties of the first part reserve and except from this conveyance the right to have a water gap leading from the lands now owned by the parties of the first part and running through the land heretofore conveyed, and said water gap is to be located at a spot to be agreed upon between the parties." (Appendix, p. 76)

Such reservation shall be of significant note later herein.

Thereafter, on or about February 19, 1969 the Waughs conveyed by deed of record in the aforesaid Clerk's Office in Deed Book 119 at page 204, two (2) tracts of land "tract no. 2" being the same sixty-six (66) acres that the Waughs purchased from the Piersons and containing the same metes and bounds description, to James W. Sisler, James P. Shisler and Bly D. Shisler. (Appendix, pp. 78-79).

Notably, just seven (7) days after the sale of the property by the Waughs to the Shislers on February 26, 1969, the Waughs and Shislers conveyed to Mable G. Pierson a tract of 1.25

acres described therein by metes and bounds, out of the sixty-six (66) acre tract by deed of record in the aforesaid Clerk's Office in Deed Book 119 at page 322. (Appendix, pp. 80-82). This conveyance is critical to the issues in this case due to the fact that the three quarters (3/4) of an acre at issue was conveyed out of what was the sixty-six acre tract and subsequently sold to Plaintiffs.

Also of note, contained in the foregoing deed is language setting forth an agreement between the Waughs and Shislers and Mabel G. Pierson dealing with water rights and a water gap. Despite the fact that this language provides no enforcement mechanism for the failure of any party to perform their agreement and despite the fact that the deed did not contain any reversionary language whatsoever, counsel for Plaintiffs belabored the point throughout these proceedings both during pre-trial motions and at trial in an attempt to establish some form of reversion, transfer or surrender of the 1.25 acre tract Plaintiffs' predecessors in title and thus to Plaintiffs. (Appendix, pp. 217-271). Such a position has and had no legal basis nor authority and is nothing more than a red herring or a desperate attempt to somehow obtain title to this tract outside the rigors of adverse possession.

Later in the year 1969, James P. Shisler and James W. Shisler, Bly Shisler having died, conveyed the "sixty-six (66) acre tract" to Elmer Shinaberry and Thelma Shinaberry by deed dated August 28, 1969 and of record in the aforesaid Clerk's Office in Deed Book 120 at page 253. (Appendix, pp. 83-84). Notably, such deed specifically references a prior outconveyance of one (1) acre from the sixty-six (66) acre tract and as a result of the recordation of the deed for the 1.25 acres to Mable Pierson herein and above discussed, any and all subsequent purchasers were on notice that, at the least the tract identified as containing sixty-six (66) acres contained, at the most 63.75 acres at this date.

Finally, on or about November 2, 1978, Thelma A. Shinaberry, in her own right and as survivor of Elmer Shinaberry conveyed the property to Plaintiffs by deed of record in this aforesaid Clerk's Office in Deed Book 147 at page 174. (Appendix, pp. 85-87). Again, the

description of the property conveyed thereby was the same metes and bounds description of the sixty-six (66) acres as in all of Plaintiffs' predecessors' title deeds discussed above.

As a result of the foregoing recitation of the record title history of the Plaintiffs' property it is clear and undisputed that nine (9) years prior to November 2, 1978 the date of the deed of conveyance to the Plaintiffs of the alleged sixty-six (66) acre tract, the 1.25 acres had been conveyed out of the sixty-six (66) acre tract and title and ownership of the 1.25 acres never passed to the Plaintiffs by the deed of November 2, 1978. Obviously, the property claimed by Plaintiffs in this litigation of three-fourths (3/4) of an acre is part of the 1.25 acre tract.

Since the inception of this litigation, Plaintiff Donald W. Lovelace has consistently maintained that he "owned" the property in dispute because it was "in my deed" when, in point of fact, and as demonstrated by the above title history, it most assuredly is not. As such, Plaintiffs' basis for "claim of title" and/or "color of title" is the "belief" (Appendix, pp. 8-10) of Donald W. Lovelace that such emanates from his deed of November 2, 1978. It should be noted here that due to a joint stipulation between the parties neither Ardel A. Lovelace nor Melanie A. Martin participated in discovery nor testified in this case. (Appendix, pp. 29-30). Accordingly, the testimony of Donald W. Lovelace is the best it can ever get for the Plaintiffs.

In the first instance, in order to accept Mr. Lovelace's "belief" as the basis for the essential element of "claim of title" and/or "color of title" the trial court had to disregard over one hundred (100) years of precedent regarding record notice. The Plaintiffs are chargeable with knowledge of the conveyances recorded in the Office of the Clerk of the County Commission of Pocahontas County. "The doctrine of constructive notice places subsequent purchasers on notice of all facts which could be discovered by searching the record of a duly recorded instrument." Brannon v. Riffle, 197 W.Va. 97, 475 S.E. 2d 97 (1996) and Smith v. Owens, 63 W.Va. 60, 59 S.E. 762 (1907). This Court in Smith, supra went on to add that,

> "It is the duty of one purchasing real estate to examine the records; and, whether he does so or not, he is affected with notice of every fact the knowledge of which might have been obtained

from the record, or to which the facts there appearing would have led him."

Mr. Lovelace, throughout this case has consistently employed absolute terminology to describe his basis of "claim of title" or "color of title", to wit:

"Q. And if I'm right and that's the same half acre, that is what gave you access to get under the bridge, isn't it?

A. No. No. I owned it to start with. I didn't have to get access.

Q. So somebody deeded you your own property?

A. Yeah. Yeah. That's exactly what they done (sic)."

(Appendix, p. 132). (Emphasis added). (When asked why Dr. Shabb deeded Mr. Lovelace .5 acres of the 1.25 acres in 1985.)

Also,

"Q. I am asking you the question, it is your position...
A. Yes, yes, its mine. It's mine.
Q. Even if you don't have a deed to it?
A. I've got a deed to it.
Q. You've never actually had a surveyor take your deed and go out and run a survey on the metes and calls ...
A. No."

(Appendix, p. 133). (Emphasis added).

Further, in his responses to written discovery in the case below, Mr. Lovelace responded thereto as follows:

"**Request No. 1:** ADMIT that Donald Lovelace cannot produce any deed establishing his ownership of the subject 'claimed property.'
Response: Deny. Donald Lovelace believed the 'subject property' in question was contained in his deed dated and recorded the 2nd day of November 1978 and treated the 'subject property' in question as being contained in his deed dated and recorded the 2nd day of November, 1978."

"**Request No. 2:** ADMIT that Donald Lovelace has never paid or exchanged anything of value for the subject 'claimed property.'
Response: Deny. Donald Lovelace believed he paid for the 'subject property' and has maintained same as his since the day he purchased the 'subject property' in 1978...."

"**Request No 4:** ADMIT that Donald Lovelace has never made any improvement to the subject 'claimed property.'
Response: Deny. From the time Donald Lovelace purchased the 'subject property' in 1978...."

"**Request No. 7:** ADMIT that Donald Lovelace is attempting to obtain ownership of the 'claimed property' without providing any consideration for the same.
Response: Deny. Donald Lovelace believed said 'subject property' was in his purchase price of $25,000...." (Appendix, pp. 8-10). (Emphasis added).

And,

"**Interrogatory No. 8:** Please state specifically, what use, if any, Donald Lovelace has made of the property he seeks to take title to since January 1, 2007.

Answer: Plaintiff objects to the form of this question. Without waiving said objection, Plaintiff states that he and his family have had dominion and control of the subject property since he purchased his land in 1978. Plaintiff believed that the subject land was part of the 66 acres he purchased." (Appendix, p. 15). (Emphasis added).

Regardless as to how valiantly Plaintiffs' counsel attempted to intertwine the other essential elements of adverse possession into his client's written discovery responses, all of the foregoing absolutely and without question, confirm and solidify Plaintiffs' reliance on their November 2, 1978 deed to establish and prove the essential element of "claim of title" and/or "color of title." (See generally, Appendix, pp. 8-10).

In addition to Plaintiffs' "problem" with constructive notice as to the conveyance of the 1.25 acres from the "66 acre tract" they further have a "problem" with the fact that Mr. Lovelace testified, at trial that he had never even read his deed to the "66 acre tract." (Unfortunately, due to Plaintiffs' objection to the inclusion of transcripts in the Appendix and mindful of the West Virginia Rules of Appellate Procedure's admonition regarding references to matters outside the record, undersigned counsel affirms as an officer of the court as to the accuracy of this statement.) (Obviously, the trial court had no knowledge of this testimony at the time that the court was presented the summary judgment motion, but it is telling.) However, this testimony was consistent with Plaintiffs' testimony throughout the case.

Also, when asked about the Shabb deed Mr. Lovelace testified that, "That's what it was. I've never looked at the deed other than until today." (Appendix, p. 133). When asked about the verified Complaint filed in this case and specifically about Exhibit A to the verified Complaint. "Did you see this before the complaint was filed?" To which he responded, "No. I didn't see that." And, regarding the 27 Affidavits referenced in the verified Complaint, Amended Complaint and verified Second Amended Complaint, Mr. Lovelace testified that, "I didn't read them all." At this juncture, the trial court should have asked how can the basis of the belief expressed

numerous times by Mr. Lovelace as to his "claim of title" or "color of title" be a deed that he never bothered to read? Obviously, it cannot. As such and consequently, the Plaintiffs did not prove or even establish "claim of title" or "color of title" because they couldn't. Mr. Lovelace "believed" the questioned property was in his deed yet he closed his eyes to the alleged basis of his beliefs (his own deed) and failed to even read it. Again, such action by the Plaintiffs is consistent with their actions throughout, i.e., no title search, no survey, four (4) "incorrect" descriptions, and feigned ignorance of language contained in TWO (2) Deeds of Trust that they signed, swore and recorded.

Further, regarding the essential element of "claim of title" and "color of title" as well as the essential element of "open and notorious" Plaintiffs had created for themselves yet another conundrum. On August 19, 1993 the Plaintiffs executed and caused to be filed in the aforesaid Clerk's Office a certain Deed of Trust which by its very terms sets forth therein a specific exclusion of the outconveyance of the 1.25 acres and specifically cites to the deed in Deed Book 119 at Page 322 to Mabel Pierson. (Appendix, p. 103). Likewise, again on July 10, 1997 Plaintiffs executed and caused to be filed in the aforementioned Clerk's Office another Deed of Trust where by the specific language of the Deed of Trust the Plaintiffs acknowledged the outconveyance of the 1.25 acres by the deed recorded in Deed Book 119 at page 322 to Mabel Pierson. (Appendix, p. 95).

As a result of these two (2) documents alone, the Plaintiffs abrogated not only the essential element of adverse possession of "claim of title" and "color of title" but simultaneously published to the world that they did not own the 1.25 acres thereby defeating the essential element of "open and notorious." It is specifically noted that the two (2) above referenced deeds of trust were both executed by both Plaintiffs under oath.

Finally, in this regard, the most fundamental element of an action for adverse possession to dispossess the legal and lawful owner of real estate of their property has undoubtedly got to be that the property sought to be taken can be identified physically. In this action which was

filed on March 7, 2018, significant effort was put forth by Plaintiffs and their counsel to establish the parameters of the property they sought to take and such efforts preceded the filing of the complaint and continued for a significant time thereafter. The most striking aspect of this effort as well as the entire action is the absolute disregard and disrespect the Plaintiffs, their counsel and their witnesses exhibited with regard to their oaths and their testimony.

Beginning in February of 2018 and prior to the filing of this action, Mr. Lovelace and his counsel convened at least three (3) meetings at the property at which time counsel and numerous (27) persons who would later become the 27 affiants on behalf of Plaintiffs walked the property; met together to listen to Plaintiffs' counsel explain the law to the witnesses; and, signed sworn affidavits as to Plaintiffs' claim of adverse possession. At the first such meeting, after gathering the assembly of twenty-seven (27) attendees and "explaining the issue," (Appendix, p. 233), Plaintiffs' counsel walked the property with the twenty-seven (27) attendees and then secured the signatures (that were notarized and thus, under oath) of the twenty-seven (27) attendees on form affidavits containing a description of the location of the boundary line between the Lovelace property and the Martin property.

All twenty-seven (27) of the affidavits signed and sworn to under oath contain a rudimentary written description of the "Eastern Boundary to [Lovelaces'] property" to be as follows:

> "Starting at the center of Cummins' Creek under the WV State Route 39 Bridge connecting with Mr. Lovelace's property South of said bridge crossing Cummin's Creek, then with the East bank of Cummin's Creek to Knapp's Creek then crossing Knapp's Creek and continuing in a Northwest direction to WV State Route 28."

A map showing the above described "Eastern Boundary to [Lovelace's] property" is located at Appendix, p. 216. This is description number one (1) which is contained and sworn to in the twenty-seven (27) affidavits referred to and relied upon by Plaintiffs in the Complaint (Appendix, pp. 1-7); Plaintiffs Amended Complaint (Appendix, pp. 31-36); and, Plaintiffs' Second Amended Complaint (Appendix, pp. 37-44). This description simply starts at the center of

Cummins Creek at the Route 39 bridge, goes to the "East bank of Cummins Creek to Knapp's Creek." As the 27 affiants "walked the property" they could easily see Cummins Creek and where it lay upon the property. However, this description does not even come close to the undisputed property boundary line fence between the parties' properties.

Thereafter, on March 7, 2018 Plaintiffs filed with the Clerk of the Circuit Court their verified Complaint which included paragraph 20 which states, "20. Plaintiffs have 27 affidavits attesting to the fact that Plaintiffs have met the requirements of adverse possession." (Appendix, pp. 136-165). Also, attached to Plaintiff's verified Complaint filed aforesaid, was Exhibit A which depicted a line totally different from the description in the twenty-seven (27) affidavits. (Appendix, p. 6). A visual depiction of the two (2) disparate lines is shown on p. 216 of the Appendix. Therefore, at the very inception of this litigation, Plaintiffs offered two (2) very different descriptions of the property they sought to take by adverse possession in their own verified Complaint.

Thereafter, on July 9, 2018, Mr. Lovelace during his deposition testified that not only was the description in the Plaintiffs' twenty-seven (27) affidavits incorrect but that Exhibit A to Plaintiffs' (verified) Complaint was also incorrect and offered a third description. (Appendix, p. 216). Within twenty days of Mr. Lovelace's deposition, Plaintiffs' counsel again convened a "meeting" at the property, lectured the assembled crowd on the elements of adverse possession (again), walked on the property (again), and obtained nineteen (19) new affidavits which do not contain a written description of any property boundary but refer to a map which was allegedly provided to the affiants at the "meeting" of February 24, 2018. (Appendix, p. 233). Further, such affidavits state therein that each new affidavit was given because every one of the affiants did not understand "the written description in my February 24, 2018 affidavit" and because every one of them stated that "I personally went to Mr. Lovelace's property to refresh my recollection of where I believe Mr. Lovelace's easterly boundary line to his property is located." (Appendix, pp. 168-206)

Despite the fact that the affiants state that they had "been on and around Mr. Lovelace's property and know that he ... claimed his Eastern Boundary as follows:" the previously quoted description (Appendix, pp. 139-165); and, despite the fact that on the day the affidavits were signed the affiants were on Mr. Lovelace's property and had had a tutorial as to the claims and law of Mr. Lovelace's Complaint, Plaintiffs' counsel prepared form affidavits that state that all of the affiants had to return to the property to refresh their recollection. This is in spite of the fact that most of the affiants swear that they have known Mr. Lovelace and known his property for ten (10) to forty (40) years. How then, is it possible that they misunderstood a very simple, non-technical description that basically says, "the line follows Cummins Creek"? They were there and they could see the creek. However, following the execution of the nineteen (19) "second affidavits" by nineteen (19) of the original affiants, Plaintiffs claim reliance on the original twenty-seven (27) affidavits in both their Amended Complaint (Appendix p. 34) and their Second Amended Complaint. (Affidavit, p. 40). With regard to Exhibit A to Plaintiffs' Complaint, Plaintiffs' counsel states in Plaintiffs' Motion to Amend Complaint that the boundary line thereon was a "misunderstanding by Plaintiffs' attorney." (Appendix, p. 233). At the risk of sounding flippant, there was undoubtedly a lot of "misunderstanding" prevalent amongst the Plaintiffs, their counsel and their affiants. At its base level, this series of multiple descriptions of the "subject property" without question demonstrates Plaintiffs' inability to even describe the corpus of their claim and their inability to meet the mandatory essential elements of adverse possession.

Defendants simply contend that the only plausible reason for all of these alleged mistakes that Plaintiffs and the 27 affiants swore on their oaths is that they could not identify the property which was the subject of their lawsuit. As a result of all of the foregoing the Plaintiffs fail in meeting the burden of establishing certain essential elements of their cause of action for adverse possession.

Fairly recently, in 1977, This Court wrote,

"This Court has spoken on a number of occasions on the doctrine of adverse possession, and while there is some semantic difference in the wording of the doctrine, we believe that the elements of the doctrine can be fairly stated as follow.

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 had held the tract adversely or hostilely; (2) That the possession has been actual; (3) That it has been open and notorious (sometimes stated in 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. Bitonti v. Kauffeld Co., 94 W.Va. 751, 120 S.E. 908 (1923); Wilson v Braden, 56 W.Va. 372, 49 S.E. 409 (1904); Heavner v. Morgan, 41 W.Va. 428, 23 S.E. 874 (1895); Core v. Faupel, 24 W.Va. 238 (1884).

While no useful purpose could be served in attempting to analyze each of the cases in this jurisdiction as they may define the various elements, it is perhaps worthwhile to restate in a brief fashion the generally accepted definitions.

Thus, for the element of 'hostile' or 'adverse' possession, the person claiming adverse possession must show that his possession of the property was against the right of the true owner and is inconsistent with the title of the true owner. The word 'hostile' is synonymous with the word 'adverse' and need not and does not import that the disseisor must show ill will or malevolence to the true owner. Core v. Faupel, supra; Brewer v. Brewer, 238 N.C. 607, 78 S.E. 2d. 719 (1953); 2 C.J.S. Adverse Possession § 60."

And,

"For possession to be open and notorious, it is generally meant that the acts asserting dominion over the property must be of such quality to put a person of ordinary prudence on notice of the fact that the disseisor is claiming the land as his own. Parkersburg Industrial Co. v. Schultz, 43 W.Va. 470, 27 S.E. 255 (1897); 3 Am.Jur.2d Adverse Possession § 47." Somon v. Murphy Fabrication and Erection Co., 160 W.Va. 84, 232 S.E.2d 524 (1977).

The entire theory of the Defendants as to why the trial court erred in failing to grant Defendants' Motion for Summary Judgment based upon Plaintiffs' failure to establish the essential elements of adverse possession, specifically the requisite element of "claim of title" or "color of title" and the requisite element of "hostile" or "adverse" is set out by the Somon Court

as follows: (Note: A significant portion of the Somon, supra. decision is set out below due to the similarity in facts and the issues presented in that case with the present action.)

> "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, '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.
>
> The foregoing definitions are at best fragile guidelines to outline in a general way the elements of adverse possession, which in the main cannot be naturally compartmentalized in a given case. They serve only as a beginning point, as no attempt has been made to fit within them subsidiary principles and exceptions that have long been recognized.
>
> Turning from these abstract principles to the case at hand, we note the following salient facts: Somon obtained his deed in 1953 and prior the actual conveyance had waked the boundary of the tract, including the old fence line, with his grantor. In this regard he stated that the old fence, standing in what is now the disputed area, was in existence and did constitute a portion of the fence line that enclosed the entire property. Prior to receiving his grant, he leased the property from his grantor and had utilized it primarily for grazing cattle with occasional cutting of timber and hunting, and these uses continued after he obtained title to the property. He also made some repairs to the old fence in the disputed area, and this was corroborated by a neighbor.
>
> The record is clear that from 1953 until 1973, when Murphy through its attorney advised that the fence line was on its property, Somon was not disturbed in his uses of the disputed area by Murphy or anyone claiming through Murphy.
>
> Murphy's attack to Somon's claim of adverse possession rests upon a broad front with the initial contention that none of the elements were proven.
>
> We do not believe that this position can be sustained under the facts. It appears that for the statutory period the old

fence line formed a part of the entire fence line that the testimony indicated surrounded Somon's farm. There was an enclosure coupled with the grazing of cattle and cutting of timber, which has been held to be sufficient to establish necessary elements of adverse possession. State v. Morgan, supra; Wilson v. Braden, supra; Chilton v. White, 72 W.Va. 545, 78 S.E. 1048 (1913).

The one challenge that appears of merit is Murphy's assertion that since Somon thought the boundary line was the old fence line, he did not intend to possess the disputed area adversely or hostilely. The argument is advanced that Somon, being mistaken in believing that his deed description carried to the fence line north of Painters Run, when in fact it did not, never intended to lay adverse claim to the disputed area. In effect he could not claim adversely as he had a bona fide belief that he owned the area. Reliance is placed by appellant on the third syllabus of Greathouse v. Linger, 98 W.Va. 220, 127 S.E. 31 (1925), which states:

'Where one by mistake occupies land up to line beyond his actual boundary, believing it to be the true line, but only intends to claim to the true line, he cannot by adverse possession acquire title to the land not actually covered by his title papers.'

When we read the case we find the syllabus does not accurately reflect the language set out in the opinion, which in turn came from the earlier case of Heavner v. Morgan, supra. The opinion language in Greathouse, 98 W.Va. at 222, 127 S.E. at 32, is:

'If one by mistake enter on the lands of another, his title papers not actually covering the land entered, he cannot by adverse possession under color of title acquire title to the land not actually covered by his title papers. But will be limited to the land actually enclosed and of which he has the pedis possessio.' Coal & Lumber Co. v. Lumber Co., 71 W.Va. 21, 26, 75 S.E.197, 199; Heavner v. Morgan, 41 W.Va. 428, 23 S.E. 874; 2 C.J. 139; 1 R.C.L. 733.'

Neither statement of law, however, deals with the questions of adverse intent. It is clear that the Court was discussing the question of the area over which adverse possession could be obtained. This relates to the element in adverse possession dealing with color of title or claim of title. The doctrine of mistake as to boundaries in adverse possession centered on the element of adversity or hostility. 3 Am.Jur.2d Adverse Possession § 39-42; 2 C.J.S. Adverse Possession §§ 79-82. This principle is stated in Annot., 80 A.L.R.2d 1171, 1173, as follows:

'The solution of the question whether adverse possession can be established, although there had been a mistake in or ignorance of boundary lines, is controlled by whether possession, under such circumstances, all other factors being present, can be considered hostile.'

The three West Virginia cases, Greathouse v. Linger, supra, Point Mountain Coal & Lumber Co. v. Holly Lumber Co.,

> supra, and Heavner v. Morgan, supra, do not deal with the issue of mistake, but rather are concerned with the scope or extent of adverse possession that can be obtained where one claims land that is not actually not in his deed even though he thought it to be. They conclude that he, who by mistake entered land of another thinking such land is covered in his deed, must show actual possession in order to hold the land adversely. This is nothing more than stating that his possession in the disputed area rests upon a 'claim of title' as distinguished from 'color of title.' They do not touch upon the question of whether a mistake as to boundary negates the element of adversity or hostility.
>
> We are not aware of any case in which this Court has been asked to consider whether, if it is shown that one holds property under the mistaken belief it is within his deed, this fact destroys his right to claim that he held it hostilely or adversely. The annotation in 80 A.L.R.2d 1171 collates the various cases and theories and the case of Norgard v. Bushe, 220 Or. 297, 349 P.2d 490, 80 A.L.R.2d 1161 (1960), provides a full analysis of these theories.
>
> It is, perhaps, sufficient to comment briefly on the two major and opposite views that have evolved in this area. One advances a subjective test; the other an objective one. Those courts that follow the subjective test reason that the element of hostile and adverse connotes a mental intent and therefore if one entertains a belief that he holds the disputed area by virtue of his title document, he does not possess it with the requisite adverse or hostile intent. The other view looks on the physical acts and concludes that if physical dominion has been exercised over the disputed area, this is sufficient to satisfy the adverse or hostile element. As Holmes, C.J., stated in Bond v. O'Gara, 177 Mass. 139, 58 N.E. 275 (1900), 'His claim is not limited by his belief.' We favor this latter theory.
>
> The reasons for such selection may be at best arbitrary, but it does not appear that proof is more certain if limited to objective evidence. The physical evidence of possession should alert the true owner that an adverse claim is made, at which point he has ten years to end the problem. It is also compatible with the claim of title that must be shown in order to satisfy this element of the doctrine of adverse possession in this type of case. This is true since the actual boundaries of the disputed area have been shown not to lie within the title instrument, thus giving ruse to the 'mistake' in the first instance. The only way the disseisor can hold is by showing actual dominion over the disputed area, which is the basis for a claim of title." Somon, supra.

Accordingly, applying the teaching of Somon, supra. to the facts of this case clearly there is no issue that Plaintiffs were claiming adversely under "color of title." Although Plaintiffs' counsel routinely interjected in the affidavits and elsewhere the elements of adverse

possession, it is clear that Donald W. Lovelace, who spoke for Plaintiffs, believed throughout and claimed throughout he owned the property because he bought it and it was in his deed. In this, he was and is incorrect.

Given that the disputed property was not and is not in his deed (like in Somon, supra.) the trial court could have looked to the other elements of adverse possession as suggested by the Somon court. As such, Plaintiffs failed to establish the other essential element of "adverse" and "hostile." The execution of the two (2) deeds of trust by the Plaintiffs, which excluded the 1.25 acres clearly shows that they did not act inconsistent with the legal title ownership of the disputed property nor consistent with their own "adverse" and "hostile" claim of ownership. They knew they didn't own the 1.25 acres and they did not pledge the land of the true owner as collateral for this debt.

Secondly, by the recordation of the two (2) deeds of trust, the Plaintiffs gave notice to the world that they did not own the disputed property. The rules of constructive notice apply to everyone, not everyone except the Plaintiffs. Such is objective evidence contrary to their claim of adverse possession, this objective evidence coupled with Plaintiffs' inability to even identity the property that was the subject of their claim of adverse possession is certainly ample objective evidence that would bar their claim.

Finally, it is of significant moment that neither the Petitioners nor This Court can determine in any way what evidence the trial court did or did not consider due to the fact that the trial court failed to enter any order upon Defendants' Motion for Summary Judgment. This is particularly troubling in that Defendants, subsequent to receiving the Clerk's "note" that the court was denying summary judgment, filed Defendants' Motion for Relief from Order Denying Summary Judgment. Unfortunately also there is no order ruling on Defendants' Motion for Relief from Order Denying Summary Judgment as well. As noted elsewhere herein, courts speak only through their orders, and in this case the trial court is mute.

B.

THE TRIAL COURT ERRED BY FAILING TO PROPERLY CONSIDER AND RULING INADMISSABLE CERTAIN EXHIBITS

This Assignment of Error addresses the exclusionary rulings of Judge Henning as they related to Exhibit A to Plaintiffs' Complaint and to the tax map aerial photographs maintained by the Office of the Assessor of Pocahontas County.

Attached to Plaintiffs' Complaint that instigated this litigation, Plaintiffs referred in the body of the Complaint to Exhibit A and attached Exhibit A thereto. Exhibit A is an aerial photograph of the common boundary area between the Lovelace property and the Martin property that was obtained by Plaintiffs from the Office of the Assessor of Pocahontas County, (Appendix, p. 6). Plaintiffs' counsel drew upon the aerial photograph a heavy black straight line from Knapp's Creek to State Route 39 (which was and is the property boundary line contended by Defendants.) In addition to drawing such line, Plaintiffs' counsel typed on the left (western) side of the line, "Plaintiffs' Property This Side of Black Line" and to the right (eastern) side of the line, Plaintiffs' counsel typed "Defendants' Property This Side of Black Line." (Appendix, p. 6).

At a hearing held on November 1, 2018, before the trial court on other matters, the trial court appeared to pre-judge such exhibits when the trial court stated: (Note: A transcript of those proceedings was filed in the Clerk's Office by the court reporter and is part of the Clerk's original file but not part of the Appendix).

> "You know, looking at the exhibits, because as I indicated, I didn't even look at them until – because of your objection, I didn't even look at them until I got ready for this hearing. The - - you know, some of them - - one - - the Exhibit [A] in the Complaint is labeled as Defendant's Property and Plaintiff's Property. And, you know, right off the bat, I don't think we can put in an exhibit that's - - and I'm just - - I'm not ruling. I'm just giving you some ideas. I don't think that's going to come in unless it's - - if it's objected to, and things like that.
>
> And, you know, the tax - - the tax assessor's estimate of where the boundary is and stuff like this, I mean, right on the document it says, 'This is not to be relied upon. We do the best we can, but it's not - - we don't profess it to be accurate.'
>
> I tried a case one time over in Hardy County, and the tax assessor had, I think, a hundred-acre tract as contiguous with a bigger

> piece. And the expert-witness surveyor testified that if the and existed at all, it was several miles away and was claimed by three or four different parties. But the tax assessor showed it was contiguous - - but, you know, the tax - - tax assessor does the best job they can, but it's not as accurate as a survey or something like that."

Subsequently the trial court ordered that the typewritten language placed on Plaintiffs' Exhibit A as set out above must be redacted for trial. Exhibit A should have been admitted without redaction by the trial court due to the fact that although Exhibit A technically is a hearsay statement it was and is admissible under Rule 801(d)(1)(A) and 801(d)(2)(A) and (B) of the West Virginia Rules of Evidence. The typewritten language placed on the aerial photograph by or at the direction of the Plaintiffs and then verified, under oath by the Plaintiffs, clearly constitutes a prior inconsistent statement of an opposing party and was thusly admissible without redaction as an exception to the "Hearsay Rule." See generally, Southern v. Burgess, 198 W.Va. 518, 482 S.E.2d 135 (1996). Thus, the trial court erred by ordering the redaction of Exhibit A.

Further, the trial court erred in excluding use of other aerial photographs maintained in the Office of the Assessor of Pocahontas County as they were not offered to prove ownership of the property at issue nor to establish any property boundaries but were offered to show that the Plaintiffs were not taxed for nor had they paid tax on the property at issue. In this regard, and as noted earlier herein, Donald W. Lovelace filed pleadings in this case which contended that he "believed" that he had paid and had been paying taxes on the property in dispute since 1978. The Assessor of Pocahontas County maintains aerial photographs of all property in the county. Such photographs have an overlay of the outline of separate tracts of land and there appears thereon a parcel number which corresponds with a tax ticket in the name of the person charged with paying the taxes on each particular tract.

The trial court excluded a copy of the aerial photograph of the property in dispute because of the trial court's concern that it possibly showed a boundary line when, in point of

fact, such was admissible to prove that Defendants and their predecessors in title and not Plaintiffs had and were paying ad valorem real estate taxes on the specific property at issue. Rule 801, West Virginia Rules of Evidence; See generally, State v Pettrey, 209 W.Va. 449, 549 S.E.2d 323 (2002). Further the trial judge's concern was obviated by his own statement that, "...right on the document it says, 'This is not to be relied upon. We do the best we can, but its not - - we don't profess it to be accurate.'"

Thus, the trial court erred in failing to admit the aerial photograph of the property in dispute.

C.

THE TRIAL COURT ERRED BY RULING THAT IT HAD NO DISCRETION WITH REGARD TO THE ASSESSMENT AND TAXATION OF COSTS UNDER RULE 54(d) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE DESPITE SPECIFICALLY FIDING THAT PETITIONERS COMMITTED NO WRONGDOING OR SANCTIONABLE CONDUCT BY DEFENDING A SUIT BROUGHT AGAINST THEM SEEKING TO TAKE OWNERSHIP OF PROPERTY LEGALLY OWNED BY THE PETITIONERS THROUGH A CLAIM OF ADVERSE POSSESSION

In its Order of July 24, 2019 the trial court, among other matters, assessed the costs of the trial (court costs) to the Defendants and directed the Clerk of the Court to tax costs within 10 days after entry of the judgment and send a copy of the bill of costs to the Defendants. Thereafter, the Petitioners filed Defendants' Rule 59 Motion to Alter or Amend Judgment (See Appendix, pp. 303-322). In Defendants' Rule 59 Motion to Alter or Amend Judgment, the Defendants asserted several grounds against the Court's assessment and taxation of costs against them. Notably, the Defendants did not advocate for assessment and taxation of costs against Plaintiffs but simply that it was not appropriate to assess and tax the costs against Defendants.

Thereafter, Respondents filed Plaintiffs' Response to Defendants' Rule 59 Motion to Alter or Amend Judgment which argued that "the court costs are not sanctions"; that, "the losing party are (sic) liable for court costs"; that fault plays no part in the assessment and taxation of

court costs; and, that it was within the trial court's discretion to assess and tax costs "as it deems fit." (See Appendix, pp. 323-324).

A hearing was held on Defendants' Motion on September 24, 2019 and after hearing the argument of counsel, the trial court entered its Order Denying Defendants' Motion to Alter or Amend Judgment which provided, in pertinent part as follows:

> "3. The Defendants asserted separate grounds in arguing that the Court should alter or amend the judgment and not access costs against the Defendants. The Court will address each separately hereinbelow.
>
> 4. First the Defendants argued that it is improper to assess the costs against the Defendants because the same was effectively a sanction that there was no finding of wrongdoing by Robert P. Martin or Melanie A. Martin. While the court believes it cannot grant the Motion to Alter or Amend on these grounds, the Court does specifically **FIND** that neither Robert P. Martin nor Melanie A. Martin committed any wrongdoing, malfeasance or nonfeasance. In fact, the Court specifically notes that this was a claim brought by the Plaintiffs seeking to take ownership of property legally owned by the Defendants through a claim of adverse possession. As such, there can be no finding that the Defendants had engaged in any wrongful conduct as though this was a claim asserting negligence or an intentional tort.
>
> 5. Next the Defendants argued that to access costs against the Defendants, who were essentially litigating this matter to vindicate their alleged ownership interest in the subject real property would incentivize further litigation. More specifically, Defendants argued that, as they obtained ownership of the subject real property by way of a general warrant deed from William R Shelton, II, they would have a viable cause of action against William R. Shelton, II. The Defendants argued that, should such cause of action be filed, it would likely result in a third-party complaint by William R. Shelton, II; however, Defendants did not elaborate on who they believed would be the target of such third-party complaint. Finally, Defendants argued that such potential claim against William R. Shelton, II would likely be ripe for summary judgment upon the filing of the same based upon Affidavits signed by William R. Shelton, II that were prepared by Barry Bruce, Esq. during a series of meetings between Mr. Bruce, Mr. Shelton and various other individuals, some of whom did appear as witnesses at the trial of this matter and some who did not. In short, the Defendants argued that the assessment of these costs could incentivize "snowball" litigation against Mr. Shelton based upon the general warranty deed for the subject property and then further litigation by Mr.

Shelton. This Court specifically makes no finding as to whether such potential litigation has any merit.

6. The Defendants next argued that the assessment of cost (sic) against the Defendants would have a "chilling effect" upon those seeking to defend their ownership in real property.

7. Finally, the Defendants argued that any costs related to the jury should not be assessed pursuant to the Declaratory Judgment Act as the jury did not return its verdict pursuant to the Declaratory Judgment Act.

9. Ultimately, the Court believed that it had no discretion with regard to the assessment and taxation of costs pursuant to *Rule 54(d) of the West Virginia Rules of Civil Procedure* which provides, in part:

> Except when express provision therefor is made in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; ...

10. The Defendants argued that *Rule 54(d)*, by using the language "...shall be allowed..." gave the Court discretion to assess and tax or not assess or tax costs. However, as the Defendants could produce no authority to support their interpretation of the *Rule*, the Court remains of the belief that it has no discretion. The Court does note that the Defendants have already filed a Notice of Appeal with regard to this case and requested the Defendants seek guidance from the Supreme Court of Appeals of West Virginia with regard to the issue of whether a Circuit Court has discretion with regard to the assessment and taxation of cost (sic) under *Rule 54(d)* in such a case." (Emphasis added).

This Court has addressed a circuit court's assessment of court costs on numerous occasions and has held that,

> "[T]he trial [court] ... is vested with a wide discretion in determining the amount of ... court costs and counsel fees, and the trial [court's] ... determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion.' Syllabus point 3, [in part,] Bond v. Bond, 144 W.Va. 478, 109 S.E.2d 16 (1959). Syl. Pt. 2, [in part,] Cummings v. Cummings, 170 W.Va. 712, 296 S.E. 2d 542 (1982) [(per curiam)]. Syllabus point 4, in part, Ball v. Willis, 190 W.Va. 517, 438 S.E.2d 860 (1993). Syl. Pt. [2], Daily Gazette Co., Inc. v. West Virginia Dev. Office, 206 W.Va. 51, 521 S.E.2d 543 (1999). Syllabus point 1, Hollen v. Hathaway Electric, Inc., 213 W.Va. 667, 584 S.E.2d 523 (2003). (per curiam). Syl. Pt. 3, Shafer v. Kings

Tire Serv., Inc., 215 W.Va 169, 597 S.E.2d 302 (2004)." Carper v. Watson, et al., 226 W.Va. 50, 697 S.E.2d 86 (2010).

Admittedly, a significant number of these cases have dealt with what types of costs may be assessed, they none the less impact the trial judge's belief herein that Rule 54(d) of the West Virginia Rules of Civil Procedure mandated that the trial court assess and tax the court costs against the Defendants and that he had no discretion with regard thereto. Simply put, it is here advocated that the trial courts DO have discretion both in terms of whether or not to assess and tax court costs and the amount so assessed and taxed.

Obviously, from the language employed by the trial court in its Order of October 21, 2019, the trial judge did not exercise any discretion as he stated he believed he had no discretion in the matter. Thereafter, the trial judge took the further initiative to set out in the Order findings that the Petitioners committed no "wrongdoing, malfeasance or nonfeasance" and "had [not] engaged in any wrongful conduct as through this was a claim asserting negligence or an intentional tort."

Given the specific findings of the trial court that the Defendants committed no wrongful conduct it is clear that the trial court felt (as he states in the Order) 1) that he had no discretion and that he must assess and tax costs against the Defendants; 2) that he clearly communicated that the Defendants should not be sanctioned because they did nothing improper; and 3) he requested "guidance" from This Court "with regard to the issue of whether a circuit court has discretion with regard to the assessment and taxation of costs under Rule 54(d) in such a case."

The Petitioners submit that by the language of the trial court's Order of October 21, 2019, the trial court was clearly uncomfortable with the assessment and taxation of costs upon Defendants. This action is, as the trial judge pointed out, not a case involving any wrongful nor intentional conduct by Defendants. This is a property case whereby the Defendants by the application of the common law, lost real estate that they "legally owned." In this case, the trial judge was unaware of any such exception and he believed he was mandated to assess and tax

costs to the party that did not prevail. However, This Court has on other occasions recognized not only is this a discretionary decision of the trial judge, but that discretion can take many forms. For instance, in Nagy v. Oakley, 172 W.Va. 569, 309 S.E.2d 68 (1983), this court observed that,

> "[A] divorce court can require court costs, including fees of a commissioner, to be paid by the party in the superior financial position if the court, in the exercise of reasonable discretion finds such an order appropriate. Costs, therefore, are taxed in a discretionary way by a court of equity after the conclusion of the case. Rule 54(d) of the West Virginia Rues of Civil Procedure provides, 'The clerk shall tax the costs within 10 days after judgment is entered and shall send a copy of the bill of costs to each party affected thereby. Jones v. Jones, 176 W.Va. 438, 345 S.E.2d 313 (1986)."

Thus, in Nagy, supra, This Court recognized that a trial judge's discretion to assess and tax costs under Rule 54(d) of the West Virginia Rules of Civil Procedure can be dictated by equitable principles. Petitioners believe that Judge Henning was looking for this exact "port in the storm."

Also, in Quesinberry v. Quesinberry, 191 W.Va. 65, 443 S.E.2d 222 (1994) This Court recognized that the assessment and taxation of court costs can be used purely as a sanction when This Court held that,

> "We believe that even though Rule 54(d), W.V.R.C.P. provides for the taxing of costs against a non-prevailing party, a court still has discretion to require entities who raise issues that force the appointment of a guardian ad litem to pay costs."

Further, in Hunt v. Shamblin, et al., 179 W.Va. 63, 371 S.E.2d 591 (1988) This Court recognized a further "equitable" exception to Rue 54(d)'s directive to the assessment and taxation of costs and expressed it as follows:

> "Finally, the appellant argues that the trial court erred in charging him with court costs incurred in the trial of the matter. Our Rules of Civil Procedure stipulate that, in most situations, costs in a civil matter should be awarded to the prevailing party. Specifically, R.C.P. Rule 54(d) provides: 'Except when express provision therefore is made either in a Statute of this State or in these rules, costs shall be allowed as of course to the prevailing party....' In

> view of the fact that this Court believes that the appellant, Douglas B. Hunt, should have prevailed in this matter, and in view of the provision of R.C.P. Rule 54(d), this Court believes that the circuit court erred in awarding the appellees costs in this matter and that the appellant should have been awarded costs." Hunt, supra.

Finally, in a case wherein This Court set aside the assessment and taxation of costs against a prevailing party This Court stated that,

> "We are not unmindful of the language of West Virginia Rules of Civil Procedure 54(d) (1978), which provides in pertinent part:
>
> > 'Except when express provision thereof is made either in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. W. Va. R. Civ. P. 54(d) (1978).
>
> When a trial court assesses costs by relying on the provisions of Rule 54 (d), the record must contain specific predicate findings for that decision when the costs are assessed against a prevailing party." Perdomo v. Stevens, 197 W.Va. 552, 476 S.E.2d 223 (1996). (Emphasis added).

Accordingly, as set forth in Judge Henning's Order of October 21, 2109, the judge set our "specific predicate findings" why he believed that the Petitioners should not be assessed and taxed court costs but, due solely to the judge's belief that he had no discretion in the matter, he assessed and taxed costs to the non-prevailing party. This is not the "run of the mine" case that proceeds to trial. There was never any allegation by the Plaintiffs of any wrong committed by the Defendants nor did the Plaintiffs claim or prove any loss whatsoever.

Petitioners simply defended the property that they "legally owned" and under such circumstances the assessment and taxation of court costs constitute an unwarranted sanction against innocent parties. Accordingly, Petitioners maintain that the trial court did and does have discretion as to the assessment and imposition of court costs after a trial under Rule 54(d) W.V.R.C.P. By the very language of the Rule wherein it states, "...unless the court otherwise directs..." the trail judge has been specifically reserved such discretion. Here, Judge Henning simply read the rule as being mandatory and he did not exercise any discretion. As a result of the fact that Judge Henning clearly indicated that he was "troubled" by his assessment and

taxation of almost four thousand dollars ($4,000.00) in costs against innocent parties (Appendix, pp. 332 and 333) he asked This Court for guidance. As such, This Court should vacate the assessment and taxation of costs herein.

VIII

CONCLUSION

As a result of all of the foregoing it is the firm belief of the Petitioners that the trial court should have granted summary judgment below due to Respondents' failure to establish the essential elements of adverse possession; that the trial court erred in redacting or excluding otherwise proper exhibits from the trial; and, the trial court erred in not exercising its discretion and determining that it was mandated to assess and tax court costs against the Petitioners who committed no wrongdoing whatsoever.

Accordingly, Petitioners pray that This Court reverse the decision of the trail court upon Defendants' Motion for Summary Judgment and grant summary judgment to Petitioners; alternatively, Petitioners pray that This Court set aside the verdict of the jury herein and award Petitioners a new trial with directions to admit the otherwise proper exhibits redacted or excluded by the trial court; and Petitioners pray for an Order from This Court relieving Petitioners of and from the assessment and taxation of court costs, and for such other relief as This Court may deem proper.

Robert P Martin and Melanie A. Martin, Petitioners,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINA

Robert P. Martin and Melanie A. Martin,
Defendants Below, Petitioners,

v. **Appeal No: 19-0745**

Donald W. Lovelace and Ardel A. Lovelace,
Plaintiffs Below, Respondents

CERTIFICATE OF SERVICE

I, Robert P. Martin, counsel for Petitioners, do hereby certify that on December 4th, 2019, I served the foregoing "**Petitioners' Brief**" upon counsel by placing same in the United States Mail, postage prepaid, as follows:

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