

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

ROBERT HATFIELD,

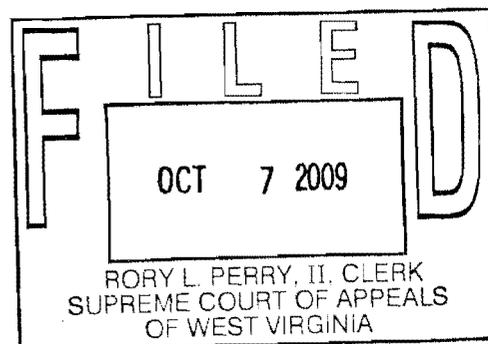
Appellant,

v.

No. 35128

VERNON E. THOMPSON, HEIRS OF EDITH VANCE ADKINS [RAY VANCE, PAULINE VANCE ADKINS, LOUISE VANCE MURPHY, ROMIE VANCE, and NANCY VANCE BREADON] and CARMIE VANCE [deceased with heirs unascertained: MABEL GRIMMET VANCE (widow), THREE UNKNOWN CHILDREN (children with widow), GENEVA VANCE PAULUS (first wife) DENCIL LEE VANCE (son with first wife) and PATRICIA JUNE VANCE BUTLER (daughter with first wife)],

Appellees.



From the Circuit Court of Cabell County, West Virginia

BRIEF OF APPELLANT

Jason A. Poling; W.Va. State Bar No. 7772
WATERS LAW GROUP, PLLC
633 Seventh Street
Huntington, West Virginia 25701
Telephone: (304) 522-6658
Facsimile: (304) 522-7722

Table of Contents

Table of Contents.....i

Table of Authorities..... ii

I. Kind of Proceeding and the Nature of the Ruling of the Lower Tribunal..... 1

II. Statement of Facts..... 1

III. Questions Presented.....8

IV. Points and Authorities9

V. Discussion of Law9

 1. The Summary Judgment Order Of The Circuit Court Fails To Sets Forth Factual Findings Sufficient To Permit Meaningful Appellate Review.....9

 2. The Petitioner Robert Hatfield Is Entitled To Have His Adverse Possession Claim Considered By A Jury..... 11

 3. Thompson Failed To Establish That There Is No Genuine Issue Of Material Fact That He Is Entitled To A Two-Sevenths Interest And Robert Hatfield Is Entitled To A Five-Sevenths Interest In The Subject Real Estate..... 12

 4. Assuming *Arguendo* That The Circuit Court Properly Determined The Respective Interests Of The Parties In The Subject Real Estate, The Court's Summary Determination That The Subject Real Estate Should Be Surveyed And Divided In Kind, With The Costs Borne Proportionately, Is Improper..... 15

 5. Assuming *Arguendo* That The Circuit Court Properly Determined The Respective Interests Of The Parties In The Subject Real Estate, The Court's Summary Determination That Thompson Is Entitled To A Right-Of-Way By Necessity, With The Costs Associated With Establishment Of The Right-Of-Way Borne Proportionately, Is Improper. 16

VI. Conclusion.....17

Certificate of Service 18

Table of Authorities

Cases:	Page
<u>Ark Land Co. v. Harper</u> , 215 W. Va. 331, 599 S.E.2d 754(2004)	15
<u>Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York</u> , 148 W.Va. 160, 133 S.E.2d 770 (1963).....	9, 11
<u>Berkeley Dev. Corp. v. Hutzler</u> , 159 W. Va. 844, 229 S.E.2d 732 (1976)	9, 16
<u>Fayette County National Bank v. Lilly</u> , 199 W.Va. 349, 484 S.E.2d 232 (1997).....	9, 10
<u>Painter v. Peavy</u> , 192 W.Va. 189, 451 S.E.2d 755 (1994)	9, 10
<u>Talbott v. Woodford</u> , 48 W.Va. 449, 37 S.E. 580 (1900).....	9, 11
<u>Tomkies v. Tomkies</u> , 158 W.Va. 872, 215 S.E.2d 652 (1975).....	12, 14
<u>Warner v. Kittle</u> , 167 W.Va. 719, 726, 280 S.E.2d 276, 281 (1981)	9, 11
 Statutes:	
<u>W.Va. Code § 37-4-1</u>	15, 16, 17
<u>W.Va. Code § 37-4-3</u>	15, 16, 17
<u>W. Va. Code § 55-2-1</u>	9, 12
 Secondary Sources:	
<u>The Scope Of Title Examination In West Virginia: Can Reasonable Minds Differ?</u> John W. Fisher, II 98 W.Va.L.Rev. 449 (1996)	13

I. Kind of Proceeding and the Nature of the Ruling of the Lower Tribunal

This is an appeal from a final order of the Circuit Court of Cabell County entered December 29, 2008 which summarily determined the rights of the parties with respect to the civil action filed by Vernon E. Thompson (hereinafter "Thompson") which sought partition of certain real situate on the waters of Madison Creek, McComas District, Cabell County, West Virginia (hereinafter "the subject real estate").

The Circuit Court, upon motion of Thompson, summarily ruled¹ that Thompson possesses a two-sevenths interest in the subject real estate and that Robert Hatfield possesses a five-sevenths interest in the subject real estate. The Court further ordered that Thompson be afforded a right-of-way by necessity to access his two-sevenths interest in the subject real estate. Additionally, the Court ordered that the subject real estate be surveyed, and that Hatfield and Thompson should bear the costs of the survey and establishment of the right-of-way in proportion to their respective interests. Finally, the Court ordered the matter dismissed.

The Order that is the subject of this appeal, which purports to dispose of all legal and factual issues in this case which has been pending since 2004, cites no law, and lacks any attempt at a factual finding beyond the statement "upon review of the pleadings filed herein and hearing the arguments of counsel...".

II. Statement of Facts

The Petitioner, Robert Hatfield, obtained his interest in the subject real estate on October 23, 1969 in a deed from Oddie Hatfield, his father. At the time of this conveyance, Hatfield's brother, Johnny C. Hatfield, and Hatfield's sister-in-law, Evelyn C. Hatfield were also conveyed

interests in the subject real estate. A copy of the deed evidencing that conveyance is attached to “Defendant’s Memorandum In Support Of His Response to Plaintiff’s Motion for Summary Judgment” (hereinafter “Hatfield’s Response to the MSJ”) as “Exhibit A”. Johnny C. Hatfield and Evelyn C. Hatfield conveyed their interest in the subject real estate to Hatfield and his wife, Frances M. Hatfield, on July 18, 1973. A copy of the deed evidencing that conveyance is attached to Hatfield’s Response to the MSJ as “Exhibit B”.

Hatfield began exercising acts of possession upon the property on October 23, 1969 such as upkeep of the buildings, mowing of the fields, and maintenance of the private roads on the subject real estate. Hatfield took up residence upon the subject real estate in 1972. Fences which enclose the subject real estate were erected upon the property prior to October 23, 1969 when Hatfield took possession. Hatfield constructed some new fences on the subject real estate in 1973 and 1974 that bordered a driveway and eliminated the gates that separate the subject real estate from another parcel of real estate that Hatfield purchased separately. Hatfield constructed a cabin on the property in 1982-83 and built two storage buildings on the subject real estate in 1975 and 1985 respectively. Hatfield posted the land in 1988 or 1989 by placing signs on the exterior boundary of the subject real estate at 50 foot intervals. The signs stated that the land was posted and set forth that the land was owned by Hatfield and gave his contact information. These signs deteriorated over time and new posted signs were placed around the exterior of the subject real estate in 2004.

¹ The final order of the Court is a bit of a conundrum in that it purports to deny Thompson’s motion yet summarily awards him the relief he sought except attorneys fees and costs. The order also curiously notes a Motion for Summary Judgment by Defendant Robert Hatfield. No such motion was ever made.

Hatfield mowed the meadows on the property once or twice a year, depending upon need, since 1972 though approximately 1993. Between 1972 and 1980 Hatfield allowed neighbors to enter onto the property and harvest hay from the meadows. Certain areas have been mowed approximately every week, depending upon the season and need, from 1972 to present. These areas include the areas where roadways are located, the family cemetery, the area around old family farm house, and the area around the cabin Hatfield constructed.

Hatfield also performed maintenance of the structures on the subject real estate that were located there at the time he obtained his interest in the real estate. The roof to the root cellar located on the real estate was replaced in approximately 1988. The roof on the old farm house was replaced in approximately 1990. In 1969 a new pump house for the well and a new water system were added to the old farm house. General maintenance, such as painting when needed, has been performed on the old farm house since 1969. In the 1970's tenants of Hatfield added a new room to the old farm house on the subject real estate.

During the time that Hatfield has owned the subject real estate he has controlled the access of others to it. In addition to himself, Hatfield has permitted his family members and neighbors to use the subject real estate. These persons and groups of persons have most recently included: Glen Allen Hatfield (hiking & assistance in upkeep), Chris Browning (hunting), Franklin Hatfield (hunting riding four-wheelers), Paul Holton and his son-in-law (permission to travel though property), Madison Creek United Baptist Church congregation (cook-outs, camping), Ronnie Hatfield, Boys Scouts of America (camping), Mr. Ferrell, neighbor (access to adjacent property, hunting), immediate family and neighbors (labor day and 4th of July celebrations), Homer Gue (mowing and odd jobs), Tom Harvey (hunting) and Alfred Knobler

(natural gas lease). In addition, there is a family cemetery on the subject real estate to which visitors are permitted access.

On three occasions circumstances required that third parties evaluate the quality of the title held by Hatfield in the subject real estate. On these three occasions title searches were performed by licensed attorneys using the records of the Clerk of the County Commission of Cabell County. Each of these searches resulted in conclusions that Hatfield possessed record title to the subject real estate. None of the title searches revealed any record basis for the claim that is being asserted by the Plaintiff. Two of these occasions involved Hatfield obtaining a loan and using the subject real estate as collateral. The title searches that were performed relative to these loans were conducted by David M. Pancake and Maurice J. Flynn. The title opinions of these two attorneys are attached to Hatfield's Response to the MSJ as "Exhibit C" and "Exhibit D" respectively. The third occasion involved Hatfield leasing the minerals on the real estate in question. That title opinion, which also concluded that Hatfield owned the real estate in question was rendered by J. Seaton Taylor and is attached to Hatfield's Response to the MSJ as "Exhibit E".

Hatfield has cared for and maintained the real estate in question since 1969. Hatfield has lived on the real estate in question or a parcel a real estate immediately contiguous to the real estate in question since 1972. Hatfield has posted the property and excluded trespassers since his possession began. Persons wishing to use the real estate must seek permission from him. Hatfield knows of no person that has used the real estate without his permission. All the neighbors in the area of the real estate know that the real estate is owned by Hatfield. Hatfield has record title to the property as reflected in the records of the clerk of the Cabell County

commission. Hatfield has borrowed money from banks whose loans were secured by the real estate in question. Title searches conducted by attorneys retained by these lending institutions demonstrate that Hatfield has record title to the real estate. In addition, Hatfield leased the minerals on the property and a title search for that mineral company revealed that Defendant has record title to the real estate in question. Hatfield has timely and continuously paid real estate taxes on the real estate in question. The forgoing acts of possession are set forth in the Defendants verified discovery responses which are attached to Hatfield's Response to the MSJ as "Exhibit F".

In addition to the above stated facts Hatfield has given a deposition concerning his interest in the subject real estate. Robert Hatfield bought the real estate from his father in 1969 and believed that he was purchasing an undivided fee interest ["Defendant Robert Hatfield's Supplemental Materials Submitted Pursuant To November 6, 2007 Court Order" (hereinafter "Hatfield Supplement") at Exhibit B, Deposition of Robert Hatfield at 38:13-19]. This deposition testimony establishes that Hatfield believed that he owned the undivided fee interest in the real estate. As stated above, Robert Hatfield has produced three certificates of title prepared by three different attorneys that state that Robert Hatfield possesses an undivided fee interest in the real estate. Hatfield testified about these certificates of title and how they support his belief that he owns the subject real estate in fee. (*See* Hatfield Supplement at Exhibit B, Deposition of Robert Hatfield at 34:20- 38:12; 40:3-41:6; 49:5-17).

Thompson's claim to the real estate in question is rooted in a share of an intestate estate. Under Plaintiff's theory he possesses a 2/7ths interest in the real estate. Plaintiff concedes that, even under his theory of this case, Hatfield possesses a 4/7ths interest in the real estate. Plaintiff

has produced no title certificate from anyone and during his deposition Thompson admitted that though he has looked at the records in the Cabell County record room, he has no training that would afford him the ability to render a competent opinion on the matter of record title in this matter. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 9:5- 10:3). Thompson admits that neither he nor the persons through whom he claims his interest have paid taxes on the real estate. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 54:16-24).

With respect to his claimed “heirship” Thompson admitted in his deposition that he, and those he claims through (his mother and her husband), knew as early at 1978 that Robert Hatfield did not recognize their claim to the real estate and was claiming adverse to them. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 17:22-18:2). In fact, it was during this general time period that Robert Hatfield built a cabin on the real estate. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 83:7-18). Based upon this knowledge, those through whom Thompson claims consulted with an attorney in 1978 about the situation. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 20:12-15). This 1978 consultation resulted in a number of letters that were generated by attorney William Matthews in 1982. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson Exhibits 1, 2, & 3). The first time that Robert Hatfield ever knew that someone claimed he did not own an undivided fee interest in the real estate was in 1982 when he received a letter from attorney Matthews (Hatfield Supplement at Exhibit B, Deposition of Robert Hatfield at 38:20-40:2). Notwithstanding the knowledge of Robert Hatfield’s claim, and consultation with an attorney, neither Thompson, his mother, nor his mother’s husband filed a lawsuit until 2004. (Hatfield Supplement at Exhibit B, Deposition of Vernon Thompson at 37:23-38:6). Mr. Thompson’s specific testimony on this issue was that his mother’s

husband had intended to file a lawsuit but died of a heart attack prior to getting it filed. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 38:1-2). Thompson further testified that after his mother's husband's death his "mother didn't want to get involved in it because she didn't want to make nobody mad or hurt nobody's feelings." (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 38:2-4). Thompson "tried to tell her business is business" (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 38:4-5), but she did nothing and neither did Thompson until this lawsuit was filed in 2004.

Thompson claims that he and his mother's husband went upon the property and engaged in activities that constitute notice to the world of his claim. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 53:23-54:15). These alleged activities were fence mending, cattle running and soybean farming. Notwithstanding the fact that these claims are disputed (*See* Hatfield Supplement at Exhibit B, Deposition of Robert Hatfield at 43:1-10), even if they are considered true, Thompson admits that the last time these activities occurred was in 1982. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 22:25-23:8; 27:25-28:5). Thompson also claims that he has been on the real estate since 1982 to hunt, a claim that is also disputed (Hatfield Supplement at Exhibit B, Deposition of Robert Hatfield at 43:21-45:6). Thompson admits that he has been "put off" the real estate by Robert Hatfield in the past. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 91:22-92:4).

Thompson admits that there is no record right-of-way connecting the subject real estate to a county road. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 90:20-91:1).

When Thompson and his mother's husband were allegedly farming and running cattle on this property, they accessed the county road by going through Thompson's "old home place", another

farm that is adjacent to the subject real estate. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 23:22- 25:10).

Under Plaintiff's theory of the case the additional unaccounted for 1/7th interest in the real estate is owned by the Edith Hatfield Vance or her heirs (hereinafter referred to as "Edith Hatfield Vance"). Though Thompson was able to obtain personal service on some of the Edith Hatfield Vance heirs he was not able to obtain personal service on others and has not even been able to ascertain all of their identities. Given this fact, service was attempted by publication. None of the Edith Hatfield Vance heirs have expressed an interest to participate in this case and to date they have not conveyed their alleged interest in this matter to either of the parties that have appeared.

III. Questions Presented

1. Whether The Summary Judgment Order Of The Circuit Court Sets Forth Factual Findings Sufficient To Permit Meaningful Appellate Review.
2. Whether The Petitioner Robert Hatfield Is Entitled To Have His Adverse Possession Claim Considered By A Jury.
3. Whether Thompson Established That There Is No Genuine Issue Of Material Fact That He Is Entitled To A Two-Sevenths Interest And Robert Hatfield Is Entitled To A Five-Sevenths Interest In The Subject Real Estate.
4. Assuming Arguendo That The Circuit Court Properly Determined The Respective Interests Of The Parties In The Subject Real Estate, Whether The Court's Summary Determination That The Subject Real Estate Should Be Surveyed And Divided In Kind, With The Costs Borne Proportionately, Is Proper.
5. Assuming Arguendo That The Circuit Court Properly Determined The Respective Interests Of The Parties In The Subject Real Estate, Whether The Court's Summary Determination That Thompson Is Entitled To A Right-Of-Way By Necessity, With The Costs Associated With Establishment Of The Right-Of-Way Borne Proportionately, Is Proper.

IV. Points and Authorities

“A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. pt. 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963).

“A circuit court's entry of summary judgment is reviewed *de novo*.” Syl. pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

“Although our standard of review for summary judgment remains *de novo*, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.” Syl. pt. 3, Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997).

Unresolved questions of fact relating to an adverse possession claim are normally questions for a jury. Warner v. Kittle, 167 W.Va. 719, 726, 280 S.E.2d 276, 281 (1981).

Acts of exclusive ownership by one of two co-tenants, such as the open sale, conveyance, and delivery of possession thereunder of the whole subject-matter, amount to a complete ouster of the other co-tenant, and unless he brings suit within 10 years thereafter his right of recovery will be barred by the statute of limitations. Sy. pt. 1, Talbott v. Woodford, 48 W.Va. 449, 37 S.E. 580 (1900).

No person shall make an entry on, or bring an action to recover, any land, but within ten years next after the time at which the right to make such entry or to bring such action shall have first accrued to himself or to some person through whom he claims. W. Va. Code § 55-2-1.

The burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof. Syl. pt. 1, Berkeley Dev. Corp. v. Hutzler, 159 W. Va. 844, 229 S.E.2d 732 (1976).

V. Discussion of Law

1. The Summary Judgment Order Of The Circuit Court Fails To Sets Forth Factual Findings Sufficient To Permit Meaningful Appellate Review.

The West Virginia Supreme Court of Appeals established the traditional standard for granting summary judgment in syllabus point 3 of Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). In that case it was held that

“A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” It is also well established that “[a] circuit court's entry of summary judgment is reviewed *de novo*.” Syl. pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Notwithstanding the fact that a order granting summary judgment is reviewed *de novo*, in syllabus point 3 of Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997), it was established that “Although our standard of review for summary judgment remains *de novo*, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.”

The issue here is whether the order which summarily adjudicated the claims of the parties in this action comports with the mandate of Lilly. It is clear that the order at issue herein does not set out factual findings sufficient to permit meaningful appellate review. In fact, the order contains no factual findings. Rather, there order merely states in a summary fashion “[u]pon review of the pleadings filed herein and hearing the arguments of counsel ...” and then proceeds to set forth the summary ruling. As evidenced by the statement of facts in this petition, this case involves a complex state of facts. The circuit court has completely failed to attempt to resolve the factual issues that exist in this case. An order devoid of factual findings which purports to resolve all the matters in factually complex litigation is clearly not what is anticipated by Lilly. Based upon the forgoing, the final order in this matter should be reversed and remanded for factual findings consistent with the directive set forth in Lilly.

2. The Petitioner Robert Hatfield Is Entitled To Have His Adverse Possession Claim Considered By A Jury.

As stated above “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. pt. 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). The facts concerning of Robert Hatfield’s adverse possession claim are fully set forth in the statement of facts section of this Petition and are hereby incorporated by reference. It is clear based upon the facts of this case that there are genuine issues of fact that must be resolved with respect to Robert Hatfield’s adverse possession claim. It is also clear that, as a matter of law, that disputed facts of an adverse possession claim, like those at issue in this case, are normally questions for a jury. *See Warner v. Kittle*, 167 W.Va. 719, 726, 280 S.E.2d 276, 281 (1981).

Thompson previously asserted in the circuit court that “as a general rule one heir or co-tenant cannot adversely possess against another heir or co-tenant”. There is an exception to that general rule which is set forth in Talbott v. Woodford, 48 W.Va. 449, 37 S.E. 580 (1900). The exception as set forth in syllabus point 1 of Talbot is that: “Acts of exclusive ownership by one of two co-tenants, such as open sale, conveyance, and delivery of possession thereunder of the whole subject-matter, amount to a complete ouster of the other co-tenant, and unless he brings suit within 10 years thereafter his right of recovery will be barred by the statute of limitations.”

In this case the Oddie Hatfield, openly sold, conveyed, and delivered possession of the whole of the real estate in question in this matter to Defendant October 23, 1969. As such, these acts constitute a complete ouster of any other alleged co-tenants in this real estate, known or

unknown, including Plaintiff. Based upon this complete ouster of any alleged co-tenants on October 23, 1969, the alleged co-tenants had until October 23, 1979 to bring suit seeking to recover their interest in the real estate at issue in this case. Even under Thompson's version of facts he has not been on the property engaged in activities that would constitute ouster of Robert Hatfield's possession since at least 1982. Under this set of facts Thompson's time within which he had to file a claim would have been sometime in 1992. W. Va. Code § 55-2-1.

It is clear that Robert Hatfield has stated a claim for adverse possession and that, at the very least, his claim for adverse possession should be considered by a jury. In fact, the record that has been developed establishes Hatfield's claim of adverse possession and Thompson has produced no evidence which refutes this claim. As such, in the alternative to remanding this case for a jury trial, should this Court find that the record in this matter contains sufficient dispositive facts to make independent factual determinations without resort to remand, it should find for Hatfield. *See e.g. Tomkies v. Tomkies*, 158 W.Va. 872, 215 S.E.2d 652 (1975). Based upon the forgoing, the order of the circuit court should be reversed and this case should either be remanded for a jury trial on Robert Hatfield's adverse possession claim, or this Court should enter judgment in favor of Hatfield.

3. Thompson Failed To Established That There Is No Genuine Issue Of Material Fact That He Is Entitled To A Two-Sevenths Interest And Robert Hatfield Is Entitled To A Five-Sevenths Interest In The Subject Real Estate.

Thompson produced questionable evidence in this case to support his claim that he possesses title to the subject real estate which would entitle him to seek the remedy of partition. In this case, which concerns the title to real estate, Thompson failed to provide evidence upon which any person competent in title examination could conclude that Thompson's claims are

bona fide. For instance, rather than retain an expert competent to render an opinion on the quality of Thompson's title, he has chosen to rely upon copies of 6 deeds, 2 wills, 3 letters from an attorney and multiple unsupported assertions of fact. Notably, Thompson provides no evidence, by affidavit or otherwise, relative to considering the deeds and wills attached to his Motion for Summary Judgment in light of the indices of the Cabell County Clerk's Office. Any person competent in title examination knows that a deed or will, even those that have been recorded, may or may not be effective depending upon whether the grantor in each deed or will possessed good title to the real estate at the time of the alleged conveyance. *See generally* The Scope Of Title Examination In West Virginia: Can Reasonable Minds Differ? John W. Fisher, II 98 W.Va.L.Rev. 449 (1996). This process can only be accomplished by examining the deeds and other documents of record prior to each alleged conveyance through a process known as "adversing". Thompson utterly failed to provide any such evidence.

While the deeds and wills that Thompson produced may support his claim, absent evidence of the state of the title of each grantor in the Thompson's chain of title prior to the effective date of each deed or will, it is impossible for anyone to know to if Thompson's asserted claim is bona fide. For instance, Thompson claims that his chain of title includes a deed from Idona and Byron Hunt to Herbert Hatfield. *See* Exhibit 4 to Plaintiff's Motion for Summary Judgment and pg. 4 of Plaintiff's Motion for Summary Judgment. Other than the assertions of the Thompson, the record is devoid on the issue of whether the Hunts even possessed anything that they could have conveyed to Herbert Hatfield. The deed exists and it has been recorded, but the question remains whether the Hunts had anything to convey. This is only one example of how Thompson's claims are completely unsupported by the type of evidence that is required to

prevail at the summary judgment stage. By contrast, Robert Hatfield has produced three title opinions which conclude he possess a fee interest in the real estate.

In addition to the forgoing, it is undisputed that, if Thompson's theory in this case is correct, that the heirs of Edith Hatfield Vance have the same argument as is being pursued by Thompson with respect to a one-seventh interest in the subject real estate. Without explanation the circuit court did not consider this interest and apparently awarded it to Robert Hatfield. Based upon the facts that have been developed in this matter to date, either both Thompson and the heirs of Edith Hatfield have an interest in the subject real estate, or neither of them do.

It is clear that genuine issues of material fact exist with respect to the extent of Thompson's interest in the subject real estate. For that reason the circuit court's order, to the extent that it concludes that Thompson has established that he has an interest in the subject real estate that entitles him to the remedy of partition, is not supported by the evidence of record in this case. In fact, the only party who has offered competent facts which establish an interest in the subject real estate is Hatfield. Hatfield has clearly established through the three title opinions he has offered an interest in fee in the subject real estate. Thompson has offered nothing substantive to refute those title opinions. As such, in the alternative to remanding this case for a jury trial, should this Court find that the record in this matter contains sufficient dispositive facts to make independent factual determinations without resort to remand, it should find for Hatfield. *See e.g. Tomkies v. Tomkies*, 158 W.Va. 872, 215 S.E.2d 652 (1975). For all the forgoing reasons the order of the circuit court on this issue should be reversed and this case should either be remanded to the circuit court for trial or judgment entered in favor of Hatfield.

4. Assuming Arguendo That The Circuit Court Properly Determined The Respective Interests Of The Parties In The Subject Real Estate, The Court's Summary Determination That The Subject Real Estate Should Be Surveyed And Divided In Kind, With The Costs Borne Proportionately, Is Improper.

An action for partition, though of a common law origin, is also governed by statute in the present day. *See* W.Va. Code § 37-4-1, *et seq.* This statutory scheme establishes a mechanism for handling partition cases, especially those cases in which the parties are unable to agree as to the value of the real estate, how the property should be divided, or if the property is subject to division. In cases such as these the courts routinely appoint commissioners to view the property and render a report as to the advisability the various options available to the parties to a partition action, such as allotment, sale, or partition in kind. *See e.g.* Ark Land Co. v. Harper, 215 W.Va. 331, 599 S.E.2d 754 (2004).

In this case the parties had extensive negotiations in an attempt to resolve this matter. They were not able to reach a compromise as to their respective interests by agreeing to terms of a physical partition of the real estate, or a value of the real estate that could have facilitated resolution of this matter through allotment. Under such circumstances, if in fact Thompson has an interest, the appointment of commissioners, and then either allotment or sale of the real estate pursuant to W.Va. Code § 37-4-3 appears to be the proper course.

For reasons that are unclear, rather than appoint commissioners to assist in resolution of this matter as provided by statute, the court determined to order the property surveyed and divided without further instruction. The only reason a ruling was needed from the court was by virtue of the fact that the parties could not agree on how to divide or allot the real estate. *See* Order entered by the court on November 6, 2007. The court order, as it pertains to the survey

and division of the real estate, should be reversed and remanded for further proceedings consistent with W.Va. Code § 37-4-1, et seq., including, but not necessarily limited to possible allotment or sale of the subject real estate pursuant to W.Va. Code § 37-4-3.

5. Assuming Arguendo That The Circuit Court Properly Determined The Respective Interests Of The Parties In The Subject Real Estate, The Court's Summary Determination That Thompson Is Entitled To A Right-Of-Way By Necessity, With The Costs Associated With Establishment Of The Right-Of-Way Borne Proportionately, Is Improper.

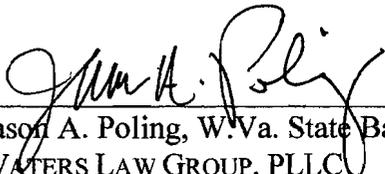
As previously stated in the statement of facts section of this petition, Thompson admits that there is no record right-of-way connecting the subject real estate to a county road. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 90:20-91:1). When Thompson and his mother's husband were allegedly farming and running cattle on this property, they accessed the county road by going through Thompson's "old home place", another farm that is adjacent to the subject real estate. (Hatfield Supplement at Exhibit A, Deposition of Vernon Thompson at 23:22-25:10).

As other ways to enter and exit the subject real estate exist, including one Thompson used when he was previously on the property, no right-of-way by necessity exists over unrelated real estate owned by Robert Hatfield. As stated in Berkeley Dev. Corp. v. Hutzler, 159 W. Va. 844, 229 S.E.2d 732 (1976) the burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof. Given the fact that Thompson used a different way to enter and exit the subject real estate he cannot now claim a right-of way by necessity through other adjacent real estate should he be awarded an interest in the real estate at issue in this lawsuit. The ruling of the circuit court that a right-of-way of necessity exists in this case is not supported by the evidence and therefore must be reversed.

Conclusion

Wherefore, the Appellant, Robert Hatfield, respectfully requests that the final Order of the Circuit Court of Cabell County dated December 29, 2009 be reversed; that this case be remanded for a jury trial on the issue of adverse possession of the subject real estate by Robert Hatfield or judgment be entered for Hatfield; that the case be remanded for trial on the issue of the extent to which the parties possess title that permits them to seek the remedy of partition or judgment be entered for Hatfield; that in the event it is determined that Hatfield does not possess title to the subject real estate in fee simple, the case be remanded for further proceedings consistent with W.Va. Code § 37-4-1, *et seq.*, including, but not necessarily limited to possible allotment or sale of the subject real estate pursuant to W.Va. Code § 37-4-3; that the ruling of the circuit court that a right-of-way by necessity exists in this case be reversed; and any other relief to which the Court deems appropriate.

ROBERT HATFIELD
By Counsel

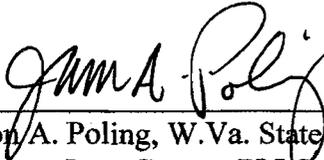


Jason A. Poling, W.Va. State Bar No. 7772
WATERS LAW GROUP, PLLC
633 Seventh Street
Huntington, West Virginia 25701
Telephone: (304) 522-6658
Facsimile: (304) 522-7722

CERTIFICATE OF SERVICE

I, Jason A. Poling, counsel for the Petitioner, Robert Hatfield, do hereby certify that the Brief of Appeal in the above referenced matter has been served upon the following persons by First Class United States mail on this the 6th day October 2009.

James E. Spurlock
Spurlock Law Office
615 Sixth Avenue
Huntington, West Virginia 25701



Jason A. Poling, W. Va. State Bar No. 7772
WATERS LAW GROUP, PLLC
633 Seventh Street
Huntington, West Virginia 25701
Telephone: (304) 522-6658
Facsimile: (304) 522-7722