Circuit Court for St. Mary's County
Case No. 18-C-14-0170

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1843

September Term, 2015

JOSEPH WILKINSON

v.

ROBERT WHITE, ET AL.

Meredith,
Kehoe,
Zarnoch,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: February 13, 2017

This is an appeal from a judgment of the Circuit Court for St. Mary's County, the Honorable David W. Densford, presiding, that resolved conflicting claims to the ownership of, and the right of access over, a small parcel of land which we will refer to as "the Disputed Property." The court concluded that: (1) Joseph Wilkinson ("Joseph")[1] did not have legal title to the Disputed Property; (2) Robert I. White owned the Disputed Property through the doctrine of adverse possession; and (3) James M. Rosenbluth and Alba M. Aldama-Rosenbluth had an easement of necessity over the Disputed Property. The court entered judgment accordingly. Joseph has appealed and presents four issues, which we have rephrased:

1. Did the circuit court err in granting appellees' motion for judgment?

2. Did the circuit court err in allowing the appellees' amended counterclaim to proceed against Wilkinson after having dismissed Wilkinson's claim?

3. Did the circuit court err in determining that White owned the Disputed Property by adverse possession?

4. Did the circuit court err in determining that the Rosenbluths were entitled to an easement by necessity over all of the Disputed Property?

We will affirm the judgment of the circuit court.

Background

The Disputed Property is located on Cuckold Creek, not far from the confluence of that body of water and the Patuxent River. The Disputed Property has a frontage of about

[1] Several members of the Wilkinson family were involved in the events leading up to this litigation. For clarity's sake, we will refer to appellant as "Joseph."

26 feet on the creek and extends, in a more or less southerly direction, approximately 367 feet to Nats Creek Road. At that point, the Disputed Property is 15 feet wide. Its area is 6,779 square feet, or .16 acre.

The White property lies to the west of the Disputed Property. The two properties share a 367 foot common boundary line. The Rosenbluth property is on the opposite side of the Disputed Property and those parcels share a common boundary line of about 125 feet. The White property abuts Nats Creek Road, but the Rosenbluths parcel does not. Its sole access to Nats Creek Road is across the Disputed Property.

In 2014, Joseph filed a civil action against White and the Rosenbluths asserting he owned the Disputed Property either as a matter of record title or through adverse possession or, alternatively, that he had a prescriptive easement over the Disputed Property to access Cuckold Creek. He sought declaratory relief, a decree quieting title in the Disputed Property to him, and various forms of ancillary relief.

White and the Rosenbluths filed a joint counterclaim and, later, an amended joint counterclaim. In their amended counterclaim, White asserted that he owned the Disputed Property through adverse possession and the Rosenbluths claimed that they had an easement of necessity across the Disputed Property to Nats Creek Road. The parties filed motions for summary judgment. During the hearing on the summary judgment motions, Joseph dismissed his adverse possession claim. The court denied all motions and the case proceeded to trial before the court on June 24 and 25, 2015.

After Joseph rested his case, White and the Rosenbluths moved for judgment under

Rule 2-519. Joseph then dismissed his claim for a prescriptive easement and the trial court granted the motion for judgment as to his other claims. The court then received evidence on the amended joint counterclaim. On August 25, 2015, the court issued a memorandum opinion and order determining that White had legal title to the Disputed Property by adverse possession and that the Rosenbluths had an easement by necessity across the Disputed Property. The court entered an amended order and judgment to this effect on October 1, 2015. Joseph filed a timely appeal.

Analysis

I. The Motion for Judgment

Joseph asserts that the trial court erred when it granted White's and the Rosenbluths' joint motion for judgment after the close of his case-in-chief. We do not agree. Some additional information is useful in placing his arguments in context.

In his complaint, Joseph alleged that he had legal title to the Disputed Property pursuant to a 2002 deed from his mother, Willie Kay Wilkinson.[2] At trial, Joseph sought to prove this proposition primarily through the testimony of two expert witnesses.

The first was Michael Whitson, a title abstractor with forty years of experience in that field. He testified that he had examined the titles to the Disputed Property, the White property and the Rosenbluth property. His relevant testimony, together with information contained in his written report that was admitted into evidence, can be summarized as

[2] In his complaint, Wilkinson also asserted that he had title to the Disputed Property by adverse possession but, as we've previously noted, he dismissed this claim prior to trial.

follows.

At the beginning of the last century, the Disputed Property was part of a tract of over 300 acres owned by R. King Clark. In 1913, Clark's widow and children sold 102 acres of this larger tract to Philip Tippett, an ancestor of Joseph. The deed of conveyance referred to the property as "Scotch Neck" or the "Blackistone," and stated that one boundary of the property ran along Cuckold Creek. The White property, the Rosenbluths' property and the Disputed Property were all encompassed within the tract conveyed to Tippett.

At various times, Tippett, his wife Hannah, and, after Tippett's death, Hannah and their children, transferred various parcels. In 1927, they conveyed what is now the Rosenbluth property to the Rosenbluths' predecessor-in-title. This deed contained a metes and bounds description of the land conveyed which is precise enough for a surveyor to be able to locate the boundaries of the Rosenbluth property with a reasonable degree of accuracy. In 1933, the Tippet family conveyed what is now White's property to his predecessor-in-title. This deed did not contain a metes and bounds description and referred to a subdivision plat that was not recorded in the land records.

At Hannah's death, what was left of the Scotch Neck tract passed to her children, George Tippett and Violet Wilkinson. In 1940, they conveyed 5.15 acres to Maurice Hoffman. This parcel became all or part of a subdivision called "Hoffman Estates." Hoffman Estates shares a common boundary with the Disputed Property but does not include it. In 1942, George and Violet divided the remaining land between themselves.

To this end, they conveyed 32 acres to Violet and her husband, Wilmer Wilkinson. Whitson stated in his report this deed "has a homemade description without survey and it is impossible to tell from reading it whether it has frontage on the water." Additionally, Whitson stated in his report that, "over the years, the Wilkinsons conveyed out over twenty small parcels, and the three that I talked about earlier in this memo[3] are the ones that are most important. The rest are properties away from the water front and the vast majority of these have little or no legal description."

Violet passed away. In 1967, Wilmer conveyed all that was left of the property to Charles and Willie Kay Wilkinson, Joseph's parents. This deed conveyed two parcels. The first is a parcel of about a half acre described by a metes-and bounds description. The description does not suggest that this parcel abuts Cuckold Creek and Joseph does not contend that the Disputed Property is encompassed within the half acre parcel.

For the purposes of this appeal, we are concerned with the second parcel. The 1967 deed did not contain a metes and bounds or other description of the second parcel. The deed describes it as "estimated to contain one fourth of an acre of land, more or less; it being the intention of this deed to convey all of remaining portion of land conveyed" by the 1942 deed to Violet and Wilmer Wilkinson. Charles passed away, and in 2002, Willie Kay Wilkinson conveyed to Joseph "all the same land" described in in the 1967 deed. In

[3] The context suggests that Whitson was referring to the conveyance to Hoffman, and the deeds to the properties now owned by White and the Rosenbluths.

his complaint and at trial, Joseph asserted that title to the Disputed Property was conveyed to him by the 2002 deed.

Whitson was unable to express an opinion as to whether the Disputed Property was included within "all of remaining portion of land conveyed" to Violet and Wilmer Wilkinson in 1942. In order to prove this part of his case, Joseph relied on the testimony of Anthony Wayne Wilkerson, a property line surveyor who testified as an expert witness.

On direct examination, Wilkerson testified that, "to a reasonable degree of surveying certainty," that the Disputed Property was conveyed to Joseph in the 2002 deed through what he characterized as a "process of elimination"—"it's what left of the 32 acres [conveyed to Violet and Wilmer] after all these other pieces [that is, the twenty-odd outconveyances made by Violet and Wilmer between 1942 and 1967] were taken out." However, on cross-examination, Wilkerson admitted that:

(1) He was unable to locate the boundaries of "a lot of" the properties transferred by Wilmer and Violet because many of these properties changed hands frequently and "hardly any of them had real good description. So [attempting to do so] was almost useless."

(2) Joseph was not conveyed title to the Disputed Property in the 2002 deed from his mother.

(3) Wilkerson never identified where "the remaining portion of land conveyed" by the 1967 deed was located. Instead, he "just assumed" that the Disputed Property was

located within this otherwise undescribed and undefined area.

At this point in his cross-examination, Wilkerson retracted his prior conclusion that the 2002 deed conveyed title to the Disputed Property to Joseph. Instead, he opined that the Disputed Property "probably belongs to the heirs of Hannah Tippet" and that Joseph "didn't get it in his 2002 deed."

In questioning from the court, Wilkerson clarified his testimony (emphasis added):

The Court:	Other that the process of elimination . . . do you have any evidence or any exhibit I ought to look to . . . that Mr. Wilkinson owns this disputed property?
The Witness:	[I]t's nothing written. *It's just what Mr. Wilkinson has been telling me that he used this roadway* or that access strip to get to Cuckold Creek. And his—some of his relatives, I think he said, also would use it; and for that reason, I figured that he had some – it must have been in the family somewhere.
The Court:	*So your view that he owns it has more to do with use than with title or conveyance. Is that a fair statement?*
The Witness:	*That's pretty fair, yeah.*

After the close of Joseph's case, White and the Rosenbluths moved for judgment pursuant to Md. Rule 2-519(b).[4]

[4] Md. Rule 2-519(b) states:

> When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

In granting the motion, the trial court stated that it found Wilkerson to be a credible witness but that "his testimony that [the Disputed Property] belongs to the plaintiff by process of elimination is insufficient." The court also acknowledged that portions of Joseph's own testimony supported the inference that Joseph's father "knew or believed" that he owned the Disputed Property but "I can't hoist the legal ownership on that conversation."

On appeal, Joseph asserts that the court conflated the very different standards by which trial courts must assess motions for judgment in court trials and jury trials and for granting a motion for judgment in a jury trial. He states: "It appears that in ruling on the motion for judgment, Judge Densford incorrectly applied the second part of Rule 2-519(b) leaving sufficient uncertainty as to his ruling so as to require at least a remand." We do not agree.

Joseph is certainly correct that, when presented with a Rule 2-519(b) motion in a jury trial, the court must assess the evidence in the light most favorable to the non-moving party. In such cases, an appellate court reviews the trial court's decision *de novo*, *District of Columbia v. Singleton*, 425 Md. 398, 406-07 (2012), and we will affirm the grant of the motion for judgment if, in our view, the evidence was legally insufficient to create a jury question. *Spengler v. Sears, Roebuck & Co.*, 163 Md. App. 220, 235 (2005).

When a motion for judgment is made in a court trial, the court "may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence." Md. Rule 2-519(b).

Whether the trial court opts to assume the role of fact-finder is discretionary. When a court proceeds to act as a fact-finder, we review the court's decision for clear error. *Yaffe v. Scarlett Place Residential Condominium, Inc.*, 205 Md. App. 429, 439 (2012); Md. Rule 8-131(c).

In this present case, Judge Densford stated that he was viewing the evidence in the light most favorable to Joseph. When we review his decision *de novo*, we conclude that he did not err in granting the motion for the following reasons.

By the time of trial, the sole basis of Joseph's claim to ownership of the Disputed Property was that he had legal title to it by means of the 2002 deed from his mother, who conveyed to him all that she had received in the 1967 deed from Joseph's grandparents. Whitson, his title expert, established the chain of title but was unable to express an opinion as to whether the 2002 deed conveyed title to the Disputed Property. It was up to Wilkerson, the surveyor, to connect the dots in Joseph's legal theory.

Wilkerson testified on direct examination, albeit without any specific explanation, that the 2002 deed did convey record title to the Disputed Property. But the probative value of this opinion collapsed on cross-examination when Wilkerson retracted his original conclusion and stated that the 2002 deed did not convey record title of the Disputed Property. Further, in response to questioning from the court, Wilkerson conceded that there were no records that he could point to that supported Joseph's claim to record title and that his conclusion was based on oral statements made by Joseph about prior usage of the Disputed Property by members of the Wilkinson family. But Joseph

had previously dismissed his adverse possession claim.

Md. Rule 5-702 provides that expert testimony is admissible only if, among other things, the trial court concludes that there is a factual basis for the testimony. In the present case, Wilkerson conceded that there was no factual basis to support his opinion that Joseph had record title to the Disputed Property, a conclusion which, in any event, he explicitly withdrew. The trial court correctly decided that Wilkerson's testimony was insufficient as a matter of law to establish that the Disputed Property belonged to Joseph.

II–IV The Substantive Relief Granted to White and the Rosenbluths

Joseph presents several arguments as to why the trial court erred in granting relief to White and the Rosenbluths.

A Failure to Join Necessary Parties?

Joseph takes the position that, in light of Wilkerson's testimony that the property was owned by Hannah Tippett's heirs, the trial court should have suspended the proceedings to require notification of the Hannah Tippett heirs so that they could defend their claim. This argument is unconvincing for several reasons. Initially, Wilkerson was admitted as an expert in surveying, not title examination. His statement that title to the Disputed Property lay in Hannah Tippett's heirs was outside the scope of his expertise.

Additionally, as we have explained in Part I of this opinion, Wilkerson conceded in his responses to the trial court's questions that he had no factual basis to conclude that Joseph had legal title to the property. Also, Joseph did not raise this contention to the trial court. His failure to do so is dispositive on this issue. *See* Md. Rule 8-131(a).

Looking past preservation, we agree with White that it would be anomalous to permit Joseph to raise the lack of necessary parties after he had presented—and lost—his case. *See Caretti v. Colonnade Limited Partnership*, 104 Md. App. 131, 142 (1995). Finally, a party need not prove his or her claim is superior to the whole world in order to quiet title; it is sufficient that they state a prima facie case and that their claim is superior to their opponent. *Porter v. Schaffer, 126* Md. App. 237, 271-74 ("[t]he defendant in a quiet title action who cannot establish his own record title has no basis to complain about the strength of the plaintiff's title, even if a third party may have a superior record title claim." *Id*. at 274.).

The Sufficiency of White's Evidence as to Hostility

Joseph argues that the trial court erred in granting White title to the property by virtue of adverse possession because White failed to establish that his possession of the Disputed Property was hostile.

In *Senez v. Collins*, 182 Md. App. 300, 324 (2008), we characterized the requirements for adverse possession as follows:

> Broadly, the elements of adverse possession can be placed in three groups: possession must be (1) actual, open and notorious, and exclusive; (2) continuous or uninterrupted for the requisite period; and (3) hostile, under claim of title or ownership.

The parties stipulated to the first two categories of requirements, but contested the final element, hostile possession. The initial burden of proof in an adverse possession case is on the claimant. *Senez*, 182 Md. App. at 324. However, "[o]nce a claimant has made a satisfactory showing as to open, continuous use for the statutory period, '[t]he

burden then shifts to the landowner to show that the use was permissive.'" *Id.* at 340.

Hostility, we have held,

> "signifies a possession that is adverse in the sense of it being "without license or permission," and "unaccompanied by any recognition of ... the real owner's right to the land." The type of "recognition of right" that destroys hostility is not mere acknowledgment or awareness that another claim of title to the property exists, but rather, acceptance that another has a valid right to the property, and the occupant possesses subordinately to that right.

Id. at 339-40 (quoting *Yorik v. Mallonee*, 174 Md. App. 415, 429 (2007)).

White testified that he neither sought nor received permission to use the Disputed Property, and his former wife testified that neither Joseph nor his family members ever gave her permission to use the property. Joseph testified that he had never given White permission to use the Disputed Property. White stated that he and his former spouse purchased his property in 1991 and that, since that time, he had used and improved the Disputed Property in various ways, including paving and using the driveway, removing snow, mowing the grass, planting trees, and carrying on other maintenance activities. White also took steps to exclude others from using the Disputed Area, including installing fencing along a portion of the Disputed Area and ejecting Joseph from the property on several occasions, an endeavor that ended when White obtained a no trespassing order against Joseph. Additionally, in 2013 White granted a deed of easement to the estate of John Insley, the prior owner of the Rosenbluth property, permitting use of the Disputed Property to access the Rosenbluth property.

This evidence was sufficient to support the trial court's conclusion that White's use of the Disputed Property was without permission and was inconsistent with ownership by

another, that is, hostile.

Tacking

White owned his property as a tenant by the entireties with his former spouse from 1991 to 2010, when she conveyed her interest in it to him after their divorce. In order to satisfy the 20 year requirement for adverse possession, White must tack the 19 years of ownership with his former spouse with his subsequent ownership of the property in his own name. Joseph argues that the law does not permit tacking ownership as a tenant by the entireties with ownership in severalty. He concedes that he is unable to point to any Maryland case law that supports his contention.

A period of adverse possession by a prior adverse possessor may be counted towards a plaintiff's claim of possession for twenty years or more when (1) there is privity of estate between the prior and subsequent adverse possessors; and (2) the land in question is either included in the mesne deed(s) or is contiguous to the property conveyed in those deed(s). *See Senez v. Collins*, 182 Md. App. 300, 332–33 (2008). White's former wife was in privity of estate with him, and the Disputed Parcel, while not included in the deed, is adjacent to the White property and has remained in White's possession from 1991 to the present. The trial court did not err in concluding that tacking was appropriate.

The Rosenbluths' Easement By Necessity

Finally, Joseph contends that the court erred in granting the Rosenbluths an easement by necessity across the entirety of the Disputed Property because they do not require the entirety of the Disputed Property to access their property.

We need not decide this issue. In order to have standing, a party must have a "real and justiciable interest that is capable of being resolved through litigation." *Patel v. Board of License Commissioners for Somerset County*, 230 Md. App. 195, 205 (2016) (quoting *State v. Phillips*, 210 Md. App. 239, 257 (2013)). Because Joseph is not the owner of the Disputed Property and his claims against appellees were dismissed, he has no justiciable interest and therefore no standing to challenge the scope of the easement granted to the Rosenbluths.

THE JUDGMENT OF THE CIRCUIT COURT FOR ST MARY'S COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.