IN THE

COURT OF SPECIAL APPEALS

OF MARYLAND

September Term, 2007

No. 111

LINDA ANN SENEZ,

Appellant

v.

ANN COLLINS, et al.,

Appellants

Appeal from the Circuit Court for Baltimore County
(The Honorable Susan Souder)

APPELLEES' BRIEF

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STATEMENT OF THE CASE

Appellees agree with the statement of the case as presented in Appellant's brief.

STATEMENT OF FACTS

Appellees took title to 339 Worton Road, Baltimore, Maryland on August 14, 2000. They had the existing house razed, and built a new home into which they moved on or about July 31, 2001. (E 19).

Appellant took title to 341 Worton Road, Baltimore, Maryland on November 22, 2000 and began living there on or about November 22, 2000. (E 19).

Both properties abut Norman Creek, in Baltimore County, along its eastern edge. The properties also abut each other in that they share a common boundary. At trial, the parties stipulated to a boundary survey, which was admitted by the trial court as Joint Exhibit #2. Joint Exhibit #2 shows the parcel of property that is the subject of this appeal. (E 275). That parcel is approximately 291 square feet in area, and includes a portion of a concrete boat ramp. (E 19).

Appellees' property was previously owned by George and Madeline Cook who took title on August 7, 1973. Appellant's property was previously owned by

Arthur and Joan Myers, who took title on April 6, 1981, or approximately nineteen years, seven months before conveying title to Appellant. (E 20).

When Myers took title to 341 Worton Road in 1981, a concrete retaining wall existed near the property line between 339 Worton Road and 341 Worton Road. The wall failed sometime in the 1980s and was rebuilt in its original footprint by Cook, Appellees' predecessor in title. The wall, which sits partly within the boundaries of 339 and partly within the boundaries of 341 Worton Road, remains substantially in place to this day. (E 20).

Sometime during his ownership of 341, Myers built a boat ramp; the boat ramp sits partly within the boundaries of 341 and partly within the boundaries of 339 Worton Road. During his ownership, Myers also installed a bulkhead which sits partly within the boundaries of 341 and partly within the boundaries of 339 Worton Road. (E 20).

During Myers' period of ownership of 341 he granted permission to third parties to use the property he owned at 341 Worton Road, and the boat ramp built thereon to launch their boats during a time in which a public boat ramp was unavailable. (E 20).

ARGUMENT

Appellant asks this Court to consider whether it was error for the Circuit Court for Baltimore County to deny her adverse possession claim notwithstanding evidence of years of hostile possession and the absence during that period of clear and unequivocal assertions of dominion over the subject property by the Appellees.[1] We shall address the question presented in two parts: the period of assumed adverse possession; and assertion of dominion by Appellees.

A. THE PERIOD OF ADVERSE POSSESSION

Appellant argues that the court below found that Appellant's predecessor in title, Arthur Myers, was in actual possession of the land, which is the subject of this appeal. As a matter of fact, what the trial judge concluded, at page four of the court's Motions Ruling is that "At best, Myers' actions toward the property in dispute indicate use or 'actual possession' of the property but nothing more." (E 21). This statement by the trial court might arguably be conclusive as to an adverse possession claim made by Arthur Myers, or the defense of a quiet title action brought against Arthur Myers assuming that Mr. Myers had actually

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[1] Appellees note that the trial court did not conclude that Appellant's predecessor in title adversely possessed the parcel of land which is the subject of this dispute. Appellant's brief reads as though the trial court had found that but for the reentry on the land by Appellees, Appellant's predecessor in title would have perfected an adverse possession claim. We disagree.

possessed the disputed parcel for the requisite twenty years. This statement by the trial court might also be conclusive as to Appellant if her period of adverse possession could legitimately be tacked to the adverse possession of Mr. Myers. However, because the court below found conclusively that Appellees' entry onto and use of the land destroyed the twenty year prescriptive period before Appellant ever took title to 341 Worton or arguably had any claim over the parcel, whether Mr. Myers' possession of the 291 square feet was adverse is immaterial to an adverse possession analysis here because the requisite 20 years period was interrupted:

> Defendant argues that when Myers' ownership is added to her ownership, she has met the 20 years requirement. Myers owned his property for 19 years and 7 months. But during the last few months of his ownership, the Plaintiffs acquired 339 Worton and used the boat ramp. Myers did not testify he gave them permission; and, Plaintiffs testified they never asked. The pages from Myers' deposition transcript cited by Defendant for the proposition that Myers "granted permission" to Plaintiffs do not make that statement. Plaintiffs' use of the area in dispute destroys the claimed 20 years period required for Defendant to establish her adverse possession claim. (Motions Ruling, E 22).

This of course, explains the trial Court's rationale for its finding, made in open court that:

> I will grant judgment in favor of the Collins on the issue of quiet title with respect to the 291 feet, the area indicated in blue in Plaintiffs' 27, that blue area does appear to be the Collins' property and should be theirs. They have title to the property free and clear.

That follows naturally from finding there was not sufficient proof of the adverse possession of the property, as a consequence, I also think what follows is judgment in favor of the Collins on the trespass counts, but there is no damage as a result of the trespass. (E 104, (at transcript page 186).

B. THE MYERS PERIOD OF ADVERSE POSSESSION

Appellant's predecessors in title, Arthur and Joan Myers, took title to 341 Worton Road in Baltimore County on April 6, 1981. Assuming, *arguendo*, that Myers adversely possessed the disputed portion of 339 Worton Road that is the subject of this appeal, and again assuming, *arguendo*, that they adversely possessed that portion of 339 Worton Road that is the subject of this appeal from the first day they took title to 341 Worton Road, then their period of adverse possession pursuant to and within the meaning of MD. Code Ann., Cts. & Jud. Proc. § 5-103, began on April 6, 1981.[2]

When Myers' period of adverse possession within the meaning of MD. Code Ann., Cts. & Jud. Proc. § 5-103 ended cannot be precisely determined, but it is logical to conclude that it ended sometime after Appellees took title to 339 Worton Road (August 14, 2000), and sometime before Myers' conveyed title in

[2] Md. Code Ann., Cts. & Jud. Proc. § 5-103(a): "Within 20 years from the date the cause of action accrues, a person shall: (1) File an action for recovery of possession of a corporeal freehold or leasehold estate in land; or (2) Enter on the land."

341 Worton Road to Appellant (November 22, 2000) during which period Appellees "enter[ed] on the land."

Though the trial court did not find that Myers' possession of the swatch of property now in dispute met all of the elements of adverse possession, the trial court found conclusively that by using their property during the period of Myers' ownership of 341 Worton Road, Appellees had entered on the land pursuant to and within the meaning of Maryland Code Ann., Cts. & Jud. Proc., § 5-103(a) sufficiently that, "by using their property, [Appellees] were in possession of their property." (E 20), Moreover, the trial court found,

> [Appellees'] testimony that they had never asked permission to use the boat ramp credible. The Court did not find credible [Appellant's] testimony that [Appellees] asked her for permission." (E 20, 21).

And finally, the trial court concluded,

> The Court was not persuaded that the fact that [Appellees] did not move into their residence at 339 full-time until the year after purchase helps [Appellant's] claim. The testimony was uncontradicted that [Appellees] made frequent visits to 339 Worton for recreation, boating and supervision of the demolition and construction. Further, there was persuasive testimony that [Appellee] Ann Collins used the boat ramp before and after residing at 339 Worton. Use of the boat ramp without seeking permission by [Appellee] was the equivalent of asserting an ownership interest or dominion over the property. (E 22 – 23).

Whether Appellees entered on the land and did so in sufficient manner to destroy Myers' assumed adverse possession of the disputed parcel will be the

central question to be addressed as the Court considers the matter at bar. The trial court concluded that the Appellees had, in fact, entered on the land in a manner sufficient to destroy the continuous nature of Myers' assumed adverse possession during the period of Myers' title ownership of 341 Worton Road: "[Appellees] had already used the boat ramp to launch canoes and to feed ducks. Thus, by using their property, [Appellees] were in possession of their property." (E 20). This is important for two reasons: first because it is an assertion of dominion over the land that is consistent with the requirements of caselaw; and secondly, because whenever this assertion of dominion occurred, it put an end to any Myers period of adverse possession of the parcel.

C. APPELLEES' ENTRY ON THE LAND WAS SUFFICENT TO DESTROY MYERS' ADVERSE POSSESSION, IF ANY, OF THE DISPUTED PARCEL.

The evidence presented at trial is clear that Appellees exercised dominon by making use of the disputed parcel during the period of Myers' ownership of 341 Worton Road and prior to Appellant's ownership of 341 Worton Road, thus destroying any Myers adverse possession thereof, and thus, making it impossible for Appellant to tack her period of adversity to that of Myers.

The Miceli v. Foley standard, that entry on the land must be "made with the clear and unequivocal intent to invade and challenge the right of the holder of the

adverse possession and to retake possession," is clearly met by Appellees' use of the land and the boat ramp. Miceli v. Foley, 83 Md. App. 541, 557, 575 A.2d 1249 (1990). Referring to her use of the boat ramp during the period when the Myers owned 341 Worton Road, Appellee Ann Collins' testimony at trial was:

> Well, when Mr. Myers was there it was much easier, we just jumped over the wall. We used it as a launch for our swimming. We had a canoe or, at least, some people brought a canoe out of the water all the time, the children, my friends, Shirley, we went swimming there.[3] (E 35-36, Transcript pages 30-31).

Later, asked if she, her friends and family had used the boat ramp with the permission of Mr. Myers, Mrs. Collins testified as follows:

> Q. Did Mr. Myers give you permission to use the boat ramp?
>
> A. There was never any question about permission.
>
> Q. So you didn't ask permission.
>
> A. Absolutely not.
>
> Q. Did Mr. Myers ever try to exclude you from using that?
>
> A. Absolutely not. (E 36, Transcript 31)

Miceli v. Foley, in conjunction with other cases tells us that:

> The running of the statutory period may be interrupted by the owner's entry on the land. This entry must be made with a clearly demonstrated intention to repossess the land. Reentry onto the land must be made openly and under claim of right. (Miceli, *supra* at 556).

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[3] This is to be distinguished from Appellees' use of the boat ramp after Appellant built the fence – ostensibly to contain her dog – which effectively excluded Appellants from over land access to the boat ramp.

Clearly, Ann Collins' testimony was that she, her family, and friends used the boat ramp within the disputed parcel on several occasions during Myers' ownership of 341 Worton Road, and they did so openly, and under a claim of right in that they did not seek, nor did Mr. Myers offer them permission, to use any portion of the disputed parcel. Appellees' action, possession and use of the land is to be distinguished from merely walking the land, or without making a claim to the land, sending an agent, such as a surveyor, onto the land for the purposes of determining the metes and bounds or identifying monuments, as was the situation in Miceli.

Use by Appellees of their property, without the invitation or permission of the putative adverse possessor, and in particular use of a boat ramp as a place from which to launch a canoe, or let swimmers into the water is the very type of use to which an owner, or one making a "proper assertion of claim to the land," (Miceli, *supra*, at 557) would be expected to subject the property under the case law requirement for sufficient reentry:

> What constitutes an assertion of possession sufficient to be considered an act of dominion and thus an act of ownership over the land differs on a case by case basis. When determining whether a particular use is sufficient to constitute dominion over the land, a court will consider the character of the land and the purposes to which it is adapted. (Miceli, *supra*, at 556).

This standard, generally employed to determine whether the acts of an adverse possessor are sufficient to indicate an assertion of claim, apply in the same way to a title holder asserting or reasserting his or her dominion over land:

> As a general rule, an entry upon or possession of the lands claimed by another, which, in the first instance, would suffice to effect a disseisin or ouster of the real owner, will break the continuity of the holder claiming by adverse possession. Such an entry upon or occupation of the land by the true owner for any portion of the period of adverse possession by the claimant will, as a general rule, break the continuity, and destroy the adverse possession. Especially is this true where such entry is followed up by possession by the owner, although the adverse claimant continues in possession as before such entry. To have this effect the entry need not be by the owner in person, but it may be by his agent. Entry by the agent or licensee of the record owner of the land may be sufficient to interrupt the running of the statute. However, the reentry and consequent interruption of the possession must rise in dignity and character to that required to initiate an adverse possession. It is not every entry, however, by the owner that will destroy the adverse possession, but to effect this, he must assert his claim to the land by acts of ownership. * * * An entry on land by a person disseised, merely for the purpose of seeing if there is any evidence of an adverse occupation, is not, as a matter of law, conclusive evidence of an interruption of the disseisor's possession. Rosencrantz v. Shields, Inc. 28 Md.App. 379, 391, 346 A.2d 237 (1975), *quoting,* 5 Thompson, Commentaries on the Modern Law of Real Property, § 2552, at 576-78 (Grimes repl. 1957).

Indeed, what could be more an assertion of dominion over a boat ramp than to openly launch a boat from it, swim from it, feed geese from it, and invite friends and family to do so as well?

D. THE SENEZ PERIOD OF ADVERSE POSSESSION

Appellant makes much of her contention that because Appellees did not take up permanent residence at 339 Worton Road until after their house was finished (perhaps July or August of 2001), they could not have asserted dominion until that time or shortly thereafter. Appellant makes this argument repeatedly as if to imply that one cannot assert dominion over one's land unless one sleeps on and actually resides on said land. However, nowhere in our cases is there such a requirement. Our cases do give us examples of acts that one may take to assert dominion over land: building structures, building fences, planting trees, hedges, bushes, etcetera. And the uncontroverted evidence adduced at trial is that Appellees:

> made frequent visits to 339 Worton for recreation, boating and supervision of the demolition and construction. Further, there was persuasive testimony that Plaintiff Ann Collins used the boat ramp before and after residing at 339 Worton. Use of the boat ramp without seeking permission by Plaintiff was the equivalent of asserting an ownership interest or dominion over the property. (E 22, 23).

Appellees will concede that a new period of adverse possession may have begun at the time when Appellant erected a fence on Appellees' property, which is still in place today, and which effectively ousts them from exercising dominion over that portion of their titled real property. Appellees do not concede that as yet Appellant enjoys anything more than "actual possession" of the disputed sliver of

land because in order for Appellant to assert ownership by adverse possession, she must hold the property in such a manner for an uninterrupted period of twenty years. Upholding the trail court will end this encroachment, which has lasted for approximately the last seven years, once and for all.

STANDARD OF REVIEW

Given that this case was tried below without a jury, the Court of Special Appeals must review the case both on the law and the evidence. Md. Rule 8-131(c). It must not, however, "set aside the judgment of the trial court on the evidence unless clearly erroneous, and . . .give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). Barnes v. Children's Hospital, 109 Md.App. 543, 552-53, 675 A.2d 558 (1996). The lower court's findings of fact are not clearly erroneous if they are supported by substantial evidence. Walker v. State, 125 Md.App. 48, 54, 723 A.2d 922 (1999); Oliver v. Hays, 121 Md.App. 292, 306-306, 708 A.2d 1140 (1998); Nicholson Air Services, Inc. v. Board of County Com'rs of Allegany County, 120 Md.App. 47, 66, 706 A.2d 124 (1998); Sea Watch Stores Ltd. Liability Co. v. Council of Unit Owners, 115 Md.App. 5, 31, 691 A.2d 750, *cert. dismissed*, 347 Md. 622, 702 A.2d 260 (1997). And the appellate court, "may not substitute [its] judgment for that of the fact finder, even if [it] might have reached a different result." Oliver v.

Hays, *supra*, at 306; Nicholson Air Services, *supra*, at 67. Rather, it "must assume the truth of all the evidence, and of all the favorable inferences fairly deducible therefrom, tending to support the factual conclusions of the lower court." Oliver v. Hays, *supra*, at 306; Mercedes-Benz v. Garten, 94 Md.App. 547, 556, 618 A.2d 233 (1993).

The clearly erroneous standard does not apply to the trial court's conclusions of law, however. Thus, "[p]ure conclusions of law are not entitled to any deference." Oliver v. Hays, *supra*, at 306. Moreover, the trial court's application of the law to the facts must be analyzed on an "abuse of discretion standard." Nicholson Air Services, *supra*, at 67; Pierce v. Montgomery County, 116 Md.App. 522, 529, 698 A.2d 1127 (1997).

CONCLUSION

On the pivotal issue of whether Appellees reentered and possessed the disputed portion of their property, The Circuit Court for Baltimore County found the testimony of Appellees credible and did not find the testimony of Appellant to be credible. (E 20 – 21). The Circuit Court for Baltimore County correctly applied the law in this case, finding that indeed, even if the possession of Appellant's predecessor in title had been adverse to that of Appellees, said possession was

interrupted by Appellants' reentry on the land, such that any adverse possession by Myers failed to reach the maturity of twenty years as required by statute.

For the reasons set forth above, the judgment entered in favor of Appellees with regard to Appellant's Counterclaim for adverse possession must be affirmed, as must the trial court's judgments with regard to Counts I, II, IV and V of Appellees' original or amended Complaint.

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CERTIFICATION REGARDING FONT AND TYPE SIZE

Pursuant to Maryland Rule 8-504(a)(8), this Brief has been prepared with proportionally spaced type:

Font: Times New Roman

Type size: 13pt.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of December, 2007, I caused two copies of the foregoing to be mailed, by first-class mail, postage pre-paid to:

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C West's Annotated Code of Maryland Currentness
Courts and Judicial Proceedings
Title 5. Limitations, Prohibited Actions, and Immunities
Subtitle 1. Limitations (Refs & Annos)

→§ 5-103. Adverse possessions; effect on limitations

(a) Within 20 years from the date the cause of action accrues, a person shall:

(1) File an action for recovery of possession of a corporeal freehold or leasehold estate in land; or

(2) Enter on the land.

(b)(1) This section does not affect the common-law doctrine of prescription as it applies to the creation of incorporeal interests in land by adverse use.

(2) This section does not affect the periods of limitations set forth in § 6-103 or § 8-107 of the Real Property Article.

CREDIT(S)

Acts 1973, 1st Sp. Sess., c. 2, § 1; Acts 1974, c. 687, § 13; Acts 1999, c. 34, § 1, eff. April 13, 1999.

PRIOR COMPILATIONS

Formerly Art. 57, § 3A.

HISTORICAL AND STATUTORY NOTES

1999 Legislation

Acts 1999, c. 34, § 1, made technical corrections to the Code.

CROSS REFERENCES

Method of quieting title, see Real Property § 14-108.

MD Rules, Rule 8-131

West's Annotated Code of Maryland Currentness

Maryland Rules (Refs & Annos)
Title 8. Appellate Review in the Court of Appeals and Court of Special Appeals
Chapter 100. General Provisions
➡RULE 8-131. SCOPE OF REVIEW

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) In Court of Appeals--Additional Limitations.

(1) *Prior Appellate Decision.* Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

Committee note: The last sentence of subsection (b)(1) amends the holding of *Coleman v. State*, 281 Md. 538 (1977), and its progeny.

(2) *No Prior Appellate Decision.* Except as otherwise provided in Rule 8- 304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.

(c) Action Tried Without a Jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Cross reference: Rule 2-519.

(d) Interlocutory Order. On an appeal from a final judgment, an interlocutory order previously entered in the action is open to review by the Court unless an appeal has previously been taken from that order and decided on the merits by the Court.

(e) Order Denying Motion to Dismiss. An order denying a motion to dismiss for failure to state a claim upon which relief can be granted is reviewable only on appeal from the judgment.

C *WEST'S* ANNOTATED CODE OF MARYLAND
MARYLAND RULES
TITLE 8. APPELLATE REVIEW IN THE COURT OF APPEALS AND COURT OF SPECIAL APPEALS
CHAPTER 500. RECORD EXTRACT, BRIEFS, AND ARGUMENT

➡RULE 8-504. CONTENTS OF BRIEF

(a) Contents. A brief shall comply with the requirements of Rule 8-112 and include the following items in the order listed:

(1) A table of contents and a table of citations of cases, constitutional provisions, statutes, ordinances, rules, and regulations, with cases alphabetically arranged. When a reported Maryland case is cited, the citation shall include a reference to the official Report.

Cross reference: Citation of unreported opinions is governed by Rule 1-104.

(2) A brief statement of the case, indicating the nature of the case, the course of the proceedings, and the disposition in the lower court, except that the appellee's brief shall not contain a statement of the case unless the appellee disagrees with the statement in the appellant's brief.

(3) A statement of the questions presented, separately numbered, indicating the legal propositions involved and the questions of fact at issue expressed in the terms and circumstances of the case without unnecessary detail.

(4) A clear concise statement of the facts material to a determination of the questions presented, except that the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief. Reference shall be made to the pages of the record extract supporting the assertions. If pursuant to these rules or by leave of court a record extract is not filed, reference shall be made to the pages of the record or to the transcript of testimony as contained in the record.

Cross reference: Rule 8-111 (b).

(5) Argument in support of the party's position.

(6) A short conclusion stating the precise relief sought.

(7) The citation and verbatim text of all pertinent constitutional provisions, statutes, ordinances, rules, and regulations except that the appellee's brief shall contain only those not included in the appellant's brief.

(8) If the brief is prepared with proportionally spaced type, the font used and the type size in points shall be stated on the last page.

Cross reference: For requirements concerning the form of a brief, see Rule 8-112.

(b) Appendix. The appellant shall reproduce, as an appendix to the brief, the pertinent part of every ruling, opinion, or jury instruction of each lower court that deals with points raised by the appellant on appeal. If the appellee believes that the part reproduced by the appellant is inadequate, the appellee shall reproduce, as an appendix to the appellee's brief, any additional part of the instructions or opinion believed necessary by the appellee.

Committee note: Rule 8-501 (j) allows a party to include in an appendix to a brief any material that inadvertently was omitted from the record extract.

(c) Effect of Noncompliance. For noncompliance with this Rule, the appellate court may dismiss the appeal or make any other appropriate order with respect to the case, including an order that an improperly prepared brief be reproduced at the expense of the attorney for the party for whom the brief was filed.

Source: This Rule is derived as follows:

Section (a) is derived from former Rules 831 c and d and 1031 c 1 through 5 and d 1 through 5, with the exception of subsection (a)(6) which is derived from FRAP 28 (a)(5).

Section (b) is derived from former Rule 1031 c 6 and d 6.

Section (c) is derived from former Rules 831 g and 1031 f.

Current with amendments received through June 4, 2007.

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