Massie v. Firmstone:
Limiting Parties From Rising Above Their Own Evidence

I. Introduction

A. General Overview of the Massie Doctrine

Lawyers often face the scenario wherein a party provides testimony that harms his or her case and then attempts to introduce contradictory evidence or asks the finder of fact to disregard his or her testimony. In Virginia, the *Massie* doctrine governs these situations and its impact on the party's case. Named after the Supreme Court of Virginia's decision in *Massie v. Firmstone*,[1] the *Massie* doctrine stands for the basic proposition that a party cannot rise above his or her own evidence.[2] The *Virginia Model Jury Instructions* have summarized the *Massie* doctrine as follows:

> When one of the parties testifies unequivocally to facts within his own knowledge, those statements of fact and the necessary inferences from them are binding upon him. He cannot rely on other evidence in conflict with his own testimony to strengthen his case.
>
> However, you must consider his testimony as a whole, and you must consider a statement made in one part of his testimony in the light of any explanation or clarification made elsewhere in his testimony. [3]

B. The Rationale of the Massie Doctrine

The rationale of the *Massie* doctrine is a sound one: a party will not be permitted to profit at the expense of the other party by contradicting his own testimony concerning facts within his own personal knowledge, disowning such statements and relying upon contrary statements or testimony made by others.[4] Nonetheless, the Supreme Court of Virginia has emphasized that "[t]he *Massie* doctrine is not to be read as a rule of thumb, categorical, absolute and universally applicable." [5]

C. The Practical Impact of the Massie Doctrine

Virginia jurisprudence makes clear that parties may face severe consequences should their testimony fall within the ambit of the *Massie* doctrine. These consequences have included striking a plaintiff's case, ruling as a matter of law that a plaintiff cannot maintain his cause of action against the defendant and reversing a jury verdict in favor of the plaintiff. Since the analysis under *Massie* focuses on statements of fact, attorneys need to pay particular attention to the factual testimony given by the parties at trial to determine whether a party is attempting to make its case stronger than presented by its own testimony. Since this issue occurs frequently, Virginia lawyers should be

knowledgeable about the meaning and scope of the *Massie* doctrine as well as its exceptions.

Part II of this article discusses the case of *Massie v. Firmstone* and its scope. Part III of this article details the common exceptions to the *Massie* doctrine.

II. Massie v. Firmstone: A party cannot rise above his own evidence.

In *Massie*, the plaintiff real estate broker brought an action against a defendant landowner for commissions for securing a purchaser. The plaintiff's own testimony showed that he was not requested to furnish a purchaser, but that he asked permission to do so; that his compensation depended upon a consummated sale to such purchaser; that the landowner was careful to reserve the right to sell the property to others if the landowner chose; and that no sale was in fact made to the proposed purchaser introduced by plaintiff.

The Supreme Court described the inherent problems involved when a party produces evidence through others that directly refutes his own testimony.

> As a general rule when two or more witnesses introduced by a party litigant vary in their statements of fact, such party has the right to ask the court or jury to accept as true the statements most favorable to him. In such a situation he would be entitled to have the jury instructed upon his contention, or if there were a demurrer to the evidence, the facts would have to be regarded as established in accordance with the testimony most favorable to him. *This is not true, however, as to the testimony which he gives himself. No litigant can successfully ask a court or jury to believe that he has not told the truth. His statements of fact and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it, where, as here, it depends upon facts within his own knowledge and as to which he has testified.*[6]

The case of *Smith v. Virginia Electric & Power Co.*[7] provides a classic application of the *Massie* doctrine. In *Smith*, plaintiff sustained electrocution injuries when a metallic rod he was using to perform a land survey came into contact with an uninsulated electric wire. At trial, plaintiff testified that he saw the electrical wire and that he discussed with other crew members the potential danger of the wire relative to the metal rods they were using on the job. The Court held that plaintiff failed to look when he should have looked, or, having looked, failed to see what was in his unobstructed view, and what was obvious to the other crew members.[8] Citing *Massie*, the Supreme Court of Virginia determined that plaintiff's testimony constituted an unequivocal statement of fact within his own knowledge that directly proved his contributory negligence; therefore, he could not recover against defendant.[9] Numerous other cases have applied *Massie* and prevented parties from rising above their own evidence.[10]

III. Exceptions to the Massie doctrine

While the *Massie* doctrine is well-established, practitioners should be aware that Virginia courts have found several exceptions to its application. In evaluating the applicability of the *Massie* doctrine, one important issue is whether the statements at issue are truly statements of fact or rather are mere estimates.

A. The Massie doctrine does not apply to mere estimates of fact.

1. The Massie doctrine does not apply to mere estimates of speed.

In *Yates v. Potts*,[11] the Court faced a scenario where the plaintiff estimated his speed at between 40 and 50 miles per hour. Since the speed limit was 45 miles per hour, the defendant sought to bind the plaintiff to her highest estimate of speed under *Massie*, which arguably established her negligence *per se*. The Supreme Court refused in holding that *Massie* did not apply to estimates of fact such as speed.[12] The Court reasoned that the discrepancy in plaintiff's testimony created a jury issue as to plaintiff's exact speed.[13] In other words, the *Massie* doctrine does not consider "mere estimates of speed" to be "statements of facts."

2. The Massie doctrine does not apply to mere estimates of distance.

Similarly, in *Kelley v. Henley*,[14] the administratrix of an estate brought a wrongful death action against defendant Kelley due to an automobile accident. At trial, Kelly testified that the decedent's automobile "just jumped right in front" of him when he was "about a car length" away.[15] On appeal, plaintiff complained that Kelley's testimony was contrary to the objective facts relating to the length of the skid marks from the scene. The Supreme Court of Virginia dismissed this contention by concluding that "a witness to an automobile accident is not held to such mathematical certainty in giving an estimate of distance, especially where he qualifies his estimate by the use of the word 'about.'"[16] In summary, "mere estimates of distance" are not unequivocal "statements of fact" to trigger application of the *Massie* doctrine.

B. The Massie doctrine does not apply to mere statements of opinion.

As with estimates of fact, the Supreme Court has drawn a distinction with testimony that is opinion rather than factual in nature. The Court's decision in *Ravenwood Towers, Inc. v. Woodyard*[17] illustrates this distinction. In *Ravenwood*, the Court faced a plaintiff who was injured when she fell while entering a misaligned elevator. Plaintiff testified that she could see where she wanted to go and, had she been looking down as she entered the elevator, she could have seen that it was misaligned. Plaintiff's eye doctor testified that plaintiff suffered from poor vision at the time of the accident and that he honestly did not know whether plaintiff had the ability to see

differences in depth between objects on the date of the accident. The Supreme Court ruled that *Massie* did not apply in concluding that plaintiff simply testified what she thought she could have seen at the time of the accident, which was no more than an expression of an opinion.[18] Various decisions have reinforced that *Massie* does not apply to mere statements of opinion.[19]

C. The Massie doctrine does not apply to matters outside the realm of the party's knowledge.

Additionally, Virginia courts have analyzed whether the statement of fact is one actually within the party's personal knowledge before applying the *Massie* doctrine. For instance, in *Saunders v. Bulluck*,[20] plaintiff brought a lawsuit based upon personal injuries she sustained in an automobile accident. At trial, plaintiff testified that she had never driven an automobile before and that "we weren't driving fast. He [the driver of her car] didn't seem to be driving reckless in any way, as far as I'm concerned."[21] Based upon this testimony, the defendant argued that the plaintiff's case failed as a matter of law. The Supreme Court explored the *Massie* doctrine before holding that "[t]he phrase 'statement of fact' is important. The rule does not necessarily apply to statement of opinion or of incomplete facts."[22] Subsequent decisions have emphasized that the *Massie* doctrine does not apply to statements made by a litigant regarding matters outsider his or her realm of knowledge.[23]

D. The Massie doctrine does not apply to statements made by persons other than a party.

Furthermore, trial courts must look carefully to the individual who provides the statement of fact to ensure that *Massie* is not applied to a statement made by a non-party. For instance, in *Lucas v. HCMF Corp.*,[24] an administratrix brought a personal injury claim; however, the doctors for the decedent provided conflicting testimony as to whether the defendant nursing home had caused or contributed to the decedent's death. The nursing home sought to apply *Massie* to plaintiff by binding her to the statements of one of the non-party doctors. Citing *Massie*, the Court held that "[w]hile a *party's testimony* is binding upon him and he cannot ask the court to disregard his own testimony, the same is not true of the testimony of a *party's witness*."[25] Under *Massie*, plaintiff could ask the finder of fact to resolve the doctor's conflicting testimony in his favor.[26] Numerous other decisions have found that *Massie* does not apply to statements made by persons other than a party.[27]

E. The Massie doctrine does not apply when the party's statement is not sufficiently clear and unequivocal such that party's case has no merit or that fair minds could not differ as to the effect of the testimony.

Virginia courts evaluating *Massie* also have grappled with whether the party's statement of facts is clear enough to constitute a judicial admission. For example, in *TransiLift Equipment, Ltd. v. Cunningham*,[28] plaintiff offered different testimony at trial

than he had in his pretrial discovery responses as to the actions of the defendant wheelchair platform driver. When asked to explain the discrepancy, plaintiff stated that he had reviewed a videotape of the accident that was shown during the trial which caused him to realize he had been mistaken about the place where the driver had operated the platform controls. The Court noted that *Massie* was intended to compel the exercise of good faith by the litigants and not to penalize them for honest mistakes of memory.[29] Under the circumstances, the Supreme Court held that plaintiff's equivocal testimony did not establish that his claim was meritless as a matter of law and rejected the application of *Massie*.[30] Other decisions have emphasized that a party's statement of facts, when considered as a whole, must "conclusively absolve" the defendant from liability.[31]

F. The Massie doctrine does not apply when the party's statement is an unfair distortion of the party's true testimony taken as a whole.

Finally, the Supreme Court of Virginia has found another exception to the *Massie* doctrine by clarifying that the party's testimony must be considered as a whole and not in isolation. For example, in *Virginia Electric & Power Co. v. Mabin*,[32] plaintiff sued an electrical company for injuries sustained when he came into contact with an electric wire. Upon examination at trial, plaintiff offered contradictory testimony concerning the condition of the wire and the manner in which he came into contact with it. Under one version of the testimony, plaintiff arguably was contributorily negligent. Given this apparently conflicting testimony, the Supreme Court observed that certain statements of the plaintiff appear to show his contributory negligence; however, such statements should be considered in light of the adversarial process.[33] In other words, an effective cross-examination may cause a plaintiff to make a damaging statement, but he may offer an explanation or clarification on redirect examination.[34] The Court ruled that the jury could decide whether to accept the party's testimony, the party's explanation or clarification and its effect given all the evidence.[35] Other decisions also have found that *Massie* will not apply to statements by a party taken alone that unfairly distort the party's overall testimony.[36]

IV. Conclusion

"No rule is more firmly established in Virginia than that of *Massie v. Firmstone*."[37] The Supreme Court of Virginia seems insistent on a strict interpretation of the *Massie* doctrine applied to statements of fact. Any variation from the specific requirements of *Massie* likely will cause a court to apply an exception. At times, the Supreme Court has shown some willingness to read past a party's apparently unequivocal statements to rule that the statements are not sufficient to trigger application of *Massie v. Firmstone*. In light of its potential consequences, attorneys in Virginia should be extremely familiar with the *Massie* doctrine and its exceptions.

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[1] 134 Va. 450, 114 S.E. 652 (1922).

[2] *See Galloway Corp. v. S.B. Ballard Constr. Co.*, 250 Va. 493, 506, 464 S.E.2d 349, 356 (1995) (finding that the evidence, including the negotiations and prior dealings, of certain subcontractors with the general contractor on a construction project showed an intent to provide the general contractor with an absolute

"pay when paid" defense to not have to pay its subcontractors until the owner paid the general contractor); *Crawford v. Quarterman*, 210 Va. 598, 603, 172 S.E.2d 739, 742 (1970) (stating that a party's case can be no stronger nor rise any higher than his own testimony permits"); *Williams v. Williams*, No. HJ-1427-4, 1999 Va. Cir. LEXIS 550, at *10 (Richmond Feb. 18, 1999) (finding that "the holding of *Massie v. Firmstone* forbids the court from finding . . . a factual finding more favorable to [the plaintiff] than the one he testified to . . . ").

[3] *Virginia Model Jury Instructions, Civil*, Vol. I, Instruction No. 2.060, at I-27 to I-28 (Repl. ed. 1998 & 2003 Supp.) ("*Virginia Model Jury Instructions*").

[4] *See Henderson v. Henderson*, 255 Va. 122, 127, 495 S.E.2d 496, 499 (1998); *Baines v. Parker*, 217 Va. 100, 105, 225 S.E.2d 403, 407 (1976); Charles E. Friend, *The Law of Evidence in Virginia*, § 18-51, at p. 893 (6th ed. 2003).

[5] *Baines*, 217 Va. at 104, 225 S.E.2d at 407. The *Virginia Model Jury Instructions* state that *Massie* would seem to demand a jury instruction; however, courts deal with *Massie* typically on a motion to strike the evidence. *See Virginia Model Jury Instructions*, Instruction No. 2.060, at I-28. Thus, the *Massie* doctrine generally is not the subject of a jury instruction. *Id.*

[6] *Massie*, 134 Va. at 462, 114 S.E. at 656 (emphasis added).

[7] 204 Va. 128, 129 S.E.2d 655 (1963).

[8] *Id.* at 134, 129 S.E.2d at 660.

[9] *Id.*

[10] *See Am. Communications Network v. Williams*, 264 Va. 336, 342-43, 568 S.E.2d 683, 687 (2002) citing *Massie* in reversing jury verdict in defamation case, in part, since plaintiff admitted the truth of the factual statements relating to the opinions at issue); *City of Va. Beach v. Carmichael Dev. Co.*, 259 Va. 493, 500, 527 S.E.2d 778, 782 (2000) (holding that plaintiff's own evidence contradicted his claim that City officials denied him a hearing before the City Council); *Patterson v. Patterson*, 257 Va. 558, 563, 515 S.E.2d 113, 116 (1999) (ruling that plaintiff's testimony established that his wife had control over a certificate of deposit with a bank despite his contention that she was merely a nominal holder of a marital asset); *CSX Transp., Inc. v. Casale*, 250 Va. 359, 364, 463 S.E.2d 445, 448 (1995) (holding that plaintiff "Casale cannot ask that he be allowed to make his case stronger by having this Court accept the favorable evidence concerning his alleged inability to work while disregarding his own testimony that he was working at the time of the second trial and would report for work in his new job the first of the following week"); *McHenry v. Adams*, 248 Va. 238, 244, 448 S.E.2d 390, 393 (1994) (applying *Massie* to plaintiff's testimony which showed that his claim for damages was time-barred); *TechDyn Sys. Corp. v. Whittaker Corp.*, 245 Va. 291, 298 n.1, 427 S.E.2d 334, 339 n.1 (1993) (rejecting application of *Massie* to testimony of TechDyn officials that its delay was attributable to reasons other than Whittaker); *Travis v. Bulifant*; 226 Va. 1, 6, 306 S.E.2d 865, 867 (1983) (ruling that plaintiff was bound by his testimony that the payment terms for three written contracts had been changed from fixed price to cost plus a profit); *Holland v. Holland*, 217 Va. 874, 876, 234 S.E.2d 65, 67 (1977) (applying *Massie* in holding that plaintiff's statements that the defendant's car "just cut right in front of" and "swerved in front" of her husband's car were "recitals of fact within her knowledge which are certain and unambiguous" and which meant that plaintiff could not rely on defendant's conflicting evidence); *Anderson v. East Coast Fish & Scallop Co.*, 10 Va. App. 215, 217, 391 S.E.2d 347, 348 (1990) (denying plaintiff's worker's compensation claim based upon plaintiff's testimony that he had shot himself accidentally with his own shotgun despite his earlier claims that he had been assaulted).

[11] 210 Va. 636, 172 S.E.2d 784 (1970).

[12] *Id.* at 639, 172 S.E.2d at 786-87.

[13] *Id.*

[14] 208 Va. 264, 156 S.E.2d 618 (1967).

[15] *Id.* at 269, 156 S.E.2d at 622.

[16] *Id.* at 269-70, 156 S.E.2d at 622. Courts have interpreted *Kelley* to signify that *Massie* does not apply to a party's mere estimate of distance, although the *Kelley* Court did not discuss or mention *Massie* in its opinion.

[17] 244 Va. 51, 419 S.E.2d 627 (1992).

[18] *Id.* at 55-56, 419 S.E.2d at 629.

[19] *See Beeton v. Beeton*, 263 Va. 329, 336-37, 559 S.E.2d 663, 667 (finding that a son's statement as to his mother's intent in making him the beneficiary of a Treasury Bill was a statement of opinion concerning the

mother's inner motivation and not a statement of fact within the son's personal knowledge), *cert. denied*, 537 U.S. 1020 (2002); *Braden v. Isabell K. Horsley Real Estate, Ltd.*, 245 Va. 11, 17, 425 S.E.2d 481, 484 (1993) (ruling that plaintiff's testimony where "she stated that she 'assumed' the list had been approved but said that she had no 'knowledge' that it was ever approved" were mere expressions of opinion or statements of fact outside her knowledge and, thus, was the "classic example of a case in which the *Massie* rule should not be applied") (citing *TransiLift Equip., Ltd.. v. Cunningham*, 234 Va. 84, 94-95, 360 S.E.2d 183, 187 (1987)); *Deskins v. T. H. Nichols Line Contractor, Inc.*, 234 Va. 185, 188, 361 S.E.2d 125, 126 (1987) (holding that a plaintiff's testimony as to the point of impact of an accident as being in the middle of the road "amounted to no more than a mere estimate or opinion" and, thus, *Massie* was inapplicable); *Hogan v. Carter*, 226 Va. 361, 370, 310 S.E.2d 666, 671 (1983) (ruling that plaintiff's equivocal testimony about the defendant's behavior did not "conclusively absolve" the defendant from liability and was essentially opinion testimony); *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 431, 297 S.E.2d 675, 678 (1982) (noting that plaintiff *thought* the car was in park but these statements were mere statements of opinion as plaintiff's "impression proved to be a misimpression, caused by a lack of knowledge of physical facts essential to an informed opinion" as she did not know what the experts knew); *Pratt v. Queen*, 11 Va. Cir. 476, 477-78 (City of Norfolk 1979) (ruling that plaintiff's statements about the conduct of the defendant driver were mere opinions without probative value especially in light of plaintiff's relative and indefinite testimony). *But see Baines*, 217 Va. at 106, 225 S.E.2d at 407 (ruling that trial court had committed reversible error by not granting defendant's motion to strike plaintiff's evidence when plaintiff unequivocally testified that the defendant had exercised due care before the automobile accident which constituted statements of facts – and not statements of opinion - observed from her vantage point on the front seat near the driver" and absolved defendant of all negligence).

[20] 208 Va. 551, 159 S.E.2d 820 (1968).

[21] *Id.* at 554, 159 S.E.2d at 823.

[22] *Id.* at 553, 159 S.E.2d at 823.

[23] *See Charlton v. Craddock-Terry Shoe Corp.*, 235 Va. 485, 489, 369 S.E.2d 175, 177 (1988) (ruling that plaintiff's testimony as to when she thought her employer discharged her was "a matter necessarily outside the realm of her knowledge"); *Holland*, 217 Va. at 876, 234 S.E.2d at 67 (finding testimony that "Croson 'just cut right in front of' and 'swerved in front of' Holland are recitals of facts within [plaintiff's] knowledge . . . ."); *Baines*, 217 Va. at 105-06, 225 S.E.2d at 407 (finding that defendant's testimony that plaintiff was properly operating her vehicle was not a statement of opinion but a statement of fact "observed from her vantage point on the front seat near the driver.").

[24] 238 Va. 446, 384 S.E.2d 92 (1989).

[25] *Id.* at 450, 238 S.E.2d at 94 (emphasis in original).

[26] *Id.*

[27] *See Hoar v. Great E. Resort Mgmt., Inc.*, 256 Va. 374, 384, 506 S.E.2d 777, 784 (1998) (holding that *Massie* did not apply where the real party plaintiff did not testify); *Williams v. Commonwealth*, 234 Va. 168, 176, 360 S.E.2d 361, 366 (1987) (holding that "[n]o litigant is bound by contradicted testimony of a witness even though proffered by the litigant" as "[t]he jury must resolve any conflict between the two witnesses"); *Bd. of Supervisors of Henrico County v. Martin*, 3 Va. App. 139, 144, 348 S.E.2d 540, 542 (1986) (doctor's history taken from claimant cannot be used to determine how the accident occurred, but may be used by a different party to impeach or corroborate the claimant).

[28] 234 Va. 84, 360 S.E.2d 183 (1987).

[29] *Id.* at 94-95, 360 S.E.2d at 189 (citing *Burruss v. Suddith*, 187 Va. 473, 482, 47 S.E.2d 546, 550 (1948)).

[30] *TransiLift*, 234 Va. at 95, 360 S.E.2d at 189; *see generally* Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 12-17, at 688 (4th ed. 2003).

[31] *See Payne v. Gloeckl*, 236 Va. 356, 359, 374 S.E.2d 32, 34 (1988) (finding that plaintiff's testimony in car accident case concerning conduct of the driver of her vehicle was contradictory and equivocal at best in ruling that *Massie* did not apply); *see also Olsten of Richmond v. Leftwich*, 230 Va. 317, 321, 336 S.E.2d 893, 895 (1985) (holding that plaintiff's apparently conflicting testimony as to whether her claim arose out of her employment was equivocal); *Crew v. Nelson*, 188 Va. 108, 114, 49 S.E.2d 326, 328 (1948) (upholding jury verdict in favor of plaintiff because plaintiff's statements of fact were unclear and equivocal and did not show that she had no case against defendant); *Schoeni v. Preferred Mgmt. Serv.*, 43 Va. Cir. 1, 3 (City of Alexandria 1997) (stating that "*Massie* does not apply where a party's testimony is equivocal").

[32] 203 Va. 490, 125 S.E.2d 145 (1962).
[33] *Id.* at 493, 125 S.E.2d at 147.
[34] *Id.* at 493-94, 125 S.E.2d at 147.
[35] *Id.* at 494, 125 S.E.2d at 147.
[36] *See Henderson*, 255 Va. at 127, 495 S.E.2d at 499 (stating that "an adverse statement by a litigant that stands in isolation from the rest of his testimony concerning the fact at issue will not trigger the *Massie* preclusion"); *Norfolk & W. Ry. v. Chittum*, 251 Va. 408, 413, 468 S.E.2d 877, 880 (1996) (finding that plaintiff's damaging statement in one part of his trial testimony could not be viewed in isolation from his other testimony); *Tignor v. Va. Elec. & Power Co.*, 166 Va. 284, 290-91, 184 S.E. 234, 236 (1936) (refusing to adopt defendant's *Massie* argument based upon plaintiff's isolated testimony in cross-examination which conceivably established his contributory negligence in light of other conflicting testimony of plaintiff because the jury must decide which version was the truth as well as its impact); *Lowe's of Lynchburg No. 0082/Lowe's Home Ctrs, Inc. v. Andrews*, Record No. 0706-03-3, 2003 Va. App. LEXIS 425, at **4-5 (Va. Ct. App. Aug. 5, 2003) (rejecting application of *Massie* based on plaintiff's testimony as a whole explaining the facts concerning her back injury).
[37] *Travis*, 226 Va. at 4, 306 S.E.2d at 866.