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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170948

Rex Alan Littleton and Lyle Neal Littleton

v.

Alan S. Wells and Sharee B. Wells

Appeal from Chilton Circuit Court
(CV-16-900001)

THOMPSON, Presiding Judge.

Rex Alan Littleton ("Rex") and Lyle Neal Littleton ("Neal") appeal from a judgment of the Chilton Circuit Court ("the trial court") denying their claim of adverse possession of a disputed parcel of property ("the disputed property") in

Chilton County and establishing a boundary line between the Littletons' property and the property of Alan S. Wells ("Scotty") and Sharee B. Wells. The Wellses filed the initial complaint in this matter, requesting that the trial court determine the boundary line between their property and that of the Littletons. In turn, the Littletons filed a counterclaim alleging adverse possession of the disputed property.

The record indicates the following. On September 4, 2015, Georgia Blackmon sold approximately 82 acres of property to Scotty and Sharee Wells ("the Wells property"). Blackmon testified that that property had been in her family for at least three generations. To the west, the Wells property abuts two contiguous parcels of property, one parcel lying directly to the north of the other. The parcel to the north is owned by Neal; the parcel to the south is owned by Neal's brother, Rex. Those two parcels are hereinafter collectively referred to as "the Littleton property." The Littletons' parents had purchased the Littleton property in 1964, and each brother had been conveyed his individual parcel by their mother in July 2000, after their father's death in 1999.

Blackmon testified that she used to visit what became the Wells property "all the time" when she was a child, but since roughly 1989, when she was about 14 years old, she said, she had been to the Wells property "maybe twice." Blackmon said that she did not know the names of the two creeks on the Wells property and that she had never maintained any fences on that property. She also said that she was never made aware of a dispute over where the boundary line between the Wells property and the Littleton property was located.

Scotty testified that, before he purchased the land from Blackmon, he was made aware that there was a dispute regarding the ownership of a portion of the Wells property. He said that he spoke to Neal "to find where the property line was." Neal drove Scotty and his wife, Sharee, to a creek and pointed out three fence lines. Scotty described the three fence lines, saying one was on the Littleton property, a second one was "what [he] believe[d] is the original property line, which is on [Neal's] side of the creek," and a third fence line was on the Wellses' side of the creek. The disputed property is generally rectangular, with what the parties called a "bulge" in the middle of one side of the rectangle, running north and

south along the eastern edge of the Littleton property, which is also the western edge of the Wells property. Scotty described the disputed property as "just wildland." He said that it sloped "steep downward" and that there were no pastures or gardens on the property. As discussed more fully below, Rex disputed Scotty's characterization of the disputed property. Scotty also said that Neal did not give him a definitive answer about where the boundary line between the Wells property and the Littleton property lay. Scotty also acknowledged that he had not had a survey performed. He said that, instead, he was relying on a 1964 survey "and I don't know that it goes bad."

Ginger Moates, an employee in the Chilton County mapping office, testified that, in 2000, the mapping office found a "conflict" over the ownership of the disputed property.[1] She said that the owners of the property at that time would have

[1]It appears that, in 1999, Rex and Neal's mother had the property she and her husband owned surveyed so that she could divide it equally among her three surviving children. Only Rex's and Neal's parcels abut the Wells property or allegedly include the disputed property. After the survey was performed, a conflict between the survey and the land description in the deeds was discovered, and corrected deeds were prepared in 2000 pursuant to the survey.

been notified of the conflict, either via telephone or letter. Before the mapping office noted the conflict, Moates said, it considered the section or plat line to have been the boundary line, which would place the disputed property on the Wells property. However, Moates also testified that the plat lines or section lines were not to be considered specific property lines. She said that, on each of their maps, the office would include a disclaimer at the bottom reading: "'This is only for tax purposes only. Not for conveyance.'" The proper way to determine exact boundary lines, she said, was to have a survey performed.

Rex testified that he recalled that, as a child, he would carry buckets of nails to help his uncles and grandfather work on the fence that Scotty had described as the third fence line, i.e., the fence line that was situated the farthest east. Rex marked an aerial photograph with x's along a line imposed on the map to indicate the fence he was discussing. That photograph is contained in the record as an exhibit. Although an actual fence cannot be seen in the photograph, Rex explained that he knew the location of the fence based on roads that are visible in the photograph. He testified that

his father made the roads with a Caterpillar tractor, including one that ran from a barn, crossed a creek, and ended at the fence line on the eastern boundary of the disputed property. That road is clearly visible in the photograph. According to Rex, the road then turned north and ran along the fence. Rex said that his family had used the road to maintain the fence since 1964. He said that, since his father died in 1999, he and his brother, Neal, took turns "bush-hogging the road out" and cutting limbs from trees so that a pickup truck could be driven along the road. Before his father died, Rex said, he had helped maintain the road and the fence "off and on."

Rex said that, to his knowledge, no one ever confronted anyone in his family when they were working on the road or the easternmost fence. No one in the Littleton family ever asked permission to maintain the road or that fence. He testified that their work on the fence was done during daylight hours. If a tree fell across the fence at night, however, Rex said, they would repair the fence at night because they had cows "down there," i.e., on the disputed property. Photographs of the third fence line show trees that have grown around the

barbed wire. The fence has as many as seven strands of barbed wire. Some of the strands are old and rusty; some of the strands are much newer.

Rex said that the Littletons had always thought the disputed property was theirs. They treated it as their own and grazed livestock on the disputed property. Members of the Littleton family hunted on the disputed property every year, Rex said. The family also held "weenie-roasts" at the creek running through the disputed property, and the children played in the creek. At one time, Rex testified, the Littletons leased the disputed property to another individual who kept horses on it.

Rex testified that the Littleton family kept cows on the disputed property until the late 1990s. Neal testified that he agreed with Rex's testimony except for that last contention. Neal said that he had kept cows on the disputed property until about 2005 and that, at the time of the trial, he was keeping a mule on the property. Like Rex, Neal testified that he had always considered the third fence line, i.e., the easternmost fence line, to be the boundary line between the Littleton property and the Wells property.

The parties stipulated that Rex and Neal's uncle, Royce Littleton, would testify to the same information previously given by Rex and Neal regarding use of the disputed property and maintenance of the road and the third fence line. The Littletons offered to have the surveyor who performed the 2000 survey testify as an expert witness; however, the trial judge stated that he did not need him to explain the survey, which is included as an exhibit in the record. The Littletons also offered to have people who were not relatives testify as to how the disputed property had been used. However, that testimony, too, would be cumulative, and, after talking with the trial court, they opted not to present additional testimony.

On March 8, 2018, the trial court entered a judgment finding that the "line dividing the subject properties of the parties" was the quarter-quarter section line seen on maps and plats. The trial court stated: "Evidence of this fact was established, inter alia, by the testimony of Ms. Ginger Moates, a long-time employee of the mapping department of the Chilton County Tax Assessor's office." The trial court then set forth the description of the boundary line, specifying

> "[t]hat the dividing line [between the Littleton property and the Wells property] is found to be the Quarter Section/Quarter Section line running along the West side of the Wells' property (described as the West boundary line of the East half of the Southwest Quarter of Section 22, Township 23, Range 15, Chilton County) and the East side of the Littletons' property (Described as the East boundary line of the Northwest Quarter of the Southwest Quarter of Section 22, Township 23, Range 15, Chilton Count (Neal Littleton's parcel) and the East boundary line of the Southwest Quarter of the Southwest Quarter of Section 22, Township 23, Range 15, Chilton County (Rex Littleton's parcel))."

The trial court ordered the Wellses to have a survey conducted depicting what it called "the disputed line" and stated that it would then adopt that line as the true boundary line, which it did in a March 27, 2018, order. The trial court also specifically rejected the Littletons' claim of adverse possession.

Because an appeal lies only from a final judgment, Sexton v. Sexton, 42 So. 3d 1280, 1282 (Ala. Civ. App. 2010)("Generally, an appeal will lie only from a final judgment, and if there is not a final judgment then this court is without jurisdiction to hear the appeal."), we first consider the finality of the March 8, 2018, judgment. In that judgment the trial court instructed the Wellses to prepare and submit a survey, which the trial court would then adopt in an

order. In Frosolono v. Johnson, 198 So. 3d 514 (Ala. Civ. App. 2015), this court concluded that a judgment purporting to establish a boundary line between adjacent properties was interlocutory because it ordered a survey for the "'proper entering of a description in the judgment' in establishing a boundary ...." Id. at 517.

However, the circumstances in Frosolono were distinguishable from those in this case. In Frosolono, this court stated:

> "The trial court found the fence to be the boundary of the portion of the disputed land claimed by the Yateses and ordered a survey; however, the trial court stated: 'If the fence does not extend to the southern boundary of the [Yateses'] property, the survey description shall extend beyond the fence in the same direction until the boundary is reached.' Thus, the fence may not establish the entire boundary line determined by the trial court's order."

198 So. 3d at 517. In other words, the survey was required to establish the entire boundary line between the properties, and, therefore, there could be no final judgment until the survey was complete.

In the instant case, however, the survey is only intended to memorialize a boundary line that the trial court unequivocally established in the March 8, 2018, judgment. In

other words, the judgment established the boundary line that the survey is to include. We find this case to be more comparable to Stokes v. Hart, 273 Ala. 279, 139 So. 2d 300 (1962).

In Stokes, the appellees argued that the appeal was due to be dismissed because, they said, the judgment from which the appeal had been taken, which established a boundary line between adjacent properties, was not final. Our supreme court wrote:

> "There is no merit in this insistence. The decree fixes the boundary line between the lands of the complainants and the respondent as a certain section line. The fact that a surveyor was directed to make a survey to determine the exact location of the section line and to erect certain judicial landmarks at designated points does not infect the decree with interlocutory characteristics of the decree held insufficient to support an appeal in the case of Tanner v. Dobbins, 251 Ala. 392, 37 So. 2d 520 [(1948)]."

273 Ala. at 280, 139 So. 2d at 301. Tanner v. Dobbins, 251 Ala. 392, 37 So. 2d 520 (1948), upon which this court also relied in Frosolono, involved consideration of a judgment that did not fix the boundary line between the properties but, instead, indicated that the boundary would be fixed after a survey was made.

In this case, the trial court established the boundary line between the Littleton property and the Wells property was the quarter-quarter section line, and it meticulously described the location of the quarter-quarter section line. It is well settled that

> "section lines established by the United States government may not be relocated. Mims v. Alabama Power Co., 262 Ala. 121, 124, 77 So. 2d 648, 651 (1955); see also Sims v. Sims, 273 Ala. 103, 134 So. 2d 757 (1961) (government-established section lines may not be relocated by acts of the parties); and Upton v. Read, 256 Ala. 593, 594, 56 So. 2d 644, 645 (1952) (recognizing caselaw as establishing the proposition that 'no act of the parties can relocate the section line as established by government survey')."

Coley v. Fain, 20 So. 3d 824, 828 (Ala. Civ. App. 2009). Substantively, there was nothing further for the trial court to do. The March 27, 2018, "final order" simply adopted the survey, which was drawn to reflect the trial court's judgment, "as [depicting] the true, correct and accurate property and boundaries subject to dispute in this action" and said the survey "shall be attached to and made a part of this Final Order." The actual establishment of the boundary line was completed in the March 8, 2018, judgment. Accordingly, we

conclude that the March 8, 2018, judgment was a final judgment capable of supporting an appeal.

On March 22, 2018, the Littletons filed a timely motion to alter, amend, or vacate the judgment. That motion was denied by operation of law on June 20, 2018. The Littletons then filed a notice of appeal to this court on July 10, 2018. This court transferred the appeal to our supreme court for lack of subject-matter jurisdiction. Our supreme court transferred the appeal back to this court on November 2, 2018, pursuant to § 12-2-7(6).

On appeal, the Littletons challenge both the trial court's denial of their adverse-possession claim and its determination of the location of the boundary line between the Wells property and the Littleton property. At the trial, the parties presented both testimony and documentary evidence. The ore tenus rule applies to "disputed questions of fact," whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence. Born v. Clark, 662 So. 2d 669, 672 (Ala. 1995).

> "[W]hen we review a trial court's finding based on evidence the trial court received ore tenus, we do not reweigh the evidence. Mollohan v. Jelley, 925 So. 2d 207, 210 (Ala. Civ. App. 2005) ('"Where a

> trial court receives ore tenus evidence, ... [t]his court is not permitted to reweigh the evidence on appeal and substitute its judgment for that of the trial court."' (quoting Amaro v. Amaro, 843 So. 2d 787, 790-91 (Ala. Civ. App. 2002))). If the trial court's finding regarding an adverse-possession issue or a boundary-line issue is based on evidence it received ore tenus, we must affirm that finding if it is supported by credible evidence. See Bohanon v. Edwards, [970 So. 2d 777 (Ala. Civ. App. 2007)]; and Carr v. Rozelle, 521 So. 2d 26, 28 (Ala. 1988) ('"A judgment of the trial court establishing a boundary line between coterminous landowners need not be supported by a great preponderance of the evidence; the judgment should be affirmed if, under any reasonable aspect of the case, the decree is supported by credible evidence." Graham v. McKinney, 445 So. 2d 892, 894 (Ala. 1984).')."

Holifield v. Smith, 17 So. 3d 1173, 1179 (Ala. Civ. App. 2008).

The Littletons first argue that they presented uncontested evidence of each element required to prevail on a claim of adverse possession. Therefore, they say, the trial court's denial of that claim is plainly and palpably erroneous.

> "'Our supreme court has long recognized that a boundary-line dispute between coterminous landowners is subject to "'a unique set of requirements that is a hybrid of the elements of adverse possession by prescription and statutory adverse possession.'" See McCallister v. Jones, 432 So. 2d 489, 491 (Ala. 1983)

(quoting Kerlin v. Tensaw Land & Timber Co., 390 So. 2d 616, 618 (Ala. 1980)).

> "'"'In the past there has been some confusion in this area, but the basic requirements are ascertainable from the applicable case law. In a boundary dispute, the coterminous landowners may alter the boundary line between their tracts of land by agreement plus possession for ten years, or by adverse possession for ten years. See Reynolds v. Rutland, 365 So. 2d 656 (Ala. 1978); Carpenter v. Huffman, 294 Ala. 189, 314 So. 2d 65 (1975); Smith v. Brown, 282 Ala. 528, 213 So. 2d 374 (1968); Lay v. Phillips, 276 Ala. 273, 161 So. 2d 477 (1964); Duke v. Wimberly, 245 Ala. 639, 18 So. 2d 554 (1944); Smith v. Bachus, 201 Ala. 534, 78 So. 888 (1918). But see, Davis v. Grant, 173 Ala. 4, 55 So. 210 (1911). See also [Ala.] Code 1975, § 6-5-200(c). The rules governing this type of dispute are, in actuality, a form of statutory adverse possession. See [Ala.] Code 1975, § 6-5-200(c); Berry v. Guyton, 288 Ala. 475, 262 So. 2d 593 (1972).'"

"'McCallister, 432 So. 2d at 491 (quoting Kerlin, 390 So. 2d at 618-19). See also Wadkins v. Melton, 852 So. 2d 760, 764 (Ala. Civ. App. 2002). In any event, "[t]he burden rests upon the party asserting the adverse claim to prove actual, hostile, open, notorious,

> exclusive, and continuous possession for the statutory period, ... and such proof must be by clear and convincing evidence." Tidwell v. Strickler, 457 So. 2d 365, 368 (Ala. 1984); see also Cooper v. Cate, 591 So. 2d 68, 70 (Ala. 1991).'
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> "Gilbreath v. Harbour, 24 So. 3d 473, 478 (Ala. Civ. App. 2009)."

Parker v. Rhoades, 225 So. 3d 642, 647 (Ala. Civ. App. 2016).

> "'To fulfill the requirement of "exclusivity of possession," a party must assert possessory rights distinct from those of others. The rule is generally stated that "'[t]wo persons cannot hold the same property adversely to each other at the same time.'" Beason v. Bowlin, 274 Ala. 450, 454, 149 So. 2d 283, 286 (1962), quoting Stiff v. Cobb, 126 Ala. 381, 386, 28 So. 402, 404 (1899). Exclusivity of possession "is generally demonstrated by acts that comport with ownership." Brown v. Alabama Great Southern R. [Co.], 544 So. 2d 926, 931 (Ala. 1989). These are "acts as would ordinarily be performed by the true owner in appropriating the land or its avails to his own use, and in preventing others from the use of it as far as reasonably practicable." Goodson v. Brothers, 111 Ala. 589, 596, 20 So. 443, 445 (1896).'
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> "Sparks v. Byrd, 562 So. 2d 211, 215 (Ala. 1990)."

Parker, 225 So. 3d at 648.

In the judgment, the trial court did not make any factual findings with respect to the Littletons' adverse-possession

claim. It simply stated that it had considered the evidence and found in favor of the Wellses. "It is well settled that, in the absence of specific findings of fact, an appellate court will presume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous. Baker v. Baker, 862 So. 2d 659, 662 (Ala. Civ. App. 2003); see also Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996)." Steele v. O'Neal, 87 So. 3d 559, 569 (Ala. Civ. App. 2011).

As the parties asserting adverse possession of the disputed property, the Littletons had the burden to prove that claim by clear and convincing evidence. Parker, supra. Although Rex and Neal did not obtain the Littleton property until their mother conveyed it to them in 2000, it is well settled that a party seeking to establish ownership by adverse possession "'can "tack" his period of possession onto that of a prior adverse claimant in order to establish a continuous stream of adverse possession for the required time span.' Sparks [v. Byrd] , 562 So. 2d [211] at 216 [(Ala. 1990)]." Water Works & Sanitary Sewer Bd. of City of Montgomery v. Parks, 977 So. 2d 440, 445 n. 2 (Ala. 2007).

Other than Scotty's "belief" that the second fence line was the actual boundary, the Wellses' primary evidence supporting their contention that the Littletons were not in adverse possession of the disputed property was that that area was "grown up." The Littletons testified that they continued to use the disputed property and maintained both the road and the third fence line. Parties who obtain property through adverse possession are not required to develop or cultivate that property. For example, in Bergen v. Dixon, 527 So. 2d 1274, 1278-79 (Ala. 1988), our supreme court affirmed a judgment finding that the defendants in that case had demonstrated open, notorious, exclusive, and hostile possession of unimproved timberland when they had selectively cut timber, planted trees, maintained fire lanes, and marked boundaries. In considering whether the property at issue in Bergen had been adversely possessed, our supreme court posed the question: "'[W]hat acts would ordinarily be performed by the true owners of what the record shows to be rural, wooded land'" 527 So. 2d at 1278 (quoting Hurt v. Given, 445 So. 2d 549, 551 (Ala. 1983)). The evidence presented by the Littletons tends to answer that question.

The undisputed evidence indicates that, since 1964, the Littleton family has treated the disputed property as their own. They never sought permission from Blackmon or her predecessors to use the disputed property. Blackmon's testimony was that she had visited the disputed property only two times since 1989, and she presented no evidence that would challenge the Littletons' contention that they had used the disputed property continuously during the years her family had owned the Wells property.

The uncontradicted testimony demonstrated that the Littletons openly used the disputed property for recreation like hunting, swimming in the creek, and family gatherings. Their livestock grazed on the disputed property, and they had leased the property to a third party, who kept horses there. The Littletons sought no permission to engage in those activities. Leasing of the property to another certainly constitutes evidence of exclusivity of possession. See Parker, supra. Neal was keeping a mule on the property at the time of the trial. Neal and Rex both testified that they had maintained the third fence line and the road leading to it two or three times a year since their father died in 1999.

Photographic evidence of the fence known as the third fence line, that is, the eastern boundary of the disputed property, indicates that trees had grown up around the fence and that old, weathered strands of barbed wire were part of that fence, both of which are indicia that the fence had been present for a long time. Rex testified that he recalled going out to the fence with his uncles and grandfather in the 1960s, carrying buckets of nails for them as they performed maintenance on the fence. Photographs also depicted newer strands of barbed wire on the fence, indicating continuous maintenance. Photographic evidence also clearly shows a road leading from a barn on Rex's property to the third fence line. The road does not go beyond that line, indicating that the Littletons considered the third fence line to be the eastern boundary of their property.

The Littletons' evidence indicates that they had been in actual, hostile, open, notorious, exclusive, and continuous possession of the disputed property for more than 50 years--far longer than the 10 years required to have adversely possessed the disputed property. The only evidence the Wellses presented that could be construed as a challenge to

the Littletons' evidence was Scotty's testimony that it was his "belief" that the second fence line was the actual boundary line between the Littleton property and the Wells property. Indeed, Scotty's testimony began with the acknowledgment that he did not know where the actual boundary line lies and that that is why he first approached the Littletons about the matter. Additionally, the trial court found that Moates's testimony "established" that the boundary line was a section line. However, her unequivocal testimony was that section lines were not boundary lines. Although Moates said that there was a conflict over the boundary between the Littleton property and the Wells property, she gave no evidence regarding the location of the actual boundary. More important, she gave no testimony to refute the Littletons' claim of adverse possession.

After considering the record before us, we conclude that there is no factual basis to support a determination that the Littletons had not been in actual, hostile, open, notorious, exclusive, and continuous possession of the disputed property for more than ten years. Therefore, the trial court's judgment denying the adverse-possession claim is clearly

erroneous. Because we conclude that the trial court erred in denying the claim of adverse possession, we need not reach the issue of whether the trial court erred in determining that a section line was the actual boundary line between the Littleton property and the Wells property.

For the reasons set forth above, the judgment is reversed, and the cause is remanded to the trial court for it to enter a judgment establishing a new boundary line consistent with this opinion.

REVERSED AND REMANDED.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.