Released: May 2, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200563

Robert Clyde Robinson

v.

Harrigan Timberlands Limited Partnership, Scotch Land Management, LLC, Fulton Logging Company, LLC, and Blacksheep Woodlands, LLC

Appeal from Clarke Circuit Court
(CV-17-900039)

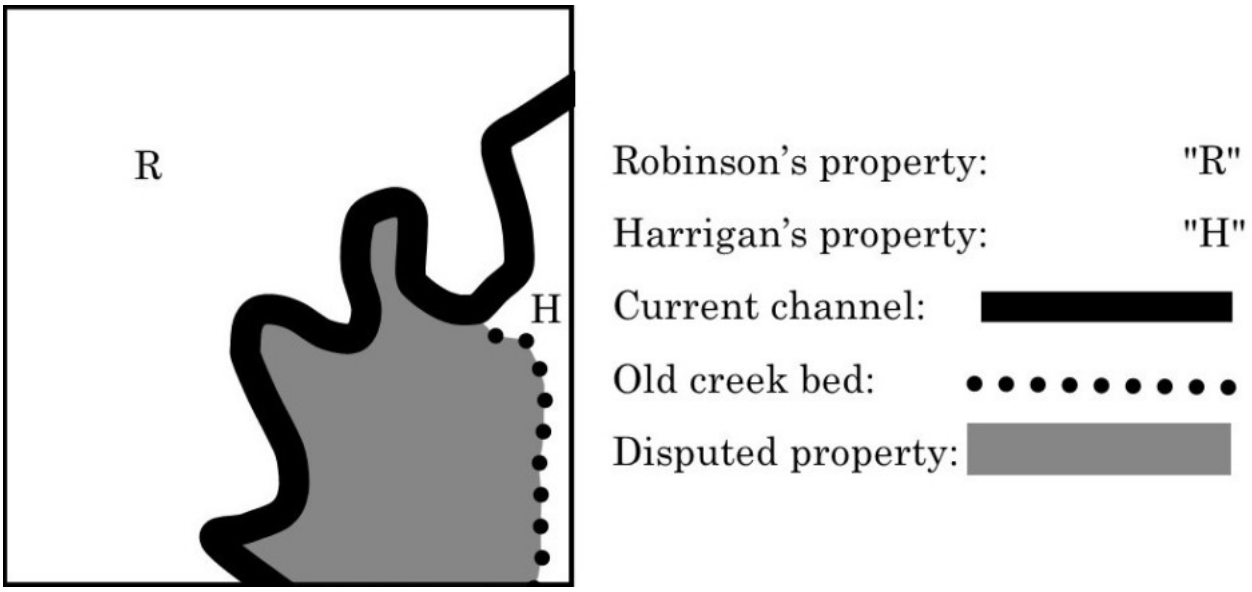
PARKER, Chief Justice.

Robert Clyde Robinson sued several timber companies for cutting timber on land, located between two creek beds, that Robinson alleged

was his. The Clarke Circuit Court entered a summary judgment in favor of the timber companies. Because Robinson failed to submit substantial evidence that he owned the land, we affirm the judgment.

I. Facts

Robinson owned a parcel of property adjacent to a parcel owned by Harrigan Timberlands Limited Partnership ("Harrigan"). Robinson owned his parcel under a 2012 deed conveying to him "[a]ll the Northwest Quarter of the Northeast Quarter West of Bassetts Creek in Section 8, Township 8 North, Range 4 East, containing 39 acres." (Emphasis added.) Harrigan owned its parcel under a 1998 deed conveying "[a]ll of E 1/2 which lies East of Bassetts Creek." (Emphasis added.) Under both deeds, the boundary line between Robinson's parcel and Harrigan's parcel was simply "Bassetts Creek." As shown on the map below, east of the current channel of Bassetts Creek was an old creek bed that Robinson alleged was the "Bassetts Creek" referred to in the deeds. The land between the current channel and the old creek bed ("the disputed property") was approximately 12.5 acres.



In September 2016, Harrigan cut and sold timber off the disputed property. Robinson sued Harrigan and four other companies that Robinson alleged were involved in cutting and removing the timber: Scotch Land Management, LLC; Fulton Logging Company, LLC; Blacksheep Woodlands, LLC (these three companies, collectively with Harrigan, are referred to as "the timber companies"); and Todd Overstreet d/b/a Overstreet Timber Company.

The timber companies moved for a summary judgment. After numerous responses and replies between the parties, the circuit court granted the motion. Robinson moved to reconsider the summary

judgment,[1] and the court denied the motion. Robinson later moved to dismiss Overstreet, and the circuit court dismissed him. Robinson appeals the summary judgment in favor of the timber companies.

II. Standard of Review

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can

---

[1]Robinson styled the motion as a Rule 59(e), Ala. R. Civ. P., motion to vacate the summary-judgment order. However, Rule 59(e) applies only to final judgments. Ex parte Troutman Sanders, LLP, 866 So. 2d 547, 549-50 (Ala. 2003). Because the summary-judgment order did not apply to Robinson's claim against Overstreet and he remained a party in the case, the order was interlocutory. Thus, Robinson's motion was in effect a motion to reconsider the order, not a Rule 59(e) motion.

> reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

III. Analysis

In Robinson's complaint, he asserted five claims against the timber companies: (1) trespass to land, (2) wrongful cutting of timber under § 35-14-1, Ala. Code 1975,[2] (3) wrongful cutting of timber under the common law, (4) conversion of timber under § 9-13-62, and (5) negligence in failing to properly ascertain boundary lines before cutting and removing the timber, which was essentially a negligent-trespass claim, Eustace v. Wilbourn, [Ms. 2190596, Sept. 25, 2020] ___ So. 3d ___ (Ala. Civ. App. 2020). Each of these claims was premised on Robinson's legal title to, or exclusive possession of, the disputed property and the timber on it. See Harding v. Bethesda Reg'l Cancer Treatment Ctr., 551 So. 2d 299, 301

[2]The complaint cited § 35-14-2, which applies to "fruit tree[s] or ornamental tree[s], or shrub[s], bush[es], or plant[s]." That citation appears to have been a scrivener's error, because the parties proceeded as if the claim were under § 35-14-1, which applies to "cypress, pecan, oak, pine, cedar, poplar, walnut, hickory, or wild cherry tree[s], or sapling[s]." § 35-14-1(a).

(Ala. 1989) ("Intrusion upon land possessed by a plaintiff, without his consent, is an essential element of trespass [to land]."); Peterson v. Hamilton, 286 Ala. 49, 52, 237 So. 2d 100, 102 (1970) ("To be entitled to recovery of the statutory penalty [under the predecessor to § 35-14-1], the plaintiff must have the legal title to the property at the time of the trespass."); Pate v. Bruner, 243 Ala. 648, 11 So. 2d 356 (1943) (recognizing landowners' common-law cause of action for conversion of timber); § 9-13-62 ("Any person or entity who damages, destroys, cuts, or removes timber ... not owned by that person or without the authority of the legal owner ... shall be ... liable to the owner for double the fair market value of the timber …." (emphasis added)); Drummond Co. v. Walter Indus., Inc., 962 So. 2d 753, 782 (Ala. 2006) ("'Absent [a] right of possession [of property], there can be no action based on [intentional or negligent] trespass.'" (quoting Avery v. Geneva Cnty., 567 So. 2d 282, 289 (Ala. 1990))).

In their summary-judgment motion, the timber companies argued that Robinson could not prove that he owned the disputed property because, they asserted, he did not have evidence that the "Bassetts

Creek" referred to in the deeds was not the current channel of the creek. Specifically, the timber companies asserted that Robinson lacked evidence that Bassetts Creek had originally followed the old creek bed and that its course had shifted to the current channel by avulsion. On appeal, Robinson argues that the timber companies failed to make a prima facie showing on the issue of ownership of the disputed land. And even if they made such a showing, he contends, he responded with substantial evidence that he owned the disputed land.

A. Avulsion versus accretion

This case involves two ways that a river or a stream can change course: avulsion and accretion. Avulsion is "[a] sudden removal of land caused by change in a river's course or by flood." Black's Law Dictionary 169 (11th ed. 2019). By contrast, accretion is "[t]he gradual accumulation of land by natural forces, esp[ecially] as alluvium is added to land situated on the bank of a river …." Id. at 26. (Alluvium is "[a]n accumulation of soil, clay, or other material deposited by water." Id. at 97.)

The legal rules regarding avulsion and accretion have ancient roots. Under the English common law,

> "if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, he shall have what the river has left in any other place, as a recompence for this sudden loss."

2 William Blackstone, Commentaries on the Laws of England *262.

Almost a century ago, this Court restated the common-law rule as it stands today:

> "'Where, by a sudden and violent or artificial change [(avulsion)], the channel or shore on which riparian or littoral lands are bounded is shifted, the boundaries of such lands are unaffected, and remain in their original position; but where the change is gradual and imperceptible, whether caused by accretion, reliction, or encroachment, the boundaries shift with the shifting of the channel or shore. If the land of the riparian proprietor is increased he is not accountable for the gain, and if it is diminished he has no recourse for the loss. ... It is only when the change in the stream is sudden, violent, or visible that the title remains the same. It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. The test as to what is gradual and imperceptible in the sense of the rule is that, although the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.'"

Greenfield v. Powell, 218 Ala. 397, 399-400, 118 So. 556, 558 (1928) (quoting 9 C.J. Boundaries § 82 (1916)).

Under this common-law rule, if Bassetts Creek either is in its original location or moved from the old creek bed by accretion, then Harrigan owns the disputed property. Robinson owns the disputed property only if Bassetts Creek moved from the old creek bed to its current channel by avulsion.

B. Timber companies' prima facie showing

Robinson first argues that the timber companies failed to meet their burden, as the summary-judgment movants, to make a prima facie showing on the issue of ownership of the disputed property. As explained above, in this case ownership was an essential element or foundation of all of Robinson's claims. "[G]enerally, a plaintiff bears the burden of proving [at trial] the essential elements of his claims ...." Ex parte Blue Cross & Blue Shield of Alabama, 773 So. 2d 475, 478 (Ala. 2000). Thus, if the case had gone to trial, Robinson would have had the burden of persuasion on the issue of ownership. On a motion for a summary

judgment, when the burden of persuasion at trial would be on the nonmovant (here, Robinson), the movant (the timber companies) may make the required prima facie showing "'either by submitting affirmative evidence that negates an essential element in the nonmovant's claim or ... by demonstrating ... that the nonmovant's evidence is insufficient to establish an essential element of the nonmovant's claim ....'" Ex parte General Motors Corp., 769 So. 2d 903, 909 (Ala. 1999) (quoting Berner v. Caldwell, 543 So. 2d 686, 691 (Ala. 1989) (Houston, J., concurring specially)) (emphasis omitted and emphasis added). As noted above, Robinson's ownership depended on his establishing that Bassetts Creek moved, and that it moved by avulsion. Thus, to make their prima facie showing, the timber companies asserted that Robinson could not prove his ownership because he did not have evidence that Bassetts Creek moved by avulsion.

Robinson contends, however, that the timber companies had to submit evidence of accretion. But he misperceives the timber companies' burden. Because ownership was essential to Robinson's claims, as the plaintiff he would have had the burden of persuasion at trial on this

issue. Thus, the timber companies could meet their summary-judgment burden by pointing out how he lacked evidence of ownership. See General Motors, 769 So. 2d at 909. As one commentator has explained:

> "A defendant who, by motion for summary judgment, attacks the merits of a plaintiff's prima facie case does, of course, bear the initial responsibility of informing the [trial] court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any,' [Rule 56(c)(3), Ala. R. Civ. P.,] which it believes demonstrate the absence of a genuine issue of material fact.
>
> "'That 'initial responsibility' is not a 'burden of proof' in the sense that we otherwise understand that term. A defendant who by motion for summary judgment asserts the insufficiency of a plaintiff's prima facie case will, at trial, have no burden of proof on any element of that prima facie case and, consequently, has none upon motion for summary judgment. Rule 56 imposes this 'initial responsibility' upon a defendant whose motion for summary judgment asserts the insufficiency of a plaintiff's prima facie case not because he bears any burden of proof as to the material issues of his adversary's case, but because requiring such a showing imposes costs of preparation upon defendants which will discourage them from interposing motions for summary judgment routinely and frivolously."

Joseph L. Lester, Alabama Evidence § 3:21, at 188 (2021). Thus, contrary to Robinson's assertion, the timber companies did not have to submit evidence of accretion. Indeed, Robinson's argument would improperly

place on the timber companies a burden to affirmatively disprove that he owned the disputed property.

Robinson also contends that the timber companies failed to make a prima facie showing because, he asserts, they relied on a presumption in favor of accretion (rather than avulsion) that has not been recognized in Alabama. Robinson is correct that Alabama courts have never adopted such a presumption. However, such a presumption was not necessary to the timber companies' case. An evidentiary presumption allocates the burden of production and/or persuasion to a party that would not ordinarily bear it. See Rule 301(b), Ala. R. Evid.[3] Here, then, as explained

---

[3]Rule 301(b) provides:

"Every rebuttable presumption is either:

> "(1) A presumption that affects the burden of producing evidence by requiring the trier of fact to assume the existence of the presumed fact, unless evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or

above, because Robinson would have borne the burden of persuasion at trial, upon the timber companies' prima facie showing, Robinson would also bear the ultimate burden of production at the summary-judgment stage. Thus, Robinson already bore the ultimate burden of production as to all facts necessary to demonstrating his ownership, including that Bassetts Creek moved by avulsion. Therefore, a presumption in favor of accretion was not necessary to impose on Robinson a burden of production to show avulsion. Accordingly, such a presumption would not have affected the burdens in this case, and we do not decide whether to adopt such a presumption.

> "(2) A presumption affecting the burden of proof by imposing upon the party against whom it operates the burden of proving the nonexistence of the presumed fact."

Rule 301(b)(1) embodies the "Thayer-Wigmore" view that a presumption reallocates only the burden of production, or more appropriately, the risk of nonproduction, to a party that does not bear the ultimate burden of persuasion. Rule 301(b)(2) accommodates the "Morgan" view that a presumption reallocates both the burden of production and the burden of persuasion. See generally Joseph L. Lester, Alabama Evidence § 3:5, at 165-66 (2021).

For these reasons, the timber companies successfully made a prima facie showing that Robinson could not prove that he owned the disputed property.

C. Robinson's evidence of ownership

The timber companies' prima facie showing triggered Robinson's summary-judgment burden to submit substantial evidence that he owned the disputed property. To meet this burden, he had to submit substantial evidence (1) that Bassetts Creek had moved from the old creek bed to its current location and (2) that it had done so by avulsion. Robinson points to six pieces of evidence that he submitted.

First, Robinson relies on his 2012 deed. The deed's quantity designation stated that Robinson's parcel contained 39 acres, which would have been true only if Bassetts Creek were located at the old creek bed. However, although the quantity designation suggests that Bassetts Creek moved, it does not indicate that the creek moved by avulsion.

Next, Robinson relies on a survey of his property conducted by Fleming Engineering ("the Fleming survey"), which shows that the current channel of Bassetts Creek "juts out almost perpendicular to the

original creek bed." Robinson's brief, pp. 26-27. Robinson argues that a fact-finder could infer from the angle at which the current channel leaves the old creek bed that the current channel was created in a sudden, violent, or visible way. However, for a fact-finder to make an inference that requires knowledge beyond that of the ordinary layperson, the inference must be supported by expert testimony. See 32 C.J.S. Evidence § 915 (2020) ("[E]xpert testimony is required if the issue is beyond the area of common knowledge or ken of the average layperson or trier of fact. In other words, expert testimony is required on those matters involving ... specialized knowledge ...." (footnotes omitted)); cf. Carnival Cruise Lines, Inc. v. Snoddy, 457 So. 2d 379, 383 (Ala. 1984) ("Where the fact sought to be proved is fairly and reasonably inferable from competent evidence adduced at trial, and that inference lies within the common knowledge of the factfinder, then that evidence is admissible without the aid of expert testimony." (emphasis added)). Here, Robinson's proposed inference, that a near-perpendicular turn in a watercourse was caused by avulsion, is not within the ken of the average layperson. Cf. Tin Cup Cnty. Water and/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.,

347 Mont. 468, 477-82, 200 P.3d 60, 68-70 (2008) (holding that summary-judgment nonmovant's proposed inference, that contractor's failure to fully grout around dam's new outlet conduit caused dam leak, was beyond common experience and required expert testimony because inference required understanding of, among other things, hydrology; concluding that nonmovant failed to submit substantial evidence of causation). See generally 31A Am. Jur. 2d Expert & Opinion Evidence § 254 (2012) ("Nonexpert witnesses cannot express opinions as to the cause of a particular ... condition where expert or special knowledge is essential to the formation of an intelligent opinion ...." (emphasis added)). And Robinson did not submit any expert testimony to support the inference. Instead, he cites Nesbitt v. Wolfiel, 100 Idaho 396, 598 P.2d 1046 (Idaho Sup. Ct. 1979), in which the Supreme Court of Idaho held that evidence that a river "literally cut a new channel to the north" was substantial evidence of avulsion. 100 Idaho at 399, 598 P.2d at 1049. But nothing in Nesbitt indicates that the Nesbitt court based its reasoning on a sudden bend or turn in the river. Thus, Nesbitt does not support Robinson's

proposed inference. Therefore, the Fleming survey was not substantial evidence of avulsion.

Robinson also relies on an affidavit of his expert witness, Jeffery N. Lucas. Lucas testified that the Fleming survey was "an accurate representation of the conditions of the property on the ground relative to the property boundaries and creek locations," and he confirmed that Robinson's deed conveyed 39 acres to Robinson. But Lucas did not opine as to how Bassetts Creek moved. Thus, Lucas's testimony was not substantial evidence of avulsion.

Next, Robinson points to his deposition testimony that Ralph McVay, Harrigan's surveyor, told him that Bassetts Creek moved in 1927 or 1929.[4] Robinson appears to assume that, if the time frame in which a

[4]Although Robinson's testimony regarding what McVay told him may have been inadmissible hearsay, the timber companies did not move to strike that testimony. Accordingly, the circuit court could have considered it. See Kelly v. Panther Creek Plantation, LLC, 934 So. 2d 1049, 1053 (Ala. 2006) ("It is an established principle of appellate procedure ... that the trial court can consider otherwise inadmissible evidence submitted ... in opposition to[] a motion for a summary judgment if the party against whom the evidence is offered does not object to the evidence by moving to strike it.").

creek moved is identifiable, then it must have moved by avulsion. But even if that assumption were true, Robinson did not bring this testimony to the circuit court's attention until he filed his motion to reconsider the summary judgment, and the motion did not explain Robinson's belated submission of the testimony.[5] A trial court has discretion not to consider

---

[5]In Robinson's earlier summary-judgment surreply, he asserted that, "according to [Robinson's] deposition, an avulsive event occurred before 1930." But Robinson did not cite the portion of his deposition, regarding McVay's statement, that he later relied on in his motion to reconsider. Thus, the circuit court was not required to consider McVay's statement in ruling on the motion for a summary judgment, and Robinson's postdecision reliance on McVay's statement in his motion to reconsider came too late. See Rule 56(c)(1), Ala. R. Civ. P. ("The [movant's] narrative summary shall be supported by specific references to ... portions of discovery materials .... If the opposing party contends that material facts are in dispute, that party shall file and serve a statement in opposition supported in the same manner as is provided herein ...."); Horn v. Fadal Machining Ctrs., LLC, 972 So. 2d 63, 69-70 (Ala. 2007) (holding that Rule 56(c)(1), which applies to both summary-judgment motions and responses, requires specific references to portions of record demonstrating whether an issue of fact exists); 10A Arthur R. Wright et al., Federal Practice and Procedure § 2721 (4th ed. 2016) ("[A trial] court is required only to consider the materials cited by the parties .... [A] party using materials either to assert that a fact cannot be or that it is genuinely disputed must cite to 'particular parts of the materials' supporting its position and should not simply attach voluminous documents without specific explanation." (quoting Rule 56(c)(1)(A), Fed. R. Civ. P.; footnote omitted)).

evidence submitted for the first time with a motion to reconsider an interlocutory summary judgment. Bon Harbor, LLC v. United Bank, 53 So. 3d 82, 93-94 (Ala. 2010). Accordingly, the circuit court was free to disregard the testimony about McVay's statement. And because the court did not state that it considered the testimony when the court denied the motion to reconsider, we presume that the court disregarded the testimony. Id. (inferring that circuit court did not consider new evidence that could have been submitted before entry of interlocutory summary judgment).

In addition, Robinson points to a news article published in the Clarke County Democrat in January 1926, which reported heavy flooding in Clarke County, particularly along the Tombigbee River. The article makes no mention of Bassetts Creek. However, Robinson argues that the article corroborates his testimony that McVay told him that Bassetts Creek moved in 1927 or 1929. But we presume that the circuit court properly did not consider McVay's statement, as explained above. Further, the 1926 article describing flooding did not logically corroborate

McVay's statement that Bassetts Creek moved by avulsion at least a year later.

Finally, Robinson points to his deposition testimony that, when he was about 12 years old, his grandfather showed him where the boundaries of his parcel were and that the boundary line his grandfather showed him was the old creek bed.[6] Again, that testimony indicated that Bassetts Creek moved, but not that it moved by avulsion. Further, Robinson did not bring his grandfather's statement to the circuit court's attention until he filed his motion to reconsider. Thus, the circuit court was free to disregard it. See Bon Harbor, supra.

For these reasons, Robinson failed to present substantial evidence that Bassetts Creek moved to its current channel by avulsion. Accordingly, Robinson did not meet his burden in responding to the

[6]Like Robinson's testimony about what McVay told him, Robinson's testimony about what his grandfather told him may have been inadmissible hearsay. However, because the timber companies did not move to strike that testimony, the circuit court could have considered it. Kelly, supra.

timber companies' motion for a summary judgment, and the judgment must be affirmed.[7]

IV. Conclusion

The timber companies made a prima facie showing that Robinson could not prove that he owned the disputed property, thus shifting the burden to Robinson to submit substantial evidence that he owned the disputed property. To meet that burden, Robinson had to submit substantial evidence that Bassetts Creek moved from the old creek bed by avulsion, but he failed to do so. Accordingly, we affirm the summary judgment.

AFFIRMED.

Wise, Stewart, and Mitchell, JJ., concur.

Bolin, Shaw, Bryan, Sellers, and Mendheim, JJ., concur in the result.

---

[7]The timber companies argue, as an alternative basis for affirmance, that the circuit court properly entered the summary judgment on the ground that the timber companies adversely possessed the disputed property. Because the creek-location issue discussed above is a dispositive basis for affirming the judgment, we pretermit discussion of the timber companies' alternative adverse-possession argument.