REL: December 11, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190587

Randy Henson

v.

Edison A. Thomas and Tammy Thomas

Appeal from Talladega Circuit Court
(CV-17-900056)

MOORE, Judge.

Randy Henson appeals from a judgment entered by the Talladega Circuit Court in favor of Edison A. Thomas and Tammy Thomas. We affirm in part and reverse in part.

Procedural History

On February 28, 2017, the Thomases filed a complaint against Henson, Rex Hartley, and Jerry Strickland. The trial court ultimately disposed of the Thomases' claims against Hartley and Strickland in favor of those defendants, and the Thomases have not appealed those rulings;[1] therefore, we pretermit further discussion of the Thomases' claims against Hartley and Strickland. The Thomases asserted claims of trespass, destruction of trees in violation of § 35-14-1 and § 35-14-2, Ala. Code 1975, and malicious prosecution. The Thomases attached to their complaint a copy of a previous judgment entered by the trial court on May 25, 2016 ("the 2016 judgment"), concerning the boundary between the property owned by the Thomases and the property owned by Henson. Henson filed

[1]The trial court found in favor of Hartley and Strickland on the Thomases' trespass claim and the Thomases"claim alleging destruction of trees in violation of § 35-14-2, Ala. Code 1975; dismissed the Thomases' claim against Hartley and Strickland alleging destruction of trees in violation of § 35-14-1, Ala. Code 1975; and entered a judgment as a matter of law in favor of Hartley and Strickland on the Thomases' malicious-prosecution claim against those defendants.

a motion to dismiss on March 31, 2017. Henson's motion to dismiss was denied on May 2, 2017.

On June 6, 2017, Henson answered the complaint; he also asserted counterclaims against the Thomases, alleging trespass and interference with the use of his property. On June 26, 2017, the Thomases filed a reply to the counterclaim. On July 25, 2017, Henson moved the trial court to order a survey and to establish markers reflecting the boundary between his property and that of the Thomases.

On September 5, 2017, the Thomases filed an amended complaint requesting a judgment extinguishing a certain easement in favor of Henson and requesting that the trial court quiet title in their favor as to the property designated in that easement. Henson answered the first amended complaint the next day.

On January 24, 2018, the trial court entered an order directing Derrol Luker, a surveyor, to locate and mark the boundary between the Thomases' property and Henson's property as determined in the 2016 judgment. On May 16, 2018, Henson filed an objection to Luker's survey.

After a hearing, the trial court overruled that objection on September 24, 2018.

On May 13, 2019, Henson filed an amended counterclaim in which he alleged that the Thomases had cut his fence during the pendency of this action, which, he asserted, had allowed 16 cows to escape from his property. The Thomases filed a reply to the amended counterclaim on June 7, 2019.

After a trial, the trial court entered a judgment on January 2, 2020, holding that "res judicata lies in this action and the Court is without authority to change [the boundary line determined in the 2016 judgment] or [to] otherwise make a finding contrary to the boundary line as previously established [in the 2016 judgment]"; the trial court also found in favor of the Thomases on their claims of trespass, destruction of trees, and malicious prosecution against Henson, awarding the Thomases damages totaling $18,021. The trial court extinguished the easement that had existed in favor of Henson, specifically finding that "the purpose of said easement has ceased to exist as ... Henson has adequate access to his property by alternate ways." With regard to Henson's counterclaims, the

trial court found in favor of Henson and awarded him a judgment against the Thomases in the amount of $5,000. On January 25, 2020, Henson filed a postjudgment motion; that motion was denied by operation of law on April 24, 2020. Henson filed his notice of appeal to this court on April 26, 2020. This court transferred the appeal to the Alabama Supreme Court based on this court's lack of appellate jurisdiction; that court subsequently transferred the appeal back to this court, pursuant to § 12-2-7, Ala. Code 1975.

Standard of Review

> "The trial court's judgment followed a bench trial, at which the court heard ore tenus evidence. ' "When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error." ' Smith v. Muchia, 854 So. 2d 85, 92 (Ala. 2003) (quoting Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996)).
>
> > " ' "The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses." Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). The rule applies to "disputed issues 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). The ore tenus standard of review provides:
>
> > "'"[W]here the evidence has been [presented] ore tenus, a presumption of correctness attends the trial court's conclusion on issues of fact, and this Court will not disturb the trial court's conclusion unless it is clearly erroneous and against the great weight of the evidence, but will affirm the judgment if, under any reasonable aspect, it is supported by credible evidence."'
>
> " Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000) (quoting Raidt v. Crane, 342 So. 2d 358, 360 (Ala. 1977)). However, 'that presumption [of correctness] has no application when the trial court is shown to have improperly applied the law to the facts.' Ex parte Board of Zoning Adjustment of Mobile, 636 So. 2d 415, 417 (Ala. 1994)."

Yeager v. Lucy, 998 So. 2d 460, 462-63 (Ala. 2008).

Discussion

I.

On appeal, Henson first argues that the trial court erred in determining, locating, and marking the boundary line between his property and the property of the Thomases. We initially note that the trial court held that, because the doctrine of res judicata applied, it was

unable to alter the location of the boundary line as determined in the 2016 judgment.

In the present case, the trial court entered an order directing Luker, a surveyor, to mark the boundary line between the two properties as was determined in the 2016 judgment. In the 2016 judgment, the trial court determined that the boundary line between the Thomases' property and Henson's property "is the actual survey line" depicted on a survey of the properties conducted by Guy S. Johnson in 1974. The trial court also determined in the 2016 judgment that the "true Northeast corner of the Northeast Quarter of the Southwest Quarter of Section 36, Township 17 South, Range 7 East" ("the northeast corner"), which is used to determine the location of the Johnson survey line, "is located by the monument currently in place as shown by a survey" conducted by Bobby Glenn Bailey. Finally, the trial court determined in the 2016 judgment that the "round concrete property marker" marking the northeast corner was "designated on the Johnson and the Bailey surveys." Despite those holdings by the trial court in the 2016 judgment, from which neither Henson nor the Thomases appealed, Henson now argues that Luker

should have used a different location for the northeast corner than the monument reflected in the Bailey survey when marking the boundary line between the parties' properties. Henson's argument as to this issue appears to challenge the trial court's determination in the 2016 judgment as to the location of the boundary line between the parties' properties, and he has presented no argument, supported by relevant legal authority, explaining why the trial court's application of the doctrine of res judicata to preclude this issue was erroneous. See White Sands Grp., L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008). ("Rule 28(a)(10)[, Ala. R. App. P.,] requires that arguments in briefs contain discussions of facts and relevant legal authorities that support the party's position. If they do not, the arguments are waived."). Therefore, we cannot conclude that the trial court erred as to this issue.

II.

Henson next argues that the trial court erred in awarding the Thomases damages on their trespass and destruction-of-trees claims. We note, however, that Henson has failed to cite any law in support of his argument.

> "Rule 28(a)(10)[, Ala. R. App. P.,] requires that arguments in briefs contain discussions of facts and relevant legal authorities that support the party's position. If they do not, the arguments are waived. Moore v. Prudential Residential Servs. Ltd. P'ship, 849 So. 2d 914, 923 (Ala. 2002); Arrington v. Mathis, 929 So. 2d 468, 470 n.2 (Ala. Civ. App. 2005); Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002). 'This is so, because " 'it is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument.' " ' Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 9 (Ala. 2007) (quoting Butler v. Town of Argo, 871 So. 2d 1, 20 (Ala. 2003), quoting in turn Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994))."

White Sands Grp., 998 So. 2d at 1058. Therefore, we will not address Henson's argument on this issue.

III.

Henson next argues that the trial court erred in awarding the Thomases damages on their malicious-prosecution claim. "The elements of malicious prosecution are: (1) a judicial proceeding initiated by the defendant, (2) the lack of probable cause, (3) malice, (4) termination in favor of the plaintiff, and (5) damage." Cutts v. American United Life Ins. Co., 505 So. 2d 1211, 1214 (Ala. 1987).

> "It is well settled in this state that advice of counsel, honestly sought and acted on in good faith, supplies an indispensable element of probable cause for legal action and is a complete defense to an action for malicious prosecution. Birwood Paper Co. v. Damsky, 285 Ala. 127, 229 So. 2d 514 (1969); Broussard v. Brown, 353 So. 2d 804 (Ala. Civ. App. 1978). To prevail on this defense, it must be shown factually that the attorney's advice was given on a full and fair statement of all the facts and circumstances known to the prosecutor.... Birwood Paper Co. v. Damsky, supra; Broussard v. Brown, supra."

Hanson v. Couch, 360 So. 2d 942, 945 (Ala. 1978).

Henson points out that he testified that, in September 2016 (after the entry of the 2016 judgment), he had instituted an action alleging criminal trespass against the Thomases based on the advice of counsel and the county sheriff, that he had done so in good faith based on his understanding of the location of the boundary line between the parties' properties, and that he had not acted with malice in doing so. However, in this case, the trial court heard ore tenus evidence, and, therefore, the trial court could have disbelieved Henson's testimony on those points. See, e.g., Yeager, 998 So. 2d at 462-63. Moreover, considering that the 2016 judgment had established the boundary line between the parties' properties, the trial court could have concluded that Henson was aware

of the true boundary between the parties' properties and, therefore, that he had acted with malice and without probable cause in instituting criminal-trespass proceedings against the Thomases.

Henson also argues that "there was no medical testimony or evidence admitted as to any damages alleged by" the Thomases. However, Henson does not cite any law in support of his argument that there must be "medical testimony or evidence" to support a damages award on a malicious-prosecution claim.[2] Therefore, we cannot conclude that Henson has met his burden of showing error on this issue. White Sands Grp., 998 So. 2d at 1058.

IV.

Henson also argues that the trial court erred in awarding him only $5,000 in damages on his counterclaim, specifically his claim that cows had escaped from his property when the Thomases damaged his fence

[2]Edison Thomas testified that the Thomases were claiming damages for emotional distress as a result of their having been incarcerated on the criminal-trespass charges, for reimbursement for the bail money they had been required to post, and for attorney's fees they had incurred to defend against the criminal-trespass charges.

during the pendency of the action. He argues that his testimony proved that he lost cows worth at least $12,800, the amount that he had paid for the cows, and, therefore, the $5,000 in damages was not supported by the evidence. Although Henson testified that he had lost 16 cows for which he had paid $800 each and which he testified at trial were worth $1,600 each, the Thomases introduced the testimony of multiple witnesses indicating that no cows, or evidence of cows such as manure or hoof prints, had been seen on the Thomases' property, thus casting doubt on Henson's claim that any cows had escaped his property. Given the ore tenus standard of review, the trial court could have concluded that Henson had exaggerated the number of cows that he had lost. See, e.g., Yeager, 998 So. 2d at 462-63.

V.

Finally, Henson argues that the trial court erred in quieting title to the property designated in the easement and in terminating the easement across the Thomases' property that had existed in favor of Henson. We note that the trial court specifically found that the easement was due to be extinguished because Henson had alternative means of ingress and

egress to his property. Henson cites Lawley v. Abbott, 642 So. 2d 707 (Ala. 1994), in support of his argument. In that case, a 1968 deed was executed that contained a provision stating: " 'Grantee shall have the joint right to use grantor's driveway for the purpose of ingress and egress to said property.' " Lawley, 642 So. 2d at 707. After a dispute arose concerning the validity of that easement, the St. Clair Circuit Court entered an order declaring the easement valid. Id. Millie Ann Lawley appealed that judgment to the Alabama Supreme Court, arguing "that the easement was originally granted for a particular purpose, i.e., ingress to and egress from" a landlocked parcel and that the purpose for the easement had ceased to exist when the grantee of the easement gained alternative access to that parcel. 642 So. 2d at 708. In affirming the judgment of the St. Clair Circuit Court, our supreme court reasoned:

> "When the easement is one of express grant ... this Court must determine the scope of the easement according to the written language of the deed. Tatum v. Green, 535 So. 2d 87 (Ala. 1988). If this language is unambiguous, the Court may not consider parol evidence to determine to what extent the grantor intended to grant the easement. Tatum.
>
> "In this case, the 1968 deed ... granted ... an easement over the property ..., without condition or reference to a

> specific purpose; accordingly, the [grantee of the easement] held, and could transfer, a property right that cannot be diminished merely because there now exists an alternative means of ingress and egress."

Id. Similarly, in the present case, although the easement in favor of Henson stated that it was "[a] perpetual easement for ingress and egress over and across an existing roadway," it was given "without condition or reference to a specific purpose." Id. Therefore, like in Lawley, we conclude that the trial court erred in extinguishing the easement simply because Henson now has an alternative means of egress and ingress to his property.

Conclusion

Based on the foregoing, we reverse the trial court's judgment to the extent that it terminated the easement in favor of Henson; we remand this cause for the trial court to reconsider, in light of this opinion, the Thomases' claim on this issue. We affirm the trial court's judgment in all other respects.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur.