Rel: August 17, 2018

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2018

2170508

Bobby McCrary, as trustee of the Bobby McCrary Revocable Trust dated June 18, 2001, and Patricia L. McCrary, as trustee of the Patricia L. McCrary Revocable Trust dated June 18, 2001

v.

Michael Wayne Cole and Pamela W. Cole et al.

Appeal from Autauga Circuit Court
(CV-16-17)

THOMPSON, Presiding Judge.

On July 16, 2015, Bobby McCrary, as trustee of the Bobby McCrary Revocable Trust dated June 18, 2001, and Patricia L.

McCrary, as trustee of the Patricia L. McCrary Revocable Trust dated June 18, 2001, filed in the Autauga Probate Court ("the probate court") a complaint against Michael Wayne Cole, Pamela W. Cole, the Gaines S. Smith Irrevocable Trust ("the Smith trust"), and Joan Smith, in her capacity as the revenue commissioner for Autauga County. In their complaint filed in the probate court, the McCrarys sought to condemn certain real property pursuant to § 18-3-1, Ala. Code 1975. The McCrarys alleged that they owned a parcel of real property ("the property") that was adjacent to property owned by the Coles and the Smith trust and that the property was landlocked. The McCrarys sought to condemn certain portions of the Coles' property and the property owned by the Smith trust in order to obtain a right of way to reach "Cole Road," an unpaved road that runs through a portion of the Coles' property and near which the Coles' home and the homes of some of the Coles' relatives are located. The McCrarys later amended their complaint to add Ocwen Mortgage Servicing, Inc. ("Ocwen"), and Mortgage Company of the South as defendants; the McCrarys alleged that those defendants held mortgages on the properties over which they sought a right-of-way.

The Coles, the trustees for the Smith trust, and Ocwen answered the condemnation complaint and/or the amended complaint. In their answer, among other things, the Coles raised the affirmative defense of res judicata. The probate court conducted a hearing. At that hearing, among other things, evidence was presented indicating that the McCrarys sought to condemn a right-of-way totaling 1,611 feet across the property owned by the Smith trust ("the Smith property") and totaling 73 feet across the Coles' property to reach Cole Road.

On April 27, 2016, the probate court entered a judgment granting the McCrarys the condemnation they sought and awarding the McCrarys a 30-foot-wide right-of-way across the property owned by the Coles and to the Smith property, and it ordered the McCrarys to pay certain amounts to the Coles and the Smith trust to compensate them for the property being condemned. In addition, the probate court stated that Cole Road was a public road; it is not clear whether the probate court was attempting to declare Cole Road a public road, and no party has addressed whether the probate court had jurisdiction to do so. On the motion of the McCrarys, on May

4, 2016, the probate court amended its April 27, 2016, order to correctly set forth the length of the right-of-way across the Smith property.

The Coles timely appealed the probate court's judgment to the Autauga Circuit Court ("the trial court"); the Smith trust did not appeal the probate court's judgment. The McCrarys moved the trial court to add Autauga County as a defendant to the action in that court, and the trial court granted that motion. On November 13, 2016, Autauga County filed an answer in the trial court. Also on November 13, 2016, Joan Smith, in her capacity as the revenue commissioner for Autauga County, filed an answer in the trial court.

The trial court conducted an ore tenus hearing on March 1, 2017. It then entered an order allowing the parties to file posttrial briefs. On July 10, 2017, the trial court entered an order determining that the doctrine of res judicata barred the McCrarys' recovery on their condemnation claim against the Coles, and it dismissed that claim; however, issues relating to whether Cole Road was a public road remained pending. The McCrarys filed a purported postjudgment motion on July 18, 2017. We note, however, that a

postjudgment motion may be taken only from a final judgment. Malone v. Gainey, 726 So. 2d 725, 725 n. 2 (Ala. Civ. App. 1999).

On January 1, 2018, the trial court entered a detailed order denying the purported postjudgment motion. In that order, the trial court again found that the McCrarys' claim against the Coles was barred by the doctrine of res judicata. The trial court went on to find that the McCrarys had failed to present sufficient evidence of a common-law dedication of Cole Road as a public road, but it rejected the Coles' argument that applicable law barred Cole Road from being declared a public road; therefore, the trial court concluded, its ruling did not prevent Cole Road from being declared a public road in the future if Autauga County agreed to do so. The January 1, 2018, order resolved the pending claims, and, therefore, it constituted the final judgment in this action. Stockton v. CKPD Dev. Co., 936 So. 2d 1065, 1069-70 (Ala. Civ. App. 2005). The McCrarys timely appealed to our supreme court, which transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

The record indicates that, in 1990, the McCrarys purchased the property, comprising approximately 173 acres in Autauga County, and that, in June 2011, the McCrarys transferred ownership of the property to their trusts. Bobby McCrary ("McCrary") testified that the McCrarys live in Pensacola, Florida, and that he uses the property for hunting. The property is landlocked. In order to access County Road 73, the closest public road, from the property, the McCrarys must cross a portion of the Smith property as well as a 73-foot-long portion of property owned by the Coles in order to reach a dirt road known as "Cole Road," which, as noted earlier, is also located on the property owned by the Coles. Cole Road is unpaved and was built to access properties owned by the Coles and some of the Coles' relatives; the various owners of the Smith property have also used Cole Road to access their property.

McCrary testified that, when he purchased the property, he obtained the permission of the Smiths and of Michael Cole's grandparents (the Coles' predecessors in interest) to cross their properties to access the property. McCrary stated that

he would not have purchased the property had the Smiths and the Coles not given that permission.

McCrary has continued to use Cole Road, and to cross the Coles' property and the Smith property with permission, since he purchased the property. McCrary testified that, in 1994, he had approximately 7 acres of timber harvested from the property and that, sometime in the 2000s, he had another 20 acres of timber harvested. On both of those occasions, the timber was removed by logging companies that traveled Cole Road to transport the timber to County Road 73.

According to McCrary, in 2010, an owner of the Smith property wanted to cut timber on that property, and, McCrary said, he "undoubtedly" informed the Coles. McCrary testified that, in response to the Smith-property owner's seeking to haul the timber from his property to County Road 73 using Cole Road, the Coles placed a post in the middle of a gate on Cole Road that is located at the place where the Smiths and the McCrarys access Cole Road to travel to County Road 73.[1]

[1]Another witness, John Pirtle, testified that an owner of the Smith property placed the post in the road and refused the McCrarys permission to remove the timber across the Smith property. The fact that the testimony on this issue is contradictory is not material.

That post is positioned in a location that allows regular vehicle traffic to pass but prevents larger vehicles, such as those used by logging companies, from using Cole Road to access the nearby public highway.

At approximately the same time that the Smith-property owner was seeking to harvest timber from the Smith property, McCrary also arranged to have approximately 110 to 120 acres of timber harvested from his property. McCrary testified that, because the post in Cole Road prevented the logging trucks from using Cole Road, he had to pay $800 for the logging company to repair an older logging road to transport the timber to Highway 73; that older logging road is hereinafter referred to as "the timber road." McCrary testified that the timber road crossed the Smith property, ran along the property line between the Smith property and the Coles' property, and crossed property owned by an entity the parties referred to as "RMS."[2] McCrary testified that the timber road was "too steep for a regular vehicle" and that,

[2]McCrary testified that his understanding was that RMS was a timber-management company.

because of the terrain, the timber road was not accessible if too much rain fell.

On cross-examination, McCrary also acknowledged that a third road would allow him to access the property. He stated, however, that that road was located near "wetlands" and that it "would cost thousands of dollars" to construct a culvert that would allow him to access the property from that other road.

In 2013, in response to the partial blocking of Cole Road, the McCrarys filed in the trial court an action against the Coles, Autauga County, and the Smith trust, seeking the imposition of a prescriptive easement across the Coles' property and the Smith property to access Cole Road, which, the McCrarys alleged, was a public road; that action is hereinafter referred to as "the 2013 action." On March 11, 2014, the trial court entered a judgment denying the McCrarys' claim for a prescriptive easement. The McCrarys did not appeal that March 11, 2014, judgment. In July 2015, the McCrarys initiated the new action in the probate court that eventually resulted in the appeal currently before this court.

John Pirtle, a forest-land manager, testified that he also used Cole Road and crossed the property of the Coles and the Smith property to access the property, both in his function as a land manager and for approximately one year in 2012 when he leased the property from McCrary for hunting purposes. Pirtle testified that he had the Coles' permission to travel on Cole Road, and he stated that Michael Cole once asked him to have "one of his guys" (apparently a friend or employee of Pirtle's) drive more slowly on Cole Road because young children lived in the houses near Cole Road.

Pirtle testified regarding the McCrarys' alternate means of access to the property. Among other things, Pirtle testified that one road that would access the property ran through federally recognized wetlands, that a federal permit would be necessary to construct a road to access the property in that area, and that it would be "very difficult and very expensive" to access the property through that area. Pirtle testified that he believed that accessing the property through other areas would be cost-prohibitive because of the amount of fill dirt required or because the construction of a bridge might be necessary. Pirtle admitted that a portion of the

property could be accessed through the timber road, but, he stated, a great deal of the property would be inaccessible by vehicle from the timber road because of gullies or other features of the property. Pirtle testified that he had provided testimony similar to or the same as his testimony in the March 2017 hearing before the trial court during the hearing in the 2013 action.

In support of the McCrarys' claim that Cole Road should be declared a public road, McCrary testified that he had seen a postal carrier, a school bus, and a garbage truck use Cole Road. Pirtle also testified that he had seen a school bus on Cole Road. Photographs admitted into evidence demonstrate that that unpaved dirt roadway is located very close to the Coles' home. McCrary admitted that the other homes on Cole Road are close to the road; the Coles' attorney stated that he elicited that testimony to demonstrate the potential detrimental impact on the Coles and other homeowners from the McCrarys' proposed use of Cole Road.

It is undisputed that the county did not construct Cole Road and that Cole Road has not been dedicated to the county or accepted by the county in any written declaration. The

McCrarys asked Barry Ousley, an engineer for Autauga County who testified in the 2013 action and in the current action, whether the county had a list of public roads that included Cole Road. The Coles objected, and a lengthy discussion between the attorneys and the trial court followed. Ousley did not answer the question, but the arguments of the attorneys and statements made by the trial court during that discussion indicate that the county has listed Cole Road as a public road. The trial court stated during the hearing in this matter that although the county's maintenance of the road was a factor in determining whether to declare Cole Road a public road, it was not determinative.

Ousley testified that, 50 years ago, if someone asked the county to maintain a road, it generally did so, and, he stated, that is how the county now has a number of county-maintained roads. Ousley testified that, over the years, the county has maintained Cole Road when someone living near the road has contacted the county to request that it perform that maintenance. Ousley testified that roads had been dedicated or maintained by the county in the past under a "buddy system," but that the county no longer accepts dedications of dirt

roads, and that the regulations governing the dedication of a road to the county requires that a road be paved before it may be accepted by the county as a public road. Ousley also stated that he had testified in the 2013 action and that he believed his testimony during the 2017 hearing was the same as it had been in the 2013 action.

Henry Lanier, an employee of the road department for Autauga County, testified that, in the past, the county had maintained Cole Road if someone who lived near that road called and asked the county to work on the road. Lanier testified that he worked on a crew that had performed maintenance on Cole Road. Lanier stated that the county last worked on Cole Road approximately four to five years before the hearing in this matter. Lanier also stated that his testimony during the March 1, 2017, hearing was consistent with the testimony he had provided in the hearing on the merits in the 2013 action.

On appeal, the McCrarys first argue that the trial court erred in determining that their claims were barred by the doctrine of res judicata.

> "'[T]he application of [the doctrine of res judicata] is a question of law. Thus, the

> appropriate standard of review is de novo.' Walker v. Blackwell, 800 So. 2d 582, 587 (Ala. 2001).
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> > "'"The elements of res judicata, or claim preclusion, are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits. Hughes v. Allenstein, 514 So. 2d 858, 860 (Ala. 1987). If those four elements are present, any claim that was or could have been adjudicated in the prior action is barred from further litigation."'
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> "Webb v. City of Demopolis, 14 So. 3d 887, 894 (Ala. Civ. App. 2008) (quoting Dairyland Ins. Co. v. Jackson, 566 So. 2d 723, 725 (Ala. 1990))."

Bullock v. Howton, 168 So. 3d 1270, 1272 (Ala. Civ. App. 2015).

In their 2013 action filed in the trial court, the McCrarys sought a judgment declaring their right to a prescriptive easement.[3] The Coles answered and disputed the material allegations of the McCrarys' 2013 complaint,

[3]It is undisputed that the trial court took judicial notice of the 2013 action. During closing arguments of the March 1, 2017, hearing in the trial court, the Coles' attorney stated that, at the beginning of the hearing, the trial court had taken judicial notice of the 2013 action. Also, in their brief in support of their purported postjudgment motion in the trial court, the McCrarys stated that the trial court had taken judicial notice of the 2013 action, and the McCrarys submitted as exhibits to their purported postjudgment motion some of the filings from the 2013 action.

including the McCrarys' characterization of Cole Road as a public road. Autauga County answered the 2013 complaint, alleging that it maintained only a portion of Cole Road as a public road and disputing that the entirety of that road was a public road. In its March 11, 2014, judgment in the 2013 action, the trial court found that the McCrarys' use of the Coles' property to access their property had been permissive, and, therefore, the trial court denied the McCrarys' claim for a prescriptive easement.

The McCrarys contend that this action sets forth a different cause of action than the one they asserted in the 2013 action. The McCrarys point out that, in the 2013 action, they sought a prescriptive easement over the Coles' property and the Smith property but that, in the action that has resulted in this appeal, they sought the condemnation of a right-of-way across the Coles' property and the Smith property and to access Cole Road a declaration that Cole Road was a public road. The McCrarys point out that the elements of their 2013 claim for a prescriptive easement are substantially different from the elements of a claim seeking a condemnation under § 18-3-1 et seq., Ala. Code 1975. In order to establish

a right to a prescriptive easement under the facts of this case, the McCrarys would have to present evidence indicating that they had used the property over which they sought an easement, exclusively and continuously, for more than 20 years in a manner that was adverse to the rights of the Coles and the Smith trust and under a claim of right. Andrews v. Hatten, 794 So. 2d 1184, 1186 (Ala. Civ. App. 2001). In order to demonstrate a right to condemn a right-of-way across the property of others, a plaintiff must prove that he or she owns landlocked property that has no reasonable access to a public roadway. Williams v. Deerman, 587 So. 2d 381, 381-82 (Ala. Civ. App. 1991) (citing Otto v. Gillespie, 572 So. 2d 495, 496 (Ala. Civ. App. 1990)). The McCrarys argue that, because the elements of the claim asserted in the 2013 action are different from those asserted in the current action, the doctrine of res judicata is not applicable.

In response, the Coles argue in their brief submitted to this court that the doctrine of res judicata applies to bar not only claims already litigated but also claims that could have been asserted in the previous litigation. "Res judicata ... bars a party from asserting in a subsequent action a claim

that it has already had an opportunity to litigate in a previous action." Lee L. Saad Constr. Co. v. DPF Architects, P.C., 851 So. 2d 507, 517 (Ala. 2002); see also Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 636 (Ala. 1998) ("If th[e] four elements [of res judicata] are present, then any claim that was, or that could have been, adjudicated in the prior action is barred from further litigation."). Courts determine whether a cause of action could have been asserted in an earlier action by determining whether the evidence necessary to support the causes of action is the same; our supreme court has explained:

> "'Discussing the same-cause-of-action element of res judicata, this Court has noted that "'"the principal test for comparing causes of action [for the application of res judicata] is whether the primary right and duty or wrong are the same in each action."'" Old Republic Ins. Co. v. Lanier, 790 So. 2d 922, 928 (Ala. 2000) (quoting Wesch v. Folsom, 6 F.3d 1465, 1471 (11th Cir. 1993)). This Court further stated: "'Res judicata applies not only to the exact legal theories advanced in the prior case, but to all legal theories and claims arising out of the same nucleus of operative facts.'" 790 So. 2d at 928 (quoting Wesch, 6 F.3d at 1471). As a result, two causes of action are the same for res judicata purposes "'when the same evidence is applicable in both actions.'" Old Republic Ins. Co., 790 So. 2d at 928 (quoting Hughes v. Martin, 533 So. 2d 188, 191 (Ala. 1988)).'"

Bullock v. Howton, 168 So. 3d at 1273 (quoting Chapman Nursing Home, Inc. v. McDonald, 985 So. 2d 914, 921 (Ala. 2007)). See also Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d at 637 ("[W]hether the second action presents the same cause of action depends on whether the issues in the two actions are the same and on whether substantially the same evidence would support a recovery in both actions.").

The record on appeal does appear to indicate that much of the same evidence was presented in the 2013 action and in the current action. See Equity Res. Mgmt., Inc. v. Vinson, supra. However, in response to the Coles' argument that the causes of action rest on the same evidence, the McCrarys contend that, as a matter of law, they could not have asserted their condemnation claim in the 2013 action because that claim was required to be initiated in the probate court. Section 18-3-3, Ala. Code 1975, provides that an action by an owner of landlocked property seeking the condemnation of property for a right-of-way must initiate the condemnation action in the probate court. See also Kish Land Co. v. Thomas, 42 So. 3d 1235, 1236-37 (Ala. Civ. App. 2010) ("Section 18-3-3 requires that an action to acquire a private right-of-way must be

brought in probate court; circuit courts do not have jurisdiction over such cases."); and Johnson v. Metro Land Co., 18 So. 3d 962, 966-67 (Ala. Civ. App. 2009) (a probate court, and not a circuit court, has jurisdiction over a private condemnation action filed pursuant to § 18-3-1 et seq., Ala. Code 1975).

> "The doctrine of res judicata does not necessarily apply when '[t]he plaintiff was unable to rely on a certain theory ... or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action ....' Restatement (Second) of Judgments § 26 (1982). In other words, '[i]f the court rendering judgment lacked subject-matter jurisdiction over a claim or if the procedural rules of the court made it impossible to raise a claim, then it is not precluded.' Browning v. Navarro, 887 F.2d 553, 558 (5th Cir. 1989)."

Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 795 (Ala. 2007).

The McCrarys could not have initiated a claim seeking to condemn a right-of-way in the trial court. § 18-3-3; Kish Land Co., LLC v. Thomas, supra; and Johnson v. Metro Land Co., supra. Although the trial court was a court of competent jurisdiction with regard to the claims asserted in the 2013

action, the trial court could was not a court of competent original jurisdiction over the condemnation claim asserted in this action, which could only be brought in the probate court. Accordingly, we must conclude that the second element of the doctrine of res judicata was not met with regard to the current claim seeking the condemnation of a portion of the Coles' property under § 18-3-1. We hold that the trial court erred in determining that the McCrarys' condemnation claim was barred by the doctrine of res judicata. Lloyd Noland Found., Inc. v. HealthSouth Corp., supra. We therefore reverse the trial court's judgment as to that issue, and we remand the cause for the trial court to determine, based on the evidence presented, whether the McCrarys were entitled to the condemnation they sought.

The McCrarys have also argued on appeal that they are entitled to a determination in their favor on the issue of the requested condemnation. In other words, they argue that this court should determine the factual issue of whether they are entitled to have the 73-foot-long strip across the Coles' property condemned for their use as a right-of-way. However,

that is a factual issue that must be resolved by the trier of fact on remand. Accordingly, we do not reach that issue.

The McCrarys also argue that the trial court erred in determining that their claim seeking to establish Cole Road as a public road was barred by the doctrine of res judicata.

> "A public way is established in either one of three ways, (1) by a regular proceeding for that purpose, or (2) by a dedication as such by the owner of the land the way crosses, with acceptance by the proper authorities, or (3) the way is generally used by the public for twenty years."

Powell v. Hopkins, 288 Ala. 466, 472, 262 So. 2d 289, 294 (1972). The McCrarys have proceeded in this action under the theory that Cole Road was a public road by virtue of the second of the above-mentioned theories, i.e., that the road was dedicated by common-law by the Coles or their predecessors in interest and accepted by the county.

In determining that the doctrine of res judicata barred this claim, the trial court stated, in part:

> "In [the 2013 action], the [McCrarys] were seeking relief as to the same strip of Cole Road that is the subject of this proceeding. The [McCrarys] sought relief in the form of a prescriptive easement, and in their pleadings the [McCrarys] listed Cole Road as a public road. However, the [McCrarys] are stating that because their prayer for relief did not call for a determination as to the status of Cole Road, that

this is an entirely different claim, and that a decision on the merits of the previous case was reached without the determination as to the status of Cole Road, which forms the basis of the [McCrarys'] argument on this issue.

"However, our supreme court, in Vinson has stated that:

> "'If a claim, which arises out of a single wrongful act or dispute, is brought to a final conclusion on the merits, then all other claims arising out of that same wrongful act or dispute are barred, even if those claims are based on different legal theories or seek a different form of damages, unless the evidence necessary to establish the elements of the alternative theories varies materially from the evidence necessary for a recovery in the first action. In taking this approach, this Court has adopted a test that in certain respects is similar to, but which is not the same as, the "same transaction" test, which is found in Restatement (Second) of Judgments and which is applied in the federal courts.'

"Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 638 (Ala. 1998). The supreme court has stated that res judicata prevents parties from bringing suit again using a different legal theory when the claim could have been brought in the original action, unless, however, the evidence needed from the new claim was materially inconsistent with the evidence needed for the originally litigated claim. Instead, the [McCrarys] should have brought the immediate claim in the original action or they run the risk of being 'barred from re-litigating any matter which could have been litigated in the prior action.' Id. at 636."

We agree with the trial court regarding this issue. The record demonstrates that the McCrarys presented the same evidence regarding the nature of the use of Cole Road in this action as they did in the 2013 action. Equity Res. Mgmt., Inc. v. Vinson, supra. Even assuming, however, that that evidence was different, the McCrarys could have litigated the issue of whether Cole Road was a public road in the 2013 action. See Lee L. Saad Constr. Co. v. DPF Architects, P.C., supra; Equity Res. Mgmt., Inc. v. Vinson, supra; and Bullock v. Howton, supra.

> "As we emphasized in Whisman v. Alabama Power Co., 512 So. 2d 78, 81 (Ala. 1987), this Court has recognized the doctrine of res judicata in that '[t]he interest of society demands that there be an end to litigation, that multiple litigation be discouraged, not encouraged, and that the judicial system be used economically by promoting a comprehensive approach to the first case tried.' See, also, Reed v. Farm Bureau Mut. Cas. Ins. Co., 549 So. 2d 3 (Ala. 1989) (a case in which we said that the purpose of the doctrine of res judicata was to prohibit the relitigation of claims, so as not to unnecessarily subject a defendant to the expense and trouble of repeatedly defending himself)."

Green v. Wedowee Hosp., 584 So. 2d 1309, 1315 (Ala. 1991). We cannot say that the McCrarys have demonstrated that the trial court erred in concluding that their claim seeking to have

Cole Road declared a public road was barred by the doctrine of res judicata, and we affirm as to that issue.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Pittman, Thomas, Moore, and Donaldson, JJ., concur.