Rel: June 17, 2022

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200751

Pearl M. Lindsey

v.

Jerry Pollard and Tammy Pollard

Appeal from Cherokee Circuit Court
(CV-20-900070)

THOMPSON, Presiding Judge.

Pearl M. Lindsey appeals from a judgment entered by the Cherokee Circuit Court ("the trial court") awarding ownership of a strip of land ("the disputed property") to Jerry Pollard and Tammy Pollard. We reverse the judgment insofar as it denied Lindsey's claim of adverse

possession of the disputed property, and her request for damages for the removal of a fence, and remand the case with instructions.

On August 13, 2020, Lindsey filed a complaint against the Pollards, seeking a determination as to the boundary line between the Pollards' and her coterminous properties.[1] She also sought compensation for the cost of a fence the Pollards had removed. The record reflects that Lindsey claimed that she owned all the property east of the fence. The Pollards claimed that they owned property west of the fence, the fence, and the disputed property, a triangular strip of land (approximately 94' x 87' x 9.50') located just east of the fence. On September 2, 2020, the Pollards filed an answer denying Lindsey's claim and a counterclaim alleging trespass against Lindsey and seeking a determination of their ownership of the disputed property. On December 1, 2020, Lindsey filed a reply to the Pollards' counterclaim.

[1]In June 2020, Lindsey filed petitions for protection from abuse, pursuant to the Protection from Abuse Act, § 30-5-1 et seq., against the Pollards (case nos. DR-20-900063.90 and DR-20-900064.90). The trial court consolidated those two actions with her action asserting the boundary-line dispute (case no. CV-20-900070). The trial court entered identical judgments in each case.

On March 3, 2021, the trial court conducted a trial. The evidence with regard to the boundary-line dispute is largely undisputed. In 1993, Dean Hudson, Lindsey's predecessor in title, purchased Lot 38 located in Roscoe Smith Estates and built a house thereon. When Hudson purchased Lot 38, Johnny Cooper, a predecessor in title to the Pollards, owned Lot 37.[2] Hudson testified that Cooper had approached him and stated that he wanted to erect a fence between their lots and that he was "going to build [the fence] straight." Hudson stated that, although he never checked to see if the fence ran along the boundary line between Cooper's and his adjacent properties, he and Cooper had treated the fence as the boundary line between their properties, and, he said, he had maintained the disputed property, which was located on his side of the fence. Additionally, Hudson had installed a propane tank for his house and part of a sprinkler system for his lawn on the disputed property.

Lindsey testified that in 1999 she and her now deceased husband purchased Lot 38 and the house located thereon from Hudson. She stated that, since the purchase, she had been an adjacent landowner to Cooper,

[2]Cooper's property had two subsequent owners before it was purchased by the Pollards.

two other predecessors in title to the Pollards, and the Pollards. When she and her husband purchased Lot 38 and the house thereon, a propane tank providing gas for the house and part of the sprinkler system providing water for the lawn were located on the disputed property. She stated that she believed the disputed property was her property, that she had maintained the disputed property as part of her lawn, and that she had planted various plants and flowers on the disputed property. She also had erected a fence along the northern border of her property, which connected to the fence between the Pollards' and her properties. She stated that she had not had any disputes with any of Pollards' predecessors in title regarding who owned the disputed property and had not had a dispute with the Pollards until they started to remove the fence. When asked whether it was her position that the fence line constituted the boundary line between the Pollards' and her properties, she responded "yes, absolutely."

Angela Garrison, who Lindsey employed to maintain her yard, testified that Lindsey had paid her to mow the disputed property. Ben Morris, Lindsey's brother, and Mary Jean Green, Lindsey's sister, testified that Lindsey had treated the disputed property as her own for

the past 21 years. Morris, who is a contractor, testified that the fence the Pollards had removed was constructed of cedar planks and would cost approximately $4,000 to rebuild.

Jerry Pollard testified that, in October 2016, he and his wife purchased Lot 37 and the house thereon. He explained that, before he purchased the property and again in 2020, he had his property surveyed. Jerry testified that both surveys indicated that the boundary line between Lindsey's and his properties was not the fence and that his property included the disputed property. Jerry stated that, when he purchased Lot 37, he believed the disputed property was included in his property. Jerry admitted that, before he and his wife removed the fence in July 2020, Lindsey had prevented his wife and him from accessing the disputed property. Specifically, when asked if he had maintained the disputed property, he responded: "There was not access for me to get on it with the lawn mower." Likewise, when asked if he had performed "any physical activities on the [disputed property] from 2016 until he started removing the fence in July 2020," Jerry responded: "I told you I didn't have access to it." Jerry admitted that his wife had asked the gas department to remove the propane tank located on the disputed property.

According to Jerry, Lindsey never claimed possession of the disputed property. He testified that in 2016 he discussed with Lindsey his intent to build a partial privacy fence along the boundary line between their properties and that Lindsey did not indicate at that time that the fence erected earlier was the boundary line. Jerry stated that when he and Lindsey discussed the 2020 survey, Lindsey stated that she did not believe the surveyor had correctly located the stakes.

The trial court admitted into evidence numerous photographs submitted by both sides depicting the disputed property before and after the fence was removed. The trial court also admitted into evidence the parties' deeds, the surveys conducted for the Pollards setting forth the boundary line as designated in the deeds, and a survey conducted for Lindsey establishing the fence erected by Cooper as the boundary line.

On March 8, 2021, the trial court entered its judgment denying Lindsey's claim to the disputed property and awarding the disputed property to the Pollards. On March 12, 2021, the trial court amended its judgment to clarify "[t]hat the true boundary line between the parties is the subdivision lot line as depicted on the plat of Roscoe Smith Estates." On March 28, 2021, Lindsey filed a postjudgment motion, alleging,

among other things, that sufficient evidence was presented to establish that she "owned" the disputed property because, she said, the evidence established her ownership of the disputed property by adverse possession. After conducting a hearing on Lindsey's postjudgment motion, the trial court denied the motion. On April 22, 2021, the trial court entered an amended judgment that set forth a legal description of the boundary line establishing that the disputed property belonged to the Pollards. On May 17, 2021, Lindsey filed her notice of appeal. On June 22, 2021, the supreme court, pursuant to § 12-2-7(6), Ala. Code 1975, transferred the appeal to this court.

> "When evidence is presented ore tenus, the trial court is '"unique[ly] position[ed] to directly observe the witnesses and to assess their demeanor and credibility."' Ex parte T.V., 971 So. 2d 1, 4 (Ala. 2007)(quoting Ex parte Fann, 810 So. 2d 631, 633 (Ala.2001)). Therefore, a presumption of correctness attaches to a trial court's factual findings premised on conflicting ore tenus evidence. Ex parte J.E., 1 So. 3d 1002, 1008 (Ala. 2008). However, '"[w]here the evidence before the trial court was undisputed the ore tenus rule is inapplicable, and the Supreme Court will sit in judgment on the evidence de novo, indulging no presumption in favor of the trial court's application of the law to those facts."' State v. Hill, 690 So. 2d 1201, 1203 (Ala.1996)(quoting Stiles v. Brown, 380 So. 2d 792, 794 (Ala.1980)). ...
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> "… When evidence is presented ore tenus and the trial court makes no express findings of fact, this Court will assume that the trial court made those findings necessary to

> support its judgment. Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A., 608 So.2d 375, 378 (Ala. 1992)(citing Fitzner Pontiac-Buick-Cadillac, Inc. v. Perkins & Assocs., 578 So. 2d 1061 (Ala. 1991)).
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> "We further note that 'the ore tenus standard of review has no application to a trial court's conclusions of law or its application of law to the facts; a trial court's ruling on a question of law carries no presumption of correctness on appeal.' Ex parte J.E., 1 So. 3d at 1008 (citing Ex parte Perkins, 646 So. 2d 46, 47 (Ala.1994), and Eubanks v. Hale, 752 So. 2d 1113, 1144-45 (Ala. 1999)). This Court '"review[s] the trial court's conclusions of law and its application of law to the facts under the de novo standard of review."' Id. (quoting Washington v. State, 922 So. 2d 145, 158 (Ala. Crim. App. 2005))."

Key v. Allison, 70 So. 3d 277, 281 (Ala. 2010).

On appeal, the Pollards contend that because Lindsey did not file a notice of appeal in each of the consolidated cases, below (see note 1, supra) she is not entitled to relief in this appeal. In the trial court, Lindsey filed three actions naming the Pollards as defendants: two petitions for protection from abuse (case nos. DR-20-900063.90 and DR-20-900064.90) and a boundary-line-dispute action (case no. CV-20-900070). The trial court consolidated the three actions for trial, and the trial court entered the same judgment, which determined all the claims presented, in each of the consolidated cases. In her notice of appeal, Lindsey appealed the judgment entered in the boundary-line-dispute

action (case no. CV-20-900070); she did not appeal the judgments entered in the protection-from-abuse actions. The Pollards argue that because the judgments in the consolidated cases are identical and Lindsey did not appeal the judgments entered in the protection-from-abuse cases, the doctrines of res judicata and collateral estoppel bar consideration of her claims on appeal. They reason:

> "This court may have appellate jurisdiction [over the boundary-line-dispute action], but it has no jurisdiction to alter, amend, reverse, or remand the identical judgments and orders in [the two protection-from-abuse actions], which are now final and binding on the parties. It would be an inconsistent result should this court reverse the trial court's [judgment] in [the boundary-line-dispute action], and the same order be valid in the other two related cases."

The Pollards' argument that this court does not have jurisdiction over Lindsey's appeal of the trial court's judgment entered in the boundary-line-dispute action is misplaced. "Res judicata and collateral estoppel are two closely related, judicially created doctrines that preclude the relitigation of matters that have been previously adjudicated or, in the case of res judicata, that could have been adjudicated in a prior action." Lee L. Saad Constr. Co. v. DPF Architects, P.C., 851 So. 2d 507, 516 (Ala. 2002). The claims in each of the three actions were litigated

simultaneously; therefore, the doctrines of collateral estoppel and res judicata, which require an adjudication in an earlier action, do not apply in this case.

Our caselaw is well established that,

> "'[w]hen two or more actions are consolidated under Rule 42, Ala. R. Civ. P., the actions do not lose their separate identities. League v. McDonald, 355 So. 2d 695, 697 (Ala. 1978). Moreover, "[a]n order of consolidation does not merge the actions into a single [action], change the rights or the parties, or make those who are parties to one [action] parties to another." Jerome A. Hoffman, Alabama Civil Procedure § 5.71 (2d ed. 2001) (citing Evers v. Link Enters., Inc., 386 So. 2d 1177 (Ala. Civ. App. 1980)). Finally, "'in consolidated actions ... the parties and pleadings in one action do not become parties and pleadings in the other.'" Ex parte Flexible Prods. Co., 915 So. 2d 34, 50 (Ala. 2005) (quoting Teague v. Motes, 57 Ala. App. 609, 613, 330 So. 2d 434, 438 (Civ. 1976)).'
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> "Solomon v. Liberty Nat'l Life Ins. Co., 953 So. 2d 1211, 1222 (Ala. 2006). When actions are ordered consolidated, 'each action retains its separate identity and thus requires the entry of a separate judgment.' League v. McDonald, 355 So. 2d 695, 697 (Ala. 1978)."

H.J.T. v. State ex rel. M.S.M., 34 So. 3d 1276, 1278 (Ala. Civ. App. 2009). See also Rule 42, Ala. R. Civ. P., and Ex parte Glassmeyer, 204 So. 3d 906, 908-09 (Ala. Civ. App. 2016)(recognizing that when cases are

consolidated the parties and pleadings in one action do not become parties and pleadings in the other and that, although a final judgment must be entered in each action, a trial court may specify that all filings be made in only one case). In Hossley v. Hossley, 264 So. 3d 893, 897 (Ala. Civ. App. 2018), this court, when determining whether it had jurisdiction to entertain an appeal when a party had filed only one notice of appeal from two cases that had been consolidated for trial, stated:

> "An appellant's designation of a judgment or order on his notice of appeal does not limit the scope of appellate review, see Rule [3(c)], Ala. R. App. P.,[3] and this court may treat a notice of appeal that is filed in one consolidated case as being effective as to the other consolidated case when the intention to appeal the judgments in both cases is clear, see R.J.G. v. S.S.W., 42 So. 3d 747, 751 n.2 (Ala. Civ. App. 2009)."

Our review of the record in this case leads us to the conclusion that we do have jurisdiction over Lindsey's appeal. The case on appeal is one of three consolidated cases, and the trial court entered a final judgment

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[3]Rule 3(c), Ala. R. App. P., provides, in part:

> "The notice of appeal shall specify all parties taking the appeal and each adverse party against whom the appeal is taken; shall designate the judgment, order, or part thereof appealed from; and shall name the court to which the appeal is taken. Such designation of judgment or order shall not, however, limit the scope of appellate review."

in each case. Each case retained its separate identity. Lindsey's notice of appeal and her appellate brief indicate that she is appealing the trial court's judgment entered in the boundary-line-dispute action only. Lindsey does not present any arguments in her appellate brief with regard to the trial court's judgments entered in the protection-from-abuse actions; consequently, because the time for filing an appeal with regard to the judgments entered in the protection-from-abuse actions has expired, the judgments in those actions are final. See Rule 4, Ala. R. App. P.; Greystone Close v. Fiduciary & Guar. Ins. Co., 664 So. 2d 900, 902 (Ala. 1995); and Lewis v. State, 463 So.2d 154 (Ala.1985). Even though the judgments in each of the consolidated cases are identical, each consolidated case was separate; the claims adjudicated in each of the consolidated cases were distinct; and, if the judgment resolving the claims in the boundary-line-dispute action is reversed, the reversal will not result in inconsistent judgments with regard to the claims adjudicated in either of the protection-from-abuse cases. Consequently, Lindsey's decision to appeal only the judgment entered in the boundary-line-dispute action, even though identical judgments were entered in the protection-from-abuse actions does not preclude our appellate review of

the judgment in the boundary-line-dispute action. Cf. R.J.G. v. S.S.W., 42 So. 3d 737 (Ala. Civ. App. 2009).

On appeal, Lindsey contends that the trial court erred in determining that she did not prove by clear and convincing evidence that she had adversely possessed the disputed property.

> "Essentially there are two forms of adverse possession in Alabama: 1) adverse possession by prescription; and 2) statutory adverse possession. Adverse possession by prescription requires actual, exclusive, open, notorious, and hostile possession under a claim of right for a 20-year period. Fitts v. Alexander, 277 Ala. 372, 170 So. 2d 808 (1965).
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> > "'"Statutory adverse possession requires the same elements, but the statute provides further that if the adverse possessor holds under color of title, has paid taxes for ten years, or derives his title by descent cast or devise from a possessor, he may acquire title in ten years, as opposed to the twenty years required for adverse possession by prescription. Code 1975, § 6-5-200. See, Long v. Ladd, 273 Ala. 410, 142 So. 2d 660 (1962)."
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> > "'Kerlin v. Tensaw Land & Timber Co., 390 So. 2d 616, 618 (Ala. 1980); see, also, Morgan v. Alabama Power Co., 469 So. 2d 100 (Ala. 1985).'
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> "Daugherty v. Miller, 549 So. 2d 65, 66-67 (Ala. 1989).

"With respect to statutory adverse possession, this Court in Brown v. Alabama Great Southern R.R., 544 So. 2d 926, 931 (Ala. 1989), stated:

> "'In Carpenter v. Huffman, 294 Ala. 189, 314 So. 2d 65 (1975), Justice Jones summarized the applicability of our adverse possession statute, now Ala. Code 1975, § 6-5-200, as it relates to coterminous landowners:
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> > "'"The three alternative prerequisites 1) deed or other color of title, 2) annual listing of land for taxation, or 3) title by descent cast or devise from a predecessor, therefore, are not necessary to sustain a claim to title by a coterminous owner. Lay v. Phillips, 276 Ala. 273, 161 So. 2d 477 (1964); Sylvest v. Stowers, 276 Ala. 695, 166 So. 2d 423 (1964). That is to say, although the claimant is relieved of these three alternative conditions prescribed by [§ 6-5-200], he may still acquire title by the exercise of adverse possession for a period of ten years. Cambron v. Kirkland, 287 Ala. 531, 253 So. 2d 180 (1971); Lay v. Phillips, supra; McNeil v. Hadden, 261 Ala. 691, 76 So. 2d 160 (1954). However, the requirements that possession be open, notorious, hostile, continuous and exclusive are still applicable. Thompson v. Odom, 279 Ala. 211, 184 So. 2d 120 (1966)."' (Emphasis added in Brown.)

"See, also, McCollum v. Reaves, 547 So. 2d 433, 435-36 (Ala. 1989), special concurrence by Jones, J., wherein the author

stated that '[t]he statutory procedure for determining disputed boundaries between coterminous owners is found in [Code 1975,] § 35-3-1 et seq.; and the applicable period of limitations is found in the general statute of limitations on actions, [Code 1975] § 6-2-33(2).' It should be emphasized that the claimant has the burden of proving that all of the requisites of statutory adverse possession have been satisfied for a ten-year period. Lilly v. Palmer, 495 So. 2d 522 (Ala. 1986).

"OPEN AND NOTORIOUS POSSESSION

"Open and notorious possession are essential elements of adverse possession, because the landowner is thereby afforded notice of the adverse claim against his land. Thus, to satisfy these two elements, the claimant must provide evidence tending to show that his acts of dominion and control over the property were of such character and distinction as would reasonably notify the landowner that an adverse claim is being asserted against his land. Sparks v. Byrd, 562 So. 2d 211 (Ala. 1990). ...

"HOSTILE POSSESSION

"Another essential element of adverse possession relates to the claimant's intent to assert dominion and control over the disputed property. Reynolds v. Rutland, 365 So. 2d 656 (Ala. 1978). The Reynolds court emphasized, however, that although 'intent to claim the disputed strip is required, there is no requirement that the intent be to claim property of another, as such a rule would make adverse possession dependent upon bad faith. Possession is hostile when the possessor holds and claims property as his own, whether by mistake or willfully. Smith v. Brown, [282 Ala. 528, 213 So. 2d 374 (1968)].' Id. at 657-58. ...

"CONTINUOUS POSSESSION

"To satisfy the element of continuous possession, the claimant must prove uninterrupted possession for 10 or more years. Prestwood v. Gilbreath, 293 Ala. 379, 304 So. 2d 175 (1974). ...

"....

"EXCLUSIVE POSSESSION

"To satisfy the final element of adverse possession, a claimant '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.R., 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).' Sparks v. Byrd, supra, at 215.

"The definition of' 'exclusive possession,' as found in 2 C.J.S. Adverse Possession § 54 at 726-27, reads as follows:

> "'"Exclusive possession" means that claimant must hold possession of the land for himself, as his own, and not for another, or must maintain exclusive dominion over the property and appropriation of it to his own use and benefit. To establish exclusive possession, there must be an intention to possess and hold land to the exclusion of, and in opposition to, the claims of all others, and the claimant's conduct must afford an

> unequivocal indication that he is exercising dominion of a sole owner. Exclusiveness essential to adverse possession may or must be shown by acts which comport with ownership and would ordinarily be done by an owner for his own use to the exclusion of others, and all such acts must be considered collectively in determining the sufficiency of possession. Exclusiveness of possession is often evidenced by the erection of physical improvements on the property, such as fences, houses or other structures, and, in their absence, substantial activity on the land is required.'

"The same principle is stated in different language in 4 H. Tiffany, The Law of Real Property, § 1141 at 735-36 (3d ed. 1975):

> "'In order that one may acquire rights in land by possession for the statutory period, the possession must, it is frequently said, be exclusive. It must be exclusive of the true owner and also of third persons. If the true owner is on the land as owner, the possession is, in the eye of the law, in such owner, and another person who is on the land has not only no adverse possession, but no possession whatsoever ... If, however, the true owner is shown to be on the land merely as a licensee, not asserting, by word or act, any right of ownership or possession, his presence on the land does not amount to an actual possession, and the possession may properly be attributed to him who is on the land exercising or claiming exclusive control thereof. In the same vein, acts of the record owner with respect to the premises indicative of ownership, but not of possession, impair the exclusiveness of adverse possession.'"

Strickland v. Markos, 566 So. 2d 229, 232-35 (Ala. 1990). The presumption is in favor of the record owner. Cooper v. Cate, 591 So. 2d 68, 70 (Ala. 1991)(citing Morrison v. Boyd, 475 So. 2d 509 (Ala. 1985)). The type of adverse possession applicable to coterminous landowners, which was summarized in Carpenter v. Huffman, 294 Ala. 189, 314 So. 2d 65 (1975), and discussed in Strickland v. Markos, supra, "is a hybrid of the elements of statutory adverse possession and adverse possession by prescription." Bearden v. Ellison, 560 So. 2d 1042, 1044 (Ala. 1990).

To establish a claim of adverse possession, a party must present clear and convincing evidence, which is

> "[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."

§ 6-11-20(b)(4), Ala. Code 1975.

In their appellate brief, the Pollards contend that "[t]he hybrid form of adverse possession does not apply as [Lindsey's] adverse possession claim is to a 'significant portion' of [their] land." In McCallister v. Jones, 432 So. 2d 489, 192 (Ala. 1983), our supreme court rejected the alleged

adverse possessor's claim that the action was merely a boundary-line dispute between coterminous landowners, because the evidence established that the claim of adverse possession was for a three- to five-acre parcel. The court held that because the case involved a claim of adverse possession of a significant portion of the conterminous landowner's land, the hybrid form of adverse possession did not apply. Unlike the acreage at issue in McCallister, however, the disputed property in this case, the area of which is approximately 290 square feet, does not constitute a significant portion of the Pollards' property, the area of which is approximately 18,100 square feet. The evidence in this case unequivocally establishes that a true boundary-line dispute was litigated and that the hybrid form of adverse possession applies. Accordingly, because this case involves a boundary-line dispute between coterminous landowners, Lindsey, who asserted the adverse-possession claim, had the burden of proving by clear and convincing evidence that she openly, notoriously, hostilely, exclusively, and continuously possessed the disputed property for a period of 10 years. See Strickland v. Markos, 566 So. 2d at 232.

A review of the record reflects that Lindsey testified that she and her deceased husband purchased Lot 38 and the house thereon in 1999, that a fence was located between the Pollards' and her properties, that the propane tank for her house and part of the sprinkler system for her lawn were located on the disputed property, that she believed the fence designated the property line between the Pollards' and her properties, and that, from her purchase of the property in 1999 until July 2020, neither the Pollards nor their predecessors in title had contested that she owned the disputed property. She stated that, because she had believed she owned the disputed property, she had planted flowers and bushes on the disputed property, had used the sprinkler system to water the disputed property, and had paid a lawn service to mow the disputed property. Those acts by Lindsey evidence use of the disputed property by someone acting as the true owner of property. Additionally, the record contains no evidence indicating that either Lindsey's use of the disputed property or her predecessor in title's use of the disputed property was by permission. Lastly, Jerry Pollard's testimony that Lindsey prevented others from using the disputed property and that he did not have access to the disputed property until he removed the fence further evidences

Lindsey's possession of the disputed property. The foregoing evidence constitutes clear and convincing evidence indicating that Lindsey's "acts of dominion and control over the [disputed] property were of such character and distinction as would reasonably notify a landowner that an adverse claim is being asserted against his land." Strickland, 566 So. 2d at 232. Thus, the record supports the conclusion that Lindsey's possession of the disputed property was open, notorious, hostile, continuous, and exclusive for over 10 years.

The Pollards contend that the trial court, by citing Connell v. Moody, 98 So. 3d 549 (Ala. Civ. App. 2012), in its judgment, held correctly that Lindsey's possession of the disputed property was permissive, not adverse. In Connell, this court considered whether the predecessors in title to conterminous landowners had altered the boundary line between their properties by agreement or, in the alternative, whether the boundary line had been altered by adverse possession. Evidence was presented that in 1971 P.F. Connell and Bula Mae Connell ("the Connells") had purchased property from Ada Kirkpatrick. The Connells and Kirkpatrick's son erected a barbed-wire fence along a tree line and not along the boundary line set forth in the deeds. According to

Kirkpatrick's deed, she owned property on both sides of the fence. The Connells planted their garden, kept livestock, and built a shed on their side of the fence. The evidence established that the Connells' shed had been built partially on Kirkpatrick's property. Testimony was presented that Kirkpatrick recognized the fence as the boundary line between the Connells' and her properties. Testimony was also presented that W.A. Connell, a son of the Connells, had stated that "the property line between the two parcels' goes through the [Connells'] shed.'" 98 So. 3d at 553.

In 2006, Joseph Moody and Laura Moody purchased Kirkpatrick's property, and at some point the Connells' children became the owners of the Connells' property. Laura Moody testified that, although she found some rusty nails and broken pieces of barbed wire when she was cleaning up the land, she did not find a barbed-wire fence on her property. In 2008, the Moodys had their property surveyed. The surveyor's line ran through an old shed. When the Moodys asked Carlos Connell, another son of the Connells, about the shed, Carlos informed them that the line as surveyed was not the correct property line. The Moodys sued the Connells' children, seeking a judicial determination of the boundary line. At trial, the Connells' children argued that the Connells had acquired

title to the disputed property because Kirkpatrick had agreed to alter the location of the boundary line and that, after the agreement was entered, the Connells retained exclusive possession of the disputed property for more than 10 years. In the alternative, they argued that they had acquired title to the property through adverse possession. The trial court, without making specific findings of fact, held that the parties' predecessors in title had not agreed in 1971 to alter the existing boundary line between their properties and that the Connells had not adversely possessed the disputed property.

When considering whether the evidence established that Kirkpatrick and the Connells had altered the boundary line by agreement, we recognized:

> "'Coterminous landowners may locate a boundary by agreement, provided one of them holds to the boundary so agreed upon for a period of 10 years after the agreement is reached. Similarly, one coterminous owner may engage in conduct which may form the basis of an estoppel against him or her and has the same practical effect as an agreement. For example, if a party represents the location of a boundary to his neighbor who, in reliance on the representation, makes valuable improvements on the property, or acts detrimentally, the owner making the representation will not be heard later to claim that his statements concerning the boundary were

> untrue. In essence, the representation and reliance upon it forms an estoppel which operates to fix the boundary.'
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> "I Jesse P. Evans III, Alabama Property Rights and Remedies § 12.4[a] (3d ed. 2004) (footnotes omitted). See also Moss v. Woodrow Reynolds & Son Timber Co., 592 So. 2d 1029, 1031 (Ala. 1992); Wallace v. Putman, 495 So. 2d 1072, 1076 (Ala. 1986); Kerlin v. Tensaw Land & Timber Co., 390 So. 2d [616,] 618 [(Ala. 1980)]; Smith v. Cook, 220 Ala. 338, 341, 124 So. 898, 900 (1929); Jacks v. Taylor, 27 So. 3d 504, 508-09 (Ala. Civ. App. 2008). Although Alabama cases have not always emphasized it, there is a requirement that the boundary line be uncertain or in dispute before the parties may reach an agreement to alter it. See generally Alan Stephens, Annot., Sufficiency of Showing, in Establishing Boundary by Parol Agreement, that Boundary was Uncertain or in Dispute Before Agreement, 72 A.L.R. 4th 132 (1989)."

98 So. 3d at 552.

This court affirmed the trial court's judgment, holding that a review of the record supported the trial court's determination that the Connells' children had failed to establish that the boundary line had been altered by agreement. We observed that no evidence was presented indicating that the boundary line was uncertain or in dispute when Kirkpatrick and the Connells allegedly agreed to alter the boundary line. Additionally, we noted that testimony was presented that W.A. Connell had stated that "the property line between the two parcels goes through the [Connells'] shed," from which the trial court could have inferred that

the fence did not represent the true boundary line between the parties' property. Therefore, we concluded that the trial court's determination that the boundary line had been altered by agreement was not plainly erroneous.

We next considered whether the trial court properly rejected the alternative argument of the Connells' children that the boundary line had been altered through the Connells' adverse possession of the disputed property. We noted:

> "'Generally, possession of land entered into with permission of the owner will not ripen into title.... In order to change possession from permissive to adverse, the possessor must make a clear and positive disclaimer or repudiation of the true owner's title. The possessor must give the true owner actual notice of such disavowal, or he must manifest acts or make a declaration of adverseness so notorious that actual notice will be presumed....
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> "'....
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> "'The trial court found that [the defendant's] possession had not been hostile but had been with the permission of the landowner. There was evidence to support that finding. Therefore, [the defendant] failed to establish the elements necessary to prove that his possession of the disputed property was adverse.'

"Moss v. Woodrow Reynolds & Son Timber Co., 592 So. 2d [1029,] 1031 [(Ala. 1992)]."

Connell, 98 So. 3d at 553. We concluded that, because the evidence indicated that the fence had been erected with Kirkpatrick's permission and that the Connells' use of the property had not provided Kirkpatrick with actual notice of adverse possession, the record supported the trial court's conclusion that the Connells' children had failed to prove that the Connells' possession of the disputed property had been hostile.

We agree with the Pollards that, insofar as Lindsey may contend that the parties' predecessors in title, i.e., Cooper and Hudson, agreed to alter the boundary line when they agreed to erect the fence, the evidence does not support an alteration of the boundary line by agreement because no evidence was presented that, at the time the fence was erected, the boundary line was in dispute. However, we cannot agree with the Pollards that Lindsey failed to establish by clear and convincing evidence that her possession of the disputed property was adverse. Clear and convincing evidence was presented by Lindsey, Garrison, Morris, and Green that Lindsey had maintained the disputed property and had claimed it as her own. Additionally, Jerry Pollard's admissions that Lindsey had denied others access to the disputed property and that he had not maintained the disputed property evidence Lindsey's intent to

claim the disputed property and to prevent others from using it. Thus, because evidence was presented indicating that Lindsey had maintained the disputed property and had prevented others, including the Pollards, from accessing the disputed property, clear and convincing evidence was presented that Lindsey's possession of the disputed property was adverse.

In the alternative, the evidence supports the conclusion that Hudson and, subsequently, Lindsey relied upon Cooper's representation that the fence evidenced the boundary line between their properties and, thus, that estoppel operates to fix the fence as the boundary line. After Cooper erected the fence, Hudson placed a propane tank and a portion of his sprinkler system on the disputed property. Later, Lindsey planted flowers and shrubs on the disputed property and maintained the disputed property. Additionally, she prevented others from accessing the disputed property. Lindsey's reliance on the fence as the boundary line between the Pollards' and her properties was for a period of more than 10 years. Thus, Hudson and Lindsey's acts of ownership and possession of the disputed property based on Cooper's representations support the determination that the Pollards, Cooper's successors in interest, are

estopped from claiming that the fence does not evidence the boundary line. See Connell, supra.

Lastly, the Pollards contend that trial court did not err by concluding that they owned the disputed property because, they say, a finding that Lindsey, through adverse possession, owns the disputed property would constitute a subdivision of their lot and would therefore violate a restrictive covenant applicable to properties located in Roscoe Smith Estates. The parties' deeds incorporate a "protective covenant and restriction for Roscoe Smith Estates" providing that "[n]o lot may be subdivided or in any way made into two or more separate lots."[4] According to the Pollards, a plain reading of the covenant means "no lot can be reduced in size in any way."

"Where the language in a restrictive covenant is clear and unambiguous, it will be given its manifest meaning, but its construction will not be extended by implication to include anything not plainly prohibited. Cox v. Walter, 348 So. 2d 454 (Ala. 1977)." Cooper v. Powell, 659 So. 2d 93, 95 (Ala. 1995).

[4]It is undisputed that the parties' deeds adopted this covenant. Additionally, Lindsey does not dispute that the covenant "runs with the land." See Allen v. Axford, 285 Ala. 251, 231 So. 2d 122 (1970).

The Pollards' contention that the restrictive covenant precludes Lindsey's claim of adverse possession of the disputed property is unpersuasive. To "subdivide" means "to divide into several parts; esp.: to divide (a tract of land into building lots)." Merriam-Webster's Collegiate Dictionary 1242 (11th ed. 2020). Accordingly, to violate the restrictive covenant, the Pollards' lot would have to be divided into two or more lots. See Hoffman v. Tacon, 293 Ala. 684, 309 So. 2d 817 (1975)(addressing whether the subdivision of a lot to create two lots violated the restrictive covenants applicable to the original lot). A determination that Lindsey owns the disputed property by adverse possession does not result in a subdivision of the Pollards' lot; rather, it increases the size of Lindsey's lot and diminishes the size of the Pollards' lot.[5] No separate lot is created -- two, not three, lots remain. Therefore, the restrictive covenant prohibiting the subdivision of the Pollards' lot is not applicable in this case.

Based on the evidence at trial, the trial court's judgment denying Lindsey's claim of adverse possession of the disputed property is plainly

[5]No argument was presented that a determination that Lindsey owned the disputed property would violate a restrictive covenant, if applicable, regarding the minimum or maximum size of a lot.

and palpably wrong. Lindsey's evidence was uncontradicted, and we hold, as a matter of law, that Lindsey openly, notoriously, hostilely, exclusively, and continuously possessed the disputed property for the requisite period of 10 years. See Wadkins v. Melton, 852 So. 2d 760, 768 (Ala. Civ. App. 2002). Therefore, we reverse the judgment of the trial court insofar as it denied Lindsey's claim of adverse possession of the disputed property, and we remand this case to the trial court with instructions to render a judgment for Lindsey consistent with this opinion. The trial court is directed to determine the appropriate boundary-line coordinates, which should be in accord with the fence line created by Cooper, the Pollards' predecessor in title, and depicted on the submitted documents and to further consider, in light of our reversal, Lindsey's request for damages for the removal of the fence.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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