Reversed and Remanded Memorandum Opinion filed December 29, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00908-CV

GARY L. LEONARD, PAMELA Y. KELLEY, ARTHUR L. KELLEY, AND CLARA BROOKS, Appellants

V.

LAVEARN IVEY, Appellee

On Appeal from the 506th Judicial District Court
Waller County, Texas
Trial Court Cause No. 14-07-22640

M E M O R A N D U M O P I N I O N

This case involves a dispute among family members concerning the construction of a will. Appellee LaVearn Ivey filed suit to obtain a declaratory judgment concerning her ownership interest in real property bequeathed to her in her mother's will, to quiet title, and to permanently enjoin the appellants, some of whom are Ivey's siblings, from interfering with her ownership. Both parties filed competing motions for summary judgment, and the trial court ruled in favor of

Ivey. On appeal, the appellants challenge the trial court's rulings and the award of attorney's fees to Ivey. Ivey responds that the trial court's judgment is correct and should be affirmed, and also requests that this court strike appellant Arthur L. Kelley's appeal, or alternatively instruct the trial court to consider sanctions against appellant Gary L. Leonard, who is the appellants' counsel. Concluding that fact issues preclude summary judgment in favor of Ivey, we reverse and remand for further proceedings. We affirm the trial court's denial of the appellants' summary judgment motion and also deny Ivey's requested relief.

FACTUAL BACKGROUND

In 2002, Mattie Bell Kelley signed a will devising interests in real property to her ten children. She died that same year, and the will was probated as a muniment of title. The testatrix's will included the following bequeathals:

> I leave the house and property at 418 Bostick Lane, defined as A-20 WM Cooper, 0.64 acres, Tract 21, the Kelley homestead, to Arthur Lee Kelley ["Arthur"].
>
> I leave the portion of the tract of property located east of the homestead at 418 Bostick Lane, also known as the garden spot, defined at A-20 WM Cooper 0.99 Acres, Tract 19, to Willie Ray Kelley ["Willie"].
>
> I leave the rest of tract A-20 WM Cooper, 0.99 Acres, Tract 19, the portion north of the homestead tract in equal shares to [five children including Ivey and Gloria Jean Guillory ("Guillory")].

About ten years later, Arthur, his wife Pamela Y. Kelley ("Pamela"), Pamela's mother Clara Brooks ("Brooks"), and two others obtained a judgment against Willie in an earlier lawsuit related to the property. Leonard, who is the attorney for the appellants, claims an interest in the judgment because the appellants intend to assign it to him and it represents their attorney's fees for successfully defending what was originally brought as a suit against them by Willie.

The appellants obtained a writ of execution to have what they characterize as Willie's interest in Tract 19 sold to satisfy the judgment. The property was posted for a sheriff's sale, prompting this dispute. The appellants claim they are entitled to execute on a portion of Tract 19 known as the "garden spot" because Willie owns that portion, based on the above-cited bequeathals. In contrast, Ivey asserts that Willie does not own any portion of Tract 19. According to Ivey, the will contains a mistake or ambiguity because it incorrectly refers to the "garden spot" as located in Tract 19 when it is actually located on the adjoining Tract 21. Therefore, Ivey contends, the appellants improperly sought to execute their judgment against Willie on property owned by Ivey and Guillory. A copy of a survey introduced in evidence appears in the Appendix below.[1]

Ivey filed the present suit as a declaratory judgment action and suit to quiet title, seeking a judgment that she and Guillory are the sole owners of Tract 19.[2] Ivey also requested a temporary restraining order enjoining the sale of any part of Tract 19, which the trial court granted. The appellants answered and filed a counterclaim for declaratory judgment. Ivey then supplemented her petition and filed an application for a temporary injunction, which the trial court granted and this court affirmed. *See Kelley v. Ivey*, No. 14-14-00686-CV, 2015 WL 4387941, at *1 (Tex. App.—Houston [14th Dist.] July 16, 2015, no pet.) (mem. op).

After the order granting the temporary injunction was appealed, Ivey filed a motion to show authority under Texas Rule of Civil Procedure 12, challenging Leonard's authority to represent Arthur, Pamela, and Brooks. On December 1,

[1] The survey shows Tract 19 north of Tract 21. Tract 21 shows a house on the property and a hand-drawn area to the east of the house, which Arthur testified was the location of the garden spot.

[2] The other three children who were bequeathed an interest in Tract 19 subsequently conveyed their interests to Ivey. Guillory is not a party to this lawsuit and the trial court's judgment does not purport to grant Guillory any relief.

2014, the trial court granted the motion in part, ordering that the answer and notice of appeal from the temporary injunction filed on behalf of Arthur be "stricken from the record the same as if each instrument was never filed." The motion was denied as to Pamela and Brooks. In July 2015, however, Leonard filed a second amended answer and affirmative defenses on behalf of Arthur, Pamela, Brooks, and himself.

On August 8, 2015, Pamela, Brooks, and Leonard filed a combined traditional and no-evidence summary judgment motion against Ivey, but did not include Arthur as a summary judgment movant. Ivey filed a response to the motion, which included a "Counter Motion for Summary Judgment" against all of the appellants. Pamela, Brooks, and Leonard filed a response to Ivey's summary judgment motion. On September 8, 2015, the trial court denied the summary judgment motion filed by Pamela, Brooks, and Leonard.

On October 12, 2015, the trial court granted Ivey's counter motion for summary judgment. In the October 12 order, the trial court granted declaratory relief and quieted title to the property identified as Tract 19 in Ivey's name and permanently enjoined Arthur, Pamela, Brooks, and Leonard from interfering with Ivey's quiet and peaceable enjoyment, ownership, dominion, and control of the property.[3] The court also ordered the appellants, jointly and severally, to pay Ivey's reasonable and necessary attorney's fees of $26,662.50, court costs of $944.00, and conditional appellate attorney's fees.

The appellants filed a notice of appeal, after which Ivey filed a second Rule

[3] Although the trial court's order included findings of fact and conclusions of law, findings of fact and conclusions of law are inappropriate in a summary judgment proceeding. *See IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997) ("The trial court should not make, and an appellate court cannot consider, findings of fact in connection with a summary judgment."); *see also City of Houston v. Morgan Guar. Int'l Bank*, 666 S.W.2d 524, 536 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (holding that "findings of fact and conclusions of law are neither required nor appropriate" in summary judgment order granting permanent injunction).

12 motion to show authority in the trial court, challenging Leonard's authority to represent Arthur. Leonard responded, arguing that the trial court lacked jurisdiction to rule on the motion after the notice of appeal was filed, and if Ivey suspected that Leonard lacked authority to represent Arthur on appeal, she should file her motion in this court. The trial court declined to rule on the second Rule 12 motion. This appeal followed.

SUMMARY JUDGMENT STANDARD OF REVIEW

We review summary judgments de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Under the well-established standards governing traditional motions for summary judgment, the movant must show there is no genuine issue of material fact and he is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). We take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We review a summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Wal–Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 568 (Tex. 2006) (per curiam).

Once a movant satisfies the burden of establishing each element of the claim or defense on which it seeks a traditional summary judgment, the burden then shifts to the non-movant to disprove or raise an issue of fact as to at least one of those elements. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014). When a party asserts an affirmative defense to defeat a summary judgment, it must come forward with evidence sufficient to raise a fact issue on each element of at least one of its affirmative defenses. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). To prevail on the affirmative defense,

the non-movant must prove each element of its defense as a matter of law, leaving no issues of material fact. *See Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 927 (Tex. 1996). When we review cross-motions for summary judgment, we consider both motions and render the judgment that the trial court should have rendered. *Coastal Liquids Transp., L.P. v. Harris Cty. Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001).

A trial court must grant a no-evidence motion for summary judgment if: (1) the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial; and (2) the respondent produces no summary judgment evidence raising a genuine issue of material fact on each of the challenged elements. *See* Tex. R. Civ. P. 166a(i). In reviewing a no-evidence summary judgment, we review the evidence in the light most favorable to the non-movant against whom the summary judgment was rendered. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005)). If the non-movant brings forth more than a scintilla of evidence to raise a genuine issue of material fact, then the trial court cannot properly grant the no-evidence motion for summary judgment. *Id.*

ISSUES AND ANALYSIS

The appellants contend that the trial court erred by (1) granting Ivey's summary judgment motion; (2) denying appellees' summary judgment motion; and (3) awarding attorney's fees to Ivey. Several sub-issues are included within each of these issues. Separately, Ivey argues that this court should either strike Arthur's appeal or, alternatively, instruct the trial court to consider whether Leonard should be sanctioned due to his "serial disregard for his duties and obligations" under the December 1, 2014 Rule 12 order.

I. The Appellants' Issues

The appellants' first two issues address the substance of the parties' dispute. In their first issue, the appellants contend that the trial court erred by granting Ivey's summary judgment motion because the statute of limitations bars Ivey's suit; the bequeathal is not ambiguous or a mistake; Ivey is not entitled to a quiet title to Tract 19 because Willie also was bequeathed an interest in Tract 19; and Ivey is likewise not entitled to injunctive relief. In their second issue, the appellants contend that the trial court erred in denying their no-evidence and traditional summary judgment motions because Ivey produced no evidence to support her contention that she and Guillory are the sole owners of Tract 19; Ivey is not entitled to declaratory relief or a quiet title; and Ivey's claims are barred by the affirmative defenses of statute of limitations, collateral estoppel, and res judicata.

Because the affirmative defenses of the statute of limitations, collateral estoppel, and res judicata are potentially dispositive, we will first address those issues. We will then address the remaining issues, some of which are common to both parties' summary judgment motions, as necessary to resolve the appeal.

A. The Appellants' Affirmative Defenses

1. Statute of Limitations

The appellants first argue that Ivey's claims are barred by the statute of limitations found in section 256.204 of the Texas Estates Code, formerly Probate Code section 93. In relevant part, this section provides:

> After a will is admitted to probate, an interested person may commence a suit to contest the validity thereof not later than the second anniversary of the date the will was admitted to probate, except that an interested person may commence a suit to cancel a will for forgery or other fraud not later than the second anniversary of the date the forgery or fraud was discovered.

Tex. Est. Code § 256.204(a). The appellants assert that this section applies to Ivey's claims of ambiguity and mistake even though she does not characterize her suit as a will contest.

As support for their contention, appellants cite *In re Estate of Jones*, in which the court stated: "Grounds for contesting the validity of a will include failure to comply with statutory requirements, lack of testamentary capacity, undue influence, **mistake**, fraud or forgery, duress, and existence of an agreement not to probate." 286 S.W.3d 98, 100 (Tex. App.—Dallas 2009, no pet.) (discussing Probate Code section 93 and citing *Dickson v. Dickson*, 993 S.W.2d 735, 740 (Tex. App.—Houston [14th Dist.] 1999, no pet.)) (emphasis added). Therefore, appellants maintain, the statute of limitations expired July 30, 2004, over a decade before Ivey filed her suit. *Jones*, however, does not support appellants' argument.

In *Jones*, a daughter filed an application to set aside an order admitting her mother's will to probate as a muniment of title, alleging that the will devised some property that was no longer in the estate and that there were unpaid debts. *Id.* at 99. On appeal from the denial of her application, the court determined that the plain language of the two-year statute of limitations contained in Probate Code section 93 indicated that an attack on an order admitting a will to probate "necessarily involves a challenge to the validity of the underlying will." *Id.* at 100. The court concluded that because the daughter's allegations did not challenge the underlying validity of her mother's will, the statute of limitations did not apply. *Id.* In *Dickson v. Dickson*, cited in *Jones*, the court held the statute of limitations did not bar a son's claim that he was the owner of land that his father purported to bequeath to the son's stepmother, when the son did not challenge the validity of his father's will and the only dispute was whether the father or the son owned the property at the time of the father's death. *See* 993 S.W.2d at 740.

Appellants assert that the key issue is whether Ivey's challenge to Willie's rights in Tract 19—in which Ivey claims is either a mistake or an ambiguity in Mattie Bell Kelley's will—is a will contest as defined by section 256.204. However, Ivey does not allege that the will is invalid due to mistake or ambiguity. Instead, Ivey alleges that due to a mistake or ambiguity in the will, she and Guillory are the sole owners of Tract 19, and she seeks to enjoin the appellants from taking any action to sell the property or otherwise disrupt her use, possession, enjoyment of the property. Because Ivey does not challenge the validity of the will, but rather seeks to clarify the ownership of Tract 19, Estates Code section 256.204(a) does not apply to bar her claims. *See Estate of Jones*, 286 S.W.3d at 100; *Dickson*, 993 S.W.2d at 740.

2. Collateral Estoppel and Res Judicata

The appellants next contend that "the allegation in this case that Willie Ray does not own an interest in Tract 19 but rather owns an interest in Tract 21" has already been fully and fairly adjudicated in *Willie Ray Kelley v. Arthur Lee Kelley, Pamela Y. Kelley, and Clara Brooks*, Cause No. 11-05-20877, in the 506th Judicial District Court of Waller County, Texas.[4] Accordingly, the appellants argue, Ivey's claims are precluded by the doctrines of collateral estoppel and res judicata. Ivey responds that collateral estoppel and res judicata do not apply to the facts of this case, and even if they did, the appellants have not satisfied their burden of proof. We agree that collateral estoppel and res judicata do not apply because the appellants have not conclusively proved that Ivey, who was not a party to Willie's lawsuit, was in privity with him for purposes of either doctrine.

[4] Although the decision in this case was appealed, this court dismissed the appeal as untimely. *See Kelley v. Brooks*, No. 14-13-00399-CV, 2013 WL 3580781 (Tex. App.—Houston [14th Dist.] July 11, 2013, no pet.) (per curiam) (mem. op.).

(a) Willie's Lawsuit

The appellants and Ivey presented various documents from Willie's lawsuit, including Willie's second amended original petition, a traditional and no-evidence motion for summary judgment filed by Arthur, Pamela, and Brooks (the "Kelley parties"), and the trial court's order on the Kelley parties' motion. The summary judgment record reflects that in 2011, after learning that Arthur had transferred his interest in Tract 21 to Pamela, who transferred it to Brooks, who then sold it to a third party, Willie sued the Kelley parties and others. In his lawsuit, Willie claimed that he was an owner of an undivided interest in the tract of land located in Waller County, Texas known as 418 Bostick Lane, Brookshire, Waller County, Texas. In effect, Willie asserted that he owned an undivided interest in Tract 21. Willie's pleadings reflected that at the time he filed his lawsuit, he was a resident of Florida.

The Kelley parties filed a traditional and no-evidence motion for summary judgment, asserting that under Mattie Bell Kelley's will, Arthur was left the house and property on Tract 21, and Willie was left the portion of Tract 19 known as the garden spot. On November 19, 2012, the trial court rendered judgment granting only the Kelley parties' no-evidence summary judgment motion. In the no-evidence portion of their motion, the Kelley parties asserted that Willie had "no evidence to support his contention that he has an ownership interest, undivided, or otherwise, in Tract 21, which is the subject of this lawsuit."

(b) Collateral Estoppel and Res Judicata

Collateral estoppel precludes relitigation of ultimate issues of fact actually litigated and essential to the judgment in a prior suit. *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 801 (Tex. 1992). A party asserting the doctrine must prove that (1) the facts sought to be litigated in the second action were fully and fairly

litigated in the first action, (2) the facts were essential to the judgment in the first action, and (3) the party against whom collateral estoppel is sought was a party or in privity with the party in the first action. *See Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990). The broader doctrine of res judicata precludes re-litigation of claims that have been finally adjudicated or that arise out of the same subject matter and that could have been litigated in the prior action. *Amstadt v. U.S. Brass Corp*., 919 S.W.2d 644, 652 (Tex. 1996). Res judicata requires proof of the following elements: (1) a final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action. *Id.*

The parties agree that Ivey was not a party to Willie's lawsuit, but disagree as to whether the appellants have conclusively proven that Ivey was in privity with Willie for purposes of collateral estoppel and res judicata. The Supreme Court of Texas and this court have recognized that people can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action. *See id.* at 653; *McNeil Interests, Inc. v. Quisenberry*, 407 S.W.3d 381, 388 (Tex. App.—Houston [14th Dist.] 2013, no pet.). To determine whether privity exists, the circumstances of each case must be carefully examined. *Quisenberry*, 407 S.W.3d at 388.

The appellants argue that although Ivey did not technically participate in Willie's lawsuit, she was in privity with Willie because she controlled Willie's litigation in that lawsuit, and Ivey shares a property interest with Willie because they were both left an interest in Tract 19.[5] Specifically, the appellants argue that

[5] The appellants list five circumstances in which a party is considered to be in privity

Ivey "had a large part" in controlling Willie's litigation because she "hired Willie Ray's lawyer, determined who was going to be sued, assisted Willie Ray's lawyer in gathering and presenting documents in response to discovery, and otherwise controlled the litigation for Willie Ray."

In support of this argument, the appellants point to portions of Willie's deposition testimony from his lawsuit in which he stated that Ivey advised him to hire a lawyer; he left it up to Ivey to hire the lawyer she recommended; and no one else, other than his lawyer, was assisting him with his claim. The appellants also direct this court to Willie's testimony that he did not know that one of his sisters—who had been sued in her capacity as the executor of Mattie Bell Kelley's estate—was a defendant, and testimony reflecting that Willie was unfamiliar with some of the documents that he had produced in discovery. The appellants have not cited, and we have not found, any case law to support a contention that such facts conclusively demonstrate privity based on control of the prior proceedings.

When considering whether privity is established based on evidence of control, courts have focused on whether an individual "actively and openly participated in the prior proceedings to such an extent that it was clear that the individual had the right to direct them." *See, e.g.*, *Maxon v. Travis Cty. Rent Account*, 21 S.W.3d 311, 316 (Tex. App.—Austin 1999, pet. dism'd by agr.). Mere participation in a prior trial or knowledge of an ongoing trial is insufficient to warrant a finding of privity. *Id.* Ivey responds that the fact that she assisted in document production and in finding counsel for her brother, who was at the time a resident of Florida, does not conclusively demonstrate that she controlled Willie's litigation. We agree. Further, the testimony the appellants point to also shows that

---

with a party in a prior proceeding and contend that Ivey satisfies two of them. However, the appellants cite no authority for their list.

Willie explained that the reason Ivey was assisting him was to help him get his family property back, and he testified that Ivey was not claiming an interest in the same property.[6] On these facts, we conclude that the appellants have failed to satisfy their burden to conclusively demonstrate that Ivey was in privity with Willie for purposes of collateral estoppel or res judicata.

B. Ambiguity or Mistake

In her counter motion for summary judgment, Ivey sought declaratory relief that the appellants had no right to execute on any part of Tract 19 based on their judgment against Willie because there is a mistake or ambiguity in the will. She also asserted that she was entitled to a quiet title to the property and a permanent injunction against the appellants because she presented undisputed evidence that the garden spot bequeathed to Willie is not located in Tract 19. On appeal, the appellants contend that the language in the will is unambiguous and contains no mistake concerning Willie's ownership of an interest in Tract 19; therefore, they argue that the trial court should not have considered Ivey's extrinsic evidence and should have instead granted their summary judgment motion.

Below and on appeal, Ivey argues that she presented clear, undisputed evidence that the location of the garden spot was mistakenly described in the will. Ivey points to a survey of the property in evidence that carves out the homestead, which is on Tract 21. The survey also reflects that there is one house on Tract 21. The will refers to the garden spot as being east of the homestead, on Tract 19. However, Ivey argues, Tract 19 is located north of Tract 21, and therefore no

[6] We also note that Willie asserted in his lawsuit that he owned in interest in Tract 21, not Tract 19, and the only issue finally adjudicated in that case was that Willie presented no evidence that he owned an interest in Tract 21. Accordingly, we disagree with the appellants' repeated assertion that because they claimed in their summary judgment motion that the garden spot devised to Willie was located in Tract 19, the trial court's judgment in Willie's lawsuit constitutes a legal determination that the garden spot was in fact located in Tract 19.

property east of the homestead can be located in Tract 19. Further, Arthur testified that the property left to Willie was the garden spot just east of the homestead and confirmed that it is not located on Tract 19. Therefore, Ivey maintains, if what is known as the garden spot is not located in Tract 19, there is a mistake in the will, and it is impossible for Willie to inherit a part of Tract 19 known as the garden spot and for the appellants to execute against that property. Ivey also concludes that the trial court found an ambiguity in the description of the garden spot's location and construed it consistent with the testatrix's intent.

The appellants contend that Ivey's arguments concerning ambiguity and mistake fail because the testatrix's bequeathal of "the portion of the tract of property located east of the homestead at 418 Bostick Lane, also known as the garden spot, defined at A-20 WM Cooper 0.99 Acres, Tract 19, to Willie Ray Kelley" is a clear and unambiguous statement of her intent to leave Willie a portion of Tract 19. As additional clarification, the appellees emphasize that the bequeathal goes on to state: "I leave ***the rest of*** tract A-20 WM Cooper, 0.99 Acres, Tract 19, the portion north of the homestead tract in equal shares to" her five other children. Because the will is unambiguous, the appellants argue, the testatrix's intent must be ascertained from the four corners of the will as a whole, and Ivey's extrinsic evidence is not admissible to construe the will or to determine her intent.

In construing a will, the focus is on the testatrix's intent. *San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 639 (Tex. 2000). Indeed, "[a]ll rules of construction must yield to the basic intention and purpose of the [testatrix] as reflected by the entire instrument." *Shriner's Hosp. v. Crippled Children of Tex. v. Stahl*, 610 S.W.2d 147, 151 (Tex. 1980). Intent must be ascertained from the language found within the four corners of the will. *Lang*, 35 S.W.3d at 639. The

court is not to focus on what the testatrix intended to write, but the meaning of the words she actually used. *Id.* Courts must not redraft wills to vary or add provisions "under the guise of construction of the language of the will" to reach a presumed intent. *Stahl*, 610 S.W.2d at 151.

If the will is unambiguous, a court should not go beyond specific terms in search of the testatrix's intent. *Lang*, 35 S.W.3d at 639. But, if the meaning of the will is uncertain or reasonably susceptible to more than one meaning, it is ambiguous, and extrinsic evidence should be considered to ascertain the testatrix's intent. *Davis v. Shanks*, 898 S.W.2d 285, 286 (Tex. 1995) (per curiam). When a will is ambiguous, the court may consider evidence of the testatrix's situation, the surrounding circumstances, and other material facts that will enable the court to place itself in the testatrix's position at the time. *Lang*, 35 S.W.3d at 639. The interpretation of an ambiguous will presents a fact issue precluding summary judgment. *Doggett v. Robinson*, 345 S.W.3d 94, 99 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

Mattie Bell Kelley's will reflects that she bequeathed to Arthur "the Kelley homestead" consisting of "the house and property at 418 Bostick Lane, defined as A-20 WM Cooper, 0.64 acres, Tract 21[.]" The will also evidences the testatrix's intent to leave Willie the property known as the "garden spot," which she specifically defined as "the portion of the tract of property located east of the homestead at 418 Bostick Lane, . . . defined at A-20 WM Cooper 0.99 Acres, Tract 19[.]" Read together, the bequeathals appear to show that the testatrix understood that the Kelley homestead was located in Tract 21 and the garden spot was located in a different tract, namely Tract 19, located to the east of the Kelley homestead. The testatrix's apparent intent to leave Willie a portion of the property in Tract 19 is further reflected in the next bequeathal, in which she left "**the rest of** tract A-20

WM Cooper, 0.99 Acres, Tract 19, the portion north of the homestead tract" to Ivey and the other named children.

Ivey maintains, however, that her evidence that Tract 19 lies north of Tract 21 and Arthur's testimony that the garden spot is located, not on Tract 19, but east of the homestead on Tract 21, demonstrates that there is a mistake or ambiguity in the will's description of the location of the garden spot. We conclude that the testatrix's language used in the bequeathals of property to her children, including the bequeathal of the garden spot to Willie, created a latent ambiguity. *See Harris v. Hines*, 137 S.W.3d 898, 908 (Tex. App.—Texarkana 2004, no pet.) (explaining that a latent ambiguity exists when "the will appears to convey a sensible meaning on its face, but it cannot be carried out without further clarification"). Consequently, the trial court did not err when it considered Ivey's extrinsic evidence because such evidence was relevant to determine whether the garden spot was located in Tract 19 or Tract 21. *See Stewart v. Selder*, 473 S.W.2d 3, 7 (Tex. 1971) (holding that, regardless of whether the will was ambiguous, extrinsic evidence was properly considered to determine whether there was a latent ambiguity); *In re Estate of Cohorn*, 622 S.W.2d 486, 487 (Tex. App.—Eastland 1981, writ ref'd n.r.e.) (holding that extrinsic evidence was admissible when misdescription of devise of tract of land in will created latent ambiguity).

Ivey maintains that the summary judgment should be affirmed because her extrinsic evidence conclusively demonstrates that it is impossible for the garden spot to be located in Tract 19, and in the absence of any controverting evidence from the appellants, the trial court correctly construed the bequeathal at issue consistent with the testatrix's intent. Ivey's argument fails for two reasons.

First, as discussed above, the appellants presented the language of the bequeathals, which appear to demonstrate that the testatrix understood that the

Kelley homestead, which she left to Arthur, was located in Tract 21, while the garden spot, which she left to Willie, was located east of the homestead in Tract 19. The testatrix's bequeathals also appear to demonstrate an intent to leave the rest of Tract 19 north of the homestead in equal shares to the other named children, including Ivey. Thus, the plain language of the bequeathals is some evidence that the testatrix intended to leave the garden spot portion of Tract 19 to Willie and the remainder of Tract 19 to the other named children in equal shares.

Second, the fact that Tract 19 is north of Tract 21 does not necessarily mean that it is impossible for the garden spot to be located east of the homestead and at the same time be located in Tract 19. The survey in evidence shows that even though Tract 19 is located north of Tract 21, a portion of Tract 19 does lie east of the house on Tract 21. Viewing Tract 19 in this way is consistent with the testatrix's intent as expressed in the will that Willie receive the portion of Tract 19 "located east of the homestead at 418 Bostick Lane, also known as the garden spot[.]" It is also consistent with the testatrix's bequeathal of "the rest of" the portion of Tract 19 that lies north of the homestead to the other named children, because the rest of Tract 19 is located north of the house and west of the portion of Tract 19 that lies east of the house on Tract 21. Arthur's testimony that the garden spot is located in Tract 21 and not Tract 19 does no more than raise a fact issue as to the location of the garden spot left to Willie.

We hold that because the testatrix's will contains a latent ambiguity in the bequeathal of the garden spot to Willie, the trial court correctly considered Ivey's extrinsic evidence; however, the trial court erred in granting summary judgment in Ivey's favor because the evidence raises a genuine issue of material fact precluding summary judgment in Ivey's favor on her request for declaratory relief, a quiet title, and a permanent injunction. We therefore reverse the trial court's judgment in

favor of Ivey and remand for further proceedings. Likewise, because Ivey presented evidence raising a genuine issue of material fact concerning the construction of the will, we affirm the trial court's denial of the appellants' no-evidence summary judgment motion. We also affirm the trial court's denial of the appellants' traditional summary judgment motion based on the statute of limitations, collateral estoppel, res judicata, and mistake or ambiguity.

C. Remaining Sub-Issues on Denial of Appellants' Summary Judgment Motion

Our discussion above disposes of most, but not all, of the substantive issues raised in the parties' competing summary judgment motions. In the appellants' second issue, they also contend that the trial court should have dismissed Ivey's declaratory judgment action and suit to quiet title because Willie is a necessary party to the lawsuit. In support of this contention, the appellants argue that Ivey requests relief that affects Willie's ownership interest in Tract 19, and point to *Commonwealth Bank & Trust Co. v. Heid Brothers, Inc.*, for a definition of "necessary party." *See* 52 S.W.2d 74, 60 (Tex. 1932) (explaining for purposes of venue determination that a necessary party is "one who is so vitally interested in the subject-matter of the litigation that a valid decree cannot be rendered without his presence as a party"). Ivey responds that she was entitled to seek declaratory relief and to quiet title because the appellants sought to act in a way inconsistent with her rights in the property, and argues that the appellants did so knowing that Arthur had admitted that Willie has never made a claim to any of the property in Tract 19.

Although the appellants offer general citations to the law relating to declaratory judgments and suits to quiet title, the appellants do not discuss joinder in the context of Ivey's claims for declaratory relief or to quiet title, or point to any

authority demonstrating that dismissal of Ivey's claims was required as a matter of law because Willie was not a party to the lawsuit. Further, the appellants offered no evidence that Willie claimed an interest in Tract 19; indeed, the appellants' own evidence from Willie's lawsuit showed that Willie claimed an interest only in Tract 21, not Tract 19, and Arthur testified that Willie's interest in the garden spot was located in Tract 21, not Tract 19. At a minimum, then, a fact issue was raised concerning whether Willie's joinder was required.

On this record, the trial court did not err by denying the appellants' summary judgment motion on this ground. In light of our disposition of the case, the appellants may renew their contention that Willie's presence is necessary for a just adjudication on remand; however, we express no opinion on the merits of the appellants' contention.

D. Attorney's Fees Awarded to Ivey

In their third issue, the appellants challenge the trial court's award of attorney's fees to Ivey. The appellants complain that the supporting affidavit of Ivey's counsel contains numerous deficiencies, including hearsay, speculation, and conclusory statements, and that the fees awarded are excessive.

The trial court's judgment reflects that the trial court awarded Ivey attorney's fees based on the Declaratory Judgments Act. In any declaratory judgment proceeding, the court "may award costs and reasonable and necessary attorneys' fees as are equitable and just." Tex. Civ. Prac. & Rem. Code § 37.009. The Act "entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law." *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). Under the Act, a party defending a suit brought may be awarded its reasonable and

necessary attorney's fees. *Bradt v. State Bar of Tex.*, 905 S.W.2d 756, 760 (Tex. App.—Houston [14th Dist.] 1995, no pet.). Because we reverse the summary judgment in favor of Ivey, we also reverse the award of attorney's fees to enable the trial court to reconsider the fees after remand. *See* Tex. Civ. Prac. & Rem. Code § 37.009.

II. Ivey's Request that Arthur's Appeal be Stricken

Lastly, Ivey argues that this court should strike Arthur's appeal or, alternatively, instruct the trial court to consider whether to sanction Leonard for his "serial disregard" of the trial court's December 1, 2014 order striking Arthur's answer in response to Ivey's motion to show authority. Ivey argues that the appellants have not appealed the order and points out that Leonard has never sought to have the trial court vacate or modify the order. Consequently, Ivey asserts, the order is valid and remains effective "to this day." Notwithstanding Ivey's failure to file a second order challenging Leonard's authority to represent Arthur until after the appellants filed their notice of appeal, Ivey maintains that the trial court's order is still "the law of the case."

In the trial court's December 1, 2014 order, the trial court did not remove Leonard from the case, but merely ordered that Arthur's answer and notice of appeal from the order granting Ivey's temporary injunction be stricken from the record. After this court issued its opinion and before the appellants moved for summary judgment, Leonard filed a second amended answer on behalf of all of the appellants, including Arthur. Ivey did not challenge Leonard's representation of Arthur at that time. She also sought summary judgment against all of the appellants, including Arthur, in her counter motion for summary judgment. After Ivey's summary judgment was granted, Leonard filed a notice of appeal on behalf of Arthur and the other appellants. Ivey did not challenge Leonard's authority to do

so in this court, but instead filed a second motion to show authority in the trial court, which the trial court declined to entertain. On these facts, we conclude that Ivey has not demonstrated that Leonard has acted with "serial disregard" for his duties or that Arthur's appeal should be stricken. We deny Ivey's requested relief.

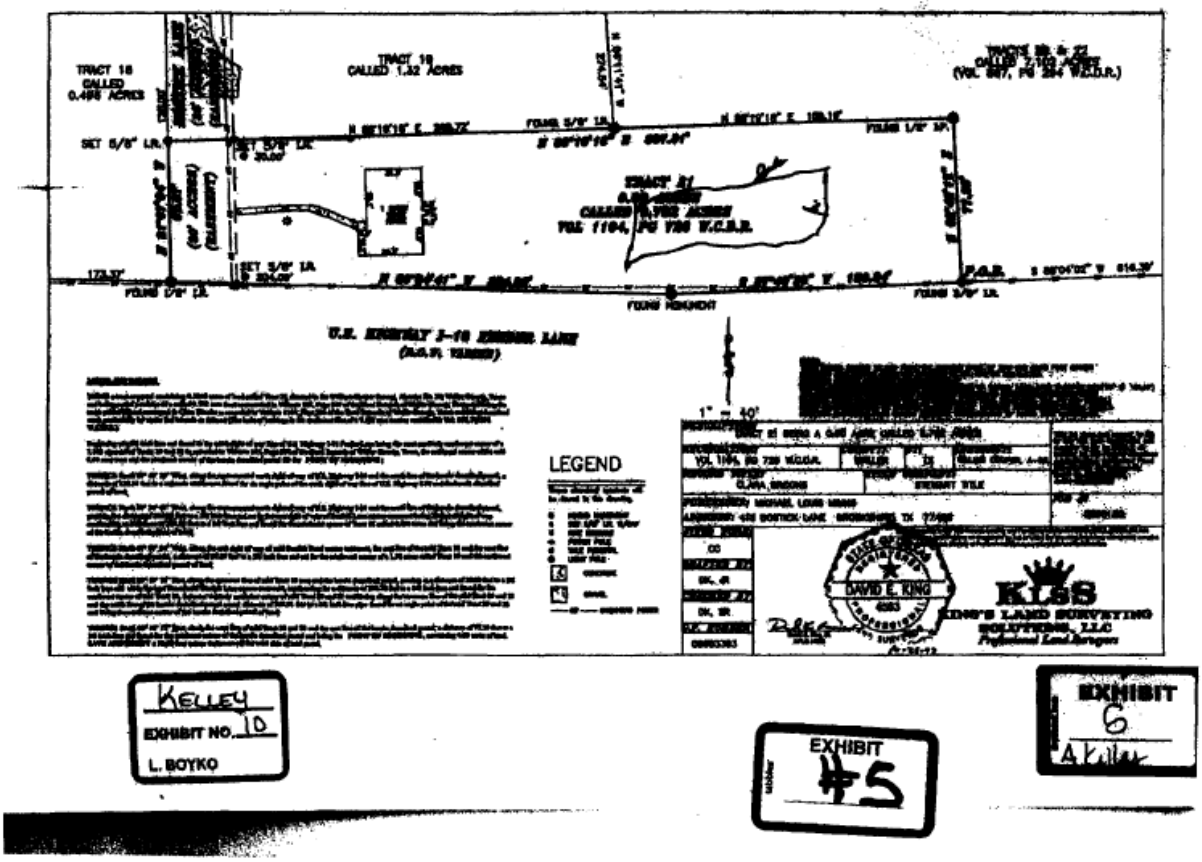
CONCLUSION

We affirm the trial court's order denying the appellants' traditional and no-evidence summary judgment motion, reverse the trial court's judgment in favor of Ivey, and remand the case for further proceedings consistent with this opinion.

/s/ Ken Wise
Justice

Panel consists of Justices Jamison, McCally, and Wise.

APPENDIX


TRACT 18
CALLED
0.495 ACRES
TRACT 19
CALLED 1.32 ACRES
TRACT 21
CALLED 9.705 ACRES
VOL. 1104, PG 709 V.C.D.R.
SET 5/8" I.R.
FOUND 5/8" I.R.
FOUND 1/2" I.R.
FOUND MONUMENT
P.O.B.
LEGEND
1" = 40'
DAVID E. KING
KING'S LAND SURVEYING SOLUTIONS, LLC
Professional Land Surveyor
KELLEY
EXHIBIT NO. 10
L. BOYKO
EXHIBIT
#5
EXHIBIT
6