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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2023-2024

CL-2023-0445

Mason Caldwell and Bent River Development, LLC

v.

**Joy Brannon McCartney, as personal representative of the
Estate of Susan Taber, deceased; Molly Fielding;
and Taber Fielding**

**Appeal from Etowah Circuit Court
(CV-19-900031)**

MOORE, Presiding Judge.

Mason Caldwell and Bent River Development, LLC (hereinafter referred to collectively as "Caldwell"), appeal from a judgment entered by the Etowah Circuit Court ("the trial court") insofar as it ordered Caldwell

to pay attorney's fees and costs in the amount of \$18,604. We reverse the judgment and remand the case with instructions.

Procedural History¹

On March 20, 2019, the trial court entered an order in an action brought by Susan Taber ("Susan"). That order established the boundary line between adjoining parcels of real property owned by Susan and Caldwell, declaring a certain fence to be the boundary line between the properties. The order also determined that Caldwell had trespassed onto Susan's property and permanently enjoined Caldwell from damaging or removing any portion of the fence or from entering Susan's property. The trial court scheduled a hearing on the matter of damages for April 2, 2019, but that hearing was stayed after Caldwell appealed the order to the extent that it granted injunctive relief. See Rule 4(a)(1), Ala. R. App. P. (authorizing appeals from interlocutory injunctions).

¹The parties have previously appeared before this court. See Caldwell v. McCartney, 323 So. 3d 611 (Ala. Civ. App. 2020) (table). We take judicial notice of the record in Caldwell. See City of Mobile v. Matthews, 220 So. 3d 1061, 1063 (Ala. Civ. App. 2016) ("[A] court may take judicial notice of its own records.").

While the case was pending on appeal, Susan died. Upon the filing of a suggestion of death, this court granted a motion to substitute Joy Brannon McCartney, the personal representative of Susan's estate, and Taber Fielding ("Taber") and Molly Fielding ("Molly"), Susan's children and heirs, as appellees. On January 17, 2020, this court affirmed the trial court's March 20, 2019, order, without an opinion, and issued our certificate of judgment on March 24, 2020. See Caldwell v. McCartney, 323 So. 3d 611 (Ala. Civ. App. 2020) (table).

On July 16, 2020, the trial court entered an order granting a motion to substitute McCartney, as the personal representative of Susan's estate, Taber, and Molly as plaintiffs in the action. On January 15, 2021, Caldwell filed an "answer and counterclaims" against the "Plaintiff," denying the allegations in the complaint that had originally been filed by Susan and asserting various counterclaims based on an allegation that that "Plaintiff or her agent caused to be erected on her property a sign, which reads 'Colonel T's Hog Farm, Where the Wind Always Blows to the South.'"

After a trial, on May 25, 2023, the trial court entered a judgment awarding "Plaintiff" \$10,000 in damages due to Caldwell's trespass and

\$18,604 in attorney's fees and costs.² Regarding the counterclaims, the trial court further determined that Taber had erected the sign upon which Caldwell had based its counterclaims, and it ordered Taber to pay Caldwell \$10,000 in damages under the theory that the sign constituted a private and public nuisance, thus rejecting all other legal theories Caldwell had advanced in its counterclaims. Both parties sought postjudgment relief, which the trial court denied.

On June 27, 2023, Caldwell filed a notice of appeal to this court, naming as appellees "Joy Brannon McCartney, Molly Fielding, estate of Susan Taber"; however, in its brief, Caldwell refers to Taber as the appellee. Upon review of the record and the notice of appeal, this court directed the parties to submit letter briefs addressing, among other things, who had been awarded the attorney's fees and costs in the May 25, 2023, judgment and what was the effect of the failure of Caldwell to designate Taber as an appellee in its notice of appeal.

²The trial court certified the judgment as a final judgment under Rule 54(b), Ala. R. Civ. P., but the judgment expressly or impliedly ruled on every claim asserted by the parties, so that certification was unnecessary to render the judgment final. See Linowiecki v. Nichols, 120 So. 3d 1082, 1086 (Ala. Civ. App. 2013).

Procedural Issues

We first address the question of who was awarded the attorney's fees and costs. During the trial, Taber testified that \$18,604 in attorney's fees and costs had been expended to prosecute the claims originally asserted by Susan in her complaint and in defending the first appeal. In the judgment, the trial court determined that Taber, who it referred to as "Fielding" in the judgment, had requested reimbursement of the \$18,604. The trial court concluded that, "[a]s the prevailing party, the Plaintiff is entitled to an award of attorney's fees and costs of \$18,604.00." The term "plaintiff" is not defined in the judgment, but, at times, the term clearly referred to Susan.

The reference to "the Plaintiff," being singular in nature, and being associated at times with Susan, a deceased person, renders the judgment ambiguous. That ambiguity may be resolved by referring to the record to determine the intent of the trial court when rendering its judgment. See Griffin v. Proctor, 244 Ala. 537, 543, 14 So. 2d 116, 120 (1943) ("If a judgment is ambiguous as to the identity of the parties in the capacity in which they sue, the judgment will be read in the light of the pleadings and other parts of the record."). The record shows that the motion for

substitution granted by the trial court called for McCartney, as the personal representative of Susan's estate, Molly, and Taber to be substituted for Susan as the proper plaintiffs following her death. At the outset of the trial, the trial court reviewed the record and acknowledged that all three were plaintiffs who could not be excluded from the hearing. Although the judgment referred to "the plaintiff" as Susan at times, she, as a deceased person, could not be afforded any relief, so it must be inferred that the trial court, in awarding attorney's fees and costs to the "prevailing party" on the trespass claim, intended that those persons substituted for Susan would be entitled to the attorney's fees and costs. See Griffin, supra. Therefore, we conclude that the trial court awarded the attorney's fees and costs to all three plaintiffs -- McCartney, as the personal representative of Susan's estate, Molly, and Taber.

Caldwell appealed the judgment designating only McCartney, as the personal representative of Susan's estate, and Molly as appellees. Rule 3(c), Ala. R. App. P., provides that "[t]he notice of appeal shall specify ... each adverse party against whom the appeal is taken" But Rule 3(c) also provides that "[s]uch designation ... shall not ... limit the scope of appellate review." The trial court entered only one judgment

awarding attorney's fees and costs to all three plaintiffs. Taber filed a brief implicitly indicating that he had been served with the notice of appeal, that he considered himself to be an appellee, and that he had not been prejudiced by the omission of his name. We, therefore, believe that justice would be served by treating Taber as a designated appellee, and we have amended the style of the appeal to reflect our determination. See Progressive Direct Ins. Co. v. Keen, 376 So. 3d 482, 484 n.2 (Ala. 2022).

"It is academic that all parties to an action whose interest will be affected by a reversal of the judgment or decree appealed from must be made parties to the appellate proceedings. Otherwise we cannot consider the case as to the non-joined appellees." Jemison v. Brown, 281 Ala. 281, 282, 202 So. 2d 44, 45 (1967). Because we have now determined that all those persons necessary to this appeal have been effectively joined, we may proceed to a discussion of the merits.

Substantive Issue

The trial court awarded attorney's fees and costs to McCartney, as the personal representative of Susan's estate, Molly, and Taber, who were the prevailing parties in the proceedings below. Caldwell appeals, arguing that the trial court erred in awarding attorney's fees and costs

because, it says: (1) as a matter of law, attorney's fees and costs are not recoverable in this case and (2) no evidence was presented as to the reasonableness of the attorney's fees. Caldwell properly preserved these issues because it filed a postjudgment motion challenging the legality and reasonableness of the award, which the trial court denied. Cf. Jones v. Sherrell, 52 So. 3d 527, 533 (Ala. Civ. App. 2010) (explaining that appellate court could not consider reasonableness of attorney's fees issues in absence of postjudgment motion raising the issue). However, we need not discuss the second issue because we conclude that the first issue is dispositive of this appeal.

Standard of Review

The first issue presents a pure question of law. "Because the issue before us presents a pure question of law, we review the matter de novo, without any presumption of correctness." Ex parte Byrom, 47 So. 3d 791, 794 (Ala. 2010). See also Simcala, Inc. v. American Coal Trade, Inc., 821 So. 2d 197, 200 (Ala. 2001).

Analysis

In Calvert v. Belcher, 678 So. 2d 795 (Ala. Civ. App. 1996), the Jefferson Circuit Court resolved a boundary-line dispute and awarded

the prevailing party litigation expenses incurred in the dispute. The parties had been at issue over whether a fence established the proper boundary line and whether the landowner who had erected the fence had thereby acquired certain property enclosed by the fence by adverse possession. In concluding that the award of litigation expenses was improper, this court said:

"There is no basis for the trial court to award expenses and/or attorney fees absent a contract allowing such an award, a statute authorizing such an award, or by special equity. Tomlinson v. G.E. Capital Dealer Distributor Finance, Inc., 646 So. 2d 139 (Ala. Civ. App. 1994). None of these factors are present in this case. Therefore, we reverse that portion of the trial court's judgment and remand it to the trial court for proceedings consistent with this opinion."

678 So. 2d at 797.

This court has likewise recognized that, for the same reasons, a prevailing party may not recover attorney's fees and costs as an element of damages for trespass to real property. See Persky v. Vaughn, 741 So. 2d 414, 416 (Ala. Civ. App. 1998). This case involves a claim of trespass to the real property formerly owned by Susan and not an action for trespass vi et armis. See Lovell v. Acrea, 500 So. 2d 1082, 1083 (Ala. 1986) ("At common law, trespass to the person was described as trespass

vi et armis, 'by force and arms.'"). Thus, the trial court had no lawful basis for awarding attorney's fees and costs on the trespass claim.

Conclusion

For the foregoing reasons, we reverse the judgment and remand the case to the trial court for the entry of a judgment consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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