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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-535

Filed 06 June 2023

Chatham County, No. 20 CVS 430

MARK CLARK and ERIN CLARK, Plaintiffs,

v.

NIALL GILLESPIE, Defendant.

Appeal by plaintiff from order entered 10 February 2022 by Judge Alyson Adams Grine in Chatham County Superior Court. Heard in the Court of Appeals 15 November 2022.

*Chris Kremer for the Plaintiff-Appellant.*

*Gunn & Messick, LLP, by Paul S. Messick, Jr., for the Defendant-Appellee.*

DILLON, Judge.

Plaintiffs Mark and Erin Clark appeal from an order granting summary judgment to Defendant Niall Gillespie.

I. Factual Background

This matter involves a boundary dispute between neighbors, each owning an eight-acre (more or less) tract. Their tracts are on land which was part of a 270-acre tract assembled in the late 18th century for a planned town called Haywoodsborough,

later Haywood<sup>1</sup>, named for State Treasurer John Haywood (1755-1827), and located at the confluence of the Deep and Haw rivers, marking the beginning of the Cape Fear River. Included in the record on appeal is the map drawn in 1799 depicting Haywoodsborough as planned with (1) proposed streets, running at right angles, either northwest to southeast or northeast to southwest; (2) a city square at the center; and (3) 294 building lots, most being 200 feet x 100 feet (appr. 1/2-acre).

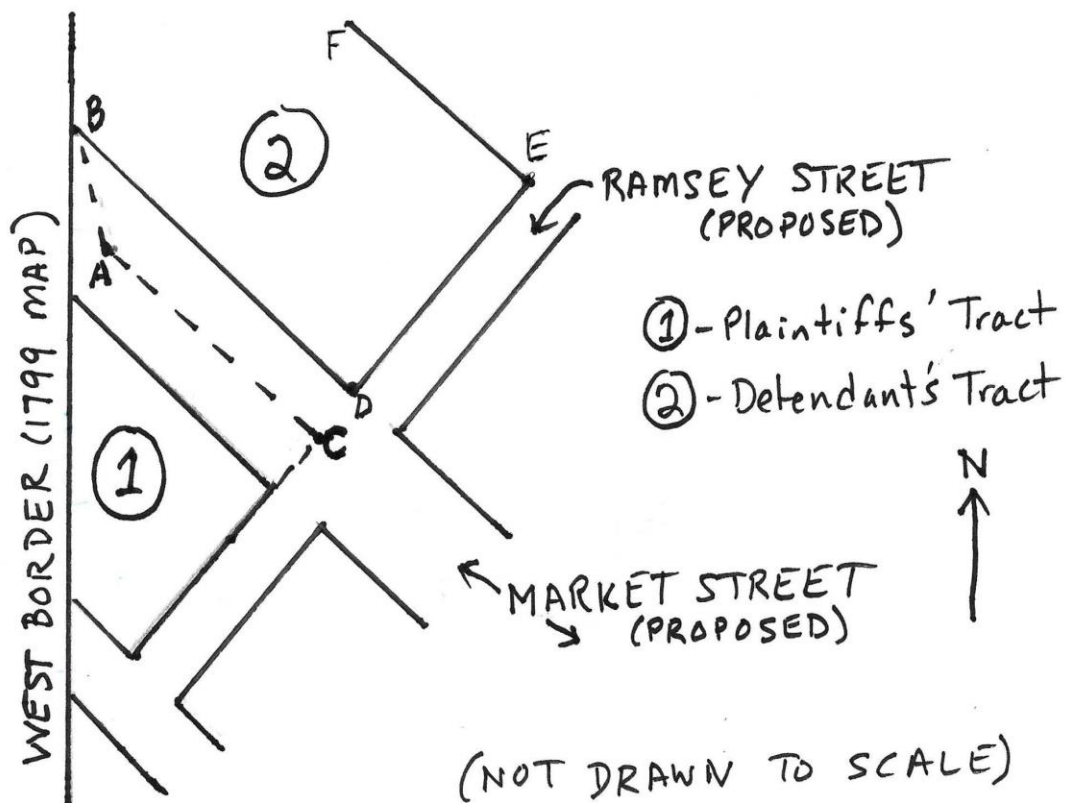
Through the centuries, Haywood has remained sparsely populated and rural. Most of the proposed 1/2-acre lots were eventually combined and/or recombined to form larger tracts. Many of the streets depicted in the 1799 map were never built or opened but were absorbed into adjacent tracts.

Relevant to this appeal, the 1799 map depicts two streets, Market Street and Ramsey Street, intersecting near the western edge of Haywood. Market Street was planned as being 130 feet wide, running northwest to southeast, and dead ending at the western edge of Haywood. Ramsey Street was planned as being 80 feet wide and running northeast to southwest. Market Street was never opened and presumably was absorbed into the parties' respective tracts over the years. The issue in this case

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<sup>1</sup> Haywood was nominated at the 1788 constitutional convention to serve as our State's new capital; however, the convention chose a site in Wake County that would become the City of Raleigh. In 1792, Haywood was in the running as the location for the new state-chartered university; however, "New Hope Chapel Hill" (now Chapel Hill) was chosen instead. This and much of the other historical information concerning Haywood was not contained in the record on appeal but was found in an article entitled "The Loss of a Town" by Dennis Daniels and published in the *Tar Heel Junior Historian* 44:2 (spring 2005). While we do not rely on the article *per se*, we take notice of laws enacted by our General Assembly concerning Haywood referenced in the article.

is the precise location of the boundary within the area that had been originally set aside in the late 1700's to be a block of Market Street. (See map below).



In 2018, Plaintiffs purchased the tract labeled “1” on the above map. That same year, Defendant purchased the tract labeled “2” above. There is no indication that the portion of Market Street which separates the parties’ tracts was ever opened or used by the public as a right-of-way. Rather, it appears that this block of Market Street has been used and/or absorbed by the prior owners of the parties’ respective tracts.

(Likewise, Ramsey Street, as shown on the above map and on the 1799 map, does not exist on the ground. There is, however, a public road on a 60-foot-wide right-of-way called Haywood Road which runs in front of tracts 1 and 2, approximately where Ramsey Street was planned to be.) The issue in this case concerns where, within unopened Market Street, the boundary between the parties' tracts is located.

The conveyances in Plaintiffs' chain of title regarding tract 1, at least since the 1980's, depict the tract's northeast boundary as the dotted line on the map, from point "B" to point "A" and then down the "centerline of Market Street" to Ramsey Street to (or near) point "C".<sup>2</sup> Plaintiffs' 2018 deed references the 1989 recorded map referenced in footnote 2 below. Based on the record, sometime in or prior to 2010, Plaintiffs' predecessor-in-title erected a fence somewhere within Market Street.

At least since the 1950's, the conveyances in Defendant's chain of title regarding tract 2 depict its southwest boundary as the northeast edge of Market Street, from point "B" to (or near) point "D", rather than a line running down the centerline of Market Street.<sup>3</sup> Defendant acquired tract 2 in 2018 by deed with a

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<sup>2</sup> Recent conveyances in Plaintiffs' chain all recite a call from "B" to "A" of about 78 feet. However, some of the prior conveyances describe the distance from point A along Market Street to Ramsey Street as being 711 feet, apparently ending at a "control corner" – at or near point C on the above map - at the northwest edge of Ramsey Street, based on a plat recorded in Book of Maps 89, Page 223 in the Chatham County Registry. Other descriptions, though, describe this boundary line as being 733 feet, extending beyond point C and *into* Ramsey Street, ending at an iron pipe (perhaps no longer there), as shown in a plat recorded in Book of Maps 88, Page 222.

<sup>3</sup> For example, conveyances in 1956 (recorded in Book 246, Page 330) and in 2004 (Book 1135, Page 967) describe the tract by references to all or part of 12 lots as depicted in the 1799 map, without any inclusion of any portion of Market Street itself. Also, the boundary is described as a

description consistent with descriptions in prior deeds in the chain of title, none of which incorporate any portion of Market Street.

After buying tract 2 in 2018, Defendant began to suspect that Plaintiffs' fence encroached beyond the middle of Market Street. In 2020, Defendant commissioned a survey, which depicts Plaintiffs' fence well across the center line of Market Street. This survey also depicts Defendant's western boundary to extend into Market Street, not based on the description in the deed he had received from his predecessor-in-title in 2018, but rather "per the reversion of the unopened streets to the adjacent property owners." In other words, the surveyor took the position that Defendant's tract 2 extended to the centerline of Market Street, as Market Street was never opened. In 2021, Defendant obtained a new deed from his predecessor-in-title, titled "Deed of Correction", which changed the description of the tract conveyed to include the northeastern half of Market Street, as depicted on the 2020 survey, which increased the size of the tract from 8.85 acres to 9.807 acres.

In sum, Plaintiffs' chain of title for many decades describes their tract as including some portion of Market Street. However, Defendant's chain of title does not purport to include any portion of Market Street, until 2021 when Defendant obtained and filed the Deed of Correction, which purportedly added 1/2 of Market

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straight line running 773 feet, which longer than the 711 or 733-foot straight line running down the middle of Market Street as described in Plaintiffs' chain of title. This longer distance seems consistent with the line between points B and D. And none of the calls Defendant's chain describes the short line between A and B described in Plaintiffs' chain.)

Street to his tract). That is, neither chain, prior to 2021, depicts a conveyance of the northeast half of Market Street (the quadrilateral approximately from points A, B, C, and D in the map above).

## II. Procedural History

Plaintiffs filed this action *pro se* in Chatham County District Court as “a processioning proceeding pursuant to Chapter 38” of our General Statutes.<sup>4</sup> In the complaint, they allege that their fence was erected in or prior to 2010 and is within their property. They make no express claim of adverse possession.

Defendant answered, asking the matter to be transferred from the District Court to the Superior Court Division. Defendant also asserted counterclaims to quiet title and for a declaratory judgment regarding the boundary line, alleging that Plaintiffs were adversely occupying the portion of his land in Market Street.

The matter was transferred to Superior Court. During discovery, Plaintiffs alleged that the property line was the “centerline” of Market Street as indicated on the 1989 recorded map in their chain of title.

Defendant moved for summary judgment. Defendant filed an affidavit from a land surveyor who alleged that Plaintiffs’ fence encroached on Defendant’s tract, as described Defendant’s 2020 survey. Plaintiffs filed an affidavit which recounts the descriptions in their chain of title.

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<sup>4</sup> The matter was originally assigned to the District Court division, apparently based on the confusing caption used by Plaintiffs: “In the United States District Court”.

Shortly before the hearing, Plaintiffs retained counsel, who moved to amend the complaint to add a claim for adverse possession, based on the location of the fence. After a hearing on the matter, the trial court granted Defendant's motion for summary judgment on all claims, essentially concluding that the boundary was as depicted in Defendant's 2020 survey. The trial court never acted on Plaintiffs' motion to amend. Plaintiffs appealed.

### III. Standard of Review

The standard of review for an appeal from summary judgment is *de novo*. See *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972).

### IV. Analysis

By granting summary judgment for Defendant, the trial court essentially concluded there was no genuine issue of material fact based upon the affidavits and other information presented to the trial court, that Defendant's boundary with Plaintiffs' tract is as described in the 2020 survey Defendant obtained and in the 2021 Deed of Correction, *and that* Plaintiffs' fence encroaches on Defendant's tract. For the reasoning below, we conclude that summary judgment was inappropriate.

#### A. Superior Court's Jurisdiction

At the outset, we note that Plaintiffs' complaint presented a claim for

“processioning” under Chapter 38 of our General Statutes. Processioning is a special proceeding, *see* N.C. Gen. Stat. § 38-1, whose “sole purpose . . . is to establish the *true location* of disputed boundary lines.” *Pruden v. Keemer*, 262 N.C. 212, 216, 136 S.E.2d 604, 607 (1964) (emphasis in original).

Chapter 38 directs that a processioning proceeding be heard first by the superior court *clerk*. N.C. Gen. Stat. § 38-3(a). However, this matter was heard in the first instance by a superior court *judge*. Our Supreme Court, though, has held that Section 38-3 is not jurisdictional and that a processioning matter may be heard in the first instance by a superior court judge. *Andrews v. Andrews*, 252 N.C. 97, 99, 113 S.E.2d 47, 48 (1960).

We further note that Defendant’s counterclaims have alleged additional issues beyond establishing location of the boundary as shown in the 1799 map. Specifically, Defendant has alleged that Plaintiffs are claiming some portion of Market Street adverse to his claim based on the location of Plaintiffs’ fence. Accordingly, the matter involved an action to quiet title and, therefore, was *required* to be heard during a regular session of superior court, rather than by a clerk. *See Lane v. Lane*, 255 N.C. 444, 449, 121 S.E.2d 893, 897-98 (1961).

#### B. Summary Judgment Was Inappropriate

We conclude that Defendant was not entitled to summary judgment, establishing the boundary as depicted in the 2020 survey he paid for.

First, we note Defendant’s 2020 survey from his summary affidavit is



internally inconsistent as to the boundary location. This survey describes the “AC” line as running 711.43 feet from Ramsey Street North 46 degrees, 03’58” West. However, the survey expressly states this “AC” line is the same line depicted in the 1989 map in Plaintiffs’ chain of title, and this map was attached to Defendant’s summary judgment affidavit. But that 1989 map describes this “AC” line as running more westerly, specifically North 48 degrees West.<sup>5</sup> Also, the 2020 survey describes this same line as the centerline of Market Street, as depicted in the 1799 map recorded in Book of Maps 8, Page 18. But the 1799 map describes the street as running North 45 degrees West.

Second, we note there is nothing in the record indicating Defendant has title to *any* part of Market Street except for the Deed of Correction which was not filed until 2021 and from a grantor who was not conveyed any interest in Market Street by its grantor. Therefore, Defendant has not shown, as a matter of law, that he owns to the line depicted in his 2020 survey under color of title or otherwise. Accordingly, we vacate the summary judgment order and remand for further proceedings.

We make the following observations from the record to help guide the trial court on remand.

The parties agree that they own Market Street, though they disagree how

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<sup>5</sup> The 1989 map actually describes the line as running from point A South 42 degrees East. However, this direction is the same as running towards point A North 48 degrees West. In any event, assuming both lines (from the 1989 and 2020 surveys) start at the same point A, then the line as depicted in the 1989 map would be more beneficial to Plaintiffs.

much of Market Street each owns. Based on the record, it appears (1) Market Street was dedicated for public use in or around 1799; (2) Market Street was never actually opened to the public or accepted by a government entity; (3) the corporation which dedicated Market Street is no longer in existence, such that Market Street as depicted in the 1799 map, running at North 45 degrees West, reverted to the adjacent lot owners to its centerline; (4) any interest based on this reversion could be subject to an adverse possession claim; (5) Defendant does not have an adverse possession claim to any portion of Market Street based on color of title, as his chain of title does not appear to have included any portion of Market Street until he filed the 2021 Deed of Correction, *see* N.C. Gen. Stat. § 1-38 (seven years' possession under color of title); (6) Plaintiffs may have an adverse possession claim based on color of title for any portion of the description in the 1989 map which includes a portion of Market Street beyond its centerline as depicted in the 1799 map; and (7) it is doubtful that Plaintiffs have an adverse possession claim based on the fence, *see* N.C. Gen. Stat. § 1-40 (twenty years' possession under claim of right).

In 1796, three years prior to the 1799 map, our General Assembly created the “Deep and Haw River Navigation Company” (the “Company”) to acquire the land identified in the 1799 map and appointed commissioners to create a company town. *Public Laws of North Carolina, 1796*, c. 21 and c. 47. According to the article cited in the first footnote, from 1800 to 1805, the Company sold some lots depicted on the 1799 map. The Company appears to have gone defunct during the 19th Century.

In 1905, our General Assembly incorporated Haywood as a town. *See Private Laws of North Carolina, 1905*, c. 170 and c. 296. And in 1915, our General Assembly enacted legislation recognizing that the State owned the four-acre public square at the center of Haywood. *Public Laws of North Carolina, 1915*, c. 105. However, there is nothing in the record or from our research which indicates that the portion of Market Street relevant to this matter was ever opened or conveyed by the Company or accepted by any government entity.

Section 136-96 of our General Statutes provides that when a corporation dedicates land for streets which are never opened/accepted, if the corporation becomes defunct, the adjacent lot owners may file a declaration withdrawing the dedication, the effect of which creates a conclusive presumption that the adjacent lot owners also own to the centerline of the abandoned street. Specifically, subdivision (a) provides that any land dedicated as a road for public use by the recording of a plat which is not actually used or opened within 15 years of its dedication “is conclusively presumed” to have been abandoned. N.C. Gen. Stat. § 136-96(a). Subsection (b), though, provides that “notwithstanding subsection (a)”, no abandonment shall be presumed until the dedicator or person claiming under the dedicator “causes to be recorded” in the country registry “a declaration withdrawing the [road] from public or private use[.]” N.C. Gen. Stat. § 136-96(b). However, subsection (d) provides that when “the dedicating corporation is no longer in existence, . . . the right, title, and interest in the land is conclusively presumed to be vested in those persons owning

lots or parcels of land adjacent to it, subject to the provisions of this section.” N.C. Gen. Stat. § 136-96(d).

Our Supreme Court has stated that adjacent owners of lots in a subdivision may be deemed to own a dedicated street which is abandoned “where the street was dedicated by a corporation which has become nonexistent.” *Russell v. Coggin*, 232 N.C. 674, 677, 62 S.E.2d 70, 73 (1950). That Court has held that a lot owner can convey title to an adjacent street dedicated by a developer corporation where the street was never opened or accepted, the corporation is no longer in existence, and the lot owner has recorded a declaration withdrawing the dedication. *See Sheets v. Walsh*, 217 N.C. 32, 6 S.E.2d 817 (1940).

#### V. Conclusion

Based upon the maps, deeds, and other information presented to the trial court, there is a genuine issue of disputed fact as to the location of the boundary line between the parties’ lots. Once the location of the boundary line on the ground has been determined, the Defendant’s counterclaims may or may not need to be resolved. Therefore, we vacate the order granting Defendant summary judgment and remand for further proceedings. Based on the record, it appears that on remand the location of the centerline of Market Street, as depicted in the 1799 survey, must be identified, and then, if necessary, any additional issues raised by the pleadings must be determined. Of course, there may be other issues raised based on other information that comes to light as litigation progresses. On remand, the trial court must be

mindful that the true description of a disputed boundary line is a question of law, but the actual location of the boundary line *on the ground* is a question of fact. *Benton v. Lumber Co.*, 195 N.C. 363, 364, 142 S.E. 229 (1928). *See, e.g.*, N.C. Gen. Stat. § 38-3(b) (matter to be tried by a jury in superior court).

VACATED AND REMANDED.

Chief Judge STROUD and Judge GORE concur.

Report per Rule 30(e).