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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1042

Filed 4 June 2024

Cherokee County, No. 20 CVS 292

RICHARD KEITH MASHBURN, LINDA FAY MASHBURN and CALVIN JAMES MASHBURN, Plaintiffs,

v.

MICHELLE L. CHANDLER and BILLY SCOTT CHANDLER, Defendants.

Appeal by plaintiffs from order and judgment entered 11 May 2023 by Judge William H. Coward in Superior Court, Cherokee County. Heard in the Court of Appeals 17 April 2024.

The Law Firm of Paul L. Erickson, PA, by Paul L. Erickson, for plaintiff-appellants.

Ferikes Bleyntat & Cannon, PLLC, by Elizabeth L. Oxley, William W. Decker, Jr., and Edward L. Bleyntat, Jr., for defendant-appellees.

ARROWOOD, Judge.

Richard Keith Mashburn, Linda Fay Mashburn, and Calvin James Mashburn (“plaintiffs”) appeal from the trial court’s order extinguishing plaintiffs’ claim to a disputed piece of property. Plaintiffs argue the trial court committed several reversible errors, specifically by refusing to accept various exhibits and affidavits,

concluding that plaintiffs were required to “place their property on the ground” and did not do so, finding that plaintiffs failed to plead adverse possession, and improperly applying the Real Property Marketable Title Act (“MTA”). For the following reasons, we affirm the trial court.

I. Background

On 19 June 2020, plaintiffs filed a claim to quiet title to a 65-acre tract of land, identified as “Section 58, District 3,” in Cherokee County. An executor’s deed conveying the tract to plaintiffs, attached as an exhibit to the complaint, described the tract as follows:

Beginning on a large dogwood on the East side of the Notla River the upper corner on No. 56, and runs North with the line of the same and passing the same two hundred and one poles to a spanish oak on the line of No. 52, then East seventy poles to a stake and pointer, then South forty five East forty six poles to two large bushes on the bank of the river, then down the meanders of the river to the BEGINNING, containing sixty five acres, more or less.

On 9 October 2020, Michelle L. Chandler (“Mrs. Chandler”) and Billy Scott Chandler (“Mr. Chandler”) (collectively, “defendants”) filed an answer and counterclaim to quiet title to a 5.51-acre lot (“disputed lot”) within the boundaries of the claimed 65-acre tract.¹ In response, plaintiffs filed affirmative defenses and an answer to the counterclaim on 18 January 2021 and a motion for partial summary

¹ Throughout this opinion and the underlying order, the 65-acre tract is sometimes referred to as “the Tract” and the disputed lot is sometimes referred to as “the Lot.”

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judgment on the issue of quiet title on 6 May 2022. Defendants' answer included attached exhibits of defendants' deed and the preceding deed, which described the disputed lot as follows:

BEGINNING at an iron pipe found at a corner common to Chennault and Mashburn and runs thence with the Mashburn line South 34-50 East 802.66 feet to a tree found in Occupation Line; thence continuing with the Mashburn line South 34-50 East 92.48 feet to the center of Notla River; thence with the center of Notla River three courses and distances as follows: North 57-45 East 123.64 feet, North 57-45 East 101.62 feet, and North 45-12 East 99.27 feet to the Nelson corner; thence leaving the centerline of Notla River and running with the Nelson line North 44-17 West 73.00 feet to an iron rod found; thence continuing with Nelson North 44-17 West 362.00 feet to an iron rod found; thence with Nelson North 45-43 East 85.00 feet to an iron rod found at the edge of a 30 foot road known as River Road; thence with the centerline of River Road with a line common to found individuals . . . North 44-17 West 469.18 feet to an iron rod set this corner pointed out by adjoining it is referenced and is in a chopped line this being a corner of Purcell and Chennault; thence with a chopped line and Chennault South 50-56 West 273.55 feet to the point and place of Beginning, containing 6.27 acres, more or less.

On 15 June 2022, the trial court entered an order denying plaintiffs' motion for partial summary judgment, finding that there were genuine issues of material fact and that the matter should proceed to trial.

In the leadup to trial, the parties conducted several depositions. At the deposition of defendants' witness attorney Charles McHan ("Mr. McHan"), he testified that he believed both parties had claims to the disputed lot under the MTA.

He additionally stated his opinion that defendants' title would be deemed superior to plaintiffs' title to the disputed lot because Mrs. Chandler and her predecessors in interest had timely paid the taxes as assessed on the disputed parcel. Following the deposition, plaintiffs filed a motion to amend to add affirmative defenses to their counterclaim on 22 December 2022. Specifically, plaintiffs sought to include an affirmative defense adding documentation of a preservation notice under N.C.G.S. § 47B-4, as well as a challenge to the constitutionality of the MTA. Plaintiffs filed a supplemental motion to amend on 16 March 2023.² The trial court granted these motions on 20 March 2023.

The trial court conducted a bench trial on 20 March 2023. The evidence and testimony presented at trial tended to show the following.

Sometime in 2019, Mr. Chandler saw a Facebook Marketplace post listing the disputed lot for sale by Fred Andrews ("Mr. Andrews"). Mr. Chandler testified that in the course of purchasing the property, he referenced the Cherokee County GIS website and searched Google to verify the location and ownership of the property; the GIS website listed Mr. Andrews as the owner. Mr. Chandler also drove to the property to see it in person and ask some of the neighbors about it. While there, Mr. Chandler spoke to Calvin Mashburn, who indicated that plaintiffs owned the

² The trial court addressed the motion to amend at the outset of trial; defendants' trial counsel stated "I don't object to the amendment. I, of course, object to the merits of the amendment, but we don't object to it."

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disputed lot; however, Mr. Chandler stated “when I hired the lawyer and done all the work to see who owned the property, that ain’t what the courthouse said.”

Following his visit to the property and discussion with Calvin Mashburn, Mr. Chandler spoke with Mr. McHan, who served as Mr. Chandler’s attorney for the land sale, and told him about Calvin Mashburn’s claim. Mr. Chandler testified that he entered into contract to buy the property and closed in late November 2019.

Mr. Chandler testified that the conflict with plaintiffs began “[p]robably early . . . 2020[.]” when he was on the property clearing some “brush and debris off the creek bank and off the property line.” Mr. Chandler stated that plaintiffs came onto the property, prompting Mr. Chandler to call the sheriff, who came to the property and allegedly “told [plaintiffs] that if they came back on the property, they would be arrested.” Following the confrontation, plaintiffs filed their complaint. At some point “around May or June[.]” plaintiffs came back onto the disputed lot and began planting corn. Mr. Chandler became aware of the planting after being notified by one of his neighbors. Mr. Chandler drove to the property and saw an individual he believed to be Preston Mashburn driving a tractor on the property, spraying the recently planted corn. Mr. Chandler proceeded to swear out a warrant for Preston Mashburn’s arrest for criminal trespass.

Richard Mashburn testified that his father originally acquired the Mashburn tract in the early 1960s, using the land for taking lumber and otherwise tending it or renting it to others to use. Richard stated that his sons had been tending the land

with cattle, and that because he was 74 years old and disabled, he deferred to his sons to manage the land and agricultural operations. Regarding his knowledge of the land described in his deed, Richard stated that he “had towed a chain when we bought this place. . . . And I towed a chain for Bo Water and got Chris to survey it. After that I towed a chain for him also. So I do know the property. I cut wood off of it.”

Plaintiffs’ next witness was attorney Donny Laws (“Mr. Laws”)³ who testified regarding his familiarity with the public records of the Mashburn property. Plaintiffs showed Mr. Laws a document marked Plaintiffs’ Exhibit 1, Exhibit E, which appeared to be a copy of a tax map depicting the Section 58, District 3 property. Mr. Laws stated that the map appeared “to be the general location of where the deeds in the chain of title locate the descriptions in the competing deeds in this lawsuit.” Mr. Laws further stated

[I]f you look at the deed in plaintiffs’ chain of title, it starts on a corner of or a bank of the Nottely River and runs generally a very long distance in a northerly direction. And it runs easterly, straight line, and southeasterly back to the river and then down with the river to the beginning, which is fairly accurate as shown on this tax map.

Plaintiffs moved to admit Exhibit 1, Exhibit E, to which defendants’ trial counsel objected, arguing “Mr. Laws doesn’t know where this [map] came from. I

³ Although plaintiffs referred to Mr. Laws as an expert witness during the opening statement at trial and in their brief, it does not appear from the transcript that Mr. Laws was ever formally tendered or designated as an expert witness, nor was his expertise stipulated to in the final pre-trial conference order.

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don't know where it came from. I don't know who put the corners or the metes and bounds that are on here." The following exchange between plaintiffs' attorney, Mr. Paul Erickson, and the trial court ensued:

MR. ERICKSON: Your Honor, the map or the diagram does show – and the reason I offer this is so you'd get some idea what we're talking about here, again, for illustrative purposes.

This diagram shows Section 58, District 3, in the gray, and it says Mashburn property. And down below there it says, "disputed lot." And that's been marked to show the parcel that the Chandlers are claiming ownership to. That's basically the only reason why I'm offering this at this time.

THE COURT: I'm looking at your list of exhibits, and I may be missing something, but I don't see a survey.

MR. ERICKSON: I do not have a survey on the exhibits, Your Honor. I have a surveyor that's going to come in to testify.

THE COURT: Has he produced a plat?

MR. ERICKSON: I do not believe he has.

THE COURT: So this Plaintiffs' Exhibit 1 is the closest thing to a survey of the area in question that you've got?

MR. ERICKSON: That plus there's some additional exhibits from the . . . tax office for the records that also show the same parcels. That's my Exhibit 15. It shows Section 58, District 3. And I was proposing to have the surveyor testify that that is an accurate depiction of my client's property.

THE COURT: Did he survey it?

MR. ERICKSON: He went out and looked at it and said he

could plot it based on his observation.

THE COURT: He said he could plot it?

MR. ERICKSON: Yes.

THE COURT: But he didn't?

MR. ERICKSON: He did not. He walked the property. He has not finished the survey.

....

THE COURT: Well, I'm going to admit it for the limited purpose of illustrating Mr. Laws' testimony. And I will give it the weight that it may or may not deserve in making findings and conclusions in this case.

These types of aerial map from the tax office are notable for one thing, and that is that they are not accurate in all respects. That's a good beginning point.

MR. ERICKSON: I understand, Your Honor.

THE COURT: If that's as far as we go, then this exhibit won't have any weight at all.

Plaintiffs next showed Mr. Laws a copy of the chain of title he had prepared with exhibits with the relative deeds. Mr. Laws stated the original deed was a certified grant from the State of North Carolina, listed on the chain of title summary as "No 2141 G-7 561 to T.M. Edwards and A.T. Edwards Feb. 21, 1855[.]" Mr. Laws went on to describe the chain of title and conveyances starting from that original deed. When asked about potential problems with defendants' chain of title, Mr. Laws stated the following:

What I was really interested in looking at [was] to see whether or not the links in the chain of title were similar

and where there was a divergence.

And if you look back at the bottom of the second page [of plaintiffs' Exhibit PX-29], you'll see the same thing I testified to in that it was a conveyance into A.T. Edwards, and then from Edwards to Hill, and then to N.B. Hill, and then from N.B. Hill to A.S., and then A.S. Hill to A.E. Evans. So A.E. Evans by virtue of this in their chain was a common source of title.

Then the next link that they found is a deed from A.E. Evans' heirs. There's not a reference to a book and page or a date of that.

....

And [A.E. Evans'] first out-conveyance in the chain of title was into [plaintiffs'] chain, never came back into him, never came back into his heirs. So even if A.E. heirs conveyed property out, it was subsequent to a conveyance that was within their chain of title.

On cross-examination, defendants' trial counsel returned to plaintiffs' Exhibit 4, the chain of title summary. Mr. Laws acknowledged that the original State grant to Edwards, on Exhibit Tab 17,⁴ was for 115 acres, despite having the same metes and bounds description as previously discussed. Mr. Laws further confirmed that a subsequent deed in Tab 15 called for 245 acres, a deed on Tab 14 called for 65 acres, and another deed on Tab 13 called for 115 acres. Each of the deeds included the same metes and bounds descriptions.

Defendants' trial counsel next showed Mr. Laws a copy of defendants' Exhibits 19 and 20, which were a copy of a GIS plat centered on the disputed properties and a tax assessment card from Cherokee County for the Mashburn property. Mr. Laws

⁴ The exhibit tabs run in descending order of seniority – i.e., Tab 17 is the oldest deed in plaintiffs' chain of title, and Tab 1 is the newest deed.

confirmed that the tax assessment card indicated that plaintiffs were paying taxes on 28.46 acres of property, not the 65 or more acres described in the various deeds.

The trial court next heard testimony from Calvin Mashburn. Calvin stated that he became the primary farmer of the Mashburn property in 1993. Calvin further stated that he had “put fencing all over the property. There are very few fencing that we put up that is actually going to stay where it is. We put up electric fence. . . . [There was] actually fence up where [Mr. Chandler] claims, but they took it down.” During later rebuttal testimony regarding his familiarity with the land and its monuments, Calvin stated

If I been over it once, I’ve been over it a million times. . . . I’ve heard of a dogwood tree, and I know where the dogwood tree was. It is down the river from this property here. It is the beginning of James and Rose Mashburn property. You could find it because . . . Brock Collins had their lines run. [Their] lines connect with our lines. And it goes up the mountain, up to the top of the mountain. Their’in bears off to the left, and our’in goes straight up.

The trial court heard testimony from several expert witnesses. Plaintiffs’ witness Aaron McNeill (“Mr. McNeill”) was accepted as an expert in land surveying. Mr. McNeill stated that he “did an extensive review of both the grants and the deeds and the maps that are of record currently[,]” looking at plaintiffs’ chain of title deeds and defendants’ survey. Mr. McNeill clarified that he had not physically been on the ground at the property because he did not feel it was necessary. Using defendants’ Exhibit 22, which was a 1979 survey depicting Section 58, District 3, Mr. McNeill

made markings to outline the boundaries of the tract. Mr. McNeill compared this illustration to the previously discussed Exhibit 1, Exhibit E, stating the depictions of Section 58, District 3 were “identical[.]” Defendants’ trial counsel again objected to the introduction of the exhibit because “nobody has identified where that came from[.]” The trial court overruled the objection, admitting the exhibit but only to illustrate Mr. McNeill’s testimony. Mr. McNeill further testified that in his review, the description of the property conveyed to plaintiffs matched the original State grant and also followed the survey depicted in defendants’ Exhibit 22.

Defendants’ first expert witness was Bruce Hamilton (“Mr. Hamilton”), who qualified as an expert land surveyor. Mr. Hamilton testified that Mr. Chandler contacted him to do a survey and provided him with the deed to the disputed lot. Mr. Hamilton stated that he began with research at the tax assessor’s office for current deeds and tax records, “then proceeded to organize a field crew, dispatched a crew to come out to the field to locate any evidence of pins, roads, use of the property” for the boundary lines Mr. Chandler had requested. Defendants introduced Exhibit 6, which was a certified copy of the recorded boundary survey Mr. Hamilton conducted for the disputed lot. Mr. Hamilton provided the following summary of his survey work on the disputed lot:

We did a tie line to the intersection of Blue Bird Lane and Nottley River Road, tied it to a half-inch rebar, proceeded in a southeasterly direction down Blue Bird Lane to Nottley River, and then a northwesterly direction from Nottley River back to Lot 29 back to the point of the

beginning. . . . We set a nail at the intersection of the road and started at an iron pin that we found that was a half-inch rebar. . . . It's off to the side of Blue Bird Lane. . . . We proceed[ed] southeasterly a variant of distance to an open-topped pipe that was found . . . along Blue Bird Lane that's show[n] on the plat that was originally done for the subdivision.

Mr. Hamilton stated that for the next calling, he proceeded along Blue Bird Lane and found a one-inch open-top pipe at the end of the line. Mr. Hamilton testified that he followed several other calls in the deed description, along Blue Bird Lane and towards the Nottley River, and found half-inch rebar pins at each point. Based on his experience, expertise, and work done on the property, Mr. Hamilton stated his satisfaction that the survey accurately described the land in the deed to the disputed lot. On cross-examination, when plaintiffs' attorney asked if Mr. Hamilton had used the Mashburn property to locate one of the pins, Mr. Hamilton stated "No, sir. I used the description of the property plus the plat. . . . As far as the actual ownership of the land, I did not determine who owned the land at the time. I just found the pin at the description."

Defendants' next witness was Mr. McHan, who was designated as an expert in title examinations. In the course of examining titles, Mr. McHan stated that once he established a chain of title, he would "generally go back for a minimum of 30 years. I . . . do what we call out-checks of the owners of the property during their ownership period. I check taxes and . . . determine if there's any judgments or liens against any particular person owning the property." Mr. McHan testified that he recommended

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Mr. Chandler obtain a survey to the disputed lot “early on in [his] conversations” with Mr. Chandler. Mr. McHan stated he determined Mr. Andrews had fee simple marketable title and proceeded to establish a chain of title dating back to 1978. Mr. McHan then obtained title insurance, verified there were no judgments or liens, examined out-conveyances, and checked tax records. Mr. McHan stated there was one out-conveyance by the owner preceding Mr. Andrews, but it matched up with the survey conducted by Mr. Hamilton. Regarding taxes, Mr. McHan was able to confirm that Mr. Andrews and predecessors in title had been paying taxes on the disputed lot “as far back as the records go here[,]” and that plaintiffs had not been paying any taxes on the disputed lot.

At the conclusion of all evidence, the trial court took the matter under advisement and requested post-trial briefs from both parties.

The trial court entered its order and judgment on 11 May 2023. In the order, the trial court found that defendants “placed their claim to the Lot ‘on the ground’ by live testimony of Bruce Hamilton, who was actually on the ground and found or placed the monuments shown on his survey.” The trial court made the following findings regarding plaintiffs’ evidence placing their claim “on the ground”:

- a. As to the beginning corner of the Tract, the “large dogwood on the east bank of the Notla River, the upper corner of No. 56”, the only evidence in the case came from Calvin Mashburn, who said, “I’ve heard of a dogwood tree, and I know where the dogwood tree was. It is down the river from this property here. It is the beginning of James and Rose Mashburn property. You could find it because

not long you ago [sic]. . .” [devolves into rambling testimony about a dead surveyor] with no testimony remotely related to whether the large dogwood exists or how it is the upper corner of “No. 56”. The metes and bounds of “No. 56” remain a complete mystery in this saga.

b. No evidence was received as to the existence or location of the “spanish oak, on the line of No. 52”, nor any description of “No. 52”.

c. No evidence was received as to the “stake and pointers”, the next corner of the Tract.

d. No evidence was received as to “two large beeches, on the bank of the [Notla] river”.

e. No evidence was received as to the location of the “meanders of the river to the beginning” either as such meanders existed in the 1800s or today (except to the limited extent the river boundary was part of the survey of the Lot).

f. With no evidence of the corners described above, there was no evidence of the courses and distances between these corners, or any evidence as to the closure of the original description.

g. Through the years, the acreage of the Tract has been at times 65, at times 115, and in one deed 245 acres. No evidence was received that would explain how the acreage could vary so widely over the years, and magnetic declination could not explain variation of that magnitude.

h. Defendants’ Exhibit 22, (Survey O.P. Lance Property recorded in plat book 6, page 6 Cherokee Co. Registry) illustrated the possible location of some of the eastern areas of the Tract, but no evidence was received that would assist [in] placing the corners or boundaries of the Tract on the ground.

i. Plaintiff Richard Mashburn testified he carried “the chains” when the Tract or some portion thereof was surveyed, possibly in the early 1960s. But no survey of the Tract was produced at the trial, and this is the only reference to any possible survey of the Tract in all of the evidence.

j. Plaintiffs, their parents (predecessors in title), and various friends or associates of the plaintiffs, have farmed or otherwise used parts of the Tract and the Lot as owners

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from time to time over the years since it was acquired by James Mashburn and wife Lois (parents of plaintiffs Richard and Calvin Mashburn) in 1963. This use has included growing tobacco, corn, tomatoes and other crops, raising hogs and cattle, cutting timber, erecting fences, all of which showed a familiarity with the Tract and the Lot, but none of this testimony indicated how it related to the actual boundaries of the Tract or the Lot.

After addressing the evidence supporting the competing claims as to boundaries, the trial court found that “[d]efendant Michelle Chandler is a person with the legal capacity to own real property in this State, who, alone or together with her predecessors in title, has been vested with fee simple estate in the Lot for 30 years or more.” The trial court made several findings detailing the chain of title for the disputed lot dating back to 1978.

Based on these findings, the trial court concluded that plaintiffs had not placed their title on the ground and therefore failed to carry their burden of proof as to record title to the disputed lot. Furthermore, “[d]efendants have proven a chain of title for the Lot for 30 years prior to the date of the filing of this action, which is not rebutted by the possession exception of § 47B-3(3)” on the basis that “[t]he possession exception will only operate to defeat a competing marketable title if the possessor carries the burden of showing the possessor owns the real property[,]” citing *Hill v. Taylor*, 174 N.C. App. 415, 422 (2005). The trial court concluded the plaintiffs had not met that burden, and accordingly, Mrs. Chandler was entitled to a judgment declaring her to be the owner of the disputed lot.

After entry of the final judgment, plaintiffs served Motions to Amend to Conform to the Evidence, to Reconsider and to Add Closing Briefs to the File on 19 May 2023. The trial court did not address these motions. Plaintiffs filed notice of appeal 9 June 2023.

II. Discussion

Plaintiffs contend the trial court erred by refusing to accept several exhibits and affidavits, concluding that plaintiffs were required to but did not “place their property on the ground,” improperly applying the MTA, and finding that plaintiffs failed to plead adverse possession. We disagree.

A. Evidentiary Challenges

Plaintiffs first argue that the trial court erred by refusing to accept their Exhibit 4, documentary evidence of their chain of title, into evidence. Despite plaintiffs’ contention, the trial court admitted Exhibit 4 into evidence and heard extensive testimony from Mr. Laws regarding chain of title. Thus, it appears that plaintiffs’ argument here is that the trial court should have simply accepted this evidence as conclusive evidence that the disputed lot belonged to plaintiffs. However, as the trial court properly recognized, the underlying claims required the parties to place their claims on the ground; while Exhibit 4 may have established a chain of title to plaintiffs’ property, neither the exhibit nor Mr. Laws’s testimony were sufficient to prove that plaintiffs’ deed encompassed the disputed lot and failed to “locate the land by fitting the description in the deeds to the earth’s surface.” *Andrews v. Bruton*, 242

N.C. 93, 96 (1955). Plaintiffs' arguments with respect to the trial court's handling of Exhibit 4 are without merit.

Plaintiffs also assert the trial court erred in determining defendants' ownership of the lot because defendants' deed was not formally admitted into evidence. However, plaintiffs' verified complaint attached defendants' deed as its Exhibit A, defendants' pleadings frequently refer to the deed, and the parties stipulated agreement to the fact that "[t]he most recent deed under which Defendants claim title to the subject parcel was recorded in the Cherokee County Register of Deeds in Official Record Book 01630 Page 0358 Thru 0360." Defendants' deed was also referred to during the trial as defendants' Exhibit 1 and was the subject of testimony from Mr. Hamilton and Mr. McHan. Plaintiffs' assertions with respect to defendants' deed are overruled.

Plaintiffs next challenge the trial court's refusal to take judicial notice of and admit into evidence affidavits of Lois Mashburn ("Exhibit 5") and Douglas Porter Owen ("Exhibit 6") as well as the partial summary judgment from a different case ("Exhibit 7"). We review a trial court's decision concerning judicial notice for an abuse of discretion. *Muteff v. Invacare Corp.*, 218 N.C. App. 558, 568 (2012) (citation omitted). "A matter is the proper subject of judicial notice only if it is 'known,' well established and authoritatively settled." *Hughes v. Vestal*, 264 N.C. 500, 508 (1965). "Any subject that is open to reasonable debate is not appropriate for judicial notice." *In re R.D.*, 376 N.C. 244, 264 (2020) (cleaned up).

Here, the trial court did not take judicial notice of the file from a previous case 97-CVD-485 involving plaintiffs and another party that included the affidavits, Exhibits 5 and 6, and the partial summary judgment, Exhibit 7. Exhibits 5 and 6 contained statements regarding the ownership of the disputed property from affiants who were deceased at the time of the present case's proceedings. The statements contained in the affidavits are not "known" or "authoritatively settled" as is evidenced by the current lawsuit; therefore, the trial court did not abuse its discretion in refusing to take judicial notice of Exhibits 5 and 6. The trial court stated that it believed it could take judicial notice of Exhibit 7 as it was "an order of the Court in a file here in Cherokee County[.]" but as explained below, the trial court excluded it from evidence under Rule 403. We hold that the trial court did not abuse its discretion in refusing to take judicial notice of Exhibit 7.

We review a trial court's evidentiary rulings for an abuse of discretion. *Holland v. French*, 273 N.C. App. 252, 258 (2020) (citations omitted). Our state's evidentiary rules provide that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C.G.S. § 8C-1, Rule 403 (2023). Here, the trial court excluded Exhibits 5 through 7 under Rule 403. The trial court deemed Exhibits 5 and 6 inadmissible because the affidavits were made by affiants who were at that time deceased, and the opposing party did not have an opportunity to cross-examine either Lois Mashburn or Douglas Porter Owen. Additionally, the trial court

determined that although it could take judicial notice of Exhibit 7, because of the “difference in parties” and other potential differences, admission of the document “could result in a confusion of the issues” for a fact finder. Due to the potential confusion of the issues and prejudice to the opposing party, refusing to admit these documents was not an abuse of discretion.

B. Quiet Title

1. On the Ground

Plaintiffs next contend that the trial court erred in concluding plaintiffs failed to place their property “on the ground.”

“[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *Keel v. Priv. Bus., Inc.*, 160 N.C. App. 703, 707 (2004).

“In an action to quiet title under [N.C.G.S.] § 41-10, plaintiffs bear the burden of proving valid title in themselves.” *Chappell v. Donnelly*, 113 N.C. App. 626, 628 (1994) (citing *Heath v. Turner*, 309 N.C. 483, 488 (1983)). “This may be accomplished by either (1) reliance on the Real Property Marketable Title Act, or (2) utilization of traditional methods of proving title.” *Id.* However, to present a *prima facie* case in a suit for quiet title, a plaintiff must show that “the disputed tract lies within the boundaries of their property; plaintiffs thus bear the burden of establishing the on-the-ground location of the boundary lines which they claim.” *Id.* (cleaned up). Thus,

even if a plaintiff has proven valid title, they must place their property “on the ground” to make a *prima facie* case for quiet title. *See id.*

Here, plaintiffs argue that the trial court erred by concluding that they were required to place their title on the ground and “failed to carry their burden of proof as to their record title.” Plaintiffs appear to argue that they were only required to prove chain of title. As the law clearly states, plaintiffs also were required to show that the disputed property lies within the boundaries of their property.

When, as here, plaintiffs rely upon their deeds as proof of title, evidence of the on-the-ground location of boundaries set out in the deeds is ordinarily presented by a surveyor who has surveyed plaintiffs’ property using descriptions contained in plaintiffs’ deeds. *Such evidence is required* since “[a]s to the identity of the land . . . a deed seldom, if ever, proves itself.”

Id. at 630 (emphasis added) (quoting *Seawell v. Boone’s Mill Fishing Club, Inc.*, 249 N.C. 402, 405 (1959)).

The deed conveying the property to plaintiffs referenced a “large dogwood,” a “spanish oak,” a “stake and pointer,” and “two large bushes on the bank of the river.” The record supports the trial court’s conclusions that plaintiffs did not present any evidence of a survey of the land to prove the disputed tract was within the bounds of their property according to the description in the deed; Calvin Mashburn testified that he knew where the dogwood tree was, but he did not place it specifically on any diagram of the property. Mr. Laws’s testimony illustrated a tax map of the property, but that map did not reference any of the markers noted in the deed—nor did Mr.

Laws conduct the survey to create the tax map.

Plaintiffs contend in their brief that defendants' evidence placed the property on the ground, and their expert Mr. McNeill's testimony in which Mr. McNeill marked the boundaries of the tract on defendants' Exhibit 22 was sufficient to place the property on the ground. Mr. McNeill's markings on defendants' exhibit are insufficient because they fail to show that the tract lies within plaintiffs' property as described in the deed; Mr. McNeill did not reference the location of either tree, the stake and pointer, or the bushes that mark the bounds of plaintiffs' deed. In sum, none of the evidence or witnesses plaintiffs presented confirmed the bounds of the property referenced in plaintiffs' deed. Plaintiffs did not present evidence of any survey they conducted, and the testimony before the trial court did not provide any shape to the land as described in the deed. Accordingly, the record supports the trial court's findings regarding whether plaintiffs placed their claim on the ground, and because the findings together support the conclusion that plaintiffs did not place their claim "on the ground," the trial court did not err.

2. Marketable Title Act

Plaintiffs next argue that the trial court failed to properly apply the MTA, and accordingly, their constitutional rights were violated. We disagree.

As explained above, in an action for quiet title, one way to prove valid title is through the MTA. *Chappell*, 113 N.C. App. at 628. The MTA provides that

[a]ny person having the legal capacity to own real property

in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.

N.C.G.S. § 47B-2(a) (2023). If a person establishes title under the MTA, the statute provides that “[a]ll such rights, estates, interests, claims or charges . . . are hereby declared to be null and void.” § 47B-2(c). However, there are exceptions to this provision. For example, “[r]ights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property” will not be extinguished under § 47B-2(c) “so long as such person is in such possession.” N.C.G.S. § 47B-3(3).

Here, the trial court concluded that defendants proved a chain of title for 30 years “which is not rebutted by the possession exception of 47B-3(3)[.]” citing *Hill v. Taylor* for the proposition that “[t]he possession exception will only operate to defeat a competing marketable title if the possessor carries the burden of showing the possessor owns the real property.” 174 N.C. App. 415, 422 (2005). As discussed above, plaintiffs carried the burden of proving valid title in themselves, and they failed to meet that burden by failing to place the disputed tract on the ground within the bounds of their property. Thus, the trial court’s conclusion that plaintiffs did not meet the burden for the exception to § 47B-2 was not error.

Further, the trial court did not err in its application of the statute. Defendants’ witness Mr. McHan detailed the chain of title on defendants’ deed going back at least

30 years prior to the commencement of the current action, and Mr. Hamilton testified that he conducted a survey of the property to place defendants' claim on the ground. Additionally, Mr. McHan testified that plaintiffs had not paid taxes on the land while defendants had. Thus, the evidence in the record supports the trial court's findings which in turn support its conclusion that defendants met their burden of proof under the MTA.

Plaintiffs next contend that the trial court's application of the MTA resulted in an unconstitutional taking or deprivation of plaintiffs' property. Even assuming *arguendo* that plaintiffs successfully amended their complaint to include a constitutional challenge to the MTA, plaintiffs did not present any argument related to this claim at trial. Further, the trial court did not make any ruling on the issue, and thus, plaintiffs failed to preserve the issue for appellate review. N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."); *see also Winebarger v. Peterson*, 182 N.C. App. 510, 515 (2007) ("A constitutional issue not raised at trial will not be considered for the first time on appeal." (cleaned up)). Accordingly, we do not consider plaintiffs' constitutional issue.

C. Adverse Possession

Finally, plaintiffs contend that the trial court erred by finding that plaintiffs “did not state a claim for adverse possession in their complaint or amended complaint.” Plaintiffs also allege that if they did fail to plead an adverse possession claim, defendants also erroneously failed to plead that their title was superior under the MTA.

Plaintiffs mischaracterize defendants’ use of the MTA as a “defense” when, as discussed above, it is instead a statutory method to prove chain of title in an action for quiet title. Defendants submitted a counterclaim for quiet title in their answer and therefore properly pled the issue to which this proof applies. For this reason, plaintiffs’ contention is without merit.

According to the record, plaintiffs in fact did not include an express claim for adverse possession in either of their pleadings. Rule 15(b) of the North Carolina Rules of Civil Procedure provides that

[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment[.]

N.C.G.S. § 1A-1, Rule 15(b). Plaintiffs here filed a motion to amend the pleadings to conform to the evidence, and the trial court did not address the motion. Plaintiffs argue that the evidence they submitted throughout the trial supported an adverse possession claim, and thus, defendants must have consented to the trial of the claim.

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Opinion of the Court

The only evidence this Court observes related to a claim of adverse possession is testimony from Richard and Calvin Mashburn who testified to their family's use of the land for farming, putting up fencing around the property, and their familiarity with the property. This evidence is insufficient to establish actual, open, hostile, exclusive, and continuous possession of the land, and the trial court did not err in refusing to make findings because plaintiffs failed to plead a claim of adverse possession. Furthermore, the lack of clarity in plaintiffs' evidence regarding the bounds of their property as discussed above also renders that evidence insufficient to support a claim for adverse possession.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order and judgment.

AFFIRMED.

Judges MURPHY and THOMPSON concur.

Report per Rule 30(e).