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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

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John Mark Surginer and Jeffrey Ward Surginer

v.

Sharon M. Roberts

**Appeal from Wilcox Circuit Court
(CV-09-68)**

DONALDSON, Judge.

John Mark Surginer ("John") and Jeffrey Ward Surginer ("Jeffrey") appeal from a judgment of the Wilcox Circuit Court ("the trial court") purporting to vest title to certain property in Sharon M. Roberts. Both the Surginers and Roberts

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describe the proceedings conducted before the trial court as involving a claim by Roberts for judicial redemption of that property. Although we question the manner in which the proceedings were presented to the trial court, we must address the issues presented on appeal as framed by the parties. Because the Surginers have not demonstrated a basis for reversal, we affirm the judgment of the trial court.

Facts and Procedural History

In 1994, Roberts purchased approximately 68 acres of land along the Alabama River ("the property").¹ The property contained, among other things, an uninhabitable trailer and a cabin. In 2001, Jeffrey offered to purchase the property from Roberts. Roberts declined the offer. Jeffrey then obtained an assignment of a mortgage on the property from Charles and Maxine Haskew, the previous owners and the mortgagees of the property. Immediately thereafter, Jeffrey attempted to foreclose on the property, but he was unable to do so because

¹Documentation regarding the property is recorded in Deed Book M, page 447, of the probate records of Wilcox County, in which the property is identified as Wilcox County tax-parcel number 28-01-11-0-000-010.000 #0 and parcel number 28-01-12-0000.003000 #0; the property is further described in the tax deed recorded in Deed Book 11E, page 483, of the probate records of Wilcox County.

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Roberts was under the protection of a United States bankruptcy court. In 2002, Roberts apparently commenced an action in the trial court against Jeffrey relating to his attempt to foreclose on the property.

Although the circumstances are not entirely clear from the record, it appears that in 2002 Jeffrey paid the property taxes on the property that were apparently delinquent at the time. In 2004, John purchased the property at a tax sale for \$10,100. Jeffrey testified that he did not know at that time that John had purchased the property. In September 2005, apparently in settlement of the action Roberts had commenced, Jeffrey executed a quitclaim deed conveying his interest in the property to Roberts in exchange for \$10,000. Roberts's action against Jeffrey was dismissed pursuant to that settlement.

On July 10, 2007, the Wilcox Probate Court, noting that the time for redemption following the 2004 tax sale had elapsed, recorded a deed, pursuant to § 40-10-29, Ala. Code 1975, conveying the property jointly to the Surginers.² In

²As previously noted, the record indicates that John purchased the property at a tax sale; the record does not contain an explanation for the joint conveyance to John and Jeffrey.

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2007 and 2008, the Surginers made various purported improvements to the property.

In 2008, Roberts commenced an action in the probate court seeking to redeem the property pursuant to § 40-10-120 et seq., Ala. Code 1975. On January 26, 2009, the probate court issued a certificate of redemption to Roberts. See § 40-10-127, Ala. Code 1975. Thereafter, the Surginers were ordered to be ejected from the property.

On November 18, 2009, the Surginers filed a complaint for declaratory relief in the trial court. In the complaint, the Surginers sought a judgment declaring that the certificate of redemption issued by the probate court in January 2009 was void and that Roberts had no right to possess the property. In her answer to the Surginers' complaint, Roberts asserted, among other things, that she had received from Jeffrey, in exchange for \$10,000, a quitclaim deed to the property in September 2005. After Roberts filed her answer, the case was placed on the administrative docket by the agreement of the parties.

On June 21, 2011, Roberts filed an amended answer, in which she asserted that she had redeemed the property, and a

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counterclaim, in which she sought, among other things, a judgment declaring that the certificate of redemption issued by the probate court on January 26, 2009, was valid. Thereafter, the trial of the case was continued several times.

On October 17, 2014, the Surginers filed an amended complaint and a reply to Roberts's counterclaim. In the amended complaint, the Surginers reasserted their previous allegations, but they also asserted that Roberts had wrongfully evicted them from the property and had wrongfully removed timber from the property. Roberts filed an answer to the amended complaint and an amended counterclaim, asserting claims of abuse of process and conspiracy to commit abuse of process.

A trial was held on December 3, 2014. The only witnesses at the trial were Jeffrey and Daniel Crigger, a home inspector hired by Roberts. On March 9, 2016, the trial court entered what it styled as a "Final Order." In the order, the trial court made various findings of fact and conclusions of law, and ordered the following:

"1. The Certificate of Redemption issued by the Probate Judge of Wilcox County on January 26, 2009 is vacated as null and void and the Probate Judge shall vacate such redemption.

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"2. To redeem the property at issue, the Defendant, Sharon Roberts, shall pay the following sums within thirty (30) days from the date of this Order.

"a. The sum of \$19,229.47 to the [Surginers] reflecting the purchase price and taxes paid by the [Surginers] and interest at a rate of 12 percent per annum.

"b. A reasonable attorney's fee to [the Surginers'] attorneys for bringing this action.

"c. The sum of \$15,800.00 for loss [of] use of the property.

"3. If the amounts contained within this Order are not paid in full by [Roberts] within thirty (30) days from the date of this Order, then [Roberts's] right to judicially redeem the property at issue shall terminate and the Court will issue an additional Order quieting title to such property and granting possession of such property to the [Surginers].

"4. That the Probate Court of Wilcox County is hereby ordered to immediately pay to the Circuit Clerk of Wilcox County all money held by the Probate Court previously paid to the Probate Court of Wilcox County by Sharon Roberts in order to obtain a Certificate of Redemption issued by the Probate Court of Wilcox County on January 26, 2009.

"5. The costs of this action, consisting of the filing fee in the amount of \$435.00 is hereby taxed against [Roberts].

On April 14, 2016, the trial court entered the following, which it styled as a "Judgment":

"This matter having previously come before the Court for trial on the merits, and the Court having entered an Order on March 9, 2016, setting forth the monetary amounts that were required to be paid by [Roberts] in order to redeem the subject property from a prior tax sale, and the Court having further ordered that if the amounts set forth in the March 9 order were not paid in full by [Roberts] on or before April 8, 2016, then [Roberts's] right to judicially redeem the subject property from the tax sale was terminated, and it now appearing to the satisfaction of the Court that [Roberts] failed or refused to pay the various amounts required for the redemption of the subject property as contained in the order of March 9, 2016, within the time allowed by the Court, therefore,

"IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Court as follows:

"1. The purported Certificate of Redemption from Tax Sale of the subject lands heretofore issued by the Probate Judge of Wilcox County on, to-wit, January 26, 2009, is vacated as null and void for want of jurisdiction, and the Probate Judge of Wilcox County shall forthwith vacate such redemption certificate by written order.

"Further, the Judge of Probate of Wilcox County, Alabama, shall pay and refund to [Roberts] all amounts previously paid to the Judge of Probate for the purported redemption of the subject property. A copy of this Order shall be served upon the Probate Judge of Wilcox County by the Clerk of this Court, and the Judge of Probate shall forthwith comply with the terms hereof.

"2. [Roberts] shall have no further right, title, interest, claim or encumbrance in and to the subject property, viz: Wilcox County Tax Parcel Number 28-01-11-0-000-010.000 #0 and Parcel Number 28-01-12-000.003000 #0, as further described in the

Tax Deed recorded in Deed Book 11E, Page 483 in the records of the Probate Court of Wilcox County, Alabama, and the fee simple title to all such lands is hereby quieted in the [Surginers].

"3. The [Surginers] shall have and recover of [Roberts] the sum of \$15,800.00, as their damages for [Roberts's] use and occupancy of the subject lands since 2009, for which execution shall issue.

"4. The [Surginers] shall also have and recover of [Roberts] the sum of \$15,000.00, as attorneys' fees permitted under the subject judicial redemption statute, such amount having been stipulated by and between the parties in open Court as a reasonable fee for the services of the [Surginers'] attorneys in defending the redemption action.

"5. The [Surginers] shall also have and recover of [Roberts] immediate and exclusive possession of the subject property, and a writ of possession shall issue to the Sheriff of Wilcox County, Alabama, authorizing him to execute this judgment of possession if [Roberts] has not completely vacated the premises and removed all of her goods and chattels therefrom within fourteen (14) days from the date of this order. [Roberts] is specifically enjoined and restrained from committing any damage or waste upon the subject premises.

"6. Since [Roberts] has defaulted with respect to her redemption of the subject property, all costs of this action, including all fees of the appraiser appointed by the Court as a Special Master, are taxed to [Roberts], for which execution shall issue.

"7. A certified copy of this order shall be duly recorded in the Deed Records of the Judge of Probate of Wilcox County, Alabama, and indexed appropriately with [Roberts] as grantor and the [Surginers] as grantees."

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On April 15, 2016, Roberts filed a "motion to set aside" the April 14, 2016, judgment. In her motion, she alleged that her attorney had not received notice of the March 9, 2016, order, and she requested an additional 30 days to comply with the March 9, 2016, order. On April 18, 2016, the trial court entered an order entitled: "ORDER GRANTING DEFENDANT'S MOTION TO STAY THE ORDER PENDING A HEARING ON MAY 5, 2016." (Capitalization in original.) The body of the order contained the following language: "MOTION TO SET ASIDE ORDER/JUDGMENT OF APRIL 14, 2016 filed by ROBERTS SHARON M is hereby GRANTED IN PART." (Capitalization in original.) The Surginers filed a motion in opposition to Roberts's motion to set aside the judgment. On May 4, 2016, Roberts filed an "amended motion to set aside, alter, or amend" the April 14, 2016, judgment and the March 9, 2016, order. In that amended motion, Roberts asserted, among other things, that the March 9, 2016, order was not a final order.

On May 5, 2016, the trial court held a hearing on Roberts's motions. On May 10, 2016, the trial court entered the following order:

"1. That [Roberts's] Motion to Set Aside and Amended Motion to Set Aside, Alter or Amend the

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Order/Judgment of April 14, 2016 and Order of March [9], 2016 is hereby granted.

"2. That the reasonable attorneys' fee awarded to the [Surginers'] attorneys is hereby set in the amount of \$15,000.00.

"3. That the Wilcox County Commission Office is hereby ordered to pay any and all monies held by this office, initially paid to the Probate Court of Wilcox County by Sharon Roberts in January of 2009, to the Circuit Clerk of Wilcox County with a copy of proof of said payment being delivered to the attorneys for the parties in this action. That a copy of this Order shall be immediately provided to the Wilcox County Commission Office.

"4. That the Defendant, Sharon M. Roberts shall pay to the Circuit Clerk of Wilcox County the following sums:

"a. The sum of \$19,229.47 to the [Surginers] reflecting the purchase price and taxes paid by the [Surginers] and interest at a rate of 12 percent per annum.

"b. The sum of \$15,000.00 attorney's fee to [the Surginers'] attorney for bringing this action.

"c. The sum of \$15,800.00 for loss [of] use of the property.

"d. The costs in this action consisting of the filing fee in the amount of \$435.00.

"That [Roberts] shall be given credit from the above amounts, the amount paid by the Wilcox County Commission Office to the Circuit Clerk of Wilcox County set forth above.

"5. That the total amount to be paid by Sharon Roberts to the [Surginers] is in the amount of

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\$50,464.47. That after the Wilcox County Commission Office pays to the Circuit Clerk all funds being held by the Commission Office, [Roberts] shall have fourteen (14) days to pay to the Circuit Clerk of Wilcox County the remaining balance of the above sums ordered by the Court."

On May 26, 2016, Roberts filed a document in which she asserted that she had complied with the trial court's May 10, 2016, order. On May 31, 2016, the trial court entered the following judgment:

"That the Court having receive[d] notice that Defendant Sharon M. Roberts has complied with this Court's Orders of March [9]th, 2016, and May 10th, 2016, which ascertained attorneys' fees to be paid by [Roberts] and [Roberts] having paid into the Court the amount of the judgment and costs, the Court hereby enters judgment for [Roberts] and finds that [Roberts] has been in possession of the subject property and has properly redeemed the property in question under Section 40-10-83 of the Code of Alabama (1975).

"Therefore, the Court enters a final judgment for the Defendant, Sharon M. Roberts divesting the Plaintiffs, John Mark Surginer and Jeffrey Ward Surginer of any and all claim, right, title or interest in and to the subject property and vesting in the Defendant, Sharon M. Roberts all right, title and interest in the subject property, more particularly described in the deed to Sharon M. Roberts from Charles Harvey Haskew and wife, Maxine G. Haskew dated August 3rd, 1994, and recorded in Deed Book M, Page 447 in the Probate Records of Wilcox County, and as further described as Wilcox County tax parcel number 28-01-11-0-000-010.000 #0 and parcel number 28-01-12-0000.003000 #0, and further described in the tax deed recorded in Deed

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Book 11E, Page 483 in the records of the Probate Court of Wilcox County. Title to said property is hereby quieted in Sharon M. Roberts."³

On June 13, 2016, the Surginers filed a notice of appeal to the supreme court, and the supreme court transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

Discussion

On appeal, the Surginers argue, among other things, that the trial court committed reversible error by vacating its April 14, 2016, judgment. The Surginers argue that both the April 15, 2016, and the May 4, 2016, motions should be construed as motions filed pursuant to Rule 59, Ala. R. Civ. P., and that both were untimely because they were not filed within 30 days of the entry of the March 9, 2016, order. The Surginers argue that the trial court had no jurisdiction to entertain those motions and, therefore, had no jurisdiction to vacate the April 14, 2016, order.

In response, Roberts argues that the Surginers should have filed a petition for the writ of mandamus relating to the May 10, 2016, order of the trial court setting aside the earlier orders. In the alternative, Roberts describes her

³The trial court entered an identical order on June 7, 2016.

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motion of April 15, 2016, as amended on May 4, 2016, as having been filed pursuant to Rule 60(b), Ala. R. Civ. P., and that the trial court's order of May 10, 2016, granted that motion.

We hold that the document entitled "Final Order" entered on March 9, 2016, was not a final order for purposes of the application of Rule 59, Ala. R. Civ. P. See Ex parte Troutman Sanders, LLP, 866 So. 2d 547, 549-50 (Ala. 2003) (holding that Rule 59 applies only to final orders capable of supporting an appeal). The March 9, 2016, order specifically required Roberts to, among other things, pay the ordered amounts in full "within thirty (30) days from the date of this Order, [otherwise] [Roberts's] right to judicially redeem the property at issue shall terminate and the Court will issue an additional Order quieting title to such property and granting possession of such property to the [Surginers]." Further, the order did not vest title to the property in either the Surginers or Roberts, as had been requested by the pleadings of the parties. Because it did not completely resolve the claims of the parties and expressly contemplated further action by the trial court, the March 9, 2016, order was not final. See Ex parte Bessemer Bd. of Educ., 68 So. 3d 782, 788

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n.5 (Ala. 2011) (noting that an order that "leaves the parties with something to determine on their own and leaves open the possibility of further action by the trial court" is not a final order). See also Batey & Sanders, Inc. v. Dodd, 755 So. 2d 581, 582 (Ala. Civ. App. 1999) (noting that when a trial court's order contemplates further proceedings it is not a final judgment). See also Blood v. Blood, [Ms. 2141058, Sept. 2, 2016] ___ So. 3d ___, ___ (Ala. Civ. App. 2016) (construing an order that required the parties to take further action as a nonfinal order).

The "judgment" entered on April 14, 2016, appears to have been a final judgment, because it did not have the characteristics of nonfinality that were contained in the March order. That judgment, however, was vacated by the trial court's order of May 10, 2016, which effectively granted Roberts's May 4, 2016, motion. We note that, although it granted a specific amount of attorney's fees to the Surginers and ordered the Wilcox County Commission and Roberts to pay certain specified funds, the trial court's May 10, 2016, order was not a final order because it did not completely resolve the claims between the parties--specifically, it did not vest

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the title to the property in either the Surginers or Roberts. "A ruling that determines fewer than all the claims is ordinarily not final as to any of the parties or as to any of the claims." Kelley v. Thomas, 878 So. 2d 1168, 1171 (Ala. Civ. App. 2003) (citing Rule 54(b), Ala. R. Civ. P.).

The trial court's May 31, 2016, judgment in favor of Roberts divested the Surginers of any claim, title, or interest in the property and vested all right, title, and interest in the property in Roberts. Therefore, the May 31, 2016, judgment was a final judgment capable of supporting the appeal filed on June 13, 2016.

In order to analyze the issues framed by the parties in this appeal, we observe that the Surginers initiated the underlying action by filing a complaint in the trial court seeking a judgment declaring that the probate court's certificate of redemption issued on January 26, 2009, was invalid. The certificate of redemption had been issued by the probate court and permitted Roberts to obtain the property through the process of statutory redemption pursuant to § 40-10-120 et seq., Ala. Code 1975. The law in Alabama is that

"[a] party aggrieved by the erroneous issuance of a certificate of redemption may petition a

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circuit court in the county in which the probate court lies for a writ of mandamus to compel the vacating of the certificate. Ordinarily, a circuit court may issue a writ of mandamus to a probate court only in cases in which it has appellate jurisdiction. See Ex parte Jim Walter Res., Inc., 91 So. 3d 50, 52 (Ala. 2012). Section 12-22-21, Ala. Code 1975, which defines the appellate jurisdiction of circuit courts over probate courts, does not include appeals concerning certificates of redemption. However, our supreme court recently recognized that a circuit court has jurisdiction to adjudicate petitions for a writ of mandamus involving the denial of a certificate of redemption. See Ross v. Rosen-Rager, 67 So. 3d 29, 38 (Ala. 2010) (citing Boyd v. Holt, 62 Ala. 296 (1878)) (refusal of the probate judge to issue a certificate of redemption for land sold for taxes was reviewable in the circuit court by a petition for a writ of mandamus)."

Wall to Wall Props. v. Cadence Bank, NA, 163 So. 3d 384, 388 (Ala. Civ. App. 2014). See also Franks v. Norfolk S. Ry. Co., 679 So. 2d 214, 216 (Ala. 1996) ("Orders as to which no statute grants appellate jurisdiction are reviewed on petitions for writ of certiorari, mandamus, or prohibition."). "All orders, judgments and decrees of probate courts shall be accorded the same validity and presumptions which are accorded to judgments and orders of other courts of general jurisdiction." § 12-13-1(c), Ala. Code 1975. A petition for "a writ of mandamus is the proper method for vacating an order that a ... court had no authority to enter." Alabama Dep't of Mental Health &

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Mental Retardation v. State, 718 So. 2d 74, 75 (Ala. Civ. App. 1998).

The Surginers did not file a petition for the writ of mandamus challenging the probate court's January 26, 2009, judgment issuing the certificate of redemption, nor did they attempt to appeal the probate court's judgment. Instead, the Surginers filed a complaint for declaratory relief in the trial court, seeking a judgment from the trial court vacating the certificate of redemption previously issued by the probate court and thereby quieting title to the Surginers. Our supreme court has recognized that the substance of a pleading, not the label attached to it by a party, controls. See Century 21 Paramount Real Estate, Inc. v. Hometown Realty, LLC, 34 So. 3d 658, 662 (Ala. 2009). Assuming, without deciding, that the underlying declaratory-judgment action could be construed as a petition for a writ of mandamus, the Surginers did not name the probate judge as a respondent. See Ex parte Privett, 887 So. 2d 854, 856 (Ala. 2004) (denying a petition for a writ of mandamus in part because the petitioner named the incorrect judge as a respondent and that judge owed no duty or responsibility to petitioner); Ex parte State Pers. Bd., 45

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So. 3d 751, 754 (Ala. 2010) (holding that trial court lacked authority to restrict the actions of a nonparty State agency); and J.A.W. v. G.H., 72 So. 3d 1254, 1257 (Ala. Civ. App. 2011) ("When a court lacks jurisdiction over a person, any order directed at that person is void.").

This court requested letter briefs from the parties on the issue whether they had properly invoked the trial court's jurisdiction, whether a petition for a writ of mandamus was required to be filed in the trial court, and whether the probate judge should have been joined in the proceedings. In response, the parties referred this court to the general equity powers of the circuit court to quiet title and asserted that the case at hand involves Roberts's attempt to judicially redeem the property, presumably asserted through her counterclaim. Although we agree that a circuit court has jurisdiction to entertain those types of actions, the complaint and portions of the counterclaim seek to invalidate or enforce, respectively, the probate court's judgment issuing a certificate of redemption. The probate court has exclusive jurisdiction over the statutory-redemption process. Ex parte Foundation Bank, 146 So. 3d 1, 6 (Ala. 2013). The circuit

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court does not have jurisdiction over the statutory-redemption process, except to review a probate court's judgment through the filing of a petition for the writ of mandamus, and that was not done in this case. Therefore, to the extent that either the Surginers or Roberts sought to have the trial court address the certificate of redemption issued by the probate court, the trial court was without jurisdiction to do so. Nevertheless, the trial court considered issues related to judicial redemption, and the parties have presented this appeal as involving only issues relating to judicial redemption.⁴ Accordingly, we will analyze only the issues as framed by the parties in this appeal. See Chamblee v. Duncan, 188 So. 3d 682, 687 (Ala. Civ. App. 2015) (explaining that appellate review is limited to the theory upon which the parties agreed to try the case below).

⁴Although the trial court did not have jurisdiction to address the validity of the certificate of redemption issued by the probate court, the portion of the judgment addressing judicial redemption is still valid. See, e.g., 50 C.J.S. Judgments § 756 (2009) (footnotes omitted) ("[A] judgment may be valid in part and void in part where the parts which are valid and void are separable[, and] [t]he fact that part of the judgment is void ... does not necessarily invalidate the entire judgment.").

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Judicial redemption provides a mechanism by which a party may redeem property sold for the failure to pay ad valorem taxes. See §§ 40-10-82 and 40-10-83, Ala. Code 1975. See First Props., L.L.C. v. Bennett, 959 So. 2d 653, 654 (Ala. Civ. App. 2006) ("'[J]udicial redemption' ... involves the filing of an original civil action against a tax-sale purchaser (or the filing of a counterclaim in an ejectment action brought by that purchaser) and the payment of specified sums into the court in which that action or counterclaim is pending.").

The Surginers do not assert that Roberts was not entitled to judicial redemption, and, therefore, we will not address whether she was in the position to judicially redeem the property following the probate court's issuance of the certificate of redemption. Instead, the Surginers assert that the trial court committed reversible error by failing to include interest and the cost of preservation improvements in the redemption amount Roberts was ordered to pay.

In support of their argument that the trial court failed to include interest from the date of the tax sale, the Surginers cite only a portion of § 40-10-83, specifically, the portion providing that "the court shall ... ascertain (i) the amount paid by the purchaser at the sale and of the taxes

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subsequently paid by the purchaser, together with 12 percent per annum thereon." The Surginers further assert that "[t]he undisputed amount due under this section is \$28,487.12. As the amount set by the trial court did not include interest at 12% per annum as to the undisputed amounts paid by [the Surginers], the calculation of this portion of the redemption amount is incorrect as a matter of law." In its orders entered on March 9, 2016, and May 10, 2016, the trial court ordered Roberts to pay the Surginers \$19,229.47, which the trial court noted reflected the purchase price and taxes paid by the Surginers and interest at a rate of 12 percent per annum. The Surginers did not challenge the trial court's calculations or the amount Roberts was ordered to pay.

"This court is confined in its review to the arguments presented to the trial court: '[o]ur review is limited to the issues that were before the trial court--an issue raised on appeal must have first been presented to and ruled on by the trial court.' Norman v. Bozeman, 605 So. 2d 1210, 1214 (Ala. 1992). Moreover, this court is confined in its review to addressing the arguments raised by the parties in their briefs on appeal; arguments not raised by the parties are waived. Boshell v. Keith, 418 So. 2d 89, 92-93 (Ala. 1982)."

Gary v. Crouch, 923 So. 2d 1130, 1135-36 (Ala. Civ. App. 2005). See also Rodriguez-Ramos v. J. Thomas Williams, Jr., M.D., P.C., 580 So. 2d 1326, 1328 (Ala. 1991) (An appellate

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court "cannot put a trial court in error for failing to consider a matter which, according to the record, was not presented to, nor decided by it.").

Even if the Surginers had properly challenged the trial court's calculations, they do not demonstrate on appeal that the trial court's calculations or award are incorrect. The Surginers do not direct this court to any authority in support of, or otherwise demonstrate any error on the part of the trial court in calculating, the sum due. "The appellant has an affirmative duty to demonstrate error on the part of the trial court; this court will not presume such error exists." Hollon v. Williamson, 846 So. 2d 349, 353 (Ala. Civ. App. 2002) (citing Greer v. Greer, 624 So. 2d 1076, 1077 (Ala. Civ. App. 1993); and Perkins v. Perkins, 465 So. 2d 414 (Ala. Civ. App. 1984)).

The Surginers also challenge the trial court's decision to exclude the value of any improvements the Surginers purportedly made to preserve the property. Pursuant to § 40-10-83,

"the court shall, on motion of the defendant made at any time before the trial of the action, ascertain ... (iii) with respect to any property which contains a residential structure at the time of the sale regardless of its location ... the value of all

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preservation improvements made by the purchaser determined in accordance with Section 40-10-122, together with 12 percent per annum thereon, subject to the limitations set forth in Section 40-10-122(a)"

The Surginers assert that Roberts did not follow the procedure outlined in § 40-10-122(d), Ala. Code 1975, regarding notice and the appointment of a referee to determine the value of preservation improvements. We observe, however, that the Surginers failed to follow that procedure as well. Regardless, pursuant to § 40-10-122(e), Ala. Code 1975, "the appropriate court shall proceed to ascertain the true value of such permanent or preservation improvements as applicable" if the parties fail to follow the procedure in § 40-10-122(d).

The trial court declined to award the Surginers any amount for purported preservation improvements after a trial at which ore tenus testimony was received in order to resolve this factually disputed issue; therefore, the ore tenus standard of review applies.

"Our ore tenus standard of review is well settled. "When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error." Smith v. Muchia, 854 So. 2d 85, 92 (Ala. 2003) (quoting Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996))."

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Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 67-68 (Ala. 2010).

The Surginers assert that they presented evidence indicating that the value of preservation improvements was \$81,458.72. During the trial, however, Roberts's expert testified that poor workmanship was used in the repairs claimed as preservation improvements and that issues relating to plumbing and electrical hazards, among other issues, would have to be addressed, which negatively impacted the value of the property. After the trial, the trial court appointed an independent appraiser who found that,

"[a]fter careful review of the all the facts, inspecting the above referenced property, ... having licensed contractors review the quality of work and quality of improvements, weighing the current and potential fire and safety hazards, and reviewing the sales of similar properties in the market[, i]t is my opinion that the current improvements negatively impact the subject property's value due to the poor craftsmanship, inferior materials used, poor design, potential fire and safety hazards, and significant water damage the new improvements have caused and continue to cause to the property; therefore the contributory value of the improvements made to the above reference property is \$0.00."

""The [ore tenus] rule applies to 'disputed issues of fact,' whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence."" Kennedy, 53 So. 3d at 68 (quoting Reed v. Board

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of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000), quoting in turn Raidt v. Crane, 342 So. 2d 358, 360 (Ala. 1977)). "Under the contradictory testimony, it was within the special province of the trial court to determine both the weight and the credibility to be accorded to the testimony of each witness." Wiggins v. Brown, 391 So. 2d 128, 129 (Ala. Civ. App. 1980). The trial court acted within its discretion in choosing to believe the testimony of two appraisers in deciding that the "preservation improvements" performed by the Surginers negatively impacted the value of the property and, thus, that they were not entitled to recover for the purported preservation improvements. The Surginers have not directed this court to any authority that requires the trial court to award a sum for preservation improvements despite the trial court's determination that those improvements have no value. Accordingly, the Surginers have not demonstrated a basis for reversal of the trial court's judgment, and the judgment is affirmed.

AFFIRMED.

Thompson, P.J., and Pittman, Thomas, and Moore, JJ.,
concur.