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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

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2150979

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Alabama Power Company

v.

Ray Keller

Appeal from Jackson Circuit Court  
(CV-07-152)

DONALDSON, Judge.

Alabama Power Company ("Alabama Power") appeals the judgment entered by the Jackson Circuit Court ("the trial court") establishing a boundary line between adjoining properties owned by Alabama Power and Ray Keller. On appeal,

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Alabama Power contends that the trial court should have applied the legal principles of adverse possession rather than the principles applicable to boundary-line disputes, that the trial court erred in establishing the boundary line, and that the equitable doctrine of unclean hands barred Keller's claims. We do not find grounds to reverse the judgment, and, therefore, we affirm the judgment.

#### Facts and Procedural History

On July 28, 2016, the trial court entered a judgment that describes in detail the procedural background of the case, the areas in dispute, and the claims of the parties. A portion of the judgment states:

"First and foremost, this is a land line or boundary line case. This case also requires the court to consider claims, counterclaims, or issues concerning statutory, prescriptive, and/or hybrid adverse possession.

". . . .

#### "I. Introduction:

"The disputed real property boundary in this case is located in Tate's Cove, a narrow, remote, picturesque valley branching off Big Coon Cove in Jackson County, Alabama. [Keller's] property is more than 700 acres and is almost completely surrounded by [Alabama Power's] holdings of more than 15,000 acres. The properties feature mountains, boulders, hollows, draws, sinks, diverse plant and animal

life, caves, creeks, wildlife, cultivated lands, evidence of human habitation and use, and timber lands--all the flora, fauna and terrain typical of the Southern Appalachian Mountains.

"The complaint was filed June 26, 2007. Therein, Ray Keller asked the court to 'judicially determine and declare the common boundary line between the parties.' Doing so is not a task the court takes lightly. The seriousness of this undertaking caused the court to view the property on three separate occasions. ...

"The parties share about four and one-half (4.5) miles of common boundary and about one and one-half (1.5) miles of that common boundary is in dispute. The disputed portion will be determined in this case. The court has walked the majority of the area where the common boundary is in dispute, particularly in the most rugged and mountainous areas where driving is impossible. The court, riding with counsel on three occasions, has driven on or in the vicinity of the remainder of the disputed boundary where roads were maintained and were passable. The court made a thorough examination of the proffered boundaries on the ground.

"This is not the first occasion where the court has been called upon to determine a boundary between adjoining landowners with large, rural and remote holdings, but this case stands out to the court due to the size and scope of the undertaking and the fact that the first survey of the property did not occur until 2006, was done in conjunction with this litigation, and was done more than 60 years after some of the land was first divided between Mr. Keller's and Alabama Power's respective predecessors in title.

"At the same time, this case is similar to many that come before the court, where historically observed and agreed boundaries, crafted by lay

persons and having withstood the test of time, collide head-on with foreign, institutional, or newcomer land owners unwilling to abide by the undisputed boundaries of decades or centuries past. With the means to employ survey crews and with access to modern equipment using twenty-first century technology, disputes arise when the current surveys do not correspond with the observed boundaries of old. One neighbor, armed with his survey, wants the boundary set to include every bit of ground his survey reflects and is unwilling to yield. The other neighbor is likewise unwilling to yield and insists that the historical boundary be observed. Litigation follows in virtually every instance, and so it is in this case.

"Initially, the case was tried ore tenus over a three-day period, beginning October 3, 2011. ...

"On May 10, 2012, the court entered an Order in favor of Mr. Keller on all claims and against Alabama Power on all claims. Both sides filed post-judgment motions to, inter alia, alter, amend or vacate the order. ...

"After briefing and oral argument, the court set aside its order of May 10, 2012, in part, granted Mr. Keller's Motion to Reopen the Evidence, and granted Mr. Keller's Motion for an Additional View. The third all-day view followed and additional evidence was received on January 27, 2014, and October 21, 22, and 23, 2014.

"... Now, the court must 'judicially determine and declare the common boundary line between the parties' as requested in the Complaint.

"II. The Areas in Dispute ... :

"In fashioning this boundary, the court will necessarily determine who owns some or all of the following areas in the vicinity of the Eastern and

Northern boundaries of Section 31, as well as in the Northeast Quarter of the Northeast Quarter of Section 31.

"i. The lands West of the Cave Spring Branch in the Northeast Quarter of the Northeast Quarter of Section 31 (Part of the 'Middle Disputed Parcel');

"ii. The lands that are East of the Cave Spring Branch and South of a line that runs East from the 'Cable Anchor Post' and/or 'Gate' and continues to the East boundary of Section 31, as located and described by the Rymeg drawing, including the Bubble-Up,<sup>[1]</sup> in the Northeast Quarter of the Northeast Quarter of Section 31 (Part of the 'Middle Disputed Parcel');

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<sup>1</sup>In the judgment, the trial court described the Bubble-Up as follows:

"There is an unusual natural feature on the disputed territory, which these parties call the 'Bubble-Up.' [Bruce] Allison[, the son of one of Keller's predecessors in interest,] said that he referred to it as the 'head of the creek.' The Bubble-Up appeared to the court to be a 'blue hole' or a place where the water emerges from an underground cave. On the first two occasions the court visited the property, the Bubble-Up was dry, but there was testimony about deep water occupying the cone shaped sink surrounding the Bubble-Up. The Bubble-Up also spews gravel when the water flows briskly, according to the testimony. Water carries pea-sized gravel out of the underground cavern, where it remains on the ground surrounding the Bubble-Up once the water recedes. The court observed great amounts of gravel surrounding the Bubble-Up on its first two visits to the property."

"iii. The lands that are South of the 'Old Management Area Sign Line,' including the Large Cave, as the same runs West from Cave Spring Branch, up the mountain and South of the Small Cave to the blazed tree, and along the 'Sign Line' until it terminates at the Painted Rock Pile (The 'Northern Disputed Parcel'); and,

"iv. The lands West of the Creek in the Southwest Quarter of Section 32--which includes the cultivated lands (The 'Southern Disputed Parcel').

". . . .

"III. Claims and Contentions:

"For purposes of this case, both parties acquired their properties in 1988.

"Plaintiff Keller claims a boundary based on a 1942 deed in Alabama Power's chain of title and a 1953 deed in his chain of title, as well as ownership and possession consistent with that 1942 division at all times since. Both conveyances are from the same grantors, Jim Davis and Anna Davis, who were husband and wife.

"The 1942 deed in Alabama Power's chain includes calls that are 'west to creek, 'up the Cave Branch to the cave,' 'along a blazed line,' and 'all lines or [sic] established by agreement with both partys [sic].' The 1942 deed includes lands that are in the Northeast Quarter of the Northeast Quarter of [Section] 31, but not the entire Quarter-Quarter section.

"The 1953 deed in Mr. Keller's chain purports to convey the Northwest Quarter of the Northwest Quarter of Section 31, but includes specific calls that encompass a larger area, including lands that are in the Northeast Quarter of the Northeast

Quarter of [Section] 31, specifically: 'with a blazed line which is bounded on the North by the property belonging to Frank Evans and running to a blazed tree on top of the cave,' 'south eastwardly with the meanderings of the cave branch,' 'west with a line which is bounded on the south by the lands of T.R. Allison,' and 'North with a line which is bounded on the west by the lands of T.R. Allison.'

"Mr. Keller claims that he and his predecessors in title are the rightful owners of the disputed lands pursuant to the original deeds, the agreed boundaries reflected in the 1942 and 1953 deeds, and ownership and possession since 1942 (at the latest) even if the deeds in his chain are not artfully crafted and do not always rightly describe the disputed lands. Mr. Keller alternatively claims he owns the disputed lands by adverse possession, during his ownership or prior to his ownership by his predecessors.

"Mr. Keller claims that Alabama Power's deed to the disputed areas in the Northeast Quarter of the Northeast Quarter is color of title only based on the 1942 division of the property and that Alabama Power has not adversely possessed anything West of the Creek, South of the East-West line above the Bubble-Up, or South of the Old Management Area Sign Line to include the Big Cave.

"Alabama Power claims the boundary is a line painted by Alabama Power in the 2000s and painted, at least in part, by its predecessors in the early 1980s. The power company says this boundary closely corresponds to what is conveyed on the face of its 1988 deed and that it also closely corresponds to the government survey line as shown by its 2006 survey of the same. While the original deed in Alabama Power's chain (the 1942 deed) does not convey the entire Northeast Quarter of the Northeast Quarter of Section 31, a later deed in the chain includes that entire Quarter-Quarter section.

Specifically, a 1959 deed from Frank Evans and Bessie Evans to H.R. Campbell purports to convey the 'NE 1/4 of the NE 1/4 of Section 31 ... being all the land owned by the grantors in Tate's Cove.'

"Defendant Alabama Power claims that it owns everything conveyed or purported to be conveyed on the face of its deed and that any title defect was remedied by statutory adverse possession based on color of title and by assessing the disputed lands for taxation in addition to satisfying the traditional, common law elements of adverse possession.

"Alabama Power claims that Mr. Keller is not entitled to prevail on a hybrid adverse possession theory because he seeks too much of Alabama Power's property and, further, that he cannot prove common law adverse possession or statutory adverse possession because he cannot achieve the twenty (20) year period required for the common law variety and because he is not entitled to the shorter ten (10) year period for statutory adverse possession because he did not assess the land for taxation nor does he have color of title.

"Alabama Power additionally claims that Mr. Keller cannot adversely possess lands that are leased to the State of Alabama for the public's use."

In the judgment, the trial court described the testimony taken at trial and its visits to the disputed boundary area. The judgment extensively recounts testimony regarding markers, monuments, landmarks, previous owners of the parties' properties, and activities of people and organizations in the area of the disputed boundary. The facts regarding the trial



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court's determination of the location of the boundary line are largely undisputed on appeal. The following portions of the judgment are the descriptions of testimony relevant as background information or pertinent to the issues considered in this appeal:

"[Keller] called Bruce Allison. ... [Mr. Allison] said that his father, Earl Allison, used to own 720 acres, the same property which Mr. Keller now owns and/or claims. He said that the farm of his grandfather, Thomas Russell (T.R.) Allison, adjoined the subject property. In 1988, Earl Allison lost the property to a mortgage foreclosure. The property was sold at a 'courthouse sale,' where it was purchased by the State of Alabama. A very short time later, the Plaintiff Ray Keller and his business partner, Billy Gordon Sanders, acquired Earl Allison's right of redemption, pursuant to former Ala. Code [1975,] § 6-5-246 ....

"The Allison property was redeemed and conveyed from the State of Alabama to Mr. Keller and Mr. Sanders by deed dated June 13, 1988. ...

". ....

"[Norrell] Privett stated that he discussed the property lines with both Earl Allison and Bruce Allison at the time he cruised the timber. As the court understands it, the boundary line Norrell Privett cruised in 1987 basically matches the boundary shown on the hunting permit map issued by Earl Allison to his hunters. Mr. Privett was shown Plaintiff's Exhibit 5, a deed in the Allison-Keller chain dated January 8, 1953, from Jim Davis and Anna Davis to T.R. Allison. The deed refers to the meanderings of the cave branch as being the boundary line. Mr. Privett says that this 1953 deed

description matches what he observed as the boundary line in 1987.

".....

"Gary Allen Nichols testified that he had leased the Big Coon property from Mr. Keller since 2005 and that he was the one who built the gate above the Bubble-Up ... in the spring of 2006 and painted it yellow. He built it where the old gate and cable were located, at the spot where there were old State management area signs marking the line. Mr. Nichols stated that he never hunted on the upper side of the gate because 'it was wildlife management area land.' Later, he discovered that the gate was removed, apparently knocked down by a boulder pushed against it with a bulldozer or other heavy equipment. That boulder was left in the road to block it.

"Mr. Nichols testified that there are old signs all along the route up the trail to the caves and that the club members hunt up to the State signs, including during the most recent hunting season. He stated that the old wildlife management area signs were all the way to the caves and testified that 'the big cave is on' Ray Keller's hunting land. He said that at the end of 2006 someone took down twenty or more of the wildlife management area signs and stacked them at his hunting cabin. He said that he did not know where they came from and had been unable to learn from anyone else whence they came. Mr. Nichols said that he saw the trees where the old signs were broken off and that some of them could be matched up to the tree where they were removed, like pieces of a puzzle. On cross examination he said that he had never noticed the red paint which Defendant Alabama Power says is its line until the boulder was used to knock down the yellow gate and block the road. He also admitted that he had never walked the whole boundary line with Ray Keller or with anyone else.

"Scotty Fleming then testified for [Keller]. He is a professional forester, the owner of Tri-State Timber Company, L.L.C. and lives at Pisgah, Alabama. His main customer is the Plaintiff Ray Keller. ... Mr. Fleming testified that no one had told him about the red paint on the lines until he discovered them himself and that he had seen no red paint there previously. Mr. Fleming testified that he had moved the boulders which were blocking the road and that the boulders were located exactly where the red line came down to the road. He said that he covered up approximately one mile of the red painted line, because the red marks did not represent what he understood was the true and correct line. He testified that he assumed the hunting club had marked it, and marked it erroneously. He believed that he was well within his rights as Mr. Keller's representative and contractor to remove what were erroneous boundary lines. Mr. Fleming later returned and marked what he thought was the boundary line. Now, upon further reflection, he believes the line he painted was in error and is not the true boundary line, either.

"This testimony proves nothing other than why he should not have painted over the old line in the first place. Whether Mr. Fleming's changing boundary line beliefs are sincere or unscrupulous is not known by the court. ...

"The Plaintiff's Exhibit 5, a deed from Jim Davis and wife Annie [Davis] to T.R. Allison, dated January 8, 1953, describes the line as 'to a blaze tree line' at the top of the cave and southeast with the meanderings of the cave branch. Mr. Fleming believes this to be the true line. Mr. Fleming further testified that when he obliterated the red paint marks (which were apparently painted by Alabama Power Company), that no old paint marks were present. He insisted that he only painted what he knew were fresh paint marks. He further testified that he would never paint over an old line, but that

he would paint over a new line that he believed was erroneous. He stated that he would not remove a historic line, [but] it never occurred to him to call Alabama Power Company officials to discuss the fresh red painted line or the gate being bulldozed down. He said that he thought that these were acts of vandalism and the acts of a rogue hunter, not the acts of Alabama Power Company. ...

"Thomas Cook testified for the Defendant Alabama Power. He is a Biologist Aide Senior with [the Alabama Department of Conservation and Natural Resources ('ADCNR')], employed with it for twenty-seven years. He painted the boundary lines of Holland Ware's property in 1983. He was hired to do so by Wade Manning, an official with the ADCNR, but was paid by Holland Ware individually. He testified that he did not paint the west line of the Northeast Quarter of the Northeast Quarter at that time. Instead, he painted the west line of the Northwest Quarter of the Northeast Quarter in Section 31, which is land owned by Mr. Keller now and, at that time, his predecessors, the Allison's. While Mr. Cook's testimony is confusing about exactly what he painted and why, it is clear that he did not paint the boundary advanced by [Alabama Power] in this case and that he painted boundaries of lands that did not belong to his employer, Mr. Ware, or his successor in interest, Alabama Power.

"Mr. Cook stated that the line to paint was easy to find and that no one objected to his painting the line where he did in 1983. He said that in 2006, Frank Allen and Joe Worthen painted the line again on behalf of ADCNR. He referenced a 'turkey project' research conducted by Auburn University to study and increase the wild turkey population in the area. The turkey project lasted from about 1980 until 1987. He stated that the wildlife management area staff maintained Tate's Cove Road down to the gate and, in years past, maintained it below the gate, past the Bubble-Up onto property claimed by Mr. Keller. ...

Mr. Cook testified that the red paint line that he made in 1983 includes the Bubble-Up as a part of the Alabama Power property.

". . . .

"Mr. Cook also explained the methodology of placement of Alabama Wildlife Management Area ['WMA'] signs on trees. . . . He testified that wildlife management area signs are not always placed on property lines but are sometimes placed along interior roads so that people will know that they are on the management area. This testimony is important because some signs placed along alternative boundaries for the subject property are not in keeping with this Alabama Power method of erecting signs. The strong implication is, of course, that someone deceptively used management area signs and red paint to mark a false boundary, a false boundary which strongly favored Ray Keller's position in this dispute and in this litigation. That 'someone' acted on Mr. Keller's behalf to move the boundary is alleged, but is not at all proven.

"Mr. Cook further testified that he had not observed the red painted line being obliterated before the 'Bubble-Up conference' with the parties and the attorneys in fall of 2006 (other witnesses testified that this meeting was in February 2007). He said that no one ever showed him the buggy axle and that he had never heard of it until this lawsuit. Mr. Cook testified that there had been at least two gates across the road at the Bubble-Up since 1984. He does not know who tore down the yellow gate, but admits that he placed the boulder there blocking the road at the direction of his supervisor, Frank Allen.

"The Defendant next called G. Dwight Hawes [who] has been a licensed land surveyor in Alabama since 1983 . . . .

"On the north line of the Quarter-Quarter section, Mr. Hawes found, at the half mile marker, a rebar with plastic cap bearing Jim Sentell's mark. Mr. Sentell, another well-known Jackson County surveyor, set this monument in 2002 when he was performing work for Ray Keller. Mr. Hawes knows Jim Sentell well and recalls that, in fact, Mr. Sentell borrowed Mr. Hawes' handheld global positioning system (GPS) device to assist him in 2002. Mr. Hawes said that Ray Keller later called him and asked him not to use this piece of information in this litigation.

". . . .

"[Alabama Power] next called Benny Frank Vinson, Jr., a forester with Alabama Power Company since 1974. . . . Through his testimony, Defendant's Exhibit 28 was admitted, which is the lease between Alabama Power Company and the ADCNR. The lease was signed August 12, 1988, and is for a term equal to and conterminous with the license of the R.L. Harris Dam Hydroelectric Project, near Wedowee in Randolph County, Alabama.

". . . .

"This is important testimony from [Alabama Power's] own employee and defeats Alabama Power's arguments that the designated parcel is 'public land.' Although leased to the State of Alabama for the benefit of the public, managed by the ADCNR and used by the public, the subject property is owned by a private corporation, Alabama Power Company, and is not owned by the State of Alabama or by any other public entity. Therefore, for that reason and for additional reasons set-out herein and below, the Defendant's argument that 'public lands cannot be adversely possessed' is not applicable to this litigation and fails.

"The court specifically finds that these are not public lands.

"[Alabama Power] next called Jeffery A. Beason, Chief Forester with Alabama Power Company. He has been with the power company since November of 1990. He testified that he personally set the Northwest corner of the Northeast Quarter of the Northeast Quarter of Section 31 in November 2004 using a GPS device. ADCNR employees then painted the lines and put up signs before the end of 2004, he testified. He said that he was next on the property on February 20, 2007, for the meeting between the parties at the Bubble-Up. At that time he found the old paint had been painted over by gray or brown paint. He also testified that he had found a corner rock also painted over with gray paint at the Southeast corner of the Northeast Quarter of the Northeast Quarter of Section 31, Photographs and other exhibits were introduced as visual representations supporting his testimony.

". . . .

"[Alabama Power] then called Frank Allen, a wildlife biologist with ADCNR. He is the supervisor in charge of 46,000 acres of public land, overseeing the Skyline Wildlife Agency's public hunting area. Mr. Allen also testified that the ADCNR publishes area permit maps every year for the Skyline Wildlife Management Area, publishing some 25,000 maps in 2011. These maps showed in a pinkish-red color the properties that belong to or are claimed by the Wildlife Management Area. All of the Northeast Quarter of the Northeast Quarter of Section 31 is included on these maps as being a part of the Skyline Wildlife Management Area. Seasonal map permits for the years 1972 through 2011 were admitted into evidence.

"Mr. Allen helped Jeff Beason, Joe Worthen and another Alabama Power Company employee flag the

western line of the Northeast Quarter of the Northeast Quarter in November 2004. He said they 'always try' to leave existing paint, making new paint marks elsewhere. He stated that they erected new wildlife management area signs on that day. He testified that all Alabama Power Company boundaries are painted red. ...

"[Alabama Power] then called Joseph Worthen. He works for the State of Alabama Division of Wildlife and Fisheries and helped paint the line in 2004. He said that the present gate just above the Bubble-Up was erected in 2004. Frank Allen blazed the trees and he painted them. 'My job was to tote a gallon of paint and paint the paint on the trees.' He observed that the red paint has not been painted over with brown or grey paint and that the new fresh red line paint, including a red painted rock, favors the Plaintiff Ray Keller and his contentions. He observed that the paint on the red painted rock extended into the ground below the dirt level, which is unusual. He said it appeared to him as though the rock had been dug up and painted or painted elsewhere and then placed there after being painted. ...

"The court permitted a third view of the subject property, which took place on April 23, 2013.

"....

"While at the first stop, in addition to viewing the corners claimed by the parties and their surveyors, the court and counsel also saw at least one incidence of old red paint on what [Alabama Power] claims is the property line. This paint lies north of the corner advanced by [Alabama Power] and is in the edge of the hedgerow adjacent to the cultivated field, west of the creek.

"The court and counsel also observed fresh red paint east of the creek on property belonging to



[Alabama Power], which fresh red paint was approximately due east of the corner advocated by [Alabama Power]. The paint did not extend to the western side of the creek on to the lands claimed by [Keller].

"....

"Leaving the Bubble-Up and walking back to the west and toward the vehicle, the viewers inspected the gate that is currently in place, as well as a damaged gate adjacent to the current gate. This was the location from which the prior gate was removed by bulldozer and the road south of the gate blocked with boulders by WMA employees at the point claimed by Alabama Power as the land line.

"... [The trial court] also encountered several signs for the State Management Area, all being the 'older style' in and around the course of the creek as it ran north. Some signs were lying in the creek and at least one sign was on the ground, firmly wedged in place by rocks, roots, and debris. There can be no question but that it had been there a long time, probably for many years.

"The view continued moving north and 'up' the creek until the viewers arrived at the 'Old Management Area Sign' shown on Plaintiff's Exhibit 1. It was grown into a tree and had obviously been there for decades, not years. From there, the viewers proceeded in a westerly direction, continuing along the creek. More fence remnants and at least one more old style Management Area sign were found in the creek before the parties arrived at the small cave shown on Exhibit 1.

"....

"Upon leaving the vehicle and walking north until intersecting [Keller's] claimed boundary, court and counsel walked down hill and in an

easterly direction. The path was along the 'Old Management Area Sign Line' as it is shown on Plaintiff's Exhibit 1. The viewers encountered at least two vintages of red paint along the trees, as well as Management Area signs on the trees. One vintage of paint is clearly old and one is clearly not as old. There are hacks and blazes along this line, none of which appear fresh.

"On multiple occasions, the viewers located the 'old style' of State Management Area signs that were on the ground and covered by layers of leaves, debris, and compost, now known to the court to be called 'the duff layer'. The viewers also encountered signs along this course for the Big Coon Hunting Club (Freddie Hatfield's group that leased Mr. Keller's property), both on trees and on the ground. ...

"Before walking all the way down the mountain and to the caves, the view party stopped, traveled south to the line claimed by [Alabama Power], and traveled back up the 'Covered Line' as it is called on Exhibit 1 to return to the vehicle. [Alabama Power's] line consists of trees that were painted, then later painted over, by Mr. Fleming according to the evidence in this case.

". ....

"Upon returning to the vehicle, the viewers drove further up the mountain to a point where the road terminated in proximity to the northern disputed boundary of the Northeast Quarter of the Northwest Quarter of Section 31. From there, the parties walked along the 'Covered Line,' as it is called on Exhibit 1 until reaching the 'red painted rock' shown on Exhibit 1. The line advanced by [Alabama Power] again featured the painted trees that were painted over by Mr. Fleming.

"The line advocated by [Keller] (the westward extension of the Old Management Area Sign Line) terminated at a pile of rocks upon which there was bright red paint on the rock pile and many colors and vintages of flagging tape affixed to the trees adjacent to and around the rock pile. There were also Management Area signs and hunting club signs in this area. This appeared to be an obvious, agreed corner.

"Proceeding north from the rock pile was a continuation of the bright red paint that [Keller] contends has been painted during this litigation. This paint is the same color and vintage as the 'fresh' or 'bright' paint observed along the boundary indicated by [Keller] as the Northern boundaries of the Northeast Quarter of the Northwest Quarter and the Northwest Quarter of the Northeast Quarter, both in Section 31. This is the same color and same vintage of paint as was observed east of the creek upon the viewer's first stop as well.

"Upon leaving the painted rock pile, the viewers traveled back in an easterly direction toward the vehicle. The parties and the court were back and forth between the two lines. The appearance of [Alabama Power's] claimed boundary has already been mentioned. [Keller's] claimed boundary consisted of trees with the bright red paint, claimed to be fresh, as well as the older red paint.

". . . .

"After re-walking some of the line previously walked, the viewers arrived in new country--where no previous view had occurred--and observed two of the 'old style' Management Area signs that were still on trees. They were obviously old, imbedded and grown into the trees, and/or heavily rusted. There is no doubt but that they had been there many years.

"The viewers continued east and toward the large cave and encountered various styles and vintages of fencing atop the large cave, as well as a cedar tree atop the cave with an 'X' hacked in it. Also encountered was red paint of an obviously older vintage.

". . . .

"William Short, a local surveyor, testified for the second time in this case. . . . Mr. Short did the field work for a severance line description that was then drawn by Michael Hodges, his employer. . . . Mr. Short admitted that the severance line drawing was just a sketch he had done for Mr. Keller, and not a complete survey, but made clear to the court that based on his fieldwork and the Government Land Office field notes, he believes this severance line to be the true and correct boundary.

"Michael Hodges, local surveyor and owner of Rymeg Consulting Group, Inc., testified next. Mr. Hodges prepared the actual drawing of the severance line proposed by Mr. Keller, based on William Short's fieldwork. Mr. Hodges confirmed that his sketch or drawing of the severance line was based on Mr. Short's field measurements and the Government Land Office field notes, and that he believed the line to be the true and correct boundary. . . .

"Jimmy Lee Ashley testified for [Keller] in a most notable fashion. . . .

"Mr. Ashley, age 81, has been a Stevenson, Alabama resident for 55 years. Jimmy Lee Ashley was raised in and around Tate's Cove both upon and right next to the property in dispute. Jim Davis and Annie Davis, Jimmy Lee Ashley's grandparents, owned over 300 acres of land in Tate's Cove, including much of the disputed property now claimed by Alabama Power and Ray Keller to include the Big Cave and the Small Cave and the Bubble-Up.

"Jimmy Lee Ashley testified to his grandfather having sold part of the land to Frank Evans in 1942 and a contiguous parcel of land to T.R. 'Russ' Allison in 1953. These are the parties' respective predecessors in title. ...

"Mr. Ashley testified that his grandfather sold some land to Frank Evans in 1942, and that he knew Mr. Evans well. Mr. Ashley testified that he was actually present on the property with his grandfather, Jim Davis, and witnessed when he and Frank Evans negotiated and carried out the sale of that land. Mr. Ashley testified that Frank Evans exchanged the only good and valuable thing he had to trade--a milk cow--for the land, and that his grandfather put a rope around the cow's neck and led her home that very day.

"Mr. Ashley testified that he was present when his grandfather and Mr. Evans discussed exactly what piece of land Mr. Evans was buying as well as the locations of the boundaries of that property. Mr. Ashley said that neither Jim Davis nor Frank Evans had any money to hire a surveyor, 'so they just called that ditch the line and--the middle of the ditch down there that runs up there to that Little Cave and dumps into the head of the creek,' also known as the Bubble-Up.

"Mr. Ashley testified that he has seen the deed his grandparents gave Mr. Evans, which references the branch and the top of the cave. Mr. Ashley says that branch that runs north and south, in the middle of that ditch, was the agreed line when his grandfather sold the land to Mr. Evans in 1942. Mr. Ashley said that after the Davis to Evans deal, Mr. Evans owned the Small Cave and Davis still owned the Big Cave. Mr. Ashley said his grandfather reserved the Big Cave because that is where his family got their drinking water. After the conveyance to Mr. Evans, Jimmy Lee Ashley testified that he and his

family continued living in their house by the caves, which was on the Davis property.

"Mr. Ashley testified that his grandfather, Mr. Davis, ultimately sold the property west of the Cave Spring Branch, with the house and the Big Cave on it, to T.R. 'Russ' Allison in 1953. Mr. Ashley said Mr. Davis left the line in the middle of the branch, the same branch referenced in the Davis to Allison deed, because they could not afford a surveyor. Mr. Ashley was clear that his understanding, based on having been present with his grandfather for both of these land deals, was that the boundary followed the middle of the branch down to the head of the creek (as he called it) or the Bubble-Up. Mr. Ashley testified that the boundary line went up right in between the Small Cave and the Big Cave, and that there was a fence running there between the two caves. Mr. Ashley says Mr. Evans never asserted that he owned the side of the branch that the Big Cave is on, his family's house, or the Big Cave, itself. As for the open land south of the caves and to the west of the creek, Mr. Ashley testified that his grandfather sold that property to the Allisons, and that he remembers the Allisons working that open land. Mr. Ashley testified that, from the head of the creek or Bubble-Up, the boundary line went uphill and East to a buggy-axle that was driven into the ground.

"Jimmy Lee Ashley's testimony is first hand and entirely credible. He is the sole surviving witness to the original division of the land by his grandfather. He is clear and certain that the Big Cave was on Mr. Keller's predecessors' land and that the small cave was on [Alabama Power's] predecessors' land with the line running between them. Also, that the ditch or the branch was the line and that it proceeded south to the Bubble-Up or head of the creek before turning East and going uphill to a buggy axle. This first-hand account of the division of the land precisely matches

[Keller's] claim regarding the location of the boundary, as well as the overwhelming evidence concerning the location of the boundary at all times since 1942 and 1953.

"Scotty Fleming next testified. Mr. Fleming described his first trip to the disputed property following the first phase of trial in this case was when Mr. Keller's new attorney wanted to see the property. Mr. Fleming recalled seeing some fresh red paint for the first time, starting about a third of the way up the mountain, on the 'Old Management Area Sign Line,' which is the line that Mr. Keller asserts is the boundary line. Mr. Fleming testified that he did not put the fresh paint there, and does not know who did. Mr. Fleming went through numerous photographs, giving comprehensive testimony about having many old Wildlife Management Area signs grown into and embedded in old trees, as well as on the ground in the duff layer, Big Coon Hunting Club signs, nail holes, old paint, flagging and blazes on this line advanced by Mr. Keller to be the true and correct boundary, all of these things extending from the rock pile at the northwest corner and going east to the top of the Big Cave.

"Mr. Fleming also described many and various items of the same nature following the Cave Spring Branch as it runs down from and in between the caves and toward the Bubble-Up. These things included signs on and embedded in trees and in the duff layer, signs wedged under creek rock by running surface water, and old fences of various styles and vintages, some of which were grown several inches into trees and which are obviously generations old. Mr. Fleming says he did not place the signs along the Old Management Area Sign Line and the Cave Spring Branch, nor did he ask or tell anyone else to put them there. They are ancient and undisputable land marks which this judge saw with his own eyes and touched with his own hands in situ, where they were obviously placed many, many years ago. ...

Indeed, no one could fabricate or falsify what Mr. Fleming testified to and what the court saw. The manner in which the old signs and wire were grown into trees, wedged into rocks and buried in the duff layer is only achieved by the passage of time--and lots of it. ...

"Mr. Keller testified that he has known about this approximately 720 acre property he now owns in Big Coon since he was a little boy, having been in the area with his father and grandfather hauling logs and fanning crops. ...

"Regarding his purchase of the subject property at Big Coon, Mr. Keller testified that 'the State had tried to buy this property from Mr. Allison, and for some reason they could not get together. Anyway, Mr. [Earl] Allison went through foreclosure and ... they auctioned this property off on the courthouse square.' Mr. Keller went to the auction, but he did not bid. Later, Mr. Keller testified, he and Billy Gordon Sanders purchased the right of redemption from Allison and redeemed the property. Sometime later, Mr. Keller bought Mr. Sanders' share and became the sole owner of the property.

"From the time Mr. Keller got this property, he leased the hunting rights to Freddie Hatfield and his hunting club, who had been hunting the property since the time the adjoining property became a wildlife management area. ...

"Alabama Power recalled G. Dwight Hawes, a licensed land surveyor in Jackson County. ...

"Mr. Hawes says that about 42 acres total comprises the area in dispute between these parties.

"Thomas Cook, a 30-year employee for ADCNR, testified for Alabama Power, again. He painted the south line of the Northeast Quarter of the Northeast Quarter around January 1984, but no other sides,



when he was painting lines for Holland Ware. He also painted the south and west lines of the Northwest [Quarter] of the Northwest Quarter.

"On cross examination, Mr. Cook said he did not know who painted the lines recently, including the lines advocated by [Keller] in this case. Mr. Cook testified that ADCNR employees paint the State's lines, and that he was not aware of anyone other than State employees who have painted their lines. Mr. Cook admitted that back in 1984 while painting for Holland Ware, they painted a 40 acre tract 'into the management area' that did not belong to Holland Ware or his successor, Alabama Power, which is the same forty that was the Allisons' property then and Ray Keller's property now.

". . . .

"Joseph Worthen, a biologist aide, 12-year employee for ADCNR at the Skyline Management Area testified for Alabama Power Company, again.

". . .

"Mr. Worthen testified that there are three (3) workers at the 60,000 acre Skyline WMA. Mr. Worthen does not know who painted [Keller's] line in 2012, though he, Mr. Worthen, helped paint some of the power company's boundary lines in 2005 . . . .

"Frank Allen testified for Alabama Power, again. Mr. Allen is a 14-year wildlife biologist for the ADCNR and has been overseeing the Skyline WMA since 2004. . . . Mr. Allen helped paint the Alabama Power Company's boundary lines for the State in 2005, and next visited the property to view the disputed boundaries along with counsel after this dispute arose.

"Mr. Allen most recently walked along the creek bed in January 2014, but has never seen any WMA

signs in the creek bed. He says he has walked along the disputed lines in Sections 30 and 31, and painted the lines in 2005, following old paint part of the time. There was no old paint present when they painted from the Southwest corner of the Northeast Quarter of the Northeast Quarter of Section 31 up to the Northwest corner of the Northeast Quarter of the Northeast Quarter of Section 31.

"The absence of the paint is obvious to the court since the testimony supports that the prior painting by the power company's predecessor, Mr. Ware, occurred in 1983 and that the lines were incorrectly painted at that time. Indeed, 2005 is the only instance in evidence the court can recall where Alabama Power Company or its predecessors painted the area of greatest dispute in this case, the West line of the Northeast Quarter of the Northeast Quarter of Section 31.

". . . .

"Mr. Allen testified that he does not know who put the new paint on the line, and he has not talked 'to the Forever Wild people' about it. Mr. Allen testified he has done nothing on the property that was not in his official capacity with ADCNR. Mr. Allen testified that there was an aluminum gate at the Bubble-Up before the current gate, which was crushed up, that he says looks 'like high water' had gotten to it, and that he had never seen it while it was still standing erect. Mr. Allen says he did not bulldoze the gate, but that he instructed an employee to put a boulder in the road thereafter. He is not aware of a cable there before the gate.

". . . .

"Jeffery Allen Beason, chief forester of corporate real estate for Alabama Power, testified for his employer, again. . . . Mr. Beason testified

that he walked the painted boundary lines, saw the browned-out or covered paint line, walked down from above the caves, through the creek bed below the caves and back down to his truck at the yellow gate. Mr. Beason saw no WMA signs in the creek bed. He never went to the old management area sign line; he never saw the signs growing in the trees; and he did not authorize anyone to paint that line."

The judgment contains the following conclusions of law and grant of relief:

"Time and its passage favor Ray Keller's position in the case. The boundaries of the 1942 and 1953 divisions of this land have been observed for more than half a century and those divisions have been affirmed by occupancy and use of the land by Jim Davis, two generations of the Allison's spanning 35 years, and, since 1988, by Ray Keller.

"The court has walked over and upon the boundaries described in the Davis-to-Evans and Davis-to-Allison deeds, which boundaries are further explained by the very compelling testimony of Jimmy Lee Ashley, the only living witness to the original division of the land, as well as other sound witnesses with personal knowledge of the boundary since 1942. The caves, the creek bed, and the Bubble-Up are immovable objects that have withstood the test of time, the court cannot fathom any difference in these physical features from 1942 to the present. They are unchanged now and will be unchanged a hundred years hence, the acts of man notwithstanding. They are excellent, permanent monuments that simplify the court's decision. The court walked the boundary created without the benefit of any modern technology in the 1942 deed and reaffirmed in the 1953 deed.

"In addition, the court personally viewed the physical evidence on the ground, which evidence

confirms that the court walk[ed] over and along the true and correct boundary. Signs nailed into and imbedded in trees, hacks and blazes in trees, old paint on trees, paint on rocks, all manner of fencing grown into old trees, fencing lying upon or buried in duff layer, various vintages of hunting club signs on the ground and in the duff layer, and various vintages of management area signs on the ground and buried in the duff layer run in concert with the physical features described above. These items show that generations of men, over 60-odd years, affixed items to the land consistent with an agreed and established boundary, that they placed these items in the exact area of the boundary, and that it is the same as the boundary claimed by [Keller] in this case.

"Further, at no time since 1942 has Alabama Power or any Alabama Power predecessor adversely possessed this rugged and remote ground so as to alter the historical and agreed boundaries. Alabama Power's claims to the contrary fail as Alabama Power's and its predecessors' acts on the land are sporadic and scrambling and do not satisfy the elements of adverse possession. This is confirmed by the court's views. Neither Alabama Power nor its lessee has adversely possessed any of these properties in dispute.

".....

"Finally, Alabama Power cannot claim exclusive possession when its neighbors are actually in possession or co-possession of the lands. The claim that Alabama Power, Holland Ware, or any other predecessor in title was in exclusive and continuous possession of the disputed parcels, ignores on a wholesale basis the considerable evidence about cattle operations, grazing and pasturing, row cropping, cutting timber, hunting leases, gathering of river stone, gathering of gravel from the Bubble-Up, camping and swimming at the Bubble-Up,

allowing visits to the cave, fencing, housekeeping, recreation, and the like all carried on by Mr. Keller and his predecessors in title from 1942 to the present. Alabama Power and its predecessors cannot as a matter of fact enjoy exclusive possession of a parcel of land upon which another party is running cattle, camping, cutting timber, fencing, erecting gates, swimming, extracting rock and gravel, or leasing for hunting.

"Regarding hybrid adverse possession by adjoining land owners, the Alabama Power Company argues that Ray Keller cannot proceed on a hybrid theory, whether by he or his predecessors, because he attempts to take too much of the Alabama Power Company's property, which property the power company and its surveyor have quantified as a number of acres in dispute. While the court believes that simple mathematics reflect that as little as 2.7 thousandths (0.0027) of the Alabama Power Company's tract is in dispute in this case, even if taking the Alabama Power Company's assertions as true, the court believes this argument is critically flawed in three other respects.

"First, the Alabama Power Company only has color of title to the disputed lands in the Northeast Quarter of the Northeast Quarter of Section 31. ...

"Time considerations also apply to the Southern disputed parcel, which has been pastured, grazed, row cropped, and the like by Mr. Keller and his predecessors since before 1942, and for so long that any adverse use ripened into title decades ago. Since 1988, Alabama Power has not adversely possessed the property nor has it taken any other action to change this fact.

"....

"[Alabama Power's] claims of adverse possession fail on each and every level, without exception.

"Based on the ore tenus evidence over seven days of trial, based on the court's three views of the property, and based on the applicable law, the court adjudicates and declares the boundary between Ray Keller and Alabama Power to be the same or substantially the same as was deeded, conveyed, created, agreed, observed, and/or adversely possessed in remote Tate's Cove since Jim Davis sold property to Frank Evans [in] 1942--with his humble, but good and valuable milk-cow as consideration--and at virtually all times since then as far as the court can tell from the evidence and from its extensive three views of the property.

". . . .

"6. Any claim of any party not expressly granted or denied herein is denied.

"7. All other relief sought is DENIED.

"8. The court retains jurisdiction of this matter to effect the intent of the order."

On August 17, 2016, the trial court entered an order suitable for recording purposes. The order declares the boundary line between the properties of Keller and Alabama Power to be:

"A severance line within Section 31, Township 1 South, Range 6 East of the Huntsville Meridian in Jackson County, Alabama, and being more particularly described as follows:

"Commence at a planted rock at the Northwest corner of said Section 31 and run a tie line North 87 degrees 34 minutes East a distance of 1321.8 feet to a painted rock at the Northwest corner of the Northeast quarter of the Northwest quarter of said

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Section 31 and the true point of beginning, thence with the old 'Management Area' sign line North 82 degrees 55 minutes East a distance of 194.1 feet, thence North 85 degrees 34 minutes East a distance of 1067.5 feet, thence North 89 degrees 24 minutes East a distance of 1845.6 feet to the 'Cave Spring' branch, thence with said branch and ensuing creek South 52 degrees 21 minutes East a distance of 90.6 feet, thence South 03 degrees 46 minutes East a distance of 96.6 feet, thence South 29 degrees 29 minutes West a distance of 76.35 feet, thence South 70 degrees 50 minutes West a distance of 67.75 feet, thence South 31 degrees 38 minutes West a distance of 116.2 feet, thence South 14 degrees 00 minutes East a distance of 129.1 feet, thence South 15 degrees 53 minutes West a distance of 91.2 feet, thence South 25 degrees 13 minutes West a distance of 210.5 feet, thence South 00 degrees 10 minutes East a distance of 243.2 feet, thence South 22 degrees 59 minutes East a distance of 140.55 feet, thence leaving said creek North 87 degrees 42 minutes East a distance of 777.1 feet to the East boundary of said Section 31, thence with said East boundary South 01 degrees 02 minutes 30 seconds West a distance of 4146 feet to the Southeast corner thereof and the terminus of the severance line hereby described."

On August 29, 2016, Alabama Power filed a motion for new findings of fact and to alter, amend, or vacate the judgment or for a new trial. In the motion, Alabama Power made the following arguments, among others: the action was an adverse-possession case and not merely a boundary-line dispute; Keller failed to adversely possess the disputed areas; and Keller's

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claims were barred under the doctrine of unclean hands.<sup>2</sup> On September 7, 2016, Alabama Power filed a notice of appeal to the supreme court. On September 22, 2016, the trial court entered an order denying all post-trial motions. At that time, the notice of appeal became effective. See Rule 4(a)(5), Ala. R. App. P. ("A notice of appeal filed after the entry of the judgment but before the disposition of all post-judgment motions filed pursuant to Rules 50, 52, 55, and 59, Alabama Rules of Civil Procedure, shall be held in abeyance until all post-judgment motions filed pursuant to Rules 50, 52, 55, and 59 are ruled upon; such a notice of appeal shall become effective upon the date of disposition of the last of all such motions.").

The supreme court transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975. Keller filed a motion to strike the portion of Alabama Power's reply brief that contained an argument regarding the application of the rule of repose to the case. Alabama Power filed a response. We

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<sup>2</sup>We note that Alabama Power asserted the affirmative defense of unclean hands in its answer.



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consider the motion to strike with the parties' arguments below.

#### Discussion

Alabama Power contends that, instead of treating this action as a boundary-line dispute, the trial court should have treated the action as an adverse-possession case and that Keller failed to show that he had adversely possessed the disputed land. "[O]ne who seeks title by adverse possession is not relying on 'paper title' and, in fact, intends to overcome another's 'paper title' by possessory acts." Zadnichek v. Fidler, 894 So. 2d 702, 705 (Ala. Civ. App. 2004).

"In Alabama there are basically two types of adverse possession, these two types being statutory adverse possession and adverse possession by prescription. Adverse possession by prescription requires actual, exclusive, open, notorious and hostile possession under a claim of right for a period of twenty years. See, Fitts v. Alexander, 277 Ala. 372, 170 So. 2d 808 (1965). Statutory adverse possession requires the same elements, but the statute provides further that if the adverse possessor holds under color of title, has paid taxes for ten years, or derives his title by descent cast or devise from a possessor, he may acquire title in ten years, as opposed to the twenty years required for adverse possession by prescription. Code 1975, § 6-5-200. See, Long v. Ladd, 273 Ala. 410, 142 So. 2d 660 (1962)."

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Kerlin v. Tensaw Land & Timber Co., 390 So. 2d 616, 618 (Ala. 1980).

Section 35-3-2, Ala. Code 1975, provides for actions to establish boundary lines between adjoining properties and the trial court's duties in such actions:

"Actions may be brought by any person owning land or any interest therein against the owner or person interested in adjoining land to have the boundary lines established; and when the boundary lines of two or more tracts depend upon the same common point, line, or landmark, and action may be brought by the owner or any person interested in any of such tracts, against the owners or persons interested in the other tracts, to have all the boundary lines established. The court shall determine any adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines and shall make such order respecting costs and disbursements as it shall deem just."

(Emphasis added). A boundary-line action may include an adverse-possession claim by one of the owners of adjoining properties. An adverse-possession claim in a boundary-line action is subject to "a unique set of requirements that is a hybrid of the elements of adverse possession by prescription and statutory adverse possession." Kerlin, 390 So. 2d at 618. "In a boundary dispute, the coterminous landowners may alter the boundary line between their tracts of land by agreement

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plus possession for ten years, or by adverse possession for ten years." Id.

Alabama Power argues that this case can be considered only as an adverse-possession case and not as a boundary-line case because, it asserts, Keller claims ownership of a significant portion of land to which Alabama Power claims to have title. In support of its argument, Alabama Power relies on Dickinson v. Suggs, 196 So. 3d 1183 (Ala. Civ. App. 2015), in which this court stated: "'[w]hen a coterminous landowner is claiming to have acquired all or a significant portion of another coterminous landowner's land by virtue of adverse possession,'" the elements of either adverse possession by prescription or statutory adverse possession apply instead of the hybrid form of adverse possession involved in a boundary-line dispute. Id. at 1187 (quoting Buckner v. Hosch, 987 So. 2d 1149, 1152 (Ala. Civ. App. 2007)) (emphasis added).

Keller argues that the land disputed in the parties' claims is not significant given the size of Alabama Power's property, and Keller did not claim all the adjoining land owned by Alabama Power. As stated in Dickinson, whether disputed land is a "'significant portion of ... land'"

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determines which elements apply to an adverse-possession claim. The judgment in this case, however, is not based on an adverse-possession claim asserted by Keller. In his complaint, Keller requested that the trial court settle a boundary-line dispute between the parties. Keller claimed a boundary line based on the descriptions in the 1942 deed within his chain of title and the 1953 deed within Alabama Power's chain of title. Alabama Power claimed portions of land adverse to Keller's claims. In adjudicating the claims, the trial court found that the parties' current deeds contained erroneous descriptions of the boundary line. In accordance with § 35-3-2, the judgment established a boundary line between the properties based on the boundary descriptions in previous deeds within the parties' chains of title. Because the judgment does not rely on an adverse-possession claim, Dickinson does not apply to the trial court's treatment of this action. We conclude that the trial court's treatment of the case is consistent with how a boundary-line action should be treated pursuant to § 35-3-2.

Alabama Power also argues that, when the deeds of adjoining property owners describe the properties by referring to United States government survey lines, the boundary line

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between the properties must be determined either by reference to the United States government survey lines described in the current property owners' deeds or through claims of adverse possession. A trial court's equitable powers, however, are not limited to those two means of determining a boundary line.

"The rule is general and well recognized that in a suit in equity to determine a boundary line, the court has authority to determine all questions essential to final adjudication and settlement of the true boundary line. Yauger v. Taylor, 218 Ala. 235, 118 So. 271 [(1928)]; Atkins v. Cunningham, 222 Ala. 553, 133 So. 586 [(1931)]; Smith v. Rhodes, 206 Ala. 460, 90 So. 349 [(1921)].

"The case of Yauger v. Taylor, supra, states:

"'The court of equity is not wanting in power to try titles to lands, so far as required in granting full equitable relief. As our cases above discussed fully disclose, this power has been freely exercised in boundary line cases under original chancery powers, whether the controversy involves the location of the true line by muniments of title alone, or the issue also involves claims of adverse possession. This is but an application of the principle that equity determines all matters incident to the exercise of its jurisdiction and the granting of relief. ...'

"[218 Ala. 235, 118 So. 274.]"

Crew v. W.T. Smith Lumber Co., 268 Ala. 628, 634, 109 So. 2d 721, 726-27 (1959). See Steele v. McCurdy, 269 Ala. 271, 279,

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112 So. 2d 336, 344 (1959); and Comer v. Limbaugh, 256 Ala. 655, 660, 57 So. 2d 72, 75 (1952) ("[A]ll matters relating or incident to the suit to establish a disputed boundary may be determined. ... The general rule is that where a court of equity assumes jurisdiction of a cause, it will retain the bill and do complete justice."). It is well settled that a trial court is not restricted to the pleadings in locating a boundary line, and a trial court must ascertain an identifiable boundary line from the evidence presented.

"If, on the basis of the pleadings and evidence presented at trial, a trial court is convinced that a controversy exists concerning the location of a boundary line, it is empowered to evaluate the evidence and reach a conclusive determination on the true location of the line; however, in doing so, it shall not be constrained by the pleadings to establish only a boundary line that is requested by either party. To the contrary, the court must proceed to find the true line, whether it is as either party contends. Stansell v. Tharp, [245 Ala. 270, 16 So. 2d 857 (1944)]; Deese v. Odom, 283 Ala. 420, 218 So. 2d 134 (1969)."

Ray v. Robinson, 388 So. 2d 957, 963 (Ala. 1980).

In Cousins v. McNeel, 96 So. 3d 846 (Ala. Civ. App. 2012), the appellant, William Cousins, argued for the reversal of a judgment determining the boundary line between his property and an adjoining property, in part, because the trial

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court in that case had relied on a description of the boundary line contained in the deed of Cousins's predecessor, George Houston, instead of the description contained in Cousins's deed. The description in Cousins's deed was based on an inaccurate survey conducted by Ronald Burke. We stated:

"In drafting the boundary-line description for section 9, the trial court relied on language contained in the deed by which Houston acquired his property in 1978; that deed was before the trial court. We also note that the trial court, as the trier of fact, could have concluded that Burke's survey, Houston's deed to Cousins, which was based on Burke's survey, and the tax assessor's records relating to Houston's property contained errors in their legal descriptions."

Id. at 855. Accordingly, we affirmed the trial court's judgment relying on a predecessor's deed for a boundary-line description and the implicit finding that the description in the current deed was erroneous. As illustrated in Cousins, a trial court is not limited to only either relying on the governmental survey lines described in the current property owners' deeds or claims of adverse possession as a basis for determining a boundary line. See Powell v. Evans, 496 So. 2d 723, 726 (Ala. 1986) (affirming judgment establishing boundary line through reformation of a deed). We conclude that the trial court appropriately treated this action as a boundary-

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line case, and we pretermitted discussion of whether sufficient evidence could have supported a finding of adverse possession in favor of Keller.

## II.

We next consider Alabama Power's arguments regarding the trial court's establishment of the boundary line based on the 1942 and 1953 deeds. Alabama Power argues that the trial court could not have disregarded the descriptions in the parties' current deeds, relying on Marsh v. Gragg, 228 Ala. 269, 272, 153 So. 219, 222 (1934). In Marsh, a party claimed that he and his predecessors had possessed land up to a ditch and that the ditch marked the border line between his property and another party's adjoining property. The deeds of the parties and the deeds in both parties' chains of title all consistently showed the boundary line to be the median line of the town block rather than the ditch. The supreme court held that the descriptions in the deeds controlled because the evidence supporting adverse possession to the ditch was uncertain. In this case, the judgment does not rely on an adverse-possession claim asserted by Keller, and descriptions of the boundary line in the deeds within the parties' chains of title are not



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consistent with the descriptions of the boundary line in their current deeds. Unlike the parties' deeds in Marsh, the trial court found erroneous descriptions of the boundary line in the current deeds of Keller and Alabama Power. Therefore, the reasoning in Marsh does not apply to this case.

Alabama Power also argues that Keller did not present clear and convincing proof of mutual mistakes in all the deeds in the parties' chains of title since 1959. The judgment does not appear to rely upon the establishment of mutual mistakes in all the deeds but, instead, upon a finding of erroneous descriptions resulting in an unsettled boundary. We are not directed to a legally authoritative basis to reverse the judgment on a lack of proof of mutual mistakes. See White Sands Grp., L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008).

Alabama Power argues that the trial court's reliance on the previous deeds in the parties' chains of title amounts to a reformation of the descriptions in the parties' current deeds and that the rule of repose bars the reformation. Keller filed a motion to strike any reference to the rule of repose, arguing, in part, that Alabama Power improperly raised the

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argument on appeal. "[A]n argument may not properly be raised for the first time in an appellant's reply brief." Leonard v. Woodruff, 204 So. 3d 901, 905 n.1 (Ala. Civ. App. 2016). The rule of repose is an affirmative defense that bars an action that was commenced more than 20 years after it could have been commenced. Snider v. Morgan, 113 So. 3d 643, 650 (Ala. 2012). Because Alabama Power raised the argument regarding the rule of repose for the first time on appeal in its reply brief, we grant Keller's motion to strike, and we will not consider that argument. See Nance v. Southerland, 79 So. 3d 612, 622 (Ala. Civ. App. 2010) (granting a motion to strike an argument raised for the first time in a reply brief).

Alabama Power also argues that, in the description of the property in the 1953 deed from the Davises to T.R. Allison, the description referencing government survey lines controls over the courses-and-distances description.

"[T]he intent of the grantor manifested by the words used in the grant, construed in the light of attendant facts and circumstances, is the controlling factor in determining the intent of the parties in respect to the land thereby conveyed.

"The principle which we have stated above has its limitations, as shown in several of our cases. In Pettit v. Gibson, 201 Ala. 177, 77 So. 703 [(1917)], it is stated that when there are two such

descriptions, one indicating the land by government numbers and the other designating the premises as the home place of a named person, the description by government numbers will generally prevail. The Gibson case refers to Sumner v. Hill, [157 Ala. 230, 47 So. 565 (1908)], by observing that there the particular description by government numbers covered only a part of the land included in the general description, saying that it was properly held that the general description in such cases will prevail. Further illustrating the theory that in interpreting [sic] such a description the intention of the parties must prevail, the cases of Head v. Hunnicutt, 172 Ala. 48, 55 So. 161 [(1911)], and Carter v. Chevalier, 108 Ala. 563, 19 So. 798 [(1895)], are cited.

"It is said in Barker v. Mobile Electric Co., 173 Ala. 28, at page 36, 55 So. 364, at page 366 [(1911)], 'What is most material and most certain in a description shall prevail over that which is less material and less certain.' And in the case of Garner v. Morris, 187 Ala. 658, 65 So. 1000 [(1914)], the Court quoted from Guilmartin v. Wood, [96 Ala. 204 (1884)], and gave effect to a particular description, from which boundaries could be readily ascertained or declared with reference to prominent monuments, as controlling over a general description."

Spires v. Nix, 256 Ala. 642, 646, 57 So. 2d 89, 93 (1952); see Miller v. Jones, 280 Ala. 612, 614, 196 So. 2d 866, 868 (1967) ("The rule is that where a general and particular description are both used in the same deed with reference to the same land, and the two are repugnant to each other, the

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particular description will control and the general will be rejected as false.").

The 1953 deed provides the following description:

"The N.W. 1/4 of N.E. 1/4 of Sec. No 31. Tp. 1 Range 6 East in Jackson County, Ala. and containing 40 acres, more or less. More particularly described as follows, beginning at the Henry Keller S.E. corner thence running East with a blazed line which is bounded on the North by the property belonging to Frank Evans and running to a blazed tree on the top of the cave, thence in a south eastwardly direction with the meanderings of the cave branch, thence west with a line which is bounded on the south by the lands of T.R. Allison and thence North with a line which is bounded on the west by the lands of T.R. Allison."

The deed specifies that the courses-and-distances description is the more particular description of the boundary lines of the property. Therefore, we conclude that the 1953 deed manifests the intent to grant the property as specifically described by courses and distances.

### III.

Alabama Power argues that the doctrine of "clean hands" bars Keller's claims.

"[O]ne 'who seek[s] equity must do equity' and 'one that comes into equity must come with clean hands.' Levine v. Levine, 262 Ala. 491, 494, 80 So. 2d 235, 237 (1955). The purpose of the clean hands doctrine is to prevent a party from asserting his, her, or its rights under the law when that party's own

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wrongful conduct renders the assertion of such legal rights 'contrary to equity and good conscience.' Draughon v. General Fin. Credit Corp., 362 So. 2d 880, 884 (Ala. 1978). The application of the clean hands doctrine is a matter within the sound discretion of the trial court. Lowe v. Lowe, 466 So. 2d 969 (Ala. Civ. App. 1985).

"... '[W]here ore tenus evidence is presented to the trial court in a nonjury case, a judgment based on that evidence is presumed to be correct and will not be disturbed on appeal unless a consideration of the evidence and all reasonable inferences therefrom reveals that the judgment is plainly and palpably erroneous or manifestly unjust.' Arzonico v. Wells, 589 So. 2d 152, 153 (Ala. 1991). ..."

J & M Bail Bonding Co. v. Hayes, 748 So. 2d 188, 199 (Ala. 1999).

Alabama Power asserts that Keller's agents tore down signs posted by the Alabama Department of Conservation and Natural Resources, moved those signs, painted over Alabama Power's boundary-line markers, and painted markers of boundary lines all in accordance to the boundary line sought by Keller. The trial court did not find the actions involving the painted markers to be unscrupulous, and evidence in the record shows that each party, or people acting for each party's benefit, placed markers in accordance to the boundary line each party sought. Alabama Power also asserts that Keller attempted to influence the testimony of a witness and that Keller's agent

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directed a surveyor to omit certain things and to include other things in a possession sketch. Keller disputes Alabama Power's characterization of his conduct toward the witness. He testified that he had merely expressed to the witness his displeasure toward a former business partner. Keller also asserts that the requests to the surveyor did not amount to requests that the surveyor provide inaccurate depictions of the land.

Alabama Power alleges that the actions it attributes to Keller were an attempt to mislead the trial court. Whether Keller's actions amounted to an attempt to mislead the court was within the trial court's discretion to determine based on ore tenus evidence and its inspection of disputed areas. Although it could have made such a determination if it had found the allegations to be credible, the trial court was not required to find that Keller's actions rose to the level of unconscionable conduct based on all the evidence regarding the actions referenced by Alabama Power. Moreover, the record contains abundant evidence to support the trial court's establishment of the boundary line in addition to the evidence Alabama Power alleges Keller manipulated. Even assuming that

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the clean-hands doctrine is applicable to boundary-line disputes, we cannot say that the trial court was required to bar Keller's claim to establish the boundary line in the manner determined by the judgment.

Conclusion

After reviewing the issues presented, we conclude that Alabama Power has not established a ground for reversal. The trial court's judgment is therefore affirmed.

AFFIRMED.

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