

REL: November 30, 2018

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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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Robert Clyde Robinson

v.

Harrigan Timberlands Limited Partnership, Scotch Land Management, LLC, Fulton Logging Company, LLC, Black Sheep Woodlands, LLC, and Todd Overstreet d/b/a Overstreet Timber Company

Appeal from Clarke Circuit Court  
(CV-17-900039)

MENDHEIM, Justice.

Robert Clyde Robinson appeals from the Clarke Circuit Court's dismissal of his action against Harrigan Timberlands Limited Partnership ("Harrigan"), Scotch Land Management, LLC

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("Scotch"), Fulton Logging Company, LLC ("Fulton"), Black Sheep Woodlands, LLC ("Black Sheep"), and Todd Overstreet d/b/a Overstreet Timber Company ("Overstreet") (hereinafter collectively referred to as "the Harrigan defendants") for the alleged wrongful cutting of timber. We reverse the judgment of the trial court and remand the case.

### I. Facts

On March 15, 2017, Robinson filed an action in the Clarke Circuit Court alleging that, from June through September 2016, "approximately 20-30 acres of timber ... was wrongfully cut and removed" from his property, that the land "was once a forest of virgin timber," that he had "lived on [the land] all his life, and [that], before the [Harrigan d]efendants' egregious actions, he explored, hunted, traversed, and otherwise enjoyed all of this property in its natural, pristine state." Robinson alleged that Harrigan was a coterminous property owner who entered into a contract with Scotch to cut and remove timber from Harrigan's property but that, in doing so, Harrigan wrongfully authorized the harvesting of timber from Robinson's property. Robinson further alleged that Scotch subcontracted with Fulton "to

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carry out a portion of the actual cutting, removal and sale of timber ... from the northern portion of his property" and that Scotch subcontracted with Black Sheep "to carry out a portion of the actual cutting, removal and sale of timber ... from the southern section of his property." Robinson further alleged that Black Sheep subcontracted with Overstreet, who cut, removed, and sold timber from the southern portion of Robinson's property. Robinson asserted several claims against the Harrigan defendants, including trespass, a statutory claim alleging the wrongful cutting of timber, a statutory claim alleging dealing in wrongfully converted timber, a common-law claim to recover damages for the wrongfully cut timber, and a claim alleging negligence/wantonness.

Robinson's complaint referenced two deeds he stated "particularly described" the property in question and that were "attached ... and incorporated ... by reference" into the complaint as Exhibits "A" and "B." However, Robinson neglected to attach the deeds to his complaint when it was filed. Counsel for Harrigan, Scotch, and Fulton notified Robinson of the oversight, and Robinson forwarded copies of the two deeds to the Harrigan defendants. The first deed,

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dated August 20, 2001, conveyed two parcels of property from Raymond Brent Robinson and Mary Ann Robinson to Robinson. The descriptions of both parcels state that the eastern boundary of the parcels is "West of Bassetts Creek in Section 8." The second deed, dated January 14, 2012, also conveyed two parcels of property to Robinson. The grantor under the 2012 deed was Mary Dell Robinson Prater. The description of the second parcel in the 2012 deed describes that property as follows: "All of Northwest Quarter of Northeast Quarter West of Bassetts Creek in Section 8, Township 8 North, Range 4 East, containing 39 acres" (hereinafter referred to as "Parcel Two"). We note that a quarter-quarter section contains approximately 40 acres of land.

On April 19, 2017, Overstreet filed an answer to the complaint in which he denied all allegations and stated as an affirmative defense that "[t]his Defend[ant] did not wrongfully cut any of [Robinson's] alleged timber."

On April 25, 2017, Harrigan, Scotch, and Fulton filed a motion to dismiss Robinson's complaint. In the motion, they noted that the deeds conveyed parcels of property to Robinson and that

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"[t]he descriptions of these parcels state that the property deeded to [Robinson] is 'w]est of Bassetts Creek.' ... However, none of the timber which was cut or removed was on the west side of Bassetts Creek. Rather, all of the cutting and removal of timber occurred on the east side of Bassetts Creek.... Simply put, according to the deeds [Robinson] attached as an exhibit to his Complaint, [Robinson] admittedly does not own the property where the trees were cut."

On the basis of the contention that Harrigan, Scotch, and Fulton did not cut any timber located on Robinson's property, those defendants requested a complete dismissal of the claims against them. They attached the two deeds as exhibits to their motion to dismiss. Harrigan, Scotch, and Fulton also attached photographs of trees the motion stated were along the boundary line of Robinson's and Harrigan's properties. One of the pictured trees had yellow paint on it, and two of the pictured trees had signs that stated: "Property Line -- No Hunting or Trespassing -- Scotch Timber Company."<sup>1</sup>

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<sup>1</sup>The appellees' brief filed by Harrigan, Scotch, and Fulton, which was joined by the remaining defendants, states that Harrigan is "a neighboring land owner" of Robinson's. Appellees' brief, p. 2. No explanation is provided in the record or in the filings on appeal as to why the signs on trees presumably owned by Harrigan list an entity called "Scotch Timber Company."

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On May 1, 2017, Black Sheep filed its own motion to dismiss the complaint. In its motion, Black Sheep contended that

"[Robinson's] Complaint fails to identify specifically what portion of the alleged land owned by Mr. Robinson was cut. It is impossible for Black Sheep to properly respond to the Complaint that gives general references to an alleged area of property that was destroyed without giving specific parameters of the alleged property connected to the deeds used to support the claims being made by [Robinson]."

Black Sheep also contended that it had committed no wrongful act as to Robinson's property and that, because the complaint alleged that it subcontracted with Overstreet and that Overstreet was the one that actually cut timber, Black Sheep could not be liable for trespass.

On May 3, 2017, Robinson filed a response in opposition to the motions to dismiss his complaint.<sup>2</sup> In that response, Robinson argued:

"While the [Harrigan d]efendants rightly point out that [Robinson's] deeds on their faces state [that his property is] west of Bassett's [sic] Creek[, Robinson] argues that pursuant to federal and state law [the] Bassett's [sic] Creek bed prior to avulsion is the true and correct boundary line

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<sup>2</sup>It appears that the parties considered Overstreet to have joined the motions to dismiss, and the record reflects that Overstreet attended the hearing on the motions.

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between [Robinson's] land and [Harrigan's] land. In light of the possibility that [Robinson] can support his claim that due to an avulsive event the boundary line argued by the [Harrigan d]efendants is not the true boundary line, it necessarily follows that there must be some doubt about [Robinson's] inability to establish a set of facts that would support a claim entitling him to relief."

In other words, Robinson contended that the course of Bassetts Creek had changed due to an avulsion, that the creek bed through which water formerly flowed constituted the original Bassetts Creek referred to in his deed, and that that creek bed was, in fact, the boundary line between the Robinson and Harrigan properties, rather than the currently designated Bassetts Creek.

On May 8, 2017, the trial court entered an order setting the motions to dismiss for a hearing to be held on June 22, 2017. On May 22, 2017, Harrigan, Scotch, and Fulton filed their "First Interrogatories and Request for Production from [Robinson]." Attached to that filing were more photographs of trees that had yellow paint on them.

On June 20, 2017, Harrigan, Scotch, and Fulton filed a reply to Robinson's response to the motions to dismiss the complaint. In that reply, they repeated the contention that they had not cut any timber west of Bassetts Creek. Harrigan,

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Scotch, and Fulton added that "[t]he new allegation of avulsion is completely and totally absent in the Complaint. Inserting the concept into a subsequent motion does not retroactively change the fact that the Complaint does not state any claim under which [Robinson] could be entitled to relief."

On the same date, Harrigan, Scotch, and Fulton filed "supplemental evidence" in support of their motion to dismiss; that supplement consisted of an affidavit from former Scotch employee Lloyd Gilchrist and a land survey of Robinson's property by McVay Surveying that contained a map showing the boundary line as the currently designated Bassetts Creek. In his affidavit, Gilchrist stated that he had been an employee of Scotch from 1980 to 2012 and that he had "patrolled that area at least two to three times per year from 1980 until 2012." Gilchrist affirmed that the photographs of trees attached to the "First Interrogatories" filed by Harrigan, Scotch, and Fulton depicted trees along the boundary line of Harrigan's property and that the trees had been marked with yellow paint since at least 2003 to designate Harrigan's boundary line.

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On June 22, 2017, the trial court heard the parties' arguments concerning the motions to dismiss filed by the Harrigan defendants. Robinson contended that, "[i]n Alabama, the boundary lines are not moved by avulsion" and that, therefore, the fact that the course of Bassetts Creek had changed over time did not alter the boundary line of Robinson's property. Robinson noted that if the boundary line corresponding to the old creek bed for Bassetts Creek is accepted, the acreage for Parcel Two as described in the 2012 deed is 39 acres but that, if the boundary line is the currently designated Bassetts Creek, then Parcel Two would be only approximately 24 acres. Robinson also stated that he had evidence indicating that an avulsion had occurred around 1900 based on a newspaper article from that period and that he could also present, if necessary, previous deeds that showed that the acreage for the parcels of property owned by Robinson had remained the same before and after the alleged avulsion. Neither the newspaper article nor the previous deeds were introduced into evidence. Robinson did introduce into evidence a map of Robinson's property from the Clarke County Tax Assessor's office. "Bassetts Creek" as depicted on the

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map appears to coincide with the position Robinson claims as the boundary line for his property. Robinson also entered into evidence an aerial photograph of his property and a large map of a land survey performed by Fleming Engineering regarding the subject property on March 22, 2017. The Fleming survey map reflects that Bassetts Creek forks near the eastern boundary of Parcel Two, the western fork meanders through the middle of Parcel Two, and a smaller eastern fork meanders near the eastern quarter-quarter section line. The Fleming survey marked the old creek bed, i.e., the eastern fork, of Bassetts Creek as the boundary line for Robinson's property.

In the same hearing, the Harrigan defendants repeated their contention that they cut only timber east of Bassetts Creek and that Robinson's theory that an avulsion had occurred was never pleaded in his complaint. In support of their contention that they cut only timber east of Bassetts Creek, the Harrigan defendants cited the photographs of trees that had been attached to their previous filings. For support of their argument that the current Bassetts Creek is the true boundary line between the properties, the Harrigan defendants pointed to the affidavit from Gilchrist and the survey they

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filed two days before the hearing. They discounted the tax assessor's map because "this map is used for tax assessment purposes only, not for any conveyance of property."

On August 21, 2017, the trial court sent a note to the parties in which it stated: "After reviewing my notes, I believe that viewing this property would be very helpful to me in arriving at a fair decision." The parties settled on the date of September 29, 2017, for a site visit by the trial court. On September 29, 2017, the trial judge, counsel for the parties, Robinson, Jeff Lucas, a land surveyor whose services Robinson had secured, and representatives for the Harrigan defendants visited the property.

On October 4, 2017, Robinson filed a "Motion to Supplement Evidence," which contained an affidavit from Lucas and a copy of the Fleming survey map. In his affidavit, Lucas stated that, as part of his review of the Fleming survey, he had made his own site visit to the property where he observed the boundary lines of the property. Lucas noted that the Fleming survey's depiction of Bassetts Creek showed it

"has one channel when it enters the Quarter-Quarter a little south of the northeast corner, then splits into two branches. The branch claimed by Mr. Robinson hugs the east boundary of the Quarter-

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Quarter, exiting just west of the southeast corner thereof, leaving approximately 2.8 acres east of Bassett's [sic] Creek and 37.0 acres west of Bassett's Creek [sic]. The other branch meanders through the middle of the Quarter-Quarter, exiting just a little to the west of the mid-point of the south boundary thereof, leaving approximately 12.5 acres east of the branch and 27.3 acres west of the branch."

Lucas concluded that, "[i]n his professional opinion, the Map of Survey prepared by Fleming is an accurate representation of the conditions of the property on the ground relative to the property boundaries and creek locations."

On October 5, 2017, Harrigan, Scotch, and Fulton filed a motion to strike Robinson's supplemental evidence consisting of the Lucas affidavit and the copy of the Fleming survey map. The basis of the motion was that Robinson's motion to supplement the evidence was untimely under Rule 56(c)(2), Ala. R. Civ. P., because it had not been served at least 10 days before the June 22, 2017, hearing.<sup>3</sup> On October 20, 2017, the

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<sup>3</sup>Rule 56(c)(2), Ala. R. Civ. P., provides:

"(2) Time. The motion for summary judgment, with all supporting materials, including any briefs, shall be served at least ten (10) days before the time fixed for the hearing, except that a court may conduct a hearing on less than ten (10) days' notice with the consent of the parties concerned. Subject to subparagraph (f) of this rule, any statement or affidavit in opposition shall be served at least

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trial court set the motion to strike for a hearing to be held on December 11, 2017.

At the December 11, 2017, hearing, following the Harrigan defendants' argument that Robinson's supplemental evidence was due to be stricken, Robinson moved to strike the supplemental evidence filed by Harrigan, Scotch, and Fulton on June 20, 2017 -- consisting of Gilchrist's affidavit and the McVay survey -- as also untimely under Rule 56(c)(2), Ala. R. Civ. P. An exchange then ensued between the parties' counsel as to whether each side would agree to withdraw its supplemental evidence.

"[Black Sheep's counsel]: ... We just want you to make a ruling on what was argued in June, nothing post, nothing post filing.

"[Robinson's counsel]: That's all I'm asking. All I'm asking is that you make rulings on my oral motion to strike their untimely filing prior to the hearing and -- you know, if y'all are going to consent to that, then we'll consent; we'll stipulate to us getting rid of the survey, the affidavit, as long as your purported survey and affidavit is also stricken.

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two (2) days prior to the hearing."

The Harrigan defendants and Robinson argue that the motions to dismiss were converted to summary-judgment motions because the trial court considered matters outside the pleadings. See discussion, *infra*.

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"[Black Sheep's counsel]: All I'm asking -- I think this motion today was --

"THE COURT: So where are we?

"[Harrigan, Scotch, and Fulton's counsel]: Judge, that's interesting. Let me think about this. Because the deed -- then that would only leave the deed for you to you consider.

"[Robinson's counsel]: Deeds.

"[Harrigan, Scotch, and Fulton's counsel]: And what I'm telling you is, we only cut everything east of Bassetts Creek. There is no dispute about that.

"THE COURT: Let me ask, while you --

"[Robinson's counsel]: There is a dispute about that."

After the foregoing exchange, the trial court proceeded to seek clarification from the parties as to exactly where they each believed the eastern boundary line of Parcel Two to be located. Following the clarification, the parties briefly returned to the motions to strike.

"[Black Sheep's counsel]: My position is that -- I mean, we're really not talking about things back in June. Today is about a motion to -- if they want to supplement, we're going to move to strike it, and they're going to --

"THE COURT: And y'all are --

"[Robinson's counsel]: And we're moving to strike theirs because theirs is untimely as well.

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"[Black Sheep's counsel]: Right. We're on --

"THE COURT: We've got it, guys."

The next day, December 12, 2017, the trial court entered a judgment disposing of all outstanding motions. The December 12, 2017, judgment denied the motion to strike filed by the Harrigan defendants and granted the motion to strike filed by Robinson. The judgment continued:

"Based on the pleadings, oral arguments of counsel, and the on-site inspection of the property the Court hereby DECLARES, ADJUDGES and DECREES that all of the timber cut was on the EAST side of Bassett's [sic] Creek, and [Robinson's] property which was previously deeded to him is all contained on the WEST side of Bassett's [sic] Creek. A copy of the survey for which this Court determines accurately depicts the property is attached hereto as Exhibit 'A' to the Court's Order. Based on the inspection of the property the Court does not believe there was an avulsion of Bassett's [sic] Creek as argued by [Robinson]. According to the deeds relied upon by [Robinson] as exhibits to his Complaint, the Court finds [Robinson] does not own the property where the subject timber and trees were cut. Accordingly, pursuant to Ala. R. Civ. P. 12(b)(6) [the Harrigan d]efendants' Motions [to dismiss] are due to be and are hereby GRANTED as it appears beyond doubt that [Robinson] can prove no set of facts in support of a claim that would entitle him to relief."

(Capitalization in original; emphasis added.)

On January 11, 2018, Robinson filed a Rule 59(e), Ala. R. Civ. P., motion to alter, amend, or vacate the December 12,

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2017, judgment. In that motion, Robinson noted that, based on the trial court's judgment, the only evidence the trial court considered was the two deeds, the tax assessor's map, the aerial photograph of his property, and the Fleming survey map submitted during the June 22, 2017, hearing, and Lucas's affidavit. Robinson argued that "the great weight of the evidence before the court at this juncture favors [Robinson's] version of the facts." On February 9, 2018, the trial court denied Robinson's postjudgment motion.

## II. Standard of Review

The trial court's judgment indicates that the court granted the Harrigan defendants' motions to dismiss Robinson's complaint. Both sides primarily contend that we should apply the standard of review for a motion to dismiss. Robinson observes that the two deeds he meant to attach to his complaint would not convert the motions to dismiss into motions for a summary judgment because "[e]xhibits attached to a pleading become part of the pleading. See Rule 10(c), Ala. R. Civ. P. ('A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.')." Ex parte Price, 244 So. 3d 949, 955 (Ala. 2017). The deeds

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are integral to Robinson's claims, and therefore they do not constitute "matters outside the pleadings." In this regard, Rule 12(b), Ala. R. Civ. P., provides, in part:

"If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Despite the fact that the two deeds are part of the pleadings, as our rendition of the facts recounts several other documents were presented to the trial court. Harrigan, Scotch, and Fulton attached photographs of trees they contended depicted the boundary line of Harrigan's property in two separate filings that were never expressly excluded by the trial court. In the June, 22, 2017, hearing, Robinson submitted a tax assessor's map, an aerial photograph of his property, and the Fleming survey map. On October 4, 2017, Robinson submitted supplemental evidence that included an affidavit from land surveyor Lucas.

The Harrigan defendants contend that, aside from the two deeds, the foregoing documents are irrelevant to the

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disposition of this case because, at the December 11, 2017, hearing, the parties agreed to withdraw all evidentiary submissions other than the deeds. However, a plain reading of the transcript of the December 11, 2017, hearing reveals that no such agreement was reached between the parties. The trial court certainly was not under the impression that any such agreement had been made, given that it addressed in its final judgment the parties' motions to strike their opponent's supplemental evidence. Indeed, the December 12, 2017, judgment states that it considered Robinson's supplemental evidence but did not consider the supplemental evidence submitted by Harrigan, Scotch, and Fulton. Moreover, despite purporting to strike the latter supplemental evidence, the trial court attached a copy of the McVay survey map to the December 12, 2017, judgment. Additionally, in the December 11, 2017, hearing both Robinson and the Harrigan defendants sought exclusion of the other's supplemental evidence based on Rule 56(c)(2), Ala. R. Civ. P.

Therefore, we conclude, based on the record before us, that the trial court did consider matters outside the

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pleadings. For that reason, the proper standard of review is the standard of review for a summary judgment.

"In reviewing the disposition of a motion for a summary judgment, we apply the same standard the trial court used in determining whether the evidence before it presented a genuine issue of material fact. Bussey v. John Deere Co., 531 So. 2d 860, 862 (Ala. 1988); Rule 56(c), Ala. R. Civ. P. When the movant makes a prima facie showing that no genuine issue of material fact exists, the burden then shifts to the nonmovant to present substantial evidence creating such an issue. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794 (Ala. 1989). Evidence is 'substantial' if it is of 'such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). This Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412 (Ala. 1990)."

Peterson v. City of Abbeville, 1 So. 3d 38, 40 (Ala. 2008).

### III. Analysis

Robinson contends that his evidentiary submissions combined with the dearth of evidence from the Harrigan defendants constituted substantial evidence that the Harrigan defendants cut and removed timber from Parcel Two. Robinson notes that he submitted a tax assessor's map that appeared to place the boundary line for Parcel Two in the location he

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advocated, that he submitted the Fleming survey map, which also placed the boundary line in the location he advocated, and that the surveyor Lucas's affidavit corroborated this conclusion by observing that Robinson's claimed boundary line coincided with the acreage of Parcel Two in Robinson's 2012 deed. In contrast, Robinson observes, the only evidence from the Harrigan defendants that was not expressly excluded by the trial court was the photographs of trees purportedly along the boundary line of Harrigan's property. However, the only affidavit authenticating what was depicted in those photographs was Gilchrist's affidavit, which was stricken by the trial court.

The Harrigan defendants provide two arguments in response to Robinson's contention that he presented substantial evidence creating a genuine issue of material fact and precluding a summary judgment in their favor. First, they argue that Robinson stipulated in the trial court that he was withdrawing his evidentiary submissions. As noted above, however, although the possibility of such a stipulation was discussed by the parties, they did not reach an agreement. Second, the Harrigan defendants contend that, in addition to

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considering documentary evidence outside the pleadings, the trial court also visited the property, and that, therefore, its decision should be afforded a presumption of correctness. In support of this argument, the Harrigan defendants quote the following from Lawson v. Garrett, 286 Ala. 125, 128, 237 So. 2d 648, 651 (1970):

"[T]he parties requested the trial judge to visit and inspect the land with all the attorneys in the case. His conclusion was -- 'this visual inspection of the land confirms the evidence offered by the complainants.' We are not told what the court saw, but this personal inspection of the property before making its findings of fact is an additional reason why the decree is reviewed here as if it were the verdict of a jury and will not be disturbed unless plainly wrong."

(Emphasis added.) The Harrigan defendants also quote other cases to similar effect, such as Mutual Service Funeral Homes v. Fehler, 257 Ala. 354, 357, 58 So. 2d 770, 772 (1952) ("It is fully recognized by all the authorities that it is discretionary with the trial judge, who is sitting as a trier of the facts, to visit the scene of the locus in quo, if to do so would shed any light upon the controversy." (emphasis added)).

The problem with the Harrigan defendants' reliance on such cases, as Robinson observes, is that every one of those

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cases is one in which a presumption of correctness was required to be afforded to the trial court's judgment because the case was being tried by the bench on ore tenus evidence. In fact, in every boundary-line-dispute case this Court could find that included a site visit by the trial court, the site visit occurred during the trial on the merits. For example, in McGilberry v. Rabon, 286 Ala. 312, 314, 239 So. 2d 745, 746 (1970), this Court stated: "The evidence is in conflict which was resolved by the trial court. In making the resolution, the court was aided by personal inspection of the premises. When this occurs, the decree is reviewed here as if it were a verdict of a jury." See also McCollum v. Reaves, 547 So. 2d 433, 435 (Ala. 1989) ("[T]he presumption in favor of the trial judge's findings, where, as here, those findings are supported by the evidence, is strengthened by his personal inspection of the premises."); and Southwestern Constr. Co. v. Liberto, 385 So. 2d 633, 635 (Ala. 1980) ("A determination made by the trial court, when evidence is taken ore tenus, is favored with a presumption of correctness and will not be disturbed on appeal unless plainly erroneous or manifestly unjust,

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especially where, as was done in this case, the trial judge has made a personal inspection of the premises.").

In the present case, the trial court was presented with a dispute of material fact concerning the location of the boundary line of Parcel Two. Instead of advancing that dispute to trial, the trial court made its own finding of fact based on the judge's visit to the property. This is evident from the following portion of the December 12, 2017, judgment:

"Based on the pleadings, oral arguments of counsel, and the on-site inspection of the property the Court hereby DECLARES, ADJUDGES and DECREES that all of the timber cut was on the EAST side of Bassett's [sic] Creek, and [Robinson's] property which was previously deeded to him is all contained on the WEST side of Bassett's [sic] Creek. ... Based on the inspection of the property the Court does not believe there was an avulsion of Bassett's [sic] Creek as argued by [Robinson]. According to the deeds relied upon by [Robinson] as exhibits to his Complaint, the Court finds [Robinson] does not own the property where the subject timber and trees were cut."

(Capitalization in original.) The pivotal factor in the trial court's judgment that the eastern boundary line of Parcel Two was located in one location suggested by the documentary evidence rather than another location suggested by documentary evidence was the court's on-site inspection of the property, an inspection made during the summary-judgment stage of the

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proceedings. As we have mentioned, this appears to be unprecedented, and it is impermissible because disputes of material fact are not ripe for resolution at summary judgment.

"The summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. ... The summary judgment procedure is not a substitute for the trial of disputed issues of fact. ... The procedure is well adapted to expose sham claims and defenses but cannot be used to deprive a litigant of a proper trial of genuine issues of fact."

Howell v. Mobile Infirmary, 337 So. 2d 338, 340 (Ala. 1976) (quoting 3 Barron & Holtzoff, Federal Practice and Procedure § 1231 (1958)). The error is compounded in this instance given that in its judgment the trial court purported to apply the standard applicable to a motion to dismiss.

Ultimately, the trier of fact may reject Robinson's contention that the "Bassetts Creek" referred to in his deeds as marking the eastern boundary of Parcel Two is in a different location than the location suggested by the Harrigan defendants. But, on the record before us, that is not a judgment that appropriately can be determined at this stage of the proceedings. Therefore, the trial court's judgment must be reversed.

IV. Conclusion

A genuine issue of material fact exists concerning the location of Bassetts Creek as the eastern boundary line of Parcel Two. Therefore, a summary judgment should not have been entered in favor of the Harrigan defendants. Accordingly, the trial court's judgment is due to be reversed and the case remanded.

REVERSED AND REMANDED.

Stuart, C.J., and Parker, Main, and Bryan, JJ., concur.