Cite as 2022 Ark. App. 249

ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-21-256

JACQUELINE HAWKINS APPELLANT	**Opinion Delivered** May 25, 2022
V.	APPEAL FROM THE NEWTON COUNTY CIRCUIT COURT [NO. 51CV-09-57]
MONTE WILLIS FOR SNOW CEMETARY ASSOCIATION; PAM EMERSON; JUSTIN VILLINES; CHRIS DANIELS; MARILYN WILLIS; MONTE WILLIS; BILL WILLIS; AND JOY POLUS APPELLEES	HONORABLE DAVID N. LASER, JUDGE
	AFFIRMED

ROBERT J. GLADWIN, Judge

Jacqueline Hawkins appeals the Newton County Circuit Court's February 16, 2021 order granting the Rule 60(b) motion of appellees Monte Willis for Snow Cemetery Association, Pam Emerson, Justin Villines, Chris Daniels, Marilyn Willis, Monte Willis, Bill Willis, and Joy Polus (hereinafter "Snow Cemetery"). Ark. R. Civ. P. 60(b) (2021). The circuit court found that it had attached an erroneous legal description of the "parking area" at issue to its November 14, 2014 order and required Hawkins to quitclaim the "parking area" to Snow Cemetery and to remove any fence around it. On appeal, Hawkins argues that the circuit court abused its discretion. We affirm.

I. *Facts*

On July 7, 2009, Snow Cemetery filed a petition for injunctive and equitable relief against Hawkins to stop her from preventing access to the cemetery.[1] Hawkins responded with a dismissal motion, and Snow Cemetery filed a petition alleging that use of Hawkins's driveway had been established through prescription and that Hawkins's erection of a fence, which blocked access to the cemetery, was illegal. It further alleged that Hawkins's predecessor in title had ceded the parking area and driveway to cemetery users and that a boundary by acquiescence had been established. Finally, it alleged that Hawkins's predecessor in title had abandoned the driveway and parking area near the front gates. In response, Hawkins filed another dismissal motion. On December 22, the circuit court denied the dismissal motion, and the court's order reflects that Hawkins agreed to allow access to the cemetery for funerals until final disposition.

On July 5, 2011, an agreed order was filed reflecting that "the common document" is the Cochrane survey, which was attached to the order, and that the cemetery is surrounded as marked on the survey by a fence, a county road, and a private driveway. The order states that the private driveway belongs to Hawkins, who has title to the "disputed" real estate. The order provides:

> 4. [Snow Cemetery is] to become an Arkansas non-profit corporation or LLC. When that is completed, [Snow Cemetery is] to apply to the IRS for 501(c)(3) status wherein donations to it are tax deductible.
>
> 5. When [Snow Cemetery] attains[s] 501(c)(3) status, [Hawkins] will donate that portion of [her] land starting at the northwest corner of the cemetery as set forth in Exhibit A and continue on a alone [sic] line to where the old fence

[1]The original petition was filed against Jacqueline Hawkins and her husband, James Edward Hawkins, who is now deceased.

ran to the county road.[2] That real estate south of the above line is to be donated by [Hawkins] to [Snow Cemetery]. In exchange for the donated real estate south of the line donated by [Hawkins], [Snow Cemetery] will accept the real property as a charitable donation with a value of at least ten thousand dollars ($10,000.00).

6. The purpose of this Agreed Order is for [Snow Cemetery] to have the above described real property and [Hawkins] to have a ten thousand dollar ($10,000.00) charitable donation.

7. Currently, there is a board fence along the county road. When [Snow Cemetery] becomes the Arkansas non-profit cemetery and gets their 501(c)(3) status, the existing board fence along the road along the property line will be taken down by [Hawkins]. June 1, 2010, is an important day to [Snow Cemetery] as Decoration Day. If [Snow Cemetery] ha[s] not accomplished the 501(c)(3) status by June 1, 2010, [Snow Cemetery] will continue to have access to the disputed lands through the private driveway of [Hawkins] across the gravel yard to the disputed area for parking . . . until such time as [Snow Cemetery] obtain[s] the 501(c)(3) designation.

8. If there is a dispute . . . as to where the line is from the northwest corner of the cemetery to where the old existing fence line was, then [the parties] agree to come back to court [for] a decision on where the old existing fence line was.[3]

9. [Hawkins] ha[s] told [Snow Cemetery] that [her] lands are subject to a Bank of America mortgage. Any donation by [Hawkins] to [Snow Cemetery] of lands for the ten thousand dollar ($10,000.00) minimum charitable donation is subject to the existing mortgage. The cost of any release deed or other expense shall be borne by [Snow Cemetery].[4]

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[2]Interlineated by handwritten notation after this sentence is the phrase "as marked on Exhibit A."

[3]Interlineated by handwritten notation after this sentence is the phrase "as marked on Exhibit A."

[4]Interlineated by handwritten notation after this sentence is the phrase "including the deletion of that portion of the donated land from the mortgage."

10. In the event that either party fails to comply with the terms of the Agreement or if the point of the fence line on the county road[5] cannot be determined, then either party may request the Court to set the matter for a hearing.

On June 14, 2012, Snow Cemetery moved to modify the agreed order, arguing that the interlineations were not part of the agreement. It argued that the interlineation in paragraph 9—"including the deletion of that portion of the donated land from the mortgage"—added an obligation for Snow Cemetery to pay for the property. It asked that the order be modified to conform to the actual agreement under Rule 60(b) of the Arkansas Rules of Civil Procedure and that all handwritten interlineations be removed.

On June 28, Snow Cemetery filed a petition for contempt citation, which alleged that Snow Cemetery had obtained its status under section 501(c)(3) of the U.S. Internal Revenue Code and that Hawkins was aware that it had completed "all requirements precedent to removal of the fence" under the agreed order. Despite this, Hawkins erected a fence. Snow Cemetery asked for immediate removal of the fence and for Hawkins to be held in contempt. On June 29, Snow Cemetery filed a petition for preliminary and permanent injunctive relief under Rule 65 of the Arkansas Rules of Civil Procedure, asking for removal of the fence.

On May 17, 2013, the circuit court filed an order reflecting that the parties agreed for the court to rule on the pleadings, and the court found as follows:

3. That on June 6, 2011, Mr. Nichols sent a draft of the Agreed Order to the Court with a request that it be signed if Mr. Goldie did not object within five (5) days. One June 7, 2011, Mr. Goldie sent a draft of the Agreed Order with the now disputed interlineations.

[5]Interlineated by handwritten notation at this point in the sentence is the phrase "as marked on Exhibit A."

4. That with the differing versions of the Agreed Order submitted to the Court, with Mr. Goldie's version coming second, the Court instructed the Trial Court Assistant to contact Mr. Nichols to see if he agreed with Mr. Goldie's changes or if he objected to them. Contact was finally made between Mr. Nichols and the Trial Court Assistant on June 30, 2011, at which time Mr. Nichols indicated that he was in agreement with Mr. Goldie's version of the Agreed Order and did not object to the changes. The Order was then signed by the Court and filed of record on July 5, 2011.

5. That [Snow Cemetery's] motion, filed nearly a year later, seems to make the argument that the interlineations . . . somehow create an obligation for [it] to pay for the disputed piece of land rather than receive it as a donation.

6. . . . It is clear to the Court that the disputed land was to be donated by [Hawkins] to [Snow Cemetery] upon the completion of certain tasks and with certain conditions. It is also clear . . . that this donation was . . . a donation of the land with no price to be paid for the land by [Snow Cemetery] and that the interlineations in the Agreed Order do not change that. Additionally, . . . that while there was no price to be paid for the land by [Snow Cemetery], the agreement did require [it] to bear any expenses necessary to complete the donation, including the expenses related to deed preparation, title work, and securing a partial release of the mortgage from Bank of America. It appears to be this last part that has caused confusion for [Snow Cemetery].

7. That it is the interpretation of this Court that . . . [the interlineation] does not create an obligation for [Snow Cemetery] to pay any portion of the mortgage in order to secure the release but is yet another reference to [its] obligation to pay the associated documentational expenses. It was specifically part of the agreement that if the bank would not grant the partial release then the property would be donated . . . subject to the mortgage.

On November 10, 2014, the circuit court filed a supplemental order, signed by attorneys for both parties, stating,

5. That [Snow Cemetery Association] has been incorporated and has obtained 501(c)(13) status, which is the equivalent of the 501(c)(3) status for cemetery associations.

6. That [Snow Cemetery Association] has presented a quitclaim deed to [Hawkins] herein for [her] execution, which will settle the disputed boundary and access issues between the parties.

7. That all required conditions precedent, which were included in the Court's previous order have been met by [Snow Cemetery].

On November 19, the circuit court filed an order with an attached exhibit containing a legal description "of the subject matter of the litigation herein." The court ordered Hawkins to execute a quitclaim deed to Snow Cemetery reflecting "the current legal names transferring the interest shown on Exhibit A attached hereto." The court also ordered Snow Cemetery to provide documentation that would allow Hawkins to claim the property as a donation.

The attached Exhibit A states:

> PROPERTY DESCRIPTION—PROPOSED BOUNDARY:
> A part of the Northwest Quarter of the Northeast Quarter of Section Thirty Five (35), Township Fifteen (15) North, Range Twenty Two (22) West, Newton County, Arkansas, described as commencing at the North Quarter corner of said Section 35; thence S 2°10'52"W, 1,319.96 feet; thence S 87°51'00" E, 698.92 feet; thence N 2°43'69" E, 45.96 feet to a ½" rebar in a fence and the POINT OF BEGINNING; thence along said fence, N 69°53'35" W, 16.00 feet to a fence corner; thence N 2°49'59" E, 207.64 feet to a fence corner; thence S 89°20'33" E, 199.72 feet to a corner; thence S 3°01'48" W, 227.95 feet; thence leaving fence, N 85°29'16" W, 184.29 feet to the POINT OF BEGINNING; said described tract containing 1.01 Acres, more or less.

In August 2016, Snow Cemetery filed a contempt petition alleging that Hawkins had not signed the quitclaim deed as ordered and had begun a "campaign of willful destruction of the cemetery." It alleged that Hawkins had failed to remove the wooden fence, had continued to build the fence, had placed cameras and survey flags, had spread gravel within the cemetery, and had erected a gate.

On May 7, 2019, Snow Cemetery moved for an emergency temporary injunction alleging that Hawkins had recently begun constructing a metal fence near the entrance to her property in violation of the order for her to remove the "board" fence. On May 15, the circuit court ordered Hawkins to "maintain the status-quo and to refrain from any further

construction of a fence until further orders." On June 12, Snow Cemetery moved for contempt against Hawkins, alleging that she had continued to build the fence and block entrance to its property in violation of the court's order.

Snow Cemetery filed a trial brief arguing, among other things, that the court's November 19, 2014 order attached an exhibit containing a legal description of the actual boundary lines of the cemetery and that

> however, paragraph 3 . . . states that the legal description attached . . . is the legal description that should be deeded to [Snow Cemetery]. Attorneys did not sign off on that Order, as they had in orders past. It is unclear how the legal [description] was attached to the Order or who drafted the Order, but it was not drafted by [Snow Cemetery's] attorney.

Snow Cemetery urged the circuit court to consider the November 19, 2014 order an outlier, disregard it, or give it "proper weight." It argued that the description was attached in error because it describes the cemetery's entire property. In its supplemental trial brief, Snow Cemetery argued that Rule 60(b) should be utilized to correct the November 19, 2014 order.

On February 16, 2021, the circuit court granted Snow Cemetery relief under Rule 60(b). The order states:

> 9. The Court finds it was the intent of the parties that [Hawkins] deed to [Snow Cemetery] the land known as the "parking area" and that this was agreed upon in open court and said agreement was incorporated into an Order, and that the legal description attached to the November 14, 2014 Order in question was attached in error and did not accurately reflect the parties' agreement regarding the "parking area." The Court finds that the correct legal description of the "parking area" is reflected in a certain Quit Claim Deed attached to [Snow Cemetery's] Trial Brief as Exhibit "G." The Court has attached said Quit Claim Deed as Exhibit "A" to this Order for purposes of clarifying the legal description that shall be deeded from [Hawkins] to [Snow Cemetery].

10. The record shows that [Hawkins] w[as] ordered to transfer the land known as the "parking area" by Quit Claim Deed with no money exchanging hands except that [Hawkins] would be able to claim a $10,000.00 tax credit/deduction for the same because [Snow Cemetery] was to become a 501(c)(3). [Snow Cemetery] is currently a 501(c)(3) so all conditions have been met for [Hawkins] to execute a Quit Claim Deed to the "parking area" (the legal description in Exhibit "A" to this Order) in favor of [Snow Cemetery].

Hawkins was ordered to sign the quitclaim deed and return it within five days of the order, and the order provided that Snow Cemetery should take the property subject to any existing mortgage. The court ordered that the fence around the cemetery should remain in place and that all the land inside belonged to Snow Cemetery. Hawkins was ordered to remove the fence around the parking area within twenty days of the order and was enjoined from constructing any further fences or barriers around the parking area. Hawkins filed a timely notice of appeal on March 10, and this appeal followed.

II. *Standard of Review*

A circuit court's findings under Rule 60 are reviewed under an abuse-of-discretion standard. *Toney v. Burgess*, 2018 Ark. App. 54, at 3, 541 S.W.3d 469, 471 (citing *Linn v. Miller*, 99 Ark. App. 407, 261 S.W.3d 471 (2007)). Rule 60(a) and (b) of the Arkansas Rules of Civil Procedure provides:

> (a) *Ninety-Day Limitation*. To correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.
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> (b) *Exception; Clerical Errors*. Notwithstanding subdivision (a) of this rule, the court may at any time, with prior notice to all parties, correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

III. *Argument*

Hawkins argues that the circuit court exceeded its authority by completely replacing the legal description in its order "six years later." Hawkins cites *Wilcoxon v. Thomas*, 2015 Ark. App. 311, at 4, 462 S.W.3d 705, 707, which states,

> It is within the discretion of the circuit court to determine whether it has jurisdiction under Rule 60 to set aside a judgment, and the question on appeal becomes whether there has been an abuse of that discretion. *Watson v. Connors*, 372 Ark. 56, 57, 270 S.W.3d 826, 828 (2008). In an appellate court's review of a circuit court's order to determine whether there has been an abuse of discretion, the appellate court will not substitute its own decision for that of the circuit court but will merely review the case to see whether the decision was within the latitude of decisions which a judge or court could make in a case. *Scales v. Vaden*, 2010 Ark. App. 418, 376 S.W.3d 471.

Hawkins contends that the circuit court exceeded its latitude under Rule 60(b) by replacing the property description attached to its November 19, 2014 order with a completely different property description that was proffered by Snow Cemetery. Hawkins argues that the court has no jurisdiction after ninety days to correct anything except a clerical error under Rule 60(b). She contends that a true "clerical error" is essentially one that arises not from an exercise of the court's judicial discretion but from a mistake on the part of its officers. *Francis v. Protective Life Ins. Co.*, 371 Ark. 285, 293, 265 S.W.3d 117, 123 (2007). The error must be readily apparent from the face of the record. *Wilcoxon*, 2015 Ark. App. 311, at 5, 462 S.W.3d at 708. The circuit court may not use Rule 60(b) to go beyond the original decree "by deciding issues that were not previously before it, and which the parties had never agreed upon." *Id.* She argues that the parties have never agreed to the precise boundary or description of the property at issue and that the alleged "error" is not readily apparent from the record.

Hawkins contends that she agreed to donate the land "south of the line that starts at the northwest corner of the cemetery and runs to where the old fence was on the county road" but did not agree to any specific legal description of the property or the precise location of the boundary line. She argues that they were to go back to court if there was a dispute as to the location of the property being donated, citing paragraph 8 in the circuit court's July 5, 2011 order. She claims that in its November 19, 2014 order, the circuit court determined for the first time the precise location of the property to be transferred and its boundary lines by supplying a specific legal description in the attached exhibit. She contends that there is no evidence to suggest that the property description was entered in error. However, she states that the record is "silent about its source" of the legal description and that it is not apparent from the record whether the circuit court's cited property description corresponded to the parcel of land more generally described in the 2011 agreed order.

Hawkins relies on *Scales*, *supra*, wherein this court affirmed the circuit court's denial of a Rule 60 motion as follows:

> We will first address whether the court abused its discretion in denying appellants' motion to modify the consent decree, notice of sale, and commissioner's deed by changing the legal description pursuant to Rule 60(a) or 60(b). Rule 60(a) provides that a trial court may modify or vacate a decree within ninety days of its entry to correct errors or mistakes or to prevent the miscarriage of justice. Ark. R. Civ. P. 60(a) (2009). The court loses jurisdiction under this subsection after ninety days. *Id*. Moreover, a court's power under Rule 60(a) is confined to correction of the record to make it conform to the action that was actually taken at the time and not to action that the court should have taken, but in fact did not take. *Carver v. Carver*, 93 Ark. App. 129, 132, 217 S.W.3d 185, 187 (2005). In this case, the orders in question were entered in 2005 and the final hearing was in 2009, long past ninety days. Further, even if we determined that the circuit court reserved jurisdiction over the issue, the court did not abuse its discretion in denying appellants' motion under Rule 60(a) because modification of the legal description would not have made the record conform to the action that was actually taken. Finally, while clerical errors may be corrected at any time pursuant to Rule 60(b), we hold that the court did not

> abuse its discretion in determining that the correction of a clerical error did not include modifying the legal description in this case.

Scales, 2010 Ark. App. 418, at 6–7, 376 S.W.3d at 475–76.

Hawkins points to this court's reasoning that "modification of the legal description would not have made the record conform to the action that was actually taken." *Id.* at 7, 376 S.W.3d at 475. She argues that here, substituting Snow Cemetery's proposed legal description for the one attached to the 2014 order did not make the record conform to the action that was actually taken. She argues that rather than correcting a clerical mistake, the circuit court decided an issue in 2014 that had been left unresolved—the precise property description—then six years later, the court rewrote the description. *See Wilcoxon*, 2015 Ark. App. 311, at 6, 462 S.W.3d at 708 (citing *Linn*, 99 Ark. App. 407, 261 S.W.3d 471 (distinguishing between "clerical mistakes" and errors that cannot be corrected more than ninety days after entry of an order)). Hawkins argues that the parties had never agreed to the precise boundary or description of the property at issue and that the precise boundary and description of the property is a substantive, not clerical, issue. Accordingly, she contends that it was not within the province of the circuit court to modify its findings on that issue more than ninety days after the entry of the order. *See Pinto v. Sims*, 2011 Ark. App. 609, 386 S.W3d 531.

We disagree with Hawkins's characterization of the circuit court's order. Snow Cemetery calls attention to the general rule that a "trial court's ruling will be affirmed if it is correct for any reason." *MDH Builders, Inc. v. Nabholz Constr. Corp.*, 70 Ark. App. 284, 290, 17 S.W.3d 97, 101 (2000). The circuit court's July 5, 2011 agreed order reflects that the parties agreed the property at issue would be exchanged, and the circuit court

incorporated a description defined by the survey that was filed of record and attached and incorporated in the decree. *Jenkins v. Dale E. & Betty Fogerty Joint Revocable Tr.*, 2011 Ark. App. 720, 386 S.W.3d 704 (holding that a description in a decree is sufficiently definite and certain if it is possible for a surveyor using the description to locate the land and establish the boundaries); *McDonald v. Roberts*, 177 Ark. 781, 783–84, 9 S.W.2d 80, 81 (1928) ("[W]hile the circuit court's order definitely fixes the line in accordance with all the evidence, still it has not actually been established and fixed on the land itself so that the parties themselves may go and locate it and know exactly where the line is. If the parties themselves cannot agree upon the definite and actual location of line from the decree of the court, . . . appellant would be entitled to have the court appoint a surveyor to locate and establish the line on the land with fixed monuments in accordance with the decree of the court.").

The 2011 order includes an attached survey that sets out the boundaries of the property in question. The interlineation that the old fence line was "marked as Exhibit A" effectively told the parties that the old fence line was the legal boundary and that if they got into a subsequent "fence line" dispute, they were not to set a new boundary for themselves. Further, nothing in the November 19, 2014 order establishes that it relates to any boundary-line issue. Hawkins admits that it is impossible to determine whether the property description attached to the 2014 order contemplated the 2011 order's survey map boundaries. Thus, even if the 2011 decree did not provide a valid identification of the property it ordered to be transferred, the 2014 order does not purport to clarify this issue. Under Hawkins's analysis, if the 2011 order was insufficient, then the issue of the "fence line" boundary remained open until the February 2021 order. The circuit court made a

finding that the legal description attached to the November 19, 2014 order was attached in error and did not reflect the parties' agreement regarding the parking area. *See Lord v. Mazzanati*, 339 Ark. 25, 2 S.W.3d 76 (1999) (the trial court is empowered under Rule 60 to enter nunc pro tunc judgments to cause the record to speak the truth).

Scales, *supra*, cites no categorical rule precluding correction of a legal description erroneously attached to an order as a clerical error; rather, it determined that the circuit court did not abuse its discretion in refusing to grant nunc pro tunc relief on the specific facts of that case. *Id.* at 7, 376 S.W.3d at 475–76. Here, the November 19, 2014 order makes no reference to altering the 2011 order but attached an incorrect legal description in reference to the 2011 order. *See S. Farm Bureau Cas. Ins. Co. v. Robinson*, 238 Ark. 159, 379 S.W.2d 8 (1964) (affirming the lower court's nunc pro tunc order wherein the court had originally designated the correct amount of interest and then an amount in a later order that did not conform to the first).

Accordingly, under the particular facts as presented in this case, we hold that the circuit court did not abuse its discretion by granting relief under Rule 60(b).

Affirmed.

BARRETT and MURPHY, JJ., agree.

Taylor & Taylor Law Firm, P.A., by: *Tory H. Lewis*, *Andrew M. Taylor*, and *Tasha C. Taylor*, for appellant.

Jeremy B. Lowrey, for appellees.