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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-22-695

Opinion Delivered May 22, 2024

JOHN COCHRAN APPELLANT/CROSS-APPELLEE V. NINA CROMER, TERRY CROMER, AND TERESA CROMER ZACHARY APPELLEES/CROSS-APPELLANTS	APPEAL FROM THE JOHNSON COUNTY CIRCUIT COURT [NO. 36CV-19-211] HONORABLE DENNIS CHARLES SUTTERFIELD, JUDGE AFFIRMED ON DIRECT APPEAL; REVERSED ON CROSS-APPEAL

KENNETH S. HIXSON, Judge

Appellant/cross-appellee John Cochran (Cochran) appeals after the Johnson County Circuit Court filed a final order and judgment on July 29, 2022, in favor of appellees/cross-appellants Nina Cromer, Terry Cromer, and Teresa Cromer Zachary (collectively, the Cromers). On direct appeal, Cochran contends that (1) the circuit court clearly erred by finding Little Piney Creek changed course by avulsion; (2) the circuit court clearly erred by alternatively finding that the Cromers had adversely possessed the disputed property; and (3) the circuit court clearly erred by awarding more acreage than the Cromers' claimed deed interest or the parties' stipulation. The Cromers filed a cross-appeal and contend that the circuit court clearly erred by failing to award them damages for Cochran's unreasonable

interference with their use of the disputed property. We affirm on direct appeal and reverse on cross-appeal.

I. *Relevant Facts*

This appeal stems from an ownership dispute over real property that includes a hayfield in Johnson County (hereafter referred to as the "disputed property")[1] that the Cromers have harvested since 1940. The Cromers filed their petition for quiet title on September 25, 2019. In their original petition, the Cromers alleged that they were entitled to the disputed property by virtue of a deed executed in 1935 or, alternatively, by adverse possession. The Cromers acknowledged that Cochran was also claiming an interest in the disputed property by a recent conveyance to him by Verlon Ward Smith through a quitclaim deed in 2019.[2] The Cromers therefore requested that title to the property be confirmed, quieted, and vested in them and that Cochran be enjoined from interfering with their use of the property.

Cochran filed a counterclaim petition to quiet title alleging that he obtained title to the disputed property through a separate quitclaim deed that was recorded on June 10, 2019. He requested that the circuit court grant him a declaratory judgment and that the court

[1]We note that the disputed property is also sometimes referenced by the parties in the record and briefs as "the hayfield," the "Cromer hayfield," the "disputed hayfield," the "25 acres," or the "29.76 acres."

[2]Vernon Smith simultaneously executed a warranty deed on property located directly north of the disputed property. The ownership of the property described in the warranty deed is not at issue herein.

confirm and vest title of the disputed property in him. Cochran denied that the Cromers had adversely possessed the property or that he or any of his predecessors had acquiesced to its ownership by any other person. Cochran further alleged that the Cromers had harvested hay off his land and requested an injunction to prohibit the Cromers from doing so in the future in addition to awarding him damages, costs, and attorney's fees. The Cromers filed their answer to the counterclaim, generally denying that Cochran was entitled to his requested relief.

The Cromers alleged that while litigation was pending, Cochran had allowed them to fertilize and prepare the hayfield for harvest but then prevented them from harvesting the hay by putting up a gate and placing a vehicle in the way to block their access to the field. This prompted the Cromers to file an emergency petition for injunction on May 19, 2020. The Cromers alleged that they had cattle they would not be able to feed without being able to harvest the hay they had prepared.

In response, Cochran asked that the petition be denied. Although he did not dispute that he blocked access to the hayfield, he explained that he was the rightful owner of the disputed property and had the legal right to block access to the private road that he owned that led to the hayfield. Cochran further explained that the private road was not the subject of the pending litigation and alleged that there were no existing easements that required him to allow anyone to use the private road.

The Cromers thereafter filed an amended petition and a second amended petition for quiet title. In their second amended petition, the Cromers alleged that they own a

hayfield of "29.76 acres, more or less" in Johnson County, Arkansas, by virtue of a 1935 warranty deed from Fain and Ben Gray to Gladys and M.D. Cromer. They acknowledged that the property description they listed in their second amended complaint differed from the property description that was included in the 1935 deed but nevertheless explained that they had been in possession of, and had paid taxes on, the property described in their complaint since 1935. Alternatively, the Cromers alleged ownership of the disputed property by adverse possession or boundary by acquiescence. The Cromers alleged that they had exclusive possession of the property since 1935 and used it to grow corn, to grow and cut hay, to hunt, and for other recreational purposes. The Cromers also alleged that Cochran denied them use of a county road that provided access to the disputed property to harvest their hay. They sought injunctive relief and damages in the amount of $16,993.80 resulting from the interference as well as attorneys' fees and costs. They alleged that they should be allowed access to the road or provided access to their property "by any other means." Cochran filed an answer denying the allegations.

A bench trial was held on May 19–20, 2022. At the beginning of trial, counsel for the Cromers stated that the parties had stipulated that the Cromers' "ancestors have been cutting and hauling hay off a 25-acre area . . . since at least 1940." Cochran's counsel agreed with the stipulation and clarified that the 25-acre area was "loosely" described or was "estimated" as being 25 acres. Counsel explained that the "25-acre tract" was the property at issue in this case. The parties additionally admitted into evidence the deposition testimony of William Lloyd Reynolds without objection.

Judge Herman Houston, the county judge for Johnson County, testified that he was familiar with County Road 2688, which he also called Lutherville Road. He explained that several people lived along that road, including the Cromers. He discussed that the county would regularly grade the road down to Verlon Smith's house. He went on to explain that the county would grade the remainder down to Slover Creek every two or three years. He stated that he considered this portion a secondary county road and stated that the reason the county would grade that portion was to avoid the hayfield or an old house from being "landlocked." Although Judge Houston stated that he considered the entire portion a county road, he later admitted that the graded portion to Slover Creek was described on the map as an unimproved road and was not designated as a county road. Judge Houston further testified that he remembered cutting hay on the disputed property for the Cromers in 1968 and 1969. He explained that he remembered having to access the hayfield by crossing Slover Creek at the end of County Road 2688.

Verlon W. Smith was the predecessor in interest to Cochran. Smith testified that he sold some land to John Cochran. When asked whether he gave Cochran a quitclaim deed for 31 acres and a warranty deed for another 154 acres, Smith explained that he thought he sold Cochran 175 acres but did not know whether a quitclaim deed was provided. Smith stated that he did not believe he sold the disputed hayfield because he did not realize it was his. Upon further questioning about whether he thought the hayfield did not belong to him, Smith responded, "That's just what some people said. I never did really think a whole

lot about it." He admitted that he had told other people they could not go down to the hayfield because that property "belonged to the Cromers."

Mary Pruitt, who was seventy-five years old, testified that she lives on Highway 315, which is across the road from the Cromers' residence. She explained that she is related to the Cromers. She remembered going to the "Cromer hayfield" as a child with her grandfather, Mood Cromer, Sr., to check the hay. Pruitt further testified that Verlon Smith had at one time confronted her father and told him that he was not allowed on the disputed property.

Leanne Yates testified that she was familiar with the "Cromer hayfield." She explained that she had hauled hay off the disputed property many times and that one would have to go past Verlon Smith's home to access the disputed property. Yates explained that she would go over to the disputed property on four wheelers or tractors. She recalled that when she did so, Verlon Smith would often holler at her, "Do you have permission to be over there? This is the Cromer land."

Ernie Holman testified that he was familiar with the disputed property from riding his bike there as a kid. He also recalled that he had been hired by Terry Cromer to fix the Slover Creek crossing at the end of County Road 2688. When he was fixing the crossing, Verlon Smith saw him and offered to allow him to park his equipment in his yard. Smith did not object to his fixing the creek crossing.

Charles Yates testified he had lived in Johnson County for seventeen years and was familiar with "Cromer hayfield." He explained that he has helped Terry Cromer cut and

rake hay. He further explained that he has hunted on the disputed property. He recalled a time when Verlon Smith confronted him and accused him of trespassing on "Cromer land."

Joel Garza, the Cromers' expert witness, testified that he is a licensed surveyor. Garza testified that the Cromers hired him to review the disputed property and that he looked at various deeds and maps to create a survey and report that were admitted into evidence. The legal description of the disputed property that was included on the survey showed that the property contained "4.20 acres in the SE ¼ of the SE ¼ and 25.56 acres in the SW ¼ of the SE ¼ for an aggregate of 29.76 acres, more or less," as the Cromers had alleged in their second amended complaint. In creating his survey that was admitted as plaintiffs' exhibit 4, Garza stated that he first considered the 1935 warranty deed of Ben Gray and Fain Gray to M.D. Cromer and Gladys Cromer (the 1935 Cromer Deed). He explained that the 1935 Cromer Deed was ambiguous and difficult to read without more information. In its legal description of the property, the deed referenced Little Piney Creek as the eastern boundary and a tree with "12 hacks." After considering a 1908 deed from a neighboring property that conveyed that property to L.R. Voss (the 1908 Voss Deed), Garza concluded that Little Piney Creek must have moved to its current location. He explained that for the deeds to make sense, Little Piney Creek must have been located east of the disputed property in 1908. As such, Garza admitted that the legal description he included on the survey did not match the legal description of what is in the 1935 Cromer Deed. He further testified that his conclusion that Little Piney Creek must have moved from its previous location in the 1908 Voss Deed and the 1935 Cromer Deed was consistent with the other evidence he found and

the other deeds he considered. When examining the eastern side of the disputed property, Garza found a slough where Little Piney Creek used to be located in addition to remnants of a bridge and culverts. He was also able to locate a tree with "12 hacks" on the disputed property.

Garza testified that he conducted research to determine why Little Piney Creek had moved. He found an article that was introduced into evidence that suggested there was significant flooding in the area in 1927. He also considered the deposition testimony of Lloyd Reynolds, who testified that there was a flood event in 1937 or 1938 that moved the creek. Garza later clarified that he did not testify that Little Piney Creek had moved in 1927 but only that he had found evidence of a flood event that year. Instead, he reiterated that Reynolds testified that the creek had moved in 1937 or 1938.

Garza explained that he is familiar with the terms accretion and avulsion. He opined that Little Piney Creek moved by an avulsion, which is when the creek moved suddenly overnight. He further explained that the property lines do not move after an avulsion. Finally, Garza testified that he had examined the 1908 warranty deed (1908 Smith Deed) conveying 129 acres to Allen Smith and the subsequent 1996 warranty deed (1996 Smith Deed) conveying the same 129 acres to Verlon Smith. Garza explained that both deeds contained the same legal description with the exception that the 1996 Smith Deed took out the reference to two trees. He opined that neither warranty deed encompassed the disputed property in the conveyance because the deeds were describing property that was to the east

of Little Piney Creek, as the creek existed in 1908. He further opined that the location of the creek did not move to its current location until 1937.

Nina Cromer testified that she lives approximately a mile from the disputed property and has lived there for sixty-six years. She explained that M.D. Cromer and Gladys Cromer were her deceased husband's mother and father. She further explained that there was never a probate case opened for M.D. Cromer, Gladys Cromer, or her deceased husband. As such, she brought this quiet-title action on behalf of herself and her two children as owners of the disputed property. She had executed a beneficiary deed in favor of her children. Tax records dating back to 2007 and property cards were admitted into evidence. Nina explained that she had records for taxes she paid on 25 acres for the disputed property until 2019. She explained that after Verlon Smith quitclaimed the property to Cochran, her tax obligations changed substantially. In 2019 and 2020, she was taxed for only 4 acres. Finally, Nina testified that after Cochran had purchased property from Smith, Cochran blocked their access to the disputed property. As such, she explained that her son had to purchase hay to feed his cattle since they could not harvest the hay on the disputed property.

Amanda Cromer testified that the Cromers had possessed the disputed property for years and that no one else claimed ownership to the property before 2019. She testified that she took several pictures of a gate that Cochran had put up to block access to the disputed property. Those pictures were admitted into evidence.

Terry Cromer, Nina Cromer's son, testified that he is familiar with the disputed property. He explained that he had been working in the hayfield for at least thirty years. He

uses the hay to feed his cattle. Terry explained that since Cochran blocked his access to the disputed property in 2019, he has purchased hay, fuel, weedkiller, and fertilizer. His list of those expenses was admitted into evidence as plaintiffs' exhibit 28.

Armil O. Curran testified that he owns and operates Curran's Abstract and Title, Inc. Curran testified that because he was aware of the controversy over the "disputed land," his company issued the two deeds in 2019 conveying property from Verlon Smith to Cochran. He explained that the first was a warranty deed for the northern 154.29 acres, and the second was a quitclaim deed for the southern 31.35 acres. He explained that the disputed property is encompassed in the quitclaim deed and that the reason a quitclaim deed was prepared for that property was because there was a concern that the Cromers had an adverse-possession claim. He noted that both the Cromers and Verlon Smith had been paying taxes on property within the same 40-acre tract.

John Cochran agreed that he received two deeds from Verlon Smith in 2019—a warranty deed for 154.29 acres and a quitclaim deed for 31.35 acres. He admitted that he had blocked access to the disputed property in the winter of 2019 because he believed he owned the property and that the county road stopped prior to his property. Cochran stated that Smith never told him that the Cromers had owned the disputed property. Cochran confirmed that he stipulated that the Cromers had been cutting hay on the disputed property since 1940 and that the disputed property is encompassed in the 31.35 acres for which he had a quitclaim deed. He admitted that he had leased the property encompassed in the warranty deed for two years before he purchased it, and he also admitted that his lease did

not include the 31.35 acres. Cochran further testified regarding what had been described as "old Piney Creek." He described it as a slough with three beaver dams and no flowing water except during floods.

Allen Miller, Cochran's expert witness, testified that he is a licensed surveyor employed with Cornerstone Land Surveying. He explained that he was hired to perform a survey when Cochran purchased the property from Verlon Smith. His survey was admitted into evidence. Miller explained that this case involves two riparian boundaries—Little Piney Creek and Slover Creek. He discussed the differences between accretion and avulsion, and in opposition to the Cromers' expert witness, Miller opined that Little Piney Creek in this case moved by accretion. Miller explained that he had seen "[d]ozens and dozens" of cases involving accretion but had never had a case involving avulsion. Because he believed Little Piney Creek moved by accretion, Miller stated that the boundary of the property is at the center of the creek regardless of its current location. He later admitted that he never read Lloyd Reynolds's deposition testimony but still opined that the creek moved in excess of 31 acres by accretion.

Miller also testified that he searched for the tree described in the 1935 Cromer Deed with twelve hack marks but could not find it. He explained that he had never seen a hack like what was claimed to be a hack in the photo at plaintiff's exhibit 10. Miller stated that he did not think Garza's opinion of the tree's location was accurate because he thought it was eight hundred feet too far north than it should have been.

Cochran was recalled to clarify that he purchased the 154.29 acres by warranty deed with a bank loan. He purchased the disputed 31.35 acres in cash because the bank would not lend the money without title insurance, which required a warranty deed.

Garza, Cromers' expert witness, was recalled as a rebuttal witness over Cochran's objection. Garza explained that in his experience, different trees react differently to hack marks over time. In this case, he believed the tree he found on the disputed property had hack marks.

At the conclusion of trial, the circuit court asked the parties to submit detailed posttrial briefs in lieu of closing arguments. It requested that the parties include a discussion regarding any findings of fact, conclusions of law, burdens of proof, elements for any cause of action, comments on witness credibility, and requested relief.

In their posttrial brief, the Cromers argued that they were entitled to ownership of the disputed property, which they referenced as "25 acres" throughout their brief. They explained that they had been cutting hay on the disputed property since 1940. They claimed that they owned the property through the deed that was recorded in 1935, which "describes the eastern boundary of the property lying to the 'west bank of Little Piney Creek and further describes a gum tree about 14 inches in diameter standing on the west bank of Little Piney Creek with the tree being marked with 12 hacks, 3 on each side thence down the west side of said creek with a meanderings thereof to the place of beginnings containing 25 acres more or less.'" The Cromers explained that, although the creek was no longer in the same place, the movement of the creek did not change the previous eastern boundary of their property

because the creek's movement was the result of an avulsion. Alternatively, the Cromers argued that they were entitled to the disputed property through boundary by acquiescence or by adverse possession. Moreover, the Cromers argued that they should be entitled to access to their property by County Road 2688. They argued that even if the road is not a county road, they had acquired "an easement by necessity, an easement by implication, and a prescriptive easement across [Cochran's] property." The Cromers finally argued that because Cochran had blocked their access to harvest the hay on their property, they were entitled to damages in the amount of $16,993.80 for the hay they purchased and fuel they expended.

In Cochran's posttrial brief, he argued that the Cromers failed to meet their burden of proof. He argued that the Cromers did not adversely possess the property because they failed to prove that their possession of the property extended beyond hay season. Cochran further argued that the Cromers' claim for title by acquiescence failed because there was no distinguishable boundary line nor proof of an implied agreement. Moreover, he claimed that the Cromers' claim that the property was deeded to them failed because his expert, which he claimed was more credible, testified that Little Piney Creek was in its current location due to accretion. Although Cochran did not specifically address the Cromers' arguments regarding access to the county road, Cochran asked that the Cromers' "case be dismissed with prejudice" and that the circuit court find in his favor.

The circuit court filed a notice of decision and directives to attorneys on July 16, 2022. In it, the circuit court explained that it was finding in the Cromers' favor regarding

the adverse-possession claim, the issue of avulsion, and the issue of whether the Cromers had an easement over Cochran's property in order to access the disputed property. However, the circuit court further explained that it was denying the Cromers' claim for damages:

> In doing so, the court finds that the [Cromers] have failed to provide evidence to establish the proper measurement of damages in this case. The court finds that the proper measurement of damages is the reasonable rental value of the land in question down to the time of assessment and that the evidence presented is insufficient to ascertain the amount of damages in this case. However, since the [Cromers] have prevailed, the court shall award them the court costs associated with this case.

The circuit court further directed the Cromers' attorney to prepare a final judgment in conformity with the court's decision.

A final order and judgment was filed on July 29, 2022. The circuit court specifically found that the Cromers were owners of the disputed property as described in their second amended complaint, which contained "4.20 acres in the SE ¼ of the SE ¼ and 25.56 acres in the SW ¼ of the SE ¼ for an aggregate of 29.76 acres, more or less." The circuit court further made the following relevant findings:

> 4. As the basis for this finding, the Court finds that [the Cromers'] exhibit number 4 is a deed from Gray to Cromer ([the Cromers'] ancestor) recorded January 1935 describing 25 acres more or less. Exhibit number 4 describes the eastern boundary of the property lying to the "west bank of Little Piney Creek" and further describes a gum tree about 14 inches in diameter standing on the west bank of Little Piney Creek with the tree being marked with 12 hacks, 3 on each side thence down the west side of said creek with meanderings thereof to the place of beginnings containing 25 acres "more or less." As demonstrated by [the Cromers'] Exhibit number 6 and testified to by David Garza, the southeast quarter of the southeast quarter contains 4.20 acres and the southwest quarter of the southeast quarter contains 25.56 acres.
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> Various exhibits introduced by [the Cromers] show pictures of a culvert and iron bridge columns indicating the placement of a bridge that passed over Little Piney

Creek where it was in 1935. In addition, [the Cromers'] Exhibit 10 and 11 show the tree with the hack marks. [The Cromers'] real property is predicated on a property description based on the previous location of Little Piney Creek. Surveyors for both [Cochran] and [the Cromers] along with [Cochran] concede that Little Piney Creek, was at one time, along the east boundary of the disputed area but has moved west in excess of 25 acres. The difference between the testimony of [Cochran] and [the Cromers] is an interpretation of how the Little Piney Creek moved.

Both experts testified that the concepts of accretion and avulsion involve the movement of a water way.

. . . .

Both expert witnesses in this case testified that at one time, the disputed property was on the west bank of the little piney shown by the deed calls. The difference is the [Cromers'] expert witness surmised that the movement of Little Piney Creek was caused by avulsion and the expert for [Cochran] testified that the change was caused by accretion, although [Cochran] did not produce any evidence to support that theory.

[Cochran's] expert, Allen Miller, testified that he had never seen any case of avulsion, and surmised that the movement of the creek was by accretion. He testified to that fact even in the face of testimony by an individual that actually witnessed a sudden event moving the creek, and an article that was introduced into evidence showing a large and sudden rain fall in the area. He further testified that the slow movement of the creek was actually a movement of over 35 acres east to west thereby changing the boundary line of the property over the years. [Cochran] stipulated that for the past 82 years the Cromers have cut hay from the disputed property. The slow movement of Little Piney Creek through the hay field would have been noted by the Cromers as they used the same piece of property to cut hay for 82 years. There was no witness produced by [the Cromers] that testified to the creek slowly moving because of accretion. In contrast, David Garza, expert for the [Cromers] testified that after viewing both the article introduced as [Cromers'] exhibit number 7 depicting rainfall in the Johnson County area to be between 16 and 20 inches at once in 1927, and the oral deposition of William Lloyd Reynolds introduced by [the Cromers] as [the Cromers'] Exhibit 1, that it is his belief that Little Piney Creek shifted by avulsion. In particular, Mr. Reynolds testified that prior to the Cromers cutting hay, the Cromers and his family raised corn in that area and further testified about the bridge that went over Little Piney Creek. Mr. Reynolds described an event when he was 10 or 11 years old that "caused the river to come down and cut the filed right half in two, maybe not half in two but it cut it in two." This is consistent with Mr. Garza's

> testimony that the Little Piney River moved south and then turned east, and at the bend in the river, because of the flood, the creek moved south. When asked if Mr. Reynolds remembered if after the flood the creek bed actually moved, he stated "Yea. Yea." Mr. Reynolds further testified on page 9 of Plaintiffs' exhibit number 1 that after the creek bed moved, the Cromers began cutting hay off the property. This eyewitness testimony was the only testimony presented indicating that the sudden event happened moving Little Piney Creek from east to west and the old creek bed of Little Piney Creek to the east of the disputed area would remain the property line, and would also be consistent with the 1935 deed giving ownership of the property to the Cromers, leaving it vested in their name. The Court finds [the Cromers'] expert witness, David Garza, more credible and finds Little Piney Creek moved by avulsion, leaving the boundaries the same as found in the 1935 deed. [The Cromers'] Exhibit 6 accurately describes what was listed as 25 acres more or less. David Garza furthermore platted the Smith property using a deed from 1908 and 1996, with Little Piney Creek in place before it moved, showing Smith did not own the 33 acres for which he gave [Cochran] a Quit Claim Deed.
>
> Other evidence introduced regarding property records and tax receipts show that Nina Cromer has paid taxes on the property.
>
> The Court adopts [the Cromers'] legal arguments regarding accretion vs. avulsion.

Additionally, the circuit court found that the Cromers alternatively proved the common-law elements of adverse possession as a basis for ownership of the disputed property to be vested in the Cromers. The circuit court further found that there was sufficient evidence "to establish an easement over County Road 2688 by implication, or in the alternative by necessity and prescription in order to access the real property which has now been vested with the Cromers." The circuit court denied the Cromers' claims for damages but awarded the Cromers $600.10 in court costs associated with the case. This appeal and cross-appeal followed.

II. *Standard of Review*

In adverse-possession and quiet-title actions, we conduct a de novo review on the record. *O'Neal v. Love*, 2020 Ark. App. 40, 593 S.W.3d 39. We will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Morrison v. Carruth*, 2015 Ark. App. 224, at 2, 459 S.W.3d 317, 319. In reviewing a circuit court's findings of fact, this court gives due deference to the circuit court's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Love v. O'Neal*, 2018 Ark. App. 543, 564 S.W.3d 546. We do not, however, defer to the circuit court on questions of law. *Peavler v. Bryant*, 2015 Ark. App. 230, 460 S.W.3d 298.

III. *Direct Appeal*

On direct appeal, Cochran contends that (1) the circuit court clearly erred by finding Little Piney Creek changed course by avulsion; (2) the circuit court clearly erred by alternatively finding the Cromers adversely possessed the disputed property; and (3) the circuit court clearly erred by awarding more acreage than the Cromers' claimed deed interest or the parties' stipulation. We address these arguments separately.

A. Whether the Circuit Court Clearly Erred in Finding Little Piney Creek Changed Course by Avulsion

An "avulsion" occurs when a body of water suddenly shifts its course, as opposed to an "accretion," which occurs when a body of water gradually changes its course. Riparian landowners are not affected by an avulsion, and the boundaries of their land do not change; however, with an accretion, the boundaries of the riparian landowners change with the course of the stream. *Bobo v. Jones*, 364 Ark. 564, 222 S.W.3d 197 (2006). The supreme

court has recognized that there is a strong presumption in favor of the permanency of land boundary lines. *Pannell v. Earls*, 252 Ark. 385, 483 S.W.2d 440 (1972). Furthermore, when land lines are altered by the movement of a stream, the weight of authority, both state and federal, appears to recognize a strong presumption, founded on long experience and observation, that the movement occurs by gradual erosion and accretion rather than avulsion. *Id.* However, this presumption operates only in the absence of countervailing evidence. *Ark. Land & Cattle Co. v. Anderson-Tully Co.*, 248 Ark. 495, 452 S.W.2d 632 (1970). It also depends on other factors, such as the relationship between the intervening time lapse and the distance of movement, and the comparative general correspondence of locations and directions of the river. *Id.* The question of whether accretion or avulsion has occurred is generally one of fact. *Pannell*, *supra*; *White v. J.H. Hamlen & Son Co.*, 67 Ark. App. 390, 1 S.W.3d 464 (1999).

The circuit court in this case found that the Cromers were entitled to the disputed property on the basis that they inherited the property through the 1935 Cromer Deed. Although the legal description in that deed described the property's eastern border as being Little Piney Creek, the circuit court found that the boundary of the Cromers' property was not affected because Little Piney Creek had moved by avulsion. Cochran disagrees with the circuit court's finding that Little Piney Creek moved by avulsion. He specifically argues that the circuit court failed to mention or apply the presumption that the creek moved by accretion. Further, Cochran claims that the Cromers failed to rebut this presumption because there was "[n]o witness testimony or documentary evidence was produced that

perceived a change in the Piney *while it was happening*." (Emphasis in original.) Moreover, he argues that the evidence that was produced was inconsistent and speculative and therefore could not overcome the presumption of accretion.

Although the Cromers argue that Cochran has waived his arguments on appeal because he failed to first raise them below, we have held that in a bench trial, a party who does not challenge the sufficiency of the evidence at trial does not waive the right to do so on appeal. *Bohannon v. Robinson*, 2014 Ark. 458, 447 S.W.3d 585. That said, while Cochran's arguments are preserved, they nevertheless lack merit.

Here, the circuit court heard evidence from two experts. Both experts acknowledged that Little Piney Creek had moved from its previous location in 1935. Miller, Cochran's expert, opined that the creek moved by accretion. He explained that he had never seen a case in which a creek moved by avulsion. Garza, the Cromers' expert, on the other hand concluded that the creek moved by avulsion after researching and examining multiple deeds, the property, deposition testimony, and articles. In addition to expert opinion, the circuit court heard evidence that Little Piney Creek had moved over twenty-five acres from its position in 1935. There was a lack of evidence that the creek slowly moved twenty-five acres over a period of time. Rather, the evidence presented was just the opposite. Remnants of the location of the old creek were found and pictures were introduced at trial. Further, there were multiple witnesses that testified that the Cromers and their ancestors had used the disputed property to grow and cut hay in addition to other recreational activities since at least 1940, and none of them testified that the creek had slowly moved across the disputed

property. In fact, Lloyd Reynolds testified at his deposition that he personally observed the creek move after a flood event in 1937 or 1938. With all this evidence, Garza testified that he determined that neither the 1908 Smith Deed nor the 1996 Smith Deed included the disputed property. Moreover, Verlon Smith, Cochran's predecessor in title, testified at trial that he did not think he owned the disputed property that he purportedly quitclaimed to Cochran.

Although Cochran argues that the circuit court should have believed his expert's opinion, Miller, as more credible than Garza, this court gives due deference to the circuit court's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Love*, *supra*. Given the evidence presented in this case, we agree that any presumption of accretion was not controlling and was overcome. As such, we cannot say that the circuit court's finding that the creek moved by avulsion was clearly erroneous and must affirm. Because we hold that the circuit court did not clearly err in quieting title on the basis that Little Piney Creek moved by avulsion rather than accretion, it is unnecessary for us to address the circuit court's alternative basis that the Cromers adversely possessed the disputed property.

B. Whether the Circuit Court Clearly Erred by Awarding More Acreage than the Cromers' Claimed Deed Interest or the Parties' Stipulation

Cochran's final argument on direct appeal is that the circuit court clearly erred in quieting title in the Cromers for "29.75 acres more or less" when the 1935 Cromer Deed

stated "25 acres, more or less," and the Cromers stipulated that they were entitled to only 25 acres. Again, we disagree.

Throughout the record, the parties referred to the disputed property by different names to refer to the same property, including "the hayfield," the "Cromer hayfield," the "disputed hayfield," the "25 acres," or the "29.76 acres." Contrary to Cochran's assertion, it is not clear that the Cromers had stipulated they were entitled to only 25 acres. At the beginning of trial, counsel for the Cromers stated that the parties had stipulated that the Cromers' "ancestors have been cutting and hauling hay off a 25-acre area . . . since at least 1940." Cochran's counsel clarified that the "25-acre area" was "loosely" described or was "estimated" as being 25 acres and explained that the "25-acre tract" was the property at issue in this case. The Cromers alleged in their second amended complaint that they were entitled to "4.20 acres in the SE ¼ of the SE ¼ and 25.56 acres in the SW ¼ of the SE ¼ for an aggregate of 29.76 acres, more or less." Further, Garza's survey contained the same ultimate description. Garza explained that the legal description could not match the description contained in the 1935 Cromer Deed because Little Piney Creek had moved from its original location. Interestingly, Miller's survey described the disputed property as containing 31.35 acres more or less. Given these facts and evidence, we cannot say that the circuit court's finding was clearly erroneous and affirm.

IV. *Cross-Appeal*

The Cromers filed a cross-appeal and contend that the circuit court clearly erred by failing to award them damages for Cochran's unreasonable interference with their use of the

disputed property. The Cromers specifically complain that the circuit court erred in "apparently believing that it could *only* award damages based on the reasonable rental value of the hayfield." (Emphasis in original.) They argue that they introduced evidence of damages without objection showing that they incurred expenses totaling $16,993.80 after they lost access to the disputed property due to Cochran's blocking access. Because we agree as explained below that the circuit court's rationale for denying the Cromers' claim for damages was flawed, we reverse.

An easement owner or landowner is entitled to compensation for loss of use of the property, and any specific losses are determined on a case-by-case basis. *Campbell v. Carter*, 93 Ark. App. 341, 219 S.W.3d 665 (2005); *First Elec. Coop. Corp. v. Charette*, 306 Ark. 105, 810 S.W.2d 500 (1991); 1 Howard W. Brill & Christian H. Brill, *Arkansas Law of Damages* § 30:1 (6th ed. 2014).

In *Campbell*, *supra*, Campbell claimed he owned an easement traversing an adjoining lot for the purpose of constructing and maintaining a septic system. Carter, the subsequent owner of the adjoining lot, refused to allow Campbell access to the easement and, in fact, constructed a residence that interfered with access to the septic system. Campbell sued Carter alleging interference with his septic easement. Campbell introduced evidence that it would cost him $19,722 to install and maintain a new septic in a location other than through the septic easement. The circuit court found that Campbell owned the septic easement and that Carter unreasonably interfered with Campbell's use of the septic easement. The circuit court awarded Campbell $19,722 in damages.

In *First Electric Coop.*, *supra*, Suzanne and Mark Charette brought suit against First Electric Coop. (First Electric) after First Electric made a mistake about the location of its easement and cut down twenty-one trees on the Charettes' property. The Charettes argued that they were entitled to the replacement value of the trees rather than simply the difference in land value. The jury was instructed that it should determine the amount of money that would compensate the Charettes for the reasonable expense of necessary repairs to the damaged property, and the jury awarded recovery in the amount of $8,300. We affirmed. On appeal, First Electric argued that the replacement measure of damages was improper. We disagreed and explained that it is proper for a circuit court to consider the intended use of property when determining the appropriate measure of damages. We acknowledged that we could envision factual situations in which recovery of the replacement cost of trees would yield a result grossly disproportionate to the fair market value of the land and would, therefore, be an inappropriate measure of damages but that this was not such a case.

We find *Campbell*, *First Electric Coop.*, and Brill & Brill, *Arkansas Law of Damages* convincing in this matter. The circuit court in this case found that the Cromers were entitled to the ownership of the disputed property because they inherited the property through the 1935 Cromer Deed, which we affirm on direct appeal. The court also found that the Cromers' access to the disputed land was obtained by use of "County Road 2688 which turned south after a fork in the road that ends at Slover Creek" where the Cromers have cut hay for eighty-two years. The circuit court found that there was sufficient evidence "to establish an easement over County Road 2688 by implication, or in the alternative by

necessity and prescription in order to access the [disputed] property which has now been vested with the Cromers." In response to the cross-appeal, Cochran does not specifically contest this establishment of the easement.

Despite finding an easement existed, the circuit court denied the Cromers' claim for damages for interference with their easement to access the disputed property, and the circuit court provided the following reasoning:

> In doing so, the court finds that the [Cromers] have failed to provide evidence to establish the proper measurement of damages in this case. *The court finds that the proper measurement of damages is the reasonable rental value of the land in question down to the time of assessment* and that the evidence presented is insufficient to ascertain the amount of damages in this case. However, since the [Cromers] have prevailed, the court shall award them the court costs associated with this case.

(Emphasis added.)

At trial, Terry Cromer testified that Cochran allowed them to seed and fertilize the hay field in 2019, but before harvest, Cochran blocked their access to the hayfield by parking a vehicle across the road and putting up a gate. The Cromers stated they would not be able to feed their cattle without being able to harvest the hay they had prepared.

Cochran did not dispute that he blocked the Cromers' access to the hayfield. Cochran explained that he was the rightful owner of the disputed property and had the legal right to block access to the private road that he owned that led to the hayfield.

Regarding the Cromers' damages, the following colloquy transpired at trial:

> [CROMERS' COUNSEL]: All right. And, then since that time [the blocking of the easement to the disputed property], each year since the quitclaim deed was given to Mr. Cochran for that area, have you had to purchase hay?

[TERRY CROMER]: Yes, sir.

[CROMERS' COUNSEL]: Okay. And did you compile a list of monies that has been spent since having to replace the hay?

[TERRY CROMER]: Yes, sir.

[CROMERS' COUNSEL]: Okay. I will show you a document, and I want you to review that. What does that document show?

[TERRY CROMER]: It shows purchase of hay from 2019 to 2021, and some fuel and weedkiller and fertilizer.

. . . .

[CROMERS' COUNSEL]: So this is -- this is expenses that you had to incur because you no longer had access to the [disputed property]; is that correct?

[TERRY CROMER]: Yes, sir.

[CROMERS' COUNSEL]: Okay. And actually, you were the one that paid this money, is that right?

[TERRY CROMER]: Yes, sir.

. . . .

[CROMERS' COUNSEL]: I'm going to ask that it be introduced as Plaintiffs' Exhibit 28.

[THE COURT]: Any objection?

[COCHRAN'S COUNSEL]: No, Your Honor.

[THE COURT]: So admitted.

. . . .

[CROMERS' COUNSEL]: Are you asking for reimbursement?

[TERRY CROMER]: Yes, sir.

Terry Cromer testified that since Cochran blocked his access to the disputed property in 2019, he had to purchase hay, fuel, weedkiller, and fertilizer totaling $16,993.80 as set forth in exhibit 28.

After Cochran allowed the evidence to be introduced without objection, Cochran's counsel cross-examined Terry Cromer on the damages set forth in plaintiffs' exhibit 28:

[COCHRAN'S COUNSEL]: . . . Now, regarding the Number 28, which is I believe you're – do you have any invoices or receipts, sir, that would go with this?

[TERRY CROMER]: My lawyer does.

[COCHRAN'S COUNSEL]: Did you provide those to your attorney?

[TERRY CROMER]: Yes.

This concluded Cochran's cross-examination regarding the evidence of damages contained in the Cromers' exhibit 28.

We agree with the Cromers that the circuit court was not limited to considering the reasonable rental value of the land in determining whether damages could be awarded. Here, it is clear that the court erred in holding that the Cromers were limited to damages for the reasonable rental value of the land in question. Rather, the circuit court was to consider damages for any specific losses caused by the loss of use of their property as set forth in *Campbell*, *First Electric Coop.*, and Brill & Brill, *Arkansas Law of Damages* above.

In light of the record before us, we reverse the judgment of the circuit court wherein it denied the Cromers' claim for damages and order the circuit court to award the Cromers a judgment for damages in the amount of $16,993.80.

V. *Conclusion*

In conclusion, we affirm on direct appeal and reverse on cross-appeal.

Affirmed on direct appeal; reversed on cross-appeal.

VIRDEN and GLADWIN, JJ., agree.

Tim Cullen, for appellant.

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