Circuit Court for Montgomery County
Case No. 447344V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2401

September Term, 2019

NANCY WERNER, ET AL.

v.

PARAMOUNT CONSTRUCTION, INC.

Fader, C.J.,
Berger,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: August 13, 2021

This case involves a dispute about the location of a nineteenth century burial plot, which was excluded from a series of conveyances in the 1920s.

The descendants of the persons buried in the plot contend that the plot is located on what is now a suburban lot in Chevy Chase. In response, the record owner of the lot filed suit to quiet title.

The Circuit Court for Montgomery County determined that the descendants did not have title to any part of the lot and that there is no evidence of a burial ground on the lot. The descendants appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Disputed Property

In 1839, Isaac Shoemaker acquired a 140-acre farm that straddled the border between the District of Columbia and Montgomery County, Maryland. The farm remained under the ownership of the Shoemaker family for several generations.

In 1924, Albert Shoemaker, Isaac's grandson, sold 60 acres of the land, located in what is now the Brookdale community of Friendship Heights in Chevy Chase, to Francis Bennett Poe. The 1924 deed excluded "a small burial plot located on the Perry Boundary line near the River Road; consisting [of] 1/7 of an acre." The deed gave no additional information about the location of the burial plot. For example, the deed did not contain a drawing that shows where, on the 60-acre property, the 1/7-acre burial plot was located. Nor did the deed contain a metes and bounds description of the burial plot's location.

In 1925, Francis Bennett Poe conveyed the 60-acre parcel to Walter Tuckerman via a deed containing the same exclusion for the burial plot. Later that same year,

Tuckerman conveyed the land to Donald Woodward and Irene Woodward Parker ("the Woodwards") via a deed containing the same exclusion.

Thirteen years later, in 1938, the Woodwards began to develop the property as part of what would become the Brookdale subdivision. As part of the subdivision process, the Woodwards created Block 4, which contained five lots and a 1/6-acre "Reservation." The plat stated that the Reservation was "[n]ot included as part of the subdivision." The Reservation is a few hundred feet east of River Road.

The Woodwards recorded the subdivision as Plat No. 949. A portion of Plat No. 949, with the Reservation highlighted, is shown below (Figure 1).

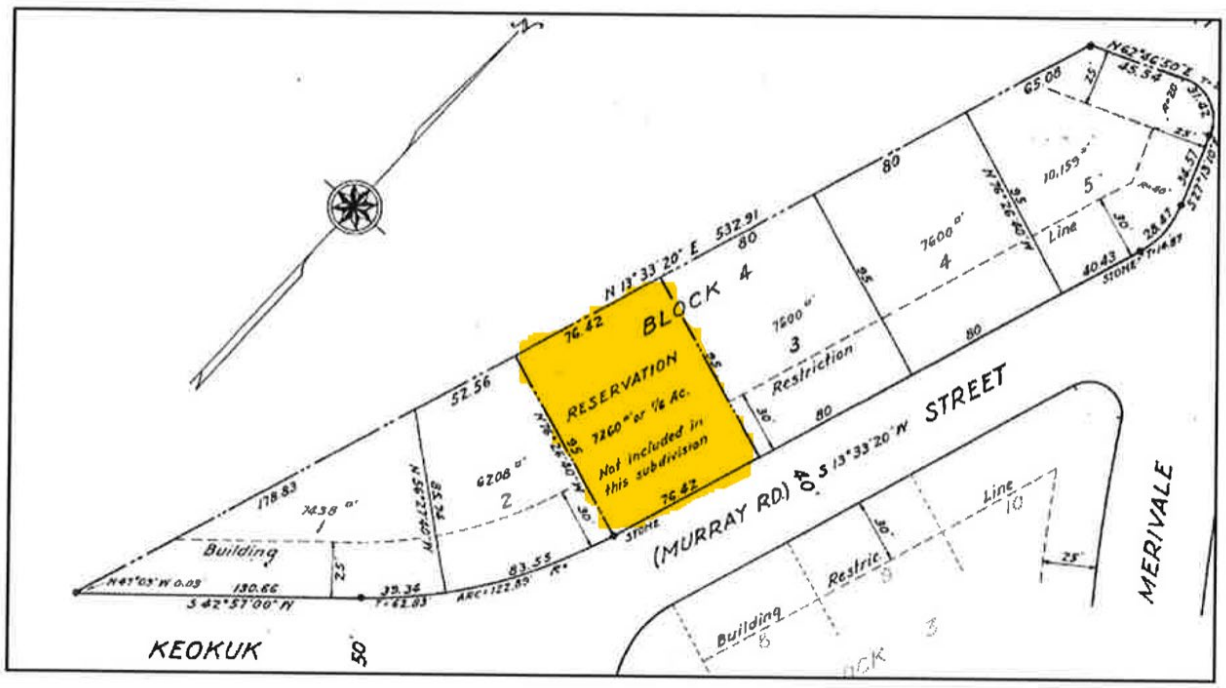

Figure 1

(From left to right: Lot 1, Lot 2, Reservation, Lot 3, Lot 4, and Lot 5.)

Later in 1938, the Woodwards sold Lots 1 and 2 to Cooper Lightbrown, who sold the same lots to Dean and Nelle Locke. In 1959, the Lockes sold Lots 1 and 2 to James and Mary Corrigan.

In 1972, the Reservation was divided in half by the devisees of the Woodwards' estates. The devisees conveyed the left half to the Corrigans – the owners of the adjacent Lot 2 – via a quitclaim deed. The devisees conveyed the right half to the owners of Lot 3 via a quitclaim deed.

In 1989, the Corrigans sold Lots 1 and 2 and their half of the Reservation to Roy D. R. and Paulette Betteley.

B. Betteley Subdivision and Montgomery County Planning Board Decisions

In 1992, the Betteleys began the process of subdividing their property. The Betteleys planned to turn Lots 1 and 2 and their half of the Reservation into two new lots, Lots 6 and 7.

In the Betteleys' plan, Proposed Lot 6 would combine part of Lot 1, the majority of Lot 2, and the Betteleys' half of the Reservation. Proposed Lot 7 would consist of the rest of Lots 1 and 2. The new layout is shown below (Figure 2).

Figure 2[1]

(Proposed Lot 6, Proposed Lot 7)

In 1993, the Montgomery County Planning Board conducted a public review hearing regarding the Betteleys' proposed plans. At the hearing, no one challenged the Betteleys' title to the half of the Reservation or claimed that the property contained a burial site. Following the hearing, the Planning Board approved the Betteleys' preliminary plans.

[1] A careful reader will observe that new Lots 6 and 7 differ considerably in shape and size from former Lots 1 and 2 plus the Betteleys' half of the Reservation. The parties do not explain the reason for the differences in their briefs. Nonetheless, from information in an appendix filed by the Werners, we surmise that the differences are largely attributable to the closure of Keokuk Street as a result of an equity case brought by the Woodwards in 1937. Apparently, some or all of the land that would have become Keokuk Street became part of Lots 1 or 2 instead.

In 1996, the Planning Board held another public hearing regarding the site plan for Lot 7 of the proposed subdivision, which did not include any part of the Reservation. In written and oral testimony in that proceeding, representatives of the Brookdale Citizens Association raised concerns about the possible location of a burial plot on the site. In a 1997 decision, the Planning Board reported that its staff was unable to find any evidence of a burial ground.[2] The Planning Board approved the site plan, and the Betteleys surveyed the new lots and recorded Plat No. 20479.[3]

The Betteleys continued to live on their property until their deaths in the first decade of this century. After their deaths, their son, Philip Betteley, lived on the property until 2016, when he sold Lot 6 (in green, figure 2) to appellee Paramount Construction, Inc. ("Paramount").

[2] The Planning Board's opinion contains the following sentence: "Staff and the Applicant also noted that the area identified on the record plat as a reservation for a burial plot is actually located on the adjoining property to the north." Neither party discusses or interprets this sentence in their briefs. Hence, it is unclear whether the "adjoining property to the north" refers to proposed Lot 6 on the Betteley property (with the Betteleys' half of the Reservation) or to the neighboring property that received the other "half of Reservation" in 1972. As noted below, an owner of the neighboring property, Ambassador Richard Erdman, applied for a property-tax exemption from the Maryland State Department of Assessments and Taxation for his part of the Reservation, because he believed that it contained a burial ground. The record in this case includes a copy of a 1994 tax map that designates some or all of the Reservation as a "Burial Lot."

[3] After the Planning Board's approval, the President of the Brookdale Citizens Association petitioned the circuit court for judicial review. He argued that the Planning Board did not consider evidence of a burial lot and erred in concluding that there was no burial ground on the property. The court dismissed the petition for untimeliness.

C. Action to Quiet Title

Shortly after acquiring the property, Paramount learned that members of the Brookdale Citizens Association believed that the Reservation, now part of Lot 6, contained a burial site. Paramount hired Dr. Phillip Hill of Archaeological Testing and Consulting, Inc., to study the property and determine whether it was a burial site. Dr. Hill examined the disputed property and concluded that there was no evidence of a burial ground on the property. He wrote and submitted a report regarding his findings.

On May 4, 2018, Paramount filed a complaint to quiet title to its property under Md. Code (1974, 2015 Repl. Vol.), § 14-108 of the Real Property Article. Paramount sought a determination that it held record title to the property and that there was no burial plot on its property.

On May 21, 2018, appellants Susan Werner Scofield and Nancy Shoemaker Werner (the "Werners") moved to intervene. The Werners claimed that they are the descendants of Isaac Shoemaker and that the Reservation, part of which is now encompassed in Lot 6, contains the Shoemaker family burial ground.

D. Paramount's Motion for Partial Summary Judgment

On May 10, 2019, Paramount moved for partial summary judgment on the issue of title. Paramount contended that it had acquired record title to the property, including half of the Reservation, in 2016. Paramount argued in the alternative that its immediate predecessors-in-title, the Betteleys, had acquired title to half of the Reservation by adverse possession.

Opposing the motion, the Werners argued that the 1/6-acre Reservation in the Woodwards' 1938 plat is the 1/7-acre plot that was excluded from the 1924 deed to Poe (and the subsequent deeds from Poe to Tuckerman and from Tuckerman to the Woodwards). The Werners also argued that Paramount's predecessors had not openly and notoriously occupied the half of the Reservation and, hence, that they could not have acquired the property by adverse possession.

The Werners did not submit any affidavits with their opposition to the summary judgment motion. The only attachment to their opposition was the 1994 Planning Board opinion granting preliminary approval of the Betteleys' subdivision.

The circuit court granted Paramount's motion for partial summary judgment. Relying on *McDonough v. Roland Park Co*., 189 Md. 659 (1948), another case concerning an ancient burial plot of indeterminate location, the court reasoned that the language in the various deeds ("a small burial plot located on the Perry Boundary line near the River Road; consisting [of] 1/7 of an acre") would not permit someone to locate the burial ground with reasonable certainty, as required by Maryland law; therefore, the court concluded, the Werners had not established that the Shoemaker burial plot was located on Paramount's property. In the alternative, on the tacit assumption that the Reservation included the burial ground, the court concluded that the Betteleys had acquired title to their half of the Reservation by adverse possession, because they had continuously used and occupied the property, including the disputed part of the Reservation, for more than 20 years.

The court added that when the Betteleys sought to subdivide the property in a series of public proceedings in the 1990s, the Werners did not object. The court interpreted the absence of an objection to mean that the Werners have only recently claimed an ownership interest in the disputed property.

Finally, the court cited the 1997 decision in which the Planning Board reported that its staff was unable to find any evidence of a burial ground on Lot 7. The court regarded that statement as additional evidence of the Werners' inability to show that the burial plot mentioned in the deeds is located on what is now Paramount's property.

E. Circuit Court Trial

Chapter 33A-17 of the Montgomery County Code restricts the development of property over the site of an established burial ground. The Werners contended that four members of the Shoemaker family are buried in the burial plot, and therefore, that Paramount should be precluded from developing the land in any manner that would disturb the burial site. Thus, even though the court had determined, as a matter of law, that Paramount had title to the half of the Reservation on Lot 6, the court still had to determine whether a burial ground was located on Paramount's property.

1. Testimony of Dr. Hill

On behalf of Paramount, Dr. Hill testified as an expert in the field of archaeology. Dr. Hill had conducted an extensive investigation of Paramount's property. Upon visiting the alleged burial site, he did not observe any above-ground evidence of a cemetery, such as headstones or depressions in the ground.

Dr. Hill noted the existence of some periwinkle low to the ground. He explained that periwinkle was commonly used as ground cover in cemeteries (because it keeps weeds out), but the presence of periwinkle, he said, did not itself justify a conclusion that a cemetery was located on the property.

After his initial inspection of the ground area of the alleged gravesite, Dr. Hill excavated below the ground. He directed the digging of eight diagonal trenches that were three feet wide and several inches deep and ran parallel to one another across the property. The trenches were designed to reveal whether there had been any human disturbance to the topsoil from digging graves.

On the basis of his investigation, Dr. Hill concluded to a reasonable degree of archaeological certainty that no bodies were buried on Paramount's property.

2. Testimony of Nancy Werner

Nancy Werner testified that she is the great-great-granddaughter of Isaac Shoemaker. Mrs. Werner has visited the site of the alleged cemetery since the 1940s when she was approximately ten years old, using the marble stairs that lead into the property. She has returned to the site regularly to pay respects to her great-great-grandparents' gravesites and to leave flowers.

Mrs. Werner claimed that there once were gravestones on the property. When she visited the cemetery with her father in the 1970s, she noticed that the gravestones were gone. During that visit, Mrs. Werner asked the former residents of Paramount's property if they knew what had happened to the headstones. Because of a hearsay objection, the court prohibited her from recounting what she heard. It appears from her testimony that

at some point – it is unclear when – the Betteleys' half of the Reservation, which she described as a "jumble," was enclosed by a chicken-wire fence.

In 2016 or 2017, Mrs. Werner applied to the Historical Preservation Society to have part of Paramount's property included in the Montgomery County Cemetery Inventory. With the application, she submitted documentation supporting her belief regarding the location of the alleged cemetery, including funeral home records, letters exchanged between her ancestors, and the book, "Genealogy of the Shoemaker Family."[4]

3. Testimony of Dr. Crane

Dr. Brian Crane, an archeologist employed by the Maryland-National Capital Park and Planning Commission, testified on behalf of the Werners. The Werners wanted Dr. Crane to testify as an expert witness in the field of archaeology and to offer his opinion as to the boundaries and location of the gravesite. In their pre-trial statement, however, they did not designate him as a witness, much less as an expert, and did not advise Paramount or the court of their intention to call Dr. Crane as an expert until the morning of trial.

The court permitted Dr. Crane to testify about his job and his background, but precluded him from offering opinions that would require his archaeological training, education, and expertise. On the basis of that ruling, the court prohibited Dr. Crane from testifying about the location or boundaries of the Isaac Shoemaker cemetery.

[4] Apparently as a result of Mrs. Werner's efforts, the Montgomery County Planning Board has become aware of the dispute over whether there is a burial site on Paramount's property. In 2019, the Planning Board agreed that it would accept the circuit court's determination in the instant case as dispositive in its own proceedings.

4. Testimony of Ambassador Erdman

Ambassador Richard Erdman, who lives on the property on the other side of the Reservation (Lot 3, figure 1), testified on behalf of the Werners. Ambassador Erdman believes that he is the record owner of the half of the Reservation abutting his lot. The Werners do not challenge Ambassador Erdman's title to the half of the Reservation on his property.

Ambassador Erdman testified that when he purchased his property in about 1982, he was aware that there might be a cemetery on it. He erroneously thought that the Reservation contained a Native American burial ground. Motivated by that mistaken belief, he applied for and received a property-tax exemption from the Maryland State Department of Assessments and Taxation. He discovered that the site was not a Native American burial ground when he witnessed Nancy Werner visit it and lay flowers. Mrs. Werner placed the flowers near where the ambassador had once found a pair of obelisks or "stone markers."

In response to a question concerning the location of the obelisks, Ambassador Erdman testified that they formed "a straight line parallel with the rear boundary," which, he volunteered, "is known as the Perry boundary line." Paramount objected to the ambassador's reference to the "Perry boundary line," a key phrase in the 1924 and 1925 deeds, which excluded the 1/7-acre burial plot from the initial conveyance. The court struck the Ambassador's statement on the ground that it was hearsay.

5. The Court's Determination

At the close of trial, the court determined that Paramount had met its burden of demonstrating that there is no burial site on its property. The court referred to Dr. Hill's uncontroverted expert testimony that, after a thorough examination, he believed that no bodies were buried on that property.

The court stated that the Werners' contentions that bodies are buried on the property were not supported by admissible evidence, but instead were based on hearsay and the beliefs of family members passed down in the Shoemaker family.

The Werners noted a timely appeal.

QUESTIONS PRESENTED

The Werners submitted four questions, which contained multiple subparts. We have consolidated their questions as follows:

1. Did the circuit court err in granting Paramount's motion for partial summary judgment that Paramount has record title of the property and that Paramount's ownership is confirmed by adverse possession?

2. Did the circuit court abuse its discretion in excluding lay witness testimony on the grounds of lack of personal knowledge and hearsay?[5]

[5] The questions presented in the Werners' brief appear in the appendix at the end of this opinion.

DISCUSSION

I.

The Werners contend that the court erred in granting partial summary judgment, because, they say, they presented evidence that produced a dispute of material fact. We disagree.

A. Standard of Review

When a party moves for summary judgment, the court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f).

The issue of whether a trial court properly granted summary judgment is a question of law. *Butler v. S & S P'ship*, 435 Md. 635, 665 (2013) (citation omitted). In an appeal from the grant of summary judgment, this Court conducts a *de novo* review to determine whether the circuit court's conclusions were legally correct. *See D'Aoust v. Diamond*, 424 Md. 549, 574 (2012). The relevant inquiry is well known:

> When reviewing a grant of summary judgment, we determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. This Court considers the record in the light most favorable to the nonmoving party and construe[s] any reasonable inferences that may be drawn from the facts against the moving party. A plaintiff's claim must be supported by more than a scintilla of evidence[,] as there must be evidence upon which [a] jury could reasonably find for the plaintiff.

Blackburn Ltd. P'ship v. Paul, 438 Md. 100, 107-08 (2014) (citations and quotation marks omitted).

"Before turning to the questions of law, we must first decide whether the [c]ircuit [c]ourt properly determined that no genuine dispute of material fact exists." *O'Connor v. Baltimore Cnty.*, 382 Md. 102, 110-11 (2004). In this appeal, the Werners assert that the record reflects factual disputes regarding whether Paramount's half of the Reservation is part of the burial ground that was reserved in the 1924 and 1925 deeds and whether Paramount's predecessors openly and notoriously possessed their half of the Reservation, so as to acquire title by adverse possession.

In considering each of these arguments, we are mindful of the requirement that, "[t]o properly oppose a motion for summary judgment, the facts presented must not only be detailed but also admissible in evidence." *O'Connor v. Baltimore Cnty.*, 382 Md. at 111 (citing *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737 (1993)). *See Hamilton v. Kirson*, 439 Md. 501, 521 n.11 (2014) ("'in order to pass muster at a summary judgment proceeding, the opponent must produce evidence that would be admissible at trial'") (citations omitted).

B. Record Title of the Disputed Property

Paramount initiated a quiet title action under § 14-108(a) of the Real Property Article. That statute provides:

> Any person in actual peaceable possession of property, or, if the property is vacant and unoccupied, in constructive and peaceable possession of it, either under color of title or claim of right by reason of the person or the person's predecessor's adverse possession for the statutory period, when the person's title to the property is denied or disputed, or when any other person claims, of record or otherwise to own the property, or any part of it, or to hold any lien encumbrance on it, regardless of whether or not the hostile outstanding claim is being actively asserted, and if an action at law or proceeding in equity is not pending to enforce or test the validity of the

> title, lien, encumbrance, or other adverse claim, the person may maintain a suit in accordance with Subtitle 6 of this title[6] in the circuit court for the county where the property or any part of the property is located to quiet or remove any cloud from the title, or determine any adverse claim.

"The purpose of an action to quiet title is to 'protect the owner of legal title "from being disturbed in his possession and from being harassed by suits in regard to his title by persons setting up unjust and illegal pretensions."'" *Porter v. Schaffer*, 126 Md. App. 237, 260 (1999) (quoting *Wathen v. Brown*, 48 Md. App. 655, 658 (1981), *which quoted Textor v. Shipley*, 77 Md. 473, 475 (1893)).

1. *Paramount's Title Claim*

"In a quiet title action . . . the plaintiff, and not the defendant, must prove possession and a legal claim to title." *Porter v. Schaffer*, 126 Md. App. at 274. "In pressing such a claim, the plaintiff has the burden of establishing both possession and legal title by 'clear proof.'" *Id*. at 260 (quoting *Stewart v. May*, 111 Md. 162, 173 (1909)); *see Polk v. Pendleton*, 31 Md. 118, 124 (1869) (stating that the claimant must prove "clear legal and equitable title to land connected with possession"). Once the plaintiff has satisfied that obligation, "the burden is shifted to the defendant to establish superior title." *Porter v. Schaffer*, 126 Md. App. at 274.

"'Clear proof' . . . does not entail proof by 'clear and convincing evidence.'" *Id*. at 261 n.15. "The Court of Appeals has 'consistently applied the *preponderance of the evidence* standard in cases involving private property ownership.'" *Id*. (emphasis in

[6] Subtitle 6 of Title 14 of the Real Property Article sets forth the procedures for quiet title actions.

original) (quoting *Urban Site Venture II Ltd. P'ship v. Levering Assocs. Ltd. P'ship*, 340 Md. 223, 229 (1995)).

The quiet title statute "requires that the plaintiff show, at a minimum, 'color of title.'" *Porter v. Schaffer*, 126 Md. App. at 262 (quoting Real Prop. § 14-108(a)). "'Color of title' denotes that 'which in appearance is title, but which in reality is not good and sufficient title.'" *Id*. (quoting *Gore v. Hall*, 206 Md. 485, 490 (1955)); *see also Spicer v. Gore*, 219 Md. 469, 476 (1959) (defining "color of title" as "title papers good enough in appearance and ostensible effect to give [the parties claiming title] the right to the bona fide belief they held that they owned the land[]"). "In order for title based on a deed to 'give color,' it must be 'so far *prima facie* good in appearance as to be consistent with the idea of good faith on the part of the party entering under it.'" *Id*. (quoting *Gore v. Hall*, 206 Md. at 490-91).

Paramount holds at least color of title to its property, including the half of the Reservation. The 1972 quitclaim deed, given to the Corrigans by the devisees of the Woodwards' estates, purported to convey half of the Reservation. The Corrigans subsequently conveyed the entire tract – Lots 1 and 2 and half of the Reservation – to the Betteleys. Upon their deaths, the tract went to their son, who then transferred his entire interest in what had become Lot 6 (including half of the Reservation) to Paramount.

The Werners do not dispute the existence of the quitclaim deed in the record. Nor do they dispute that the deed clearly described the half of the Reservation as part of the purported conveyance. As a result, the burden shifts to the Werners to assert a superior title claim. *Porter v. Schaffer*, 125 Md. App. at 274.

2. *The Werners' Title Claim*

"[T]he defendant in a quiet title action who cannot establish his own record title has no basis to complain about the strength of the plaintiff's title[.]" *Porter v. Schaffer*, 125 Md. App. at 274. "The burden rests upon the defendant to establish a title which [s]he has set up to defeat the complainant's claim of ownership." *Id*. at 260.

In challenging Paramount's claim of title, the Werners assert that the Shoemaker family cemetery is located on Paramount's half of the Reservation. To support their competing claim of ownership, the Werners argue that the 1/6-acre Reservation in the Woodwards' Plat No. 949 includes the smaller 1/7-acre burial ground that was excluded from transfer in the deeds of 1924 and 1925.[7]

The Werners claim that the circuit court erred in applying the standard articulated in *McDonough v. Roland Park Co.*, 189 Md. 659 (1948), and determining that the exclusion in the 1924 and 1925 deeds was inoperative. *McDonough* involved an 1849 conveyance of 30 acres of property. The deed contained the following exclusion:

> Reserving therefrom the graveyard situated upon said above described parcel of ground the same to be fifty feet square and to be used only as a burial place by the said Jacob Mason and his heirs with free ingress and egress thereto at all times hereafter by said Jacob Mason and his heirs.

Id. at 660.

[7] An acre consists of 43,560 square feet. One-sixth of an acre equals 7,260 square feet (43,560/6). One-seventh of acre equals about 6,223 square feet (43,560/7). Thus, the 1/6-acre Reservation is about 1,000 square feet larger than the 1/7-acre burial plot that was excluded from the 1924 and 1925 deeds.

The property was subsequently conveyed five times over the course of a century, ending up under the ownership of the Roland Park Company in 1946. *Id*. The Roland Park Company sought to have the cloud on its title quieted and to have the graveyard exclusion declared null and void, over the objections of the heirs of Jacob Mason. *Id*. at 661. The circuit court ruled in Roland Park's favor, and the Court of Appeals affirmed, stating, "every deed of conveyance, in order to transfer title, must either in terms, or by reference, or other designation, give such description of the subject-matter intended to be conveyed, as will be sufficient to identify the same with reasonable certainty." *Id*. at 664 (quoting *Berry v. Derwart*, 55 Md. 66, 72 (1880)).

The Court concluded that the reservation in the deed contained "no description of the location of the graveyard sufficient to identify it and it appear[ed] extremely doubtful whether there was any graveyard established at the time the reservation was made." *Id.* at 665. For that reason, the Court stated:

> [t]he existence of the graveyard not having been established, the failure to locate any graveyard on the property at the present time, the absence of evidence that bodies were ever interred there, and the lack of sufficient description in the reservation to identify the intended graveyard with reasonable certainty all lead us to the opinion that the reservation in question here is wholly inoperative[.]

Id. at 666.

In granting partial summary judgment on the issue of title in this case, the circuit court relied on *McDonough* to hold that the Werners have not placed the Shoemaker cemetery "on the ground." As in *McDonough*, the court reasoned, the description of "a small burial plot located on the Perry Boundary line near the River Road; consisting [of]

1/7 of an acre" was insufficient to identify any graveyard on the property with reasonable certainty "as required by Maryland law."

The court's conclusion is well founded. Albert Shoemaker conveyed a 60-acre property – twice as large as the property at issue in *McDonough*. Yet, the language of the relevant deeds tell us nothing about the location of the 1/6-acre burial plot, except that it is "on the Perry Boundary line" – a term undefined in the deed itself – and that it is "near" (but not how near) River Road.

Nonetheless, the Werners point out that the Woodwards acquired the former Shoemaker property in 1925 via a deed that excluded the burial plot on the Perry Boundary line near River Road. Thirteen years later, the Woodwards created the Reservation, which is a little larger than the burial plot and is located only a few hundred feet from River Road. It is unclear why the Woodwards would have created a Reservation of about the same size as the burial plot that was excluded from their 1925 deed, and in the same general location (along the River Road), unless they understood that the Reservation encompassed the burial plot. For that reason, we shall assume, solely for the sake of argument, that a reasonable factfinder could find that the 1/6-acre Reservation includes the 1/7-acre burial plot that was excluded in the 1924 and 1925 deeds.[8]

[8] In reaching a contrary conclusion and directing the entry of partial summary judgment against the Werners on the issue of title, the circuit court observed that Paramount's archeologist, Dr. Hill, "was unable to find any evidence of bodies being actually buried in the area" of the half of the Reservation on Paramount's property. In support of that proposition, the court did not rely on Dr. Hill's trial testimony, as the trial

C. Adverse Possession

It is not dispositive that the 1/7-acre burial ground that was excluded from the 1924 and 1925 deeds may be contained within the 1/6-acre Reservation in the 1938 plat, because Paramount contends that its predecessors, the Betteleys, acquired their half of the Reservation by adverse possession. We agree with the circuit court that the undisputed facts in the record support Paramount's claim of adverse possession.

"'Adverse possession is a method whereby a person who was not the owner of property obtains a valid title to that property by the passage of time.'" *Yourik v. Mallonee*, 174 Md. App. 415, 422 (2007) (quoting Maryland Civil Pattern Jury Instruction 2:1); *accord Senez v. Collins*, 182 Md. App. 300, 322-23 (2008). "To establish adverse possession, a claimant must show that the possession was actual, open, notorious, exclusive and continuous or uninterrupted for the statutory period of twenty years." *Goen v. Sansbury*, 219 Md. 289, 295 (1959); *see also Senez v. Collins*, 182 Md. App. at 324-25.

The Werners contest the circuit court's conclusion that Paramount's predecessors, the Betteleys, openly and notoriously possessed the alleged burial ground. "The element of 'open and notorious' pertains to the concept of constructive notice to the title owner." *Senez v. Collins*, 182 Md. App. at 325. To be "open and notorious," the "[p]ossession

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had yet to occur. Instead, the court relied on a copy of his report, which Paramount had attached to its complaint. The report was inadmissible for a number of reasons, not least of which was that it did not express any expert opinions to the requisite degree of professional certainty. *See American Radiology Servs. v. Reiss*, 470 Md. 555, 581 (2020). The court erred in relying in part on inadmissible evidence in the grant of summary judgment.

'must be visible and notorious, so that the owner may be presumed to have notice of it.'" *Id.* (quoting *Beatty v. Mason*, 30 Md. 409, 414 (1869)).

In support of its motion for summary judgment, Paramount submitted an affidavit from the Betteleys' son, Philip Betteley. He testified that from 1989 to 2016 his family members had owned the property, lived on the property, and paid taxes on the property. He also testified that in the 1990s his parents had engaged in a public process, involving public hearings and administrative decisions, to resubdivide the property. Paramount argued that the Betteleys' conduct amounted to open and notorious possession.

In opposing the motion for summary judgment, the Werners submitted no affidavits or other sworn testimony. Thus, they did not dispute any aspect of Philip Betteley's testimony. Instead, they relied solely on the Planning Board's opinions, which approved the Betteleys' subdivision plan (in 1994) and approved the Betteleys' site plan for Lot 7 (in 1997).[9]

The circuit court correctly concluded that the Werners did not generate a genuine dispute of material fact concerning whether the Betteleys openly and notoriously possessed their property, including the alleged burial ground, for more than 20 years from 1989 through 2016. The Werners failed to dispute Philip Betteley's testimony, which establishes a prima facie case of open and notorious possession. Moreover, the Planning Board opinions support, rather than refute, the proposition that the Betteleys openly and

[9] The Werners first mentioned the 1997 opinion at the hearing on the summary judgment motion, not in their opposition to the motion itself. The court allowed them to discuss the 1997 opinion even though they had not previously mentioned it.

notoriously possessed the property, because the opinions confirm the Betteleys engaged in a lengthy, public process to obtain permission to subdivide the property, including their half of the Reservation.

In support of the assertion that possession of the disputed property was not "open and notorious," the Werners point to the "unkempt status" of the alleged burial ground. The Werners advance the proposition that the Betteleys' maintenance (or lack thereof) of their half of the Reservation would not "put an ordinary prudent person on notice" that they were laying claim to the property.

As support for their contentions concerning the condition of the alleged burial ground, the Werners relied solely on the representations of their counsel at the hearing on the summary motion. Thus, the Werners submitted no admissible evidence to support those representations. Consequently, the court could have rejected the Werners' contentions out-of-hand.

The court, however, chose to consider the contentions for what they were worth, but correctly regarded the alleged lack of maintenance as immaterial. In the court's view, the distinction between the Betteleys' unmaintained property and the well-maintained property next door simply "highlight[ed] everyone's knowledge in the surrounding area that the Betteley's [sic] claimed ownership of their half of the reservation."

In any event, the court observed that, according to the 1994 Planning Board document on which the Werners themselves relied, the Betteleys used a stairway on their half of the Reservation (perhaps the marble stairs) to gain access to a deck on their property. On the record before the court at summary judgment, therefore, the court did

not err in concluding, as a matter of law, that the Betteleys' openly and notoriously possessed their property, including the portion on which the burial plot is allegedly situated.

In a separate argument, the Werners contend that the circuit court erroneously treated the Betteleys' efforts to subdivide their property "as evidence of title." We agree with the Werners that "subdivision activity cannot confer title," but we disagree that the court treated the subdivision as though it somehow effectuated a transfer of title. As the circuit court correctly recognized, the Betteleys' efforts to subdivide their property, including their half of the Reservation, were undisputed evidence of open, notorious, and adverse possession, which supported Paramount's claim of title.

The subdivision of the land was a public process involving multiple hearings before the Montgomery County Planning Board. The attempt to subdivide the property put the world on notice that the Betteleys claimed title or that believed that they already had good title. Despite the very public process in which the Betteleys asserted their claims, the Werners did not assert an ownership interest. The court did not err in relying on that undisputed evidence in concluding, as a matter of law, that Paramount's predecessors had acquired title to half of the Reservation by adverse possession.[10]

[10] In the section of their brief that pertains to adverse possession, the Werners briefly argue that the court erred in relying on the 1997 Planning Board opinion, which the Werners themselves brought to the court's attention. According to the Werners, the court relied on the 1997 opinion for the proposition that there was no evidence of a burial plot "on the disputed property." The Werners observe that the 1997 opinion involved a site plan for new Lot 7, which does not include the half of the Reservation that the Woodwards' devisees conveyed to the Betteleys' predecessors in 1972. In our judgment,

II.

The Werners contend that the trial court improperly limited the trial testimony of Dr. Crane and Ambassador Erdman. They implicitly contend that the alleged errors, either separately or in combination, require the reversal of the court's conclusion that there is insufficient evidence of a burial plot on Paramount's property. We disagree.

A. Standard of Review

"The admissibility of evidence ordinarily is left to the sound discretion of the trial court." *Moreland v. State*, 207 Md. App. 563, 568 (2012). "We will not disturb a trial court's evidentiary ruling unless 'the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.'" *Moreland v. State*, 207 Md. App. at 568-69 (quoting *Decker v. State*, 408 Md. 631, 649 (2009)) (further quotation marks omitted). "A court's decision is an abuse of discretion when it is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Moreland v. State*, 207 Md. App. at 569 (quoting *Gray v. State*, 388 Md. 366, 383 (2005)) (further quotation marks omitted).

B. Dr. Crane

After the Werners failed to designate him as an expert witness in accordance with the scheduling order, the court precluded Dr. Crane, an archeologist employed by the

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the court's error, if any, is inconsequential: the existence of evidence of a burial plot has no bearing on whether the Betteleys acquired the land allegedly containing the burial plot (half of the Reservation) by adverse possession.

Maryland-National Capital Park and Planning Commission, from testifying as an expert. The Werners withdrew their request to have Dr. Crane testify as an expert. Nonetheless, they expressed their desire to have him testify as a fact witness.

The court asked counsel for the Werners for a proffer of Dr. Crane's testimony. Counsel responded:

> Dr. Crane is in charge of the cemetery inventory for the county. And as such . . . he has overseen the location of the placing of the Isaac Shoemaker cemetery lot in the Brookdale subdivision.

Counsel was apparently referring to an application, by Mrs. Werner, to obtain the County's recognition of the alleged burial plot in this case.

When the court asked for the factual basis for Dr. Crane's testimony, counsel referred to the "application and research and his knowledge and experience." The court responded that the Werners "can't just wait until the last minute or backdoor an expert." Nonetheless, the court allowed Dr. Crane to testify about the cemetery inventory in general and about what he normally does in the course of his duties, and to answer some general questions about his job. Beyond that, the court prohibited Dr. Crane from testifying about anything that required his archeological background, which by counsel's admission, included determining the location of the alleged cemetery.

Dr. Crane testified about his archaeological background and the historic preservation work that he does in his job at the Commission. When the Werners' counsel asked how someone from his agency would go about determining the location and boundaries of a cemetery on the map, counsel for Paramount objected on the ground that it called for expert testimony. The court sustained the objection.

A few moments later, the Werners' counsel asked Dr. Crane to look at an opinion by the Planning Board. He stated that he had never seen it before. The court interjected that because Dr. Crane was not familiar with the document, he lacked the foundation required by a fact witness and could not answer any questions about it.

The Werners contend that because of Dr. Crane's employment at the Planning Commission, he has "first-hand knowledge of the Historic Preservation Office's maps and mapping procedures." Thus, they argue, the court erred in not allowing him to testify to the practices of his office, including placing cemeteries on the map.

As a lay witness, Dr. Crane was permitted to testify only on matters "rationally based on [his] perception." Md. Rule 5-701. At trial, Dr. Crane confirmed that he had no first-hand knowledge concerning the location or boundaries of the Shoemaker burial ground. He had not visited the location of the alleged gravesite, and he did not handle the Werners' application for the cemetery's historic preservation status.[11] Therefore, his testimony about the location of the Shoemaker family cemetery would not be rationally based on his perception. Indeed, in response to the court's questions, Dr. Crane conceded that placing the specific cemetery on the map would require his expertise.

It is undisputed that the gravesite currently has no visible surface markers, and the inventory map did not provide any information on boundaries that a layperson without archaeological training could discern. Dr. Crane may have considerable factual

[11] At the time when the application was submitted in 2017, the inventory was managed by volunteers. Dr. Crane's office did not manage the inventory until it was required by statute in 2018.

knowledge of the Montgomery County cemetery inventory, but he has no personal knowledge of the location of this particular cemetery. The circuit court did not err or abuse its discretion in precluding Dr. Crane's "backdoor expert" testimony.

C. Ambassador Erdman

Ambassador Erdman, who lives next door to Paramount's property, testified that when he moved into his residence, he found two, long obelisk-like stones in the ground. He removed the stones because they made it difficult to cut the grass.

When asked to describe the location of the stones in the ground before he removed them, Ambassador Erdman testified that they "[f]orm[ed] a straight line parallel with the rear boundary, which is known as *the Perry Boundary line*," a key term in the 1924 and 1925 deeds. (Emphasis added.)

When Ambassador Erdman mentioned "the Perry Boundary line," counsel for Paramount made a general objection. The court sustained the objection and struck the testimony, calling it hearsay. The Werners contend that the court erred in doing so.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). When questioned on its ruling, the court explained:

> The Perry boundary line is something that's on a deed. . . . He only knows it because he's looked at a deed or done research. What the research [says] is hearsay in the court proceeding. It's an out of court statement being offered to prove the truth of the matter that that's the Perry boundary line.

Ordinarily, when a witness testifies about a hearsay statement, the witness recounts what an out-of-court declarant has said or written. In this case, however,

Ambassador Erdman was not, at least in so many words, asserting that an out-of-declarant had told him that the rear boundary of his property was known as the Perry Boundary line. His statement may have been objectionable, but it does not seem to have been objectionable on the ground that it was hearsay.

The real problems with Ambassador Erdman's testimony are twofold. First, there is no indication in this record of how he, as a layperson, has any factual basis to testify that the rear boundary of his property "is known as the Perry Boundary line," an undefined term from a series of century-old deeds. Second, and relatedly, in asserting that the rear boundary of his property "is known as the Perry Boundary line," the ambassador was clearly attempting to interpret the 1924 and 1925 deeds and to volunteer an expert opinion about the location of the burial plot that was excluded from those deeds.

"[I]t is the policy of this Court not to reverse for harmless error, and the burden is on the appellant in all cases to show prejudice as well as error." *Rippon v. Mercantile Safe Deposit Co*., 213 Md. 215, 222 (1957) (quoting *Balto. Transit Co. v. Castranda*, 194 Md. 421, 440 (1950)). "It is not the possibility, but the probability, of prejudice which is the object of the appellate inquiry." *State Deposit Ins. Fund Corp. v. Billman*, 321 Md. 3, 17 (1990) (citing *Harford Sands, Inc. v. Groft*, 320 Md. 136, 148 (1990)). "Courts are reluctant to set aside verdicts for errors in the admission or exclusion of evidence unless they cause substantial injustice." *Hance v. State Roads Comm'n*, 221 Md. 164, 176 (1959).

On cross-examination, Ambassador Erdman admitted that his knowledge of the "Perry Boundary line" was based on what he was told by the surveyors who marked the property. Thus, Ambassador Erdman was not testifying from his own personal knowledge of the location of the "Perry Boundary line"; he was offering an expert opinion about the location of the boundary line based on what others had told him and his lay analysis of the relevant deeds, plats, and other records. Because the court could have excluded the ambassador's testimony on those grounds, it was harmless error for the court to exclude the testimony on the ground of hearsay.

The Werners claim that Ambassador Erdman's statement was admissible because he was quoting from documents that are either public or are already in the record for this case. If true, the Werners cannot be prejudiced by the exclusion of the testimony. If the Werners are correct and the location of the Perry boundary line has already been indicated in the record, then the court already had access to that information and did not need to rely on Ambassador Erdman's testimony to establish that proposition.

CONCLUSION

The circuit court did not err in granting partial summary judgment in favor of Paramount and against the Werners on the issue of whether Paramount acquired half of the Reservation in the 1938 plat by adverse possession. Nor did the court err in

sustaining the objections to Dr. Crane's testimony or commit prejudicial error in sustaining the objection to Ambassador Erdman's testimony.[12]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[12] With their brief, the Werners submitted an appendix that contained court filings in a 1937 case, *In the Matter of the Petition of Donald Woodward, et al*., Equity No. 8475 (Cir. Ct. for Mont. County). In that case, the court permitted the Woodwards to rescind their plan to dedicate Keokuk Street, which is shown on the 1938 plat. According to the Werners, the abandonment of Keokuk Street somehow explained why the Reservation, at 1/6-acre, was larger than the alleged burial ground, at 1/7-acre. Paramount moved to strike the appendix, arguing that this new evidence was not presented at trial and may not be considered on appeal. At oral argument, however, Paramount withdrew the motion, apparently because the 1937 court filings include a notarized allegation that the Woodwards owned all of the land abutting on and immediately adjacent to Keokuk Street. As an appellate court, we are not in a position to engage in factfinding about the significance of documents that no one thought to present to the true factfinder, the circuit court.

APPENDIX

In their appellate brief, the Werners presented the following questions:

A. Did the trial court err as a matter of law in granting plantiff's [sic] summary judgment motion on its quiet title claim?

    1. Did the trial court improperly grant summary judgment in the face of contested material facts and on inferences improperly drawn in favor of the moving party?

    2. Did the trial court improperly apply the "on the ground" standard established in *McDonough* [*v. Roland Park Co.*, 189 Md. 659 (1948),] resulting in reversible error with respect to the grant of partial summary judgment to Paramount on the matter of title?

B. Did the trial court err as a matter of law in granting summary judgment on Paramount's adverse possession claim?

    1. Does the unkempt status of the Burial Ground confirm a lack of "open and notorious" possession of the Burial Ground necessary to sustain an adverse possession claim?

    2. Did the Court improperly rely on the 1992 Betteley Subdivision as evidence of title, when subdivision activity cannot confer title?

    3. Did the Court err in concluding that the February 14, 1997 Planning Board opinion (E164) established "no evidence" of a burial ground when the Property and/or Burial Ground were not the subject of that opinion?

C. Did the trial court commit reversible error in finding that no burial ground exists on the burial ground by improperly excluding witness testimony?

    1. Did the trial court improperly limit the testimony of Dr. Crane?

    2. Did the trial court improperly limit the testimony of Ambassador Erdman?

D. Did the trial court exceed its authority in ordering a permanent injunction against Werner as to any estate, title, claim, lien or interest in

or to the property or any part thereof in light of Maryland Real Prop. Code 14-121, which confers a right of access to burial sites?

Paramount argued that the Werners had not preserved Question D. In their reply brief, the Werners formally abandoned Question D.