Circuit Court for Charles County
Case No. C-08-CV-21-000602
Case Nos. C-08-CV-19-000606, 618

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1718 & 2035

September Term, 2022

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ENNIO RODRIGUEZ

v.

JOSEPH C. GRAY, JR., ET AL.

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Wells, C.J.,
Shaw,
Kenney, James A., III
(Senior Judge, Specially Assigned),
JJ.

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Opinion by Kenney, J.

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Filed: August 19, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

The two consolidated appeals arise out of a boundary dispute between adjoining landowners, Ennio Rodriguez, and Joseph Gray, Jr. and Alice Gray.[1] They present a tale of three surveys and a Consent Order.[2]

The first appeal (which we will refer to as the "**CIVIL ACTION**"), No. 1718, Sept. Term, 2022, involves a lawsuit filed in the Circuit Court for Charles County by Rodriguez against the Grays for quiet title, declaratory relief, trespass, and nuisance, to which the Grays counterclaimed for quiet title, declaratory relief, and trespass. Based on res judicata, the circuit court granted the Grays' motion for summary judgment against Rodriguez on his claim for quiet title and declaratory relief because an earlier action between the parties had resulted in a consent order. The case proceeded to a jury trial on the remaining counts. The jury found that Joseph Gray, Jr. had not committed a nuisance but that both he and Rodriguez had trespassed on the other's property. For the trespass on Rodriguez's property, the jury assessed damages of $1 and for the trespass on the Grays' property, it assessed a total of $37,640, including punitive damages. In his appeal, Rodriguez presents three questions which we have rephrased as follows[3]:

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[1] In 2013, the Grays transferred their property by deed to a revocable living trust of which they were trustees. At some point, their sons, Paul and Joey Gray, were named trustees. The Grays' trust is a named party in each of the underlying cases but for convenience, we will refer to the property as the Grays'.

[2] They are the Tomlinson Location Survey, the DH Steffens Survey, and the Norris Survey, which are attached at the end of this opinion.

[3] In his brief, Rodriguez presents his questions as follows:

I. Did the circuit court err in granting summary judgment to the Grays on the quiet title and declaratory relief counts based on res judicata?

II. Did the circuit court err in striking the Norris Survey as void and excluding any evidence that contradicted the DH Steffens Survey?

III. Did the circuit court err in granting the Grays' motion in limine and limiting the evidence Rodriguez could produce on the trespass count?

For the reasons explained below, we will affirm in part and reverse in part the judgments of the circuit court in the Civil Action.

The second appeal, (which we refer to as the "**CONTEMPT ACTION**"), No. 2035, Sept. Term, 2022, involves a contempt petition filed by the Grays in the Circuit Court for Charles County about two weeks before Rodriguez filed the Civil Action. The circuit court found Rodriguez in contempt of a consent order (the "Consent Order") that the parties had signed in what we will refer to as the 2019 Action. In the Contempt Action, Rodriguez was

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1. Did the [c]ircuit [c]ourt err in granting summary judgment even though the DH Steffens Survey does not describe the boundaries of the [a]ppellant's real property, does not coincide with the Location Survey, nor was it even identified in the Consent Order dated October 20, 2021 that the trial court relied upon?

2. Did the [c]ircuit [c]ourt err by striking the boundary survey recorded by Kevin Norris and excluding Kevin Norris as an expert witness at trial and by precluding admission of evidence that contradicted the DH Steffens Survey and testimony that the disputed fence at issue was in fact located on [a]ppellant's real property?

3. Did the [c]ircuit [c]ourt err by limiting the [a]ppellant's evidence of damages and the interactions and disputes between [a]ppellant and [a]ppellees while permitting [a]ppellees to offer racially inflammatory and unduly prejudicial evidence outside of the restricted time period as a basis for punitive damages?

found in contempt and ordered to pay the Grays $11,034.50. Rodriguez appeals. As we will explain below, we reverse the judgment of the circuit court in the Contempt Action.

## CIVIL ACTION (NO. 1718, SEPT. TERM, 2022)

## FACTS AND PROCEEDINGS

On November 23, 2005, Rodriguez bought a parcel of land with a post office address of 6570 Pomfret Road in La Plata, Maryland. Along a part of Rodriguez's southernly boundary, the Grays own a parcel with a post office address of 6580 Pomfret Road in La Plata, Maryland where they have lived for about forty years. Both Rodriguez and the Grays access Pomfret Road by way of a ten-foot-wide gravel drive.

On November 23, 2005, Rodriguez's predecessors in title entered into a Right of Way Maintenance Agreement ("RWMA")[4] with the Grays.[5] The RWMA references an "attached survey" identified as a "Location Survey" of the Rodriguez parcel dated November 22, 2005, depicting the ten-foot gravel right-of-way partially traversing the Grays' property. It states that the right-of-way had existed since the Grays acquired their

[4] While "right-of-way" and "easement" are '"synonymous"' terms, for consistency with the RWMA's use of right-of-way, we will use right-of-way. *Gregg Neck Yacht Club, Inc. v. Cnty. Comm'rs of Kent Cnty.*, 137 Md. App. 732, 754 (2001) (quoting *Chevy Chase Land Co. v. United States*, 355 Md. 110, 126 (1999)).

[5] The RWMA refers to an attached survey dated November 22, 2005, prepared by Ben Dyer Associates. The attached "survey" is not a boundary survey but a "location survey" for Everett Parker, et al. (Rodriguez's predecessors in title) by Tomlinson & Associates. It expressly states that no boundary was performed. The Location Survey was done for the predecessors in title of the Rodriguez property. Even though it is not a Ben Dyer Associates survey, the parties and the trial court have treated it as the survey referred to in the RWMA, and we will also.

property in 1965.[6] As depicted in the RWMA, the right-of-way is about 360 feet in length. It starts at Pomfret Road and runs about 275 feet on a line somewhat parallel to the depicted boundary line between the Grays' property and the neighboring Armstrong property. It then continues about eighty-five feet over the Grays' property along the depicted boundary line between the Grays' and Rodriguez's properties to where it enters onto Rodriguez's property.

A few months after the RWMA was executed, and Rodriguez had closed on his property, the Grays commissioned DH Steffens to perform a boundary survey of their property (the "DH Steffens Survey").

When things between Rodriguez and the Grays first soured is not clear, but in August of 2016, Rodriguez sent the Grays a "cease and desist" letter to stop "installing speed bumps" along "the legal easement to [his] property[,]" which he claimed was fifteen

[6] Location surveys, which are referred to as "location drawing[s]" in COMAR, differ from a boundary survey. The purpose of a "location survey" is "to locate, describe, and represent the positions of buildings or other visible improvements affecting the subject property." COMAR 09.13.06.06A. The "subject property" of the Location Survey at issue is what is now the Rodriguez property. A "boundary survey," on the other hand, is a "means of marking boundaries for sufficient definition and identification to uniquely locate each lot, parcel, or tract" of real property. COMAR 09.13.06.03A(1). Its purpose "is to establish, reestablish, or describe, or all of these, the physical position and extent of the boundaries of real property." COMAR 09.13.06.03A(2). It will show where "[l]ines of occupation do not conform to the deed lines" and where a "comparison of adjoining properties' deed descriptions indicates the existence of a gap or an overlap[.]" COMAR 09.13.06.03F(2)(h)(i)-(ii). There is a "right-of-way/easement survey" that details "the necessary data to establish or reestablish the location of sufficient property lines . . . to assure the accurate location of the strip or parcel of land being described for the use and benefit of others." COMAR 09.13.06.09A. In other words, it is more accurate than a location survey or drawing as to the boundaries.

feet wide.[7] It appears that matters came to a head in December 2018 when Rodriguez bulldozed hedges located along the right-of-way between the two properties as shown on the RWMA.

**The 2019 Action**

The Grays filed the 2019 Action against Rodriguez in the Circuit Court for Charles County seeking a declaration that Rodriguez's "use of the [Grays'] property extends only to the ten[-]foot gravel drive, as stated in the [RWMA]" in addition to injunctive relief prohibiting Rodriguez from "altering, modifying, or destroying" the Grays' property.[8] Rodriguez, represented by counsel, filed an answer, claiming ownership of "all of the property which is claimed to belong to the [Grays] pursuant to the terms of the [RWMA.]" In addition, he filed a five-count counterclaim against the Grays that stated, "the parties are involved in a dispute concerning the boundaries of the Rodriguez Parcel and the Gray Parcel" and that he was entitled to a right-of-way as the owner of the "dominant tenement." Based on the deed description of his property, he claimed his property "adjoins Pomfret Road" and that the property over which the right-of-way runs was a "[d]isputed [p]arcel." He asked to quiet title and for a declaration that he owned the "disputed parcel," but, if he did not own the property, that he had a fifteen-foot right-of-way by either necessity or

[7] The Rodriguez property does have an undeveloped fifteen-foot right-of-way over the Armstrong property that perhaps he thought related to the RWMA.

[8] In response to Rodriguez bulldozing the hedges, the Grays initially filed a self-represented complaint in the District Court for Charles County for tort damages. That case was transferred and consolidated with the 2019 Action. *See* C-08-CV-19-000606.

adverse possession.[9] His last count was for nuisance based on the Grays maliciously interfering with his use of his property.

On the morning of the first day of trial, December 20, 2019, the parties participated in mediation without success; trial began that afternoon. Phil Wilk, who was accepted as an expert in land surveying, testified as a manager of DH Steffens. He stated that he had reviewed the parties' deeds, and when he walked the property with the Grays in November 2017, he found the corners of the Grays' property. He opined that the Grays owned the property over which the right-of-way ran. He took "no issue" with the Location Survey attached to the RWMA, because it "coincides" with the 2006 DH Steffens Survey, which was admitted into evidence.

At the end of Wilk's testimony, the case was continued to April 9, 2020. Because of the pandemic and continuance requests by both parties, however, it did not resume until March 25, 2021.

Between December 20, 2019 and March 25, 2021, two things impacting this litigation occurred. In May of 2020, the Grays installed a split-rail fence between the right-of-way and the parties' two parcels as shown on the survey attached to the RWMA that extended past the end of the right-of-way into a wooded area. Later that year, Rodriquez

[9] Rodriguez's attorney stated three times during opening statement that even if the Grays "win" on the question of whether the right-of-way is on the Grays' property, which he did not think they would, Rodriguez still would be entitled to a right-of-way over the Grays' property.

engaged Kevin Norris to perform a boundary survey of his property (the "Norris Survey"). That survey was completed on March 18, 2021.

The Location Survey attached to the RWMA depicts the common boundary line between the properties as being approximately 120 feet from Rodriquez's house. The DH Steffens Survey of the Grays' property does not specify the distance between the common boundary and Rodriguez's house, but it reflects a common boundary much closer to the house. The Norris Survey depicts a more southerly common boundary with the right-of-way being on the Armstrong property rather than the Grays'. It depicts the common boundary to be about ninety-one feet from Rodriguez's house as shown on the Location Survey.

On March 25, 2021, the scheduled second day of trial, the parties again engaged in another unsuccessful mediation. The trial was again postponed, and, after several more postponements, was scheduled to resume on October 21, 2021.[10]

[10] Rodriguez recorded the Norris Survey on June 22, 2021. The Grays recorded the DH Steffens Survey on December 10, 2021. Arguing that Maryland is a race-notice jurisdiction, Rodriguez makes much of recording his survey first, but this is not a situation to which the race-notice concept applies because surveys do not ordinarily transfer an interest in real property. *See Shelter Senior Living IV, LLC v. Baltimore Cnty. Maryland*, 251 Md. App. 129, 142-43 (2021) (citing Md. Code Ann., Real Property § 3-203 and indicating that Maryland is a "race-notice jurisdiction"), and *In re Levitsky*, 401 B.R. 695, 720 (Bankr. D. Md. 2008) (explaining that a race-notice jurisdiction means that when a grantor conveys *a deed or deed of trust* to one purchaser or lender and then subsequently conveys *a deed or deed of trust* on the same property to another purchaser who takes the property without notice of the first *deed or deed of trust*, "the first purchaser or lender who properly records its interest in the land records will defeat the other purchaser or lender's interest").

Instead of proceeding to trial on October 21, 2021, the parties entered into the Consent Order that was accepted by the court. It provided that: 1) the RWMA, to which was attached the Location Survey, is "a valid and binding" agreement; 2) that the Grays are the "owners of the underlying fee simple parcel which encompasses" the right-of-way "which is a ten foot (10') wide driveway that runs along the northerly most boundary [of the Grays' property] North 44', East 275 feet to the place where the southern most boundary [of the Rodriguez property] intersects the first said boundary and thence North 44', East eighty[-]five feet (85') to a point where the said gravel drive turns west onto [the Rodriguez property]" and "as more fully shown on the attached survey"; 3) neither party shall place obstructions in the depicted right-of-way; 4) Rodriguez will not destroy the Grays' property located outside the right-of-way; 5) Rodriguez will install a five mph speed limit sign in a specified location within thirty days of the order; and 6) Rodriguez will pay $5,000 to the Grays within thirty days of the order.

On November 19, 2021, Rodriguez bulldozed 155 feet of the split-rail fence installed by the Grays. In response, the Grays petitioned in the District Court for a peace order, which was granted temporarily. At a hearing subsequently held, the District Court found that Rodriguez had violated the Consent Order by trespassing on the Grays' property and extended the peace order for six months. The peace order expired at the end of the six months.

**Civil Action**

On December 17, 2021, Rodriguez initiated the Civil Action with a four-count complaint against the Grays. In the first two counts, he sought quiet title and a declaratory

judgment that the actual boundary line between Rodriguez's and the Grays' property was as shown on the Norris Survey. The third count was for trespass and the fourth was for nuisance. The Grays responded with a counterclaim for quiet title, a declaratory judgment, and trespass based on the destruction of their fence.[11,12]

The Grays, asserting res judicata based on the Consent Order, moved for summary judgment on Rodriguez's quiet title and declaratory judgment claims. Rodriguez, in opposition, argued that "an agreement for the maintenance of a right of way does not legally or actually change the boundaries of the parties' real property established by markers in the ground" and that "a genuine dispute of material facts" remains. He asserts that although the Consent Order "resolved the dispute about [his] right of way over the [Grays'] property[,]" it did not "legally declare or actually determine" the boundary line. In his opposition, he included an affidavit and report from Kevin Norris.

The Grays responded that the Norris Survey was not "in any way" relevant to whether the doctrine of res judicata or collateral estoppel applied. They argued that all that needed to be done was to look at the "legal and factual determination made by the Court in the [p]rior [c]ase." Because the Consent Order recognized the validity and enforceability of the RWMA and stated that the Grays are the owners "of the parcel of property over

[11] In an amended complaint, the Grays later added wrongful interception of oral communications, which they later dismissed.

[12] In a separate action, the Grays also petitioned for contempt against Rodriguez for violating the Consent Order. That action is the subject of the second appeal. When we address that appeal later in this opinion, we will provide additional information.

which Rodriguez was granted an easement[,]" they assert that Rodriguez had, by his consent, "conceded" the Grays' ownership of the property on which the gravel drive sits and, by doing so, "gave up the ability to further dispute the boundary lines as established in [the RWMA] and in [the DH Steffens] survey."[13]

In an order filed June 22, 2022, the circuit court granted the Grays summary judgment on their quiet title and declaratory judgment counts and dismissed Rodriguez's complaint on the same counts. It held that the Consent Order controlled the boundary line dispute, and that the boundary line between the Grays' property and Rodriguez's property "is as described" in the Grays' deed, the RWMA, the Consent Order, and the DH Steffens Survey. It further ordered that the Norris Survey was null and void. Rodriguez's motion for reconsideration was denied by the circuit court.

The Grays also sought summary judgment on their trespass and nuisance counts, and both parties filed motions in limine to limit evidence the other party might offer in regard to those counts. The circuit court reserved on the Grays' motion for summary judgment, but granted their motion in limine. In addition, it prohibited Rodriguez from introducing evidence of damages pre-dating the Consent Order of October 21, 2021, based

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[13] The Grays also argued that the Consent Order states that in testimony on December 20, 2019, Wilk testified that the boundary description in the RWMA "coincides" with the DH Steffens Survey of 2006. The preamble to the Consent Order states: "THIS MATTER having come before this Court on Plaintiff's Complaint for Declaratory Judgment, Injunctive Relief and Damages and Defendant's Counterclaim, and this Court having taken testimony on December 20, 2019, and this matter having been scheduled for the second day of trial . . . ." There is no express reference to the DH Steffens Survey or Wilk's testimony in the Consent Order. But it does expressly refer to the "ten (10) foot existing gravel driveway" that "exists over the [Grays'] property" as "shown on the attached survey[.]"

on the res judicata determination, and after December 17, 2021, the date Rodriguez filed his complaint, for failure to allege the continuing nature of the trespass/nuisance claims. As to Rodriguez's motion in limine, the court ruled the Grays could introduce evidence of Rodriguez's malice from December 11, 2018 to the date Rodriguez destroyed the Grays' hedges, to February 18, 2022 when the Grays filed their counterclaim. The court limited Rodriguez's damages evidence to nominal damages and punitive damages but precluded compensatory damages, damages for loss of use, or attorney's fees because he did not plead or allege those damages.

In the three-day jury trial beginning on October 25, 2022, five witnesses testified: Joseph Gray, Jr.; Philip Wilk; Herbert Redmond (the surveyor of the DH Steffens Survey); Kevin Norris; and Rodriguez. At the conclusion of the evidence, the jury found that Joseph Gray did not commit a nuisance but did trespass, causing Rodriguez no damage. It awarded Rodriguez $1 in nominal damages. It found that Rodriguez also trespassed and caused damage to the Grays' property. It awarded the Grays $3,640 in compensatory damages related to the removal of the fence and $34,000 in punitive damages. This timely appeal by Rodriguez followed.

## DISCUSSION

### I.

Rodriguez contends that the circuit court erred in granting the Grays' summary judgment on his quiet title and declaratory relief counts based on res judicata. He argues that the previous 2019 Action, which resulted in the Consent Order, involved only the use and enforcement of the right-of-way whereas the action on appeal is a quiet title action for

the purposes of determining the parties' common boundary line. The Grays counter that the circuit court's grant of summary judgment based on res judicata was proper because the location of the parties' common boundary line was fully litigated in the 2019 proceeding.

Res judicata, or claim preclusion, is an affirmative defense that bars relitigating a claim when "there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation." *Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 106-07 (2005). "By preventing parties from relitigating matters that have been or *could have been* decided fully and fairly, the doctrine of *res judicata* avoids the expense and vexation attending multiple lawsuits, conserves the judicial resources, and fosters reliance on judicial action by minimizing the possibilities of inconsistent decisions." *Gonsalves v. Bingel*, 194 Md. App. 695, 709 (2010) (internal quotation marks and citation omitted), *cert. denied*, 417 Md. 501 (2011). There are three requirements for the doctrine of res judicata to apply: "(1) the parties in the present litigation are the same or in privity with the parties to the earlier action; (2) the claim in the current action is identical to the one determined in the prior adjudication; and (3) there was a final judgment on the merits in the previous action." *Powell v. Breslin*, 430 Md. 52, 63-64 (2013).

Here, the first requirement is not at issue. The parties are the same in both the present matter and the earlier litigation. As to the third element, consent orders are ordinarily considered final judgments on the merits. *See Jones v. Hubbard*, 356 Md. 513, 532 (1999)

(Consent orders "should normally be given the same force and effect as any other judgment, including judgments rendered after litigation."). At issue is the second requirement and whether the present claim is substantially identical to the claim that ended with the Consent Order.

When considering whether claims are identical for the purposes of res judicata, we apply the "transaction" test. *See Kent Cnty. Bd. of Educ. v. Bilbrough*, 309 Md. 487, 498-99 (1987). Under that test, "[c]ases are grouped by transaction pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Douglas v. First Sec. Fed. Sav. Bank, Inc*., 101 Md. App. 170, 188 (1994) (quotation marks and citation omitted). *See also Gertz v. Anne Arundel Cnty.*, 339 Md. 261, 269 (1995) ("[W]e adopted the transaction test of § 24 of the *Restatement (Second) of Judgments* as the basic test for determining when two claims or causes of action are the same for purposes of *res judicata*."). A Comment to § 24 of the RESTATEMENT (SECOND) OF JUDGMENTS, at 199, indicates that ordinarily a transaction "connotes a natural grouping or common nucleus of operative facts." In other words, we look to see the "relatedness in time, space, origin or motivation" of the operative facts when they are woven together. *Smalls v. Maryland State Dep't of Educ., Off. of Child Care*, 226 Md. App. 224, 247 (2015) (quotation marks and citation omitted). No one factor is determinative, but "the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first." *Id.* (cleaned up). "If there is a

substantial overlap, the second action should ordinarily be held precluded." *Id.* (cleaned up) (quoting the Comment to § 24 of the RESTATEMENT).

Under § 22 of the RESTATEMENT (SECOND) OF JUDGMENTS, at 185, a litigant who may file a counterclaim but does not, is not "precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2)." That subsection provides:

> (2) A defendant who may interpose a claim as a counterclaim in an action *but fails to do so is precluded*, after the rendition of judgment in that action, from maintaining an action on the claim *if*:
>
> (a) The counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or
>
> (b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action *would nullify the initial judgment or would impair rights established in the initial action*.

*Id.* (emphasis added). *See Fairfax Savs., F.S.B v. Kris Jen Ltd. P'ship*, 338 Md. 1, 10-11 (1995) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 22 (1982)).

After setting out the law on res judicata and collateral estoppel in his appellate brief, Rodriguez states that the Consent Order refers solely to the Location Survey, without any reference to Mr. Wilk's testimony in the 2019 Action, the DH Steffens Survey, or "the recorded Kevin Norris Survey[.]" On this predicate, he contends that the 2019 Action and the present litigation represent different "transactions." More specifically, he asserts that the present litigation seeks a determination of the parties' common boundary line, whereas the focus in the 2019 Action was "enforcement of a right of way[.]"

The Grays assert in response that counts 1 and 2 of Rodriquez's complaint in the present action are essentially identical to his countercomplaint in the 2019 Action. They

argue that Rodriquez, in the previous litigation, counterclaimed for quiet title and a declaration that he owned the Grays' land adjoining Pomfret Road on which the right-of-way was located and that the right-of-way was fifteen feet wide and not ten feet wide. In addition, he sought injunctive relief in his nuisance count because the Grays' were "seriously interfering" with his "ordinary comfort and use of his property." In the present action, and "[a]lthough [he] phrased his prayers for relief differently," they point out that Rodriguez is seeking "quiet title," a declaration that the "boundary lines are as depicted in the Norris Survey," "damages for trespass," and "injunctive relief and damages against the Grays." As they see it, Rodriguez is seeking "the exact same thing he had already sought" in the previous litigation.

We are persuaded that the claims and purpose of the previous 2019 Action and the present action are, for the purposes of res judicata, substantially the same. To be sure, the previous litigation included the enforcement and use of the right-of-way, but its location in respect to the common boundary was essential to its resolution by the Consent Order, which determined that the RWMA was a "valid and binding agreement."[14] The RWMA establishes, in part, that the right-of-way has been in place since 1958 and is the "existing gravel drive" that runs along "the northern most boundary" of the Grays' property until it intersects "the southern most boundary" of the Rodriguez property as shown on the

[14] A hand-written note indicates "no boundary performed" as to the Rodriguez property. It does indicate by hatch-marked lines the Grays' property in a shape similar to that shown on both the DH Steffens and Norris Surveys.

attached survey. It orders Rodriguez not to "enter upon, alter, modify or destroy" the Grays' property "outside the boundaries of the ten (10) foot existing gravel driveway[.]"

Under the doctrine of res judicata, the judgment in a previous action is not only conclusive "as to all matters that have been decided in the original suit, *but as to all matters which with propriety could have been litigated in the first suit*." *Mostofi v. Midland Funding, LLC*, 223 Md. App. 687, 696 (2015) (emphasis added) (quotation marks and citation omitted). Maryland's counterclaim rule is permissive, and Rodriguez filed a counterclaim in the 2019 Action. Under Rule 2-612, the court's acceptance and entry of the Consent Order is an adjudication "of [all] the claims for relief presented in the action, whether by original claim, counterclaim, cross-claim, or third-party claim."

As our Supreme Court has said in *Kent Island, LLC v. DiNapoli*, 430 Md. 348, 359-60 (2013):

> "A consent judgment or consent order is an agreement of the parties with respect to the resolution of the issues in the case or in settlement of the case, that has been embodied in a court order and entered by the court, thus evidencing its acceptance by the court." *Long v. State*, 371 Md. 72, 82 (2002) (citing *Jones*, 356 Md. at 529; *Chernick v. Chernick*, 327 Md. 470, 478 (1992)). A consent decree memorializes the parties' agreement to relinquish the right to litigate the controversy, "and thus save themselves the time, expense, and inevitable risk of litigation." *Id*. at 82 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971)).

Under the terms of the Consent Order, the RWMA "is a valid and binding agreement[.]" By its terms, "an easement exists over the [Grays'] property that is ten (10) feet in width which may be used by [Rodriguez] for ingress and egress to [his] property

and by [the Grays] for ingress and egress to [their respective properties.]"[15] The RWMA was entered into by the Grays and Rodriguez's predecessors in title with the attached Location Survey.[16] It references what is now the Rodriguez parcel to the metes and bounds description in the 1998 deed to his predecessors in title recorded at the Charles County Land Records at Liber No. 2775, Folio 395, and the Grays' parcel to the metes and bounds description in the deed recorded at the Charles County Land Records at Liber No. 176, Folio 304, neither of which purport to provide the Rodriguez property with fee simple access to Pomfret Road.

Prior to executing the Consent Order of October 21, 2021, Rodriguez, who was represented by counsel when he signed the Consent Order, had heard Wilk's testimony and was aware of both the Norris and DH Steffens Surveys. In short, Rodriguez had every reason not to accept the Consent Order as it was written and to pursue the boundary issue in the previous litigation. To permit Rodriguez to advance his quiet title and declaratory judgment claims would, in effect, nullify the Consent Order and "impair rights established in the initial action." *Fairfax Savs.*, 338 Md. at 11 (quotation marks and citation omitted).

Nothing in the Consent Order in the 2019 Action indicates it to be anything other than an agreement to resolve or settle all the issues presented in the case. There is certainly no reservation of the Consent Order's effect on or application to other claims or litigation regarding the Grays' ownership of the property on which the right-of-way sits and its

[15] The Consent Order provides for the payment by Rodriguez to the Grays of $5,000 within thirty days of the order. It does not express what that sum included.

[16] The RWMA indicates that "No Title Examination" was done in its preparation.

intersection with Rodriguez's property along the common boundary line as shown on the Location Survey. *See R&D 2001, LLC v. Rice*, 402 Md. 648, 663-64 (2008); *Young-Henderson v. Spartanburg Area Mental Health Ctr.*, 945 F.2d 770, 773-74 (4th Cir. 1991).

Accordingly, we affirm the circuit court's grant of summary judgment on Rodriguez's quiet title and declaratory relief counts as it relates to the common boundary between his property and the Grays' property as shown on the Location Survey. We recognize Rodriguez's argument that the grant of summary judgment on the issue was inappropriate because the location of the right-of-way and the common boundary was a disputed material fact based on the DH Steffens and Norris Surveys. But, as we see it, the determination of the right-of-way in relation to the common boundary referred to above is one of contract interpretation rather than fact-finding. '"[A] consent order is a valid contract between the parties that is judicially enforceable."' *Kirby v. Kirby*, 129 Md. App. 212, 215 (1999) (quoting *A.H. Smith Assocs. Ltd. P'ship v. Maryland Dep't of Env't,* 116 Md. App. 233, 243 (1997)). Here, there was testimony and argument introduced in the previous litigation indicating that the DH Steffens Survey coincides or is consistent with the Location Survey. Even though that survey was not referenced in the Consent Order, it does not contradict the Location Survey and provides a boundary survey description of the common boundary line between the two properties. To be sure, the Norris Survey reflects a different common boundary line, and, in the absence of the Consent Order, that would constitute a disputed material fact for the purposes of summary judgment. But, as indicated above, Rodriguez had the Norris Survey, was aware of the DH Steffens Survey, and had heard the testimony of its relationship to the Location Survey when the Consent Order was

signed, ending the previous litigation. Under these facts, we are not persuaded that the court's inclusion of the DH Steffens Survey in its order was error, but if it were, it was harmless because the boundary between these two properties was established for these parties and their successors and assigns by the Consent Order.

**II.**

Rodriquez further contends that the circuit court erred in striking the Norris Survey as void ab initio and precluding any evidence that contradicted the DH Steffens Survey. The Grays respond that the circuit court did not err because the court was simply applying the terms of the Consent Order to which the parties had agreed.

As explained in Part I, the boundary line between the Grays' property and Rodriguez's property was agreed to in the Consent Order, and the DH Steffens Survey is consistent with that agreed-to line. Therefore, it was not error to preclude evidence contradicting the DH Steffens Survey in regard to the location of the common boundary line as a result of the Consent Order.

**III.**

Rodriguez contends that the circuit court erred in limiting evidence of his damages to a period between October 21, 2021 and December 17, 2021, wrongfully limited him to nominal damages.[17] He further contends that the court erred in allowing the Grays to

[17] More particularly, Rodriguez argues that he was wrongfully precluded from introducing a video he took on January 9, 2022, in which he alleged that Joseph Gray accosted him with a stick.

introduce video recording evidence indicating a racial bias toward the Grays.[18] Asserting that evidence of racial bias did not "prove any element" of trespass or nuisance, he argues that such evidence was both not relevant and overly prejudicial.

Because Rodriguez previously litigated or had the ability to litigate claims of the trespass/nuisance by Joseph Gray, the Grays respond that the circuit court properly barred Rodriguez from offering evidence of those claims pre-dating the Consent Order based on res judicata. As to evidence of any trespass/nuisance actions by Gray that occurred after Rodriguez filed his complaint, that evidence was properly barred because he did not plead that those actions were of a continuing nature. In addition, the Grays argue that the period of time for which Rodriguez could offer evidence of damages to his property and to his health and mental well-being, the health and mental well-being claims were withdrawn prior to trial, and no evidence of any property damages was introduced. As to the court allowing evidence of Rodriguez's personal animus and racial bias toward Joseph Gray to support their punitive damages claim against Rodriguez, the Grays argue that the circuit court did not abuse its discretion.

Based on the earlier Consent Order and his pleadings, we perceive neither error nor an abuse of the court's discretion in limiting the time period for which Rodriguez could produce evidence regarding his trespass/nuisance claims. Because a punitive damages

[18] Rodriguez directs our attention to two video recordings. The first video, dated May 28, 2021, records an encounter in which Rodriguez tells Joseph Gray: "Go and see if you can buy some watermelons, fried chicken and go have a barbeque right in your house and stop bothering me, can you do that?" In the second video, dated July 15, 2021, Rodriguez referred to Joseph Gray an "animal."

claim requires a showing of actual malice, we are persuaded that the introduction of evidence of Rodriguez's racial bias was relevant and that the two videos were not overly prejudicial. *See Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 263 (2004) (stating that only when actual malice is alleged may punitive damages be awarded). "Actual malice" refers to conduct characterized by, among other things, "evil motive[.]" *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 454 (1992). Acts motivated by racial bias that are taken with a desire to harm or humiliate someone can support a finding of malice. *Nelson v. Kenny*, 121 Md. App. 482, 495 (1998). A finding of malice is a fact-based determination reached by credibility assessments and reasonably drawn inferences from the evidence. Language dehumanizing a person and directing verbally demeaning language at them may reasonably inform a malice analysis.

**THE CONTEMPT ACTION (No. 2035, SEPT. TERM, 2022)**

The second appeal arises out of a contempt petition filed by the Grays against Rodriguez in the Circuit Court for Charles County. The circuit court granted the petition and ordered Rodriguez to pay the Grays $11,034.50 in damages, plus interest. Rodriguez filed a Motion to Alter, Amend, or Vacate the Contempt Orders, which the court denied. In his appeal, Rodriguez presents three questions which we have condensed to two[19]:

[19] As presented in his appellate brief, his questions are:

1. Did the [c]ircuit [c]ourt err in holding [a]ppellant in contempt without notice of the Show Cause Order?

I. Did the circuit court err when it held Rodriguez in contempt because: A) he had not been properly served with the circuit court's show cause order, and B) the contempt order did not contain a purge provision?

II. Did the circuit court err in requiring Rodriguez to pay the cost of the fence he damaged when he has already been held liable for those damages in two other actions?[20]

For the following reasons, we shall reverse the judgment of the circuit court.

## FACTS AND PROCEEDINGS

As discussed in the Civil Action, the Consent Order was entered on October 21, 2021. On November 19, 2021, Rodriguez bulldozed the fence installed by the Grays along but outside of the right-of-way.

The Grays filed a petition for contempt against Rodriguez in the Circuit Court for Charles County on November 30, 2021 for violating the terms of the Consent Order based on the destruction of the fence, his failure to install a speed limit sign, and his failure to

2. Did the [c]ircuit [c]ourt err in denying [a]ppellant's Motion to Alter, Amend, or Vacate Contempt Order?

3. Did the [c]ircuit [c]ourt err in waiting, reversing its findings that [a]ppellant had purged the violation, and still holding [a]ppellant liable for the same fence for which he was held liable in the Second Action and in the criminal trial?

[20] The two other actions include the consolidated Civil Action, discussed above, in which the jury found that Rodriguez had committed trespass and awarded the Grays $3,640 in compensatory damages and $34,000 in punitive damages. The other is the District Court of Charles County case where Rodriguez was found criminally liable for malicious destruction of property valued at more than $1,000 in the District Court for Charles County. That case was removed to the stet docket on the condition that Rodriguez pay $5,500 in restitution within 120 days. When it had not been paid, the State moved to reopen the case. Following a restitution hearing and a violation of parole hearing, Rodriguez was found to have violated his probation and ordered to pay restitution in the amount of $3,640, payable in $200 monthly installments.

pay the Grays $5,000. The Grays' attorney sent Rodriguez a copy of the contempt petition by certified mail, return receipt requested, restricted delivery.[21] A USPS tracking receipt indicates that Rodriguez claimed the petition papers on December 10, 2021.

On January 19, 2022, the circuit court issued a show cause order on the petition setting a hearing date of March 4, 2022. Citing Md. Rule 15-206(d), the show cause order directed service on Rodriguez by first class mail. The Grays' attorney affirmed by affidavit that Rodriguez was sent a copy of the show cause order by both first class mail as directed by the court and also by certified mail.

Rodriguez did not appear at the hearing on March 4, 2022. Paul, Joseph Gray Jr.'s son, testified that Rodriguez had violated the Consent Order by destroying 150 feet of the Grays' split-rail fence located on their property outside of the right-of-way on November 19, 2021, failing to install the required speed limit sign, and failing to pay the Grays $5,000. Evidence was presented that it cost $3,350 to repair the fence in addition to the costs to re-stake the property and to bring the contempt action.

The circuit court found Rodriguez in contempt for violating the Consent Order. It ordered a monetary judgment that included $5,000, with interest from the date of the Consent Order and $6,034.50 for costs associated with the destruction of the fence. In addition, it ordered installation of the speed limit sign as required by the Consent Order. A status hearing date was set for April 1, 2022. A new attorney entered his appearance on behalf of Rodriguez on March 30, 2022.

[21] A courtesy copy was also sent to the attorney who represented Rodriguez when the Consent Order was signed.

At the April 1, 2022 status hearing, Rodriguez and his attorney were present. His attorney asked the court to set aside the contempt finding because Rodriguez did not have notice of the hearing on March 4, 2022, and had believed the April 1, 2022 hearing was the contempt hearing. Questioned by the court about why Rodriguez did not receive service, his attorney stated, without challenging the Grays' attorney's affidavit of service, that he did not "know specifically what went wrong" but Rodriguez believed that Joseph Gray intercepted that mail. The Grays' attorney stated his belief that Rodriguez knew of the date of the contempt hearing based on information that he had met with an attorney shortly before the March 4, 2022 hearing date. The court directed Rodriguez to file a written motion with proper evidence supporting his notice claim.

Rodriguez's attorney then asked the court to give Rodriguez thirty days to comply with the Consent Order, and the court agreed. As a showing of good faith, Rodriguez paid the Grays $1,000 toward what he owed under the Consent Order.

A week later, Rodriguez filed the requested written motion to alter/amend/vacate the contempt order. Attached to that motion was Rodriguez's affidavit stating that he did not receive the show cause order and an affidavit from Kevin Norris that the destroyed fence was on Rodriguez's property and not the Grays'. The Grays, opposing the motion, argued compliance with the court's direction to send the show cause order by first-class mail, which was never returned. They added that the show cause order sent to Rodriguez by certified mail remained "unclaimed."

Several status hearings on the contempt petition occurred as the Civil Action proceeded through litigation, ending on October 27, 2022.[22]

The final hearing on the motion to alter/amend/vacate the contempt order occurred on January 5, 2023. Rodriguez's attorney again asked the court to alter/amend/vacate the contempt order based on lack of service of the show cause order, duplicative judgments for payment under the civil and criminal actions, and Rodriguez's payment of $5,000 required by the Consent Order. The Grays' attorney agreed that Rodriguez had paid the $5,000 but that interest of about $230 remained unpaid.[23] After the parties' arguments, the court denied the motion to alter/amend/vacate the contempt order, and Rodriguez filed this appeal.

## DISCUSSION

### I.

[22] At a status hearing on May 10, 2022, it was agreed that Rodriguez had installed a speed limit sign and paid $5,000 to the Grays as required under the Consent Order, but any accrued interest had not been paid. Rodriguez argued that he had purged the contempt and asked the court to grant his motion to alter/amend/vacate the contempt order, which the court had yet to rule on. At a status hearing on May 26, 2022, Rodriguez reminded the court about this pending motion, but given the many other outstanding motions between the parties in the Civil Case, the parties agreed to argue those motions instead. At a status hearing on June 8, 2022, Rodriguez asserted compliance with all requirements of the Consent Order but had not paid any interest on the $5,000. He had not paid the monetary judgment related to the fence because he believed that was on his property. Rodriguez's attorney asked the court to vacate the contempt order based on a lack of service, but he understood that it would be easier to decide the motion when the Civil Case was resolved. The court again reserved its ruling on the motion.

[23] Whether the portion of the contempt order beyond the $5,000 required by the Consent Order was paid or had been incorporated into another judgment is not clear.

Initially, the Grays contend that Rodriguez's appeal of the contempt order is untimely and that the only appealable issue is the circuit court's denial of his motion to alter/amend/vacate the consent order. They argue that the contempt order was entered on March 8, 2022. Rodriguez orally asked the court to vacate the contempt order on April 1, 2022, and filed a written motion on April 7, 2022. The court denied the motion on January 5, 2023, and Rodriguez appealed on January 23, 2023.[24]

Rodriguez responds that the contempt order of March 8, 2022 was not final until the motion was denied. He argues that the order was "clearly" not final because the court retained jurisdiction, allowed him to purge and to pay a partial amount on April 1, 2022, and continued with status hearings to determine whether the Consent Order had been satisfied. In addition, the court required his personal appearance on April 1 and at multiple status conferences.

Ordinarily, a party has thirty days from the entry of a final judgment to file an appeal. *See* Md. Rule 8-202(a). In an appeal from a contempt finding, it is thirty days from the entry of the order making that finding. *Stevens v. Tokuda*, 216 Md. App. 155, 165 (2014). Here, the court entered the order ruling that Rodriguez was in contempt on March 8, 2022.

There is an exception to the thirty-day rule. When a party files a motion under Md. Rule 2-534 within ten days after the entry of judgment, Md. Rule 8-202(c) extends the time

[24] In *Rosales v. State*, 463 Md. 552, 562-70 (2019), the Supreme Court of Maryland held that the thirty-day time period for filing an appeal under Md. Rule 8-202 is not jurisdictional but a matter of a "claim-processing" and can be waived when not raised on appeal. Here, it has been raised by the Grays.

period for noting an appeal to thirty days after the motion is withdrawn or decided. *See Pickett v. Noba*, *Inc.*, 114 Md. App. 552, 556 (1997) (citing Md. Rule 2-534 and Md. Rule 8-202(c), and holding that an untimely filed motion under Md. Rule 2-534 does not toll the time for filing an appeal), *cert. denied*, 351 Md. 663 (1998). If the contempt order entered on March 8, 2022 was a final judgment, an oral motion on April 1, 2022 or a written motion on April 8, 2022 would not trigger the ten-day exception to the thirty-day rule and extend the appeal time to January 23, 2023. The facts of this case might suggest that the court did not consider it a final judgment. We need not resolve the issue, however, because the result of our review in either situation would be the same. Therefore, we will review it as a review of the denial of the motion to alter, amend, vacate for abuse of discretion. As we stated in *Bass v. State*, 206 Md. App. 1, 11 (2012):

> It is well settled that "an exercise of discretion based upon an error of law is an abuse of discretion," *Brockington v. Grimstead,* 176 Md. App. 327, 359 (2007), and when an otherwise discretionary decision is premised upon legal error, that decision is necessarily an abuse of discretion because "the court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case." *Arrington v. State,* 411 Md. 524, 552 (2009); *see also Alston v. Alston,* 331 Md. 496, 504 (1993) (noting "even with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards").

In regard to the denial of his motion to alter/amend/vacate, Rodriguez contends that he was not properly served with the show cause order. More specifically, he argues the service of a show cause order in a contempt proceeding is governed by Md. Rule 15-206(d), which provides:

> (d) **Service of order.** – The [show cause] order, together with a copy of any petition and other document filed in support of the allegation of contempt,

> shall be served on the alleged contemnor pursuant to Rule 2-121 or 3-121[25] or, if the alleged contemnor has appeared as a party in the action in which the contempt is charged, in the manner prescribed by the court.

(Emphasis added.) Rule 2-121(a), which governs in personam service of process in the circuit court, requires service of process to be made:

> (1) by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it; (2) if the person to be served is an individual, by leaving a copy of the summons, complaint, and all other papers filed with it at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion; or (3) by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: "Restricted Delivery—show to whom, date, address of delivery."

The Supreme Court has said that, to be valid, "the service must have been personal and the fact that the defendant may have had actual knowledge of the suit against him would not cure a defective service." *Sheehy v. Sheehy*, 250 Md. 181, 185 (1968). In other words, improper service of process warrants dismissal. *See* Md. Rule 2-507(b) (stating that "[a]n action against any defendant who has not been served or over whom the court has not otherwise acquired jurisdiction is subject to dismissal as to that defendant at the expiration of 120 days from the issuance of original process directed to that defendant").

The Consent Order concluded the 2019 Action that was brought by the Grays against Rodriguez on October 21, 2021. Although Rodriguez's counsel in that case did not withdraw his appearance, Md. Rule 2-132(d) provides that, in the absence of circumstances not present here, when no appeal is taken from a final judgment, "the appearance of an attorney is automatically terminated upon the expiration of the appeal period[.]" The appeal

[25] Rule 3-121 governs service of process in district court.

period ended on November 21, 2021. The Grays' filed their petition for contempt on November 30, 2021 as a new case.

The language of Md. Rule 15-206(d) allowing the court to prescribe service "if the alleged contemnor has appeared as a party in the action in which the contempt is charged" does not apply because the petition for contempt was filed as a new and separate case. Because service of process under Md. Rule 2-121 was required, the court erred by directing that the show cause order be sent by regular mail to Rodriguez. *Cf. Flanagan v. Dep't of Hum. Res.*, 412 Md. 616, 623-27 (2010) (requiring show cause order for contempt to be served personally and holding that leaving it at the door of the contemnor's usual place of abode was insufficient service of process). Therefore, it was an abuse of discretion to deny the motion to alter, amend, or vacate. As a result, the contempt order will be vacated and the case dismissed.

For that reason, we need not address Rodriguez's question regarding damages related to the fence except to state that there appears to be a general consensus among the parties and the court that Rodriguez has been found liable for removing it in multiple court actions and that he should only be responsible for paying for it once. We agree.

**JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY IN CASE NO. C-08-CV-21-000602 AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

**JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY IN CASE NO. C-08-CV-19-000618 REVERSED AND VACATED. COSTS TO BE PAID BY APPELLEES.**

**The Location Survey**

BK 05605 PG 0436

Location Survey
Land of
Everett Parker et al
7th Election Dist.
Charles County MD

Tomlinson & Associates
5485 Indian Hd Hwy
Indian Hd, MD. 20640
301-743-9665

161

**The DH Steffens Survey**

E-FILED; Charles Circuit Court
Docket: 2/18/2022 4:52 PM; Submission: 2/18/2022 4:52 PM

BOUNDARY SURVEY
LAND OF
JOSEPH C. & ALICE J. GRAY, JR.

SURVEYOR'S CERTIFICATE

DH Steffens Co.

EXHIBIT

62/83

80

**The Norris Survey**

E-FILED; Charles Circuit Court
Docket: 12/17/2021 3:01 PM; Submission: 12/17/2021 3:01 PM

EXHIBIT
C

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