IN THE SUPREME COURT OF GUAM

IN THE MATTER OF THE APPLICATION OF PETER B. LEON GUERRERO and ADOLF P. SGAMBELLURI, in their capacity as JOINT ADMINISTRATORS OF THE ESTATE OF PEDRO B. LEON GUERRERO, Petitioners for Registration of Title to Lot No. 186NEW, Municipality of Yona, Territory of Guam, Petitioners-Counter Oppositioners-Appellees

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IN THE MATTER OF THE APPLICATION BY THE ESTATE OF H. DWIGHT LOOK for Registration of Title to Lot No. 186NEW, Municipality of Yona, Territory of Guam, Oppositioner-Counter Petitioner-Appellant

OPINION

Supreme Court Case No. CVA03-024
Superior Court Case No. LR0120-73

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Appeal from the Superior Court of Guam
Argued and submitted on July 19, 2004
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Jr., Associate Justice; MIGUEL S. DEMAPAN, Justice *Pro Tempore*.

TORRES, J.:

[1] The proceedings in this case date to 1973 and involve a dispute over the ownership of land. The instant appeal is from a decision of the trial court in a proceeding ordered upon remand of the Supreme Court of Guam for consideration of an adverse possession issue. On remand, the trial court held that Counter-Petitioner/Appellee Look Estate ("Look Estate") failed to prove that it adversely possessed the disputed property. We affirm the judgment of the trial court.

I.

[2] The sole issue on appeal is whether the trial court properly found, on remand from this court, that the Look Estate failed to establish a factual record sufficient to prove adverse possession. The review of this ruling is the only matter before this court. This issue arose from a thirty-year background, the relevant points of which are presented below.

[3] Francisco B. Leon Guerrero ("Francisco") owned 3,200 hectares of real property in Yona, Guam described as Estate 278, Yona. In 1954, Francisco borrowed $60,000.00 from the government of Guam, securing the debt with a mortgage on this land. Francisco defaulted and the government foreclosed and purchased the property at the foreclosure sale. In 1961, the property was redeemed by Frank D. Perez (Perez) after Francisco sought his help. Francisco granted Perez a power of attorney to sell Estate 278. Perez convinced H. Dwight Look ("Look") to purchase Estate 278 in its entirety. Look purchased the property for $80,000 and at the request of Perez and Francisco, agreed to exempt from the conveyance 120 hectares to be reserved for Francisco. The quitclaim deed ("Deed"), which transferred Estate 278 from Francisco to Look, was recorded on October 11, 1961 and stated:

> All of the property in the Place of Tayagan and Laguina, Municipality of Yona, containing approximately 3,200 hectares according to the provisional record appearing in Volume I of Yona, page 368 as Estate Number 278, Letter B, Suburban, ownership of which is claimed by Francisco Baza Leon Guerrero, Party of the First

> Part, BUT EXCLUDING THEREFROM AND FROM THE PROPERTY HEREIN SOLD AND CONVEYED, one (1) contiguous portion measuring ONE HUNDRED AND TWENTY (120) HECTARES to be surveyed and located at a later date within Land square 26, Sections 2 and 3, and within the shaded area in the map, Appendix "A", attached hereto and made an integral part hereof, it being agreed and understood that any access roads adjacent to the 120 hectares excluded from this conveyance shall not be blocked, obstructed or in a any manner closed by either party to this deed.

Appellant's Excerpts of Record ("ER"), p 96 (Deed). Perez's attorney, Mr. Ramon Diaz, penciled and shaded the exempted area ("Shaded Area") on the topographical map. No other written agreement was ever entered into by the parties subsequent to the original land conveyance. The parties later learned that portions of the Shaded Area were owned by others not involved in this litigation.

[4] Both Look and Francisco used portions of the land and there are conflicting stories and accounts of oral agreements as to the boundaries that each individual would recognize. No writing aside from the topographical map attached to the Deed evidenced the agreement between Look and Francisco as to the boundary of the exempted 120 hectares.

[5] After suffering a stroke, Francisco conveyed his interest in Estate 278, to Pedro B. Leon Guerrero ("Pedro") on January 15, 1971. On October 31, 1972, Look conveyed to Rufo Taitano ("Taitano") a portion of the Shaded Area, designated by Look as Lot No. 184.[1]

[6] On December 10, 1973, Pedro filed a petition to register the 120 hectares of Estate 278 designated in Pedro's petition as Lot No. 186. Oppositions were filed by Look, Taitano and a third unrelated party whose objection was never relevant in this appeal.[2] Look also filed a Counterclaim on June 25, 1974, alleging that he was the owner of the entire Estate 278 by valid conveyance as well as by adverse possession. The litigation concerned whether Francisco would receive land only within the Shaded Area or the 120 hectares expressly noted in the deed's reservation.

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[1] Lot No. 184 was comprised of the yellow and orange portions on the Color-Coded Perry Map (see Attachment "Color Coded Perry Map") and was later designated as Lot No. 186 New-R1.

[2] Although International Products Development Corp. filed an opposition to the original petition to register, the corporation did not oppose the amended petition and is not a party in this appeal.

[7] The trial began in April 1977 before the Superior Court of Guam. The basic issue before the trial court was whether the parties intended Francisco's exemption of land in the Deed to be paramountly a matter of quantity of land or location of land. Pedro conceded that the Shaded Area did not contain 120 hectares but argued that the parties had intended to reserve that specific area of land. The evidence presented at trial consisted of deeds, maps, drawings and testimony under examination by counsel and the court. In its Decision filed June 14, 1978, the trial court agreed with Pedro and stated: "due to a mutual mistake of fact as to the size and original shape of the shaded area, reformation of the exception in the Francisco-Look deed is proper." *In re Pedro B. Leon Guerrero*, LR120-73 (Super. Ct. Guam June 14, 1978). Therefore, Pedro was adjudged the record owner of the 120 hectares designated as Lot No. 186. Look subsequently appealed the trial court's Decision, whereas Taitano did not.

[8] The District Court of Guam Appellate Division reversed the trial court's decision, finding that the Shaded Area dictated what should have been transferred. *In re Pedro B. Leon Guerrero*, Civ. No. 78-00344A (D. Guam. Ap. Div. July 23, 1980). On further appeal to the Ninth Circuit Court of Appeals, the Ninth Circuit agreed and found that the parties did not intend to reserve a free-floating 120 hectare parcel. *Leon Guerrero v. Look*, No. 80-4398 (9th Cir. Nov. 27, 1981). Following the mandate of the District Court Appellate Division, the trial court issued an Order declaring Pedro the fee simple owner of the undisputed portion of Lot No. 186. In re Pedro B. Leon Guerrero, LR120-73 (Super. Ct. Guam June 28, 1982). In the same Order, the trial court accorded Pedro the opportunity to file an amended petition in order to claim the disputed portions of the Shaded Area. *Id*. at 2.

[9] On September 18, 1984, Taitano conveyed Lot No. 184, also known as Lot No. 186-New R1, back to Look. Pedro died on December 7, 1985. Peter B. Leon Guerrero and Adolf P. Sgambelluri, as joint administrators of Pedro's Estate ("Leon Guerrero Estate") were substituted in a Stipulation and Order dated May 30, 1990, and represented the Leon Guerrero Estate in the proceedings that followed.

[10] The Leon Guerrero Estate filed an Amended Petition on September 18, 1990, seeking to register the remaining disputed portion of Lot No. 186. Referring to the Color-Coded Perry Map, the Leon Guerrero Estate sought to register the disputed yellow, orange and green parcels.[3] On October 1, 1990, Look filed an Opposition and Counter-Petition and sought to register the disputed yellow, orange and green parcels. Trial was held on the Amended Petition in March, 1995.

[11] The second trial court found that the transaction between Look and Taitano was a sham and that Look was the real party in interest. *In re Peter B. Leon Guerrero*, LR120-73 (Super. Ct. Guam Sept. 25, 1997) (Findings of Fact and Conclusions of Law, p.7). Additionally, the trial court found that Look was the true owner of a portion of Lot No. 184 because Look received it from third parties and not from Francisco. *Id*. at 10. The trial court also found that Look was entitled to portions of the disputed property *via* the doctrine of agreed boundaries. *Id.* at 9.

[12] The Leon Guerrero Estate appealed and in *In re Peter B. Leon Guerrero*, 2001 Guam 22 ("*Leon Guerrero I*"), this court held that Look is barred by the doctrine of res judicata from claiming any interest forfeited by Taitano because Taitano failed to appeal the judgment against him. *Leon Guerrero I* also held that Look could not claim any portion of the disputed property under the doctrine of agreed boundaries and that Look could not claim the orange or yellow parcels by adverse possession. However, the court in *Leon Guerrero I* found that the record was insufficient to determine whether Look was entitled to the green parcel by adverse possession. *Id* at ¶ 40. The case was remanded for consideration of that issue alone. Subsequently, Look passed away and his estate continued the litigation.

[13] On November 6, 2002, the trial court heard oral argument on remand from *Leon Guerrero I*. In a Decision and Order filed on March 10, 2003, the trial court found that the Look Estate failed to prove that it adversely possessed the disputed green parcel. The trial court entered judgment

[3]The Color-Coded Perry Map was submitted by the Leon Guerrero Estate to this court in *Leon Guerrero I* and by the Look Estate in the instant appeal. The blue parcel in the Color-Coded Perry Map is a portion of Lot 186, which was found to be within the Shaded Area and owned by Pedro, and is not in dispute in this appeal. *See* Appellant's ER p. 26 (Decision and Order) and p. 84 (Judgment).

decreeing the Leon Guerrero Estate as the fee simple owner of Lot No. 186 New R1-New and Lot No. 186 New-1-1 as shown on the Color-Coded Perry Map. The Look Estate appealed.

II.

[14] This court has jurisdiction over this appeal from a final judgment of the Superior Court. Title 7 GCA § 3107(b) (2004). Moreover, the Guam Land Title Registration Law provides in pertinent part that a party aggrieved by a land registration decree may "appeal therefrom in the manner now or hereafter provided by law for appeals in civil actions." Title 21 GCA § 29116 (2002).

[15] The Look Estate appeals the trial court's finding that it failed to prove adverse possession. "Adverse possession is usually a mixed question of law and fact." *Proctor v. Heirs of Jernigan*, 538 S.E.2d 36, 37 (Ga. 2000). Whether the facts are sufficient to constitute an adverse possession claim is a question of law. *Id.* Whether the evidence presented by the claimant proves adverse possession is a question of fact. *See id.* "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . ." Guam R. Civ. P. 52; *see also Guam United Warehouse Corp. v. DeWitt Transp. Servs. of Guam, Inc.*, 2003 Guam 20, ¶ 13, *Town House Dep't Stores, Inc. v. Ahn*, 2000 Guam 32, ¶ 13. "A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake." *Yang v. Hang*, 1998 Guam 9, ¶ 7 (citation omitted). This standard of review for findings of fact is very deferential. *Craftworld Interiors, Inc., v. King Enterprises, Inc.*, 2000 Guam 17, ¶ 8.

[16] The Look Estate argues that because the trial court based its finding solely on documentary evidence from the previous trial, and not on credibility, our review should be completely *de novo*. We disagree.

[17] The Look Estate cites to *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504 (1985) to support its *de novo* argument. The Look Estate's reliance on *Anderson* is misplaced. In that case, the Supreme Court observed that various Courts of Appeals have on occasion asserted the

theory that findings not based on credibility determinations may be reviewed de novo. *Id.* at 574, 105 S. Ct. at 1511-12. The Supreme Court noted, however, that the "rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility." *Id.* at 574, 105 S. Ct. at 1512. The Supreme Court reasoned that a trial court's experience with fact finding also brings experience and expertise. Duplication of the trial judge's efforts on appeal "would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Id.* at 575, 105 S. Ct. at 1512 . Moreover requiring the parties to convince three rather than one judge that their account of the facts is the correct one requires too much energy and resources. *Id*. The Supreme Court further recognized that Rule 52(a), states straightforwardly that findings of fact cannot be set aside unless clearly erroneous, and the Rule does not exclude categories of factual findings from the obligation to accept a trial court's findings unless clearly erroneous. *Id.* at 573-74, 105 S. Ct. at 1511-12.

[18] The language of Federal Rules of Civil Procedure Rule 52(a) discussed in *Anderson* is even more general than the language of Guam Rules of Civil Procedure Rule 52(a) which incorporates the 1985 amendments to the FRCP 52(a) and includes "*oral or documentary evidence*." GRCP 52(a) (emphasis added).[4] The Look Estate's argument that there should not be any special deference when the findings do not rest on the trial court's assessment of credibility of witnesses but on documentary proof is not supported by the court in *Anderson* or by GRCP 52(a). For these reasons, the clearly erroneous standard is the rule rather than the exception. *Id.* at 575, 105 S. Ct. 1512.

[19] We therefore will review the trial court's factual findings in this appeal under the clearly erroneous standard. Our review of the trial court's interpretation or construction of law, and whether the trial court correctly applied the law, are questions of law reviewed *de novo. See Ada v. Guam Tel. Auth.*, 1999 Guam 10, ¶ 10; *Camacho v. Camacho*, 1997 Guam 5, ¶ 24; *People v. Quichocho,* 1997 Guam 13, ¶ 3.

[4] In *Anderson*, the then-existing Federal Rule of Civil Procedure Rule 52(a) provided: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *Anderson* 470 U.S. at 573, 105 S. Ct. at 1511.

III.

[20] The trial court held that the Look Estate could not claim the disputed green parcel by adverse possession under written instrument because the green parcel was within the Shaded Area exempted from the Deed to Look. The trial court then determined that the Look Estate failed its burden to prove adverse possession under an unwritten claim pursuant to section 11211 of Title 7 of the Guam Code Annotated. These two holdings are addressed in turn.

A. Adverse Possession by Written Instrument

[21] The trial court found that the disputed property was exempted from the written conveyance and therefore Look could not claim adverse possession under written instrument. Adverse possession by written instrument is defined by statute as follows:

> When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

Title 7 GCA § 11209 (1998). One claiming title founded upon a written instrument is deemed to have possessed or occupied the land:

> (1) Where it has been usually cultivated or improved.
>
> (2) Where it has been protected by a substantial enclosure.
>
> (3) Where, although not enclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant.
>
> (4) Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not enclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

Title 7 GCA § 11210 (1998).

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[22] The Look Estate argues that the trial court erred when it held that Look did not meet all the aforementioned requisites for adverse possession under color of title. The trial court found that Look's claim was not founded upon a written instrument and did not consider Look's claim under the above-mentioned statutes. Accordingly, the first issue on appeal is whether the trial court erred in finding that sections 11209 and 11210 are inapplicable, and because this is an issue of the proper application of the law our review is *de novo*. *See Ada*, 1999 Guam 10 at ¶ 10; *see also Camacho*, 1997 Guam 5 at ¶ 24.

[23] The Look Estate argues that the written instrument upon which it claims ownership of the disputed parcel is the Deed from Francisco. The Look Estate states that the "Deed purports on its face to convey an estate to the entire Estate 278, entitling grantee to possession of the whole estate except 120 hectares up to the pencil line on the topographical map attached to the deed." Appellant's Opening Brief, p. 16 (Jan. 14, 2004). This statement is not correct.

[24] The Deed makes no mention of a "pencil line." The Deed's description of the conveyed land, including the reservation, provides in full:

> All of the property in the Place of Tayagan and Laguina, Municipality of Yona, containing approximately 3,200 hectares according to the provisional record appearing in Volume I of Yona, page 368 as Estate Number 278, Letter B, Suburban, ownership of which is claimed by Francisco Baza Leon Guerrero, Party of the First Part, BUT EXCLUDING THEREFROM AND FROM THE PROPERTY HEREIN SOLD AND CONVEYED, one (1) contiguous portion measuring ONE HUNDRED AND TWENTY (120) HECTARES to be surveyed and located at a later date within Land square 26, Sections 2 and 3, and within the shaded area in the map, Appendix "A", attached hereto and made an integral part hereof, it being agreed and understood that any access roads adjacent to the 120 hectares excluded from this conveyance shall not be blocked, obstructed or in a any manner closed by either party to this deed.

Appellant's Excerpts of Record ("ER"), p 96 (Deed). The Deed on its face conveys 3200 hectares but excludes 120 hectares "within the shaded area." The Deed on it face does not limit the 120 hectare reservation at any "pencil line."

[25] The pencil line was alleged by Look himself at the 1995 trial wherein he testified that he met with Francisco and was shown the map which contained "a straight pencil line going due south from the northern part of this area down to the Ylig River." Appellant's ER, pp. 92-93 (Trial Transcript).

Look also testified that he "asked what the pencil line was and they said it was their version of where a hundred and twenty hectares would come to. And I agreed." Appellant's ER, p. 94 (Trial Transcript).

[26] Look further testified that although he questioned the Shaded Area, he never challenged it.[5] Look failed to challenge the reservation after the Deed was recorded in 1961 and the Look Estate cannot challenge the description therein in the instant appeal.

[27] In order to pursue an adverse possession claim under section 11209 of Title 7 Guam Code Annotated, the written instrument must convey "the property in question." 7 GCA § 11209; *see also Packard v. Moss*, 8 P. 818, 820 (Cal. 1885) (stating that "[t]o give color, the conveyance must be good in form, contain a description of the property, profess to convey the title, and be duly executed"). The Deed reserves and does not convey or purport to convey the Shaded Area, which includes the green parcel. *See Leon Guerrero*, 2001 Guam 22 at ¶ 34 (stating that "[t]he land in dispute within the shaded area is shown by the blue, green, orange, and yellow parcels on the color-coded Perry Map and has an area of approximately 50.5 hectares"). The "property in question" was not conveyed, and the Look Estate cannot claim that the Deed conveys color of title to it. 7 GCA § 11209; *see* 3 AM. JUR. 2d *Adverse Possession* § 126 (2003) ("A deed is color of title

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[5] The following excerpt of Look's cross examination by Attorney Robert Keogh who represented the Leon Guerrero Estate makes this point clear.

> Q: [by Attorney Keogh] Can you take a look at the deed, please, and maybe you can tell us if you can see anywhere on there a reference to a recordation date?
> A: [by Look] (Pauses briefly) -- It appears to be recorded on October the 11 th, '61.
> Q: Okay. Thank you. Therefore, the time that you're now saying was the first time that you saw the map attached to that deed then was sometime after October 11 of '61; is that right?
> A: Yes.
> Q: Do you have any recollection of how much after October 11 it would have been?
> A: No, I don't.
> Q: Now when you saw the shaded area on the map attached to the deed, did you raise any objection to that shaded area?
> A: I didn't raise any objection, I questioned it.
> Q: I think you testified you questioned it and - but what I'm asking you is did you raise any objection at that time?
> A: No.
> Q: Okay. Did you ever file anything to challenge that placement
> A: No.
> Q: . . . of that shaded area?
> A: No.

Tr., vol. II, pp. 12-13 (Trial, March 17, 1995).

only for the land designated and described in it. Because one cannot claim color of title by deed beyond what the deed purports to convey, a deed that describes part of a tract does not constitute color of title to the part of the tract not described. Also, the presence of an exception in a deed forbids the grantee to claim under color of title any of the land embraced in the exception.") (citations omitted); *see also Rye v. Baumann*, 329 S.W.2d 161, 166 (Ark. 1959) (stating that "the land embraced in the exception cannot pass to the grantee"). Therefore, we affirm the trial court's holding that the Look Estate cannot claim adverse possession under color of title by a written instrument.

B. Adverse Possession by Unwritten Instrument

[28] The trial court determined that the Look Estate failed to sustain its burden to prove adverse possession under an unwritten claim pursuant to section 11211 of Title 7 Guam Code Annotated. Adverse possession under a claim not in writing is defined as follows:

> Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

Title 7 GCA § 11211 (1998). In order to adversely possess property under a claim not in writing, a claimant must proceed under section 11212 of Title 7 Guam Code Annotated which provides:

> For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:
>
> (1) Where it has been protected by a substantial enclosure;
>
> (2) Where it has been usually cultivated or improved; provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this Title, unless it shall be shown that the land has been occupied and claimed for the period of ten years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes which have been levied and assessed on such land.

Title 7 GCA § 11212 (1998).

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[29] The Look Estate argues that the trial court erred on two grounds: (1) in holding that the Look Estate had to "substantially enclose" *and* "usually cultivate and improve" the green parcel; and (2) when the trial court failed to rely on the tax assessment roll in determining whether taxes were assessed on the green parcel.

1. Proof of Substantial Enclosure *and* Usually Cultivate and Improve

[30] The trial court stated that Look had to establish that the green parcel was substantially enclosed *and* that it had been usually cultivated and improved. Appellant's ER, p. 170 (Decision and Order) (emphasis added). Whether the trial court erred in requiring the Look Estate had to prove that Look both substantially enclosed *and* cultivated and improved the green parcel involves an issue of statutory construction and our *de novo* review begins with the plain language of the statute. *See Pangelinan v. Gutierrez*, 2000 Guam 11, ¶ 23.

[31] To prove adverse possession upon an unwritten claim, section 11212 first states that the "land is deemed to have been possessed and occupied in the following cases only. . . ." 7 GCA § 11212. Section 11212 then gives two cases: "(1) Where it has been protected by a substantial enclosure; (2) Where it has been usually cultivated or improved.. . . ." *Id.* The cases are separated by a semicolon. The provision does not use a conjunction such as "and" or "or" to indicate whether one or both cases must be proved. Because the statute is ambiguous the court may look to the legislative history and other sources. *See People v. Angoco*, 1998 Guam 10, ¶5 (quoting *Church of Scientology of California v. U.S. Dep't. of Justice*, 612 F.2d 417, 421 (9th Cir. 1979)).

[32] Section 11212 was originally codified as section 325 of the old Guam Code of Civil Procedure which was adopted from California. *See* 7 GCA § 11212, *Perez v. Gutierrez*, 2001 Guam 9, ¶ 13. California case law, although not binding, is persuasive. *Id.* California's adverse possession statute is nearly identical providing:

> For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

> First--Where it has been protected by a substantial inclosure [sic].
>
> Second--Where it has been usually cultivated or improved.
>
> Provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, State, county, or municipal, which have been levied and assessed upon such land.

CAL. CODE CIV. PRO. § 325. The only difference between the Guam and California codes is that the Guam code provides for a ten-year occupation, whereas the California code provides for a five-year occupation.

[33] California courts have interpreted the substantial enclosure and cultivation and improvement requirements to be alternatives. *Hayes v. Mitchell*, 7 Cal. Rptr. 364, 366 (Dist. Ct. App. 1960) ("Therefore, provided the other prerequisites have met, *i. e.*, occupation for five years and payment of taxes, the moving party has proved his case if he shows **either** substantial inclosure or usual cultivation **or** improvement.") (emphasis added).

[34] We agree with the California case law and hold that the trial court erred to the extent it determined that the Look Estate had to prove both substantial enclosure and cultivation *and* improvement. The trial court's error in this regard is harmless and does not compel reversal. This is because the trial court analyzed both requirements and found that Look failed to prove either substantial enclosure or cultivation or improvement. Appellant's ER, pp. 170-76 (Decision and Order). Our analysis must therefore turn to whether the trial court's finding that Look failed to prove either substantial enclosure or cultivation or improvement as required by section 11212 was clearly erroneous. *See* GRCP 52 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . .").

2. Factual Proof of Adverse Possession Pursuant to Title 7 GCA § 11212

[35] "[T]he doctrine of adverse possession is to be construed strictly, and such possession cannot be made out by inference, but only by clear and positive proof, the burden of proving all the essential elements of adverse possession or prescriptive title is upon the party relying upon it." *San*

Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n, 93 P.2d 582, 589 (Cal. Dist. Ct. App. 1939) (quoting 1 CAL. JUR. 636 § 95 and citing *Clarke v. Clarke*, 66 P. 10 (Cal. 1901)). Pursuant to section 11212, possession must be shown by substantial enclosure or by cultivation or improvement on the disputed property. The adverse possession claimant must show his possession to have been "open, notorious, continuous, and hostile, not only to the real owners, but also the entire world for the full statutory period." *Ross v. Burkhard Inv. Co.*, 265 P. 982, 986 (Cal. Dist. Ct. App. 1928). A party claiming adverse possession must prove five elements:

> 1. possession by actual occupation under circumstances sufficient to constitute reasonable notice to the owner;
>
> 2. possession hostile to the owner's title;
>
> 3. possession whereby the holder claims the property as his own under either color of title or claim of right;
>
> 4. continuous and uninterrupted possession for the requisite statutory period; and
>
> 5. the holder has paid all taxes levied on the property during the requisite statutory period.

West v. Evans, 175 P.2d 219, 220 (Cal. 1947) (citations omitted); *see also In re Bell*, Appeal No. 76-9A, 1978 WL 13516, * 3 (D. Guam App. Div. Mar. 22, 1978). "Unless each one of these elements is established by the evidence, the plaintiff has not acquired title by adverse possession." *West*, 175 P.2d at 220.

[36] The Leon Guerrero Estate originally filed its petition to register title to the disputed property, including the green parcel, in 1973. Appellant's ER, p. 0 (Petition). Look filed a counterclaim alleging adverse possession in 1974. Appellant's ER, p. 24 (Counterclaim). By leave of the trial court, the Leon Guerrero Estate filed an amended petition and the Look Estate filed an opposition and counter-petition in 1990. In order to prove its ownership of the green parcel by adverse possession, the Look Estate must prove that it fulfilled all the elements prior to filing of the Leon Guerrero's petition in 1973. The Look Estate does not dispute this, stating: "[S]ince the activities by Look began in November or December of 1961, the 10 year period prescribed by 7 G.C.A. §

11212, would expire on November or December 1971. The [Leon Guerrero] Estate did not file its land registration action until December 10, 1973." Appellant's Opening Brief, p. 40 (Jan. 14, 2004).

[37] For the Look Estate to succeed in this appeal, the trial court's finding that the Look Estate failed in its burden to prove substantial enclosure or cultivation or improvement prior to 1973 must be clearly erroneous. Our review of the entire record must produce the definite and firm conviction that the court below made a mistake. We do not believe the trial court's finding that the Look Estate failed in its burden is clearly erroneous.

a. Substantial Enclosure

[38] The trial court found that: (1) Look built a fence in 1962-1963; (2) the fence ran one-third of the eastern side of the green parcel; (3) Look did not enclose the western or southern boundaries of the green parcel; (4) the fence was not maintained; and (5) Look admitted that cattle disappeared from the area. Appellant's ER, p. 173 (Decision and Order). The trial court concluded that Look failed to substantially enclose the green parcel.

[39] With respect to substantial enclosure,

> [w]here the claimant does not actually occupy the premises, but relies solely upon the maintenance of a substantial inclosure, a strict compliance of the statute in this regard should be required. His acts of ownership should be so open and apparent as to leave no reasonable question as to his hostile claim of title. To apply the common figure of speech, his inclosure becomes his rampart for the protection of his fortress. So long as his inclosure is maintained substantially intact, he continues to "fly the flag" of adverse title.

Ross, 265 P. at 986. Look testified that he never lived on Estate 278: Transcript ("Tr."), vol. II, p. 4 (Trial, March 17, 1995). The enclosure must therefore be substantial enough to declare Look's possession "as to leave no reasonable question as to his hostile claim of title." *Ross*, 265 P. at 986.

[40] Look's testimony that cattle and the fence disappeared sometime in 1980 is not dispositive and does not indicate whether the fence and cattle disappeared in the ten years prior to 1973. One of the determinative issues is whether the fence ran the entire length of the blue-green border so as to construct a substantial enclosure. If it did not, Look cannot establish his open and notorious occupation against Leon Guerrero.

[41] The Look Estate argues that the trial court's finding that the fence ran one-third of the boundary between the green and blue parcels is clearly erroneous and not supported by the record. Appellant's Opening Brief, p. 30 (Jan. 14, 2004). The Look Estate argues that the fence ran the full length of green-blue border, and the record contains testimony from Look to support this position. Appellant's Opening Brief, pp. 30-33 (Jan. 14, 2004).

[42] This court must examine the record and transcripts to determine whether the trial court's finding is supported by substantial evidence. Aside from Look's own testimony, the record and maps prior to 1973 do not show a fence that ran the full length of the green-blue border for ten years prior to 1973.

[43] In 1972, Look conveyed a portion of the disputed property to Taitano. That deed referred to and attached a survey map ("Hotson Map") commissioned by Look. Tr., vol. I, p. 70 (Trial, March 16, 1995); Appellee's Supplemental Excerpts of Record ("SER"), pp. 49-52 (Grant Deed). The Hotson Map shows the fence but does not reflect that the fence ran the full length of the green parcel. Appellant's ER, p. 100 (Hotson Map). Look testified that: (1) the Hotson Map was done in 1972; (2) the fence existed at that time; (3) he showed Hotson the fence; and (4) he asked Hotson to "tie it in." Tr., vol. I, pp. 71-72 (Trial, March 16, 1995). The Hotson Map offers no support to Look because it does not show a fence running the full length of the green parcel.

[44] In his testimony, Look had to refer to the Sian survey map ("Sian Map"), which was prepared for Look in 1991, eighteen years after the original petition was filed. Appellee's SER, p. 59. Look testified that the Sian Map established the fence line. Tr., vol I, p. 72 (Trial, March 16, 1995). Look testified that he showed Mr. Sian three points which were marked as "1," "FP1," and "FP2," which represented fence posts which were still in place. Tr., vol I, p. 73 (Trial, March 16, 1995). The Sian Map, however, does not show undisputably that a fence existed for ten years prior to 1973. First, the Sian Map was prepared in 1991 at the direction of Look himself who showed Mr. Sian the fence posts. Second, the fence line in the Sian Map is based on three old fence posts only toward the northern end of the alleged fence. The Sian Map does not show, and Look did not allege

any other fence posts along the southern end of the alleged fence which might prove that the fence ran the whole length.

[45] Therefore, Look has not demonstrated by "clear and positive" evidence that the fence existed for the statutory period of ten years and that it ran the entire length of the green-blue border. At best Look's own Hotson and Sian maps show a fence that might have run about one-third of the border between the green and blue parcels, which is what the trial court found.[6]

[46] Under the deferential clearly erroneous standard of review, we are not left with a definite and firm conviction that the trial court committed a mistake and we affirm the trial court's finding that the Look Estate did not prove that the disputed lot was substantially enclosed.

b. Cultivation or Improvement

[47] The trial court found that Look's activities in the green parcel did not show cultivation or improvement for purposes of proving adverse possession. Specifically, the trial court examined Look's testimony and found that although he cleared a substantial part of the green parcel, the clearing was done in 1980. Appellant's ER, p. 175 (Decision and Order). The trial court further found that the cultivation was only in a small portion of the green parcel. Appellant's ER, p. 175 (Decision and Order).

[48] The Look Estate concedes that the planting of citrus trees in the northern portion of the green parcel was in the 1980's. Appellant's Opening Brief, p. 36 (Jan. 14, 2004). The Look Estate argues, however, that Look allowed a Mr. Toves to earlier farm the southern portion. Appellant's Opening Brief, p. 36. In its Opening Brief, the Look Estate does not state when Toves farmed the southern portion, and Look's testimony does not indicate the year Toves started farming. *See* Tr., vol. I, pp. 81-82 (Trial, March16, 1995). The Look Estate has therefore not provided "clear and positive" evidence that any cultivation occurred prior to 1973.

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[6] The trial court's Decision and Order did not cite to specific parts of the record upon which its finding was based.

[49] Even assuming that the farming was done prior to 1973, farming on the southern part of the green parcel by Toves alone does not satisfy the statute. With respect to proving adverse possession "[t]he requirement of the statute that the land be 'usually cultivated or improved' means that it should be cultivated or improved in the manner or to the extent usual in the case of similar property." *Gray v. Walker*, 108 P. 278, 279 (Cal. 1910). Look testified that Toves tilled the soil. Tr., vol. I, p. 81 (Trial, March 16, 1995). The tilling of soil may show cultivation within the meaning of the statute. *See Rowley v. Davis*, 167 P. 162, 164 (Cal. Dist. Ct. App. 1917) (finding that "planting to grain and part in orchard" met the requirements of the statute). However, because only the southern portion of the green parcel was farmed by Toves, such cultivation does not show that Look's possession of the entire green parcel was open, notorious and hostile to Leon Guerrero.

[50] The Look Estate further argues that Look improved the green parcel within the meaning of the statute by additional farming and clearing of trails. Appellant's Opening Brief, p. 37. Look testified that he cleared trails to provide access for farming. Tr., vol. I, p. 82 (Trial, March 16, 1995), but he does not state when he blazed those trails. Tr., vol. I, p. 82 (Trial, March 16, 1995). Look has also failed to provide "clear and positive" evidence that the land was improved in the ten years prior to 1973.

[51] Under the deferential clearly erroneous standard of review, we are not left with a definite and firm conviction that the trial court committed a mistake and we affirm the trial court's finding that the Look Estate did not prove that the disputed lot was cultivated or improved.

[52] By failing to prove that the disputed lot was either substantially enclosed or usually cultivated or improved, the Look Estate failed its burden of proving that Look adversely possessed the disputed green parcel. Accordingly, the payment of all taxes levied and assessed upon the green parcel is not important and we need not address the tax issue raised by the Look Estate.

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C. Agreed Boundaries

[53] In its appeal, the Look Estate raises the argument that even if adverse possession is not found, this court may conclude he owns the green parcel by the doctrine of agreed boundaries. The trial court did not address this issue in its Decision and Order.

[54] With respect to the doctrine of agreed boundaries, this court's holding in *Leon Guerrero I* was explicit: "we hold that Look may not claim any of the disputed parcels by the doctrine of agreed boundaries." *Leon Guerrero*, 2001 Guam 22 at ¶ 35. This is the law of the case and the Look Estate is barred from raising it anew. *People v. Hualde*, 1999 Guam 3, ¶ 13 ("[A] court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case"). The Look Estate may not claim the green parcel by way of the doctrine of agreed boundaries and this argument is rejected.

D. Adverse Possession by the Leon Guerrero Estate

[55] The Look Estate's last argument is that the Leon Guerrero Estate must itself prove adverse possession of the green parcel. The Look Estate argues that the order of the trial court after remand from the District Court Appellate Division and the Ninth Circuit Court of Appeals leaves both parties free to assert claims to the disputed property. *See* Appellant's ER, pp. 26-27 (Order). We disagree. The trial court's order does not indicate that the Leon Guerrero Estate had to claim the disputed property by adverse possession. The order states: "Petitioner may file an amended petition claiming any other portion of the above-described "shaded area" not already registered in other proceedings. . . ." Appellant's ER, p. 27 (Order).

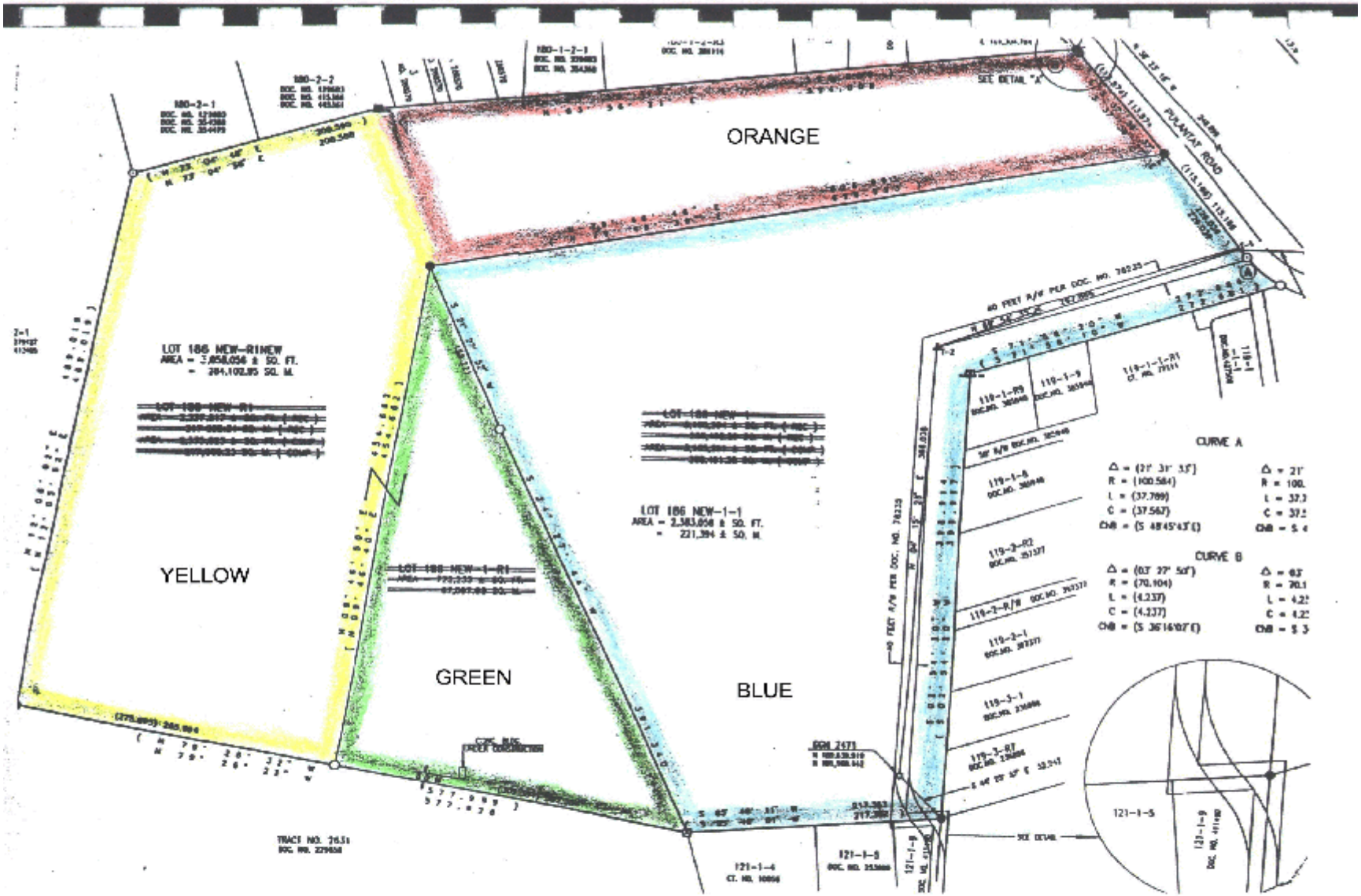
[56] Pursuant to the trial court's order, in 1990, the Leon Guerrero Estate filed an amended petition to register title to the disputed property ("Amended Petition"). Appellant's ER, p. 28 (Amended Petition). The chain of title attached as Exhibit A to the Amended Petition, purports to show that the record owner of the disputed property is the Leon Guerrero Estate. *See* Appellant's ER, pp. 33-62, (Abstract of Title). The original petition filed in 1973 by Pedro intended to register title to the land which was exempted in the Deed to Look. That Deed maintained ownership of the

"Shaded Area" in Francisco and the Leon Guerrero Estate does not need to prove adverse possession. Look was the one who challenged the Leon Guerrero Estate's ownership of the land by way of adverse possession and other theories.

[57] In *Leon Guerrero I*, this court remanded: "solely for the determination of whether Look may claim the green parcel by adverse possession." *Leon Guerrero*, 2001 Guam 22 at ¶ 40. The Look Estate may not argue that the Leon Guerrero Estate must prove adverse possession and this argument is likewise rejected.

IV.

[58] We find that the trial court did not err in finding that the Look Estate failed to prove Look substantially enclosed or cultivated or improved the disputed property and in holding that the Look Estate failed to prove that it adversely possessed the disputed property. We reject the Look Estate's arguments that it may claim the disputed property by the doctrine of agreed boundaries and that the Leon Guerrero Estate must itself prove that it adversely possessed the disputed property. The judgment of the trial court is hereby **AFFIRMED**.



ATTACHMENT
(Opinion, CVA03-024)

PERRY MAP