NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
***See* Ariz.R.Sup.Ct. 111(c); ARCAP 28(c); Ariz.R.Crim.P. 31.24**

DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RONALD O. PEET, Plaintiff/Counterdefendant/ Appellant, v. ELMER A. SKOOG and KAREN S. SKOOG, husband and wife, Defendants/Counterclaimants/ Appellees.	1 CA-CV 11-0279 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-021745

The Honorable Eileen Willett, Judge

AFFIRMED

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By Kissandra L. Tysman
Attorneys for Plaintiff/Counterdefendant/Appellant

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By Thomas A. Stoops
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O R O Z C O, Judge

¶1 Ronald O. Peet appeals from the superior court's grant of summary judgment in favor of Elmer A. and Karen S. Skoog. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Peet and the Skoogs are the owners of adjoining parcels of land on Lot 37. Peet has owned the southern half of Lot 37 since 2007 and the Skoogs have owned the northern half since 1997. Lot 37 was originally subject to a forty-foot wide railroad easement running through the middle of the lot from east to west. Although the easement was extinguished many years ago, there remains a six-foot-high fence topped with barbed wire separating the north end of Peet's property from the south end of the Skoogs' property. Sometime after the easement extinguished, Lot 37 was split in two and the easement was conveyed along with the northern half of Lot 37 to the Skoogs' predecessor in interest.

¶3 Peet's predecessors in interest, Jackson and Younis, purchased the southern half of Lot 37 in 1984. In 2003, Jackson obtained a survey of Lot 37. The survey revealed that the true boundary between Peet's and the Skoogs' properties is actually twenty feet south of the fence.

¶4 Mr. Skoog alleged in an affidavit that when he and his wife purchased their property in 1997, he was aware that the true boundary of their property extended twenty feet south of

the fence and he chose not to remove the fence. Mr. Skoog further alleged that he allowed Jackson and Peet to use the twenty-foot strip of land (the disputed area).

¶5 Jackson denied that he ever received permission from Mr. Skoog to use the disputed area. Jackson alleged that he became the owner of the disputed area some time in 1994, ten years after he and Mr. Younis purchased the south half of Lot 37. Jackson admitted, however, that when he sold his property to Peet in 2007, he did not include the disputed area in the deed.[1]

¶6 In July 2009, Peet filed a complaint in superior court to quiet title to the disputed area based on adverse possession. Peet also filed a motion for summary judgment and the Skoogs filed a cross-motion for summary judgment. Both parties sought to quiet title to the disputed area.

¶7 In their motion, the Skoogs argued that Jackson never established title by adverse possession because he leased the property to several tenants from 1984 until 2007 and there is no evidence that those lease agreements included the disputed area. In support of their motion, the Skoogs attached an affidavit from Mr. Skoog. In the affidavit, Mr. Skoog stated that he had personal knowledge that: (1) Jackson leased his property to

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[1] Prior to Jackson selling the property to Peet, Younis sold his interest in the property to Jackson.

several tenants from 1984 until 2007; (2) Jackson leased the property to the Skoogs from 1989 until 1992; (3) the lease agreement with the Skoogs specifically excluded the disputed area; (4) Jackson's property was vacant for significant periods of time between tenancies; and (5) "[a]ny use of the [disputed area] . . . was by a tenant and not Younis or Jackson themselves." Peet did not dispute Mr. Skoog's allegations.

¶8 The trial court granted summary judgment in favor of the Skoogs. The court found that Peet failed to establish his claim for adverse possession as a matter of law because Jackson specifically excluded the disputed area from the deed conveying the property to Peet. The trial court held:

> [Peet] must show adverse possession by clear and convincing evidence. [Peet] has not done so based on the undisputed facts presented. [Peet's] predecessor in interest exercised dominion and control of the land within the fence, inclusive of the strip in question, from 1984 until 2007. Mr. Jackson did not sell the strip to [Peet]. Further, Jackson knew in 2003 that the title to the land was held by [the Skoogs]. [Peet] is not entitled to tack on the preceding time when Jackson was in possession of the strip since privity of estate between successive users has not been established as a matter of law.

¶9 Peet filed a motion for new trial, which the trial court denied. Peet timely appealed. We have jurisdiction

pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.A.1 (Supp. 2011).[2]

DISCUSSION

Problems with Peet's Brief

¶10 As an initial matter, the Skoogs argue Peet's appeal should be dismissed or his brief be stricken because Peet violated Rule 13(a)6 of the Arizona Rules of Civil Appellate Procedure by failing to provide the applicable standard of review for the arguments he raises on appeal. Although Peet failed to provide the applicable standard of review, in the exercise of our discretion, and because we prefer to decide cases on the merits, we decline to impose such sanctions. *See Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966) (stating that we prefer to decide each case on its merits).

¶11 The Skoogs also argue that Peet failed to challenge the denial of his motion for a new trial in his opening brief. Although Peet did not expressly challenge the denial of his motion for a new trial in the argument section of his brief, the issues he raises in his opening brief are identical to the issues he raised in the motion for a new trial. We therefore address his arguments on the merits.

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[2] We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

Standard of Review

¶12 We review a trial court's grant of summary judgment de novo. *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, 249, ¶ 14, 129 P.3d 966, 971 (App. 2006). We independently determine whether there are any genuine issues of material fact and whether the trial court correctly applied the law. *Id.* We view the facts and reasonable inferences from those facts in the light most favorable to the non-moving party. *Hourani v. Benson Hosp.*, 211 Ariz. 427, 432, ¶ 13, 122 P.3d 6, 11 (App. 2005).

Adverse Possession

¶13 A party claiming title to real property by adverse possession must show that his or her possession of the property was actual, visible, exclusive, hostile to the claims of others, and continuous for at least ten years. *Berryhill v. Moore*, 180 Ariz. 77, 82, 881 P.2d 1182, 1187 (App. 1994); *see also* A.R.S. § 12-521.A.1 (2003). Generally, "[t]he enclosure of land is evidence of possession and, either in itself or in connection with other acts of ownership, may be a sufficient basis for an adverse possession claim." *Knapp v. Wise*, 122 Ariz. 327, 329, 594 P.2d 1023, 1025 (App. 1979) (citations omitted).

¶14 As the party seeking to establish title by adverse possession, Peet bore the burden of proof. *Whittemore v. Amator*, 148 Ariz. 173, 175, 713 P.2d 1231, 1233 (1986). To

satisfy his burden of proof, Peet was required to show that the requisite statutory elements were satisfied. *Id.*

¶15 Peet argues the trial court erred because he established his right to title to the disputed area through adverse possession because the disputed area was fenced off from the Skoogs for at least 25 years. However, it is not enough to claim adverse possession by the enclosure of the disputed area where, as here, Peet has not owned the property for the requisite ten years. In such situation, he is required to prove that his predecessor in title had previously maintained adverse possession of the disputed area as provided in A.R.S. § 12-526.A (2003). *Chandler v. Jackson*, 148 Ariz. 307, 311, 714 P.2d 477, 481 (App. 1986).

Tacking

¶16 "Tacking" is the doctrine that permits a party claiming title by adverse possession (in this case, Peet) to add his period of possession to that of a prior adverse possessor (Jackson) to establish the continuous ten-year statutory period. *Cheatham v. Vanderwey*, 18 Ariz. App. 35, 37, 499 P.2d 986, 988 (1972). In Arizona, tacking is codified by A.R.S. § 12-521.B, which states: "'Peaceable and adverse possession' need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them." Where, as here, the party claiming adverse possession has not

owned the property for the requisite ten years, proof of tacking of successive adverse possession by third parties is "absolutely necessary" to satisfy the statutory ten-year continuous possession requirement. *Cheatham*, 18 Ariz. App. at 35, 499 P.2d at 986. In Mr. Skoog's affidavit, he avowed:

> 13. I have personal knowledge from observing the use of the land . . . that the south half of Lot #37 was leased to various tenants for various lengths of time, starting in 1984 until Phillip E. Younis and Brian E. Jackson sold the south half of lot #37 in 2007.
>
> 14. In fact, I myself leased the south half of lot #37 from Mr. Younis and Mr. Jackson for three years starting in 1989, and my lease specifically excluded the strip of land that is subject of this litigation.

¶17 Neither Peet nor Jackson dispute Mr. Skoog's allegations[3] that: (1) Jackson leased his property to several tenants from 1984 until 2007; (2) Jackson leased the property to the Skoogs from 1989 until 1992; and (3) Peet failed to establish any kind of agreement whereby the tenants agreed to adversely possess the disputed area on behalf of Jackson.

¶18 For Peet to tack the periods during which Jackson leased the property, it was necessary for him to show that the

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[3] *See* Ariz. R. Civ. P. 56(e) (when a motion for summary judgment is supported by affidavits, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial").

lessees' use of the disputed area fell within the terms of a lease, agreement, or understanding between Mr. Jackson and his lessees. *Ammer v. Arizona Water Co.*, 169 Ariz. 205, 210, 818 P.2d 190, 195 (App. 1991). Because Peet did not provide evidence of any agreements between Jackson and the lessees, he cannot tack the periods when Jackson leased the property and therefore cannot establish title by adverse possession.

Motion to Strike

¶19 Peet argues the trial court erred because it did not rule on his motion to strike portions of Mr. Skoog's affidavit before granting summary judgment. We disagree.

¶20 Supporting and opposing affidavits must be based on personal knowledge, set forth admissible facts and affirmatively show that the affiant is competent to testify. Ariz. R. Civ. P. 56(e). Affidavits may be opposed by depositions, answers to interrogatories, or further affidavits. *Id.* A statement made in an affidavit must not set forth ultimate facts or conclusions of law. *Florez v. Sargeant*, 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996). The trial court's ruling on the admissibility of evidence in summary judgment proceedings is reviewed for an abuse of discretion and resulting prejudice. *Mohave Elec. Coop., Inc. v. Byers*, 189 Ariz. 292, 301, 942 P.2d 451, 460 (App. 1997).

¶21 The trial court stated in its judgment that it considered the parties' motions for summary judgment, statements of facts, and "related pleadings." Peet filed his "Response to Defendant's controverting statement of facts and motion to strike portions thereof" as a joint motion. The trial court's consideration of the parties' statement of facts and related pleadings would have logically included Peet's motion to strike portions of Mr. Skoog's affidavit. Moreover, the trial court explicitly stated that it considered Peet's motion to strike in an Under Advisory Ruling dated September 21, 2010. Additionally, in its minute entry denying Peet's motion for a new trial, the court also denied Peet's motion to strike. We therefore find no support for Peet's argument that the trial court failed to consider or rule on his motion.

¶22 We also find no support for Peet's argument that the trial court abused its discretion in denying his motion to strike. In his motion, Peet requested that the court strike paragraphs five, six, nine, ten, eleven, and twelve from Mr. Skoog's affidavit. On appeal, Peet did not specifically state which paragraphs the court improperly considered, but he challenges the court's denial of his motion. We therefore address each argument raised below.

¶23 Mr. Skoog stated in paragraphs five and six of his affidavit that he and his wife have been the owners of the

twenty-foot strip of land since they purchased the property in 1997. Peet alleged these statements are conclusions of law. We disagree. The statements were recitations of fact based on Mr. Skoog's personal knowledge.

¶24 Mr. Skoog stated in paragraph nine that when he purchased the property, he was aware that he was also purchasing the twenty-foot strip of land south of the fence. Mr. Skoog also stated that he chose not to remove the fence because he did not want to expend the effort. In context, Mr. Skoog was not making a conclusion of law. Rather, he was merely stating that it was his understanding that he and his wife owned the disputed area.

¶25 Mr. Skoog stated in paragraphs ten and eleven that since he purchased his property, he has maintained the fence and the disputed area, which he permitted Peet and Jackson to use. Peet argued that these statements are conclusory facts because Mr. Skoog does not state exactly how he maintained the fence and the disputed area nor how he gave permission to Peet or Jackson to use the strip of land. While Peet may deny or contradict Mr. Skoog's statements, such statements were recitations of fact based on Mr. Skoog's personal knowledge.

¶26 Mr. Skoog stated in paragraph twelve that he has personal knowledge that Younis and Jackson did not use the disputed area consecutively from 1984 until 2007. Peet argues

that Mr. Skoog lacked personal knowledge to make this statement because Mr. Skoog was not living on the north half of Lot 37 during the entire period of time to which his statement relates. Regardless of whether Mr. Skoog could make such an observation, Peet was not prejudiced by this statement because he did not dispute that several tenants leased the property from 1984 until 2007 or that there were significant periods of time between tenancies when the property was vacant. Therefore, we find no err in denying the motion to strike.

Attorney fees

¶27 Peet argues the trial court erred in granting the Skoogs' request for attorney fees because there was a factual dispute over whether the Skoogs presented him with a check in accordance with A.R.S. § 12-1103.B (2003). Section 12-1103.B authorizes the court to award attorney fees to a party who brings an action to quiet title to real property if that party timely tenders five dollars to the opposing adverse possessor in exchange for the execution and delivery of a quit claim deed disclaiming any adverse interest or right. We review an award of attorney fees under § 12-1103 for an abuse of discretion. *Sonneberg v. Ashby*, 17 Ariz. App. 60, 62, 495 P.2d 500, 502 (1972).

¶28 After judgment was entered, the Skoogs filed a request for attorney fees. The Skoogs stated that they timely sent a

five-dollar check and a quit claim deed to Peet by certified mail. The Skoogs further stated that they sent a letter to Peet via regular mail informing him that a check was sent by certified mail to the same address. The Skoogs alleged that the certified letter with the check and quit claim deed was returned to them because Peet refused to accept the letter or retrieve it from the post office. Skoog's counsel stated that, if necessary, he could provide the trial court with the returned certified letter along with the check.

¶29 Peet admits that he received the letter sent by regular mail from the Skoogs' counsel with a quit claim deed and a request to execute the deed, but he alleges a five-dollar check was not included. Although Peet denies receiving a check, he does not deny the Skoogs' allegations that he refused to accept the certified letter or retrieve it from the post office. The trial court therefore did not err in awarding attorney fees to the Skoogs because Peet cannot purposefully ignore a letter sent by certified mail in order to avoid an award of attorney fees.

¶30 Peet also argues the trial court abused its discretion in awarding 100 percent of the Skoogs' requested $23,183.50 in attorney fees because the evidence did not support such an award. The award of attorney fees under A.R.S. § 12-1103.B is discretionary. *Sonnenberg*, 17 Ariz. App. at 62, 495 P.2d at

502. In determining whether to award attorney fees, the trial court should consider: (1) the merits of the party's claims; (2) whether litigation could have been avoided; (3) whether assessing fees would cause an extreme hardship; (4) whether the prevailing party succeeded on all its claims; (5) the novelty of the legal questions presented; (6) whether a party's claims have been previously adjudicated in Arizona; and (7) whether the award would discourage other parties from asserting tenable claims. *In re Estate of Parker,* 217 Ariz. 563, 569, ¶ 32, 177 P.3d 305, 311 (App. 2008).

¶31 Peet argues that although he failed to establish his claim for adverse possession, he prevailed in showing that Jackson established title to the property by adverse possession. He therefore argues he prevailed on one of his two claims. Peet's argument contradicts the trial court's judgment, which states that Jackson did not transfer any title "he may have owned" to Peet. Peet also argues his claims presented novel legal issues that had not been adjudicated in Arizona. We disagree. Additionally, although the attorney fees were substantial, we cannot say the trial court abused its discretion.

¶32 Finally, Peet argues the award of attorney fees was improper because the court did not make factual findings to support the award. Peet cites no authority requiring the trial

court to make such findings. Moreover, Peet did not request that the trial court make factual findings. Peet therefore waived this argument on appeal. *See In re Marriage of Pownall*, 197 Ariz. 577, 583, ¶ 27, 5 P.3d 911, 917 (App. 2000) (holding that a party's failure to object to the lack of findings supporting an award of attorney fees results in waiver).

Attorney fees on appeal

¶33 The Skoogs request their attorney fees on appeal under A.R.S. § 12-1103.B. In the exercise of our discretion, we decline to award attorney fees to the Skoogs. They are, however, entitled to their costs, upon their compliance with ARCAP 21.

CONCLUSION

¶34 For the foregoing reasons, we affirm the trial court's grant of summary judgment and the award of attorney fees in favor of the Skoogs.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Presiding Judge

/S/

MARGARET H. DOWNIE, Judge