

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GEORGE H. YARD and SHARON ANN YARD, as Trustees of the Yard
Family Revocable Trust Dated December 15, 2000, *Plaintiffs/Counter-*
Defendants/Appellees,

v.

SILKIE PERKINS, a single woman, *Defendant/Counter-Claimant/Appellant.*

No. 1 CA-CV 16-0501
FILED 1-11-2018

Appeal from the Superior Court in Yavapai County
No. V1300CV201580202
The Honorable Jeffrey G. Paupore, Judge *Pro Tempore*

AFFIRMED IN PART, VACATED IN PART, REMANDED IN PART

COUNSEL

Lake & Cobb, PLC, Tempe
By Hank E. Pearson
Counsel for Defendant/Counter-Claimant/Appellant

Hunter, Humphrey & Yavitz, PLC, Phoenix
By Isabel M. Humphrey, Randall S. Yavitz
Co-Counsel for Plaintiffs/Counter-Defendants/Appellees

MEMORANDUM DECISION

Judge James P. Beene delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Lawrence F. Winthrop joined.

B E E N E, Judge:

¶1 Silkie Perkins (“Perkins”) appeals the superior court’s order dismissing as moot her counterclaim and granting attorneys’ fees in favor of George and Sharon Yard (“the Yards”). For the following reasons, we affirm the dismissal but vacate the judgment of attorneys’ fees and remand for further consideration.

FACTS AND PROCEDURAL HISTORY

¶2 Perkins and the Yards own adjacent ranches in Yavapai County. Perkins’ father owned the property before her, and the Yards purchased their ranch in the early 1990s. Spanning the two ranches is a dirt road that existed before the Yards purchased their ranch. The dirt road encroaches on Perkins’ ranch, and the road, along with an associated drainage ditch, is enclosed in a fence built by Perkins’ father. The fence encompasses approximately three quarters of an acre of Perkins’ ranch. The dirt road was the only access to the Yards’ property, and they used it for that purpose continuously after purchasing the ranch.

¶3 In May 2015, the Yards delivered to Perkins a letter claiming to have a prescriptive easement over the road and drainage ditch, and that the Yards owned the property in question by adverse possession. The Yards demanded that Perkins sign and return, within 20 days, enclosed quit claim deeds granting the Yards non-exclusive easements over the road and drainage ditch, and the contested property in fee simple in exchange for payment of five dollars enclosed for each deed.¹ In June 2015, when Perkins did not sign and return those deeds, the Yards filed a three count verified complaint, claiming title by adverse possession of the contested area, a

¹ A.R.S. § 12-1103(B) (2017) mandates that a plaintiff who wishes to recover attorneys’ fees to deliver to the defendant, 20 days prior to filing a claim to quiet title, five dollars and an unsigned quit claim deed which, if executed by the defendant, would grant the plaintiff the desired relief.

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prescriptive easement over the dirt road, and a prescriptive easement over the wash adjacent to the road. The Yards claimed to have openly and notoriously possessed the area for the statutory period of ten years.

¶4 Perkins' answer countered that the Yards' use of the roadway was permissive. Asserting the Yards had no claim to the contested property, Perkins asked the Yards to sign a quit claim deed granting Perkins the contested property in fee simple in exchange for payment of five dollars. The Yards did not sign and return that deed. The superior court allowed Perkins to file an amended pleading in November 2015, which repeated her objections to the Yards' claims, and included a counterclaim to quiet title to the contested property. The counterclaim alleged, *inter alia*, that Perkins was the rightful owner of the contested property, and sought a judgment "establishing that Perkins is the fee simple owner" and "reasonable attorneys' fees pursuant to A.R.S. § 12-1103(B)."

¶5 In May 2016, the Yards signed a quit claim deed, transferring their interest in the disputed property to Perkins. The Yards then moved to dismiss their claims pursuant to Ariz. R. Civ. P. 41(a)(2), claimed the quit claim deed "rendered moot" Perkins' counterclaim and filed an application for attorneys' fees and taxable costs, requesting almost \$30,000 in fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-1103(B) (2017).² In response, Perkins did not object to the requested dismissal of the Yards' claims (provided it was with prejudice and without an award of attorneys' fees) but argued the quit claim deed entitled her to judgment as a matter of law on her counterclaims as well as an award of attorneys' fees. After briefing, the superior court dismissed the Yards complaint with prejudice, dismissed Perkins' counterclaim as moot, and granted \$20,000 of attorneys' fees and costs to the Yards. Perkins timely appealed the superior court's order to dismiss her counterclaim and the grant of the Yards' attorneys' fees. We have jurisdiction pursuant to A.R.S. § 12-2101(A) (2017).

DISCUSSION

¶6 Perkins first argues that the superior court erred by dismissing her counterclaim under Rule 41(a)(2). We review *de novo* a trial court's grant of a motion to dismiss. *Coleman v. City of Mesa*, 230 Ariz. 352, 355-56, ¶ 7 (2012).

² Absent material revision after the relevant date, we cite a statute's current version.

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¶7 Perkins' argument appears to be based on a misreading of the superior court's order. While Perkins asserts that the Yards' claims were dismissed without prejudice, the superior court ordered that the Yards' motion to dismiss was "GRANTED WITH PREJUDICE." Perkins seeks judgment against the Yards' quieting title to the property at issue in this case. The quit claim deed executed by the Yards and the superior court's order dismissing the case with prejudice already provided Perkins with the requested relief, rendering the request moot. Nor has Perkins shown the superior court was required to consider this now-moot issue. *See Fraternal Order of Police Lodge 2 v. Phx. Emp. Relations Bd.*, 133 Ariz. 126, 127 (1982) (absent a question of great public importance or one which is likely to reoccur, we do not consider moot issues). The superior court did not err by dismissing Perkins' counterclaim as moot.

¶8 Perkins next argues the superior court erred as a matter of law by granting attorneys' fees to the Yards. We review an award of attorneys' fees for an abuse of discretion. *Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 205, ¶ 5 (App. 2014). The court abuses its discretion if the reason for the award is "legally incorrect." *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 350, ¶ 17 (App. 2006) (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983)); *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23 (App. 2004) ("An abuse of discretion exists when the trial court commits an error of law in the process of exercising its discretion.").

¶9 The Yards were awarded attorneys' fees pursuant to A.R.S. § 12-1103(B), the purpose of which is to encourage resolution of quiet title actions before litigation. *See Mariposa Dev. Co. v. Stoddard*, 147 Ariz. 561, 565 (App. 1985) (stating that the purpose of § 12-1103(B) is to "mitigate the burden of the expense of litigation to establish a just claim or defense"). The statute provides that, if a party "twenty days prior to bringing the action to quiet title to real property, requests the person . . . holding an apparent adverse interest or right therein to execute a quit claim deed thereto" and tenders five dollars for that purpose, and the person holding an apparent adverse interest does not do so, the court in a subsequent quiet title action may award the party requesting the quit claim deed attorneys' fees. A.R.S. § 12-1103(B). Here, Perkins did not provide the quit claim deeds requested by the Yards before they filed their complaint, which resulted in the award of attorneys' fees for the Yards. Perkins, however, argues that the Yards cannot recover fees because they are not the prevailing party — their case has been dismissed with prejudice and the Yards' granted a quit claim deed in Perkins favor for the contested land.

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¶10 In a quiet title action, only the prevailing party is entitled to attorneys' fees under § 12-1103. *Whittemore v. Amator*, 148 Ariz. 173, 176 (1986); *see also Lange v. Lotzer*, 151 Ariz. 260, 262 (App. 1986) ("Arizona Legislature has expressly determined that only a prevailing party who follows certain prerequisites may recover attorney's fees [under § 12-1103(B)]."); *Scottsdale Mem'l Health Sys., Inc. v. Clark*, 164 Ariz. 211, 215 (App. 1990) ("It is within the trial court's discretion to determine whether to award attorney's fees to a party who has prevailed in a quiet title action and otherwise complied with the provisions of section 12-1103(B).").

¶11 Perkins is the prevailing party in this case, not the Yards. After suing Perkins, and facing Perkins' counterclaim, the Yards signed a quit claim deed in Perkins' favor and then moved to voluntarily dismiss their claims. The superior court subsequently dismissed the case with prejudice. Perkins achieved her litigation goals; she both defeated the Yards complaint and established uncontested ownership of the at-issue real property. Under these circumstances, the superior court erred by granting the Yards attorneys' fees, tacitly concluding they were the prevailing parties.³

¶12 Finally, Perkins argues that as the prevailing party, she is entitled to attorneys' fees pursuant to A.R.S. § 12-1103. As an initial matter, whether Perkins sent the Yards a quit claim deed and five dollars, twenty days before filing a successful counterclaim, is a question of fact to be determined by the superior court. *See Long v. Clark*, 226 Ariz. 95, 96, ¶¶ 3-4 (App. 2010) (merely answering a complaint is insufficient to satisfy the provisions of § 12-1103(B), a defendant must send a letter and quit claim deed and file a counterclaim to recover attorneys' fees). Moreover, compliance with the statute does not automatically entitle Perkins to attorneys' fees, and it is within the discretion of the superior court to determine the amount of fees, if any, to which she is entitled.

CONCLUSION

¶13 For the foregoing reasons, we vacate the judgment of attorneys' fees against Perkins and affirm the dismissal of Perkins' counterclaim. We remand to the superior court to decide whether, as the

³ Because we find the superior court erred in granting attorneys' fees, we need not address Perkins' argument that the Yards are not entitled to attorneys' fees because they have a contingency fee agreement with their counsel.

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prevailing party, Perkins is entitled to attorneys' fees pursuant to A.R.S. § 12-1103(B).

¶14 Both parties request attorneys' fees on appeal pursuant to § 12-1103(B). As they did not prevail on appeal, the Yards are not eligible for attorneys' fees. In our discretion, we decline to grant attorneys' fees to Perkins. As the prevailing party, Perkins is entitled to costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21. A.R.S. § 12-342 (2017).



AMY M. WOOD • Clerk of the Court
FILED: AA