IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 05/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

BARRY E. LEWIN and DAWN M. MAGID, husband and wife,	1 CA-CV 10-0440
	DEPARTMENT E
Plaintiffs/Counterdefendants/ Appellants,	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	
DAVID and DIANE ROUSSEAU, husband and wife,	
Defendants/Counterclaimants/ Appellees.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-006588

The Honorable J. Richard Gama, Judge

AFFIRMED

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P O R T L E Y, Judge

¶1 Barry Lewin and Dawn Magid ("the Lewins") challenge the judgment entered after a bench trial in favor of David and Diane Rousseau ("the Rousseaus"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The Lewins purchased their property in 1990. The northern boundary of their property contained a row of tall oleanders,[1] and in the center of the oleanders was a wire fence. The Rousseaus purchased their property in 1995, which is directly north of the Lewin property. The oleanders and fence were still in place, and was ostensibly the boundary between the two parcels. The oleanders died in 2007, and the neighbors shared the cost to remove the plants and the fence.

¶3 The Rousseaus subsequently had their property surveyed and discovered that their southern boundary line was five feet north of where the oleanders and the fence had been, which meant that the Rousseaus had access to five feet of the Lewin property.

[1] The oleanders were described as approximately twenty to thirty feet tall and six to eight feet wide.

¶4 Upon discovering the information in February 2008, the Lewins tendered a quit-claim deed and five dollars to the Rousseaus to resolve the boundary dispute.[2] The Rousseaus refused to sign the deed. The next month, the Rousseaus tendered a quit-claim deed and five dollars to the Lewins without success. The Lewins subsequently filed a quiet title action, and the Rousseaus counterclaimed for adverse possession and, among other claims, breach of contract because the Lewins had failed to pay their portion of the cost to haul away the oleanders and fence.

¶5 After a three-day trial, the trial court, in a comprehensive order, found for the Rousseaus on their adverse possession claim over the disputed area and found that the Lewins owed the Rousseaus $500 for the oleander haul-away. The court also ordered the Lewins to pay the Rousseaus' attorneys' fees. After an unsuccessful motion for a new trial and motion for relief from judgment, the Lewins filed this appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶6 The Lewins list six issues on appeal. The issues can be summarized into four categories: (1) whether the evidence was sufficient to support adverse possession; (2) whether estoppel

[2] The disputed area is five feet wide and 151.45 feet long.

precluded adverse possession; (3) whether the trial court abused its discretion in making certain evidentiary rulings during trial; and (4) whether the court erred in awarding the Rousseaus' attorneys' fees and costs.

I

¶7 In challenging the sufficiency of the evidence the Lewins contends that the Rousseaus' possession of the disputed area was not open and notorious because the wire fence was not visible, and their possession was not otherwise open and notorious.[3]

¶8 "A party claiming title to real property by adverse possession must show that his or her possession of the property was actual, visible, and continuous for at least ten years and that it was under a claim or right, hostile to the claims of others and exclusive." *Spaulding v. Pouliot*, 218 Ariz. 196, 203, ¶ 25, 181 P.3d 243, 250 (App. 2008); A.R.S §§ 12-521(A)(1) & -526 (2003). A claimant must establish each element by "clear and positive evidence, which is analogous to the rigorous 'clear and convincing' standard of proof." *Miller v. McAlister*, 151 Ariz. 435, 437, 728 P.2d 654, 656 (App. 1986). On appeal, we will not disturb the findings of fact unless they are clearly

[3] The Lewins also suggest that the trial court followed *Carnevale v. Dupee*, 853 A.2d 1197 (R.I. 2004). We find nothing in the record to support the suggestion.

erroneous. *Spaulding*, 218 Ariz. at 199, ¶ 8, 181 P.3d at 246. In fact, "[w]e view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the judgment, affirming if there is any evidence to support the trial court's findings." *Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 188, 840 P.2d 1051, 1053 (App. 1992). We review questions of law, however, de novo. *Spaulding*, 218 Ariz. at 199, ¶ 8, 181 P.3d at 246.

¶9 The Lewins challenge the finding that the wire fence was visible and argue that "[a]ll of the witnesses agreed the 'welded wire fence' was not visible." In spite of the fact that the neighbors knew that the fence existed before it was removed, the trial court did not focus on the visibility of the fence within the oleanders, but found that "[t]he existence of the oleander hedge and the welded wire fence on the north side was an 'actual and visible' appropriation of the [d]isputed [a]rea by the[] defendants and their predecessors." The court's focus was on whether possession of the disputed area was visible.

¶10 The trial court had the proper focus. Our supreme court has held that the use of the disputed area must be visible to be open and notorious. *Gusheroski v. Lewis*, 64 Ariz. 192, 198, 167 P.2d 390, 393 (1946) (quoting *Glantz v. Gabel*, 212 P. 858, 860 (Mont. 1923)). In fact, in *Inch v. McPherson*, we

affirmed the finding that the Inchs had a prescriptive easement[4] to use three feet of the McPherson property separated by a misplaced hedge that the predecessors had planted, which was subsequently removed. 176 Ariz. 132, 135-36, 859 P.2d 755, 758-759 (App. 1992). We agreed that the Inchs' use was visible, open and notorious. *Id*. (quoting *Rorebeck v. Criste*, 1 Ariz. App. 1, 4, 389 P.2d 678, 681 (1965)).

¶11 Here, testimony established that the oleanders and fence existed since 1964 and that the Rousseaus used the disputed area. Consequently, there was sufficient evidence for the trial court to determine the location of the hedge and that the disputed area was visible.

¶12 The Lewins next argue that the evidence does not support that the Rousseaus exclusively used the disputed area.[5] We disagree.

¶13 The trial court heard testimony that demonstrated that the Rousseaus, and the prior owner of the property, used the

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[4] Claims for a prescriptive easement or adverse possession require a showing of the same elements except for the exclusivity of use. *See Ammer v. Ariz. Water Co.,* 169 Ariz. 205, 208 n.1, 818 P.2d 190, 193 n.1 (App. 1991).

[5] The Lewins also argue that the evidence was insufficient to support the finding of boundary acquiescence. *See Mealey v. Arndt*, 206 Ariz. 218, 221-22, ¶¶ 13, 15, 76 P.3d 892, 895-96 (App. 2003) (defining the elements of boundary acquiescence). Because we can affirm the judgment based on any ground supported by the record, we need not address the alternative basis for the court's decision. *See Adage Towing & Recovery, Inc. v. City of Tucson*, 187 Ariz. 396, 398, 930 P.2d 473, 475 (App. 1996).

disputed area for more than ten years. The Register family owned the Rousseau property from 1964 until 1993. John Register, who was a youngster when his family moved in, testified that the oleanders and wire fence were there before his family moved onto the property in 1964. He also testified that his family annually trimmed the hedge, mowed the grass and used the disputed area as part of their yard during the time his family owned the property. Mr. Rousseau testified that he mowed the grass, trimmed the oleanders, killed weeds, planted banana trees and other plants in the disputed area, and the family used the disputed area since moving onto the property in 1995. He also testified that a drip line was installed and one of the bubblers protruded into the disputed area.

¶14 The Lewins, however, contend that because they hired workers who watered the hedge, the Rousseaus' use was not exclusive.[6] Although each neighbor watered their side of the oleanders, maintaining their privacy from each other, there was no evidence that the Lewins entered onto or otherwise made use of the disputed area. *See Rorebeck*, 1 Ariz. App. at 5, 398 P.2d

[6] Raised for the first time in their reply brief, the Lewins argue that any use or construction in the Rousseau backyard was not visible because the oleanders obstructed their view. Although we would not generally address an issue raised for the first time in a reply brief, *Muchesko v. Muchesko*, 191 Ariz. 265, 268, 955 P.2d 21, 24 (App. 1997), we have held that under A.R.S. §§ 12-521(A) or -526(A) "there is no requirement . . . that the true owner actually be aware of the . . . appropriation of the land." *Lewis*, 173 Ariz. at 192, 840 P.2d at 1057.

at 682 (holding that killing ants and weeds on a disputed property line benefited both owners and was not an objection to an adverse possession claim). Consequently, the fact that both watered the oleanders did not preclude exclusive use of the disputed area. *See Overson v. Cowley*, 136 Ariz. 60, 69, 664 P.2d 210, 219 (App. 1992) ("[I]n order to defeat another's adverse possession, [they] must clearly indicate to the occupant that [their] possession is invalid and [their] right challenged." (quoting *Kirby Lumber Corp. v. Smith*, 305 S.W.2d 829, 830 (Tex. Civ. App. 1957))); *see also Gusheroski*, 64 Ariz. at 197, 167 P.2d at 393 (adverse possession must be physically interrupted so that it cannot be held to be continuous). Thus, because there was evidence that the Rousseaus exclusively used the disputed area as if it was their property, *see Fritts v. Ericson*, 103 Ariz. 33, 36, 436 P.2d 582, 585 (1968), the record supports the finding that the Rousseaus exclusively used the disputed area as their own for more than ten years.

II

¶15 The Lewins next contend that the Rousseaus are estopped from asserting adverse possession over the disputed area. They claim that when the Rousseaus requested a variance in 1995 to remodel the house, the legal description of the property used to seek the variance did not include the disputed

area.[7] As a result, the Lewins assert that the Rousseaus cannot now claim ownership of the disputed five feet.

¶16 There are three elements of estoppel: first, the parties to be estopped must have committed acts inconsistent with their current position; second, reliance by the other party; and third, injury by the repudiation of the prior conduct. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 28, 156 P.3d 1149, 1155 (App. 2007). We examined estoppel in *City of Tucson v. Melnykovich*, an inverse condemnation action. 10 Ariz. App. 145, 457 P.2d 307 (1969). There, the Pima County Board of Supervisors condemned twenty feet of Melnykovich's property in 1948 to widen Speedway Boulevard, but he was not notified until the City of Tucson sent bulldozers to widen the road in 1965. *Id*. at 146, 457 P.2d at 308. Melnykovich sued. The City of Tucson argued that he was estopped from alleging a taking of his property because his tax bills since 1953 did not include the disputed twenty feet, and his 1963 mortgage did not include the extra twenty feet in the legal description. *Id*. at 148, 457 P.2d at 310.

¶17 On appeal, we held that estoppel was inapplicable because Melnykovich had no notice of the taking and there was no evidence to show why the twenty-foot strip was omitted from the

[7] Soon after the Rousseaus purchased the property, they requested a variance because the roof eave did not comply with City of Phoenix set back requirements.

tax rolls or that he prepared the legal description for the mortgage. *Id*. at 149-50, 457 P.2d at 311-12. We also rejected the argument that Melnykovich was estopped because he failed to inquire about his tax bills, or that he had taken inconsistent positions with his belief that he owned the disputed twenty feet. *Id.* at 150, 457 P.2d at 312.

¶18 Here, the Lewins did not prove that the Rousseaus prepared the survey[8] or that the Lewins relied on it for any purpose. Moreover, there was no evidence that, during the thirteen years the Rousseaus owned the property before the start of the litigation, the Rousseaus acted inconsistently with their belief that they owned the disputed area. Consequently, the trial court did not abuse its discretion by rejecting the estoppel argument.

III

¶19 The Lewins next argue that the trial court erred when it refused, pursuant to Arizona Rule of Evidence 704, to allow their land surveyor expert witness, David Nykorchuk, to testify to an ultimate issue. We review the admissibility of expert testimony for an abuse of discretion. *Webb v. Omni Block, Inc.*, 216 Ariz. 349, 352, ¶ 6, 166 P.3d 140, 143 (App. 2007).

[8] The survey indicates that it was prepared by the City of Phoenix.

¶20 After describing his qualifications, Nykorchuk testified what he observed while conducting his survey. When asked whether he had an "opinion as to whether or not the [Rousseaus] had appropriated any portion of [the Lewin property] for their use," the trial court sustained an objection because the opinion "invad[ed] the province of the trier of fact." The Lewins made an offer of proof and asserted that Nykorchuk would have testified that the wire fence was not intended as a boundary but only to support the oleanders and did not support the adverse possession claim.

¶21 Rule 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Although Rule 704 allows ultimate issue testimony, "it does not do so without limit." *Webb*, 216 Ariz. at 353, ¶ 12, 166 P.3d at 144. Ultimate issue opinion testimony cannot be couched in legal conclusions to simply opine how a case should be decided. *Id*.

¶22 Here, Nykorchuk was effectively asked whether the Rousseaus had adversely possessed any part of the Lewin property. The question asked for a legal conclusion that Nykorchuk was not qualified to provide. Accordingly, the trial court did not abuse its discretion in prohibiting an answer to the question.

¶23 The Lewins also argue that the testimony was admissible pursuant to Rule 801(d)(2). The Lewins, however, did not suggest at trial that Rule 801(d)(2) was an appropriate alternative to admit the opinion, and we, therefore, consider the argument waived. *See Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982) (holding that appellate courts cannot consider issues and theories not presented to the court below). Consequently, we find no error in excluding Nykorchuk's opinion.

¶24 The Lewins next claim that the trial court erred when it allowed Mr. Rousseau to testify, over objection, about the existence and location of the wire fence. Specifically, the Lewins argue that the Rousseaus spoiled the best evidence about the existence of the wire fence. *See State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

¶25 The neighbors had the dead oleanders and fence removed before any contemplation of litigation. Although the Lewins hired the landscapers to remove the foliage, they do not contend that the fence did not exist or that its former location could not be determined after its removal. In fact, Nykorchuk testified that when he surveyed the Rousseau property after the start of the litigation, he located a piece of the wire fence and several post holes in the ground. Because the fence was not removed to prevent proof of its existence or its location, the

trial court did not err when it allowed Mr. Rousseau to testify about the existence and former location of the fence. *See Smyser v. City of Peoria*, 215 Ariz. 428, 438 n.11, ¶ 32, 160 P.3d 1186, 1196 n.11 (App. 2007).

¶26 The Lewins next claim that the trial court erred when it denied their new trial motion. Specifically, they argue that they were deprived of a fair trial because they had been assured that Mrs. Rousseau would not be available to testify. We review the denial of a motion for a new trial for an abuse of discretion. *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, 135, ¶ 6, 163 P.3d 1083, 1085 (App. 2007).

¶27 The Lewins posit that the joint pretrial statement provided that Mrs. Rousseau would be available to testify "possibly by deposition testimony". The record, however, belies the argument. The signed joint pretrial statement actually stated that Mrs. Rousseau will testify "by deposition testimony unless she becomes available for the trial." Because the Lewins failed to object to the statement pursuant to Arizona Rule of Civil Procedure 16(d)(2)(D), we consider the argument waived.

¶28 Moreover, excerpts of Mrs. Rousseau's deposition testimony were admitted at trial. There is no evidence that Mrs. Rousseau was available to testify or that she would have testified differently at trial. Consequently, the trial court

did not abuse its discretion when it denied the Lewins' motion for new trial.

IV

¶29 Finally, the Lewins challenge the fees awarded to the Rousseaus. They first contend that because neither party was completely successful the trial court erred when it awarded the Rousseaus attorneys' fees. We review the court's award of attorneys' fees and costs for an abuse of discretion. *Maleki v. Desert Palms Prof'l Props., L.L.C.*, 222 Ariz. 327, 333-34, ¶ 32, 214 P.3d 415, 421-22 (App. 2009).

¶30 The trial court awarded the Rousseaus a portion of their attorneys' fees pursuant the quiet title statute, A.R.S. § 12-1103(b) (2003). The Lewins do not argue that the Rousseaus failed to comply with the statutory requirements to secure an award of fees. Consequently, because our legislature has determined that a prevailing party who follows the prerequisites in a quiet title action can recover fees, the court did not err. *See Lange v. Lotzer*, 151 Ariz. 260, 261, 727 P.2d 38, 39 (App. 1986).

¶31 The Lewins, however, argue that the Rousseaus should not recover fees because the Rousseaus rejected their Arizona Rule of Civil Procedure 68 offer of settlement and a portion of the judgment did not exceed the offer. The problem with the argument is twofold. First, although the Rousseaus were awarded

only $500 on the breach of contract claim, which was less than the $3200 offer, the Rousseaus prevailed on the key issue of the offer and the overall dispute between the neighbors — ownership of the disputed area. Second, the trial court did not have to look to A.R.S. § 12-341.01 (2003) because the dispute did not involve an express or implied contract and, as a result, did not have to wrestle with which party prevailed under the totality of the litigation analysis. Consequently, the court did not err in basing its fee award on § 12-1103(b). *See In re Estate of Parker,* 217 Ariz. 563, 569, ¶ 31, 177 P.3d 305, 311 (App. 2008).

¶32 The Lewins also argue that the Rousseaus failed to demonstrate that they had a genuine financial obligation to pay the fees. Specifically, they contend that the Rousseaus' fee agreement states that the attorneys "may but are not obligated to, submit 'interim billing for fees and direct expenses.'"

¶33 The relevant section of the fee agreement is, however, misquoted. The fee agreement states that "interim billings for fees and direct expenses are due and payable upon presentation. I may also forward to you for direct payment invoices or bills I receive for more significant expenses." The plain language of the fee agreement demonstrates that the term "may" only relates to invoices for significant expenses that may be forwarded for payment.

¶34 Moreover, the fee application states that "client was actually billed and paid or promised to pay, the fees and expenses shown on the attached itemization, for the work performed in this matter." As a result, it is clear that the trial court found that the Rousseaus had a genuine obligation to pay their attorneys. Consequently, the trial court did not err in awarding attorneys' fees.

¶35 The Rousseaus request attorneys' fees on appeal pursuant to § A.R.S. 12-1103(B). In our discretion, we decline to award the Rousseaus attorneys' fees on appeal. *See Parker*, 217 Ariz. at 569-70, ¶ 34, 177 P.3d at 311-12. They, however, may recover their appellate costs subject to compliance with ARCAP 21.

CONCLUSION

¶36 For the foregoing reasons, we affirm the judgment of the trial court.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge