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

FILED BY CLERK
SEP 30 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PAUL KADLEC and RACHEL KADLEC, husband and wife; and DUANE HOWELL and BRENDA HOWELL, husband and wife,

Plaintiffs/Appellants,

v.

DANIEL DORSEY and SHERRI DORSEY, husband and wife,

Defendants/Appellees.

2 CA-CV 2013-0020
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20076040

Honorable Christopher P. Staring, Judge
Honorable Jan E. Kearney, Judge

REVERSED AND REMANDED

Vernon E. Peltz — Tucson
Attorney for Plaintiffs/Appellants

Hinderaker Rauh & Weisman, P.L.C.
By Adam Weisman and Robert Rauh — Tucson
Attorneys for Defendants/Appellees

V Á S Q U E Z, Presiding Judge.

¶1 In this real property dispute, appellants Paul and Rachel Kadlec and Duane and Brenda Howell (collectively "the Kadlecs") appeal from the trial court's judgment in favor of appellees Daniel and Sherri Dorsey on the Dorseys' quiet title claim. On appeal, the Kadlecs argue the court erred by: (1) finding they had not established a prescriptive easement by adverse use or by imperfectly created servitude; (2) allowing the Dorseys to amend their answer to include a counterclaim seeking quiet title; and, (3) awarding attorney fees to the Dorseys pursuant to A.R.S. § 12-1103(B). For the reasons stated below, we reverse the court's judgment and remand for proceedings consistent with this decision.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's judgment. *Smith v. Beesley*, 226 Ariz. 313, ¶ 3, 247 P.3d 548, 551 (App. 2011). Richard Turigliatto owned forty acres of undeveloped land south of Tucson, which he split into three parcels. A dirt roadway, referred to by the parties as Rega Road, passed through all three parcels, connecting with public roads at either end. Turigliatto conveyed all three parcels subject to the Rega Road easement. In 1995, he conveyed the central parcel to Jonathan Perkins "subject to an undefined easement as shown in [the survey of Rega Road] attached [to the deed as] Exhibit 'B.'"

¶3 Howell and Kadlec own property nearby. Howell began using Rega Road when he acquired his property in November 1990. Kadlec's predecessor, Felix Lucero, began using the roadway shortly after acquiring his property in October 1994, and Kadlec continued using Rega Road after he purchased the property in September 1999.

¶4 In 2006, Dorsey purchased the central parcel from Perkins' successor-in-interest, Laura Bradley. Although the deed provided that the property was being conveyed subject to "all easements [and] rights-of-way . . . as may appear of record," Bradley told Dorsey that Rega Road was a "private road," which belonged to "whoever owned the property." Later that year, Dorsey blocked access to Rega Road. The Kadlecs filed this action, alleging among other things that they had an easement by prescription and seeking a declaratory judgment that they had "the right to the reasonable use and enjoyment of the right-of-way easement across the Dorsey Property known as Rega Road."[1]

¶5 The Kadlecs moved for partial summary judgment, arguing the Dorsey property "was subject to a recorded easement," pursuant to the 1995 Turigliatto deed to Perkins. In a cross-motion for partial summary judgment, the Dorseys argued that because Turigliatto never identified a beneficiary of the easement, he intended only to retain an easement "for the benefit of his own remaining properties." The trial court granted the Kadlecs' motion, concluding "the Turigliatto deed must be read to permit ingress and egress over the road without limitation to any particular beneficiary." On appeal, this court affirmed. *Kadlec v. Dorsey*, 223 Ariz. 330, ¶ 10, 223 P.3d 674, 677 (App. 2009). Our supreme court, however, vacated our decision and remanded the case to the trial court. *Kadlec v. Dorsey*, 224 Ariz. 551, ¶ 13, 233 P.3d 1130, 1132 (2010).

---

[1]The Kadlecs and the Howells filed separate actions which were consolidated by stipulation under this cause number. The Dorseys filed a third-party complaint against Bradley for breach of contract, fraud, negligent misrepresentation, and rescission. Pursuant to the parties' stipulation, the trial court dismissed the third-party complaint with prejudice.

¶6 After a bench trial, the trial court issued its under-advisement ruling, finding the Kadlecs had failed to prove an easement by prescription by clear and convincing evidence and quieting title in favor of the Dorseys. In relevant part, the court explained:

> The weight of the evidence supports finding that Rega Road was an easement of necessity until July 1996, when [the Dorseys' predecessor,] . . . Perkins, built Mountain Canyon Road [to the south.] . . . Necessity is not prescription. Further, the evidence supports the conclusion that . . . Perkins blocked the road with berms for at least several days in July 1996, significantly interrupting any prescriptive period that allegedly began before that time. Notably, . . . Perkins' testimony establishes that he intended to stop people from using Rega Road. *See Higginbotham v Kuehn*, 102 Ariz. 37, 39, 424 P.2d 165, 167 (1967) (interruption of adverse possession must be made with intent to take possession). Further, the Court does not believe . . . Perkins removed the berms the same day he installed them. In summary, the Court concludes that, due to necessity and/or . . . Perkins installing the berms, any period of prescription did not begin to run until July 1996 at the earliest.

The court therefore concluded that the Kadlecs had failed to establish a prescriptive use for ten years because "Dorsey gated the property less than ten years after . . . Perkins removed the berms." The court also rejected the Kadlecs' argument that they were the beneficiaries of an imperfectly created easement pursuant to the 1995 Turigliatto deed to Perkins.

¶7 In November 2012, the trial court entered judgment in favor of the Dorseys on their quiet title claim, awarding them costs and attorney fees pursuant to § 12-1103(B). This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1).

Standard of Review

¶8 We view the facts in the light most favorable to sustaining the trial court's ruling, *Bennett v. Baxter Grp.*, 223 Ariz. 414, ¶ 2, 224 P.3d 230, 233 (App. 2010), and are bound by the court's findings of fact unless they are clearly erroneous, *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). A finding of fact is not clearly erroneous if substantial evidence supports it. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 58, 181 P.3d 219, 236 (App. 2008). We review de novo a trial court's conclusions of law. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 9, 156 P.3d 1149, 1152 (App. 2007); *see also Sabino Town & Country*, 186 Ariz. at 149, 920 P.2d at 29. And, an error of law in the process of exercising discretion may constitute an abuse of discretion. *Salvation Army v. Bryson*, 229 Ariz. 204, ¶ 8, 273 P.3d 656, 659 (App. 2012).

Discussion

¶9 Generally, a party may obtain an easement by prescription if it can establish "'that the land in question has actually and visibly been used for ten years, that the use began and continued under a claim of right, and [that] the use was hostile to the title of the true owner.'" *Paxson v. Glovitz*, 203 Ariz. 63, ¶ 22, 50 P.3d 420, 424 (App. 2002), *quoting Harambasic v. Owens*, 186 Ariz. 159, 160, 920 P.2d 39, 40 (App. 1996) (alteration in *Paxson*). Although a showing of mere use is not sufficient, if the claimant proves by clear and convincing evidence "open, visible, continuous, and unmolested use of the land" for at least ten years, the use is presumptively hostile and under a claim of right. *Harambasic*, 186 Ariz. at 160-61, 920 P.2d at 40-41; *Inch v. McPherson*, 176 Ariz.

132, 135-36, 859 P.2d 755, 758-59 (App. 1992). The burden then shifts to the owner to rebut the presumption by a showing that the use was permissive. *Harambasic*, 186 Ariz. at 161, 920 P.2d at 41.

¶10 The Kadlecs argue the trial court erred by concluding their use of Rega Road prior to July 1996 was an easement by necessity that defeated their claim of a prescriptive easement. In its under-advisement ruling, the court stated that "[t]he weight of the evidence supports finding that Rega Road was an easement of necessity until July 1996, when . . . Perkins built Mountain Canyon Road." The court noted that "[u]se by necessity is typically not adverse because the user has some justification for use other than a claim that is hostile to that of the true owner." In support of its ruling, the court relied upon the Restatement (Third) of Property (Servitudes) §§ 2.16 cmt. f and 2.17 cmt. h, illus. 27.

¶11 On appeal, as they did below in their motion for reconsideration of the trial court's ruling, the Kadlecs point to several of the court's findings of fact they contend are inconsistent with an easement by necessity. Specifically, the court found that "[b]oth the Howell and Kadlec properties were sold subject to an easement over what is known as Mountain Canyon Road," and "Howell and Kadlec can access their property by Mountain Canyon Road and by Wolf Track Trail." The court also explicitly found that Howell and Kadlec "do not need Rega Road to access their properties." However, in ruling on the Kadlecs' motion for reconsideration of the judgment in favor of the Dorseys, the court "reject[ed their] assertion that its prior [r]uling include[d] a finding of legal necessity." The court explained that in using the word "necessity," it had meant that "Rega Road was

the only safely practicable means certain users had to reach their respective properties prior to the improvement of Mountain Canyon Road in 1996." And, it stated that "[t]he use of a road simply because there is no other reasonably practicable means of physical access to one's property lessens the likelihood that the individual has the individual claim of right to use the road."

¶12 But, contrary to the trial court's reasoning, the legal principles underlying the parts of the Restatement comments the court relied upon are limited to easements by necessity.[2] *See* Restatement § 2.16 cmt. f (use pursuant to easement by necessity not adverse); Restatement § 2.17 cmt. h, illus. 27 ("Use of a way by necessity is not open or notorious."). We have found no authority for the proposition that in the absence of an easement by necessity, a claimant is not entitled to a prescriptive easement merely because the use is necessary. Nothing in the Restatement comments that the court relied upon leads us to a different conclusion. "To be adverse, the use must be made without authority and without permission of the property owner," Restatement § 2.16 cmt. f, and it must be open, which means "not made in secret," or notorious, which means "actually known to the true owner," Restatement § 2.17 cmt. h. Here, it is undisputed that the

[2]"Under the common law, [an easement by necessity is established] where land is sold that has no outlet, [and] the vendor by implication of the law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser to have access to his property." *Bickel v. Hansen*, 169 Ariz. 371, 374, 819 P.2d 957, 960 (App. 1991). "Former unity of title and subsequent separation are factual predicates to implying a way of necessity." *Tobias v. Dailey*, 196 Ariz. 418, ¶ 13, 998 P.2d 1091, 1094 (App. 2000). These "factual predicates" distinguish an easement by necessity from a prescriptive easement. *See Oyler v. Gilliland*, 351 So. 2d 886, 887-88 (Ala. 1977) (easements by necessity and prescription mutually exclusive because necessity based on implied intended grant). No party claimed, and the trial court did not find, the factual predicates for an easement by necessity.

Kadlecs neither sought nor obtained permission, express or implied, to use Rega Road. The court thus committed an error of law in concluding that "any period of prescription did not begin to run until July 1996" because the Kadlecs' use of Rega Road before then was by necessity. *See Salvation Army*, 229 Ariz. 204, ¶ 8, 273 P.3d at 659.

¶13 Next, the Kadlecs assert there was no evidence "to support the trial court's erroneous conclusion that there was an effective interruption of the prescriptive" use of Rega Road in July 1996 when Perkins installed the berms. In response, the Dorseys contend the court correctly concluded that any prescriptive use of Rega Road was effectively interrupted in July 1996 based on Perkins' intent to close the road.

¶14 An easement by prescription can be established only "if the owner or possessor of the claimed servient estate does not effectively interrupt the adverse use prior to the end of the prescriptive period." Restatement § 2.17 cmt. j; *see also Harambasic*, 186 Ariz. at 160, 920 P.2d at 40. "A physical interference with the use is effective only if it brings about a cessation of use. If the adverse user resumes the use, the interruption has not been successful unless the cessation of use was long enough to indicate [the claimant's] abandonment" of the easement. Restatement § 2.17 cmt. j.

¶15 Here, the trial court found that Perkins "built berms on Rega Road, with the intent to close" it and that "[i]t was not possible for people to cross over the berms with normal vehicles." Viewed in isolation, these findings might support the court's conclusion that Perkins effectively interrupted any prescriptive period by installing the berms. However, the court also found that when Howell heard Lucero "screaming" at Perkins about the installation of the berms, Howell told Perkins to "remove [them and]

threatened to sue him," and that Perkins removed the berms shortly thereafter. Although the court found the berms remained in place for "at least several days," Perkins failed to bring about "a cessation of use" of Rega Road that was "long enough to indicate" the Kadlecs had abandoned the easement. Restatement § 2.17 cmt. j. Indeed, Lucero's and Howell's demands that Perkins remove the berms demonstrated hostile and adverse claims, not abandonment of those claims. And Perkins' removal of the berms in response to those demands established his own abandonment of any intention to retake exclusive possession and use of Rega Road.

¶16 But, the Dorseys contend the parties stipulated in the trial court "that *Higginbotham* was the law governing an interruption of prescriptive uses" and this court must "decline the invitation" to apply the Restatement § 2.17 cmt. j "if our [s]upreme [c]ourt has promulgated its own rule." In *Higginbotham*, our supreme court held that the defendant did not interrupt the claimant's adverse possession of the disputed land by tearing down the encroaching fence installed by the true owner's predecessor and reinstalling another fence in the same location. 102 Ariz. at 39, 424 P.2d at 167. The court reasoned that there was no evidence that the true owner tore down the fence with the intention of retaking possession of the disputed strip of land. *Id.* Contrary to the Dorseys' suggestion, *Higginbotham* and the Restatement do not establish conflicting rules. Under the Restatement, a true owner's "unsuccessful attempt to block the [prescriptive] use reinforces the argument that the use is adverse." Restatement § 2.17 cmt. j. This principle is consistent with *Higginbotham*, in which the court pointed out that an effective interruption "'must clearly indicate to the occupant that his possession is

invalid and his right challenged.'" 102 Ariz. at 39, 424 P.2d at 167, *quoting Kirby Lumber Corp. v. Smith*, 305 S.W.3d 829, 830 (Tex. Civ. App. 1957). An unsuccessful attempt to block a prescriptive use does not clearly indicate to the user that the use is invalid. *See Concerned Citizens of Brunswick Cnty. Taxpayers Ass'n v. State ex rel. Rhodes*, 404 S.E.2d 677, 687 (N.C. 1991) ("Defendant's repeated protests, remonstrances, blockages, and other attempts to interfere with the use of the path, all of which failed, are the strongest kind of evidence of adverse use."); *Trs. of Forestgreen Estates, 4th Addition v. Minton*, 510 S.W.2d 800, 803 (Mo. Ct. App. 1974) ("Plaintiffs' actions in immediate removal of the barriers to avoid hampering of their use strengthens their argument of adverse, hostile use under claim of right.").

¶17 Here, although evidence established that Perkins intended to block Rega Road when he installed the berms, the fact that he removed the berms within a few days of installing them, at the Kadlecs' insistence, is clear evidence that Perkins did not successfully interrupt the Kadlecs' prescriptive use of the road. Accordingly, the trial court erred by concluding otherwise. *See Salvation Army*, 229 Ariz. 204, ¶ 8, 273 P.3d at 659.

¶18 We will affirm the trial court's ruling if the result is legally correct for any reason. *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R. Co.*, 231 Ariz. 517, ¶ 4, 297 P.3d 923, 925 (App. 2013). Therefore, although not raised by the parties on appeal, we address additional findings and conclusions made by the court in its ruling. First, the court found that Kadlec "cannot meet the ten-year requirement without tacking" and concluded tacking fails in this case because Lucero used Rega Road with "the belief it

was a public road." In its ruling on the Kadlecs' joint motion for reconsideration, the court further explained its reasoning: "[A]n individual's erroneous belief that a road is *public* necessarily precludes the same individual from having an *individual* claim of right to an easement over the road." Use is not made under a claim of right when made in subordination to the true owner. *Spaulding v. Pouliot*, 218 Ariz. 196, ¶ 21, 181 P.3d 243, 249-50 (App. 2008). But, a "'claim of right is nothing more than the intention of the one wrongfully [using another's property] to . . . use the land . . . irrespective of any semblance or shadow of actual title or right.'" *Id.*, *quoting Weber v. Roosevelt Water Conservation Dist.*, 126 Ariz. 509, 510, 617 P.2d 17, 18 (1980) (alteration in *Spaulding*). Moreover, absent other facts or circumstances, "[a] use is adverse even though made in the mistaken, but good faith, belief that the user is entitled to make it." Restatement § 2.16 cmt. f.

¶19 Although Lucero testified that he thought Rega Road was a public road, he also referred to it as "[his] road . . . [t]o [his] house," explaining that his children had named the road Rattle Tail Ranch and he had put up a sign to that effect. Accordingly, Lucero's belief that Rega Road was a public road does not preclude an easement by prescription. "The characterization of the [disputed roadway by the claimant] as a 'public road' does not necessarily defeat the claimed easement by prescription." *Suiter v. Kurtz*, 1 Ariz. App. 350, 353, 403 P.2d 3, 6 (1965). The claimant's use must be distinct from the general public's use to ensure the landowner is put on notice of the impending encroachment and, thus, may protect his interest in the property. *Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 209, 818 P.2d 190, 194 (App. 1991) ("[The claimant's] use need only

be exclusive in the sense that it is based upon a right that he claims as an individual rather than as a member of the general public."). By confronting Perkins about the installation of the berms, Lucero clearly put Perkins on notice that he was asserting a right to use Rega Road, again distinguishing him from the general public who may also have used the road. "'In all cases the intention and not the mistake is the test by which the character of the possession is determined.'" *Higginbotham*, 102 Ariz. at 39, 424 P.2d at 167, *quoting Trevillian v. Rais*, 40 Ariz. 42, 46, 9 P.2d 402, 403 (1932).

¶20 Second, we address the trial court's findings suggesting that its ruling, in part, was based on the frequency of the Kadlecs' use of Rega Road at various times over the years. The court noted there was conflicting evidence on this issue—some witnesses testified the Kadlecs used the road on a regular basis, while others stated their use was sporadic. However, the continuous-use requirement for prescriptive easements "does not require that actual physical use be made constantly, or even frequently." Restatement § 2.17 cmt. i; *see also Kay v. Biggs*, 13 Ariz. App. 172, 176, 475 P.2d 1, 5 (1970) (two-to-three-weeks use during summer each year sufficient to show continuous possession for adverse possession). A claimant must only show they use the land "as would an ordinary owner of the same type of land." *Kay*, 13 Ariz. App. at 175, 475 P.2d at 4; *see also Spaulding*, 218 Ariz. 196, ¶ 24, 181 P.3d at 250 (although requirements for establishing prescriptive easement and title by adverse possession not identical, "we generally apply their principles interchangeably").

¶21 In sum, the evidence established that Howell began using Rega Road when he acquired his property in November 1990. Kadlec's predecessor, Lucero, began using

the roadway shortly after acquiring his property in October 1994, and Kadlec continued using it after he purchased the property in September 1999. The trial court erred in concluding that "due to necessity and/or . . . Perkins installing the berms, any period of prescription did not begin to run until July 1996." The Kadlecs' demand for removal of the berms and Perkins' acquiescence is clear evidence that the true owner had notice of the claimants' adverse claim of right to use the roadway. Thus, even if the court credited Dorsey's testimony that he installed the gate "effectively clos[ing] off" Rega Road by the "end of January, beginning of February" of 2006, the Kadlecs established their prescriptive use of the roadway for the requisite ten-year period before it was closed.[3] The Dorseys presented no evidence that the Kadlecs' use of Rega Road was permissive. Accordingly, the court erred in awarding judgment in favor of the Dorseys on their quiet title claim and in ruling against the Kadlecs on their prescriptive easement by adverse use claim.[4] We therefore reverse the court's judgment including its award of attorney fees and costs to the Dorseys.

---

[3]Although the trial court stated that it had weighed "all the evidence, including the credibility of witnesses" in determining whether the Kadlecs had met their burden of proving an easement by prescription, *see Premier Fin. Servs. v. Citibank (Ariz.)*, 185 Ariz. 80, 85, 912 P.2d 1309, 1314 (App. 1995) (trial court, not appellate court, determines credibility of witnesses), those credibility findings are not determinative to the outcome.

[4]Consequently, we need not address the merits of the Kadlecs' argument that they presented sufficient evidence "that Rega Road was created pursuant to the terms of an intended but imperfectly created easement." Nor do we need to address their other assignments of trial court error.

Disposition

¶22 For the foregoing reasons, we reverse the trial court's judgment in favor of the Dorseys on their counterclaim and remand the case to the trial court with instructions to enter an appropriate judgment in favor of the Kadlecs on their prescriptive easement by adverse use claim. We also vacate the court's award of attorney fees and costs to the Dorseys. The Dorseys request attorney fees and costs on appeal pursuant to § 12-1103(B). Because they are not the prevailing party, we deny that request. *See Scottsdale Mem'l Health Sys., Inc. v. Clark*, 164 Ariz. 211, 215, 791 P.2d 1094, 1098 (App. 1990) (under § 12-1103(B), court has discretion to award attorney fees to prevailing party).

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge