IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

FREEPORT MINERALS CORPORATION,
Plaintiff/Appellee,

v.

ROBERT CORBELL AND KATHRYN CORBELL, HUSBAND AND WIFE; CHARLES P. CORBELL AND DOROTHY CORBELL, HUSBAND AND WIFE; CHARLES T. CORBELL AND ESPERANZA CORBELL, HUSBAND AND WIFE,
Defendants/Appellants.

No. 2 CA-CV 2016-0226
Filed August 23, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Greenlee County
No. CV201500022
The Honorable Kenneth L. Fields, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Kelly[1] concurred.

E S P I N O S A, Judge:

¶1 In September 2016, the trial court granted summary judgment in favor of appellee Freeport Minerals Corporation in its quiet title action against appellants Robert, Kathryn, Charles P., Dorothy, Charles T., and Esperanza Corbell. The Corbells now challenge that ruling, arguing there were material facts in dispute such that summary judgment was not appropriate. For the following reasons, we affirm.

Factual and Procedural Background

¶2 This case involves an estimated 240 acres of land that both Freeport and the Corbells claim to own. The parcel at issue lies within a much larger piece of property whose title was held by Lee and Leona Udall in 1979. The parties do not dispute that the Udalls transferred the property's title in 1981 to Charles and Beverly Kohlhase, who the following year transferred it to their company Kohlfam Properties, L.P., which in turn sold it in 1990 to Phelps Dodge Corporation, Freeport's predecessor-in-interest, which

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

Freeport acquired in 2013. What the parties do dispute is whether the Corbells, apparently believing the parcel had been included in property they purchased from the Udalls in 1979,[2] acquired title through adverse possession.

¶3 In June 2015, Freeport filed a complaint against the Corbells seeking (1) to quiet title to the disputed property, (2) a declaratory judgment that Freeport owned the land in fee simple absolute, (3) to hold the Corbells liable for common law trespass, and (4) to immediately possess and recover the land. The Corbells filed an answer in January 2016 asserting they had acquired the property through adverse possession and counterclaiming for quiet title and a declaratory judgment that they owned the property in fee simple absolute. Freeport moved to dismiss the counterclaims, but the trial court denied the motion. In its ruling, the court noted "the adverse possession claim(s) need[ed] to be plead more specifically in order for [Freeport] to formulate a defense/reply," instructed the Corbells to "disclose within a timely fashion specific facts to support each individual claim," and warned that "[f]ailure to do so w[ould] risk having their claims foreclosed on a motion for summary judgment."

¶4 In June 2016, the Corbells not having supplemented their pleadings, Freeport filed a motion for summary judgment on all of its claims and the Corbells' counterclaims. Freeport also filed a separate statement of facts that included a number of documents and the affidavits of the property's former managers Gary Jones and Jeffrey Menges, and former owner Charles Kohlhase, all stating the Corbells used the property with the owners' permission. The Corbells filed a response supported by the affidavit of Robert Corbell, which reiterated the Corbells' adverse possession argument and to which

[2]Documents Freeport submitted with its complaint indicate the property Charles P. and Dorothy Corbell purchased from the Udalls in 1979 has a distinct legal description from that of the disputed parcel, which was not included in the purchase; the purchased property was estimated to be 26 acres; and the 240-acre parcel in dispute is not contiguous to the 26 acres. The Corbells do not appear to dispute the accuracy of this information.

Freeport objected on the basis "it provide[d] no specific facts, [wa]s vague and conclusory, [wa]s not premised on personal knowledge, [wa]s premised on hearsay, and refer[red] to documents which [we]re not even attached."

¶5 The trial court granted summary judgment in Freeport's favor on all its claims including denial of the Corbells' counterclaims. The court found that Freeport had demonstrated undisputed legal title and payment of property taxes, plus the permissive nature of the Corbells' use of the property. It further determined that Robert Corbell's affidavit "[wa]s not based upon his personal knowledge and [wa]s founded upon inadmissible hearsay evidence" and "d[id] not support [the Corbells'] claims or raise a genuine issue of material fact." The court subsequently entered judgment against the Corbells pursuant to Rule 54(c), Ariz. R. Civ. P., and awarded Freeport $36,773.88 in attorney fees under A.R.S. § 12-1103(B). The Corbells appealed; we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Summary Judgment

¶6 Under Rule 56(a), Ariz. R. Civ. P., summary judgment is appropriate when "the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Our review of a trial court's grant of summary judgment is de novo, and we view the evidence and all reasonable inferences in the light most favorable to the party against whom summary judgment was entered. *Felipe v. Theme Tech Corp.*, 235 Ariz. 520, ¶ 31, 334 P.3d 210, 218 (App. 2014).

¶7 Summary judgment is not appropriate when "the trial judge would be 'required to pass on the credibility of witnesses with differing versions of material facts, . . . required to weigh the quality of documentary or other evidence, and . . . required to choose among competing or conflicting inferences.'" *Newman v. Sun Valley Crushing Co.*, 173 Ariz. 456, 458, 844 P.2d 623, 625 (App. 1992), *quoting Orme Sch. v. Reeves*, 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990) (omissions in *Newman*). Nevertheless, the requirement of a "genuine" factual dispute means that summary judgment is only precluded when an

issue of fact "requires a trial, i.e., . . . a reasonable trier of fact could decide in favor of the party adverse to summary judgment on the available evidentiary record." *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). Summary judgment "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶8 Both parties in this case asked the trial court to quiet title to the disputed property in their favor. The parties agree as to the legal description of the property involved, although it is unclear how much of that property the Corbells claim to own. The Corbells nevertheless argue they acquired the property through adverse possession.

¶9 Adverse possession is "an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." A.R.S. § 12-521(A)(1). Section 12-526(A), A.R.S., establishes a ten-year statute of limitations for recovering land from someone in "peaceable and adverse possession," which "need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them," § 12-521(B). "[A] claimant must show that the adverse possession was actual, open and notorious, hostile, under a claim of right and was exclusive and continuous for a ten-year period." *Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 189, 840 P.2d 1051, 1054 (App. 1992). "The person claiming title by adverse possession shoulders the burden of proof and must show that the requisite statutory elements have been satisfied. There are no equities favoring establishment of an adverse possession claim." *Berryhill v. Moore*, 180 Ariz. 77, 82, 881 P.2d 1182, 1187 (App. 1994) (citation omitted).

¶10 Once a party claiming title to property through adverse possession has shown that his or her possession was "open, visible, continuous, and undisturbed," we will presume that the possession was "under a claim of right and not permissive." *Spaulding v. Pouliot*,

218 Ariz. 196, ¶ 25, 181 P.3d 243, 250 (App. 2008). The property's owner "then bears the burden of showing he or she expressly or impliedly permitted the claimant's use of the property." *Id.* If the claimant's possession began with permission, we will presume that the permission continued unless the claimant's "later actions indicated to the owner that the use had become hostile and under a claim of right." *Id.* ¶ 15.[3]

¶11 The parties appear to agree that the Corbells have used the property to some extent since 1979. But they disagree about whether it was with the permission of the various owners of record. Although the Corbells' response to the motion for summary judgment asserted they never sought permission to use the property because they believed it was part of the property they purchased from the Udalls in 1979, "an unsworn and unproven assertion of fact in a memorandum is insufficient" to survive summary judgment. *Moretto v. Samaritan Health Sys.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997); *see also* Ariz. R. Civ. P. 56(e) ("[A]n opposing party may not rely merely on allegations or denials of its own pleading."); *Maxwell v. Fid. Fin. Servs., Inc.*, 184 Ariz. 82, 86, 907 P.2d 51, 55 (1995) (party opposing summary judgment "can respond by memorandum, but the memorandum must reference depositions, answers to interrogatories, or admissions on file to comply with [Rule 56]").

¶12 Freeport, for its part, introduced three affidavits stating that each of the property's owners gave the Corbells permission to use the land. The Corbells did not object to any of Freeport's proffered evidence in their response to the summary judgment motion but later objected to the affidavits on hearsay grounds in their motion for reconsideration after summary judgment had been granted.[4] In denying the motion for reconsideration, the trial court

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[3] Although this portion of *Spaulding* discusses prescriptive easements, whose requirements are not identical to those for adverse possession, "we generally apply their principles interchangeably." *Spaulding*, 218 Ariz. 196, ¶ 24, 181 P.3d at 250.

[4] "An affidavit used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out

identified specific portions of Freeport's affidavits on which it had based its decision. Those portions are not hearsay, not being repetitions of out-of-court statements, and are based on the personal knowledge of the affiant, and therefore were admissible evidence to consider on a motion for summary judgment. *See* Ariz. R. Evid. 801(c) (hearsay is an *out-of-court statement* repeated in court to prove the truth of the matter asserted).

¶13 Considering only the evidence before the trial court when it ruled on Freeport's motion,[5] neither party introduced admissible evidence showing whether the Corbells were given permission to use the property by the Udalls, who owned it from 1979 to 1981. The sole affidavit the Corbells provided in response to the summary judgment motion stated that, "[o]n May 11, 1979, [Robert Corbell's] parents accompanied the previous owner, [Lee] Udall, on an inspection of the Property," and were told that the land they bought from the Udalls included the portion of Freeport's property now in dispute. Freeport properly objected to this testimony, which does not indicate that Robert Corbell had personal knowledge of the May 11, 1979, conversation and otherwise appears to be based on inadmissible hearsay. *See* Ariz. R. Civ. P. 56(c)(5); Ariz. R. Evid. 801(c).

¶14 However, the affidavit of Charles Kohlhase, who owned the property from 1981 until 1990, stated that he and his wife "allow[ed] the Corbells to use the Property." That statement is admissible evidence based on Charles Kohlhase's personal knowledge. Likewise, the declaration of Gary Jones, who oversaw

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facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Ariz. R. Civ. P. 56(c)(5).

[5] In addition to not considering the portions of Freeport's affidavits the trial court rejected as hearsay, we do not consider the affidavits of Robert Corbell and Charles P. Corbell submitted with the motion for reconsideration. *See Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, n.1, 156 P.3d 1157, 1162 n.1 (App. 2007) (appellate court may not consider evidence not before trial court when it ruled).

the property from 1992 to 2010 while working for Phelps Dodge and then Freeport, included admissible evidence based on personal knowledge that both companies permitted the Corbells to be on the land. *Cf. United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 304, 681 P.2d 390, 456 (App. 1983) (company's agent may testify to matters within personal knowledge).

¶15 The only evidence the Corbells introduced in rebuttal was Robert Corbell's affidavit stating, "No one has ever permitted me and my family to use the property," and, "At no time did any previous owner, Kohlhase, Phelps Dodge or its successor, Freeport . . . [,] give us permission to use our property. We never asked for permission because we have held this property for nearly 40 years." But Robert Corbell did not establish that his personal knowledge entitled him to "nearly 40 years[']" worth of alleged facts. *See* Ariz. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, n.3, 167 P.3d 1277, 1280 n.3 (App. 2007) (affidavit apparently not based on personal knowledge not considered). And even if Robert Corbell's broad statements could be said to "provide a 'scintilla' or create the 'slightest doubt' [they would] still be insufficient to withstand a motion for summary judgment," *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶16 Although once-permissive use can become hostile, *Spaulding*, 218 Ariz. 196, ¶ 15, 181 P.3d at 248, the Corbells did not introduce any evidence that they at some point expressed to the record title owners an intention to use the property in a hostile manner and under a claim of right, *id.*, until the events immediately preceding the current litigation. In fact, Robert Corbell stated in his affidavit—albeit again without foundation—that the Corbells at least "never discussed their use of the Property with" Charles Kohlhase. Because the Corbells failed to introduce evidence sufficient to rebut the presumption of continued permissive use, summary judgment was properly granted.

¶17 Furthermore, the Corbells' claims were notably deficient in at least two other ways. First, they did not provide the trial court

with evidence showing precisely what portion of Freeport's land they claim to own. Although they did submit in response to the earlier motion to dismiss sketches purportedly showing the approximate location of the claimed property's fences and building, their estimate of the property's size is 240 acres while § 12-526(B) only permits adverse possession of up to 160 acres.

¶18 The second and perhaps more significant issue is that the Corbells never identified which of them had taken the property through adverse possession. Although property can be owned by more than one person simultaneously, the Corbells did not introduce evidence showing that all six of them had been adversely possessing the property since 1979. In fact, the undisputed record shows that Kathryn and Esperanza married into the Corbell family in 2004 and 2008, respectively, which indicates they were not adversely possessing the property in 1979 or even 1990. Although it is possible for a spouse to gain an interest in property owned by the other spouse prior to marriage, Kathryn and Esperanza did not introduce any evidence to that effect. *See* A.R.S. § 25-213(A) ("A spouse's real property that is owned by that spouse before marriage . . . is the separate property of that spouse."); *Drahos v. Rens*, 149 Ariz. 248, 249, 717 P.2d 927, 928 (App. 1985) (separate property "does not change its character after the marriage except by agreement or operation of law").

¶19 As for the four other Corbells, no evidence was introduced regarding which of them claimed to be adversely possessing the property at any given time or for any particular period. Robert Corbell's affidavit indicated he is the son of Charles P. and Dorothy Corbell, but nothing identified Charles T.'s relation to the others. To the extent the property could have been adversely possessed by some Corbells during some years and others during different periods, the Corbells did not establish privity that might have permitted tacking different periods together. *See* § 12-521(B).

¶20 Simply put, no reasonable trier of fact could decide in the Corbells' favor on the available evidentiary record. *See Allyn*, 167 Ariz. at 195, 805 P.2d at 1016. The vague and unfounded assertions the Corbells made in response to Freeport's motion for summary

judgment were of "so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion" that the Corbells had adversely possessed Freeport's property, *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. Accordingly, summary judgment was properly granted in Freeport's favor.[6]

Attorney Fees Below

¶21 The Corbells additionally contend the trial court erred in awarding attorney fees to Freeport. We review an attorney fee award for an abuse of discretion, which occurs if the court's "reason for the award is 'legally incorrect.'" *In re Estate of Ganoni*, 238 Ariz. 144, ¶ 18, 357 P.3d 828, 831 (App. 2015), *quoting Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, ¶ 17, 141 P.3d 824, 830 (App. 2006). Section 12-1103(B), A.R.S., provides that the successful plaintiff in a quiet title action may recover, "in addition to the ordinary costs, an attorney's fee to be fixed by the court" if the plaintiff asked the defendant twenty days before filing suit to execute a quit claim deed and gave the defendant five dollars for doing so. "The purpose of awarding attorneys' fees under A.R.S. § 12-1103 is 'to avoid needless litigation'" and "to 'mitigate the burden of the expense of litigation to establish a just claim or defense.'" *Estate of Ganoni*, 238 Ariz. 144, ¶ 19, 357 P.3d at 831, *quoting Mariposa Dev. Co. v. Stoddard*, 147 Ariz. 561, 565, 711 P.2d 1234, 1238 (App. 1985).

¶22 The Corbells argue the trial court committed legal error by "presum[ing] an entitlement of attorney fees" and "not considering the Supreme Court mandated elements" set forth in *Associated Indemnity Corp. v. Warner*, a case involving attorney fees under A.R.S. § 12-341.01. 143 Ariz. 567, 568, 694 P.2d 1181, 1182

[6] Freeport's answering brief also states it "is entitled to summary judgment on its claim of common law trespass." Although the trial court did not list the trespass claim in its summary judgment ruling, the court's 54(c) ruling included the statement that the Corbells were "forever barred and enjoined from any further trespass on the Property." The Corbells' opening brief does not mention the trespass claim and we therefore do not address it.

(1985). The *Warner* factors are (1) the merits of the unsuccessful party's defense, (2) whether "[t]he lawsuit could have been avoided or settled," (3) whether a fee award would be "an extreme hardship," (4) whether the successful party prevailed completely, (5) the novelty of the legal questions, and (6) whether a fee award would discourage others with legitimate claims. *Id.* at 570, 694 P.2d at 1184.

¶23 In accordance with § 12-1103(B), more than twenty days before filing suit, Freeport sent all of the Corbells quit claim deeds for execution, along with checks for five dollars. The trial court concluded its order granting Freeport's motion for summary judgment by stating it would "entertain an award of reasonable attorneys' fees pursuant to [§] 12-1103." Freeport subsequently filed a motion for attorney fees totaling over $120,000. The court considered the motion along with the Corbells' response and awarded Freeport approximately $37,000 in attorney fees.

¶24 Contrary to the Corbells' assertion on appeal, the trial court did not "presume[] an entitlement of attorney fees" but rather noted in its ruling that it "ha[d] the discretion to award attorneys' fees as well as the discretion to fix the amount." The court specifically found the Corbells' claim to the property "not reasonably held" and the litigation "necessary solely because [the Corbells] made it so" by rebuffing Freeport's efforts to settle before filing suit, in accord with the first two *Warner* factors. The court also found that Freeport's submitted time spent on the case "[could not] be viewed as reasonable under the circumstances" and accordingly awarded Freeport less than a third of the amount requested, noting that amount "w[ould] not work an economic hardship on [the Corbells]," satisfying the third *Warner* factor.

¶25 Although the trial court did not directly address the remaining *Warner* factors, we note that Freeport was granted summary judgment on all claims, the Corbells' claim to own property through common law adverse possession was not particularly novel, and there is no reason to believe parties who can present sturdier evidence of adverse possession will be discouraged from doing so because of the attorney fees assessed against the Corbells in this case. We also note that *Warner* discussed the discretionary nature of

attorney fee awards and stated that, although "it is the better practice to have a record which reflects the justification" for the trial court's fee determination, "the statute does not require it." 143 Ariz. at 570-71, 694 P.2d at 1184-85. We find a reasonable basis in the record upon which the court could grant attorney fees, *see id.* at 571, 694 P.2d at 1185, and therefore conclude it did not abuse its discretion in doing so.

Attorney Fees on Appeal

¶26 Freeport's answering brief includes a request for attorney fees pursuant to Rule 21(a), Ariz. R. Civ. App. P., and § 12-1103(B). The same reasons justifying Freeport's attorney fee award below likewise counsel in favor of awarding Freeport attorney fees on appeal.

Disposition

¶27 For all of the foregoing reasons, summary judgment in favor of Freeport is affirmed. The trial court's award of Freeport's attorney fees is also affirmed, and upon its compliance with Rule 21(c), Freeport is awarded its reasonable attorney fees on appeal.