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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOAN ETZENHOUSER, a married woman dealing with her sole and separate property, Plaintiff/Appellant, v. JONNA BAKER and GLEN BAKER, wife and husband; GJB PROPERTIES, L.L.C., an Arizona limited liability company; JOHN S. RICHINS and JANE DOE RICHINS, husband and wife; and R & M REALTY COMPANY, L.L.C., an Arizona limited liability company, Defendants/Appellees.	2 CA-CV 2008-0129 2 CA-CV 2009-0009 (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV2006-01815

Honorable William J. O'Neil, Judge

AFFIRMED

Carmichael & Powell, P.C.
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V Á S Q U E Z, Judge.

¶1 Appellant Joan Etzenhouser filed this action for fraud, fraudulent concealment, negligent misrepresentation, and negligence against Jonna Baker; GJB Properties, LLC; John Richins; and R & M Realty Company, L.L.C., after Etzenhouser purchased real property that subsequently developed earth fissures. On appeal, Etzenhouser challenges the trial court's entry of summary judgment in favor of the defendants. She contends the court erred by finding she had failed to submit sufficient evidence for a reasonable jury to conclude the defendants had actual knowledge of earth fissures prior to the sale. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 We view all facts and reasonable inferences therefrom in the light most favorable to Etzenhouser, as the party against whom summary judgment was entered. *See Vasquez v. State*, ___ Ariz. ___, ¶ 2, 206 P.3d 753, 755 (App. 2008). In February 2004, Etzenhouser purchased real property in Queen Creek from Bradley Burke and Patti Bailey. Baker, a real estate broker with GJB Properties, represented Etzenhouser in this transaction,

and Richins, a real estate agent with R & M Realty, represented the sellers. Following a rainstorm in August 2005, three earth fissures opened up on the property. These fissures continued to expand and caused cracking in the floors, walls, and ceiling of the house located on the property.

¶3 In October 2006, Etzenhouser filed the present lawsuit.[1] In January 2008, Baker and GJB Properties filed a motion for summary judgment, contending pursuant to A.R.S. § 32-2117 that they had "no actual knowledge that the Property and/or the surrounding area was subject to earth fissures."[2] In response, Etzenhouser submitted an affidavit from a hydrologist stating that the property "may have been know[n] to be in or near an area of earth fissure hazards as early as 1962." The hydrologist based that conclusion on a series of maps published by the Arizona Geological Survey and the Federal Geological Survey; public presentations to the Queen Creek Town Council and the local Planning and Zoning Commission; and radio, television, and newspaper reports. Etzenhouser also submitted an affidavit from a real estate broker stating "[i]t would have been reasonably expected of real estate practitioners and brokers conducting business in the Queen Creek and Pinal County area to have knowledge of the existence of fissures." In addition, Etzenhouser

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[1]Etzenhouser also sued Burke and Bailey, the sellers of the property, for breach of contract, fraud, and fraudulent concealment; however, those claims are not part of this appeal.

[2]In 2006, the legislature enacted A.R.S. § 32-2117, mandating the mapping of earth fissures in Arizona and granting immunity "for any act or failure to act in connection with . . . [a]ny disclosure . . . if the subdivider, owner or licensee had no actual knowledge that the land was subject to earth fissures before the map was posted."

contended that two Arizona Department of Real Estate bulletins, which she alleged had been "disseminated to all licensed realtors in Arizona, including Baker," had "specifically discussed the existence of earth fissures" in the area.

¶4 The trial court granted summary judgment against Etzenhouser, finding she had failed to submit any evidence Baker and GJB had "actual knowledge of the fissuring of the property" prior to the sale, making them immune from liability pursuant to § 32-2117. Richins and R & M Realty subsequently moved for summary judgment on the same ground. In response, Etzenhouser submitted essentially the same evidence as before, with the addition of an affidavit from a local "activist" who stated that "two large signs" less than 1.5 miles from the property warned the public of the existence of fissures in the area. The court similarly granted the motion of Richins and R & M Realty. Etzenhouser timely filed separate notices of appeal from the trial court's rulings, and the appeals were consolidated pursuant to Etzenhouser's motion.

Discussion

¶5 Etzenhouser argues the trial court erred in granting summary judgment in favor of the defendants. We review a trial court's grant of summary judgment de novo to determine "'whether a genuine issue of material fact exists and whether the trial court correctly applied the law.'" *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, ¶ 37, 87 P.3d 81, 88 (App. 2004), *quoting PNL Asset Mgmt. Co. v. Brendgen & Taylor P'ship*, 193 Ariz. 126, ¶ 10, 970 P.2d 958, 961 (App. 1998). Summary judgment should be granted "if

the facts produced in support of [a] claim . . . 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." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶6 Etzenhouser argued below that summary judgment was inappropriate because "genuine issues of material fact remain[ed] as to whether Defendants knew or should have known that [the property] contained or was in an area that was likely to develop earth fissures." On appeal, she concedes § 32-2117 requires that the defendants had actual knowledge.[3] However, she contends the evidence she presented was sufficient for a reasonable jury to conclude the defendants had such knowledge. We disagree.

¶7 "Except in the case of confession, it is generally impossible to [establish legal knowledge] by direct evidence, and [such knowledge] can only be inferred from overt acts." *Grant Bros. Constr. Co. v. United States*, 13 Ariz. 388, 396, 114 P. 955, 957 (Ariz. Terr. 1911). Thus, "actual knowledge can be proven by circumstantial evidence."[4] *In re Tocco*, 194 Ariz. 453, ¶ 11, 984 P.2d 539, 543 (1999). However, the circumstantial evidence

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[3]Etzenhouser apparently believes the defendants' actual knowledge of fissures in the Queen Creek area generally, rather than on this property itself, would be sufficient to show they knew "the land was subject to earth fissures" for purposes of § 32-2117. Because the defendants do not make a contrary argument and we find summary judgment would have been appropriate regardless, we do not reach this issue.

[4]To the extent Etzenhouser alleges the court interpreted § 32-2117 to preclude her from proving the defendants' actual knowledge through circumstantial evidence, we find no support in the record for such a contention.

presented by Etzenhouser did not include any acts from which a jury could reasonably infer the defendants had actual knowledge of fissures on this particular property, such as evidence they had observed structural problems that could have been related to fissures, *see Maycock v. Asilomar Dev., Inc.*, 207 Ariz. 495, ¶¶ 10, 17, 88 P.3d 565, 567, 569 (App. 2004); had received a report about the property indicating the presence of fissures, *see Smith v. City of Kelso*, 48 P.3d 372, 374 (Wash. App. 2002); had initialed a document identifying fissures, *see Michak v. Transnation Title Ins. Co.*, 64 P.3d 22, 27-28 (Wash. 2001); had undertaken measures to remedy or conceal fissures, *see Savage v. Doyle*, 153 S.W.3d 231, 236-37 (Tex. App. 2004); or had made prior inconsistent statements suggesting they were aware of fissures, *see Lanier Home Center, Inc. v. Underwood*, 557 S.E.2d 76, 81 (Ga. App. 2001).

¶8 Nor did Etzenhouser present any evidence the defendants had actually seen either of the signs warning of fissures or any of the specific maps or reports on the issue, instead arguing only that they had "undoubtedly received some of this information." Such a conclusory statement is insufficient to defeat summary judgment. *See Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 275, 560 P.2d 789, 793 (1977). And, even assuming the Arizona Real Estate Department bulletins, one issued in 1999 and the other in 2003, were mailed to the defendants as Etzenhouser contends, there is no evidence the defendants personally received them or ever read the articles in question, which dealt with a variety of "adverse

land conditions" and "geologic hazards."[5] *See In re Tocco*, 194 Ariz. 453, ¶¶ 10-11, n.3, 984 P.2d at 542-43, 543 n.3 (rejecting unsupported inference attorney knew from Rules of Professional Conduct her conduct was unethical). At most, therefore, the circumstantial evidence Etzenhouser offered supported an inference that the defendants should have known there was a risk of fissures in the Queen Creek area generally. When a statute requires proof of actual knowledge, "a mere showing that the [defendants] reasonably *should have known*" is insufficient. *See id.* ¶ 11. The trial court's entry of summary judgment was therefore proper.

Disposition

¶9 For the reasons stated, we affirm the entry of summary judgment in favor of the defendants.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge

[5]The 1999 article contains a single reference to fissures, and the 2003 article contains only one paragraph out of eight specifically devoted to the issue.