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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THOMAS L. CHAPMAN and BARBARA A. CHAPMAN, husband and wife; and MICHAEL S. PORTER and SHERRY L. PORTER, husband and wife, Plaintiffs/Appellants/Cross-Appellees, v. JAMES THURBER and MELODY THURBER, husband and wife, Defendants/Appellees/Cross-Appellants.	2 CA-CV 2009-0155 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20081842

Honorable Virginia C. Kelly, Judge

AFFIRMED IN PART;
REVERSED IN PART AND REMANDED

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V Á S Q U E Z, Presiding Judge.

¶1 In this quiet title action, appellants Thomas and Barbara Chapman (the Chapmans) and Michael and Sherry Porter (the Porters) appeal from the trial court's grant of summary judgment in favor of appellees James and Melody Thurber (the Thurbers). The Chapmans and the Porters argue the court erred in finding they had failed to establish they had obtained ownership through adverse possession portions of a strip of land owned by the Thurbers and in denying their own motion for summary judgment. The Thurbers cross-appeal from the court's award of attorney fees, arguing the court erred in reducing the fees by the amount the Thurbers had been paid by a title insurance company. For the reasons stated below, we affirm the court's denial of the Porters' motion for summary judgment and its grant of summary judgment in favor of the Thurbers on the Chapmans' claim. However, we vacate its summary judgment in favor of the Thurbers with respect to the Porters' claim and the award of attorney fees and remand for further proceedings consistent with this decision.

Factual and Procedural Background

¶2 LaVar and Katherine Jones owned a parcel of residential property and an adjoining thirty-foot-wide strip of land that runs below it and continues eastward below the southern end of two neighboring properties.[1] The Chapmans purchased the property

[1]Pursuant to records of the Pima County Assessor, the residential property was identified as parcel number 114-20-1520; the disputed strip as parcel number 114-19-018A.

immediately east of the Joneses' property in 1989, and the property to the east of the Chapmans' parcel was purchased by the Porters in 1992. From 1992, the Chapmans erected a storage shed, stored wood, and trimmed the trees on the disputed strip below their property. The Porters used their backyard, including the strip, for training dogs and had placed jumps and tunnels on the strip. They rebuilt the bank of a wash that flowed through their property and the strip and maintained the strip, regularly grading and leveling it and removing weeds.

¶3 The Joneses' son, Dwight, testified at his deposition that he never had seen "any physical evidence that would indicate someone else claimed ownership of the disputed parcel[.]" In 1996 or earlier, Dwight had conversations with both the Chapmans and the Porters, offering on behalf of his father to sell them the portions of the strip abutting their respective properties. They both "politely declined." Around the same time, LeVar Jones apparently sent a letter to another neighbor, telling him to remove a fence he had built on another portion of the Joneses' property.

¶4 In 2006, Thurber bought the Joneses' property. Around the time of the purchase, James Thurber "walked up and down the disputed parcel and . . . did not see any evidence that any other person claimed ownership." In 2006, Sherry Porter called the Thurbers before erecting a fence between the Porters' and the Chapmans' properties that extended onto the strip.[2] In 2008, the Thurbers erected a fence separating the strip from the Porter and Chapman properties. The Porters and the Chapmans filed this action

[2]The fence's placement apparently did not reflect accurately the Porter-Chapman border and subsequently was removed.

against the Thurbers, asserting they had obtained ownership of the strip by adverse possession pursuant to A.R.S. § 12-526.[3] The Thurbers filed a counterclaim and all parties moved for summary judgment. After a hearing, the trial court granted summary judgment in favor of the Thurbers and awarded them attorney fees pursuant to A.R.S. § 12-1103. This appeal and cross-appeal followed.

Discussion

¶5 The Porters and the Chapmans argue the trial court erred in granting summary judgment in favor of the Thurbers. "Whether summary judgment is appropriate is a question of law we review de novo." *Ballesteros v. Am. Standard Ins. Co. of Wisc.*, 223 Ariz. 269, ¶ 6, 222 P.3d 292, 295 (App. 2009). We generally will affirm a grant of summary judgment when there is "no genuine issue as to any material fact." *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). However, summary judgment is not appropriate when a trial court is required to assess "the credibility of witnesses with differing versions of material facts . . . [or] to choose among competing or conflicting inferences." *Id.* at 311, 802 P.2d at 1010. And we will reverse a summary judgment when "the trial court erred in applying the law." *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, ¶ 4, 7 P.3d 136, 139 (App. 2000). "In reviewing a grant of summary judgment, we view the evidence and reasonable inferences 'in the light most favorable to the party opposing the motion.'" *Cannon v. Hirsch Law Office, P.C.*, 222

[3]The Porters and the Chapmans amended their complaint to include as a defendant GMAC Bank, the beneficiary of two deeds of trust on the disputed property. The bank failed to answer, and a default judgment was entered against it.

Ariz. 171, ¶ 7, 213 P.3d 320, 323 (App. 2009), *quoting Wells Fargo Bank v. Ariz. Laborers Local No. 395 Pension Trust Fund*, 201 Ariz. 474, ¶ 13, 38 P.3d 12, 20 (2002).

¶6 "The question of whether the elements of adverse possession have been established is 'one of fact which must be determined from the circumstances of each case.'" *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996), *quoting Kay v. Biggs*, 13 Ariz. App. 172, 175, 475 P.2d 1, 4 (1970). "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 of right, hostile to the claims of others, and exclusive." *Spaulding v. Pouliot*, 218 Ariz. 196, ¶ 25, 181 P.3d 243, 250 (App. 2008); *see* A.R.S. §§ 12-521(A)(1), 12-526.

¶7 "Occasional or casual acts do not ordinarily give sufficient notice to the true owner that the property is being held adversely." *Gospel Echos Chapel, Inc. v. Wadsworth*, 19 Ariz. App. 382, 385, 507 P.2d 994, 997 (1973). And "[t]he mere use of another's property is insufficient to create ownership . . . without some additional act or circumstance indicating that the use is not merely permissive but hostile to the owner's rights." *Herzog v. Boykin*, 148 Ariz. 131, 133, 713 P.2d 332, 334 (App. 1985) (citation omitted). However, once a claimant shows open, visible, and continuous possession for the statutory period, the burden shifts to the owner of the property to show he or she permitted the claimant's use of the property, either expressly or by implication. *Spaulding*, 218 Ariz. 196, ¶ 25, 181 P.3d at 250; *see also Tenney v. Luplow*, 103 Ariz.

363, 367, 442 P.2d 107, 111 (1968); *Knapp v. Wise*, 122 Ariz. 327, 329, 594 P.2d 1023, 1025 (App. 1979).

¶8 The trial court found that "[t]he Chapmans and Porters ha[d] failed to produce clear and convincing evidence of all elements of adverse possession" and specifically concluded "as a matter of law" that the Thurbers were "entitled to summary judgment because the undisputed material facts show that [their] possession was not hostile or exclusive." Although the Thurbers contended at the hearing on the motions for summary judgment that the "fundamental flaw" in their case was that "they d[id]n't show a hostile use," they failed to make any argument, or offer any evidence, that the Chapmans' or the Porters' use of the strip had been permissive.[4] The court's entry of summary judgment therefore apparently was predicated, at least in part, on its erroneous belief that the Chapmans and the Porters had the burden of establishing by clear and convincing evidence that their use had been hostile and exclusive. "But, once the party claiming the easement has shown that his or her use during the statutory period was 'open, visible, continuous, and unmolested,' Arizona law presumes that the use was

[4]As we discuss in more detail below, there was evidence to support the conclusion that the Chapmans and the Porters had "used the land in subordination to the owner's title," *see Spaulding*, 218 Ariz. 196, ¶ 21, 181 P.3d at 250, and therefore that their use had been permissive. However, whether and to what extent any of the Chapmans' or the Porters' actions could be so interpreted is a question that necessarily would have required the trial court to choose between conflicting inferences. Summary judgment therefore would not have been appropriate on this basis in any event. *See Orme Sch.*, 166 Ariz. at 311, 802 P.2d at 1010.

under a claim of right and not permissive." *See Spaulding*, 218 Ariz. 196, ¶ 14, 181 P.3d at 248, *quoting Gusheroski v. Lewis*, 64 Ariz. 192, 198, 167 P.2d 390, 393 (1946).[5]

¶9 With respect to the Porters' claim, Sherry Porter stated in her uncontested affidavit that their use of the strip had been both open and visible and more than merely "occasional or casual." *Gospel Echos Chapel*, 19 Ariz. App. at 385, 507 P.2d at 997. Not only did the Porters continuously keep dog jumps and tunnels on the strip, they regularly graded and used the entire strip in their dog-training operation. Viewed in the light most favorable to the Porters, *see Cannon*, 222 Ariz. 171, ¶ 7, 213 P.3d at 323, the facts were sufficient for a reasonable jury to find open, visible, and continuous possession of the disputed areas for ten years. The trial court erred, therefore, by entering summary judgment in favor of the Thurbers on the Porters' claim.[6] *See Orme Sch.*, 166 Ariz. at 311, 802 P.2d at 1010.

¶10 The same, however, cannot be said of the Chapmans' claim. The affidavit and subsequent testimony supporting their claim showed only that they had erected a shed, stored wood, trimmed trees, and discharged water from their pool on the disputed strip. The Chapmans rely primarily on *Spaulding* in asserting that these facts were

[5]Moreover, had the trial court relied on the fact that neither Dwight nor James Thurber had observed any physical evidence that anyone else claimed ownership of the strip to conclude that the Chapmans' and the Porters' possession was insufficiently open and visible, such a conclusion necessarily would have involved assessing "the credibility of witnesses with differing versions of material facts . . . [and] choos[ing] among competing or conflicting inferences." *Orme Sch.*, 166 Ariz. at 311, 802 P.2d at 1010.

[6]The Thurbers note that the Chapmans and the Porters "did not obtain a deed to the property, survey the disputed strip of land, pay the taxes on it, place a 'no trespassing' sign on it, or erect a fence around it to keep others out." But they cite no authority that such actions are necessary to establish adverse possession, and we are aware of none.

sufficient to establish a prima facie case that they had acquired the disputed strip by adverse possession. *See Spaulding*, 218 Ariz. 196, ¶ 26, 181 P.3d at 250-51. In *Spaulding*, the predecessor in interest to the putative adverse possessor had "hired people to clear the [disputed] parcel, which had become overgrown, and . . . maintained the landscaping on it for the next twenty-eight years." *Id.* Although the Chapmans contend that "[i]n *Spaulding*, the facts concerning landscaping were identical to . . . Chapman['s] testimony," there is no evidence that the Chapmans "landscaped" the entire disputed property. Thomas Chapman averred only that he had "pruned and maintained the mesquite trees on the property" an unspecified number of times and "kept the property clean." *See Gospel Echos Chapel*, 19 Ariz. App. at 385, 507 P.2d at 997 ("occasional or casual" use insufficient to establish ownership by adverse possession).

¶11 And although the Chapmans apparently believe that their shed is equivalent to a propane tank, which occupied the disputed land in *Spaulding*, *see id*., the land at issue in that case was bounded on one side by the putative adverse possessor's home and on the other by a driveway he had used openly and continuously. *Id*. ¶ 2. Thus, the title owner was on notice that the entire disputed parcel was held under an adverse claim of ownership. Here, however, the outhouse-sized shed, located at the edge of the disputed land only a few feet from the property line, at most put the Thurbers on notice that the few square feet it occupied were being adversely possessed.[7] *See Jones v. Burk*, 164 Ariz. 595, 597, 795 P.2d 238, 240 (App. 1990) ("dumpster . . . located at the northern

[7]Because the Chapmans make no argument other than that they were "entitled to the entire parcel," we do not consider whether they might have prevailed on a lesser claim. *See Jones v. Burk*, 164 Ariz. 595, 597, 795 P.2d 238, 240 (App. 1990).

apex of the disputed parcel . . . insufficient to show that the [title owners], or their predecessors in interest, would have been aware of any adverse claim").

¶12 The Porters also argue the trial court erred in denying their motion for summary judgment.[8] Although the denial of a motion for summary judgment generally is nonappealable, we may consider such denials where, as here, we otherwise have jurisdiction over the appeal. *See Ballesteros*, 223 Ariz. 269, ¶ 6, 222 P.3d at 295. In this instance, we view the facts and reasonable inferences in the light most favorable to the Thurbers, the nonmoving party. *See Cannon*, 222 Ariz. 171, ¶ 7, 213 P.3d at 323. So viewed, there was sufficient evidence for a reasonable jury to conclude the Porters' use of the strip was insufficiently visible and open to put the Joneses and subsequently the Thurbers on notice that the Porters held the strip under a claim of adverse ownership.

¶13 Again, both Dwight and James Thurber stated they had not observed any physical evidence that anyone else claimed ownership. The Porters contend that "the adverse possession had ripened into title" before 2005 and thus James Thurber's observations were "irrelevant." However, as the Thurbers argued at the hearing, a jury could "infer[] that . . . the use, if you looked at it today . . . wasn't different than it was [five] or [ten] years ago." Such an inference would be consistent with Dwight's earlier observations and LeVar Jones's apparent failure to order either the Chapmans or the Porters to remove any structures they had placed on the strip, as apparently he had with

[8]Because we uphold the trial court's grant of summary judgment in favor of Thurber with respect to the Chapmans' claim, we do not address the Chapmans' argument that the court erred in denying their motion for summary judgment.

another neighbor. Additionally, the Porters do not assert their use of the strip changed materially between 1992 and 2005.

¶14 Moreover, a jury reasonably could conclude that the Porters' use of the strip had been permissive, on the basis that their "polite" reactions to the Joneses' offer to sell them the strip and Sherry Porter's approaching the Thurbers before erecting a fence on the strip constituted an acknowledgment that they had "used the land in subordination to the owner's title." *See Spaulding*, 218 Ariz. 196, ¶ 21, 181 P.3d at 250; *see also Herzog*, 148 Ariz. at 133, 713 P.2d at 334 (failure of claimant to "make his intentions of adverse and hostile use known" during conversations with owner supported implication of permissive use). Such an acknowledgement alone would be sufficient to "overcome the presumption that [their] use was not permissive." *Spaulding*, 218 Ariz. 196, ¶ 21, 181 P.3d at 250. Thus, the trial court did not err in denying the Porters' motion for summary judgment.

Disposition

¶15 For the reasons stated above, we vacate the trial court's entry of summary judgment in favor of the Thurbers with respect to the Porters' claim, affirm the summary judgment on the Chapmans' claim and its denial of the Chapmans' and the Porters' motions for summary judgment, and remand for further proceedings consistent with this decision. Because this decision does not resolve the Porters' claim, and Thurber's application for attorney fees below and the court's award of fees do not distinguish between fees incurred by the Thurbers on the Chapmans' and the Porters' separate

claims, we vacate the award of fees and upon remand, the trial court is directed to award the Thurbers fees incurred in defending against the Chapmans' claim.[9]

¶16 Thurber also requests an award of attorney fees on appeal pursuant to A.R.S. § 12-1103(B). *See Mariposa Dev. Co. v. Stoddard*, 147 Ariz. 561, 565, 711 P.2d 1234, 1238 (App. 1985) (attorney fees may be awarded on appeal in quiet title action). In our discretion, we award the Thurbers attorney fees and costs incurred solely in defending the Chapmans' appeal of the trial court's summary judgment on the Chapmans' claim. *See City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 195, 877 P.2d 284, 294 (App. 1994) (court has "significant discretion to award fees in a matter intertwined with another matter for which it may not grant attorney's fees").

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

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

[9]Consequently, we do not address the Thurbers' cross-appeal with respect to the amount of fees awarded.