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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARIE BREI and JASON BREI, wife and husband, Plaintiffs/Appellees, v. RALPH G. DURAN, Defendant/Appellant.	2 CA-CV 2008-0114 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200601582

Honorable William J. O'Neil, Judge

AFFIRMED IN PART
REVERSED AND REMANDED IN PART

McEvoy, Daniels & Darcy, P.C.
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E S P I N O S A, Judge.

¶1 Ralph Duran challenges the trial court's judgment entered after a bench trial quieting title to portions of property in favor of appellees Jason and Marie Brei. We reverse in part and affirm in part.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's judgment. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 148, 920 P.2d 26, 28 (App. 1996). Duran and the Breis own adjoining five-acre parcels of land in Pinal County, both of which are primarily covered in high desert vegetation. Duran's property, which he purchased in 1988, lies to the west of the Brei property, which they purchased in 2005.

¶3 The only access to the Brei property is by way of Jacy Trail, a road that approaches both properties from the north, but the Breis' actual entrance onto their property from Jacy Trail is disputed by the parties. Duran maintained below, as he does on appeal, that Jacy Trail ends at his northern boundary line and that the Breis' access to their property is by driving south on Jacy Trail, turning east onto Riner Court, which runs along the Breis' northern property line, and entering their property through their northern boundary. The Breis contend that they accessed their property through their western boundary, which they reached by driving south on Jacy Trail and then over the northeast portion of Duran's property. The Breis claimed they and their predecessors in interest all accessed the Brei

property in this manner for at least ten years until their access was blocked by Duran's tenants in 2006.

¶4 The parties' dispute also concerns their mutual boundary line. Duran claims the boundary between his property and the Breis' was delineated by a barbed wire fence that was there when he bought his property. Duran maintains that in 2005 or 2006, the Breis replaced this fence with a new one that encroaches by just over a foot onto his property. The new fence also contains a gate through which the Breis would drive over his property and enter their property. Duran claims the old fence did not have a gate. The Breis maintain that when they replaced the old fence, they did not change its location, and that both fences encroached onto Duran's property since at least 1993. They also contend that the old fence contained a gate through which the Breis and their predecessors in interest accessed the property, and that they merely replaced the old gate with a new one.

¶5 In August 2006, counsel for the Breis sent Duran's counsel a letter, a quitclaim deed, and a check in the amount of five dollars, pursuant to A.R.S. § 12-1103(B), requesting that Duran sign the quitclaim deed acknowledging the Breis' easement over Duran's property. Duran refused to do so and, instead, submitted his own quitclaim deed and check for five dollars to the Breis, requesting they relinquish any claim to his property. The Breis likewise refused.

¶6 In September 2006, the Breis filed a complaint to establish a prescriptive easement across the northeast portion of Duran's land. Duran answered and filed a

counterclaim, seeking to quiet title to the property and alleging that the Breis' west fence unlawfully encroached onto his land. The Breis later amended their complaint to include a claim of private way of necessity.

¶7 After a two-day bench trial, the trial court found the Breis entitled to a prescriptive easement over the northeast corner of Duran's property measuring thirty feet wide and 141 feet in length (the "driveway easement"). The court also found the Breis had acquired the portion of Duran's property enclosed by their west fence through adverse possession (the "fence property"). In the signed judgment, however, the court granted the Breis fee title to both the fence property and the driveway property itself. Following the entry of the court's judgment, Duran filed two post-trial motions, both of which were denied.[1] This court has jurisdiction over Duran's appeal pursuant to §§ 12-120.21(A)(1) and 12-2101(B).

Discussion

¶8 Duran argues the trial court erred when it found the Breis had satisfied the elements necessary for a prescriptive easement and when it granted the Breis fee title to the driveway easement instead of a prescriptive easement. In addition, Duran challenges the court's finding that the Breis had acquired the fence property through adverse possession.

[1]The trial court originally did not rule on Duran's post-trial motions because Duran had already filed his notice of appeal. We suspended the appeal and revested jurisdiction in the trial court so it could rule on the motions. The trial court's denial of both is included in this appeal.

Duran also argues the court erred in awarding the Breis their attorney fees. Duran last contends that his post-trial motions should have been granted.

¶9 "On appeal, we review de novo questions of law, but we will not disturb the trial court's findings of fact unless they are clearly erroneous." *Spaulding v. Pouliot*, 218 Ariz. 196, ¶ 8, 181 P.3d 243, 246 (App. 2008). "We will affirm the trial court's judgment if there is any reasonable evidence supporting it." *Id.*

Driveway Easement

Evidence Establishing Prescriptive Easement

¶10 We first address Duran's argument that the Breis failed to establish all of the elements necessary for a prescriptive easement. "A party claiming an easement by prescription 'must 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.'" *Spaulding*, 218 Ariz. 196, ¶ 14, 181 P.3d at 248, *quoting Paxson v. Glovitz*, 203 Ariz. 63, ¶ 22, 50 P.3d 420, 424 (App. 2002) (alteration in *Paxson*).

¶11 Duran contends that a prescriptive easement was not established because the Breis failed to produce evidence that the driveway easement had been used continuously for ten years. Under Arizona law, the adverse use "need not have been carried on by the same person for the entire ten years. The doctrine of tacking permits combining the successive uses of those in privity by conveyance or agreement or understanding that refers the

successive adverse use to the original adverse use and transfers that use." *Paxson*, 203 Ariz. 63, n.5, 50 P.3d at 426 n.5.

¶12 Duran argues the "last person known to be living on the Brei property was Michael Parsons," "Mr. Parsons transferred his interest in the Brei Property to Melody Davis in 2001," and "[t]here was no evidence at the trial that Melody Davis lived at the Brei Property . . . [or] utilized any portion of Duran's property." Contrary to Duran's assertions, however, the Breis presented evidence that Davis did in fact live at the property and used the driveway easement at issue. Specifically, Thomas Brannock, who lives northwest of the Brei property, testified that Davis was occupying the Brei property and that she had moved a second mobile home onto it by way of the driveway easement. He also testified that since 1988, all of the prior owners of the Brei property, including Davis, had used the driveway easement to access the Brei property.[2] Also introduced into evidence were aerial and satellite photographs from 1992, 1999, 2000, and 2003, all of which depict at least one mobile home or similar structure on the property. Accordingly, the court's finding that "[u]se of the roadway across [Duran]'s property was open and notoriously utilized by [the Breis] and [the Breis'] predecessors in title for a continuous period commencing not later than 1993" is supported by evidence.

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[2]Even if Davis did not live at the Brei property, this would not necessarily be fatal to the Breis' claim for a prescriptive easement, so long as Davis (or her tenants) used the driveway easement. "[A]ll the [party] must show is that he occupied or used the land as would an ordinary owner of the same type of land[,] taking into account the uses for which the land was suitable." *Rorebeck v. Criste*, 1 Ariz. App. 1, 5, 398 P.2d 678, 682 (1965).

¶13 Duran points to evidence that the Brei property was vacant for several years before the Breis purchased it and argues the use of the driveway therefore was not continuous for ten years. However, the testimony upon which Duran relies was equivocal, with the witness specifically stating he could not remember how long the property was vacant between owners. Moreover, viewing the evidence in the light most favorable to upholding the trial court's decision, *see Sabino*, 186 Ariz. at 148, 920 P.2d at 28, there was testimony indicating the vacancy between Davis and the Breis was only for a short period, based on Marie Brei's statements that when they moved onto the property there were groceries in the mobile home's refrigerator and recent evidence that cats had lived there.[3] *See Berryhill v. Moore*, 180 Ariz. 77, 81, 83-84, 881 P.2d 1182, 1186, 1188-89 (App. 1994) (allowing tacking between successive users where property was vacant for several months between tenants and new owners); *cf. McNeil v. Kingrey*, 377 S.E.2d 430, 433 (Va. 1989) (holding tacking was not permitted when former owner's use terminated twenty-two months before new owner's use began); 28A C.J.S. *Easements* § 36 ("A substantial interruption during the period of adverse use is fatal to the claim.").

¶14 Duran also contends the Breis were not entitled to a prescriptive easement because they "failed to present evidence that Duran should have known his property was being utilized." It is well settled, however, that "[t]o require that a land owner have actual

[3]In her affidavit attached to Duran's second post-trial motion, Davis also indicated the property was only vacant for a short period of time.

knowledge of a claimant's actions in order to establish notice would foreclose obtaining title by adverse possession when the owner removes himself from any contact with the property." *Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 192, 840 P.2d 1051, 1057 (App. 1992). "We do not believe that this is the intent of the adverse possession statutes, as there is no requirement in either A.R.S. §§ 12-521(A) or 12-526(A) that the true owner actually be aware of the claimant's appropriation of the land." *Id.* Here, Duran testified he had only visited his property every two years or so, and would spend only thirty minutes to an hour on the property during his visits. He did not realize anyone was occupying the Brei property until 2006, even though it had been occupied by Silver Starr de Varona and her husband since at least 1993. He also testified he could tell that people were using the northeast portion of his property to "turn around and go back the other way." Moreover, as the Breis point out, the use of the driveway easement to reach the Brei property is evident on a number of aerial and satellite photographs admitted into evidence.

¶15 Duran further argues the trial court's finding as to the size of the driveway easement is not supported by the evidence. This claim, however, is undercut by a survey plat of the property that showed the length and width of the driveway area, as well as testimony from Jason Brei confirming that the plat accurately depicted its size.[4] In addition, Thomas

[4]Duran additionally contends the trial court improperly admitted the survey as well as certain other items into evidence, including the aerial and satellite photographs of the property. But he cites no authority and provides no argument to support this claim. Therefore, the issue is waived. *See* Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons

Brannock testified that a photograph of the driveway easement accurately represented its size and that two mobile homes had been removed through the gate and driveway. As noted earlier, we will not reverse the court's findings unless they are clearly erroneous, *see Spaulding*, 218 Ariz. 196, ¶ 8, 181 P.3d at 246, and factual findings are not clearly erroneous if supported by substantial evidence, *see Kocher v. Dep't of Revenue*, 206 Ariz. 480, ¶ 9, 80 P.3d 287, 289 (App. 2003). We conclude Duran has failed to demonstrate the trial court erred in determining the Breis were entitled to a prescriptive easement.

Award of Fee Title

¶16 We next turn to Duran's contention the trial court erred by granting the Breis fee title to the driveway easement. Duran points out the Breis had sued only for an easement and the court found the Breis were entitled to an easement. The record confirms that the Breis had tendered to Duran a quitclaim deed that would have granted them an easement and then filed suit against Duran for a prescriptive easement across Duran's property. The court, as discussed above, correctly ruled in the Breis' favor, expressly finding they were entitled to a prescriptive easement. In its judgment, however, the court granted the Breis fee title to the driveway portion of Duran's property. The Breis do not respond to Duran's argument or otherwise address this glaring discrepancy in their appellate briefs.[5]

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therefor, with citations to the authorities, statutes and parts of the record relied on."); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (issue waived where appellant failed to develop and support argument).

[5]The Breis drafted and submitted the proposed judgment that was then signed by the trial court without any modifications. Duran did not object to the judgment's inclusion of

¶17 This situation is similar to that in *Weber v. Roosevelt Water Conservation District*, 126 Ariz. 509, 617 P.2d 17 (1980), where our supreme court held that the trial court should have granted the defendant a prescriptive easement instead of fee title because there was "no evidence that the [defendant] was claiming the property in question as a fee owner" and "its claim of right was as an easement." *Id.* at 511, 617 P.2d at 19. Accordingly, we conclude the trial court erred when it granted the Breis fee title to the driveway area instead of an easement, and we reverse and remand this portion of the judgment for correction.

Adverse Possession of Fence Property

¶18 We next consider Duran's contention the trial court erred in awarding the fence property to the Breis because they failed to prove all of the elements necessary for adverse possession. "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*, 218 Ariz. 196, ¶ 25, 181 P.3d at 203. "The question of whether the elements of adverse possession have been established is 'one of fact which must be determined from the

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language awarding the Breis fee title to the driveway property either before or after the judgment was entered. Such errors should be brought to the trial court's attention so they may be remedied at that stage of the proceedings, rather than for the first time on appeal. Here, however, the Breis failed to argue that Duran had waived this issue, and therefore we address it. *See Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, ¶ 28, 985 P.2d 633, 640 (App. 1999) (by failing to raise waiver as a defense, defendant "waived its waiver argument").

circumstances of each case.'" *Sabino*, 186 Ariz. at 149, 920 P.2d at 29, *quoting Kay v. Biggs*, 13 Ariz. App. 172, 175, 475 P.2d 1, 4 (1970).

¶19 Duran first argues that the fence encroaching onto his property was not in place for the requisite ten years. He asserts, "[w]hile the Breis alleged the chain link fence was on their western boundary when they moved in, there was no evidence that a chain link fence existed on the Brei western boundary prior to 1998." But this claim is not supported by the record. Although there was conflicting evidence as to the type of fence that was in place, Duran himself testified there had been a fence on the east side of his property since 1988. Thus, again, there was evidence to support the factual determinations made by the trial court, and we find no basis to conclude its findings were clearly erroneous. *See* Ariz. R. Civ. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."); *Kocher*, 206 Ariz. 480, ¶ 9, 80 P.3d at 289 ("A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists.").

¶20 Duran also challenges the trial court's finding of adverse possession on the ground the boundary fence did not enclose the entire area the Breis claimed. "As a general rule, enclosure coupled with the claimant's mere general use of property within the enclosure is sufficient to prove adverse possession without requiring proof of other specific acts that would 'fly the flag' over the disputed land, but only if the enclosure is complete." *Berryhill*, 180 Ariz. at 84, 881 P.2d at 1189. But we need only again look to Duran's testimony that

a fence covered the east side of his property "from one end to the other," and that it had been there since 1988. Accordingly, the court's findings that the fence existed prior to 1993 and that it extended along the entire western boundary of the Brei property were not clearly erroneous.

Attorney Fees

¶21 As part of its judgment, the trial court awarded the Breis their costs and attorney fees. Duran requests that we reverse this award because he contends the Breis were not entitled to judgment in their favor. Pursuant to § 12-1103(B), "A prevailing party in an action to quiet title may recover costs and attorney fees if it served a quitclaim deed on the other party twenty days before bringing the action . . . , tendered consideration of five dollars . . . , and if the other party refused to execute the deed." *Spaulding*, 218 Ariz. 196, ¶ 29, 181 P.3d at 251. Under the statute, the trial court has the discretion "to determine whether to award attorney's fees to a party who has prevailed in a quiet title action and otherwise complied with the provisions of section 12-1103(B)." *Scottsdale Mem'l Health Sys., Inc., v. Clark*, 164 Ariz. 211, 215, 791 P.2d 1094, 1098 (App. 1990). We review an award of attorney fees for an abuse of discretion. *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, ¶ 17, 141 P.3d 824, 830 (App. 2006).

¶22 We have determined the trial court's judgment in favor of the Breis is supported by the record and not erroneous, and Duran does not dispute that the Breis

complied with § 12-1103(B) as to the driveway easement.[6] We therefore have no basis for concluding the court abused its discretion in awarding the Breis their costs and attorney fees.

Duran's Post-trial Motions

¶23 We lastly address the trial court's denial of Duran's two post-trial motions. Duran's first motion was brought pursuant to Rules 59(a) and (*l*) and 60(c), Ariz. R. Civ. P. The second, entitled "Supplemental Motion for Relief from Judgment Based on Newly Discovered Evidence," was based solely on Rule 60(c). We review the denial of both a Rule 59 motion and a Rule 60(c) motion for an abuse of discretion. *See Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, ¶ 33, 195 P.3d 645, 653 (App. 2008) (motion for new trial); *Fry v. Garcia*, 213 Ariz. 70, ¶ 7, 138 P.3d 1197, 1199 (App. 2006) (Rule 60(c) motion); *see also Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998) (applying abuse of discretion standard to Rule 59(*l*)'s federal counterpart).

¶24 In his first motion, Duran argued the Breis had failed to establish the elements necessary for adverse possession and that the size of the driveway easement was not supported by the evidence. Because we already have addressed and upheld the trial court's

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[6]We note the trial court awarded the Breis all of their costs and attorney fees even though the Breis utilized § 12-1103(B) only with respect to the driveway easement and not the fence property. The terms of § 12-1103(B) are clear that its procedures must be specifically followed in order to entitle a party to an award of attorney fees. *See Lange v. Lotzer*, 151 Ariz. 260, 262, 727 P.2d 38, 40 (App. 1986). Duran, however, waived this issue by failing to raise it below or on appeal.

determinations on both of these issues, we conclude the trial court did not abuse its discretion in denying Duran's motion.

¶25 In support of his second motion, Duran submitted an affidavit from Melody Davis, the person who owned the property before the Breis. In her affidavit, Davis stated she had lived at the Brei property while she owned it and never used the driveway easement and did not see her son, who also lived on the property, use it either. She also stated there was a gate on the west side of the property with a mailbox on it, and that she used the mailbox to leave notes for her son and his girlfriend. Duran's second motion also included affidavits describing Duran's counsel's efforts to locate Davis both before and after trial.

¶26 The trial court denied Duran's second motion on several grounds. First, the court felt that Davis's statements "far more bolster [the Breis'] case and to the extent there is disagreement, this Court finds it would not have weighted Ms. Davis'[s] testimony so heavily as to have overcome the statements of the other witnesses that are clearer and plausible." In addition, the court found "the offered evidence substantially undermines the testimony of [Duran], making him less credible than he already was." The court noted Duran "was unequivocal in his testimony that there had never been a gate in the fence on the western border of the Brei property" and had "intimated no one lived there prior to the [Breis]," and "[t]he proposed evidence flies in the face of such testimony." Finally, the court denied Duran's motion because it found "the efforts to locate Ms. Davis to be wholly inadequate." The court's reasoning is supported by the record, which in particular suggests

Duran's lack of diligence in locating Davis before the trial. We therefore cannot say the trial court abused its discretion in denying Duran's second post-trial motion.

Disposition

¶27 For the reasons set forth above, we affirm the trial court's award of quiet title of the fence property to the Breis, but reverse its judgment awarding the Breis fee title to the driveway easement, and remand with instructions to enter a new judgment consistent with the court's finding that the Breis are entitled to a prescriptive easement. We affirm the court's award of attorney fees and its denial of Duran's post-trial motions.

¶28 The Breis have requested an award of attorney fees on appeal pursuant to § 12-1103(B) and Rule 21, Ariz. R. Civ. App. P. As outlined above, the Breis complied with the statute's requirements with respect to the driveway easement and have prevailed on the merits. Therefore, in the exercise of our discretion, we grant the Breis their reasonable attorney fees on appeal attributable to the easement issue, in an amount to be determined upon compliance with Rule 21(c), Ariz. R. Civ. App. P. *See Lewis*, 173 Ariz. at 195, 840 P.2d at 1060 (awarding attorney fees on appeal pursuant to § 12-1103(B)).

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge