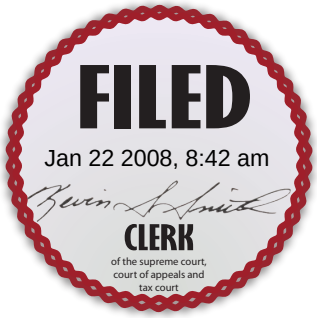

ATTORNEY FOR APPELLANTS:

LAWRENCE R. WHEATLEY
Danville, Indiana

ATTORNEY FOR APPELLEES:

ANTHONY R. JOST
Riley Bennett & Egloff, LLP
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GERALD MORGAN, ROSETTA MORGAN, and A & A MACHINE SERVICE, INC.,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 32A01-0705-CV-231
SERVICE INDUSTRIES, LLC, PETER LACHMANN and HEIDI LACHMANN,	)	
Appellees-Defendants.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable David H. Coleman, Judge
Cause No. 32D02-0503-PL-9

January 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Gerald and Rosetta Morgan and A & A Machine Service, Inc., appeal the trial court's grant of summary judgment in favor of Peter and Heidi Lachmann and Service Industries, LLC ("Service"). The trial court's order found that the Lachmanns and their assigns held a valid easement on a portion of the Morgans' property pursuant to a valid contract; that if the contract was invalid, the Lachmanns had acquired a prescriptive easement; and that the Lachmanns had acquired a parcel of property contained in the legal description of the Morgans' property by adverse possession. The Morgans raise several issues, which we restate as whether the trial court properly granted summary judgment on 1) whether the contract granting the Lachmanns an easement is valid; 2) whether, assuming the contract's invalidity, the Lachmanns have acquired a prescriptive easement; and 3) whether the Lachmanns established the elements of adverse possession. Concluding that the trial court properly granted summary judgment on the issue of whether the Lachmanns had acquired a prescriptive easement and whether the Lachmanns had acquired title to the property by adverse possession, we affirm. The Lachmanns also argue that the trial court improperly denied its motion for attorneys' fees, and also request that we award attorneys' fees incurred in defending this appeal. Concluding the trial court acted within its discretion in declining to award attorneys' fees, we affirm the trial court in that respect as well. We also conclude that this appeal was not frivolous, and decline to award appellate attorneys' fees.

Facts and Procedural History

This case involves a dispute over a tract of land running over property owned by the Morgans (the "Morgan Property") to property owned by the Lachmanns, limited liability

companies owned by the Lachmanns, and their son, Peter Lachmann, (the "Lachmann Property") and a parcel of real estate adjacent to the two properties.

The Lachmanns were the majority owners of Service Industries, Ltd. ("Service, Ltd."), which became Service on February 1, 2003. In addition, the Lachmanns are the majority owners of two other limited liability companies, Service Industries I, LLC ("Service I"), and Service Industries II, LLC ("Service II"), which were formed on November 18, 1999. The Lachmanns assigned a twenty-percent interest in all three companies to Peter on February 1, 2003.

I. The Easement

In 1977, the Lachmanns and Service, Ltd., purchased the Lachmann Property. On July 14, 1977, Service, Ltd., represented by Peter, entered into an agreement (the "Agreement") with the prior owners of the Morgan Property, Paul and Martha Gerth, under which Service, Ltd., and "its successors, assigns, lessees and licensees" were granted a "perpetual non-exclusive right of way to use in common with [the Gerths and their successors]" through the Morgan Property to the Lachmann Property. Appellant's Appendix at 80. The Agreement included a legal description of this right of way (the "Easement"). Paul signed the Agreement, but Martha did not. Pursuant to this Agreement, the Lachmanns have built and paved a driveway over the Easement, and have re-paved it several times since entering into the Agreement.

The Morgans entered into a contract to purchase the Morgan Property from the Gerths on June 16, 1981, and obtained title to the Morgan Property on July 12, 2000. In 2002, the Morgans applied for a building permit to construct structures and improvements on the

Morgan Property, which already contained commercial buildings. This application was granted, subject to the Morgans restructuring part of the Easement in order to fix drainage issues.

In either 2003 or 2004, the Lachmanns contacted several asphalt contractors to obtain estimates for repaving the Easement. On June 28, 2004, the Lachmanns sent the Morgans a letter indicating that the Lachmanns were unable to repave the Easement until the Morgans completed the improvements required by Hendricks County.

II. The Disputed Parcel of Property

Between the Morgan Property's northern border and the Lachmann Property's southern border is a wedge-shaped piece of property (the "Disputed Parcel"). The Disputed Parcel is approximately 150 feet wide and runs the length of the Morgan Property's northern border. The Disputed Parcel is included in the Morgan Property's legal description.

On August 1, 2003, the Morgans wrote a letter to the Lachmanns claiming that the Disputed Parcel belonged to the Morgans and instructing the Lachmanns to stop using the Disputed Parcel. The letter demanded that the Lachmanns remove a dog pen, sign, electrical service, and gate located on the Disputed Parcel.

Up until this time, the Lachmanns believed that the Disputed Parcel was included in the legal description of their property. Sometime prior to 1977, when the Lachmanns purchased the Lachmann Property, the Gerths had constructed a fence around the Morgan Property that ran along the southern edge of the Disputed Parcel. In 1977, Paul installed a gate in this fence where the Easement crossed the fence line. In either 1977 or 1978, Paul built a dog pen for the Lachmanns on the north side of the fence; part of this dog pen was

located on the Disputed Parcel. Around this time, Cinergy Electric installed underground electric supply and telephone wires for the Lachmanns on the Disputed Parcel. In 1978, the Lachmanns installed a company sign on the fence next to the Easement. In either 1980 or 1981, the Lachmanns enlarged the dog pen so that it extended further onto the Disputed Parcel. In 1993, the Lachmanns replaced the gate on the fence with a sliding fence gate. They also removed the fence, which was deteriorating and hindering the ability to mow.

III. The Lawsuit

On March 9, 2005, Service and the Lachmanns (collectively the "Appellees") filed a complaint against the Morgans to quiet title to the Disputed Parcel. On May 27, 2005, the Morgans filed their Answer, Affirmative Defense, and Counterclaim, claiming that the Easement was invalid. On April 25, 2006, the Appellees filed a motion for summary judgment. On May 25, 2006, the Morgans filed their response and motion for partial summary judgment, designation of evidence, and a motion to strike portions of an affidavit filed by the Appellees. The trial court initially granted this motion to strike, but denied it after the Appellees filed a motion to reconsider. On July 27, 2006, the Appellees filed a Motion to Stay Proceedings Pending Settlement Discussions, and the trial court ordered the matter stayed pending such discussions. On October 30, 2006, the Morgans filed a Praecipe for Summary Judgment Hearing, and the trial court held a summary judgment hearing on January 9, 2007.

On January 19, 2007, the trial court issued an order granting summary judgment to the Appellees, finding that they owned the Easement and that they had obtained title to the Disputed Parcel through adverse possession. The Morgans then filed a Motion for Relief

from Judgment and Motion to Correct Errors. Along with their response to this motion, the Appellees filed a Petition for Reimbursement of Attorneys' Fees and Expenses. The trial court denied both the motion and the petition. The Morgans now appeal the trial court's judgment, and the Appellees appeal the trial court's denial of their petition for attorneys' fees.

Discussion and Decision

Before addressing the primary issues, we will briefly dispose of the Morgans argument that the Appellees lack standing. The Morgans allege that the Appellees misrepresented to the trial court the nature of the Lachmann Property. The basis for this claim is that in May 2000, Peter Lachmann issued two warranty deeds, one granting Service I a fifty-two percent interest in a portion of the Lachmann Property, and another granting Service II a fifty-two percent interest in another portion of the Lachmann Property. The Morgans contend that therefore, the Appellees misrepresented that the Lachmann Property was a single seven-acre tract of land, as it is instead three tracts of real estate. The Morgans claim this alleged misrepresentation "prevented the Morgans from fully and fairly presenting their case and defenses." Appellant's Brief at 21. The Morgans have wholly failed to support this bald assertion. Also, we fail to glean from the record any possible prejudice; we find no need to elaborate further on this issue.

The Morgans also claim that "[s]ince the Lachmanns were not the record owner of the real estate, the Lachmanns did not have standing and were not the proper parties to bring an action to enforce an alleged agreement to determine the rights of the owners of [the two tracts referenced in the warranty deeds]." Id. at 21. The Morgans base this claim on the principle

that "a corporation is a legal entity separate and distinct from its stockholders," and such stockholders "cannot recover on causes of action belonging to the corporation." Smith v. Kinney, 167 Ind. App. 202, 204, 338 N.E.2d 507, 509 (1975). This claim is likewise wholly without merit. First, pursuant to the warranty deeds, the Lachmanns personally retained a forty-eight percent interest in the two tracts of land identified in the warranty deeds. Second, the Agreement explicitly identifies Service, Ltd. (which is now Service) and the Lachmanns. Finally, the Disputed Parcel and the Easement are not part of the property described in the warranty deeds, as this land is part of the legal description of the Morgan Property. There is no reason that the Lachmanns lack standing to enforce the terms of the Agreement, argue easement by prescription, or assert adverse possession over the Disputed Parcel. We also note that, even if the LLCs were the proper parties, as members of the LLCs, the Lachmanns were entitled to bring this suit in the name of the LLCs and could also be parties to the suit. See Ind. Code §§ 23-18-3-5; 23-18-8-1. Finally, Indiana Trial Rule 9(A) indicates that "[t]he burden of proving lack of such capacity [to sue] . . . shall be upon the person asserting lack of it, and shall be pleaded as an affirmative defense." The Morgans' failure to plead this issue as an affirmative defense waives the issue. State Farm Mut. Auto. Ins. Co. v. Shuman, 175 Ind. App. 186, 197, 370 N.E.2d 941, 951 (1977); Warner v. Young Am. Volunteer Fire Dep't, 164 Ind. App. 140, 147-48, 326 N.E.2d 831, 836 (1975).

I. Standard of Review

Summary judgment "should be granted guardedly and should not be used as an abbreviated trial." Newhouse v. Farmers Nat'l Bank of Shelbyville, 532 N.E.2d 26, 28 (Ind. Ct. App. 1989). A trial court should grant a motion for summary judgment only when the

evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). The trial court's grant of a motion for summary judgment comes to us cloaked with a presumption of validity. Rodriguez v. Tech Credit Union Corp., 824 N.E.2d 442, 446 (Ind. Ct. App. 2005). However, we review a trial court's grant of summary judgment de novo, construing all facts and making all reasonable inferences from the facts in favor of the non-moving party. Progressive Ins. Co. v. Bullock, 841 N.E.2d 238, 240 (Ind. Ct. App. 2006), trans. denied. We may affirm the trial court's grant of summary judgment upon any basis that the record supports. Rodriguez, 824 N.E.2d at 446. In ruling on the propriety of the trial court's denial or grant of summary judgment, we will not look at materials other than those designated to the trial court on the motion for summary judgment. Trietsch v. Circle Design Group, Inc., 868 N.E.2d 812, 817 (Ind. Ct. App. 2007).

II. The Easement

The Morgans argue that the Agreement is invalid for two reasons: 1) the Agreement fails to sufficiently identify the dominant estate; and 2) the absence of Martha's signature.[1] The Appellees contest these points and also argue that even if the Agreement is invalid, they have acquired a prescriptive easement.

A. Sufficiency of the Description

[1] The Morgans also argue that the Agreement created merely a license instead of an easement. We reject this argument as the plain language of the Easement indicates that the parties contemplated an easement, and repeatedly used the term "easement" in the agreement. Moreover, a license, by definition, is revocable. See One Dupont Centre, LLC v. Dupont Auburn, LLC, 819 N.E.2d 507, 514 (Ind. Ct. App. 2004). The Agreement explicitly states that the granted use is "perpetual." Therefore, the intent of the parties was clearly to create an easement. See Indus. Disposal Corp. of Am. v. City of E. Chicago, 407 N.E.2d 1203, 1206 (Ind. Ct. App. 1980) ("An irrevocable license in legal effect is no different than an easement.").

The Agreement indicates that the Gerths (the Grantors) grant Service, Ltd., a right of way to use,

> The following real estate, owned by Grantor in which the Grantor has an interest, situated in the county of Hendricks, State of Indiana, to wit:
> Land being part of the Southeast quarter of section 5, Township 15 N. Range I East;
> Beginning at a point on the North right of way line of US-Route #36 being 69 feet North of the South line of said quarter section, and 1739.00 feet East of the SW-corner thereof (also being 402.8 feet East of the center-line of said quarter section;) Thence North zero degrees East a distance of 290.40 feet to a point; thence North 89 degrees and 30 minutes East a distance of 30.00 feet to a point (also being 33.00 feet West of the subject property line.) Thence South zero degrees East a distance of 290.40 feet to the North right of way line of said Rt. # 36, thence South 89 degrees and 30 minutes West a distance of 30 feet to the place of Beginning.

Appellant's App. at 25. The Agreement goes on to provide, "Grantee shall build at grantees expense a connecting drive way, within said right of way area, starting from the North edge of . . . grantees property line in the North of grantor's property." Id. at 26. The Agreement also indicates that the grantees shall construct a stone base with asphalt topping along the right of way "as outlined in attached plot plan dated 6.16.77, lat. Rev. 7.12.77." Id.

"A valid easement . . . exists if the document adequately describes the dominant and servient estates." Tanton v. Grochow, 707 N.E.2d 1010, 1013 (Ind. Ct. App. 1999). "[I]n construing an alleged creation of an easement through a grant or reservation, no particular words are necessary; any words which clearly show the intention to give an easement are sufficient." Id. Instruments creating express easements should describe the dominant and servient estates with "reasonable certainty." Larry Mayes Sales, Inc. v. HIS, LLC, 744 N.E.2d 970, 973 (Ind. Ct. App. 2001). The purpose of the description of the estates "is not to identify the land but to furnish the means of identification." Tazian v. Cline, 686 N.E.2d 95,

100 (Ind. 1997). "[I]f we can identify the dominant tenement with reasonable certainty based upon the language of the deed, we are not required to find a direct description of that tenement in the conveyance." Kopetsky v. Crews, 838 N.E.2d 1118, 1126 (Ind. Ct. App. 2005).

Here, the Agreement provides the specific description of the Easement, identifies the owners of the dominant and servient estates, indicates the Easement is located on the grantor's estate, and references a plot plan.[2] By indicating the Easement is located on the Morgan Property, the Agreement identifies the Morgan Property as the servient estate. Larry Mayes Sales, Inc., 744 N.E.2d at 973 (where deed described the location of the easement, "since the easement is located on the Mayes' property, it inherently identifies the Mayes' property as the servient tenement"). Also, the Agreement clearly indicates that the Easement is for the use of the adjacent land owned by Service, Ltd., thereby sufficiently providing the means to identify the dominant estate. See Chase v. Nelson, 507 N.E.2d 640, 642 (Ind. Ct. App. 1987). Moreover, the easement does not connect to any other parcel of land.[3] See Kopetsky, 838 N.E.2d at 1126-27. Although the Agreement does not include specific descriptions of the dominant and servient estates, it clearly provides a means by which the estates may be identified. See id.; Chase, 507 N.E.2d at 642 ("Although not artfully drafted, we still find that the dominant and servient tenements adequately were described."). In sum, it is clear from the Agreement that the intent was to create an easement allowing Service,

[2] It does not appear that this plot plan is included anywhere in the record.

[3] The Morgans argue that the description is insufficient because the Lachmann Property is now actually three tracts of land, one tract owned in part by Service and another owned in part by Service I. This fact is completely immaterial, as the Agreement permits ingress and egress to Service, Ltd.'s successors,

Ltd., and its successors to ingress and egress to the Lachmann Property through the identified right of way located on the Morgan Property. See Larry Mayes Sales, Inc., 744 N.E.2d at 974.

B. Absence of Martha Gerth's Signature

Next, the Morgans argue the Agreement is invalid because Martha Gerth did not sign it. It is undisputed that the Gerths owned the Morgan Property as tenants by the entirety. The general rule is that "to be valid and enforceable a contract for the sale of tenancy by the entirety real estate requires the signatures of both spouses." Biggs v. Marsh, 446 N.E.2d 977, 983 (Ind. Ct. App. 1983).

"Merely owning property as tenants by the entirety does not ordinarily bind one spouse when the other has contracted with a third person, unless the contracting spouse is authorized, or the non-contracting spouse ratifies the act." McIntosh v. Turner, 486 N.E.2d 565, 566 (Ind. Ct. App. 1985), reh'g denied, 489 N.E.2d 116, trans. denied. This is because spouses "have no separable interest in entireties property, therefore, a conveyance by one tenant is ineffective to pass legal title." Wienke v. Lynch, 407 N.E.2d 280, 283 (Ind. Ct. App. 1980).

There are recognized exceptions to this rule. If one spouse acts as the agent of the other, a contract signed by only one spouse will be valid and enforceable against the other. See Nwannunu v. Weichman & Assocs., P.C., 770 N.E.2d 871, 878 (Ind. Ct. App. 2002) (recognizing that under certain circumstances, one spouse may act as the other's agent). An agency relationship is not created merely by marriage; instead, "the evidence must be clear

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assigns, lessees, and licensees.

and satisfactory and sufficiently strong to explain and remove the equivocal character the wife is placed in by reason of the marital relation." Bradford v. Bentonville Farm Supply, Inc., 510 N.E.2d 745, 747 (Ind. Ct. App. 1987).

Also, if a spouse later acquiesces to the transaction, the contract will become operable, dating back to the date of the contract signed by a single spouse. Wienke, 407 N.E.2d at 283 n.3. Acquiescence will make such a contract operable whether or not an agency relationship existed between the parties at the time of the underlying agreement. Beneficial Mortg. Co. of Ind. v. Powers, 550 N.E.2d 793, 796 (Ind. Ct. App. 1990), trans. denied.

Generally, the existence of an agency relationship is a question of fact. Douglas v. Monroe, 743 N.E.2d 1181, 1187 (Ind. Ct. App. 2001).[4] The issue of whether a spouse acquiesced to the other spouse's unilateral conveyance is also generally a question of fact. Powers, 550 N.E.2d at 796. Because of the factual nature of these issues, and because we determine that, assuming the Agreement is inoperable, the Lachmanns have acquired an easement by prescription, we prefer to resolve this issue on that ground.[5]

C. Prescriptive Easement

The Appellees argue that even if Paul's signature does not bind Martha, they have acquired a prescriptive easement by their use of the Easement since entering into the Agreement. In its summary judgment order, the trial court entered the following relevant findings of fact:

5. The Lachmanns have used and continue to use the Easement on average

[4] However, when the relevant facts are undisputed, the existence of an agency relationship is a question of law for which summary judgment can be appropriate. Id.

[5] Similarly, we choose not to address whether the absence of Martha's signature could be considered a scrivener's error.

> three to four times per day since 1977.
> ***
> 8. The Morgans have business buildings on the Morgan Real Estate, which are in clear view of the Easement, and the Morgans are occasionally outside when the Lachmanns drive by.
> 9. The Lachmanns have built and paved a driveway connecting to the Easement, a street-approach onto U.S. Highway 36, and have coated the Easement drive several times prior to this action.

Appellant's App. at 2-4 (citations omitted). The trial court also entered, as a conclusion of law, that the Appellees "would have a prescriptive easement over the Morgan's Real Estate, if they did not otherwise have an express easement, because they have maintained an actual, hostile, open, notorious, continuous, uninterrupted adverse use for at least twenty years under a claim of right." Id. at 22.

One acquires a prescriptive easement by satisfying the four elements of adverse possession. Wilfong v. Cessna Corp., 838 N.E.2d 403, 406 (Ind. 2005). The four elements, which must be established by clear and convincing proof, are:

> (1) Control--The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of "actual," and in some ways "exclusive," possession);
> (2) Intent--The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of "claim of right," "exclusive," "hostile," and "adverse");
> (3) Notice--The claimant's actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant's intent and exclusive control (reflecting the former "visible," "open," "notorious," and in some ways the "hostile," elements); and,
> (4) Duration--the claimant must satisfy each of these elements continuously for the required period of time (reflecting the former "continuous" element).

Fraley v. Minger, 829 N.E.2d 476, 486 (Ind. 2005). In Indiana, the duration required for a prescriptive easement is twenty years. Ind. Code § 32-23-1-1. As owners of the dominant

estate, the Appellees had the burden of proof as to each element. Brown v. Heidersbach, 172 Ind. App. 434, 438, 360 N.E.2d 614, 618 (1977).

"In order to establish a prescriptive right, something more than mere permissive use must be shown." N. Snow Bay, Inc. v. Hamilton, 657 N.E.2d 420, 423 (Ind. Ct. App. 1995). "An owner of land is not shorn of any of his rights by merely permitting, as a favor, another to pass over his land." Hutchinson v. Worley, 129 Ind. App. 157, 163, 154 N.E.2d 389, 392 (1958). "Use which is merely permissive or which is exercised under a mere license cannot ripen into an easement, regardless of how long the use is continued." Greenco, Inc. v. May, 506 N.E.2d 42, 46 (Ind. Ct. App. 1987).

The Morgans' sole argument with respect to the Lachmanns acquiring an easement by prescription is that the Appellees' use was permissive, pursuant to the Agreement. We initially note that this argument is inherently inconsistent with the Morgans' claim that Martha did not consent or know of the Agreement. Indeed, as the Appellees point out, if Martha did not consent to the Agreement, then the Lachmanns' use of the Easement was not permissive as to Martha. If, on the other hand, Martha did consent to the Agreement, then the Appelleess have a valid easement pursuant to the Agreement. Martha's affidavit indicates that she was unaware that Paul granted the Easement and that she never authorized Paul to grant the Easement. Assuming these statements are true,[6] the Lachmanns use of the Easement was not permissive. No evidence exists that Martha gave the Lachmanns permission to use the Easement, and, as we are proceeding under the premise that the Agreement was inoperable, Paul could not have granted permission to use the Easement

under the Agreement. See Pension Fund of Disciples of Christ v. Gulley, 226 Ind. 415, 420, 81 N.E.2d 676, 678 (1948) (where husband and wife held property in tenancy by the entireties, the "unity prevented either, during their marriage, from holding any moiety or divisible interest capable of being divested by the individual act of the other," and that where the husband grants a mortgage without wife's consent "the mortgage is void as to both the husband and wife" (emphasis added)); Chandler v. Cheney, 37 Ind. 391, 1871 WL 5078 at *5 (1871) (recognizing that in tenants by the entireties, "neither the husband nor the wife can dispose of any part without the assent of the other" (emphasis added)); id. at *6 ("[N]either can alien, without the consent of the other, any portion or interest therein." (emphasis added)) (quoting Ketchum v. Walsworth, 5 Wis. 95 (1856), overruled in part, Bennett v. Child, 19 Wis. 362 (1865)); cf. McIntosh, 486 N.E.2d at 566-67 (where husband sold part of property owned by husband and wife, no valid agreement existed); Wienke, 407 N.E.2d at 283 (conveyance by one spouse of property held in entireties is ineffective). That Paul had knowledge of the Appellees' use of the Easement and may have known that they were operating under a (mistaken) assumption that they possessed a legal right to use the Easement actually serves to support a finding of easement by prescription. See Pugh v. Conway, 157 Ind. App. 44, 49, 299 N.E.2d 214, 217 (1973) (recognizing that a prescriptive easement may be established by adverse use "with the knowledge and acquiescence of the owner of the servient land"). Therefore, assuming the Agreement was inoperable, we conclude that the Appellees did not have "permission" to use the Easement, and therefore were using the Easement adversely to the Gerths.

[6] If these statements are not true, then the Lachmanns acquired the Easement pursuant to the

The Morgans do not make any argument regarding the remaining elements of adverse possession, and our review of the record indicates that no genuine issue of material fact exists on any of the elements. The Appellees paved the easement and used it daily. See Faukboner v. Corder, 127 Ind. 164, 26 N.E. 766, 767 (1891) (party establishing easement by prescription had expended time and money grading and marking the passage, which he used for ingress and egress). In short, the evidence leaves no question of material fact as to Martha and Paul's knowledge and acquiescence to the Lachmanns' use of the Easement. See Hamilton, 657 N.E.2d at 423; Monarch Real Estate Co. v. Frye, 77 Ind. App. 119, 133 N.E. 156, 158 (1921) (explaining that the dominant estate may establish prescriptive right by showing "continuous adverse use . . . with the knowledge and acquiescence of the owner of the land"). Therefore, we conclude the trial court properly granted summary judgment on the issue of whether the Appellees had acquired a prescriptive easement.

III. The Disputed Parcel

In regard to the Disputed Parcel, the trial court entered the following relevant findings of fact:

> 23. The Disputed Parcel is included in the Morgan Real Estate land description, but has been maintained and improved by the Lachmanns as part of the Lachmann Real Estate since 1977.
> 24. On August 1, 2003, the Morgans claimed in a letter to the Lachmanns that the Disputed Parcel was part of their property . . . .
> ***
> 26. Until that time, neither the Morgans nor any other party ever contested the Lachmanns' use of the Disputed Parcel.
> 27. All parties have always understood the old farm fence to be the property line.
> 28. Before the Lachmanns purchased their property in 1977, the Gerths

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Agreement. See supra, section II. B.

> constructed a farm-fence around what they and the Lachmanns believed to be the Morgan Real Estate.
> 29. The fence was along the southern edge of the Disputed Parcel and excluded the Disputed Parcel from the Morgan Real Estate and included it as part of the Lachmann Real Estate.
> 30. In 1977, Mr. Gerth . . . installed a farm gate in the existing farm fence . . . .
> 31. In late 1977 or early 1978, Mr. Gerth built a dog pen . . . which was on both the Disputed Parcel and the Lachmann Real Estate.
> 32. Around that same time, Cinergy Electric installed underground electric supply and telephone wires for the Lachmanns, north of the fence on the Disputed Parcel.
> ***
> 34. In 1980 or 1981 the Lachmanns had the dog pen enlarged . . . thereby extending further onto the Disputed Parcel.
> 35. In 1993, the Lachmanns replaced the older farm fence gate with a modern sliding fence gate but kept the gate on the same line that the old farm fence was on.
> ***
> 37. The Lachmanns have mowed the Disputed Parcel and kept it free from underbrush ever since they purchased the Lachmann Real Estate in 1977.

Appellant's App. at 17-19. The trial court then concluded that no issue of material fact existed as to whether the Appellees had acquired title to the Disputed Parcel by adverse possession.

The elements of adverse possession are identified above. See supra, section II. C. (citing Fraley, 829 N.E.2d at 486). The only difference relevant to this case with regard to adverse possession of property is that the relevant duration is ten years.[7] See Ind. Code § 34-

[7] A party must also be in compliance with the adverse possession tax statute. See Ind. Code § 32-21-7-1; Fraley, 829 N.E.2d at 493. In the statement of facts section of their appellate brief, the Morgans state that "the Lachmanns acknowledge that they have not paid the real estate taxes on the disputed parcel, since Mr. Lachmann alleged that they only 'believed' they were paying said real estate taxes." Appellant's Br. at 13. First, stating that one believed he did an act is far from acknowledging that they did not do that act. Second, the adverse possession tax statute requires that the adverse possessor pay only those taxes he "believes in good faith to be due on the land or real estate." Ind. Code § 32-21-7-1. Finally, by citing no authority and making no cogent argument with regard to the tax issue, the Morgans have waived said issue. See Ind. Appellate Rule 46(A)(8); Johnson v. State, 832 N.E.2d 985, 1004 (Ind. Ct. App. 2005) (defendant waived issue by devoting only one sentence to it and failing to cite any relevant case law), trans. denied.

11-2-11. The Morgans do not identify which element of adverse possession the Appellees failed to demonstrate. Instead, they argue merely that material issues of fact remain because: 1) the Morgans insisted the Appellees remove their property from the Disputed Parcel in 2003; and 2) the affidavit of Gerry Morgan contests the relevant facts relied upon by the Appellees to establish adverse possession.[8]

After a party has established the elements of adverse possession for a ten-year period, title passes to the claimant. Fraley, 829 N.E.2d at 487. At this time, "fee simple title to the disputed tract of land is conferred upon the possessor by operation of law, and title is extinguished in the original owner." Snowball Corp. v. Pope, 580 N.E.2d 733, 734 (Ind. Ct. App. 1991). Facts and circumstances that arise after this period are not relevant to determining whether a party has acquired title by adverse possession. See Fraley, 829 N.E.2d at 487; Garriott v. Peters, --- N.E.2d ---, 2007 WL 4554762 at *5 (Ind. Ct. App. Dec. 28, 2007) ("Once a party has acquired title through adverse possession, that party does not lose title based on acts committed or circumstances existing after title is established."). Therefore, the fact that the Morgans attempted to eject the Appellees sixteen years after the relevant possessory period is "of no matter, since ownership of the land had passed

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[8] The Morgans also complain that the Appellees "make representations of what were the beliefs of third parties," and indicate that the Morgans "had requested the trial court strike these portions of the Affidavit of Peter Lachmann based on non-admissibility of these statements." Appellant's Br. at 25. However, the Morgans do not argue on appeal that these statements were in fact inadmissible. Therefore, any argument relating to the inadmissibility of these statements is waived. See Ind. Appellate Rule 46(A)(8); Johnson, 832 N.E.2d at 1004.

We also reject the Morgans' assertion, made in the statement of facts section of their appellate brief, that the Appellees "contradict themselves by stating they exclusively mowed the 'Disputed Parcel', but later stated the removal of 'the deteriorating old farm fence' was because 'it was becoming . . . [a] mowing hindrance for both the Lachmans and the Gerths." We think it obvious that a fence may constitute a mowing hindrance for landowners on both sides of a fence.

previously to the [Lachmanns]." Berrey v. Jean, 401 N.E.2d 102, 106 (Ind. Ct. App. 1980), overruled on other grounds, Fraley, 829 N.E.2d 476.

With regard to Gerry Morgan's affidavit, the only issue this affidavit contests is the date on which the Lachmanns installed the sliding gate fence. See Appellant's App. at 111-12 (conceding that the Lachmanns installed the sliding gate, but claiming it was installed at a later date). First, we note that even if there was a temporary period during which no fence or gate was in place, such a circumstance does not preclude summary judgment on the issue of whether the Appellees adversely possessed the Disputed Parcel. Cf. Piles v. Gosman, 851 N.E.2d 1009, 1016 (Ind. Ct. App. 2006) (rejecting the argument that a party may not adversely possess property without continuously maintaining a fence along the entire property line). Regardless of the date on which the Lachmanns installed the sliding gate, overwhelming evidence indicates that the Appellees established the elements of adverse possession. The existence of a fence along the claimed boundary line is strong evidence of the Appellees' assertion of control and intent to claim the Disputed Parcel. See Garriott, 2007 WL 4554762 at *7; Williams v. Rogier, 611 N.E.2d 189, 193-94 (Ind. Ct. App. 1993), trans. denied, overruled on other grounds, Fraley, 829 N.E.2d 476. The Appellees' erection of improvements on the Disputed Parcel provides further evidence of adverse possession. See Williams, 611 N.E.2d at 193-94; cf. Beaver v. Vandall, 547 N.E.2d 802, 804 (Ind. 1989) (finding insufficient evidence to establish adverse possession where no fence was erected and no structures were erected on the parcel). The Appellees' actions with regard to the Disputed Parcel were also so open as to satisfy the notice element. See Wetherald v. Jackson, 855 N.E.2d 624, 640 (Ind. Ct. App. 2006) (a party's maintenance and construction of

improvements constituted sufficient notice to holder of record), trans. denied; Rothschild v. Leonhard, 33 Ind. App. 452, 71 N.E. 673, 676 (1904) ("Actual possession of lands under a claim of title is sufficient notice of such claim to put other on inquiry as to the nature and extent of the claim.") (quoting Johnston v. Glancy, 4 Blackf. 94 (Ind. 1835)).

As no issue of material fact exists as to any of the elements of adverse possession, we conclude the trial court properly granted summary judgment on this issue.

IV. Attorneys' Fees

Under Indiana Code section 34-52-1-1, the trial court has discretion to award attorneys' fees to the prevailing party if the other party "(1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless; (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or (3) litigated the action in bad faith." A claim is frivolous

> (a) if it is taken primarily for the purpose of harassing or maliciously injuring a person, or (b) if the lawyer is unable to make a good faith and rational argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law.

Kahn v. Cundiff, 533 N.E.2d 164, 170 (Ind. Ct. App. 1989), summarily aff'd, 543 N.E.2d 627 (Ind. 1989). A claim is unreasonable "if, based on a totality of the circumstances, including the law and facts known at the time of the filing, no reasonable attorney would consider that the claim or defense was worthy of litigation or justified." Id. at 170-71. And a claim is groundless "if no facts exist which support the legal claim relied on and presented by the losing party." Id. at 171.

The ultimate decision of whether to award attorneys' fees lies with the discretion of

the trial court, and we review this decision for an abuse of that discretion. Breining v. Harkness, 872 N.E.2d 155, 161 (Ind. Ct. App. 2007).[9]

Initially, we deny the Appellees' request for appellate attorneys' fees. Although we ultimately ruled for the Appellees on the merits, we do not find the Morgans' appeal wholly frivolous, unreasonable, or groundless. We point out that we specifically declined to rule on the issue of the validity of the Agreement because of the factual nature of the issues. The Morgans' arguments, though ultimately unpersuasive, were supported with citation to authority, and made in a fairly clear manner. In sum, we believe this appeal to be made in good faith.

In the trial court, the Appellees requested attorneys' fees based on the costs associated with: 1) the Morgans' counterclaim seeking to invalidate the Easement; 2) the Morgans' motion for summary judgment; and 3) the Morgans' motion for relief from judgment.

With regard to the counterclaim, the Appellees argue that the Morgans could not defeat any of the Appellees' theories, and that "as the Morgans attempted to argue against one theory, they instead further supported the other theories." Appellee's Brief at 36. Although we agree that the Morgans' arguments regarding Martha's lack of knowledge of the Agreement and the Appellees' permissive use of the Easement are somewhat circular, we also recognize that parties are not precluded from arguing alternate theories that may seem contradictory. See Ind. Trial Rule 8(E)(2) ("A pleading may also state as many separate claims or defenses as the pleader has regardless of consistency."); Hubbard v. State, 742

[9] We review de novo the issue of whether a party litigated in bad faith or whether the party's claim was frivolous, unreasonable, or groundless. Id. However, the trial court entered no conclusion as to this point, and denied the Appellees' request without any findings or conclusions.

N.E.2d 919, 922 n.6 (Ind. 2001) (although the State's primary theory was that the defendant acted alone, the State was also permitted to argue a theory of accomplice liability), cert. denied, 534 U.S. 869 (2001); Strong v. Commercial Carpet Co., Inc., 163 Ind. App. 145, 151, 322 N.E.2d 387, 390-91 (1975), reh'g denied, 163 Ind. App. 145, 324 N.E.2d 834.

With regard to the Morgans' motion for summary judgment, we also find that the motion was not entirely frivolous, unreasonable, or groundless. As with this appeal, although the Appellees prevailed on the merits, we do not find that the Morgans' arguments were not worthy of litigation.

The more difficult issue relates to the Morgans' Motion for Relief from Judgment and Motion to Correct Error. The Morgans apparently based this motion on their claim that the Appellees had committed fraud, misrepresentation, or other misconduct, see Ind. Trial Rule 60(B)(3), in relation to their failure to inform the court and the Morgans that Peter Lachmann had granted partial interest in two portions of the Lachmann Property to two companies owned by the Lachmanns and their son, to whom the Lachmanns had given a twenty-percent interest in the companies. The Appellees failure to fully describe and disclose the ownership of this property had no bearing whatsoever on the merits of the litigation. No evidence of any sort indicates that the Appellees concealed this information or gained any advantage by failure to disclose. Moreover, the claim in the Morgans' motion that "[t]he misrepresentations of ownership, size and configuration of the 'Lachmann Real Estate' made by the Lachmanns demonstrates an unconscionable scheme or plan to improperly influence the Court's decision and prevent the Morgans from fully and fairly presenting their case and defenses," finds no support anywhere in the record and appears to be no more than mere

fiction and fantasy.

Still, given the wide discretion we grant trial courts in granting or denying requests for attorneys' fees, e.g., Kelley v. Vigo County Sch. Corp., 806 N.E.2d 824, 831-32 (Ind. Ct. App. 2004), trans. denied, we cannot say that the trial court abused its discretion in denying the Appellees' request.

Conclusion

We conclude the trial court properly granted summary judgment on the issues of whether the Appellees established an easement by prescription and whether they obtained title to the Disputed Parcel by adverse possession. We also conclude the trial court acted within its discretion in denying the Appellees' request for attorneys' fees.

Affirmed.

KIRSCH, J., and BARNES, J., concur.