MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Sunnie Roberts,
Appellant-Defendant,

v.

Curtis Owens, et al.,
Appellees-Plaintiffs.

May 1, 2023

Court of Appeals Case No. 22A-PL-1562

Appeal from the Warrick Superior Court

The Honorable Amy Steinkamp Miskimen, Judge

Trial Court Cause No. 87D02-1706-PL-987

Memorandum Decision by Chief Judge Altice
Judges Riley and Pyle concur.

Altice, Chief Judge.

Case Summary

[1] Sunnie Roberts appeals the judgment in favor of Curtis and Katherine Owens (collectively, Plaintiffs), on their complaint against her and her now-deceased husband, Jared[1] (collectively, Defendants), for trespass and ejectment. Specifically, Sunnie argues that the evidence did not establish that Defendants trespassed on Plaintiffs' property and that the trial court erred in concluding that they failed to establish a claim of adverse possession on the disputed property.

[2] We affirm.

Facts and Procedural History

[3] On May 7, 2014, Plaintiffs purchased thirty-eight acres in Newburgh from David Roberts (David)[2] with plans to live on the premises and operate a vineyard and winery. Prior to the sale, David hired Morley and Associates (Morley) to conduct a survey of the property and mark the boundaries.

[4] Plaintiffs' and Defendants' properties intersected at a particular point that had been marked on a plat map. Defendants' parcel was just north of Plaintiffs'

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[1] At some point during the pendency of the proceedings, Jared was killed in an automobile accident.

[2] David is not related to Defendants.

property and was comprised of approximately five acres with a mobile home on the property. Defendants had rented their property from 2014 until they purchased it from Jeanne Morisette on April 6, 2016. That land had originally been owned by Wilder Oil Company (Wilder) that operated as a gas station dating back to 1957. Wilder conveyed the property to Morisette on October 29, 2008, which she then sold to Defendants.

[5] Sometime after Plaintiffs purchased the property, Ron Owens—Curtis's brother—purchased six of those thirty-eight acres on the east side of Plaintiffs' property. Curtis and Ron hired Morley to conduct an additional survey to establish new county tax parcel identification numbers and boundaries. Morley located the previous markers and set the monuments with 5/8-inch rebar. The rebar was driven into the soil, and above-ground wooden stakes were placed next to the monuments.

[6] During the last survey for Plaintiffs, Morley's associates used the parties' deeds and monuments to ensure that the "entire property ended up getting everything it was supposed to get." *Transcript Vol. 2* at 8. Upon completion of the survey, it was discovered that various improvements including a fence and a nine-foot portion of a wooden shed, encroached from Defendants' property onto Plaintiffs' land. The partial fence—that did not enclose the property—was situated on Plaintiffs' property just south of the shed.

[7] The disputed property was approximately one-quarter acre. When Plaintiffs purchased the property, the area was overgrown. Curtis paid to have trash and

other debris such as old TV's, broken lawnmowers, tires, and rims removed from a ditch located just south of Defendants' property.

[8] Shortly after Morley had placed survey pins on the property to mark the boundaries, Jared removed them and placed wooden stakes in the ground where he believed the proper boundaries were located. Jared drew images of male genitalia on the shed, threw bricks into the grass, and drove golf balls into the disputed area. Curtis also saw Jared pound wrenches into the ground that damaged Curtis's lawn mower when he mowed. Curtis was concerned that pieces of metal would be thrown from the mower that would hurt or kill someone. Curtis also repeatedly removed wood that Jared would stack in the disputed area.

[9] On occasion, Jared would intimidate Curtis and throw knives at the shed while Curtis was outside working on the property. Beginning in May 2015, Curtis began reporting Jared's activities to police that resulted in the filing of criminal trespass charges against Jared.[3]

[10] Morley returned to the property on two separate occasions in 2017 to re-mark boundaries because the monuments and stakes had been removed. On April 18, 2017, Plaintiffs' attorney sent a letter and a copy of the Morley survey to Defendants, demanding that they remove the fence and trash from Plaintiffs'

[3] Jared died before those criminal charges could be resolved.

property. As that correspondence prompted no action, Plaintiffs filed a civil complaint for trespass and damages against Defendants on June 26, 2017.

[11] The trial court granted Plaintiffs' motion for default judgment on August 12, 2017, because Defendants did not formally answer the complaint. On November 9, 2017, Defendants moved to set aside the default judgment, and on February 23, 2018, they filed a complaint against Plaintiffs to quiet title in adverse possession. Defendants' complaint alleged, among other things, that they and their predecessors "have had normal and customary exclusive, complete, actual, open, notorious, and hostile, control over the property for more than twenty years." *Defendants' Exhibit B.* Defendants asserted that they demonstrated actual ownership of the property for that period, have paid all taxes thereon, and "their predecessors built a shed on the property being adversely possessed" . . . and requested that "title to the disputed property be quieted in their name." *Id.*

[12] On March 15, 2018, the trial court conducted a hearing on the motion to set aside the default judgment. The trial court granted the motion, finding that Defendants "responded in writing to deny the complaint for damages and trespass by serving the same on plaintiff's attorney, . . . but that [the] response was not filed with the court as it should have been" *Appellants' Appendix Vol. 2* at 54. Finding, however, that Defendants had advanced a meritorious defense to Plaintiffs' claim, the trial court set aside the default judgment and determined that Defendants should have the opportunity to "defend against the complaint" and "pursue their [counter]claim of adverse possession." *Id.* at 55.

[13] When a bench trial commenced on April 4, 2022, the parties stipulated that Plaintiffs had paid the property taxes on their parcel (the 102 parcel) and that Defendants had paid taxes on their parcel (the 103 parcel) since their purchase of the property in 2016.

[14] Rather than having their own survey performed, Defendants relied on—over Plaintiffs' objection—several aerial photos to establish the boundaries. There was a disclaimer, however, on the Geoscience Information System (GSIS) website—where the photos were generated—stating that there was no "warranty concerning accuracy or merchantability," and that "no part of [the website] should be used as a legal description or document." *Exhibit J* at 115-32. The purpose of the map and photos was "to display the geographic location of a variety of data sources frequently updated from local government and other agencies." *Transcript Vol. 2* at 94-98. Sunnie admitted at trial that Plaintiffs placed her on notice about the encroachments in 2014 after the survey had been completed.

[15] Vance Fisher, a neighbor who lived close to both properties for over twenty years, testified that David's father maintained the disputed area from 1999 through 2004. Fisher indicated that for nearly sixteen years thereafter, the disputed area had become overgrown except for the immediate area where Defendants' mobile home is situated. Fisher testified that he never saw Jared or Sunnie maintain the disputed overgrown area, and he knew that Morley had conducted a survey for Plaintiffs. Fisher also observed Curtis remove trash and clean up the disputed area after Plaintiffs had purchased the property.

[16] David testified that he had lived on the property for many years during his childhood, and that Wilder had owned the adjoining property that Defendants eventually purchased from Morisette. David testified that Morisette approached him at some point and inquired about building a partial fence that would encroach on his property. Morisette wanted the fence to keep animals out of her garden. In exchange, Morisette promised to maintain the area and give David some of the vegetables from the garden. David testified that although he agreed to such an arrangement, he made it clear to Morisette that he was not relinquishing ownership of that property.

[17] Although Morisette initially honored the agreement, she stopped gardening after two years and the area became overgrown with weeds and a dumping ground for trash. David conveyed this information to Plaintiffs when they purchased the property, and he showed them the boundary lines that the Morley survey confirmed. David further testified that he and his father were the only individuals who had ever maintained the disputed property.

[18] Following the conclusion of the two-day trial, judgment was entered for Plaintiffs. The trial court's order stated that the evidence was sufficient to show that Defendants had trespassed on Plaintiffs' property and that the fence and shed should be removed. It also determined that because it was Jared who caused Plaintiffs to incur expenses for removing debris that had accumulated on the property, Sunnie was not responsible for those expenses. Finally, the trial court concluded that Defendants failed to establish the elements of their counterclaim for adverse possession of the disputed area.

[19] Roberts now appeals.

Discussion and Decision

I. Trespass

[20] In addressing Sunnie's contention that the evidence failed to establish that Defendants trespassed on the disputed property, we consider the evidence in the light most favorable to the judgment and draw all reasonable inferences therefrom. *Brown v. Eaton*, 164 N.E.3d 153, 161 (Ind. Ct. App. 2021), *trans. denied*. We do not reweigh the evidence or reassess witness credibility. *Id.* A judgment will be reversed only if the evidence leads to but one conclusion and the factfinder reached the opposite conclusion. *Johnson v. Blue Chip Casino, LLC,* 110 N.E.3d 375, 378 (Ind. Ct. App. 2018), *trans. denied.*

[21] Sunnie seeks to avoid liability for trespass because the evidence clearly established that the "disputed property falls within [the 103 parcel], . . . which is owned, maintained, and homesteaded by [Defendants]." *Appellant's Brief* at 8-9. In support of this claim, she asserts that the trial court erred in relying on the Morley surveys and parcelization maps to establish the boundaries, and further contends that the GSIS mapping photos—which contradicted the Morley surveys—were sufficient to establish the property boundaries, ownership of the land, and location of the shed.

[22] Here, the April 18, 2017 letter that Plaintiffs sent to Defendants demanding the removal of the trash and fence included the surveys that Morley conducted in

2014 and 2015. The surveys show that the fence and shed encroach on Plaintiffs' property. Rather than having their own survey performed, Defendants relied on the GSIS, and Sunnie presented no evidence at trial disputing the validity of the Morley surveys. As discussed above, GSIS clearly states on its website that it does not warrant the accuracy of the boundaries depicted in the photos and the photos should not be used for legal purposes.

[23] Additionally, although Sunnie relies on the county's real property maintenance records to support her claim that Defendants owned the disputed area, those records show nothing more than that each owner paid property taxes. Moreover, the documents establish that no improvement was on the Morissete property from 2004 through 2010 and there were no property taxes paid during those years for improvements. In fact, it was not until 2011 that there was a $700 assessment for an improvement on the Morisette property. Defendants, however, did not live there at the time, and Sunnie testified that she did not know the nature of the tax assessment.

[24] In light of the evidence presented at trial, it is apparent that Sunnie is requesting us to reweigh the evidence, which we decline to do. As it was reasonable for the trial court as the factfinder to rely on the Morley surveys as a basis for the correct boundaries of the property, we conclude that the trial court properly determined that the fence and shed encroached on Plaintiffs' property.

II. Adverse Possession

[25] Notwithstanding our conclusion above, Sunnie maintains that Defendants did not commit trespass because the evidence established that they satisfied the elements of adverse possession with regard to the disputed area. She contends that they exercised control over the disputed property, intended to claim ownership of it, paid taxes, and provided the required notice of their intent and exclusive control of the disputed parcel for the statutorily required period of ten years.

[26] In *Fraley v. Minger,* our Supreme Court determined that the following elements must be satisfied to establish adverse possession:

> (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).

829 N.E.2d 476, 486 (Ind. 2005).

[27] In addition to the above, Ind. Code § 32-21-7-1 requires an adverse possessor to pay all taxes and special assessments that he "reasonably believes in good faith" to be due on the property during the period of the claimed adverse possession. *Id.* Finally, Ind. Code § 34-11-2-1 requires that all elements of adverse possession must be satisfied for a ten-year period.

[28] We note that a heightened quantum of proof governs adverse possession claims, in that the elements of adverse possession must be established by clear and convincing evidence. *Id.* at 482-83. Where overcoming a presumption requires a heightened quantum of proof, such determination falls within the sound discretion of the factfinder, whose discretion is afforded deferential review. *Id.* at 483. That said, when reviewing a trial court's judgment on an adverse possession claim, we must determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing evidence or assessing witness credibility, whether a reasonable trier of fact could conclude from the facts found by the trial court that the challenged elements of adverse possession were established by clear and convincing evidence. *Id.*

[29] In this case, the evidence showed that Defendants did not maintain or mow the disputed area of land when they resided on the property. Fisher testified that the only individuals he ever saw maintain the disputed property was David's father from 1999 to 2003 during the years that he owned the property.

Thereafter, for nearly sixteen years, the area remained overgrown but for the place where Defendants' mobile home is situated. While Fisher never saw Defendants maintain the disputed area, he observed Curtis mowing it and clearing the ditch of debris after Plaintiffs had purchased it.

[30] David testified that he resided on the property since 1998, and that he and his father had mowed and maintained the disputed area as part of their property. Although Morisette and David reached an agreement about constructing a fence to keep the animals out of Morisette's garden, Morisette did not follow through with maintaining the property, and the area became a dumping ground for trash. These circumstances do not satisfy the elements of control or notice. *See Fraley,* 829 N.E.2d at 486.

[31] Additionally, the evidence failed to establish that Defendants or any of their predecessors demonstrated the intent to claim full ownership of the disputed tract superior to the rights of all others. In our view, merely dumping trash and discarding junk on the disputed property after Defendants knew of Morley's surveys and the encroachments does nothing to establish an adverse possession claim. *See id.*

[32] We also note that the evidence does not support Sunnie's contention that Defendants satisfied the elements of adverse possession continuously for the required ten-year period. More particularly, she could not establish when the shed and fence were constructed or who had built them. The Warrick County real property maintenance records reveal that there was no shed on

the property until 2010 or 2011, and Plaintiffs filed suit for trespass and removal of the shed in 2017. Defendants were placed on notice of the encroachment as soon as Morley's surveys were completed in 2014 and after Plaintiffs had purchased the property. In short, Defendants knew of the encroachments when they purchased the property in 2016. Moreover, Jared's actions of throwing bricks, golf balls, and pounding wrenches and other metal objects into the ground when Curtis was trying to clean up and mow the property is clearly not indicative of ownership of the land through adverse possession. *See id.*

[33] In light of these circumstances, we conclude that the trial court correctly rejected Defendants' counterclaim for adverse possession.

III. Appellate Attorney's Fees

[34] Plaintiffs contend that they are entitled to an award of appellate attorney's fees in accordance with Ind. Appellate Rule 66(E) because Sunnie's claims on appeal are baseless, frivolous, and "utterly devoid of all plausibility." *Appellees' Brief* at 23. Plaintiffs assert that Sunnie's appeal amounts to nothing more than "continued malicious harassment . . . that has gone on for close to a decade." *Id.* at 15.

[35] App. R. 66(E) provides for an assessment of "damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorney's fees." Our discretion to award attorney's fees under App. R.

66(E) is limited to instances where an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. *Edwards by Next of Friend Glaser v. City of Carmel,* 191 N.E.3d 900, 911 (Ind. Ct. App. 2022). A strong showing is required to justify an award of appellate damages, and the sanction is not imposed to punish mere lack of merit, but something more egregious. *Helmuth v. Distance Learning Systems, Ind., Inc.,* 837 N.E.2d 1085, 1094 (Ind. Ct. App. 2005). More particularly, to merit an award of attorney's fees, an appeal must be "wholly frivolous" and "utterly devoid of all plausibility." *Fritts v. Fritts,* 28 N.E.3d 258, 267 (Ind. Ct. App. 2015). We use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal. *Edwards,* 191 N.E.3d at 911.

[36] Here, Plaintiffs essentially maintain that because Sunnie did not prevail on appeal, they are entitled to appellate attorney's fees. However, merely proffering appellate arguments that do not ultimately prevail is inadequate to support an award of attorney's fees to the party who responds to those arguments. *See, e.g., Basic v. Amouri,* 58 N.E.3d 980, 986 (Ind. Ct. App. 2016) (observing that we do not impose the sanction of attorney's fees to punish mere lack of merit but only for something more egregious); *see also Kelley v. Kelley,* 158 N.E.3d 396, 400 (Ind. Ct. App. 2020) (holding that "just because an appellant is unsuccessful on appeal does not mean the appellee is entitled to appellate attorney's fees").

[37] Contrary to Plaintiffs' claims, Sunnie's appeal does not satisfy the criteria that would warrant an award of appellate attorney's fees. Although Sunnie does not

prevail in this appeal, we cannot say that the issues she presented were wholly frivolous and utterly devoid of all plausibility. Therefore, we deny Plaintiffs' request for appellate attorney's fees.

[38] Judgment affirmed.

Riley, J. and Pyle, J., concur.