2016 IL App (1st) 142810-U

No. 1-14-2810

Filed April 22, 2016

FIFTH DIVISION

IN THE APPELLATE COURT

OF ILLINOIS

FIRST JUDICIAL DISTRICT

ELIZABETH J. OLSON and EDWARD E. OLSON, Plaintiffs-Appellants, v. VITO BARBARA, Defendant-Appellee (Illinois Land Trust No. 3361, Unknown Owners and Nonrecord Claimants, Defendants).	)))))))))))	Appeal from the Circuit Court of Cook County No. 10 CH 34581 Honorable Rita M. Novak, Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.[*]
Justices Gordon and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court applied the wrong standard for determining exclusivity on plaintiffs' prescriptive easement claim, its order granting summary judgment to defendant on that claim was reversed, as were its orders finding in favor of defendant on plaintiffs' second trespass claim and defendant's counterclaim for a declaratory judgment on the rights of the parties. Judgments

[*] This case was recently reassigned to Justice Burke.

were affirmed in all other respects.

¶ 2 Defendant Vito Barbara erected an iron fence through the walkway running between his building and the building owned by his neighbors, plaintiffs Elizabeth and Edward Olson. Plaintiffs filed an action against Barbara seeking to quiet title to the walkway under the doctrine of adverse possession or obtain a prescriptive easement. They also asserted claims for private nuisance and trespass. Barbara filed an answer and affirmative defenses claiming laches, equitable estoppel, abandonment, acquiescence/waiver, compliance with municipal and building codes and adverse possession. He also filed counterclaims for (1) a declaratory judgment regarding the rights of the parties to the disputed property and (2) to quiet title in his name to the disputed property. On cross-motions for summary judgment, the circuit court denied plaintiffs' motion on all four counts and granted summary judgment to Barbara on the quiet title, prescriptive easement and nuisance counts. Following a bench trial, the court subsequently found in favor of Barbara on the trespass count and his counterclaims. Plaintiffs appeal, arguing the court ignored their evidence, failed to apply the correct law and misinterpreted their statements and the statements made by their witnesses. We affirm in part, reverse in part and remand.

¶ 3 BACKGROUND

¶ 4 Plaintiffs own the real property at 3359 South Lowe Avenue, in Chicago. The house on the property was built in 1888. Edward Olson's parents and grandmother purchased the property in 1975 and it had been held by the Olson family until plaintiffs acquired it in 2008 when they bought out Edward's siblings.

¶ 5 In 2005, Barbara purchased the adjacent property at 3361 South Lowe Avenue. When he purchased it, the single-story house on the property was separated from plaintiffs' building by a "gangway," a three-foot wide concrete walkway running between the two buildings. From the

sidewalk on South Lowe Avenue, a set of concrete steps secured by a gate led down to the gangway. The gangway ran between the buildings and then became a concrete path running between the backyards of the two properties. The backyards were separated by a chain link fence on Barbara's side of the path. The path ended at a latched gate and a set of concrete steps leading up to the alley behind the properties.

¶ 6 Barbara had the house on the property demolished in 2006. He had a new three-unit residential building built on the property and wrought iron fences erected enclosing his front and back yards. This construction was completed in late 2007. In August 2008, he had a six-foot tall wrought iron fence installed down the middle of the gangway. The new fence ran the full length of the gangway, parallel to the buildings, and was joined to Barbara's fences at the front and back of his property.

¶ 7 In 2010, plaintiffs filed a *pro se* action against Barbara in the Chancery division of the circuit court. Relevant here is their *pro se* second amended verified complaint asserting the following four counts: (I) quiet title/adverse possession, (II) prescriptive easement/"adverse possession," (III) private nuisance and (IV) trespass.

¶ 8 Plaintiffs made the following factual allegations in their complaint. Edward Olson's parents and grandmother purchased the property at 3359 South Lowe Avenue on September 26, 1975. Edward lived on the property from 1975 to 1983, then again from 1987 through 1997. His mother lived there from 1975 until her death in 2000, at which point title to the property passed to Edward and his siblings. Plaintiffs acquired title to the property in 2008 when they purchased the outstanding interest in the property from Edward's siblings.

¶ 9 When Edward's parents purchased the property in 1975, there was a concrete walkway (gangway) running between plaintiffs' building and the building on the adjacent property at 3361

South Lowe Avenue (adjacent property). The gangway allowed ingress and egress to plaintiffs' property and was part of the legal descriptions of both properties. The adjacent property lay south of plaintiff's property. Both properties fronted onto South Lowe Avenue.

¶ 10 When the Olsons purchased the property in 1975, two chain-link fences separated the two properties. The first fence ran west from the front northwest corner of the adjacent building to the sidewalk on South Lowe Avenue. A set of steps located just north of the front fence led up to the sidewalk. There was a latched gate at the top of the steps leading to the sidewalk and a handrail running down the steps along the north side of the adjacent property's fence. The second fence ran east along "plaintiffs backyard sidewalk" from the rear northeast corner of the adjacent building to the alley behind the buildings. A set of cement steps led from the sidewalk up to the alley. A latched gate was at the bottom of the steps. There was a third latched gate inside the gangway near the rear south east end of plaintiffs' building.

¶ 11 Plaintiffs alleged the only way into the gangway was by steps on "plaintiffs' property." They claimed that, from September 26, 1975, until the spring of 2006, the front fence, handrail, rear fence and three gates were in place, the gangway ran unobstructed and the owners of plaintiffs' property had "continuously used the gangway to the exclusion of all others."

¶ 12 Plaintiffs alleged that, in the spring of 2006, Barbara had the building on the adjacent property demolished, the gangway dug up and the front fence, gate and handrail removed. He had a water spigot, electricity, and gas meters installed on the north side of his new building "encroaching" into the gangway. Plaintiffs claimed Barbara had no way to access the meters or spigot except by their front steps.

¶ 13 Barbara installed a six-foot tall wrought iron fence running east from the north east corner of his building. In late 2007, plaintiffs made a written demand that he remove the fence as

surveys showed the fence encroached on their property.

¶ 14 In August, plaintiffs installed new gateposts on the west end of their property and inside the gangway to replace the posts and handrail removed by Barbara. Later that day, the posts closest to Barbara's adjacent property were cut down.

¶ 15 Shortly thereafter, Barbara had a six-foot tall wrought iron fence installed in the gangway. The fence began at the sidewalk running along South Lowe Avenue and ran east for 71 feet to connect to Barbara's fence at the rear of his building. The approximate width of the gangway ranges from 39 inches to 36 inches. Of this, the portion of the gangway belonging to plaintiffs ranged from approximately 17 inches on the west side to almost 14 inches on the east side. However, the space between the fence and plaintiffs' building ranged from almost 14 inches on the west to approximately 10 inches on the east. Plaintiffs claimed that the wrought iron fences encroached on their property by multiple inches. They asserted the fence in the gangway prohibited ingress and egress to their property, made their building unsafe to live in and prevented all maintenance and repair work on their building.

¶ 16 Count I of plaintiffs' complaint is labeled "quiet title-adverse possession." Plaintiffs claimed that, from September 1975 until the spring of 2006, the Olson family had traversed the gangway. They had kept the gangway clear of snow and debris by shoveling and sweeping it. They had taken their bicycles, lawnmowers and trashcans through it. Their guests and visiting family members walked through the gangway as did the tenants in their building and repairmen doing work on the building. The owners and occupants of the adjacent property had neither given the Olsons the authority to use the gangway nor prohibited them from using it. Anyone looking could easily see the Olsons using the gangway. No one other than the owners of 3359 South Lowe Avenue and their guests and tenants were allowed to use the gangway, including the owner

of the adjacent property. The gangway was enclosed by a four-foot high chain link fence and gates at each end closed it off from all other persons. The only entrance to the gangway was by steps on plaintiffs' property.

¶ 17 Plaintiffs claimed their possession of the gangway was continuous for more than 30 years, hostile or adverse, actual, open and notorious, exclusive and under a claim of title consistent with that of the true owner. They claimed they therefore met the requirements for adverse possession of the portion of the adjacent property lying north of the original fences on that property and between the two buildings. They sought title and possession to that portion of the adjacent property. Plaintiffs requested the court to order Barbara to remove the fences encroaching on their property, remove the meters and spigot encroaching into the gangway and install fences in the same manner as the fences he had removed. They sought an injunction preventing Barbara from further obstructing the property lying north of the original fences. Plaintiffs also sought damages and lost rent.[1]

¶ 18 In count II, titled "prescriptive easement-adverse possession," plaintiffs made the same allegations as in count I and sought the same relief except that, instead of title to the portion of the adjacent property lying north of the original fences and between the two buildings, they sought an easement "over and across" this property.

¶ 19 In count III, plaintiffs alleged the fence built in the gangway created a private nuisance as it violated assorted sections of the Chicago municipal code as well as interfered with their plans

[1] Plaintiffs also sought an order directing Barbara to remove plaintiffs' address from his deed of trust for the 3361 South Lowe Avenue property. In the deed, Barbara had quitclaimed his interest in the property to a trust. The document stated the correct pin number and street address for the real estate but incorrectly listed plaintiffs' address, "3359 S. Lowe Avenue," directly under the legal description for the property. The court does not appear to have addressed this issue. However, plaintiffs have not raised the correction of the deed on appeal and we, therefore, do not address the issue.

to rent out the two apartments in their building. They claimed the fence prevented emergency personnel and their equipment from fitting through the space between the fence and plaintiffs' building and created a fire hazard as it prevented escape from the building through windows into the gangway. Plaintiffs asserted they could not maintain their building as required by the code as they could no longer shovel snow in the narrow space, the melting snow would erode their brick foundation and repairmen had no space to work in the narrow space created by the fence. They also claimed the fence interfered with their plans to rent the two apartments in their building as they feared that the fence would endanger someone's life in the event of a fire and the building remained unoccupied as a result. Plaintiffs alleged Barbara's acts in placing the fence were intentional. Plaintiffs sought the same relief as in count I of their complaint.

¶ 20 In count IV, plaintiffs alleged Barbara committed trespass on their property when he failed to remove the wrought iron fences which were entirely on and encroached on their property. They claimed the first fence at the rear of Barbara's property encroached on their property by 2 7/8 inches on the west and 4 and 3/8 inches on the east. They claimed the fence in the gangway encroached on their property by 3 and 3/4 inches. Plaintiffs also claimed Barbara committed trespass due to the concrete splatters on their building which occurred during the demolition and construction of Barbara's new building. They requested the same relief as in count I of their complaint.

¶ 21 Barbara filed an answer and affirmative defenses claiming laches, equitable estoppel, abandonment, acquiescence/waiver, compliance with municipal and building codes and adverse possession. He also filed counterclaims for (I) a declaratory judgment regarding the rights of the parties to the disputed property and (II) to quiet title in his name to the disputed property. Barbara claimed, *inter alia*, that the new fence was on his property, he had built the fence

pursuant to surveys of his property, he had submitted the surveys to the City of Chicago in support of his application to build, the City had issued him permits for the construction of the building and fences and he had built the fence in accordance with the permits and surveys.

¶ 22 The parties filed cross-motions for summary judgment on all counts.

¶ 23 Following oral argument on the motions, the circuit court granted defendants' motion for summary judgment on the request to quiet title, prescriptive easement and private nuisance counts in full and on plaintiffs' trespass count in part. It denied plaintiff's motion for summary judgment on all counts. Although Barbara had requested summary judgment on his counterclaims, the court did not address this motion in its order.

¶ 24 The court found that plaintiffs failed to meet their burden to prove adverse possession or prescriptive easement as depositions from their own witnesses showed that the gangway was not exclusively used by the Olsons. Rather, the depositions demonstrated that the gangway was used by people in the neighborhood for ingress and egress from the street to the alley and by the people living in the adjacent building as a way to get to the back of that building. The court found plaintiffs' evidence insufficient to support their claim of private nuisance and their trespass claim that their building was damaged by Barbara during the construction of his new building. Lastly, finding that genuine issues of material fact existed regarding the property line and whether Barbara acted intentionally in building the fence on plaintiffs' property, the court denied Barbara's motion for summary judgment on this aspect of the trespass claim.

¶ 25 The case proceeded to trial on the remaining trespass issue and Barbara's two counterclaims. On August 19, 2014, following a bench trial during which the parties appeared *pro se*, the court found in favor of Barbara on the trespass claim and his counterclaims. Having heard testimony from the parties' surveying expert witnesses, the court found the testimony of

Barbara's expert surveyor was more credible and entitled to greater weight than that of plaintiffs' expert. It held that Barbara's expert provided a trustworthy explanation of why the surveyors had reached different conclusions regarding the property line and its relationship to the fence and established that the fence did not encroach on plaintiffs' property. The court therefore found plaintiffs failed to prove trespass. The court noted that, in its previous order on the motions for summary judgment, it had found plaintiffs failed to prove adverse possession and it reiterated that finding. The court therefore entered judgment in favor of Barbara and against plaintiffs on all claims and counterclaims.

¶ 26 Plaintiffs filed a timely notice of appeal from the court's orders on September 15, 2014. Both parties remain *pro se*.

¶ 27 ANALYSIS

¶ 28 Plaintiffs challenge the circuit court's findings in favor of Barbara on all four counts of their complaint. The court granted summary judgment to Barbara and denied plaintiffs' motion for summary judgment on plaintiffs' quiet title, prescriptive easement and private nuisance counts and, in part, on their trespass count. Then, following a bench trial, the court found in favor of Barbara on the remaining trespass issue and Barbara's counterclaims seeking a declaratory judgment and to quiet title.

¶ 29 Before reaching plaintiffs' arguments, we note that Barbara's brief fails to comply with the Illinois supreme court rules for appellate briefs. His brief consists of a four-page series of paragraphs in which he recites the evidence without citation to the record and argues, without citation to legal authority, that the evidence shows plaintiffs claims were not "valid" or "applicable." The thrust of his brief is that the evidence shows the fence is on his property, people besides the Olsons used the property, plaintiffs have been "harassing" him for nine years

and he has expended significant resources fighting their attempts "to swindle money and property" from him during that time. Pursuant to Illinois Supreme Court Rules 341(h)(7) and 341(i), arguments in an appellee's brief must "contain the contentions of the [appellee] and the reasons therefore, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. 341(h)(7), (i) (eff. Feb. 6, 2013); *Vancura v. Katris*, 238 Ill. 2d 352, 372 (2010). Barbara's brief fails to comply with these requirements. Nevertheless, plaintiffs have not raised the deficiencies in Barbara's brief in a reply brief and we will not strike his brief *sua sponte*. We will, however, disregard any inappropriate or unsupported statements and arguments.

¶ 30 I. Quiet Title - Adverse Possession

¶ 31 The trial court did not err in granting summary judgment in favor of Barbara and denying summary judgment to plaintiffs on their quiet title count. Plaintiffs claimed they acquired title through adverse possession to the portion of Barbara's adjacent property lying north of the original fences on that adjacent property and south of their own property line (the strip), including the property running between the two buildings (the gangway). It is undisputed that the property line runs somewhere east to west through the gangway.

¶ 32 Summary judgment is properly granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. It is a drastic measure and should only be granted if, construing the record strictly against the movant and liberally in favor of the nonmoving party, the movant's right to judgment is clear and free from doubt. *Id*. However, the nonmovant cannot rely solely on his complaint or answer to raise an issue of fact when the movant has supplied facts which, if not contradicted, entitle him to judgment as a matter of law. *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 249 (1994). Summary judgment should be denied if there is a dispute as to a material

fact or if reasonable persons could draw different inferences from the undisputed material facts or accord different weight to the relevant factors of a legal standard. *Seymour*, 2015 IL 118432, ¶ 42. We review *de novo* the circuit court's decision on a motion for summary judgment. *Id.*

¶ 33 If adverse possession is established, then the claimant is accorded title to the land and the previous titleholder is divested of ownership. *McNeil v. Ketchens*, 397 Ill. App. 3d 375, 393 (2010). To establish title by adverse possession, the claimant must possess the disputed land for 20 years. *Miller v. Metropolitan Water Reclamation District of Greater Chicago*, 374 Ill. App. 3d 188, 189-90 (2007). The 20-year period starts to run when the titleholder "has a visible, objective reason to know that someone is trespassing. The period cannot run on the sly." *McNeil*, 397 Ill. App. 3d at 393. The adverse possessions by successive possessors of property who were in privity "can be tacked together to establish a continuous possession for the statutory period of limitation." *McNeil*, 397 Ill. App. 3d at 394 (citing *Mitchell v. Chicago, Burlington & Quincy Ry. Co.*, 265 Ill. 300, 306-07 (1914)).

¶ 34 The adverse possessor must prove that the 20 years of possession was: " '(1) continuous; (2) hostile or adverse; (3) actual; (4) open, notorious and exclusive; and (5) under a claim of title inconsistent with that of the true owner.' " *Miller*, 374 Ill. App. 3d at 190 (quoting *General Iron Industries, Inc. v. A. Finkl & Sons Co.*, 292 Ill.App.3d 439, 441 (1997)). "Use of property by permission of the owners is not adverse possession." *McNeil*, 397 Ill. App. 3d at 393. "All presumptions are in favor of the title owner, and the party claiming title by adverse possession must prove each element by clear and unequivocal evidence." *Township of Jubilee v. State*, 405 Ill. App. 3d 489, 498-99 (2010).

¶ 35 The circuit court here found that plaintiffs failed to sustain their burden to establish adverse possession as they could not prove the exclusivity of their possession.

¶ 36 " 'Exclusivity [for purposes of adverse possession] requires that the claimant possess the property independent of a like right in others, [and that] the opponent, the alleged rightful owner, must altogether be deprived of possession.' " *Brandhorst v. Johnson*, 2014 IL App (4th) 130923, ¶ 57 (2014) (quoting *Malone v. Smith*, 355 Ill. App. 3d 812, 817 (2005)). To show exclusivity, plaintiffs did not have to show that they (and their predecessors in interest to the property) excluded people from the gangway or, more specifically, from that portion of the adjacent property lying north of the original fences on Barbara's property and south of plaintiffs' property line and running through the gangway. *Id*. Rather, they had to show that Barbara and his predecessors in interest to that strip of property "never *possessed* the strip during the adverse possession period." (Emphasis in original.) *Id*.

¶ 37 "Our supreme court has commented that '[t]he [adverse] occupancy must be exclusive. If the possession is only used and enjoyed in common with others, or the public in general, it cannot be regarded as hostile to other persons claiming title.' " *Estate of Welliver v. Alberts*, 278 Ill. App. 3d 1028, 1039 (1996) (quoting *Travers v. McElvain*, 181 Ill. 382, 387 (1899) (conflating the exclusivity and hostile elements)). "Because two people cannot possess the same thing, the concept of possession itself embodies exclusiveness for purposes of adverse possession." *Nationwide Financial, LP v. Pobuda*, 2014 IL 116717, ¶ 32.

¶ 38 As the trial court found, the deposition testimony of plaintiffs' witnesses Dawn Reiman and Nancy Konzen, which was attached to defendants' motion for summary judgment, negates plaintiffs' contention that their use of the gangway was exclusive.

¶ 39 Reiman, Edward Olson's ex-wife, had visited the Olsons' building on South Lowe Avenue since she was 13 years old, lived there with Edward from 1987 to 1997 and continued to visit the building when her son lived there some years later. She testified in her deposition that

she, her children and all the Olsons had used the gangway. She also testified that "strangers" and "random people in the neighborhood" also used the gangway as a way to "cut through from the alley."

¶ 40 Konzen, Reiman's sister, had lived at the subject property from 1997 to 2006. Prior to that, she had "frequently" visited the house when her sister lived there with Edward. Konzen testified in her deposition that she and her daughter had used the gangway, as had "Matt" [Reiman's son] who had lived downstairs in the first floor apartment. She also testified that the "college kids" renting the house on the adjacent property, now Barbara's property, had used the gangway. She stated the students would "come home drunk" in a taxi and then "run off" without paying, opening the gate to the gangway and running through the gangway to the alley to get back into their own house. She witnessed this multiple times. It happened "quite often" and Konzen had had cab drivers and police come to her door "plenty of times," thinking the "kids" lived at her house.

¶ 41 As the circuit court found, Reiman's and Konzen's testimony showed "the public and others," including "the children who lived next door in *** Barbara's property," all used the gangway and the gangway "was, at best, shared by the Olsons and their predecessors in interest." Their testimony showed that the gangway was used by persons other than the Olsons and the occupants of their property. Most importantly, Konzen's testimony showed that the occupants of the adjacent property "quite often" used the gangway to reach the back door of the adjacent property. Accordingly, plaintiffs' own witness demonstrated that the occupants of the adjacent property were not altogether deprived of possession of the gangway and the rest of the strip of land to which plaintiffs seek title.

¶ 42 Plaintiffs had the burden to prove each element of their adverse possession claim. Since

their own witness established that Barbara's predecessors in interest were not altogether deprived of possession of the strip of property, plaintiffs cannot prove the exclusivity element of adverse possession. As a result, the circuit court order granting summary judgment to Barbara and denying plaintiffs' motion for summary judgment on the quiet title - adverse possession claim is affirmed.

¶ 43 II. Prescriptive Easement

¶ 44 The circuit court erred in granting summary judgment to Barbara and denying summary judgment to plaintiffs on their prescriptive easement claim. The court found in favor of Barbara on the prescriptive easement claim on the same basis as it did on the quiet title count: Neiman's and Konzen's testimony showed plaintiffs and their predecessors in interest did not exclusively use the gangway as they "shared" the gangway with the public and the students who lived in the adjacent building. The circuit court cited *Catholic Bishop of Chicago v. Chicago Title & Trust Co.*, 2011 IL App (1st) 102389, ¶ 20, for the proposition that the exclusivity requirement for both adverse possession and a prescriptive easement cannot be met where either the public or title holder uses the land at issue. However, *Catholic Bishop of Chicago* is instructive in demonstrating that the court applied the wrong standard in determining whether exclusivity existed for purposes of a prescriptive easement.

¶ 45 An easement is a nonpossessory interest, "a right or privilege in the real estate of another." *Nationwide Financial, LP v. Pobuda*, 2014 IL 116717, ¶ 29. If an easement is found to exist, the owner of the easement has the right, for a limited purpose, to pass over or use the land of another. *Chicago Title Land Trust Co. v. JS II, LLC*, 2012 IL App (1st) 063420, ¶ 32. The land tract benefitted by the easement is the dominant estate and the land burdened with the easement is the servient estate. *Id.* At issue here is an easement by prescription, which is established by

long-term use without consent of the owner of the servient estate. *Id*. at 207-08.

¶ 46 The elements necessary to establish a prescriptive easement are similar to those required to establish adverse possession in that the use of the way must have been, for a 20-year period, "adverse, uninterrupted, exclusive, continuous and under a claim of right." *Nationwide Financial, LP*, 2014 IL 116717, ¶ 28. The claimant has the burden to distinctly and clearly establish the elements for a prescriptive easement. *Chicago Title Land Trust Co.*, 2012 IL App (1st) 063420, ¶ 32. However, " '[w]here a way has been used openly, uninterruptedly, continuously and exclusively for more than a period of twenty years, the origin of the way not being shown, there is a presumption of a right or grant [allowing the use of the property] from the long acquiescence of the party upon whose land the way is located.' " *Nationwide Financial, LP*, 2014 IL 116717, ¶ 29 (quoting *Rush v. Collins*, 366 Ill. 307, 315 (1937)). "Where there has been privity between users, periods of use may be tacked together to satisfy the requisite prescription period." *Id*.

¶ 47 In *Catholic Bishop*, the court considered whether the parties claiming a prescriptive easement over a walkway had demonstrated that their use of the walkway was "exclusive." The court stated that, "because exclusivity requires that the claimant possess the property independent of a like right in others, the rightful owner must be 'altogether deprived of possession.' " *Catholic Bishop*, 2011 IL App (1st) 102389, ¶ 17 (quoting *Chicago Steel Rule Die & Fabricators Co. v. Malan Construction Co*., 200 Ill. App. 3d 701, 707 (1990)). The court then found that the claimant failed to demonstrate the exclusive possession element of a prescriptive easement as they did not show that the true owners of the property were altogether deprived of use of the walkway.

¶ 48 However, the exclusivity standard set forth in *Catholic Bishop* and applied by the circuit

court here to the prescriptive easement determination is the standard applicable to an adverse possession claim, not a prescriptive easement claim. In fact, our supreme court in *Nationwide Financial, LP,* 2014 IL 116717, recently overruled *Catholic Bishop* on this basis, holding that *Catholic Bishop* and the line of cases on which it relied "erred in superimposing the adverse possession understanding of exclusivity onto the law of easements of prescription."[2] *Nationwide Financial, LP,* 2014 IL 116717, ¶ 39.

¶ 49 The supreme court explained the difference between the exclusivity requirement in a prescriptive easement case and the "strict exclusivity of adverse possession." *Id.* ¶ 31. In a successful adverse possession case, the original owner is divested of his title and the adverse possessor gains title to the property and the right to exclude all others from the property. *Id.* ¶ 33. Thus, "an adverse possession claimant must 'possess' the land as owner and possession denotes physical control over the property." *Id.* ¶ 32.

¶ 50 In contrast, one does not "possess" an easement. *Id.* An easement "creates a nonpossessory right to enter and use land in the possession of another." *Id.* ¶ 29 (quoting Restatement (Third) of Property (Servitudes) § 1.2(1) (2000)). If a claimant gains an easement by prescription, then the true owner is divested of the right to exclude the claimant from using the easement for a particular limited purpose, such as traveling over the easement. *Id.* ¶ 33. But, unlike in adverse possession, the true owner of the land is not deprived of title or "altogether deprived of possession or use of the land." *Id.* ¶ 29.

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[2] Our supreme court decided *Nationwide Financial, LP v. Pobuda*, 2014 IL 116717, in September 2014, shortly after plaintiffs filed their notice of appeal in the case at bar. Its determination that *Catholic Bishop* "was wrongly decided" (*Id.* ¶ 41) did not set forth a new rule. It did not set forth new law or overrule past precedent. Instead, the court rejected the standard for determining exclusivity in the context of a prescriptive easement set forth in *Catholic Bishop* "as contrary to [the court's own] precedent." *Id.* ¶ 30. The court's decision was a clarification of existing law. It therefore was not a new rule and was retroactive to the instant appeal, which was pending at the time the case was decided. See *Harris v. Thompson*, 2012 IL 112525, ¶¶ 29-33.

¶ 51 The supreme court explained:

> " 'Exclusive' in the context of a prescriptive easement claim 'does not mean that no one may or does use the way, except the claimant of the easement. It means no more than that his right to do so does not depend upon a like right in others, and it does not mean that the claim is necessarily well founded.' " *Id.* (quoting *Petersen v. Corrubia,* 21 Ill. 2d 525, 531 (1961).

The court noted that it had "plainly and consistently held that a [prescriptive easement] claimant's use may be 'exclusive' within the meaning of this rule, even though the owner of the fee title to the land also makes use of the road or way in question." *Id.* (citing *Peterson v. Corrubia,* 21, Ill. 2d 525, 531 (1961); *Leesch v. Krause,* 393 Ill. 124, 129 (1946); *Rush v. Collins,* 366 Ill. 307, 314 (1937); *Look v. Bruninga,* 348 Ill. 183, 189 (1932); *Schmidt v. Brown,* 226 Ill. 590, 599 (1907); *McKenzie v. Elliott,* 134 Ill. 156, 163 (1890)).

¶ 52 The claimant seeking a prescriptive easement need not prove that no one else used "the way" over which he seeks an easement. *Nationwide Financial, LP*, 2014 IL 116717, ¶ 29. Accordingly, the circuit court erred in finding that, because the testimony of plaintiffs' witnesses showed plaintiffs and their predecessors had "shared" use of the strip with others, including with the occupants of the adjacent property, plaintiffs could not prove the exclusivity element for a prescriptive easement. It erred in granting summary judgment to Barbara and denying plaintiffs' motion for summary judgment solely on this basis.

¶ 53 Given the circuit court's finding that plaintiffs could not meet their burden to prove the exclusivity element of their prescriptive easement claim, it did not consider whether plaintiffs supported the four other elements of their claim. See *Nationwide Financial, LP*, 2014 IL 116717, ¶ 29 (to establish a prescriptive easement, claimant's use of the "way" must be "adverse,

uninterrupted, exclusive, continuous and under a claim of right" for 20 years). Nor, for that matter, did it consider whether plaintiffs showed exclusivity under the correct standard for a prescriptive easement.

¶ 54 Generally, these determinations are questions of fact for the trier of fact to resolve. *Id.* ¶ 25. Here, however, the parties filed cross-motions for summary judgment. When parties file cross-motions for summary judgment, they concede the absence of any genuine issues of material fact, agree that only questions of law are involved and invite the court to decide the issues based on the record. *Id*. Nevertheless, "the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. It is possible that neither party alleged facts that, even if undisputed, were sufficient to warrant judgment as a matter of law or to preclude a genuine issue of material fact, notwithstanding the parties' invitation to the court to decide the issues as legal questions. *Falcon Funding, LLC v. City of Elgin*, 399 Ill. App. 3d 142, 147 (2010).

¶ 55 Such is the case here, where there is simply not enough evidence in the record from which we can find that either of the parties is entitled to judgment as a matter of law on the prescriptive easement claim. The focus of the parties and the circuit court was the "exclusivity" element, to which the court applied the standard as it existed prior to *Nationwide Financial, LP*. As a result, triable questions of fact remain regarding whether plaintiffs proved their use of the strip of property to the north of the original fences on the property now owned by Barbara was "adverse, uninterrupted, exclusive [under the correct standard], continuous and under a claim of right" for 20 years. Of particular concern is the well settled rule regarding prescriptive easements that " '[w]here a way has been used openly, uninterruptedly, continuously and exclusively for

more than a period of twenty years, the origin of the way not being shown, there is a presumption of a right or grant from the long acquiescence of the party upon whose land the way is located.' " *Nationwide Financial, LP*, 2014 IL 116717, ¶ 29 (quoting *Rush v. Collins*, 366 Ill. 307, 315 (1937)). This is a matter that cannot be addressed on the parties' cross-motions for summary judgment.

¶ 56 Accordingly, we reverse the court's grant of summary judgment to Barbara on the prescriptive easement claim and affirm the court's denial of summary judgment to plaintiffs' on the prescriptive easement claim. Summary judgment to either party on the prescriptive easement claim is not warranted based on the evidence before the court.

¶ 57 III. Private Nuisance

¶ 58 The circuit court did not err in granting summary judgment to Barbara on the private nuisance count.

¶ 59 A private nuisance is an invasion of another's interest in the use and enjoyment of his or her land and must be substantial, either intentional or negligent, and unreasonable. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 204 (1997). Unlike a trespass, a nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession. *Id*. (quoting Restatement (Second) of Torts § 821D, Comment *d*, at 101 (1979)). Nevertheless, "the interference with the use and enjoyment of property must consist of an invasion by *something perceptible to the senses*, *** 'something that is *offensive, physically*, to the senses and by such offensiveness makes life uncomfortable.' " (Emphasis added.) *Id*. at 205 (quoting *Rosehill Cemetery Co. v. City of Chicago*, 352 Ill. 11, 30, 185 N.E. 170 (1933)). Common examples of private nuisance are smoke, fumes, dust, vibration, or noise produced by defendant on his own land and impairing the use and enjoyment of the neighboring land. *Id*. at

205-06. To state a claim for private nuisance, a complaint must allege a "perceptible element that would influence the physical senses" on the affected property. *Id*. at 206.

¶ 60 Plaintiffs' complaint is insufficient to state a claim for private nuisance and plaintiffs provided no competent evidence to support such a claim. They do not allege the fence in the gangway created a perceptible element that would influence the physical senses. Instead, they charged that the fence created a private nuisance as it created a space so small that no one could fit between the fence and the side of their house. They claimed the fence, as a result, violated assorted sections of the Chicago municipal code because it prevented emergency personnel from fitting through the space, created a fire hazard as it prevented escape from their building into the gangway through a window, and prevented them from maintaining their building as required by the code as they could no longer maintain their foundation in the narrow space. As the circuit court found, all of these allegations are speculation unsupported by competent evidence. Plaintiffs also alleged the fence prevented them from renting out the two apartments in their building as they feared that the fence would endanger someone's life in the event of a fire. Again, this is unsupported speculation. Plaintiffs have not alleged the fence creates an invasion by something perceptible to the senses and their complaint therefore fails to state a cause of action for private nuisance. *In re Chicago Flood Litigation*, 176 Ill. 2d at 205. The trial court's order denying plaintiffs motion for summary judgment on the private nuisance claim and granting summary judgment to Barbara on the claim is affirmed.

¶ 61 IV. Trespass

¶ 62 The trial court granted summary judgment to Barbara and denied summary judgment to plaintiffs on plaintiffs' trespass claim for the damages sustained as a result of the demolition and reconstruction of Barbara's house. Then, following a bench trial, it found in favor of Barbara on

the remaining trespass claim alleging the fence trespassed on plaintiffs' property.

¶ 63 "A trespass is an invasion in the exclusive possession and physical condition of land." *Millers Mutual Insurance Ass'n of Illinois v. Graham Oil Co.*, 282 Ill. App. 3d 129, 139 (1996). In Illinois, one may be liable in trespass for negligently or intentionally causing a thing or a third person to enter the land of another. Id. (citing *Dial v. City of O'Fallon*, 81 Ill. 2d 548, 556-59 (1980)).

¶ 64 Plaintiffs claimed the siding on their house was dented and the windows and siding splattered with concrete during the demolition and reconstruction of Barbara's house. The only evidence that the denting was due to Barbara's construction projects was Konzen's testimony that she observed bricks falling and there might have been damage. As the trial court noted, Konzen did not testify that she observed the damage, let alone that she observed the damage occur. Further, there was no evidence at all regarding the origin of the concrete splatters. Accordingly, plaintiffs failed to show the damage to their house was caused by Barbara's demolition and building on his property and the court's order granting summary judgment to Barbara and denying summary judgment to plaintiffs on this portion of the trespass claim is affirmed.

¶ 65 However, we reverse the court's order in favor of Barbara on plaintiffs' claim that the fence trespassed on their property. As determined previously, plaintiffs' claim that they have a prescriptive easement over the portion of the strip of property owned by Barbara will be decided on remand. "The owner of an easement has the right of use of the easement, which encompasses 'use that is reasonably necessary for full enjoyment of the premises.' " *Chicago Title Land Trust Co.*, 2012 IL App (1st) 063420, ¶ 69 (quoting *McMahon v. Hines*, 298 Ill. App. 3d 231, 236 (1998)). "In the context of easements, trespass occurs when there is a material interference with the right of the owner of the dominant estate to reasonable use of the easement." *Id.* ¶ 76.

¶ 66 The court may determine on remand that plaintiffs have a prescriptive easement over the disputed property. If so, then plaintiffs would be the owners of the dominant estate, the tract of land benefitted by the easement. *Id*. ¶ 32. In which case, Barbara's fence would be trespassing on plaintiffs' right to use the property, even though the fence is, as the trial court correctly determined based upon the property surveys, built within his property line. Accordingly, we reverse the trial court's order finding in favor of Barbara on this trespass issue as it cannot be decided until resolution on remand of plaintiffs' claim for a prescriptive easement.

¶ 67 V. Counterclaims

¶ 68 Following the bench trial, the trial court granted Barbara's counterclaims for a declaratory judgment regarding the rights of the parties to the disputed property and to quiet title in his name to the disputed property. We affirm the court's order granting Barbara's counterclaim to quiet title to the southern portion of the strip of property that, as shown by his expert's surveys, belongs to his property.

¶ 69 However, we reverse the order granting Barbara's counterclaim for a declaratory judgment regarding the rights of the parties to the strip of property. As the prescriptive easement claim is yet to be resolved, the parties' rights to the disputed property have not been determined. Although plaintiffs do not have title to the southern portion of the strip lying outside the boundaries of their property, they may have a prescriptive easement over that property with which Barbara cannot interfere. The determination regarding the parties rights to the disputed property will be determined on remand.

¶ 70 CONCLUSION

¶ 71 For the reasons stated above, we reverse the trial court's order granting summary judgment to Barbara on the prescriptive easement claim, its finding in favor of Barbara on the

second aspect of the trespass claim, and its order granting Barbara's counterclaim regarding the rights of the parties to the disputed strip of property. We affirm the court's orders in all other respects. The cause is remanded for further proceedings.

¶ 72 Affirmed in part; reversed in part; remanded.