UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0366

September Term, 2015

CHARLES KIRK, *ET UX.*

v.

THOMAS GARDNER, *ET UX.*

Eyler, Deborah, S.,
Meredith,
Kehoe,

JJ.

Opinion by Kehoe, J.

Filed: March 9, 2016

This is an appeal from a judgment of the Circuit Court for Anne Arundel County entered in an action arising from a dispute between neighbors, Charles and Cheryl Kirk and Thomas and Nanci Gardner. The circuit court resolved most, but not quite all, of the issues before it, in favor of the Gardners. Neither party is satisfied. The Kirks raise four issues, which we have consolidated and reworded:

1. Do the Ventnor subdivision covenants impose an express air and light easement?

2. Are the Gardners maintaining a private nuisance on their property?

3. Did the Gardners establish the elements of adverse possession?

The Gardners filed a cross-appeal and raised three additional issues, only one of which remains relevant after our resolution of the issues before us:[1]

> Did the circuit court err in denying the Gardners' claim that the Kirks were in violation of the ten-foot setback created by the covenants?

We affirm the judgment of the circuit court.

Background

The Kirks and the Gardners reside on adjacent waterfront properties in the community of Ventnor. The Kirks' property is comprised of two lots that front on Wharf Creek. The Gardners' property is comprised of four and a half waterfront lots, fronting on Wharf Creek to the south and Bodkin Creek to the east. Essentially, the Gardners

1. The Gardners' cross-appeal is in part contingent upon our resolution of the Kirks' challenges to the circuit court's findings. Because we will affirm the circuit court's judgment, the Gardners' cross-appeal on those issues is rendered moot.

own a corner property and their lots sit perpendicular in relation to the Kirks' property. The properties share a north-south boundary line, and border a fifteen foot platted right-of-way, which was originally intended to provide access to otherwise landlocked lots, now owned by the Gardners.

The waterfront lots in Ventnor were originally conveyed by ground leases. The ground leases contained identical covenants. The ones relevant to the parties' contentions are:

> SECOND-No dwelling shall be erected on waterfront lots nearer than forty feet from the shore line at mean tide; and all garages, outbuildings and other improvements shall be erected in the rear of the dwelling, and that free and open spaces shall be left on both sides of all structures erected on said lots, which free and open spaces shall extend the full length of said lots, and shall not be less than ten feet in width from the dividing lines thereof.
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> * * * *
>
> FOURTH-[Prohibits various commercial and agricultural uses and concludes with:] nor shall any noxious, dangerous or unhealthful thing or practice be permitted or maintained on said lots.
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> * * * *
>
> SEVENTH-No fences shall be permitted on said lot other than hedge or wire fencing.

It may be that good neighbors, like the members of Tolstoy's happy families, share common behavioral traits, but neighbors who grate upon one another do so in unique ways. The Kirks, the Gardners, or both of them, clearly fall into the latter category, but what poisoned the parties' once amicable relationship is not clear from the record. In any event, the Kirks filed suit in December 2012, and the Gardners filed a counterclaim

shortly thereafter. The following chart sets out the causes of action pled by the parties and their dispositions by the circuit court:

The Kirks' Complaint		
Count	Cause of Action	Disposition
1	Violation of Express Easement for Air and Light	Summary Judgment granted in the Gardners' favor.
2	Violation of Implied Easement of Air and Light	Summary Judgment granted in the Gardners' favor.
3	Tortious Interference with Prospective Economic Advantage	Summary Judgment granted in the Gardners' favor.
4	Private Nuisance	Summary Judgment granted in the Gardners' favor.
5	Permanent Injunction	Summary Judgment granted in the Gardners' favor, per motion to alter or amend.
6	Punitive Damages	Summary Judgment granted in the Gardners' favor.
The Gardners' Counterclaim		
Count	Cause of Action	Disposition
1	Quiet Title	Gardners' Summary Judgment motion denied. Judgment granted following a bench trial.
2	Trespass	Gardners' motion denied, following a bench trial.
3	Declaratory judgment: covenants have been abandoned	Summary Judgment granted in part, in the Gardners' favor.
4	Breach of covenants: split rail fence; side yard setback	Summary Judgment granted in the Kirks' favor.

We will provide additional facts as necessary to our analysis.

Analysis

Standards of Review

We address the standard of review applicable to appeals from motions for summary judgment first. Pursuant to Md. Rule 2-501(f), "[a] court shall enter judgment in favor of or against a party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." In reviewing an appeal from a grant of a motion for summary judgment, we review the facts in the light most favorable to the non-moving party, here the Kirks, to determine whether the parties generated a genuine issue of material fact. *Barbre v. Pope*, 402 Md. 157, 171-72 (2007). Where no issue of material fact is presented, we review the circuit court's determination on the merits as a matter of law, *de novo*. *Id*.

Md. Rule 8-131(c) prescribes the standard pursuant to which we review bench trials, as occurred in the case before us. The rule provides:

> When an action has been tried without a jury, the appellate court will review that case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

1. An easement for air and light?

The Kirks' first contention is that the trial court erred in granting the Gardners' motion for summary judgment as to the Kirks' claim that Covenant SECOND established an express easement of light and air across the waterfront lots in the subdivision for the benefit of neighboring properties. The Kirks contend that the Gardners violated this covenant by planting cypress trees on their property. They assert that these trees interfere with their water views across the Gardners' property.

For the benefit of the reader, we restate the language of Covenant SECOND:

> SECOND-No dwelling shall be erected on waterfront lots nearer than forty feet from the shore line at mean tide; and all garages, outbuildings and other improvements shall be erected in the rear of the dwelling, and that free and open spaces shall be left on both sides of all structures erected on said lots, which free and open spaces shall extend the full length of said lots, and shall not be less than ten feet in width from the dividing lines thereof.

In addressing the Gardners' motion for summary judgment as to the Kirks' express easement claim, the trial court concluded: "Defendants' Motion for Summary Judgment on Count I . . . is GRANTED, at a minimum, because the Court finds there is no express covenant of 'light and air' in the Ground Lease covenants[.]"

The Court of Appeals has explained the principles applicable to construing covenants, as follows:

> In construing covenants, it is the cardinal principle . . . that the court should be governed by the intention of the parties as it appears or is implied from

> the instrument itself. The language of the instrument is properly considered in connection with the object in view of the parties and the circumstances and conditions affecting the parties and the property[.]

Belleview Constr. Co. v. Rugby Hall Cmty. Ass'n, Inc., 321 Md. 152, 157-58 (1990) (internal citations and quotation marks omitted). Absent ambiguity, the court's role is to interpret the language of the declaration "to ascertain and give effect to the intention" of the declarants. *Miller v. Kirkpatrick*, 377 Md. 335, 351 (2003). This is a legal analysis and the trial court's decision is subject to *de novo* review by an appellate court. *Chevy Chase Land Co. v. United States*, 355 Md. 110, 123 (1999).

The Kirks' primary argument is based on their interpretation of Covenant SECOND. Their contention is best presented by quoting from their brief:

Covenant Language	*Practical Application*
"No dwelling shall be erected on waterfront lots nearer than forty feet from the shore line at mean tide; and all garages, outbuildings and other improvements shall be erected in the rear of the dwelling, ..."	Homes shall not be built within forty (40) feet of the shoreline and all garages and other structures shall be erected between the house and the street. NB: With waterfront property, the 'front' is the side facing the water.
"...and that free and open spaces shall be left on both sides of all structures erected on said lots, ..."	Read in conjunction with part 1, all accessory structures shall be placed behind the main residence leaving both sides of the properties "free and open." As said restriction used the term "free and open" versus "no structure" then same can only be interpreted as meaning -- open or unobstructed as to both structures <u>and</u> plantings.

"...which free and open spaces shall extend the full length of said lots, and shall not be less than ten feet in width from the dividing lines thereof."	The covenant again repeats "free and open" and clarifies that the free and open spaces shall run the full length of said lots and that the sides shall be the greater of ten feet or the distance between the main structure and the dividing lines. Such wording increases the water views across neighboring lots for the relatively narrow fifty (50') foot lots and preserves twenty (20') foot sight lines for the inner lots.

Again, we are to give effect to words used, here "free and open space":

Free - 8.a. Not being occupied or used, 8.b Unobstructed; clear. *The American Heritage Dictionary* 531 (Houghton Mifflin ed., 2nd College ed., 1985).

Open - 1.b Affording unobstructed passage or view. *The American Heritage Dictionary* 870 (Houghton Mifflin ed., 2nd College ed., 1985).

This reasoning is not persuasive. Covenant SECOND is not a monument to the scrivener's art, but we agree with the circuit court that the covenant is concerned solely with structures. There is, quite simply, no language in the covenant that suggests, much less expressly provides, that the grantor intended the phrase "free and open space" to limit a lessee's ability to plant trees and shrubs. Nor are we willing to read such a meaning into the language of the covenant. Such a construction would be "in derogation of the natural right which the owner of property has to use and enjoy his own as he sees fit, so long as it does not work such an injury to others as the law will take cognizance of." *Himmel v. Hendler*, 161 Md. 181, 187 (1931).[2]

2. The Kirks also direct our attention to the deposition testimony of their expert witness, Robert Blanchfield, Esquire, which they attached as an appendix to their (continued...)

2. A private nuisance?

The second issue the Kirks raise on appeal is the court's grant of the Gardners' motion for summary judgment on their private nuisance claim. In their motion for summary judgment, and at the hearing before the circuit court, the Kirks alleged that the Gardners planted peach trees as well as blueberry and raspberry bushes in close proximity to the Kirks' patio, which interfered with their use and enjoyment of their property. At the heart of the Kirks' contention was that the Gardners' vegetation posed a health risk to Mrs. Kirk, who has a severe allergy to bees and is thus susceptible to anaphylactic shock.

In granting the Gardners' motion for summary judgment, the motions court provided the following explanation:

> The reason I am doing that is because I do not think that you have a cause of action for nuisance, and I believe that showing that your client has a particular sensitivity to bees, which you think is a link, causally to the planting of the peach trees, that is not the normal person. And the normal person, the average person does not have a sensitivity to peach trees, the blossoms of peach trees, the dropping fruit of peach trees and any bees that may come around.
>
> And I believe the law is pretty clear on that, that it is has to be a nuisance to the average person.

(...continued)

brief. The Gardners have moved to strike the appendix because it is not part of the record. We grant the motion and will not consider the Kirks' argument that is based on the deposition. *See Rollins v. Capital Plaza Assoc., L.P.*, 181 Md. App. 188, 200 (2003).

On appeal, the Kirks assert that the court erred in finding that the Gardners' fruit-bearing vegetation did not amount to a private nuisance. According to the Kirks, the facts before the motions court were sufficient to establish that the Gardners planted the trees and bushes with the intent to interfere with Mrs. Kirk's use and enjoyment of her property. In support of this contention, the Kirks contend that the Gardners were aware of Mrs. Kirk's severe allergy to bees and planted the peach trees and blueberry and raspberry bushes near the Kirks' patio with the intent of attracting bees, wasps, and hornets.[3] The Gardners counter that the court was correct in granting its motion for summary judgment because the Kirks "do not argue that peach trees are offensive or harmful to the ordinary person, but only that they may attract bees which may be harmful to [Mrs.] Kirk because o[f] her unique sensitivities." We agree with the Gardners.

"A nuisance is an interference with the enjoyment of one's property when that interference is substantial and unreasonable such that it would be offensive or inconvenient to the normal person." *Schuman v. Greenbelt Homes, Inc.*, 212 Md. App. 451, 464-65 (2013). Here, the Kirks allege a nuisance in fact, that is "'an act, occupation, or structure . . . which becomes a nuisance by reason of the circumstances,

3. The Kirks also assert that the cypress trees the Gardners planted along the boundary line have interfered with their water views and caused the value of their property to be reduced by $140,000. The Kirks did not raise this argument to the circuit court nor did the court address the issues *sua sponte.* Accordingly, this contention is not preserved for our review. *See* Md. Rule 8-131(a).

location, or surroundings.'" *Id*. at 469 (quoting *Adams*, 204 Md. at 170). As this Court has explained, "[t]o identify this type of nuisance, we look at what 'ordinary people, acting reasonably, have a right to demand in the way of health and comfort under all the circumstances.' . . . [I]t is not enough if a particular plaintiff 'is offended or annoyed if he is peculiarly sensitive.'" *Id*. at 469-70 (quoting 1 Harper, James & Gray On Torts § 1.25 (3d ed. 2006)).

The only evidence before the motions court was that the Gardners planted fruit bearing trees and bushes, near the boundary line with the Kirks' property and patio, that Mrs. Kirk has a severe allergy to bees, and that peach trees are likely to attract bees. No evidence was presented to so much as suggest that the trees or bushes would pose an unreasonable threat to the ordinary person. Rather, the Kirks' claim is based solely on Mrs. Kirk's unique sensitivity to bees, which *Schuman* establishes is not sufficient to support an action for private nuisance. Accordingly, we conclude the circuit court was correct in granting the Gardners' motion for summary judgment as a matter of law.

3. The Kirks' Claim for Adverse Possession

The Kirks' final contention on appeal is that the trial court erred in finding that the Gardners acquired title to the right-of-way through adverse possession. This Court has explained the elements necessary to establish a claim to title through adverse possession as follows:

> The elements of adverse possession are well settled: To establish title by adverse possession, the claimant must show possession of the claimed property for the statutory period of 20 years . . . . Moreover, such possession must be actual, open, notorious, hostile, under claim of title or ownership, and continuous and uninterrupted. The "statutory period" is established by [Courts and Judicial Proceedings Article § 5-103], which requires that "[w]ithin 20 years from the date the cause of action accrues," a landowner must either "[f]ile an action for recovery of possession of a corporeal freehold or leasehold estate in land," or "[e]nter on the land."

Hillsmere Shores Improvement Assoc., Inc. v. Singleton, 182 Md. App. 667, 691 (2008) (internal citations and quotation marks omitted).

Because the Kirks contend that the court erred in its determination that the Gardners' use of the right-of-way was hostile, and in allowing the Gardners to "tack" ownership of previous owners in order to satisfy the statutory period, we limit our discussion accordingly.

3.1. Hostile Use

In a Memorandum Opinion, the trial court made the following finding on the issue of hostility:

> The burden shifts to Plaintiffs to show that the right-of-way was not adversely possessed because Defendants have satisfied the elements of actual, open and notorious, and continuous for twenty (20) years. *Kirby*, 347 Md. at 392. Plaintiffs counter that Thomas Gardner asked William Ruppert for permission to pave the northern portion of the right-of-way, which Plaintiffs claim is inconsistent with hostile possession. However, it appears neither party was ever truly aware of the presence of the right-of-way. All parties and their predecessors seem to have believed and acted as if Defendants and their predecessors were the owners of the right-of-way. Thus, Defendant's request for consent to build on the northern portion of

> the right-of-way is not necessarily inconsistent with hostile possession because Defendants and their predecessors still maintained the property as if it were their own. A common neighborly task is to notify or request permission from one's neighbors to build, even on their own property. Therefore, the third element of adverse possession has been satisfied by Defendants.

The Kirks argue that the court erred in finding that the Gardners acquired title to the right-of-way through adverse possession because the evidence before the court was not sufficient to establish that the Gardners' use was "hostile." The Kirks assert that the Gardners' use of the right-of-way was permissive and the fact that neither the Gardners nor any of their predecessors in title were aware of the existence of the platted right-of-way. As a result, the Kirks argue that the use of the right-of-way was never adverse. In support of this contention, the Kirks cite to the testimony at trial, as well as an instance in which Mr. Gardner consulted the Kirks' predecessor in title, William Ruppert, before paving a portion of the right-of-way. The Kirks also assert that the Gardners cannot point to the Kirks' fence, which is located on the Kirks' property and was placed there by the Kirks' predecessor in title, as a boundary marker by which the Gardners can identify their land. Moreover, the Kirks assert that there was no physical evidence to provide notice that the Gardners, or their predecessors in title, had an interest in the right-of-way. We are not persuaded.

We addressed "hostility" in *USA Cartage Leasing, LLC v. Baer*, 202 Md. App. 138, 200 (2011), *aff'd*, 429 Md. 199 (2012):

> "Hostile" is a term of art in the law of adverse possession; it does not connote enmity, ill will, or the absence of neighborly cooperation. *Yourik*, 174 Md. App. Md. at 429. Rather, in the context of the case before us, the term "signifies a possession that is adverse in the sense of it being 'without license or permission,' and 'unaccompanied by any recognition of . . . the real owner's right to the land.'" *Id*. (citation omitted).
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> * * *
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> "[I]n evaluating a claim, the pertinent inquiry is whether the claimant has proved the elements 'based on the claimant's "objective manifestation" of adverse use, rather than on the claimant's subjective intent.'" *Porter v. Schaffer*, 126 Md. App. 237, 276 (1999) (citation omitted).

Upon our review of the record, we cannot conclude that the trial court was clearly erroneous in finding that the Gardners' use of the right-of-way was hostile. Contrary to the Kirks' assertion, there is nothing to so much as suggest that either the Gardners or their predecessors in title sought permission to use the right-of-way. The evidence indicates that they never asked permission because they were unaware of the right-of-way's existence. But this doesn't matter because the appropriate question is whether the the Gardners's and their predecessors' actions were consistent with the notion that they owned the right-of-way. In our view, the testimony of Messrs Gardner, Ruppert and Brashears was sufficient to support the trial court's findings.

Moreover, that Mr. Gardner consulted Mr. Ruppert before making improvements to the right-of-way adjacent to his property is not dispositive. The transcript supports the

court's finding that Mr. Gardner was being neighborly. It is evident from Mr. Ruppert's testimony that he regarded the right-of-way as belonging to the Gardners.

Finally, the record contradicts the Kirks' contention that the Gardners failed to provide a physical manifestation of their ownership interest in the right-of-way. As we noted above, Mr. Gardner, Mr. Ruppert, and Mr. Brashears, all testified that the Gardners, and their predecessors in title, maintained the right-of-way. Accordingly, there is no error in the court's determination that the Gardners' possession of the right-of-way was hostile.

3.2. Tacking

On the issue of tacking, the court made the following findings in its Memorandum Opinion:

> The testimony of the Defendants indicates that they continuously maintained the right-of-way from 2001 until the filing of the lawsuit on December 12, 2012, which is eleven years. Additionally, Ruppert, who occupied Plaintiff's property from 1998 through 2008, testified that the Garufis and the Defendants had maintained the right-of-way as if it were their own, which totals fourteen years. Defendant's also testified that Brenda Garufi identified the right-of-way as part of the area being conveyed, which she and her husband had occupied and maintained since their purchase of the property on October 20, 1992. William Brashears testified that property owners of Defendant's lots had been maintaining the right-of-way since the 1960s.
>
> Thus, Defendant's testimony that the Garufis and themselves occupied and maintained the right-of-way for the statutory period is bolstered by the testimony of Ruppert and William Brashears. Plaintiffs offered no further evidence that disputes the maintenance and possession of Defendants and their predecessors. Therefore, the evidence indicates that,

> through tacking, Defendant's satisfy the second element, posssessing the property for the statutory period of twenty (20) years.

The Kirks' final contention is that the trial court erred in finding that the Gardners could tack their possession of the right-of-way to that of their predecessors in title in order to satisfy the statutory period of twenty years. They point to that fact that the deed to the Gardners did not expressly include the right-of-way area. Therefore, the Kirks assert, the doctrine of tacking is not applicable. They are incorrect.

This Court addressed the tacking doctrine in *Senez v. Collins*:

> For tacking to apply, the land in dispute need not be included in the deed by which the last occupant claims title, **provided the land in question is contiguous to that described in a deed, and that lands both titled and untitled are part of a close, apparent by reason of physical boundaries such as fences or hedges.** Two possessions will be tacked if it appears that the adverse possessor actually turned over possession of that part as well as of that portion of the land expressly included in his deed.

182 Md. App. 300, 332-33 (2008) (emphasis added; internal bracketing, quotation marks, and citations omitted).

The right of way area is adjacent to the property conveyed to the Gardners and it was separated from the Kirks' property by a fence. That the fence was located on the Kirks' lot is irrelevant—the fence served as a visible indicator that the Gardners and their predecessors owned the area in question. The trial court did not err in applying the doctrine of tacking in this case.

4. The Gardners' Cross-Appeal

In 2010–11, the Kirks remodeled and expanded the size of their home. As a result, the entire east side of the Kirks' garage, house, and patio are within ten feet of the parties' common boundary. Asserting that each structure violated the ten foot setback in the Covenant SECOND, the Gardners sought an injunction requiring removal of the offending portions of the structures. The Kirks moved for summary judgment. The court granted the motion "because the Statute of Limitations (Courts and Judicial Proceedings Article ["CJP"] § 5-114) bars the [Gardners] from bringing their action three years after the date on which the violation first occurred[.]"

On appeal, the Gardners contend that the court erred because their cause of action did not accrue until the Kirks obtained a variance, which was granted on November 18, 2011. The Gardners' counterclaim was filed on March 13, 2013, which, they assert, was within three years of the date of the accrual of their cause of action. They cite CJP § 5-101. The Gardners' argument is without merit.

As the circuit court recognized, the relevant statute of limitation is CJP § 5-114(b)(1), which provides that

> A person may not initiate an action or proceeding arising out of a failure of a building or structure to comply with a setback line restriction more than 3 years after the date on which the violation first occurred.

The violation did not occur when the Kirks obtained a variance; it occurred when the Kirks began construction on the structures within the setback. It has long been the law of this State that "[a] cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong." *Poffenberger v. Riser*, 290 Md. 631, 636 (1981). The Gardners have not directed us to anything in the record that establishes the relevant date and we will not trouble ourselves further with the issue. *See Konover v. WHE*, 142 Md. App. 476, 494 (2002).

Finally, the Kirks built a wire fence running along their boundary with the Gardners. The fence has vertical and horizontal wooden supports. The Gardners sought removal of the Kirks' fence because its wooden elements allegedly violate Covenant SEVENTH, which prohibits fences other than those made of hedge or wire. The circuit court concluded that this claim was also barred by the statute of limitations. The relevant statutory provision is again CJP § 5-114(b)(1) and the Gardners again have not directed us to anything in the record establishing when the fence was constructed.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED. COSTS TO BE DIVIDED BETWEEN THE PARTIES EQUALLY.