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NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

BRYANT PREMIUM REAL ESTATE,)
 LLC, an Oklahoma Limited Liability)
 Company,)
)
 Plaintiff/Appellee,)
)
 vs.)
)
 MICHAEL C. MORGAN and)
 MARLA M. MORGAN, husband and)
 wife,)
)
 Defendants/Appellants.)

FILED
COURT OF CIVIL APPEALS,
STATE OF OKLAHOMA

NOV - 5 2021/

JOHN D. HADDEN,
CLERK

Case No. 119,575

Rec'd (date)	11-5-21
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APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE SUSAN STALLINGS, TRIAL JUDGE

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR
FURTHER PROCEEDINGS**

David M. Box
Mason J. Schwartz
Cooper T. Hahn
WILLIAMS, BOX,
FORSHEE & BULLARD, P.C.
Oklahoma City, Oklahoma

For Plaintiff/Appellee

Adam J. Singer
Stephen L. McCaleb
DERRYBERRY & NAIFEH, LLP
Oklahoma City, Oklahoma

For Defendants/Appellants

OPINION BY DEBORAH B. BARNES, JUDGE:

In this action for encroachment and continuing trespass, Michael C. Morgan and Marla M. Morgan (collectively, Defendants) appeal from a judgment granting summary judgment to Bryant Premium Real Estate, LLC (Plaintiff) and denying Defendants' counter-motion for summary judgment on their counterclaim of adverse possession and quiet title. We affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

Some of the facts pertinent to this appeal are undisputed. Plaintiff and Defendants own two adjacent properties; a portion of the north end of Plaintiff's property abuts the entirety of the south end of Defendants' property.¹ Prior to their ownership of their properties, in 1981 Travis Brown and Marilyn Brown, and Gerald (Jerry) R. McCutcheon and his wife, executed an easement, filed of record, that conveyed to each other access to a dam, to be constructed on the north end of

¹ Plaintiff's property contains about forty acres of undeveloped land. On February 29, 1996, Bryant Land Improvement, LLC, purchased the land from "Marilyn Brown, Trustee of the Travis and Marilyn Brown Farm Trust, Trust B and Marilyn Brown, Trustee of the Travis and Marilyn Brown Farm Trust set aside for Marilyn Brown, and Thomas W. Brown and Sandra D. Brown, Husband and Wife[.]" The warranty deed stated, among other things, that the land was purchased subject to "easements . . . of record[.]" In November 2016, by quit claim deed, Plaintiff purchased the land from Bryant Land Improvement. Defendants acquired their land, consisting of about ten acres, in two purchases. On January 29, 1993, they purchased the eastern five acres of their property by warranty deed from a Robert and Brenda Campbell, "subject to easements . . . of record," and on May 7, 2012, by Sheriff's Deed, acquired the western five acres.

Plaintiff's property, and to water behind the dam, to be constructed on Plaintiff's land and the southern end of Defendants' property. The dam and pond, which was mostly on Defendants' land, were constructed prior to Plaintiff's and Defendants' acquisition of their properties.

Also of record is a "Memorandum of understanding and agreement" the McCutcheons and Defendants executed on February 29, 2012, and filed of record on March 8, 2012. The Memorandum referenced and attached a copy of the 1981 easement entered into by the McCutcheons and the "Marilyn Brown Farm Trust . . . for the construction and maintenance of a dam and the storing of water behind said dam." The Memorandum states that on January 29, 1993, Defendants purchased the land owned by the McCutcheons at the time of the 1981 easement²

[w]hich land was acquired by [Defendants], subject to the [1981] Easement, with the understanding and agreement that [Defendants] would be subject to the terms and conditions set forth in the easement and that [Defendants] would share proportionally in the responsibilities for the maintenance and repair of the Easement along with [the McCutcheons] and the other parties to the Easement.

In 2012, Mr. Morgan constructed two structures and laid track for a train. Part of one of the structures is on Plaintiff's property and the rest is on Defendants' property; the other structure is entirely on Plaintiff's property. The train track is

² The Memorandum referenced both the property Defendants purchased by warranty deed in 1993 and the property purchased by Sheriff's Deed in 2012. Both were owned by the McCutcheons at the time the 1981 easement was executed.

mainly on Defendants' property, but the track running south of the pond also is on Plaintiff's property. Defendants admit these structures and track were constructed south of and beyond the legal boundary of their property, and that they did not obtain permits to construct the structures or track and have not paid taxes on the land where they are built. Defendants further admit they did not ask Plaintiff's permission to build the structures or track.

Defendants claim they have individually maintained the dam since January 1993 and constructed the structures and train track in 2012 to assist in the dam maintenance and to haul off debris. While Plaintiff disputes they exclusively maintained the dam, it admits Defendants have maintained the dam since 1993. Plaintiff denies, however, that the main use of the train and the structures is for dam maintenance, but rather that the train system was built and is used by Mr. Morgan as his hobby and for recreational use.

Also disputed by the parties is the land that comprises the 1981 easement. Defendants assert in their response and counter-motion that "as a result of the Easement a dam was constructed (the 'Pond Dam') and a pond exists beyond the Pond Dam on the Morgan Property." They further claim, "[T]he portion of the land which is the subject to the Easement is less than the entire Pond Dam." They claim, "The easement is defined by a T-Post and Wooden Cross Timber fence,

which was constructed by Tom Brown.”³ Defendants claim they “have maintained the Pond Dam at the southern border of [their property] and the northern border of Plaintiff’s property,” since 1993. They further claim they “maintained, cared for and cleared not only the portion of the Pond Dam which falls within the [1981] Easement but also portions of Plaintiff’s land which extend south beyond the Easement.”

Plaintiff argues there is no Pond Dam; rather there is a dam, a pond and an easement allowing the parties access to each other’s property to maintain the dam. It disputes Defendants maintained, cared for or cleared any portion of its property beyond that which is authorized by the 1981 easement. It further maintains the easement does not expressly allow either party to place structures or tracks on the property of the other as part of that maintenance.

Plaintiff filed its motion for summary judgment in which it argues the structures and track are an ongoing trespass and that it is entitled to judgment as a matter of law on Defendants’ adverse possession claim and on their defenses to Plaintiff’s trespass claim. Defendants filed a response and counter-motion for summary judgment in which they claim they have adversely possessed the disputed property, and even if the court finds they have not, Plaintiff’s trespass claim is

³ Mr. Morgan’s deposition testimony described the fence as a T-post and barbed wire fence.

barred by the statute of limitations. Defendants further assert that even if the statute of limitations does not bar Plaintiff's action, they are entitled to judgment as a matter of law on their defense of non-trespass because the structures and tracks are used for maintenance of the dam as authorized by the easement. Defendants also filed an amended response and counter-motion to which some additional materials were attached. Plaintiff filed its response and reply.

The trial court entered its order denying Defendants' counter-motion for summary judgment and granting Plaintiff's motion for summary judgment. Defendants appeal.

STANDARD OF REVIEW

Defendants argue the trial court erred in granting summary judgment to Plaintiff the effect of which was to deny their counterclaim for adverse possession and their non-trespass defense. "A summary judgment disposes solely of issues of law and therefore, it is reviewable by a *de novo* standard." *Gates v. Eller*, 2001 OK 38, ¶ 8, 22 P.3d 1215 (footnote omitted).

Summary judgment is appropriate only when there is no substantial controversy as to any material fact, and one party is entitled to judgment as a matter of law. *Flanders v. Crane Co.*, [1984 OK 88,] 693 P.2d 602. All inferences and conclusions to be drawn from the undisputed facts must be viewed in the light most favorable to the party opposing the motion for summary judgment. *Flanders*, [¶ 10].

More specifically, where the evidence is conflicting in an action to establish a property interest by prescription, it is an issue of fact to

be determined by the trier of the facts. *Arbuckle Realty Trust v. Southern Rock Asphalt Co.*, [1941 OK 237], 116 P.2d 912.

Mefford v. Sinclair, 1993 OK CIV APP 95, ¶¶ 12-13, 859 P.2d 1127

(Memorandum Opinion) (footnote omitted).

The interpretation of contracts, and whether they are ambiguous, are matters of law for the court to determine. *Osprey L.L.C. v. Kelly Moore Paint Co., Inc.*, 1999 OK 50, ¶ 13, 984 P.2d 194. “Issues of law are reviewable by a *de novo* standard and an appellate court claims for itself plenary independent and non-deferential authority to reexamine a trial court’s legal rulings.” *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶ 14, 859 P.2d 1081 (citation omitted).

ANALYSIS

Defendants contend controverted issues of material fact remain; therefore, the trial court erred in granting summary judgment to Plaintiff. They also contend the trial court erred in denying their counter-motion for summary judgment in which they raised the following issues:

- whether they met, as a matter of law, the elements needed to establish their claim to the subject property by adverse possession;
- whether the statute of limitations precluded Plaintiff’s trespass claim;
- whether the structures and train tracks are used for the maintenance of the dam, an activity explicitly authorized by the terms of the written easement, and thus cannot constitute trespass; and

- whether, on balance, the equities in this case do not require removal of the alleged encroachment.

Defendants further contend the easement was modified on or about 1985 by Plaintiff's and Defendants' predecessors in interest when they constructed a fence dividing the easement.

I. Adverse Possession

Defendants argue they have been in continuous, hostile, open and exclusive possession of a portion of Plaintiff's property since 1993; a part of the dam south of their property and south of what they have titled the Pond Dam. They claim title to that land should be quieted in them. Plaintiff argues one or more of the elements needed to prove title by adverse possession are absent from the uncontroverted facts; therefore, the trial court correctly granted summary judgment to Plaintiff on its claim of encroachment and against Defendants on their counterclaim of adverse possession and quiet title. From our review of the summary judgment record, we agree the trial court did not err in granting summary judgment to Plaintiff on Defendants' claim of adverse possession.

“In order to establish adverse possession the claimant must show that possession was *hostile, under claim of right or color of title*, actual, open, notorious, exclusive, and continuous, for the statutory time” of fifteen years.

Krosmico v. Pettit, 1998 OK 90, ¶ 15, 968 P.2d 345 (citation omitted) (emphasis

added). Claims to another's land through adverse possession are not favored and establishing the needed elements may not be made through implication. *Norman v. Smedley*, 1961 OK 143, ¶ 0, 363 P.2d 839 (Syllabus by the Court) (per curiam). The burden rests with the party claiming title by adverse possession, and the claim fails absent the establishment of even one element. *Id.* In the present case, we agree with the trial court that the uncontroverted material facts show Defendants failed to establish a claim of right to Plaintiff's land south of the "Pond Dam" and that their use of the land was hostile.

Defendants claim they adversely possess an area of the dam located on Plaintiff's property that, they assert, is not part of the Pond Dam encompassed within the easement. They admit their maintenance and use of the portion of the Pond Dam within the physical bounds of the easement was permissive. However, they assert not all of the Pond Dam is within the physical bounds of the easement; thus, their control of the Pond Dam area outside the confines of the easement – that is, south and east of the easement – was not permissive.⁴ Plaintiff maintains Defendants' argument about what the easement allows is confusing and inaccurate.

⁴ Mr. Morgan testified in his deposition that part of the property he has been exclusively maintaining since 1993 "has been this entire pond dam structure which begins due south of where the easement begins[.]" In his response to Plaintiff's interrogatories, Mr. Morgan also asserts that in addition to maintaining the Pond Dam within the easement, he "has also been maintaining, exclusively since January 1993, the 'pond dam structure' and 'pond dam structure earthen wings' comprising approximately 1.5 acres of land."

It asserts, “[T]here is simply a Dam, a Pond and an easement which encumbers both the entirety of the Pond, and the entirety of the Dam.” It, therefore, argues Defendants’ maintenance of any portion of the dam was permissive and cannot meet the hostility requirement of adverse possession. Given these arguments, this element of adverse possession turns on the language of the easement.

As to the land encompassed within the easement, neither party has argued any ambiguity in the easement language. The easement provides in pertinent part as follows:

WHEREAS, First Parties [Plaintiff’s predecessors in interest] and Second Party [Defendants’ predecessor in interest] have agreed to the construction of a dam on First Parties’ property and creation of a lake on both First Parties’ and Second Party’s property. Both sets of parties have agreed to this easement for the dam on First Parties’ property and storage of water behind the dam on both sets of parties.

WHEREAS, both parties grant to each other an easement for the dam and the property covered by water behind the dam and hold each other harmless for damage done by said water.

WHEREAS, both parties are waiting to grant to each other said easement.

NOW, THEREFORE, in consideration of the sum of One and No/100 Dollars(\$1.00) and other valuable considerations, receipt of which is hereby acknowledged, both parties do hereby and by these presents grant, bargain and convey to each other this easement for the purpose of construction and maintaining a dam and storing water behind said dam.

The easement was recorded May 22, 1981. By the easement’s express language, the only description of the land encompassed within the easement is “an easement *for the dam and the property covered by water behind the dam . . .*,” and the grant

and conveyance to each of the parties' predecessors "this easement for the purpose of construction and *maintaining a dam* and storing water *behind said dam.*"

(Emphasis added.)

No written modification of the easement is in the summary judgment record. Defendants attached to their amended response and counter-motion for summary judgment the affidavit of Thomas W. Brown, Plaintiff's predecessor in interest.⁵ Mr. Brown averred that prior to Plaintiff's purchase of its 40 acres, he "built a dam which created a pond on what is now the southern border of Defendants' property," an area described in the affidavit as the "Pond Dam." He averred that "[i]n the mid-1980's [Mr. McCutcheon] and [he] built a fence which was meant to divide the easement boundary. This was for the purpose of keeping our cows off [Mr. McCutcheon's] property and to use the constructed fence as a boundary line for the easement." He further averred, "Maintenance of the Pond Dam is important because if trees are left to grow on it, they will ruin the dam." He averred that to his "knowledge, the [Defendants] have done a good job at keeping the Pond Dam mowed and have done what needs to be done to keep it in good condition."

⁵ Plaintiff filed a motion to strike Defendants' amended response because it was filed after the deadline the court ordered for the filing of the amended response, the amended response was filed without notice to Plaintiff and without court permission, and contained Mr. Brown's affidavit obtained after the deadline for the amended response. In granting Plaintiff's motion for summary judgment, the court found Plaintiff's motion to strike was moot.

Defendants presented evidence of a fence line they claim defines the south edge of the easement. The fence was a T-post and barbed wire fence, a substantial portion of which is now gone according to Mr. Morgan's deposition testimony. They claim this fence line and Mr. Brown's affidavit show the easement was amended in 1985 to designate a particular area of each party's property that was within the easement; i.e., that area where the fence line ran. That area, they argue, does not include the entire dam; only that portion of the dam within the amended easement. Thus, Defendants claim they adversely possessed that part of the dam south of the 1985 easement boundary they have been maintaining since 1993. From our review of the summary judgment record, Defendants' argument – in effect, an argument that the whole of the dam is not equal to the sum of its parts – is without merit.

First, nothing of record shows Plaintiff had notice of this non-written "amendment" of the easement prior to its purchase of the 40 acres in 2016 (or Bryant Land Management's purchase in 1996) up to the time of the execution of Mr. Brown's affidavit on November 24, 2020. In this regard, the only other instrument of record pertaining to the dam apart from the 1981 easement is a February 29, 2012 "Memorandum of understanding and agreement." While according to Mr. Brown's affidavit the McCutcheons agreed to the "amendment" of the 1981 easement in 1985, no mention is made of the 1985 amendment of the

easement in the Memorandum executed by the McCutcheons and Defendants.

Instead, the 2012 Memorandum reiterates the “terms and conditions” of the 1981 easement.

Second, Mr. Morgan admitted that in “late ‘96 or 1997,” a representative of Bryant Land Management removed a portion of that fence: “Not all of the fence was taken down, but a portion of the fence was taken down” by the representative. “Less than 50 percent” remains. Thus, even if the fence was erected in 1985, Plaintiff’s predecessor removed that boundary marker less than fifteen years after its erection, and less than fifteen years after Defendants began maintaining the dam in 1993.

Third, Mr. Brown’s affidavit makes clear his description of the “Pond Dam” is the dam – the dam he built on his 40 acres pursuant to the easement – and the pond he created on what is now Defendants’ property. The affidavit makes no reference to “the pond dam structure” or “to pond dam earthen wings.” While he averred the fence line was erected to divide the easement boundary, he does not aver that the 1981 easement’s express conveyance of the right of each party *to maintain a dam* – to have access to the dam located on Plaintiff’s property – was altered. Mr. Brown did not aver that the “amended” easement was intended to exclude Defendants or the McCutcheons from maintaining the dam; rather, the intent was to keep his cattle from entering what is now Defendants’ property.

Indeed, he averred maintenance of the Pond Dam – the dam and the pond he built – was very important “because if trees are left to grow on it, they will ruin *the dam*.” (Emphasis added.) Thus, even accepting as true the averments in Mr. Brown’s affidavit, they do not create a controverted issue of material fact concerning the 1981 easement and its grant of an easement to the parties to “maintain[] a dam[.]”

Mr. Morgan testified that he has been maintaining the dam since 1993 and that his entry onto Plaintiff’s property (the entirety of the dam) was to maintain the dam by removing trees, shrubs, silt and other debris. As discussed later in this Opinion, a question of fact remains concerning whether the structures and train are a reasonable use of the easement. However, Defendants were permitted access to and thus entry upon Plaintiff’s property consistent with the terms of the easement; that is, consistent with the permission for entry to the dam granted and conveyed by the easement. Consequently, Defendants’ entry was permissive and their claim of right to a portion of the dam by adverse possession fails as a matter of law regardless of whether any or all of the remaining elements of adverse possession are present.⁶

⁶ Defendants’ arguments in response to Plaintiff’s motion for summary judgment and their counter-motion also suggest they claim by adverse possession the land on which the structures and track were built whether on or off the easement. However, those structures and track were built in 2012. Because we have determined Defendants’ claim of adverse possession to a portion of the dam they have maintained since 1993 fails, any adverse possession claim to the land on which the structures and track were built also fails because they have been in existence for less than fifteen years.

II. Encroachment: Continuing Trespass

Defendants claim the trial court erred in awarding summary judgment to Plaintiff on its “trespass” claim because the statute of limitations ran on that claim. They argue Plaintiff was aware of the train tracks and structures since at least 2013, but did not bring this action for another six years; four years beyond the two-year statutory period for trespass actions.⁷ While Plaintiff disputes such knowledge, it argues its action is not for trespass but rather for continuing trespass; that is, it is not seeking money damages, but rather removal of the structures and track from its land, citing *Russell v. Williams*, 1998 OK CIV APP 135, 964 P.2d 231. It claims the fifteen-year statute of limitations applies to its action for continuing trespass. Defendants respond that because they used the structures and train tracks to maintain the dam, as permitted by the easement, those structures and train tracks are not a trespass.

⁷ Title 12 O.S. 2011 & Supp. 2017 § 95 states, in part, as follows:

A. Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

...;

3. Within two (2) years: An action for trespass upon real property[.]

A. Continuing Trespass: Statute of Limitations

The *Russell* Court rejected the defendants' claim that the plaintiff's encroachment action was barred by the two-year statute of limitations. The Court explained:

It is true that the statute of limitations for trespass to land is two years. However, that statute of limitations applies only to actions for damages resulting from trespass. The statute of limitations for an encroachment on property is the 15-year period for acquiring title by prescription or adverse possession. 12 O.S. 1991 [now 2011] § 93(4); 60 O.S. 1991 [now 2011] § 333; *Johnson v. Whelan*, [1940 OK 68,] 98 P.2d 1103; *Whytock v. Green*, 1963 OK 141, 383 P.2d 628; *A+ Welding & Construction, Inc. v. Brichacek*, 1997 OK CIV APP 25, 941 P.2d 534.

Russell, ¶ 8. The Court further explained:

The Oklahoma Supreme Court has further held that, although the statute of limitations for recovering damages for trespass has expired, a court still may require a continuing trespass to be removed. *Fairlawn Cemetery Ass'n v. First Presbyterian Church, U.S.A. of Oklahoma City*, 1972 OK 66, 496 P.2d 1185. The encroachment alleged in the instant case is in the nature of a continuing trespass. Use of the term "trespass" may be confusing depending on the context. Comment c following § 162 of the Restatement of Torts (Second) provides that if the trespasser disseises the rightful owner and remains on the land, then no trespass has occurred because the rightful owner has been dispossessed. A continuing trespass, on the other hand occurs when the trespasser remains on the land of the rightful owner while such land is in the possession of the rightful owner. Because [the plaintiff] seeks only to have the encroachment removed, rather than damages, the two-year limitations period for trespass is not applicable here.

Russell, ¶ 10.

In *Fairlawn Cemetery*, the plaintiff cemetery appealed from a judgment entered in favor of the defendant church in an action for injunction and other relief from an encroaching trespass. The action was brought more than two years after the encroaching structure was built. The Oklahoma Supreme Court explained:

Church's encroachment upon the property of the Cemetery has continued for several years and it appears the church will continue its unauthorized use unless enjoined. In such case, the conduct of the church creates a continuing trespass which a court of equity will enjoin. *Brown v. Donnelly*, [1899 OK 110,] 59 P. 975. In *Bradley v. Renfrow*, [1938 OK 566,] 84 P.2d 430, we said, "where a trespasser persists in trespassing upon [the land] of another, and threatens to continue his wrongful invasion of the premises, equity will restrain such trespass."

Fairlawn Cemetery, ¶ 15. The Court further reasoned, however:

While we agree the church should be enjoined from continuing the dirt fill on Cemetery's property and should be required to remove the encroaching dirt between the wall and Cemetery's south property line, we find the plaintiff is barred by the statute of limitations in seeking to require the church to re-establish vertical alignment of the west 540 feet of its concrete fence. The restoration of the wall to its former condition is in the nature of damages for trespass which is subject to a limitation period of two years.

Fairlawn Cemetery, ¶ 16 (citations omitted).

In the present case, Plaintiff does not seek damages nor has it asked for the restoration of its land upon the removal of the structures and track from its property. Rather, Plaintiff seeks to enjoin Defendants from their continuing trespass by seeking removal of the encroaching structures and tracks from its

property.⁸ Because it brought this action within fifteen years of the time the encroachments were built, Plaintiff's action is not barred by the statute of limitations. Consequently, the trial court did not err in granting summary judgment to Plaintiff on this ground.

B. Continuing Trespass: Reasonableness of the Use

Defendants, however, also assert the grant of summary judgment to Plaintiff is in error because they are not trespassing. They argue, pursuant to the 1981 easement, that they have been rightfully maintaining the dam. The structures and train tracks, they argue, have been used by them since 2012 to maintain the dam.

They assert,

The Easement does not define what is meant by "maintenance" and instead only provides that each party grants the other an easement to construct and maintain the Pond Dam. There are no prohibitions or limitations on the method in which the parties to the Easement may, or may not, provide maintenance to the Pond Dam.

They also assert controverted facts surround Plaintiff's claim that the primary purpose of the structures and track are not for dam maintenance; therefore,

⁸ We note Plaintiff had previously filed a motion for temporary injunction and application for hearing in which it alleged Defendants were "harassing, threatening, or interfering with the use, enjoyment or development of [its] Property by [it], its agents, representatives, invitees, or contractors." Plaintiff claimed that in October 2020, it was in the process of developing its property and Defendants were entering its property and harassing its contractors thus impeding its development and exposing it to liability. A hearing was held and the court issued a temporary restraining order that, among other things, restrained either party from entering the land of the other and requiring the court's permission or a written agreement to allow entry to maintain the dam.

summary judgment should not have been granted to Plaintiff on its continuing trespass claim.⁹ The parties thus frame the issue of continuing trespass in terms of the reasonableness of the use of the trains and structures for the purpose of the easement.

In *Hudson v. Lee*, 1964 OK 134, 393 P.2d 515, the Oklahoma Supreme Court reiterated “that the conveyance of an easement gives the grantee all rights as are incident or necessary to the reasonable and proper enjoyment of the easement granted.” *Id.* ¶ 13 (citation omitted).¹⁰ Citing *Hudson*, the Court in *Burkhart v.*

⁹ Plaintiff specifically argues the structures and “hobby train are not reasonable means of use of the Easement.”

¹⁰ The *Hudson* Court addressed a circumstance where “the intention of the parties could not be gathered from the instrument itself and the provision relating to the right of ingress and egress possessed an element of uncertainty[.]” *Id.* ¶ 18. The Court explained:

A court of equity will look at the real object of a deed and the intention of the parties, and will compel the fulfillment of both, and, if possible, the intention of the grantor will be gathered from the whole instrument. If the intention of the parties to the deed is plain, parol evidence is not admissible to prove an intention different from the terms of the deed, but where a deed possesses an element of uncertainty, parol evidence, the admissions of the parties, and other extraneous circumstances may be proved to ascertain its true meaning.

... A cardinal rule in construing a deed is ascertaining the true intent of the makers, as that intent may be discerned from the instrument itself, taking it all together, considering every part of it and viewing it in the light of the circumstances surrounding the makers at the time of its execution; and their later acts in connection therewith may be considered in arriving at their intention.

... In construing an easement, a court is privileged to place itself in the position of the parties at the time the easement was entered into, and adopt that permissible construction of the

Jacob, 1999 OK 11, 976 P.2d 1046, stated, “Under a general grant of an appurtenant easement, a landowner may make reasonable use of the easement which is necessary for the development of the dominant estate.” *Id.* ¶ 11. Further, “[t]he use made by the dominant estate owner must not unreasonably overburden the servient estate.” *Id.* (citations omitted). However, “[w]hether or not a use is reasonable is a question of fact. The burden of proof rests with the party relying on the easement, in this case the [dominant estate owner], to show that the rights granted by the easement are sufficiently extensive to justify the proposed use.” *Id.* ¶ 12.

While the land encompassed within the easement is clearly expressed in the easement (the dam), the reasonableness of the use of the structures and train in maintaining the dam is in dispute. Consequently, the trial court erred in granting summary judgment to Plaintiff on its continuing trespass claim. Therefore, we reverse the trial court’s order granting summary judgment to Plaintiff on its continuing trespass claim and remand the case for further proceedings.¹¹

easement which will make it fair and reasonable under all of the facts and which will carry out the intent of the parties.

Id. ¶¶ 14-16 (internal quotation marks omitted) (citations omitted). Under the facts of that case, the Court held the trial court did not err in admitting parol evidence to ascertain and determine the true intention of the parties.

¹¹ On remand, as urged by Plaintiff in its response and reply to Defendants’ amended counter-motion for summary judgment, the reasonableness of the use will be assessed on various factors:

CONCLUSION

Based on the law and our review of the summary judgment record, we conclude the trial court properly granted summary judgment to Plaintiff on Defendants' counterclaim of adverse possession and quiet title. No controverted questions of material fact remain as to the needed element of hostility and claim of right; therefore, Defendants' claim fails. We further conclude the trial court properly determined that Plaintiff's continuing trespass claim is not barred by the statute of limitations. However, the reasonableness of the use of the structures and train for the purposes of the easement presents a factual question not properly decided on summary judgment. Therefore, we reverse the trial court's grant of

The reasonableness of the proposed use is determined by consideration of several factors: (1) the purpose of the easement, (2) the new use compared to the past use, taking into account the purpose of the land and the language granting the easement, (3) the physical character of the easement, (4) the burden on the servient land, and (5) any other relevant factors. Burdens on the servient estate include, among other things: (1) decreased property value, (2) increased noise and traffic or interference with the servient owner's peace and enjoyment of the land, and (3) physical damage to the servient estate.

Burkhart, ¶ 12 (citations omitted). These are factual determinations the trial court must make in the first instance. This Court may not address factual or legal issues on summary judgment that the trial court did not address. *Okla. Schs. Risk Mgmt. Tr. v. McAlester Pub. Schs.*, 2019 OK 3, ¶ 13, 457 P.3d 997 ("Generally, an appellate court will not make first instance determinations of disputed law or fact issues, and will not affirm a summary judgment based upon facts and legal issues unadjudicated by the trial court when it granted summary judgment." (footnote omitted)); *Indep. Sch. Dist. # 52 of Okla. Cnty. v. Hofmeister*, 2020 OK 56, ¶ 52, 473 P.3d 475 ("This Court will not make first instance determinations of disputed non-jurisdictional law issues or contested fact issues." (footnote omitted)). Further, given our disposition, we make no decision regarding Defendants' balancing of the equities argument.

summary judgment to Plaintiff on its continuing trespass claim and remand for further proceedings on this issue. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
FOR FURTHER PROCEEDINGS.**

WISEMAN, P.J., concurs, and BLACKWELL, J., concurs specially.

BLACKWELL, J., concurring specially:

I concur with the opinion above but write separately to highlight two additional issues that I believe remain open for trial upon remand. First, even if the structures and hobby-train tracks are deemed an unreasonable use of the easement, the trial court must still address the defendants' argument that requiring their removal would be inequitable considering all the circumstances. *Malnar v. Whitfield*, 1985 OK 82, 708 P.2d 1093, 1096 ("The inquiry into whether a permanent injunction should be granted is to be determined upon a consideration of all the equities between the parties."). And second, although the opinion above correctly notes that the statute of limitations bars any damages claim related to the trespass beyond two years, the trial court must still consider the plaintiff's claims of damages occurring within that time frame, including any appropriate

compensation if the trial court ultimately concludes that removal of the encroachments is not warranted.

November 5, 2021