TMS v. ZACHARIAH, et al. TMS v. ZACHARIAH, et al.

2021 | Cited 0 times | Court of Appeals of Arizona | April 13, 2021

IN THE ARIZONA COURT OF APPEALS DIVISION ONE

TMS VENTURES LLC, Plaintiff/Appellee/Cross-Appellant,

v.

TERESA C. ZACHARIAH, et al., Defendants/Appellants/Cross-Appellees.

No. 1 CA-CV 18-0712 No. 1 CA-CV 19-0388 (Consolidated)

Appeal from the Superior Court in Maricopa County No. CV2016-005381 The Honorable Pamela S. Gates, Judge

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART

COUNSEL

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MEMORANDUM DECISION

Judge D. Steven Williams delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Chief Judge Peter B. Swann joined.

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W I L L I A M S, Judge:

¶1 Appellants Teresa and Joseph Zachariah, Ingrid and Alfred Harrison as trustees of the Ingrid Lenz Harrison Revocable Trust, and Roseanne Appel (collectively, appeal ruling that Appellee TMS law dedication of an easement traversing portions of their properties to

reach its property. TMS cross-appeals later ruling declining to award attorney fees for prevailing on summary judgment on the For reasons set forth below, we reverse on common law dedication and vacate the attorney fees and cost award to TMS. alternative ruling that TMS also established an implied way of necessity, we remand to allow the court to address attorney fees on that claim.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 recorded a subdivision plat for the Stone Canyon East subdivision, the relevant portion of which appears below: ¶3 One year later, which pronounced

San Miguel Avenue as shown on [the 1959] plat and to provide for another The easement allowed Maricopa County to increase the width of San Miguel Avenue to fifty feet and granted to the county:

land 24 and 25.

The parties dispute the exact parameters of these grants, depicting them as follows: roadway purposes only . . . to maintain a public way for vehicular or foot traffic thereon

¶4 Phoenix Title expressly referred to the Easement for Roadway in its deed conveying Lot 24, but not in its deeds conveying Lots 22 or 23. The Zachariahs, Appel, and the Harrisons purchased Lots 22, 23, and 24, respectively, between 2009 and 2010. There is an approximate 12-foot wide driveway from the East San Miguel cul-de-sac home on Lot 22, depicted below:

Appel uses a portion of this driveway to access her home on Lot 23. Part of the driveway is located on Lot 23, and the entire driveway is located within the area described in the Easement for Roadway. The driveway has been gated since 1987, and the Zachariahs currently control access.

¶5 TMS purchased the property immediately south of the land The TMS Property is bordered on the west, south and partially on the east by city-owned land. On March 31, 2016, TMS wrote to the Neighbors demanding that they acknowledge the easement depicted in the Easement for Roadway to enable construction of a driveway to the TMS Property. When the Neighbors refused, TMS sued them seeking to quiet title to the Easement for Roadway and for declaratory and injunctive relief. 1 The Neighbors counterclaimed

1 TMS also sued the owner of Lot 25, Jerry D. Smith as Trustee of the JDS Trust Dated August 22,

2005. Smith agreed to be bound by the outcome of the litigation and is not a party to this appeal. to the footings, foundation, walls, roofs and

construction of a driveway to the TMS Property.

¶6 motion, the superior court bifurcated trial, ordering bench trial on the claims which concern access to the property and a

Following the bench trial, the court ruled TMS had established a common law dedication of the Easement for Roadway and, alternatively, an implied way of necessity within the Easement for Roadway. It subsequently granted summary judgment to TMS on the anticipatory nuisance counterclaim.

¶7 TMS applied to recover $653,380.25 in attorney fees and $14,859.01 in costs. TMS apportioned its claim over three law firms who had represented them during the litigation as follows: $385,756.75 in attorney

$234,488.50 in attorney fees and $8,947.42 in costs incurred by Beus Gilbert

defending the non-covered counterclaims (before referring the matter to

The court awarded $369,410.25 in attorney fees and $4,466.43 in costs for work performed by Burch & Cracchiolo, P.A. work performed by Beus Gilbert PLLC,

and no fees for work performed by Berry Riddell, LLC.

¶8 The Neighbors timely appealed from the final judgment. TMS timely cross-appealed the We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A)(1).

DISCUSSION

I.

¶9 After de novo but defer to its findings of fact unless clearly erroneous. Town of Marana v. Pima County, 230 Ariz. 142, 152, ¶ 46 (App. 2012). A finding of fact is not clearly erroneous if it is supported by substantial evidence even if there is substantial conflicting evidence. Castro v. Ballesteros-Suarez, 222 Ariz. 48, 51 52, ¶ 11 (App. 2009). ¶10 On appeal, the Neighbors the

Nonetheless, we must consider the evidence presented at trial in the light Town of Marana, 230 Ariz. at 152, ¶ 46.

A.

¶11 finding an implied way of necessity within the area described in the Easement for Roadway; they only challenge finding of a public dedication. As access to the TMS Property is not at issue, we first consider whether the distinction the Neighbors seek is meaningful or purely theoretical. See Progressive Specialty Ins. Co. v. Farmers Ins. Co. of Ariz., 143 Ariz. 547, 548 s function to declare principles of law which cannot have any practical effect in settling the rights of

¶12 A landowner can dedicate land to a proper public use. Pleak v. Entrada Property Owners , 207 Ariz. 418, 421, ¶ 8 (2004) (citing Restatement (Third) of Prop.: Servitudes § 2.18(1) (2000)). Under common law dedication, the public acquires an easement to use the dedicated property for the specified purposes but fee title remains with the dedicator. 2 Id. Once perfected, a common law dedication is irrevocable. City of Chandler v. Ariz. Dep t of Transp., 224 Ariz. 400, 403, ¶ 9 (App. 2010).

¶13 In contrast, an implied way of necessity only grants access to the owner of the landlocked parcel. Dabrowski v. Bartlett, 246 Ariz. 504, 514, ¶ 26 (App. 2019). And it only grants whatever access is necessary for the beneficial use of the landlocked parcel. Bickel v. Hansen, 169 Ariz. 371, 374 (App. 1991). Moreover, unlike a common law dedication, an implied way of necessity is appurtenant to the parcel it serves. College Book Ctrs., Inc. v. , 225 Ariz. 533, 541, ¶ 29 (App. 2010).

¶14 As such, there are meaningful and relevant differences between a common law dedication of the Roadway for Easement and an implied way of necessity within the Roadway for Easement. Cf. Kadlec v. Dorsey, 224 Ariz. 551, 553, ¶ 10 (2010) (noting that private roads located within easements do not automatically become public). We therefore

2 Dedication of roadways also may be accomplished by statute. A.R.S. § 9-254. That method is not at issue in this case. B. Common Law Dedication

¶15 An effective dedication of private land for public use has two components offer to dedicate and acceptance. Pleak, 207 Ariz. at 423 24, ¶ 21. The party asserting dedication bears the burden of proof. Kadlec, 224 Ariz. at 552, ¶ 8. presumed nor does a presumption of an intent to dedicate arise unless it is

clearly shown by the owner City of Phx. v. Landrum & Mills Realty Co., 71 Ariz. 382, 386 (1951). ceremonies, or form of conveyance is necessary to dedicate land to public

use; anything fully demonstrating the intent of the donor to dedicate can Pleak, 207 Ariz. at 424, ¶ 21.

¶16 The Neighbors concede the Easement for Roadway constituted an offer to dedicate. They contend, however, that the offer was never accepted. which fully demonstrates the intention of the donor and the acceptance by the public works the City of Chandler, 224 Ariz. at 403, ¶ 10 (quoting

Allied Am. Inv. Co. v. Pettit, 65 Ariz. 283, 287 (1947)); see also Allied, 65 Ariz. at 287 e unnecessary if the intent can be gathered from Our caselaw discusses three general methods of establishing acceptance, which we address below.

1. Acceptance By the Government

¶17 The public recipient, whether it be the state, a county, or a municipality, can accept an offer of dedication either formally or by taking steps to maintain the dedicated land. See City of Chandler, 224 Ariz. at 403, nty properly accepted the roadway Evans v. Blankenship, 4 Ariz. 307, 316

aza). The parties agree that neither Maricopa County nor the Town of Paradise Valley accepted the Easement for Roadway.

2. Acceptance By Reference In a Deed of Sale

¶18 Acceptance also can arise if a deed of sale expressly refers to the deed of dedication, giving the buyer notice of the dedication. Lowe v. Pima Cnty., 217 Ariz. 642, 647, ¶ 21 (App. 2008); see also Pleak, 207 Ariz. at the lots in Entrada were sold after recordation of the Survey and . . . the conveyance documents specifically ¶19 Here, while the deeds for the Harrison and Smith lots referenced the Easement for Roadway, the deeds for the Zachariah and Appel lots did not. In Lowe, we placed the burden on the original owner to

217 Ariz. at 647, ¶ 21. If Phoenix Title wanted to complete a public dedication of the Easement for Roadway, it could have referenced the Easement in the deeds of sale for each burdened lot. For reasons not apparent in the record, it did not do so. See City of Scottsdale v. Mocho, 8 Ariz. App. 146, 151 (1968) (intent by the platter to dedicate for a proper public purpose, either

exp

¶20 Neither side addresses whether an offer of dedication may be partially accepted when some of the relevant chains of title reference the relevant deed of dedication or recorded plat and some do not. The superior court did not find partial acceptance; it instead based its ruling on evidence that the Zachariahs and Appel knew about the Easement for Roadway when they purchased their lots. 3 The court did not, however, cite any authority suggesting actual knowledge of a proposed dedication is an adequate substitute for express notice in the deed of sale, and we are not aware of any. It instead cited Neal v. Hunt, 112 Ariz. 307, 311 (1975), for the

There, our supreme court held that the circumstances by searching the Mohave County r did not have constructive notice of the agreement. Id.

¶21 Neal is not a common law dedication case and did not address whether a purchaser accepts a

common law dedication of an easement by learning that the easement exists. Rather, in Lowe, we held that landowners who knew their deed excluded the northernmost thirty feet of the

3 The Neighbors contend this ruling violated the law of the case because a previously assigned judge ruled The court made this statement in a minute

entry denying summary judgment; it thus was not binding for law of the case for horizontal appeal purposes. See Sorensen v. Farmers Ins. Co. of Ariz., 191 Ariz. 464, 465 judgment is an intermediate order deciding simply that the case should go

; Powell-Cerkoney v. TCR-Mont. Ranch Joint Venture, II, 176 Ariz. 275, 279 (App. 1993) e will not apply law of the case if the prior decision did not actually decide the issue in question.). purchased parcel still were not obligated 217 Ariz. at 647, ¶ 21.

Likewise, the Zachariahs and Appel were not obligated to search deeds for other nearby lots they did not intend to purchase. Their actual knowledge of the Easement for Roadway does not constitute acceptance by deed. See Pleak, 207 Ariz. at 424, ¶ 23 (quoting Cnty. of Yuma v. Leidendeker, 81 Ariz. 208, 213 (1956) [T]he sale of lots referencing a recorded plat containing the dedication constitutes an . .

3. Acceptance By Use

¶22 Acceptance also may be premised on actual use by the general public. Drane v. Avery, 72 Ariz. 100, 102 (1951), overruled in part on other grounds by Chadwick v. Larsen, 75 Ariz. 207 (1953); Allied, 65 Ariz. at 290 (1947); see also Restatement (Third) of Prop.: Servitudes § 2.18 cmt. d. While settlement patterns of the community[,] . . . [t]he use must . . . be of such

character as to indicate the intention to accept the property for the particular 23 Am. Jur. 2d Dedication § 50 (2020). As such, use not enough. Mocho, 8 Ariz. App. at 151.

¶23 TMS contends the Zachariahs and Appel becam public the driveway that encroached on the We see no reasonable interpretation of the law under which the use of a shared driveway to access own property would constitute general public use. See id. at 150 (internal quotation marks omitted) [T]here can be no dedication to private uses, or to uses public in their nature but the enjoyment of which is restricted to a limited part of the . TMS also presented evidence that prospective purchaser and . . . for its contractors and professionals to access ut conceded these uses were permission. Permissive use does not constitute general public use. See Sons

of Union Veterans of Civil War, Dep of Iowa v. Griswold Am. Legion Post 508, 641 N.W.2d 729, 734 (Iowa 2002) (quoting Culver v. Converse, 224 N.W. 834, 836 (1929) Mere permissive use of a way, no matter how long continued, will not amount to a dedication

¶24 TMS also relies on the superior the Neighbors and other lot owners on San Miguel Avenue It also cites easement- that various l These uses were of the proposed width expansion of San Miguel Avenue, not the portion of the easement reaching the TMS Property.

¶25 While Arizona has not addressed the question, several courts have held that acceptance by use only applies to those portions of the proposed dedication where there has been established public use. Sweeten v. Kauzlarich, 684 P.2d 789, 792 (Wash. Ct. App. 1984); see also Chalkley v. Tuscaloosa Cnty. , 34 So. 3d 667, 674 (Ala. 2009) (quoting 23 Am. Jur. 2d Dedication § 43 (2002) he law on the subject generally is that [a]n offer of dedication need not be accepted in its entirety; the property offered for dedication may be accepted in part and the remainder rejected. ; A & H Corp. v. City of Bridgeport, 430 A.2d 25, 30 (Conn. 1980) (quoting Meshberg v. Bridgeport City Trust Co., 429 A.2d 865, 869 (Conn. 1980) the actions of the public . . . are such as to show an intention to accept all

rather than a part they will be construed as having that effect, but . . . acceptance of a part is not necessarily an acceptance ; Baugus v. Wessinger, 401 S.E.2d 169, 172 (S.C. 1991) (reversing summary judgment ndisputed acceptance of the Nel La Lane roadway from but s land has been

Others have found use of only part of the dedicated land can constitute acceptance of an entire dedication but only if the use evinces a purpose to accept the entire dedication. See, e.g., Smith v. State, 282 S.E.2d 76, 82 (Ga. 1981).

¶26 Even assuming Arizona would follow the latter path an issue we need not decide no such purpose is evident in this record, as the only uses shown of the proposed roadway were (1) the Zachariahs and Appel accessing their own properties and (2) TMS and third parties See Biagini v. Beckham, 163 Cal. App. 4th 1000, 1013 14 (Cal. Ct. App. the use of property is consistent with a private easement, there is no basis

for ; Sons of Union Veterans, 641 N.W.2d at 734.

¶27 TMS also relies on Pleak [that] would require proof of actual use by the public before finding an

effec -by-case inquiries regarding

207 Ariz. at 425, ¶ 26. There, however, it was undisputed that the were sold after recordation of the Survey and that the conveyance documents Id. at 424, ¶ 23. Pleak therefore rejected the argument that express notice in the conveyance and actual public use are required to trigger a common law dedication, id. at 424 25, ¶¶ 23 26, a position the Neighbors do not take. Hunt v. Richardson, 216 Ariz. 114 (App. 2007), is misplaced. Id. at 119, ¶ 15

purchased their properties with reference to the Survey, thus constituting

¶28 demonstrates . . . appears in this undisputed record. City of Chandler, 224 Ariz. at 403, ¶ 10

(quoting Allied, 65 Ariz. at 287). ruling finding a common law dedication of the Easement for Roadway.

C. Implied Way of Necessity

¶29 As noted, supra ¶ 11, the superior court found the existence of an implied way of necessity described in the . . . Easement for The Neighbors do not contest

this finding, informing Consequently, we do not address

it.

D. Attorney Fees and Taxable Costs in Superior Court

¶30 The Neighbors also challenge the attorney fees and cost award to TMS. Because we reverse on common law dedication, we vacate the fees and cost award on that claim. arguments against the award to provide guidance on remand.

¶31 The Neighbors contend TMS cannot recover attorney fees under A.R.S. § 12-1103(B) because an implied way of necessity does not transfer title to any part of the property, citing Dabrowski, 246 Ariz. 504. There, we held that parties who successfully proved the absence of any express or implied easement over their property could recover fees under § 12-1103(B). Id. at 516 17, ¶¶ 38 40. We see no reason why a party who successfully proves the existence of an implied way of necessity should be treated differently. See A.R.S. § 12-

Chantler v. Wood title to real property, whether legal or equitable, may be determined in [a quiet ¶32 The Neighbors also contend the superior court improperly awarded TMS nontaxable costs incurred by Beus Gilbert. A party cannot recover litigation expenses as costs without statutory authorization. Schritter v. State Farm Mut. Auto. Ins. Co., 201 Ariz. 391, 392, ¶ 6 (2001). Taxable costs include:

1. Fees of officers and witnesses.

2. Cost of taking depositions.

3. Compensation of referees.

4. Cost of certified copies of papers or records.

5. Sums paid a surety company for executing any bond or other obligation therein, not exceeding,

however, one per cent on the amount of the liability on the bond or other obligation during each year it was in force.

6. Other disbursements that are made or incurred pursuant to an order or agreement of the parties.

A.R.S. § 12-332(A). We review whether expenditures are taxable costs de novo. , 235 Ariz. 605, 608, ¶ 6 (App. 2014). But we review the amount awarded for an abuse of discretion. Lee v. ING Inv. Mgmt., LLC, 240 Ariz. 158, 161, ¶ 11 (App. 2016).

¶33 The Neighbors challenge several items listed for While some of these items are not taxable costs, it is

unclear whether TMS claimed that they were. See RS Indus., Inc. v. Candrian, 240 Ariz. 132, 137, ¶ 16 (App. 2016) (denying recovery of expenses incurred Newman v. Select Specialty Hosp.-Ariz., Inc., 239 Ariz. 558, 567, ¶ 42 (App. 2016) (denying pies and postage counsel s parking and lunch during trial). Indeed, TMS claimed only

$17,913.49 of And TMS offers a calculation on appeal under which the court could have reached the awarded amount by allowing only court reporter fees, opposing expert witness fees, process server fees, subpoena fees, and electronic court filing fees. See RS Indus., Inc., 240 Ariz. at 137, ¶ 16 (noting that a party may costs it incurs in deposing an opposing expert witness taxable costs). On this record, we cannot say the court abused its discretion

in determining an appropriate cost award.

II. Cross-Appeal

¶34 TMS also challenges the fees and cost award in its cross- appeal, contending the superior court improperly declined to award any fees it counterclaim. TMS contends it could recover fees on the anticipatory

nuisance counterclaim under A.R.S. § 12-341.01(A) because the counterclaim was -based claims. See Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc., 198 Ariz. 10, 13, ¶ 17 (App. well-established that a successful party on a contract claim may recover not only attorneys fees expended on the contract claim, but also But it does not appear the court awarded any fees under § 12-341.01(A). Upon granting summary judgment on anticipatory nuisance, the court invited TMS to file [of]

§ 12- And its post-trial -

¶35 Even if we were to assume the court awarded fees under § 12-341.01(A), we would find no abuse of discretion. See City of Cottonwood v. James L. Fann Contracting, Inc. The [superior] court has

discretion to determine . . . where a successful claim is Claims are intertwined for purposes of a fee award under A.R.S. § 12-341.01(A) if they are based on the same set of facts and involve common allegations that require the same factual and legal development. Skydive Ariz., Inc. v. Hogue, 238 Ariz. 357, 369, ¶ 52 (App. 2015). Such is not the case here, as TMS acknowledged the anticipatory nuisance counterclaim did not arise from the same set of facts in its motion to bifurcate it from the remainder of the case. TMS instead stated that the counterclaim its] future

On those bases, conducting two separate trials one on legal access and the second on anticipatory nuisance will expedite and economize the

¶36 Moreover, the court granted summary judgment on the anticipatory nuisance counterclaim because it found the Neighbors could not show injury resulting from future construction. See McQuade v. Tucson Tiller Apartments, Ltd., 25 Ariz. App. 312, 315 (1975) (Whether the Neighbors could prove a high probability of damage to their properties has no bearing on TMS legal access claims. We thus see no abuse of discretion.

III. Attorney Fees and Costs on Appeal and Cross-Appeal

¶37 TMS requests its attorney fees and costs incurred in this appeal and cross-appeal under A.R.S. §§ 12-1103 and 12-341.01(A). We decline because TMS is not the successful party in this court. See A.R.S. § 12- Scottsdale Mem Health Sys., Inc. v. Clark, 164 Ariz. 211, 215 (App. 1990) (is within the trial court discretion s to a party who has prevailed in a quiet title action and otherwise complied with the provisions of section 12 As the prevailing party on appeal, the Neighbors are entitled to their costs upon compliance with ARCAP 21.

CONCLUSION

¶38 We reverse the superior court judgment finding a common law dedication of the Easement for Roadway. Because we reverse on common law dedication, we also vacate the attorney fees and cost award to TMS on that claim. We remand to allow the court to address attorneys fees related to the implied way of necessity claim.