DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANK CONNELLY, an unmarried man,	)	1 CA-CV 11-0442
	)	
Plaintiff/Appellant,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
STANLEY SHORES and CAROL SHORES,	)	Rule 28, Arizona Rules
	)	of Civil Appellate
Defendants/Appellees.	)	Procedure)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-080820

The Honorable John R. Ditsworth, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

Gove L. Allen — Mesa
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By Trevor J. Fish
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N O R R I S, Judge

¶1 This timely appeal arises out of the dismissal on summary judgment of plaintiff/appellant Frank Connelly's claims against his neighbors, defendants/appellees Stanley and Carol

Shores. Connelly alleged the Shores violated their housing subdivision restrictions by limiting his access to a setback area he owned over which they held an easement and by installing landscaping and an irrigation system in the setback. Because the subdivision's restrictions do not allow Connelly access to the setback for all purposes, we affirm the superior court's grant of summary judgment on his claim he should "be allowed free access [to the setback] . . . at all times." But, because genuine issues of material fact exist on his claim the Shores violated the restrictions, we reverse summary judgment on that claim and remand it to the superior court for further proceedings consistent with this decision. Accordingly, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL BACKGROUND

¶2 Connelly and the Shores are adjacent property owners in the Sun Lakes Unit 17 subdivision; the Shores bought their home in 2003 and Connelly bought his home in 2008. Their homes are subject to the Sun Lakes Unit 17 Declaration of Restrictions ("Declaration") and Architectural Compliance Guidelines ("Guidelines"). As explained in the Declaration and Guidelines (collectively, the "restrictions"), Connelly's property includes a strip of land ("setback") that runs parallel to the southwest wall of his home and the wall extending from the southwest corner of his home to the rear fence across the back of his

property. The setback is located, however, in the Shores' yard, and the restrictions grant them an easement of use and enjoyment to the setback.[1] According to the Shores, the prior owner of their home installed landscaping on the setback in 1984, when the home was built, and the landscaping has remained in essentially the same condition since that time. Section 11 of the Guidelines provides:

> Every property that does not have a common party wall on the property line has a setback of five feet along the side property lines. This means that your house [(here, Connelly's)] is built five feet from the actual property line on one side. . . .
>
> This area is named the five-foot setback/right to use area (easement). The intent of this five-foot area is to provide the adjacent homeowner [(Connelly)] access to that side of his or her property for maintenance of the home. The adjoining

[1]The southwest wall of Connelly's home and the wall that extends from the southwest corner of his home to the back fence form the barrier between the parties' yards and, under the restrictions, are known as the "party wall." As the Declaration explains,

> Every wall which is built as a part of the original construction and placed . . . on the lot setback line, shall constitute and be considered a party wall and as to such wall each of the owners immediately adjacent shall assume the obligations and privileges of these restrictive covenants. . . . In addition, each owner [(here, the Shores)] shall have an easement of continued use and enjoyment of that portion of the adjoining lots which may be located on his side of the party wall.

> neighbor [(the Shores)] shall not locate any permanent improvement on or otherwise affect the drainage characteristics, composition or grade of that portion of the lot located on that side of the party wall. The adjacent homeowners must be allowed free access to the blind side of his or her house at all times. . . .
>
> The Architectural Compliance Committee will not approve any improvement, modification, hardscape . . . softscape . . . or any other permanent additions in the five-foot setback/right to use area.[2]
>
> It is the responsibility of each homeowner to know the easements and property lines on the property they own. Should a homeowner find a neighbor who has installed or constructed any of the aforementioned items within the five-foot setback/right to use area, it is his or her responsibility to seek a cure of the violation with the involved neighbor.

¶3 According to the Shores' affidavit filed in support of their motion for summary judgment,[3] Connelly submitted "Homeowner Concern Forms" to the Sun Lakes Homeowners Association ("the

[2]"Hardscape" includes "concrete, flag stone, pavers or bricks" used for "adding walkways and flats areas." "Softscape" includes "grass and granite interspersed with plants, shrubs, trees, water systems, groundcover, river rock, etc."

[3]Connelly did not file an affidavit or separate statement of facts in support of his response to the Shores' motion, and the superior court treated the Shores' statement of facts as "uncontroverted." *See generally Schwab v. Ames Const.*, 207 Ariz. 56, 59, ¶ 15, 83 P.3d 56, 59 (App. 2004) (citations omitted) ("A failure to respond to a motion for summary judgment with a written memorandum or opposing affidavits cannot, by itself, entitle the moving party to summary judgment. The trial court must consider the entire record before deciding a summary judgment motion.").

Association") and complained to the Architectural Compliance Committee over a several year period, asserting the Shores were not complying with the setback restrictions. Despite his complaints, in July 2010, the Association issued a written notice ("2010 notice") certifying the Shores' lot was "currently in compliance with all Sun Lakes #2 HOA ACC guidelines."

¶4 Nevertheless, in November 2010, Connelly sued the Shores. He alleged, as the owner of the setback, he was entitled to "use or destroy his own property unrestricted" ("free access claim"). He further alleged the Shores had violated the restrictions by "refusing to allow [him] access" to the setback "at all times"[4] and installing irrigation lines and landscaping in the setback ("violation claim"). Accordingly, Connelly asked the court to enter a judgment ordering the Shores to "provide [him] free and unrestricted access" to the setback and damages for the "cost to return [the setback] to its original state," that is, without the irrigation lines and landscaping.

[4]According to the Shores' affidavit, "[g]iven Mr. Connelly's open and acknowledged intention of . . . entering the Shores[']s backyard to remove and/or alter the landscaping . . . located within the [setback]," they had locked the gate to their yard -- the only means of accessing the setback -- and "indicated to Mr. Connelly that permission for entry into their backyard and upon the [setback would] only be granted as necessary for Mr. Connelly to maintain the side of his home."

¶5 The Shores moved for summary judgment, essentially arguing, first, under the Guidelines, Connelly was only entitled to access the setback to "maintain his home"; second, the irrigation and landscaping did not impede his ability to do this; third, even if the irrigation and landscaping violated the restrictions, the Association had waived any non-compliance by failing to respond to Connelly's complaints and issuing the 2010 notice; and fourth, the ten-year statute of limitations period in Arizona Revised Statutes ("A.R.S.") section 12-526(A) (2003) barred Connelly's violation claim because the landscaping had existed in the setback ten years or more before Connelly bought his home in 2008. After briefing and oral argument, the superior court granted the Shores' motion for summary judgment "[f]or the reasons submitted by [them] in the briefs and oral arguments."[5]

DISCUSSION

¶6 On appeal from summary judgment, we determine de novo whether there are any genuine issues of material fact and whether the superior correctly applied the law. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). A declaration of covenants,

[5]In granting summary judgment, the superior court did not specify which of the Shores' arguments it relied upon. On appeal, Connelly has challenged each argument; thus, we address them.

conditions, and restrictions constitutes a contract between a subdivision's property owners as a whole and the individual lot owners, and interpretation of those restrictions is a question of law we review de novo. *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 633-34, ¶ 5, 2 P.3d 1276, 1278-79 (App. 2000). Further, we interpret restrictions to give effect to the intent of the parties who created the document as determined by the language of the instrument and the circumstances surrounding the creation of the restrictions. *Powell v. Washburn*, 211 Ariz. 553, 556-57, ¶ 13, 125 P.3d 373, 377 (2006).

I. Connelly's Right to Access the Setback –- The Free Access Claim

¶7 Connelly first argues, as he did in the superior court, the restrictions entitle him to unrestricted access to the setback at all times and, therefore, the superior court should not have dismissed his free access claim. Thus, as he sees the situation, this access gives him unrestricted "control over the [setback] landscaping" such that "the owner of the easement ha[s] no right to relandscape" it and, further, he is "entitled to exercise his right of self-help to remove the encroaching landscaping." We disagree with Connelly's construction of the restrictions and affirm the superior court's dismissal of his free access claim.

¶8 Although the Declaration imposes on all homeowners the responsibility of keeping their lots landscaped and the Guidelines specify "adjacent homeowners [(here, Connelly)] must be allowed free access to the blind side" of their homes, these provisions do not, as Connelly argues, give him the right to control the setback to the exclusion of the Shores. These provisions must be read in context with the other setback provisions contained in the restrictions. *Powell*, 211 Ariz. at 557, ¶¶ 14-16, 125 P.3d at 377 (quotations and citations omitted) ("Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein.").

¶9 As the Shores point out, the Guidelines clarify the "intent of the [setback] is to provide the adjacent homeowner [(here, Connelly)] access to that side of his or her property *for maintenance of the home*." (Emphasis added.) Further, the Guidelines limit but do not bar an adjoining neighbor (here, the Shores) from improving the setback; instead, the Guidelines bar only certain improvements in the setback: "The adjoining neighbor shall not locate *any permanent improvement on or otherwise affect the drainage characteristics, composition or grade of that portion of the lot* located on that side of the party wall." (Emphasis added.) Underscoring the right of adjoining neighbors to install or construct certain improvements

in the setback is the cure provision: "Should a homeowner find a neighbor who has *installed or constructed any of the aforementioned items* within the [setback], it is his or her responsibility to seek a cure of the violation with the involved neighbor." (Emphasis added.)

¶10 We therefore disagree with Connelly's construction of the restrictions as giving him essentially sole control over the setback to the exclusion of the Shores. *See Coll. Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 540, ¶ 25, 241 P.3d 897, 904 (App. 2010) (citing *Powell*, 211 Ariz. at 556, ¶ 12, 125 P.3d at 376) ("[A]mbiguities in restrictive covenants are not to be decided in favor of free use and enjoyment of property, but rather, in accordance with the contractual intent of the parties as inferred from the language and circumstances surrounding creation of the CC&R provision."); *see also Hunt v. Richardson*, 216 Ariz. 114, 121, ¶ 21, 163 P.3d 1064, 1071 (App. 2007) (quotation and citation omitted) ("In resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude and the servient estate.").

¶11 Connelly argues, however, the provision in the Guidelines stating adjacent homeowners "must be allowed free access to the blind side of his or her house at all times"

demonstrates he "is entitled to free access across [the Shores' yard] at all times in order to maintain his home" and would "then be entitled to exercise his right of self-help to remove the encroaching landscaping." As noted, this provision appears in the same paragraph of the Guidelines that clarifies the setback is intended to provide access for maintenance and precludes the adjoining neighbor from locating certain improvements in the setback. Thus, reading these provisions together, we interpret "free access" to mean Connelly is entitled to access the setback to maintain his home. His right to use the setback to maintain his home does not, however, give him the right to remove landscaping or other improvements located in the setback which the restrictions permit. *See Hunt*, 216 Ariz. at 121, ¶ 21, 163 P.3d at 1071.

¶12 Further, even if we did not interpret the restrictions to limit Connelly's control over the setback, he would not be entitled to exercise control over the setback in a manner that unreasonably interferes with the Shores' use of their easement. *See id.* Granting Connelly unconditional control of the Shores'

yard would unreasonably interfere with the Shores' enjoyment of the setback.[6]

¶13 To conclude, under the restrictions, Connelly is entitled to access the setback to maintain his home, but the restrictions do not exclude all improvements. Connelly's right to access the setback does not give him unrestricted control over the area and he is not entitled to remove landscaping or other improvements permitted by the restrictions. Thus, as pleaded, the superior court correctly dismissed Connelly's free access claim.

II. The Shores' Landscaping -- The Violation Claim

¶14 As discussed, the Guidelines specifically provide a setback's adjoining neighbors "shall not locate any permanent improvement on or otherwise affect the drainage characteristics, composition or grade" of the setback. Connelly alleged in his complaint that his property was "at substantial risk of damage due to the installation of water lines and improper drainage as a result of [the Shores'] . . . violation of the . . .

[6]Although Connelly also argues the restrictions "contemplated that [he] . . . would have an implied easement through the [Shores'] gate . . . and across [their] yard," he has waived this argument by failing to raise it in the superior court. *Scottsdale Princess P'ship v. Maricopa County,* 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995) (appellate court will not consider arguments raised for the first time on appeal). Even if not waived, the Guidelines specifically grant Connelly a right of access to maintain his home and, thus, there is no evidence they contemplate any other "implied easement."

Guidelines." The Shores admitted in their answer to Connelly's complaint that "some vegetation, including plants/trees/shrubs, along with watering lines and decorative rock are located on the [setback]," but in moving for summary judgment did not address whether this irrigation and landscaping was permissible under the restrictions. Whether the restrictions permit these improvements presents a genuine issue of material fact and the Shores were not entitled to summary judgment on Connelly's violation claim. We thus remand this claim for further proceedings consistent with this decision.

III. Defenses to the Violation Claim

A. Waiver

¶15 On appeal, as they did in the superior court, the Shores argue that even if their irrigation and landscaping violated the restrictions, the Association waived any violation by failing to respond to Connelly's complaints and issuing the 2010 notice, *see supra* ¶ 3. We disagree.

¶16 As Connelly argues, because the Declaration includes a non-waiver provision, the Association's acts did not waive his violation claim. Section 10 of the Declaration states:

> In the event of any violation or threatened violation of any of the covenants herein, the Association or any owner of any lot . . . in the subdivision may bring an action at law or in equity, either for injunction, action for damages or such other remedy as may be available. . . .

> The failure by any land owner or the Association to enforce any restrictions, conditions, covenants or agreements herein contained shall not give rise to any claim or cause of action against the Association or such land owner, nor shall such failure to enforce be deemed a waiver or abandonment of this Declaration or any provision thereof.

Under the clear language of this provision, the Association's 2010 notice and alleged failure to enforce the restrictions did not preclude Connelly from bringing an action against the Shores for allegedly violating the restrictions. *See Coll. Book Ctrs.*, 225 Ariz. at 539, ¶ 18, 241 P.3d at 903 ("[W]hen CC&Rs contain a non-waiver provision, a restriction remains enforceable, despite prior violations, so long as the violations did not constitute a 'complete abandonment' of the CC&Rs."). Further, although the Shores attached an aerial photograph as an exhibit to their motion for summary judgment which purported to show "the entire subdivision appears to have vegetation, landscaping, and other improvements located on a majority (if not all) of the respective [setbacks]," they did not argue the actual landscaping demonstrated a complete abandonment of the Declaration. *See Coll. Book Ctrs.*, 225 Ariz. at 539, ¶ 18, 241 P.3d at 903 (quotation and citation omitted) ("Complete abandonment of deed restrictions occurs when 'the restrictions imposed upon the use of lots in [a] subdivision have been so

thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions [and] defeat the purposes for which they were imposed[.]'").

B. The "Adverse Possession" Statute of Limitations

¶17 The Shores also argue that, as a matter of law, Connelly's violation claim was barred by the ten-year statute of limitations under A.R.S. § 12-526(A). Given the current state of the record, we disagree. Section 12-526(A) provides: "A person who has a cause of action for recovery of any lands, tenements or hereditaments from a person having peaceable and adverse possession thereof, cultivating, using and enjoying such property, shall commence an action therefor within ten years after the cause of action accrues, and not afterward."

¶18 As an initial matter, we reject Connelly's claim the non-waiver provision of the Declaration quoted above prevents the Shores from asserting the statute of limitations as a defense. Assuming without deciding the parties could waive the applicable statute of limitations, *but see Gary Outdoor Adver. Co. v. Sun Lodge, Inc.*, 133 Ariz. 240, 242, 650 P.2d 1222, 1224 (1982) (contract provision "perpetually waiving the statute of limitations" did not void contract because suit filed before expiration of statute of limitations; nevertheless, "[s]uch a provision is unenforceable"), we disagree the non-waiver provision applies to the Shores' statute of limitations defense.

The provision essentially provides that no one may sue the Association or a lot owner for failing to enforce the restrictions. It further provides that failure to enforce the restrictions shall not be deemed a "waiver" or "abandonment" of a claim based on a violation of the restrictions. The statute of limitations established by A.R.S. § 12-526, however, does not operate as a "waiver" or "abandonment" of Connelly's claim; his claim remains, but the statutory time-bar, if proven, would simply prevent him from seeking a remedy. *See generally Linville v. Cheney*, 60 Ariz. 325, 329, 137 P.2d 395, 396 (1943) (quotation and citations omitted) ("It is universally recognized that statutes of limitations do not affect the validity of the obligation, but merely the remedy given by law for its enforcement."), *overruled in other part by State v. Miami Trust Co.*, 61 Ariz. 499, 152 P.2d 131 (1944). Thus, the non-waiver provision does not prevent the Shores from asserting the statute of limitations as a defense.

¶19 Assuming, also without deciding, that the Shores' use of the setback exceeded the scope of their easement, we nevertheless hold the Shores did not establish as a matter of law that the statute of limitations applied to bar Connelly's violation claim. *See generally* Restatement (Third) of Property: Servitudes § 2.16 cmt. f (2000) ("Even though a person may be authorized to make some uses of property, the person may become

an adverse user with respect to uses that go beyond the authorized use if the excessive use gives rise to a cause of action for trespass, waste, or other interference with a property interest. Use that is prohibited by a lease or beyond the scope of a license or servitude may be adverse."); 28A C.J.S. *Easements* § 46 (2012) (citing cases) ("The fact that a use[] is permissive in its inception does not in itself prevent it from subsequently becoming adverse and ripening into an easement by prescription."); *Hester v. Sawyers*, 71 P.2d 646, 651 (N.M. 1937) ("A prescriptive right may be acquired, although the use was originally permissive, if in fact it became adverse."). As this court has explained, A.R.S. § 12-526(A) sets forth the elements of the adverse possession statute of limitations, and

> According to A.R.S. § 12-521(A) [(2003)]:
>
> 1. "Adverse possession" means an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.
>
> 2. "Peaceable possession" means possession which is continuous, and not interrupted by an adverse action to recover the estate.

> Under the statutes, a claimant must show that the adverse possession was actual, open and notorious, hostile, under a claim of right and was exclusive and continuous for a ten-year period.

Lewis v. Pleasant Country, Ltd., 173 Ariz. 186, 189, 840 P.2d 1051, 1054 (App. 1992) (citations omitted). Further, although the requisite ten years of "'[p]eaceable and adverse possession' need not be continued in the same person," when the alleged possession is "held by different persons successively there must be a privity of estate between them" to tack the prior occupant's period of possession onto the current occupant's. A.R.S. § 12-521(B).

¶20 Here, the Shores asserted they purchased their home in 2003 from the original owner, who built it in 1984. But, although they asserted the "irrigation system remains exactly where it had originally been . . . when the Shores[] purchased their home in 2003" and the "landscaping . . . and all the vegetation located within the [setback] remains the same or substantially similar to the way it existed more than ten . . . years prior to Connelly's purchase of his home," they did not present evidence regarding how or for how long their use of the easement met each of the requirements of adverse possession or a prescriptive right, including whether they had the requisite "privity of estate" with the prior owner, which would entitle

them to tack their periods of allegedly adverse use. *See generally Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 209, 818 P.2d 190, 194 (App. 1991) (citation omitted) ("In the prescription context, privity of estate is created by a conveyance, agreement, or understanding that refers the successive adverse use to the original adverse use and is accompanied by a transfer of the use.").

¶21 Thus, the Shores did not establish as a matter of law the statute of limitations established by A.R.S. § 12-526 barred Connelly's violation claim.

V. Attorneys' Fees

¶22 Because neither party has ultimately prevailed and we are remanding to the superior court, we vacate the superior court's award of attorneys' fees and costs to the Shores. Further, we deny both parties' requests for attorneys' fees on appeal.

CONCLUSION

¶23 For the foregoing reasons we hold the superior court properly granted summary judgment on Connelly's free access claim. Because we find genuine issues of material fact whether the Shores' irrigation and landscaping violated the restrictions and whether Connelly's violation claim was time-barred, we remand this claim to the superior court for further proceedings consistent with this decision.

/s/
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
DONN KESSLER, Judge