DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT PAYNE, an individual; LEVI SLAUGHTER and DEBORAH SLAUGHTER, husband and wife, Plaintiffs/Appellees, v. LLOYD LEMONS and CHRISTA LEMONS, husband and wife; EVERETT PEMBERTON, an individual, Defendants/Appellants.	No. 1 CA-CV 09-0122 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Apache County

Cause No. CV2007358

The Honorable Donna J. Grimsley, Judge

REVERSED AND REMANDED

Holland Law Firm, PLLC — Snowflake
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Attorneys for Appellees

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By Robert S. Hitchcock
Attorneys for Appellants

J O H N S E N, Judge

¶1 Lloyd Lemons, Christina Lemons and Everett Pemberton ("Appellants") appeal from the superior court's grant of a motion for partial summary judgment on liability in favor of Robert Payne, Levi Slaughter and Deborah Slaughter ("Appellees") and denial of Appellants' motion for summary judgment. For the following reasons, we reverse and remand.

FACTUAL AND PROCEDURAL HISTORY

¶2 Appellants own adjacent 40-acre parcels in the Ranch of the White Mountains subdivision. In 1981, when Ranch of the White Mountains was subdivided, its owner dedicated and recorded a 50-foot public "roadway and utility easement" along all four sides of each parcel in the subdivision, including Appellants' parcels. Jeff Lake Road, a dirt road not maintained by the county, runs along the southern boundary of Appellants' parcels within the 50-foot easement. Appellees must use Jeff Lake Road to access their properties.

¶3 After a heavy rainfall in 2007 made Jeff Lake Road difficult to navigate, Appellees drove on the road's north shoulder (but still within the easement) to bypass difficult patches. According to Appellants, Appellees' bypass route destroyed vegetation, causing erosion that threatened a fence on the Lemonses' parcel. To protect the fence, Appellants erected a new fence blocking Appellees' bypass on the north side of the

road and created an alternate bypass on Jeff Lake Road's southern shoulder. Appellants contend the fence they constructed did not intrude on the road as it previously existed; Appellees, however, maintain that the new fence partially blocked the existing road. On September 18 and 25, 2007, Appellants received letters from Appellees' counsel demanding they remove the new fence. Appellants complied. In early October 2007, after removing the fence, Appellants dug a drainage ditch within the easement, which, according to Appellees, was located in the approximate location of the recently removed fence.

¶4 On December 6, 2007, Appellees filed a complaint alleging Appellants were negligent per se because their conduct violated Arizona Revised Statutes ("A.R.S.") sections 13-2906 (2001), obstructing a highway or other public thoroughfare, and 48-3615 (Supp. 2009), diverting the flow of waters in a watercourse creating a hazard to life or property. After Appellants answered, denying the allegations, Appellees moved for partial summary judgment on the issue of Appellants' liability. Appellants filed their own motion for summary judgment, alleging their actions did not interfere with Appellees' right to the easement, that A.R.S. § 13-2906 did not apply, that Appellants did not violate A.R.S. §§ 13-2906 or 48-

3615 and that Appellants' actions were not the proximate cause of any injury suffered by Appellees.

¶5 The superior court set a hearing on the parties' motions at which, without explanation, it also heard testimony and admitted exhibits. The court entered an unsigned order finding Appellants had violated A.R.S. §§ 13-2906 and 48-3615, were negligent per se and therefore were liable to Appellees for damages. After directing Appellees to prepare an order for its signature, the court issued a signed order finding Appellants liable to Appellees "for their actions in blocking" the easement along Jeff Lake Road and ordering Appellants to refrain from attempting to maintain Jeff Lake Road past their current driveways, to remove existing fences lying within the easement and to avoid intentionally causing surface waters to "run down the easement" to Appellees' detriment. The superior court then scheduled a hearing on the issue of damages. Before the damages hearing was held, however, Appellants filed a notice of appeal of the signed order on liability.

DISCUSSION

A. Jurisdiction.

¶6 The general rule is that "jurisdiction of appeals is limited to final judgments which dispose of all claims and all parties." *Maria v. Najera*, 222 Ariz. 306, ___, ¶ 5, 214 P.3d 394, 395 (App. 2009) (quoting *Musa v. Adrian*, 130 Ariz. 311,

312, 636 P.2d 89, 90 (1981)). Arizona Revised Statutes § 12-2101(G) (2003), however, grants this court jurisdiction over "an interlocutory judgment which determines the rights of the parties and directs an accounting or other proceeding to determine the amount of the recovery." A party may appeal such a judgment when the superior court has exercised its discretion to expressly direct that the only remaining issue is the amount of recovery. *Bilke v. State*, 206 Ariz. 462, 468, ¶ 28, 80 P.3d 269, 275 (2003).

¶7 Here, the signed order from which Appellants appeal did not dispose of all claims because, although it granted Appellees' motion for partial summary judgment on the issue of liability, it did not dispose of their damage claim. The superior court did not expressly state that the only remaining issue was the amount of Appellees' recovery, but after entering the order on liability, the court set a scheduling conference "regarding the issue of damages only." Therefore, because the court's order held Appellants liable to Appellees and left open only the matter of damages, we have jurisdiction of Appellees' appeal of the order. A.R.S. § 12-2101(G); *see Bilke*, 206 Ariz. at 462, 80 P.3d at 269.

B. Standard of Review.

¶8 We review the superior court's grant of summary judgment *de novo* and view the facts in the light most favorable

to the non-moving party. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment is appropriate "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1); *see also Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).[1]

C. Negligence Per Se.

¶9 The superior court held Appellants' actions in constructing the fence and digging the ditch violated A.R.S. §§ 13-2906 and 48-3615 and constituted negligence per se.

1. A.R.S. § 13-2906.

¶10 Pursuant to A.R.S. § 13-2906, "[a] person commits obstructing a highway or other public thoroughfare if, having no legal privilege to do so, such person, alone or with other persons, recklessly interferes with the passage of any highway or public thoroughfare by creating an unreasonable inconvenience or hazard." A violation of this section is a class 3 misdemeanor. A.R.S. § 13-2906(B).

[1] We presume the superior court treated testimony offered at the hearing in the same manner as it would have treated affidavits or deposition testimony presented in support of the cross-motions for summary judgment, and so do we.

¶11 The superior court granted Appellees' partial summary judgment motion because it found Appellants' "actions in blocking the roadway violated" A.R.S. § 13-2906. In their cross-motions for summary judgment and on appeal, the parties dispute whether the fence Appellants constructed blocked a portion of Jeff Lake Road as it had existed before it was washed out or blocked only the bypass route Appellees created to the north of Jeff Lake Road. At oral argument on the motions for summary judgment, however, Appellees' counsel stated, "the dispute is not whether or not [the fence] obstructed a roadway, but whether it was obstructing an easement."

¶12 Even if we do not take this statement as a concession that the fence did not enter the roadway, a disputed issue of fact exists as to whether the fence obstructed any part of Jeff Lake Road. Viewing the facts most favorable to Appellants, we cannot conclude based on the evidence offered on the cross motions for summary judgment that the fence entered the roadway. Appellants submitted a declaration of Lloyd Lemons in which he avowed that "[t]he newly constructed fence did not block Jeff Lake Road as it existed." Although Appellees assert the fence entered the roadway, they offered no affidavit in support of that contention, but relied instead on photographs from which no conclusions can be drawn. Because Appellants offered evidence that at the very least created a genuine issue of material fact

on this issue, the superior court erred in granting summary judgment. *See Andrews*, 205 Ariz. at 240, ¶ 13, 69 P.3d at 11.

¶13 Additionally, to the extent they assert Appellants violated A.R.S. § 13-2906 by blocking the easement (rather than, or in addition to, blocking Jeff Lake Road), Appellees provided no authority either in the superior court or on appeal for the proposition that the whole of an easement for ingress and egress constitutes a "highway or other public thoroughfare" within the meaning of the statute. When interpreting a statute, we first look to the statutory language with the goal of ascertaining and giving effect to the legislature's intent. *Lincoln v. Holt*, 215 Ariz. 21, 24, ¶ 7, 156 P.3d 438, 441 (App. 2007). We give words and phrases their ordinary meanings unless it appears the legislature intended a different meaning. *State v. Wise*, 137 Ariz. 468, 470 n.3, 671 P.2d 909, 911 n.3 (1983). When words are not defined in the statute and there is no indication the legislature intended an extraordinary meaning, we may turn to "an established, widely respected dictionary." *Id.*; *see also Lincoln*, 215 Ariz. at 24, ¶ 7, 156 P.3d at 441.

¶14 The legislature has provided no definition for "highway" or "public thoroughfare" for purposes of A.R.S. § 13-2906 but defines "public" as "affecting or likely to affect a substantial group of persons." A.R.S. § 13-2901(2) (2001).

The Random House Webster's Dictionary provides the following definitions:

> Highway: a main road, esp. one between towns or cities . . . ; any public road or waterway; any main or ordinary route, track, or course.
>
> Thoroughfare: a road, street, or the like, that leads at each end into another street; a major road or highway; a passage or way through: *no thoroughfare*.

Random House Webster's Unabridged Dictionary 903, 1974 (Deluxe ed. 2004).

¶15 These definitions of "highway" and "thoroughfare" do not support the proposition that A.R.S. § 13-2906 applies to the portion of an easement for ingress and egress that is not a road or street. Certainly those portions of the easement existing beyond the boundaries of Jeff Lake Road do not constitute a "main road," or a "road, street, or the like." Similarly, even those portions of the easement beyond the road that travelers might drive upon to avoid rough patches when the road is muddy are not "ordinary route[s], track[s], or course[s]." Thus, even assuming Jeff Lake Road constitutes a "highway" or "public thoroughfare," we conclude the statute does not apply to those portions of the easement beyond the roadway. As a result, the superior court erred in finding that Appellants' actions violated A.R.S. § 13-2906.

2. A.R.S. § 48-3615.

¶16 Arizona Revised Statutes § 48-3615 designates engaging "in any development or to divert, retard or obstruct the flow of waters in a watercourse if it creates a hazard to life or property without securing the written authorization required by § 48-3613" a class 2 misdemeanor. The legislature has defined "watercourse" for purposes of the statute to mean "a lake, river, creek, stream, wash, arroyo, channel or other topographic feature on or over which waters flow at least periodically. Watercourse includes specifically designated areas in which substantial flood damage may occur." A.R.S. § 48-3601(12) (Supp. 2009).

¶17 The superior court found that Appellants violated A.R.S. § 48-3615, thereby committing negligence per se. Appellees contend the area of the easement on which Appellants dug the trench constitutes "a topographic feature on or over which waters flow at least periodically" and where "substantial flood damage may occur." *See* A.R.S. §§ 48-3601(12), -3615. They support this argument with the superior court's finding that during heavy rains, runoff flows into a nearby wash.

¶18 Appellees, however, provide no authority for the proposition that the easement constitutes a watercourse to which A.R.S. § 48-3615 applies. First, the provision of § 48-3601 that includes as watercourses "areas in which substantial flood

damage may occur" applies only to areas "specially designated" as such. Appellees make no showing or suggestion that the easement has been specially designated as an area in which substantial flood damage may occur.

¶19 Furthermore, we disagree that the easement falls within the definition of a watercourse as a "topographic feature on or over which waters flow at least periodically." *See* A.R.S. §§ 48-3601(12), -3615. Though the phrase "topographical feature" is somewhat ambiguous, *Campbell Estates, Inc. v. Bates*, 21 Ariz. App. 162, 517 P.2d 515 (1973), provides guidance. In determining the difference between surface waters and waters in a watercourse, the court in that case turned to a previous Arizona Supreme Court decision which stated, "[T]he essential characteristics of a water course are a channel, consisting of well-defined bed and banks, and a current of water. And the best-reasoned cases go to the extent that without all these characteristics there can be no water course." *Id.* at 166, 517 P.2d at 519 (quoting *Maricopa County Mun. Water Conservation Dist. No. 1 v. Sw. Cotton Co.*, 39 Ariz. 65, 85, 4 P.2d 369, 376 (1931)).

¶20 The superior court in this case found that when it rains, surface waters flow over the easement toward a wash, sometimes causing Jeff Lake Road to "wash out." Appellees have made no showing that the easement contains any feature

exhibiting a bed, channel, banks or any other such characteristic of a watercourse that Appellants diverted, retarded or obstructed by constructing the ditch. *See* A.R.S. § 48-3615. Under Appellees' theory, any area on which rain waters fall would constitute a watercourse for purposes of § 48-3615. Therefore, we conclude § 48-3615 does not apply to Appellants' conduct and that, as a result, the court erred in finding Appellants negligent per se for violating the statute.

D. Interference with the Easement.

¶21 Appellants argue that instead of deciding the parties' cross-motions for summary judgment on the issue of negligence per se, the superior court should have looked to the law governing easements. Appellants contend that under those legal principles, their construction of the fence and ditch was privileged, entitling them to summary judgment on Appellees' claims against them. Although we agree that the superior court erred in granting judgment in favor of Appellees on their claims alleging negligence per se, we cannot conclude the court should have entered summary judgment in Appellants' favor under the law governing easements.

¶22 When considering "whether a servient estate owner is entitled to burden an easement by erecting improvements, such as fences and gates, [courts] have employed a test that first examines the terms of the easement and then, assuming the

easement terms are not preclusive, balances the needs of the parties." *Hunt v. Richardson*, 216 Ariz. 114, 121, ¶ 21, 163 P.3d 1064, 1071 (App. 2007) (internal quotation omitted). As stated, the court first must look to whether the terms of the easement prohibit the servient owner's improvements; the servient owner is prohibited from making improvements inconsistent with the easement's terms, even if the improvements do not unreasonably interfere with use of the easement. *Id.* at 121, ¶ 22, 163 P.3d at 1071.

¶23 If the court finds that the easement's terms do not preclude construction of the improvement, the court next must balance the parties' interests. *Hunt*, 216 Ariz. at 121, ¶ 23, 163 P.3d at 1071. The servient estate owner may make any use of the servient estate not barred by the easement's terms that does not "unreasonably interfere" with enjoyment of the easement. *Id.* At the same time, the easement holder's "use of an ambiguous easement is constrained to that which is necessary or reasonable under the circumstances." *Neal v. Brown*, 219 Ariz. 14, 19, ¶ 19, 191 P.3d 1030, 1035 (App. 2008) (citing *Squaw Peak Cmty. Covenant Church v. Anozira Dev., Inc.*, 149 Ariz. 409, 412, 719 P.2d 295, 298 (App. 1986)). Additionally, the easement holder's permissible uses of the easement include those which do not unreasonably interfere with the enjoyment of the servient estate and do not cause it unreasonable damage. *Paxson v.*

Glovitz, 203 Ariz. 63, 70, ¶ 36, 50 P.3d 420, 427 (App. 2002) (quoting Restatement (Third) of Property § 4.10 (2000)). What is reasonable becomes an issue of fact for the trier of fact to determine considering all relevant circumstances. *Squaw Peak*, 149 Ariz. at 412, 719 P.2d at 298.

¶24 We may affirm summary judgment on any ground supported by the record and the law. *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996). The record in this case, however, does not allow us to determine that there exists no genuine issue of material fact as to whether the easement's terms prohibit Appellants' actions or whether Appellees' use of the easement and Appellants' actions were reasonable under the circumstances.

CONCLUSION

¶25 For the foregoing reasons, we reverse the judgment entered in Appellees' favor and remand for further proceedings consistent with this decision. Although Appellants request their attorney's fees on appeal, they cite no legal authority for their request, which we deny. Fid. Nat. Title Co. v. Town of Marana, 220 Ariz. 247, 251, ¶ 17, 204 P.3d 1096, 1100 (App. 2009). We grant Appellants their costs on appeal, contingent

upon their compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/_____
PATRICIA A. OROZCO, Presiding Judge

/s/_____
JON W. THOMPSON, Judge