DIVISION ONE
FILED: 05/29/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CHRYSLER FINANCIAL SERVICES AMERICAS, LLC dba CHRYSLER FINANCIAL dba DAIMLER CHRYSLER FINANCIAL SERVICES AMERICAS, LLC dba CHRYSLER FINANCIAL, Plaintiff/Counterdefendant/ Appellee, v. KENNETH MCLEOD and CAROL ANN MCLEOD, husband and wife, Defendants/Counterclaimants/ Appellants.	No. 1 CA-CV 11-0146 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-022519

The Honorable J. Richard Gama, Judge

AFFIRMED

Maynard Cronin Erickson Curran & Reiter, P.L.C. Phoenix
By Jennifer A. Reiter
Attorneys for Plaintiff/Appellee

Kenneth McLeod and Carol Ann McLeod Phoenix
In *Propria Persona* Defendants/Counterclaimants
Appellants

G E M M I L L, Judge

¶1 Kenneth and Carol McLeod, husband and wife, appeal the summary judgment granted to Chrysler Financial ("Chrysler"). For the reasons that follow, we affirm.

BACKGROUND

¶2 During the relevant time frame, Kenneth was the president of CSG Wireless, Inc. ("CSG"). On December 30, 2006, Kenneth and CSG as co-purchasers, purchased a Dodge Ram truck from Bell Dodge, L.L.C. ("Bell Dodge"). The parties executed a Motor Vehicle Retail Installment Sales Contract ("Contract") that required Kenneth and CSG to make monthly payments to Bell Dodge's assignee, Chrysler. The purchasers defaulted in April 2008, and Chrysler recovered the truck. Chrysler commenced this action on July 15, 2009 against CSG and the McLeods to recover the outstanding balance of $10,807.58 plus interest and attorneys' fees as provided in the Contract. Kenneth answered and asserted counterclaims of breach of contract and breach of the covenant of good faith and fair dealing.[1]

¶3 Chrysler moved for summary judgment and attached the declaration of its representative Duane Lacy to its supporting statement of facts. Copies of the Contract and applications by CSG and Kenneth for joint credit were included with and authenticated by Lacy's declaration. Carol independently moved

[1] Kenneth and Carol filed separate answers.

for summary judgment arguing she was immune from liability on the Contract because she was not a party to it and the truck was not community property. The McLeods filed motions to strike Lacy's declaration and Chrysler's statement of facts before responding to Chrysler's motion for summary judgment. After the summary judgment motions were fully briefed, the McLeods requested a hearing pursuant to Arizona Rule of Civil Procedure 56(c)(1) ("Rule(s)").

¶4 Finding a hearing was not necessary, and without expressly ruling on the motions to strike, the court issued a signed minute entry on November 5, 2010, denying Carol's motion for summary judgment and granting summary judgment to Chrysler. The McLeods appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1)(Supp. 2011).[2]

DISCUSSION

¶5 As a preliminary matter, we note that the McLeods refer to items -- including their attached appendices -- not contained in the record. Because appellate review is limited to the record before the trial court, we do not consider those items. *See GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 4-5, 795 P.2d 827, 830-31 (App. 1990). We also disregard unsupported "facts" and instead draw the facts from properly-

[2] Unless otherwise specified, we cite the current versions of statutes when no material revisions have been enacted since the events in question.

supported factual recitations and from the record on appeal. *See Ariz. Dep't of Econ. Sec. v. Redlon*, 215 Ariz. 13, 15, ¶ 2, 156 P.3d 430, 432 (App. 2007); *see also Higgins v. Higgins*, 194 Ariz. 266, 270, ¶ 12, 981 P.2d 134, 138 (App. 1999) (holding a *pro per* litigant to the same standard as an attorney).

I. Summary Judgment

¶6 The McLeods advance two arguments challenging the superior court's grant of summary judgment to Chrysler. First, they contend the court should have granted Carol summary judgment because she "rebutted the presumption of community debt concerning the purchase of the Dodge truck[.]" Further, they assert the credit application purportedly signed by Kenneth that Chrysler attached to its statement of facts was "forged," thereby creating an issue of fact and precluding summary judgment. We reject these arguments.

¶7 We review *de novo* the grant of a motion for summary judgment. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). "[S]ummary judgment is mandatory where the party opposing the judgment does not file affidavits in opposition to the affidavits filed by the moving party, unless the papers of the

moving party fail to show he is entitled to judgment as a matter of law." *Eastwood Elec. Co. v. R. L. Branaman Contractor, Inc.*, 102 Ariz. 406, 410, 432 P.2d 139, 143 (1967) (citations omitted). Similarly, we review the superior court's characterization of property *de novo*. *Davies v. Beres*, 224 Ariz. 560, 562, ¶ 6, 233 P.3d 1139, 1141 (App. 2010).

¶8 In disputing the community nature of the truck, the McLeods contend Carol had "NO involvement in the sales transaction."[3] We agree with the superior court that this assertion does not satisfactorily rebut the statutory presumption that the truck is community property. *See* A.R.S. § 25-211(A) (Supp. 2011) (subject to exceptions not applicable here, "[a]ll property acquired by either husband or wife during the marriage is the community property of the husband and wife"); *Am. Exp. Travel Related Servs. Co., Inc. v. Parmeter*, 186 Ariz. 652, 653-54, 925 P.2d 1369, 1370-71 (App. 1996) (same).

¶9 By executing the Contract in his personal capacity,[4] and regardless of Carol's disapproval of the truck purchase,

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[3] The McLeods also argue Carol received no "value" from the purchase of the vehicle. However, they do not cite to any evidence in the record to support this contention, and the McLeods' affidavits do not contain an avowal to this effect.

[4] The McLeods do not dispute the court's finding that Kenneth "entered into a contract for the purchase of [the truck]" and was a "direct co-buyer."

Kenneth bound the community to the payment obligations contained in the Contract. *See Lorenz-Auxier Fin. Group, Inc. v. Bidewell*, 160 Ariz. 218, 220, 772 P.2d 41, 43 (App. 1989)

> ([Irrespective of pecuniary benefit to the community, d]ebt incurred by one spouse while acting for the benefit of the marital community is a community obligation whether or not the other spouse approves it. . . . Further, debts incurred during marriage are presumed to be community debts, and the party who contends otherwise has the burden of overcoming the presumption by clear and convincing proof.) (citations omitted).

¶10 Moreover, contrary to the McLeods' insistence, Carol's signature was not required to bind the community. This is so because Kenneth was a co-purchaser, not a guarantor. *See* A.R.S. § 25-214(C)(2) (2007) ("Either spouse separately may acquire . . . community property or bind the community, except that joinder of both spouses is required in . . . [a]ny transaction of guaranty, indemnity or suretyship.").

¶11 For these reasons, the court correctly concluded that the McLeods did not sustain their burden of overcoming the presumption that the truck purchase constituted community debt.

¶12 Turning briefly to the McLeods' second argument challenging the summary judgment order, we note that the authenticity of the credit application is not material to this

case.[5] Instead, Lacy's declaration and the Contract itself definitively establish that Kenneth was a co-purchaser of the truck who failed to satisfy the payment obligations set forth in the Contract. Whether Kenneth applied for credit to facilitate his purchase has no bearing on the fact that he defaulted as a co-buyer of the truck. The McLeods did not provide evidence refuting Lacy's declaration and the Contract;[6] thus, no genuine issue existed regarding the McLeods' liability for defaulting on the Contract. Consequently, the court did not err in granting Chrysler summary judgment.

II. Court's Failure to Expressly Rule on Motions

¶13 The McLeods contend the superior court erred in failing to rule upon and grant their motions to strike and in failing to grant their request for a hearing on the summary judgment motions. We conclude that the court necessarily,

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[5] When Kenneth informed Chrysler's counsel that the application did not bear Kenneth's signature, she offered to remove it from the record because Chrysler's "claim and the Motion for Summary Judgment are certainly not dependent on that document."

[6] Without seeking leave from the court, the McLeods filed third-party affidavits over three weeks after responding to Chrysler's summary judgment motion. None of these affidavits challenged Kenneth's liability as a co-purchaser of the truck. In support of Carol's motion for summary judgment, she attached her affidavit in which the only possibly relevant avowal she made addressed her lack of involvement with the truck purchase. These three affidavits, in addition to Kenneth's affidavit avowing that he is not a lawyer, constituted the totality of evidence the McLeods presented the superior court.

although implicitly, denied the motions to strike and did not abuse its discretion in declining the request for oral argument.

¶14 As an initial matter, we summarily reject the McLeods' argument that the court committed reversible error by not expressly ruling on their motions to strike. The McLeods refer us to no authority that supports this contention, and we are not aware of any. *See* ARCAP 13(a)(6) (requiring appellant's opening brief to "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) (holding appellate courts "will not consider arguments posited without authority"). In any event, the record reflects that the court *did* consider the arguments raised in the McLeods' motions and implicitly rejected them.

¶15 Regarding the merits of the motions to strike, the McLeods argued Lacy's declaration should have been stricken because it was "unsworn" and referenced records reviewed by Lacy for which "[t]here is no foundation for what actual records were reviewed, how those records relate to [the McLeods], or where those records exist." The McLeods further argued Chrysler's statement of facts supporting the summary judgment motion should have been stricken because it was "premised entirely" upon

Lacy's "unsworn" declaration.

¶16 We conclude that the superior court did not abuse its discretion in implicitly denying the motions to strike. *See Birth Hope Adoption Agency, Inc. v. Doe*, 190 Ariz. 285, 287, 947 P.2d 859, 861 (App. 1997) (denial of motion to strike is reviewed for abuse of discretion). Lacy's declaration complies with Rule 80(i), which requires unsworn declarations contain the declarant's dated signature after the statement, "I declare . . . under penalty of perjury that the foregoing is true and correct." Further, Lacy's statements in his declaration that establish the foundational requirements for the Contract, and his statements regarding Kenneth's failure to comply with his payment obligations, are not inappropriate in this context. We find no error.[7]

¶17 With respect to the McLeod's request for a hearing on the summary judgment motions, the court declined to schedule oral argument pursuant to Rule 7.1(c)(2) "in the interest of expediting its business[.]" Rule 7.1(c)(2) affords trial courts the discretion to determine written motions without oral

[7] To properly challenge Chrysler's motion for summary judgment, the McLeods, instead of moving to strike the Lacy declaration and Chrysler's related statement of facts, should have presented the court with competent contrary evidence. *See Birth Hope*, 190 Ariz. at 287, 947 P.2d at 861 (noting "the proper way to test the sufficiency of a motion for summary judgment is by responding, not by moving to strike the motion"). They did not do so.

argument on this basis. By the time the summary judgment motions had been fully briefed, over ten months had transpired since Kenneth was served with Chrysler's complaint. This was sufficient time for the McLeods to conduct the discovery necessary to develop a meaningful response to Chrysler's summary judgment motion. Moreover, the McLeods fail to explain how the lack of a hearing prejudiced them. We cannot, on this record, find an abuse of discretion.

CONCLUSION

¶18 The summary judgment is affirmed. Pursuant to ¶ 10 of the Contract and A.R.S. § 12-341.01(A) (2003), and subject to compliance with Arizona Rules of Civil Appellate Procedure 21, we will award Chrysler an amount of reasonable attorneys' fees incurred on appeal. Chrysler is also entitled to its taxable costs.

____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

___/s/_____
PATRICIA A. OROZCO, Presiding Judge

___/s/_____
DONN KESSLER, Judge