DIVISION ONE
FILED: 05/24/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MILTON SMALL, Trustee of the Milton Small Living Trust, Plaintiff/Appellant/ Cross-Appellee, v. LARRY I. KANE and FERN R. KANE, Defendants/Appellees/ Cross-Appellants.	)	No. 1 CA-CV 11-0236 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure

Appeal from the Superior Court in Coconino County

Cause No. CV2008-0302

The Honorable Joseph J. Lodge, Judge
The Honorable Fred Newton, Judge (Retired)

AFFIRMED IN PART; VACATED IN PART; REMANDED IN PART

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J O H N S E N, Judge

¶1 Milton Small, as Trustee of the Milton Small Living Trust, appeals from the superior court's summary judgment in

favor of Larry I. and Fern R. Kane on his claims for breach of contract, trespass, punitive damages and injunctive relief. The Kanes cross-appeal the court's decision to award them only a third of their attorney's fees. We affirm the summary judgment but vacate and remand the attorney's fees order.

FACTS AND PROCEDURAL HISTORY

¶2 This is a dispute between neighboring homeowners in the Mystic Hills Subdivision in Coconino County. Mystic Hills was established in 1992, when the developer recorded the Declaration of Covenants, Conditions and Restrictions for Mystic Hills Development Corporation ("the CC&Rs") and the Final Plat of Mystic Hills ("the Plat"). Because preservation and enhancement of the natural landscape was of primary concern to the developer, the community was to be compatible with the natural environment. The CC&Rs provided for a "building envelope" for each lot that represented the "maximum developable area" of the lot. The CC&Rs also provided for the establishment of a Design Review Committee ("DRC"), which was charged with approving or disapproving plans in accordance with the Residential Development Standards ("RDS"). The Plat shows an area designated by parallel zigzag lines running through various lots, described as:

> DRAINAGE EASEMENT, VEGETATION CONSERVATION, AND WILDLIFE TRAVEL ZONES, PEDESTRIAN WALKWAYS FOR RESIDENTS ONLY AND OPEN SPACE.

NO RESTRICTIVE FENCING OR WALLS SHALL BE ERECTED WITHIN THIS AREA.

("Conservation Easement"). The developer relinquished management of the subdivision to the Homeowners Association Board on January 1, 2002.

¶3 The Kanes purchased Lot 83 in 1995. The lot has two building envelopes -- a smaller envelope at the front of the property nearest the road, Acacia Drive, and a larger envelope at the rear of the property. The two envelopes are separated by the Conservation Easement, which crosses the property. The Plat shows access to the rear envelope of Lot 83 by an easement across Lot 85. At some point before August 1994, the developer graded a driveway on Lot 83 from Acacia Drive through the front envelope and the Conservation Easement to the rear envelope. In 2007, the DRC approved the Kanes' plans for building on Lot 83, and construction began that year.

¶4 Small owns Lot 86, which is behind Lot 83. In April 2008, Small sued the Kanes, alleging breach of contract and trespass and seeking punitive damages and injunctive relief.[1] Small alleged the Kanes breached the CC&Rs and committed

[1] Small also named other defendants; the resolution of his claims against those parties is not at issue in this appeal.

trespass by constructing a driveway, turnaround, berming and landscaping in the Conservation Easement.[2]

¶5 On summary judgment, the Kanes asserted the location of the driveway already was established when they purchased the property. Among other evidence, they presented photographs from 1993 and 1995, which they claimed showed an access drive in the current driveway location. They presented an affidavit from a witness who testified the location of the driveway was established after the Plat was recorded but prior to the developer transferring management of the subdivision to the Homeowners Association. The Kanes also argued they had followed the required approval process set forth in the RDS and obtained the necessary approvals from the DRC and the City of Sedona.

¶6 After discovery and several rounds of briefing, the court entered summary judgment in favor of the Kanes. The Kanes then filed a statement of costs and a motion for an award of attorney's fees pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-341.01(A), (C) (West 2012)[3] and Rule 11, Arizona Rules of Civil Procedure, in the amount of $138,353. After

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[2] Small also alleged the Kanes had improperly combined the two building envelopes to construct their house and had built part of their house in the Conservation Easement. Small abandoned those allegations after a survey disproved them.

[3] Absent material revisions after the relevant date, we cite a statute's current Westlaw version.

receiving Small's objection, the court allowed the Kanes one-third of the amount they had sought in fees and $4,818.84 in costs. The Kanes filed a motion to amend the judgment on attorney's fees, which the court denied.

¶7 Small appealed from the judgment, and the Kanes filed a cross-appeal from the court's order awarding fees. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (West 2012).

DISCUSSION

A. Summary Judgment in Favor of the Kanes.

¶8 Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). We determine *de novo* whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000).

1. The community documents.

¶9 In entering summary judgment against Small, the superior court concluded the Kanes' driveway did not violate the CC&Rs or the RDS. We agree.

¶10 CC&Rs constitute a contract between the subdivision's property owners as a group and the individual lot owners. *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). We interpret

CC&Rs to give effect to the intent of the parties and to carry out the purpose for which they were created. *Powell v. Washburn*, 211 Ariz. 553, 556-57, ¶¶ 13-14, 125 P.3d 373, 376-77 (2006). We look at the language of the instrument and the circumstances surrounding its creation. *Id*. If CC&Rs are created by a subdivision developer, we attempt to discern the intent of that developer. *Saguaro Highlands Cmty. Ass'n v. Biltis*, 224 Ariz. 294, 296, ¶ 6, 229 P.3d 1036, 1038 (App. 2010). The interpretation of the CC&Rs is a question of law. *Powell*, 211 Ariz. at 555, ¶ 8, 125 P.3d at 375.

¶11 The Mystic Hills CC&Rs, recorded in August 1992, provide for the creation of the DRC, which is charged with establishing procedural rules and regulations, along with the provisions of the RDS, which the DRC "in its sole discretion" may amend, repeal or augment. The RDS provisions are deemed part of the CC&Rs and are binding on all owners within the development. The DRC must approve or disapprove plans in accordance with the RDS.

¶12 Under the RDS, preservation of the "native forest terrain" is identified as the underlying theme of the community and "preservation and enhancement of the natural landscape" is "of primary concern." The RDS also provides:

> These Residential Development Standards may change from time to time. Different sites and different designs will have different

> criteria. Consequently, it may seem that these Residential Development Standards are not being uniformly applied.

¶13 Section 2.1 of the RDS governs the building envelope and setbacks. It describes the building envelope as the "only area where alterations to the natural landscape may occur except for driveways." It also provides for modification of the building envelopes, but specifies that "[notwithstanding] any modification . . . Building Envelopes may not encroach upon any required minimum setback, except for that area required for the crossing of the front setback by the access driveway." It further specifies:

> In no case shall any construction take place in or extend into a 'Drainage Easement, Vegetation Conservation and Wildlife Travel Zone' as shown on the Plat. Where a 'Drainage Way Only' is shown on the Plat extending into the Building Envelope construction may occur if natural drainage is provided for and approval is given by the Design Review Committee and the City of Sedona.

¶14 Access drives are governed by § 2.4 of the RDS, which provides that access drives shall be located "to preserve and avoid important natural features . . . and to minimize disruption of the existing landscape." It permits access drives to cross drainage ways, under certain conditions. It specifically states: "No driveway shall be constructed across

the conservation easement on lot 94 to provide access to the southern building envelope as shown."[4]

¶15 Finally, § 4.13 gives the DRC discretion to waive the development standards:

> The Design Review Committee reserves the right to waive or vary any of the Development Standards and any of the procedures set forth herein on a lot by lot basis at its discretion, for good cause shown. Any request for a waiver or variance from the Development Standards by an owner shall be in writing. The Design Review Committee may also grant a waiver or variance on its own initiative.

¶16 The Mystic Hills developer created the Plat, CC&Rs and the RDS. Accordingly, we must determine whether the developer intended by these documents to prohibit the construction of a driveway over the Conservation Easement on Lot 83.

¶17 Small argues the developer's intent is evidenced by the Plat and the expressed purpose of creating a community in harmony with the natural environment. He notes that the Conservation Easement affects 42 lots and that the building envelopes for all of them can be reached without crossing the Conservation Easement. Where a lot's building envelopes are separated by the Conservation Easement, as with Lots 83 and 94,

[4] Lot 94, like Lot 83, consists of two building envelopes -- one at the front, near the street, and a second at the rear of the lot -- separated by the Conservation Easement.

access is available through an easement over a neighboring lot, so that the Conservation Easement need not be traversed.

¶18 Small further argues that RDS § 2.1, which includes the statement, "In no case shall any construction take place in or extend into" the Conservation Easement, prohibits the Kanes' driveway. But § 2.1 is titled "Building Envelope and Setbacks." RDS § 2.4, titled "Access Drives," provides generally that "drives shall be located to preserve and avoid important natural features." As noted, it expressly bars construction of a driveway across the Conservation Easement on Lot 94, but says nothing about Lot 83. If, as Small argues, § 2.1 prohibits the construction of all driveways in the Conservation Easement, then the express prohibition applying to Lot 94 in § 2.4 is unnecessary. We interpret contracts not to render terms superfluous. *Miller v. Hehlen*, 209 Ariz. 462, 466, ¶ 11, 104 P.3d 193, 197 (App. 2005). The implication of the reference to Lot 94 in § 2.4 is that a driveway may not be constructed over the Conservation Easement on Lot 94, but is allowed over the Conservation Easement on Lot 83.

¶19 Most significantly, the developer graded the very driveway at issue as part of the original construction of the subdivision. It defies logic to conclude that the developer intended to preclude construction of a driveway over the

Conservation Easement on Lot 83, when the developer himself created such a driveway.

¶20 Moreover, City of Sedona records show that the driveway on Lot 83 was planned as part of the original development. The records custodian for the City averred:

> Construction/improvement plans for the roads, utilities and certain driveways associated with the Mystic Hills subdivision were approved by the City of Sedona Engineering Department shortly after City Council's approval of the final plat and the subdivision's roads, utilities and certain driveways, including the driveway on Lot 83, were then constructed.

¶21 The developer's establishment of the driveway nearly contemporaneously with the recording of the community documents demonstrates the developer did not intend that the owner of Lot 83 could not construct a driveway through the Conservation Easement.

¶22 Small further argues, however, that the driveway was prohibited by § 12.15 of the CC&Rs, which bars construction of "any fence or other improvement or other obstruction which would interrupt the normal drainage of the land or within any area designated . . . as a 'drainage easement.'" Section 12.15 allows an exception for construction with the written consent of the City of Sedona and the DRC of structures "within the drainage easements so long as such structures do not interfere with the intended purpose or function of such areas."

¶23 Small contends the exception in § 12.15 applies only to areas designated on the Plat as "drainage easement," and not to areas designated as "drainage and storage easement," "drainage way only," or "drainage easement, vegetation conservation, and wildlife travel zone." Regardless of any other function that they might have, easements that include "drainage" as one of their purposes, such as the Conservation Easement, necessarily are drainage easements within CC&R § 12.15.

¶24 Small argues that, even if § 12.15 applies, no evidence shows that the DRC and the City approved the construction in writing pursuant to § 12.15. Although their approvals do not mention § 12.15, both the City and the DRC approved the Kanes' construction. The DRC gave written approval to the Kanes' preliminary design on March 5, 2007. Subsequent correspondence concerned the fact that the existing driveway had been created along and across deep washes and was placed in the only location possible "without huge environmental destruction." The Kanes' final submittal was approved in writing by the DRC on June 1, 2007. The record also shows that the City of Sedona approved the construction of the driveway on Lot 83 as part of the original construction of the subdivision.

¶25 Small also argues that the driveway was not permitted by § 12.15 because it interferes with the purpose of the

Conservation Easement. The only evidence Small offers for this assertion, however, is his own declaration that wildlife travel has been diminished by the construction of the driveway and the related construction traffic and that open space has been eliminated. These general statements are insufficient to preclude summary judgment. Small's declaration does not establish that any reduction in wildlife travel has been caused by the driveway rather than by construction traffic. As for the elimination of open space, the driveway already existed. He has not established how the Kanes' improvement of the existing driveway caused such a change.

2. The Plat.

¶26 Small also argues that the Plat precludes the paving of the driveway through that easement. Examination of the Plat, which the developer recorded with the community documents, confirms our conclusion above that the developer did not intend to preclude a driveway over the Conservation Easement in Lot 83.

¶27 Our goal in interpreting a plat is to determine and give effect to the intent of the party creating it. *Smith v. Beesley*, 226 Ariz. 313, 318, ¶ 15, 247 P.3d 548, 553 (App. 2011). Likewise, we interpret an easement so as to give effect to the intent of the parties as discerned from the language of the document or the circumstances surrounding the servitude's creation. *Id*. Generally, unless the easement is designated

exclusive, the owner of the servient estate is allowed other compatible uses of the land. *Id*. at 318, ¶¶ 16-17, 247 P.3d at 553.

¶28 The Plat describes the easement on Lot 83 as:

> DRAINAGE EASEMENT, VEGETATION CONSERVATION, AND WILDLIFE TRAVEL ZONES, PEDESTRIAN WALKWAYS FOR RESIDENTS ONLY AND OPEN SPACE. NO RESTRICTIVE FENCING OR WALLS SHALL BE ERECTED WITHIN THIS AREA.

The only express restriction is against fencing and walls, neither of which is at issue here. The Plat does not prohibit all construction of any sort. The easement would appear to be intended to ensure that the area remain unobstructed to allow for water flow and animal and pedestrian traffic. A driveway is not necessarily inconsistent with that purpose.

¶29 An assistant engineer and an assistant city attorney for the City of Sedona explained that the Plat language does not prohibit the grading or construction of a driveway over the easement and that, had such a restriction been intended, the easement would have been labeled "Vehicle Nonaccess Easement." The engineer explained that the driveway did not violate any easement on the Plat.

¶30 Citing Restatement (Third) of Property: Servitudes ("Restatement") § 2.13 (2000), Small suggests that a servitude restricting the use of the easement as a driveway was implied in the Plat. Section 2.13 states:

> In a conveyance or contract to convey an estate in land, description of the land conveyed by reference to a map or boundary may imply the creation of a servitude, if the grantor has the power to create the servitude, and if a different intent is not expressed or implied by the circumstances . . . .

The Restatement also warns, however, that "[s]ervitudes should not be implied on the basis of equivocal map labels or references." *Id.* cmt. a. In sum, although the Plat reserves use of the easement for certain purposes, it does not preclude the owner of the property from making other use of it.[5]

3. The other claims.

¶31 Small also argues the superior court erred in granting summary judgment on his claim for trespass. Trespass is the unauthorized physical presence on another's property. *State ex rel. Purcell v. Superior Court*, 111 Ariz. 582, 584, 535 P.2d 1299, 1301 (1975). Having concluded that the Kanes' construction of the driveway was not a breach of the CC&Rs or the RDS and therefore was not unauthorized, we affirm the court's judgment on Small's trespass claim and related punitive damages claim.

[5] Because the Plat did not preclude the Kanes' driveway, we do not address Small's argument that the developer did not properly amend the Plat.

B. The Award of Attorney's Fees.

¶32 Under A.R.S. § 12-341.01(A), the court may in its discretion award attorney's fees to the successful party in a contested action arising out of contract. The Kanes argue the superior court abused its discretion by awarding them attorney's fees of only one-third the amount they incurred and requested.

¶33 In explaining its ruling, the superior court stated:

> While this case was initially broader in scope it quickly focused on the propriety of Defendant Kanes' driveway and the actions of the [Homeowners] Association in approving the driveway. Referring to Defendant Kanes' Motion for Attorney Fees and Costs it is also clear there were additional dynamics and issues between the parties. The motion and responsive pleadings related to attorney fees and costs alone are in excess of 700 pages.
>
> This Court can order the payment of attorney fees from nothing up to 100%. Such an award is in the discretion of the Court. In this case, all the parties engaged in the extensive litigation and even though the case was decided on a summary basis the costs and fees are extremely high for what was litigated.
>
> IT IS ORDERED Plaintiff shall pay one-third (1/3) of the attorney fees and all the costs asserted by Defendant, Mystic Hills Homeowners Association, Larry I. Kane, Fern Kane and Douglas W. Hawkins. The Court accepts the amounts as submitted by these defendants.

¶34 The Kanes contend the superior court did not consider the record in making its award and instead arbitrarily limited

the award without providing an explanation. They argue the extensive litigation in the case was driven by Small, who they claim aggressively and needlessly ran up costs.

¶35 We accord the superior court considerable discretion in reviewing an application for attorney's fees. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985). When the court determines to deny all or a significant portion of a fees request under A.R.S. § 12-341.01(A), however, we encourage it to spell out its reasoning so that we may conduct a proper review. *Id.*

¶36 The court's order in this case observed only that "all the parties engaged in the extensive litigation" and that the "fees are extremely high for what was litigated."[6] We share the superior court's disappointment that this litigation consumed the amount of public and private resources that it did. But in evaluating a request for fees in such a case, the superior court should examine how and why the case developed as it did. *See SWC Baseline & Crismon Investors, L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, ___, ¶ 57, 265 P.3d 1070, 1084-85 (App. 2011) (party may not object to amount of fees when it bears

[6] The court also noted that the applications for fees and the responses totaled more than 700 pages. All but a relative few of those pages, however, were attorney timesheets, which an applicant is required to file in support of a request for fees.

blame for having escalated the litigation by filing unmeritorious claims).

¶37 Thus, a key issue in a case such as this is not whether the prevailing party's fees generally seem high, but whether those fees are reasonable under the circumstances. *See Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983). The primary issue between Small and the Kanes was relatively discrete and benign -- whether the community documents and the Plat permitted the Kanes to build their driveway. Small went far afield by pleading a tort claim (trespass) against the Kanes, along with a claim for punitive damages. The latter claim plainly was unmeritorious, but until it was dismissed, the Kanes theoretically were at risk for a huge amount of punitive damages. Under the circumstance, they hardly can be faulted if they directed their counsel to mount a full-scale defense.[7]

¶38 By the same token, although there were many motions filed and proceedings scheduled, in assessing a prevailing party's fee request, the superior court should attempt to discern whether issues that drove that party's fees upward were

[7] Although A.R.S. § 12-341.01(A) does not apply when a party has prevailed on a tort claim, in this case, the Kanes' defense to the trespass claim was the same as their defense to the breach-of-contract claim -- that the community documents and Plat permitted them to construct their driveway.

raised by that party or by the other. For example, in this case Small argued at some length that the RDC acted improperly by waiving provisions in the CC&Rs and the RDS that purportedly barred the Kanes' driveway, and likewise argued that the developer did not properly amend the Plat to allow the driveway. All of these arguments are irrelevant because the community documents and the Plat did not prohibit the driveway, but the Kanes had no choice but to respond when Small raised them. The same is true with respect to Small's early contention that the Kanes' home violated the community documents. *See* note 2, *supra.*

¶39 We therefore vacate the superior court's order on the Kanes' request for attorney's fees and direct the court to reconsider that request on remand. We do not mean to say that on remand, the court should approve all of the Kanes' requested fees. In his objection to the fees request, Small identified approximately $45,000 in fees that he contended were inappropriate or excessive. In the exercise of its discretion, the superior court on remand may take into account those arguments by Small, as well as the other factors set out in *Associated Indem. Corp.*, 143 Ariz. at 570, 694 P.2d at 1184.

CONCLUSION

¶40 We affirm the judgment against Small and in favor of the Kanes, except with respect to the amount of attorney's fees

imposed in favor of the Kanes. We vacate and remand that portion of the judgment for further proceedings consistent with this decision.

¶41 The Kanes request an award of fees pursuant to A.R.S. § 12-341.01(A) and costs pursuant to A.R.S. § 12-341 (West 2012). In our discretion, we award costs and reasonable attorney's fees upon the Kanes' compliance with Rule 21, Arizona Rules of Civil Appellate Procedure.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PHILIP HALL, Judge