NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 04/24/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CITY OF PHOENIX, a municipal corporation, Plaintiff/Appellee, v. DAVID B. VANYO, individually and as trustee, Defendant/Appellant.	No. 1 CA-CV 11-0296 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-005453

The Honorable Sam Meyers, Judge

AFFIRMED

Phoenix City Attorney's Office — Phoenix
By L. Michael Hamblin, Assistant City Attorney
Attorneys for Plaintiff/Appellee

Gallagher & Kennedy, P.A. — Phoenix
By Jeffrey D. Gross
Attorneys for Defendant/Appellant

J O H N S E N, Judge

¶1 David B. Vanyo appeals the superior court's denial of his motion for new trial after a jury granted the City of Phoenix a prescriptive easement over a portion of his property. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Vanyo purchased a home in Phoenix in 2004.[1] To the northwest and up a mountain from Vanyo's property sat a water tank owned by the City of Phoenix that could be reached only by a narrow road running along the western boundary of Vanyo's property. Eventually Vanyo discovered that when the City had paved the access road, it also paved some of his property lying adjacent to the road. After Vanyo complained, the City offered to purchase about 5,500 square feet of property from Yanyo, but Vanyo rejected the offer.

¶3 The City then filed a complaint in eminent domain against Vanyo, seeking to acquire the property and a temporary construction easement to expand access to the water tank during an improvement project. Vanyo counterclaimed, alleging inverse condemnation based on the City's past use of his property. The City disputed that Vanyo was entitled to any compensation for past use and amended its complaint to add a claim for a prescriptive easement over the encroachment.

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[1] We view the evidence in the light most favorable to sustaining the jury's verdict. *See S Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, 18, ¶ 16, 31 P.3d 123, 131 (App. 2001).

¶4 The matter went to trial on November 16, 2010. As tried, the issue was the City's use of Vanyo's property for water department employees to park their vehicles and turn them around before heading down the access road away from the water tank. A long-time water department employee who said he was "very familiar" with the water tank testified that when he started daily inspections of the tank in 1987, there was a flat dirt turn-around area to the east of the water tank adjacent to an embankment that sloped down to the east. Because the narrow road is the only means to access the water tank, City trucks used the turn-around area to reverse direction before going back down the road. The employee testified that from 1987 to 1995, when a remote monitoring system was installed, a City employee drove up to inspect the water tank three times a day. After that period, City employees drove up to inspect the tank twice a week, in addition to visits required by numerous construction and improvement projects, and the employee who testified personally observed workers using the turn-around area. In 2005, the City paved the turn-around area. The paving went up to the edge of the original flat dirt area, but not beyond.

¶5 The jury was presented two verdict forms. One allowed the jury to find that Vanyo was entitled to compensation for the City's taking of his property and to determine the amount of compensation, the amount of compensation for the temporary

construction easement, and the rental value of the City's past use of the property on the inverse condemnation claim. Rather than signing that verdict form, the jury signed and submitted the second verdict form, finding the City established a prescriptive easement over 3,609 square feet of Vanyo's property and awarding Vanyo $13,917 for the temporary construction easement.

¶6 Vanyo filed a motion for new trial pursuant to Arizona Rule of Civil Procedure 59(a)(8), arguing the jury's verdict was not supported by the evidence. The superior court denied the motion. Vanyo timely appealed.[2] We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(5)(a) (West 2012).[3]

DISCUSSION

¶7 "We review for an abuse of discretion a court's denial of a motion for a new trial on the grounds that the verdict is against the weight of the evidence." *Dawson v. Withycombe*, 216 Ariz. 84, 95, ¶ 25, 163 P.3d 1034, 1045 (App. 2007). The court in such a case abuses its discretion "only if the evidence was

[2] Vanyo's notice of appeal was premature, but the superior court later entered a final appealable judgment. *See Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981).

[3] Absent material revisions after the date of the events at issue, we cite a statute's current version.

not sufficient" to support the verdict. *State v. Neal*, 143 Ariz. 93, 97, 692 P.2d 273, 276 (1984).

¶8 To establish a prescriptive easement, the City was required to prove, by clear and convincing evidence, that: (1) the land had been actually and visibly used for ten years, (2) "the use began and continued under a claim of right" and (3) "the use was hostile to the title of the true owner." A.R.S. § 12-526(A) (West 2012) (ten-year statute of limitations); *Harambasic v. Owens*, 186 Ariz. 159, 160, 920 P.2d 39, 40 (App. 1996) (elements of prescriptive easement); *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996) (clear and convincing standard).

¶9 On appeal, Vanyo does not dispute that the City's use of the property was under a claim of right and hostile to his title. He argues only that the City failed to present sufficient evidence that it used the entire 3,609 square feet of encroachment area. *See Krencicki v. Petersen*, 22 Ariz. App. 1, 3, 522 P.2d 762, 764 (1974) (prescriptive easement may not encompass more than the area actually used).

¶10 The evidence recounted above was sufficient to establish the City's requisite use of the turn-around area. In response to Vanyo's implicit contention that the City offered insufficient evidence of use of the embankment property, the City argues it "goes without saying" that the embankment

"supports" the turn-around area and, accordingly, that the City proved a prescriptive easement over the embankment.

¶11 The parties have not directed us to any reference in the record concerning whether the embankment "supported" the turn-around from a geological or structural engineering perspective, and we have searched the record in vain for any such reference. Nevertheless, we conclude the case was tried by consent on the theory that if the City were able to establish the requisite "use" of the turn-around, it would be entitled to a prescriptive easement encompassing not only the turn-around but also an agreed-upon section of the embankment.

¶12 In Exhibit A to Vanyo's Answer to the City's Second Amended Complaint and Counterclaim, the turn-around area was depicted as 1,065 square feet in size and the embankment was 2,544 square feet, totaling 3,609 square feet. Although Vanyo has not provided us with the entire record of the superior court trial, at no point in the record available to us did Vanyo argue the City was required to prove use of the embankment separate from use of the turn-around. Nor did he argue that use of the turn-around did not necessarily involve use of the embankment. In fact, his position in the superior court was that by using the turn-around, the City wrongfully had used both the turn-around and the embankment. Vanyo's counterclaim for inverse condemnation (which sought rent for the City's past use of the

property) alleged "continuous use and occupation of the Encroachment Area by the City" and asserted that "[t]he amount of the Encroachment Area that has been used by the City is approximately 3,609 square feet." In his Answer to the City's Second Amended Complaint and Counterclaim, Vanyo used the same language, again alleging the City used 3,609 square feet of his property. And in the parties' Joint Pretrial Statement, among the "issues of fact or law deemed material" Vanyo cited was whether "[t]he City excavated and paved approximately 3,609 square feet of [his] property and has been using it without [his] consent." Finally, Vanyo offered no objection to the verdict form for prescriptive easement, which did not allow the jury to find that the City had a prescriptive easement for less than the entire 3,609 square feet.

¶13 In sum, throughout the proceedings in the superior court, Vanyo took the position that the City had used the embankment when it used the turn-around. Upon the jury's verdict that the City's use satisfied the elements of a prescriptive easement, Vanyo may not argue for the first time on appeal that when the City used the turn-around it was not at the same time using the embankment on which the turn-around is located.

CONCLUSION

¶14 For the foregoing reasons, we affirm the judgment of the superior court. We award the City its costs on appeal, contingent on compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
PATRICIA K. NORRIS, Judge