IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

WILLIAM LANE AND SUSAN LANE, HUSBAND AND WIFE,
Plaintiffs/Appellants,

v.

SONOMA COMMUNITY ASSOCIATION,
AN ARIZONA NONPROFIT CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2016-0057
Filed October 26, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20144104
The Honorable Catherine Woods, Judge

AFFIRMED

COUNSEL

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By Drue A. Morgan-Birch
Counsel for Plaintiffs/Appellants

Curl & Glasson, PLC, Tucson
By Douglas W. Glasson
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Vásquez concurred.

H O W A R D, Presiding Judge:

¶1 William and Susan Lane appeal from the trial court's judgment in favor of Sonoma Community Association ("SCA"). They contend the court erred by concluding SCA did not breach its contract with the Lanes and in denying their request for injunctive relief. Because the judgment is supported by the record, we affirm.

Factual and Procedural Background

¶2 On appeal from a judgment on partial findings, we view the facts and inferences therefrom in the light most favorable to sustaining the judgment. *Johnson v. Pankratz*, 196 Ariz. 621, ¶¶ 19-20, 2 P.3d 1266, 1271 (App. 2000). But the facts are essentially undisputed. In 2005, the Lanes purchased a lot in the Sonoma Community, a subdivision in a larger master-planned community. The developer of the subdivision built a house on the lot and the Lanes moved into the home in 2006. Homes in their subdivision are governed by two sets of Covenants, Conditions and Restrictions: those of the larger, master-planned community (the "Master CC&Rs") and those of the smaller Sonoma Community (the "Tract CC&Rs").

¶3 Immediately west of the Lanes' property is a concrete-lined drainage way. The east retaining wall of the drainage way sits entirely on the Lanes' property. A three-foot tall wrought iron fence arises from the middle of that retaining wall. The fence runs along the west edge of the Lanes' front yard.

¶4 In December 2009, the SCA Board voted that "[m]aintenance of any wall and fencing above ground along the ditches will be the shared (50-50) responsibility with the adjoining homeowner." In December 2013, the Board authorized a contract to repair the drainage way fences throughout the community. In April

2014, the Board sent a notice to the Lanes that, pursuant to the December 2009 motion, their share of the repairs was $492.

¶5 In July 2014, the Lanes sued SCA for breach of contract, contending it violated the CC&Rs by assessing them half the cost of the repairs, and they also sought injunctive relief. Following a bench trial, the trial court granted SCA a Rule 52(c), Ariz. R. Civ. P., judgment on partial findings, concluding the Lanes had not produced sufficient evidence that SCA had breached any contractual obligation and had not met the required elements for injunctive relief. We have jurisdiction over the Lanes' appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Breach of Contract

¶6 The Lanes first argue the trial court erred in concluding SCA did not breach the CC&Rs because the fence is a "Common Area" under the CC&Rs and therefore SCA is entirely responsible for the cost of its repair and maintenance. They contend that because the wall is integral to the drainage way, and the fence would not be there but for the drainage way, the "unambiguous intent [of the CC&Rs] is that SCA is responsible for maintaining the fence at issue." When reviewing a judgment entered pursuant to Rule 52(c), we defer to the trial court's "findings of fact but independently review its conclusions of law." *Tobias v. Dailey*, 196 Ariz. 418, ¶ 7, 998 P.2d 1091, 1093 (App. 2000); *see also Johnson*, 196 Ariz. 621, ¶¶ 19-20, 2 P.3d at 1271.

¶7 CC&Rs "constitute a contract between property owners as a whole and individual lot owners, and contract interpretation is a question of law, which we review de novo." *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, ¶ 31, 257 P.3d 1168, 1177 (App. 2011). "[T]he cardinal principle in construing restrictive covenants is that the intention of the parties to the instrument is paramount." *Powell v. Washburn*, 211 Ariz. 553, ¶ 9, 125 P.3d 373, 376 (2006), *quoting Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 449, 868 P.2d 1030, 1032 (App. 1993). "In interpreting [CC&Rs], 'the language used will be read in its ordinary sense, and the restriction . . . will be construed in light of the circumstances surrounding its formulation, with the idea of carrying out its object, purpose and

intent.'" *Cypress*, 227 Ariz. 288, ¶ 31, 257 P.3d at 1177, *quoting Powell*, 211 Ariz. 553, ¶ 16, 125 P.3d at 377 (omission in *Cypress*).

¶8 The Master CC&Rs define a "Common Area" as "all real property and the Improvements or amenities thereon . . . which shall from time to time be constructed, owned, controlled or operated by [SCA] for the common use and enjoyment of the owners . . . including . . . flood control [and] drainage." The Tract CC&Rs state that SCA owns all Common Areas, which are intended for use as, among other things, "drainage-ways." Both CC&Rs provide that SCA is responsible for the repair and maintenance of "Common Areas." SCA stipulated the drainage way next to the fence at issue here is a Common Area. A land surveyor testified that the retaining wall is "integral" to the drainage way and that the fence, though not a "functional" part of the drainage way, is a safety feature required by building codes because of the drainage way.

¶9 These facts support the Lanes' claim that the CC&Rs show an intent that the fence be considered a Common Area. However, "each part of a contract must be read together." *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, ¶ 18, 246 P.3d 938, 942 (App. 2010). And "because specific contract provisions express the parties' intent more precisely than general provisions, specific provisions qualify the meaning of general provisions." *Id.* A specific provision thus gives definition to and controls over general provisions. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 274, 681 P.2d 390, 426 (App. 1983); *see also Brady v. Black Mountain Inv. Co.*, 105 Ariz. 87, 89, 459 P.2d 712, 714 (1969) (specific contract provision "controls over the general").

¶10 Section 14.16.5 of the Master CC&Rs addresses the exact situation here. It states that

> in the case of walls or fences: (i) between Common Areas and Lots or Parcels; or (ii) situated on Common Areas within or adjacent to a Lot or Parcel, the Owners . . . of such Lots or Parcels shall be responsible, at their expense, for all maintenance, repair, painting and replacement of that portion of the wall that faces the Owner's property.

This provision demonstrates the parties' intent that the owners of lots abutting Common Areas share the cost of fence repair and maintenance, whether the fence is on the homeowner's lot or the Common Area. Therefore, whether the fence at issue is on the Common Area, as the Lanes argue, or in between, the Lanes are responsible for half of the maintenance.

¶11 The intent of parties' in these circumstances is clear based on the unambiguous language of § 14.16.5. *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, ¶ 22, 87 P.3d 81, 86 (App. 2004) ("Unambiguous provisions in restrictive covenants will generally be enforced according to their terms."), *abrogated on other grounds in Powell*, 211 Ariz. 553, ¶ 15, 125 P.3d at 377. Moreover, accepting the Lanes' interpretation would render § 14.16.5 "meaningless and violate the expressed intention of the contract among the property owners." *Id.* We decline to do so.

¶12 Next, "the circumstances surrounding [the CC&Rs] formulation" support the interpretation that the fence was not intended to be a Common Area under the sole responsibility of SCA. *Powell*, 211 Ariz. 553, ¶ 16, 125 P.3d at 377, *quoting Griffin v. Tall Timbers Dev., Inc.*, 681 So. 2d 546, 551 (Miss. 1996). The land surveyor testified that the retaining wall and fence, consistent with the original design, were built entirely on the Lanes' lot. And those same designs expressly exclude the wall and fence from designation as a "Common Area." The clear intent, therefore, is that the drainage way, and only the drainage way, was considered a Common Area under the control of SCA and the fence was not. The design also demonstrates that this was always intended to be a fence between a Common Area and lot, as expressly contemplated by § 14.16.5.

¶13 Lastly, § 9.03 of the Tract CC&Rs provide that "[i]n the event of damage to an improvement on a Lot, the Owner thereof shall repair or rebuild the improvement to the same standards and specifications of the original improvement." An "[i]mprovement" includes any fences or walls located on a lot. And § 10.01 of the Tract CC&Rs further provides that "[e]ach Owner shall be responsible for all costs and expenses relating to the maintenance, repair, upkeep, taxation and assessment of his Lot(s) and any

improvements thereon, including but not limited to . . . maintenance and repair of . . . fences and walls."

¶14 Contrary to the Lanes' argument, the CC&Rs do not show an intent that a fence which, by design, lies entirely on a homeowner's lot and abuts a Common Area also be considered a "Common Area." Rather, pursuant to §§ 9.03 and 10.01, SCA would be in violation of the CC&Rs if it paid for the entire cost of the fence's repairs. Section 14.16.5, as the most specific and applicable provision, shows the parties intended the cost of repair for the fence at issue here be shared equally by the Lanes and SCA. *See ELM Ret. Ctr.*, 226 Ariz. 287, ¶ 18, 246 P.3d at 942.

¶15 The Lanes additionally argue the CC&Rs create an easement for the fence and wall in favor of SCA. They point to several provisions of both CC&Rs which provide easements for "encroachments" of retention walls and other "improvements" which occurred during the construction process. They additionally rely on provisions of the CC&Rs which grant various easements to SCA for the purposes of water drainage.

¶16 The Lanes' reliance on these provisions appear to be based on their premise that the drainage way, retention wall and fence are one structure. They thus appear to reason that because the fence sits on their lot, it necessarily "encroaches" upon it. Alternatively, they contend these provisions evince the intent that because an easement for drainage exists, it must include the fence as well.

¶17 First, however, the land surveyor testified the fence was not a "functional" part of the drainage way and was intended to lie entirely on the Lanes' lot. Accordingly, the trial court could have properly found that the fence was not an encroachment. Second, even if the fence is an encroachment, that fact results in SCA having the legal right to have the fence on the Lanes' lot. The easement provisions cited by the Lanes do not dictate which party is financially responsible for the repair and maintenance of the fence. *See Scalia v. Green*, 229 Ariz. 100, ¶ 7, 271 P.3d 479, 481 (App. 2011) (document granting easement defines rights of parties).

¶18 Next, the provisions granting SCA an easement for drainage of water are, by their terms, only granted "for the purpose of" improving the drainage of water. Likewise, in another provision SCA only reserved itself the right to declare easements over Common Areas for "drainage." Those provisions, like the encroachment easement provisions, do not address the financial responsibility for maintenance of fences between lots and drainage ways. *See id.* Section 14.16.5 specifically addresses the financial responsibility for maintenance of fences between a homeowner's lot and Common Area, regardless of who holds legal title to the fence, and thus governs here. *See ELM Ret. Ctr.*, 226 Ariz. 287, ¶ 18, 246 P.3d at 942.

¶19 The Lanes additionally argue the trial court's conclusion that § 14.16.5 controlled here effectively, and erroneously, nullified the easement provisions of the CC&Rs. But, as explained above, the easements, if anything, give SCA a right to maintain the fence, but § 14.16.5 dictates how the parties will share the maintenance costs. This interpretation of § 14.16.5 does not nullify the easement provisions.

¶20 The Lanes further argue the Board acted *ultra vires* when it passed the December 2009 motion to make homeowners whose property abutted a drainage way responsible for half the cost of the repair of the fences between the homeowner's property and the drainage way. They reason the motion effectively amended the CC&Rs—an action which can only be accomplished by the approval of "at least fifty-one percent (51%) of the total votes held by Owners"—and was thus outside the authority of the Board.

¶21 This motion, however, did not amend the CC&Rs because it is entirely consistent with § 14.16.5. Even were we to conclude the motion was an *ultra vires* act, the Lanes would still be responsible for half of the repair cost of the fence pursuant to § 14.16.5 and we therefore decline to address this argument further.[1]

[1]For these same reasons, we reject the Lanes' argument that the Board's motion discriminated against them by failing to spread the cost of the repairs across the other sixty-six lot owners in SCA.

Injunctive Relief

¶22 The Lanes lastly argue the trial court erred by denying their request for injunctive relief to prevent SCA from continuing to violate the CC&Rs. They contend that "[n]othing in the CC&Rs alerted them that they would be subject to assessments to reimburse [SCA] for maintaining common areas which it was contractually obligated to repair and maintain."

¶23 We review the trial court's ruling for an abuse of discretion. *Horton v. Mitchell*, 200 Ariz. 523, ¶ 12, 29 P.3d 870, 873 (App. 2001). We will affirm the court if it is correct for any reason. *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 178, 680 P.2d 1235, 1239 (App. 1984).

¶24 An injunction is an equitable remedy that allows the trial court to structure a remedy to promote equity between the parties. *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, ¶ 9, 2 P.3d 1276, 1280 (App. 2000). "The enforcement of restrictive covenants through an injunction is not a matter of right, but is governed by equitable principles." *Id.*

¶25 Section 14.16.5 of the CC&Rs expressly states that the cost to repair and maintain fences between lots and Common Areas is to be borne equally between the homeowner and SCA. And the Lanes received a copy of the CC&Rs and the plat map indicating the fence was constructed on their lot when they initially purchased it. The Lanes have not shown that SCA has violated or intends to violate the CC&Rs. We therefore cannot say the trial court abused its discretion in denying the Lanes' request for injunctive relief. *See Horton*, 200 Ariz. 523, ¶ 12, 29 P.3d at 873; *see also Rancho Pescado, Inc.*, 140 Ariz. at 178, 680 P.2d at 1239.

Attorney Fees and Costs on Appeal

¶26 The Tract CC&Rs provide that reasonable attorney fees and costs shall be awarded to the "prevailing party in any Court action." We therefore award SCA, as the prevailing party, its reasonable attorney fees and costs upon its compliance with Rule 21, Ariz. R. Civ. App. P. *See Mining Inv. Grp., LLC v. Roberts*, 217 Ariz. 635, ¶ 26, 177 P.3d 1207, 1213 (App. 2008).

Disposition

¶27 For the foregoing reasons, we affirm the trial court's judgment.