IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

JAMES P. WILLIAMS, et al.,
Plaintiffs/Appellants-Cross Appellees,

v.

KEVIN KING, et al.,
Defendants/Appellees-Cross Appellants.

No. 1 CA-CV 18-0498
FILED 1-23-2020

Appeal from the Superior Court in Maricopa County
No. CV2015-009886
The Honorable Rosa Mroz, Judge

AFFIRMED

COUNSEL

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OPINION

Judge David D. Weinzweig delivered the opinion of the Court, in which Presiding Judge Randall M. Howe and Judge John C. Gemmill[1] joined.

W E I N Z W E I G, Judge:

¶1 This case requires us to examine whether the Arizona Constitution guarantees a jury trial for a private civil action created by statute. At issue is the private action for altering a watercourse without authorization under A.R.S. § 48-3613(D). We hold the Constitution affords no such right because the common law did not afford that right at statehood.

¶2 Plaintiffs James Williams and Susan Holcombe sued Defendants Kevin and Bouatheo King for flood damage, asserting various common law tort claims and a private right of action under A.R.S. § 48-3613(D). Plaintiffs received a jury trial and jury verdict on all common law claims, but the superior court held a bench trial on the statutory claim and ruled for Defendants. Plaintiffs appeal, arguing the superior court improperly denied them a jury trial on their statutory claim, and erroneously denied their request for attorney fees and injunctive relief under the statute. Defendants cross-appeal the jury verdict and the court's denial of Rule 68 sanctions. We find no error and thus affirm.

FACTS AND PROCEDURAL BACKGROUND

¶3 This appeal arises from a dispute between neighbors over flood damage. Plaintiffs and Defendants live on adjacent lots at the base of South Mountain in Phoenix. Defendants erected a perimeter concrete wall in 2012 and imported fill dirt to elevate their lot. Defendants did not hire an engineer to determine the waterflow consequences of their improvements and never sought or secured prior approval from government regulators for grading or drainage plans.

¶4 A severe monsoon storm swept the area in August 2014, dumping large amounts of rain in a brief period. Plaintiffs sustained

[1] The Honorable John C. Gemmill, Retired Judge of the Court of Appeals, Division One, has been assigned to hear this matter under Article 6, Section 3, of the Arizona Constitution.

serious flood damage from the rainwater, which breached their home and devastated their yard. Plaintiffs claimed that Defendants diverted the rainwater onto Plaintiffs' lot—pointing to Defendants' concrete wall and fill dirt. Plaintiffs sued Defendants for flood damage, asserting five common law theories—strict liability, negligence, trespass, negligence per se and nuisance—and one statutory claim for unauthorized alteration of a watercourse under A.R.S. § 48-3613(D) (the "Altered Watercourse Claim"). Plaintiffs timely demanded a jury trial on all theories.

¶5 After the court denied both parties' summary judgment motions, Defendants served an offer of judgment on Plaintiffs for $65,000. A cover letter accompanied the offer of judgment, indicating that Defendants would also be willing to convert part of the fence into a "wrought iron view fence through which ground water could pass" and level the ground around the modified fence. Plaintiffs declined the offer.

¶6 As trial approached, Defendants asked the superior court to clarify whether the court or a jury would decide the Altered Watercourse Claim, including whether the concrete wall was erected in a "watercourse" as defined in A.R.S. § 48-3601(12). The court said it intended to submit a special interrogatory to the jury on the watercourse issue, while reserving the right to accept or reject the jury's factual finding if the court determined the question was for the court. The court reiterated this plan at the final pretrial conference.

¶7 The jury trial began in mid-April 2018. After Plaintiffs presented their case, Defendants unsuccessfully moved for judgment as a matter of law. The same day, the court informed the parties that it would decide the statutory Altered Watercourse Claim and would not submit a special interrogatory to the jury. The jury ultimately returned a verdict on the common law tort claims for Plaintiffs, awarding them $58,790 in damages. But the court ruled against Plaintiffs on the Altered Watercourse Claim because "[n]either the initial wall, nor the 2015 wall, nor the [fill] dirt, are in a watercourse."

¶8 Plaintiffs moved to clarify and reconsider the court's ruling on the Altered Watercourse Claim, arguing the jury found in their favor on every claim. The court denied the motions, explaining in relevant part that Plaintiffs had no statutory or constitutional right to a jury trial on the Altered Watercourse Claim.

¶9 Plaintiffs moved for an award of attorney fees under A.R.S. § 48-3613(D) and costs under A.R.S. § 12-341, while Defendants moved for

Rule 68 sanctions based on their offer of judgment. The court awarded costs to Plaintiffs but declined to award fees and denied Defendants' motion for Rule 68 sanctions.

¶10 Plaintiffs timely appealed from the final judgment. Defendants timely cross-appealed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), -2101(A)(1) and -2101(A)(5)(b).

DISCUSSION

I. Plaintiffs' Appeal

¶11 Plaintiffs argue the superior court erroneously denied them a jury trial on the Altered Watercourse Claim, A.R.S. § 48-3613(D), and contend the court's decision on the merits of that claim was unsupported by substantial evidence.

A. Right to Jury Trial on Private Civil Action

¶12 Plaintiffs first challenge the superior court's denial of a jury trial on their private cause of action under Section 48-3613(D). Plaintiffs enjoyed a jury trial on their common law tort claims—including negligence, nuisance, strict liability, trespass and negligence per se—but the superior court determined that no jury trial was available on the statutory claim. We review de novo whether Plaintiffs were entitled to a jury trial. *Carey v. Soucy*, 245 Ariz. 547, 550-51, ¶ 12 (App. 2018).

1. Private action under A.R.S. § 48-3613

¶13 Section 48-3613 was enacted in 1984 along with many other statutes to "establish[] and regulate[] flood control districts." *A Tumbling-T Ranches v. Flood Control Dist.*, 222 Ariz. 515, 539, ¶ 77 (App. 2009); A.R.S. §§ 48-3601 to -3628. Subsection A of the statute generally declares that "a person shall not engage in any development which will divert, retard, or obstruct the flow of waters in any watercourse without securing written authorization from the board of the [flood control] district in which the watercourse is located," while subsection B identifies various exceptions that require no authorization. A.R.S. § 48-3613(A), (B). At issue here is subsection D, which recognizes a private action against "violators" of the statute, directing that courts "shall require the violator to . . . remove the obstruction and restore the watercourse to its original state," and "may award such monetary damages as are appropriate to the injured parties resulting from the violation, including reasonable costs and attorney fees." A.R.S. § 48-3613(D).

¶14 We have interpreted this private action to require proof of three elements: (1) a diversion, retardation or obstruction of a watercourse, (2) lack of authorization from the flood control district, and (3) the possibility of resulting damage. *Smith v. Beesley*, 226 Ariz. 313, 323, ¶ 37 (App. 2011). The statute leaves the issue of whether to award money damages or attorney fees "entirely [to] the court's discretion," and "[n]othing in the statute prohibits a trial court from considering the availability of authorization or the good faith efforts of a developer to comply with the law when deciding whether to award monetary damages or attorney fees." *Id*. at 324, ¶ 40.

2. No basis for jury trial under statute or constitution

¶15 Arizona law recognizes the right to a jury trial in civil actions only when afforded by a statute or the constitution. *See In re Estate of Newman*, 219 Ariz. 260, 272, ¶ 45 (App. 2008) ("Unless the statute expressly so provides, there is no right to a jury trial on statutory claims that did not exist at common law prior to statehood.").

¶16 Plaintiffs do not contend that Section 48-3613 guarantees a jury trial; the statute never mentions the topic. Plaintiffs instead rely on Article 2, Section 23, of the Arizona Constitution, which recognizes "[t]he right of trial by jury shall remain inviolate."[2] Section 23 preserves the historical right to a jury trial in civil actions if that right "existed at common law when the Arizona Constitution was adopted in 1910." *Life Inv'rs Ins. Co. v. Horizon Res. Bethany, Ltd.*, 182 Ariz. 529, 532 (App. 1995).

¶17 Plaintiffs rely on *Kroeger v. Twin Buttes R. Co.*, 13 Ariz. 348 (1911), as the historical right they wish to preserve, insisting the court in *Kroeger* afforded a jury trial for a common law tort claim that is "substantially similar[]" to the private action under Section 48-3613(D).

¶18 But Plaintiffs received precisely the jury trial recognized in *Kroeger*. The plaintiff landowner in *Kroeger* received a jury trial on his common law tort claims against a railroad for building an embankment that diverted storm water onto his property, including claims that the railroad "did not use due and reasonable care" and he suffered damages "by reason of the [railroad's] negligence." *Kroeger v. Twin Butte R. R. Co.*, 14 Ariz. 269, 272-73 (1912). Plaintiffs correctly describe the "source of the remedy" in *Kroeger* as "likely negligence, trespass, or nuisance, all claims with the right

[2] The Constitution also guarantees "an impartial jury" in Article 2, Section 24, but only "[i]n criminal prosecutions."

to a jury trial." So too here. Plaintiffs enjoyed a jury trial on their common law tort claims against Defendants for building a concrete wall that diverted storm water onto their land, including claims for negligence, nuisance and trespass.

¶19 Plaintiffs instead want us to expand the historical right embraced in *Kroeger* until it reaches the modern private action under Section 48-3613(D). But Section 23 of the Arizona Constitution neither creates nor expands the right to a jury trial "where none existed before." *See Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 416, ¶ 43 (2006) ("Arizona's jury trial provision merely preserves a right to jury trial if such a right existed at common law.").

¶20 Section 48-3613(D) was not enacted to codify the common law claims asserted in *Kroeger*, either explicitly or implicitly. *See Soto v. Sacco*, 242 Ariz. 474, 482, ¶ 23 (2017) ("The Arizona Constitution protects only the right to a jury trial as it existed before statehood."); *cf. Derendal v. Griffith*, 209 Ariz. 416, 425, ¶ 36 (2005). "In determining whether there is a common-law, jury-eligible antecedent to a modern offense, we compare the character of the modern offense with that of the common-law offense," and "focus on the elements of the offenses." *Crowell v. Jejna*, 215 Ariz. 534, 538, ¶¶ 10, 13 (App. 2007) (applying Section 23 in the criminal law context).

¶21 Although the statute and common law claims both offer paths to recover flood damages, the private action differs in character and proof requirements from the common law tort claim. The private action under Section 48-3613(D) is merely a cog in a comprehensive regulatory scheme of 30-plus statutes that "establishe[d]" county flood control districts and imbued them with authority to authorize development in a watercourse. *A Tumbling-T Ranches*, 222 Ariz. at 539, ¶ 77. To that end, the private action represents a potent incentive for persons to secure board authorization from the flood control district before pursuing developments that might obstruct a watercourse.

¶22 By comparison, the common law claim in *Kroeger* has no connection to flood control districts and requires no proof that the defendant did not secure the blessing of regulators. After all, *Kroeger* and statehood predate Section 48-3613 and the emergence of flood control districts by decades. *See Life Inv'rs Ins. Co.*, 182 Ariz. at 532 ("Since the deed of trust statute was enacted in 1971, there was no provision for this type of statutory action in 1910, and, hence, no issue exists regarding preservation of a nonexistent right."); *Magma Flood Control Dist. v. Palmer*, 4 Ariz. App.

137, 138 (1966) (first legislation creating flood control districts was enacted in 1921).

¶23 The modern statute also endows the court with total discretion to award damages, is available to pursue actual and potential damages, provides for injunctive relief and authorizes a shift of attorney fees. *See* A.R.S. § 48-3613(D) ("The court may also award such monetary damages as are appropriate to the injured parties resulting from the violation, including reasonable costs and attorney fees."). The common law claim, by contrast, does not leave damages to the court, requires actual damages, and does not authorize a shift of attorney fees (either at statehood or now). *See Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9 (2007) (common-law negligence claim requires proof of actual damages); *Smith v. Am. Express Travel Related Servs. Co.*, 179 Ariz. 131, 141 (App. 1994) (award of attorney fees under fee-shifting statute was improper for common-law tort claims). Nor would a jury trial have been afforded before statehood on the injunctive relief component of Section 48-3613(D); instead, the court would have heard that claim sitting in equity. *Caruthers v. Underhill*, 235 Ariz. 1, 9, ¶ 31 (2014).

¶24 The superior court correctly determined that Plaintiffs had no right to a jury trial on their private action under Section 48-3613(D).[3]

B. Factual Findings, Attorney Fees and Injunctive Relief

¶25 Plaintiffs next contest the superior court's factual findings on the statutory claim that "[n]either the initial wall, nor the 2015 wall, nor the [fill] dirt" were built or deposited in a watercourse. We defer to the court's factual findings if supported by substantial evidence, *Moore v. Title Ins. Co.*, 148 Ariz. 408, 413 (App. 1985), such that a reasonable person could have reached the court's conclusion, *SAL Leasing, Inc. v. State ex rel. Napolitano*, 198 Ariz. 434, 438, ¶ 13 (App. 2000).

¶26 Plaintiffs have shown no error. The record contains substantial evidence to support the court's factual finding that Defendants' wall was not in a watercourse. Defendants offered two qualified expert witnesses who reached that conclusion. Although Plaintiffs countered with substantial evidence and an expert witness of their own, we do not reweigh

[3] Plaintiffs also claim the superior court failed to provide notice that the court would decide the statutory claim without a jury. Plaintiffs, however, had no right to a jury trial on the statutory claim and have shown no prejudice.

the evidence or reassess credibility issues on appeal. *See Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 597, ¶ 27 (App. 2007) ("To the extent the parties presented facts from which conflicting inferences could be drawn . . . , it was for the trial court, not this court, to weigh those facts.").

¶27 Plaintiffs also argue the superior court erroneously denied their request for injunctive relief and attorney fees under A.R.S. § 48-3613(D), but the statute conditions injunctive relief on the finding of a "violation of this section," and permits the court to award money damages, including reasonable costs and attorney fees, "resulting from the violation" of the section. A.R.S. § 48-3613(D). The court found no "violation" of the statute and thus correctly denied Plaintiffs' request for injunctive relief and attorney fees. *See Beesley*, 226 Ariz. at 324, ¶ 41 (rejecting the notion that an injured party is entitled as a matter of law to attorney fees under § 48-3613(D)).

II. Defendants' Cross-Appeal

¶28 Defendants argue that substantial evidence did not support the jury's verdict on the common law tort claims and challenge the superior court's refusal to impose Rule 68 sanctions against Plaintiffs.

A. The Jury Verdicts

¶29 Defendants contend the jury lacked substantial evidence for its verdicts. Plaintiffs respond that we lack jurisdiction to consider the argument because Defendants did not file a post-verdict motion under Rule 50(b).[4]

¶30 Our appellate jurisdiction is "defined, and limited, by the Legislature." *Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, 426, ¶ 4 (App. 2016). As relevant here, we lack jurisdiction under A.R.S. § 12-2102(C) to consider "the sufficiency of the evidence to sustain [a] verdict or judgment in an action tried before a jury unless a motion for a new trial was made" in the superior court. *Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, 182, ¶¶ 6-7 (App. 2011).

¶31 Defendants made no post-verdict motion for a new trial or "any other post-verdict motions for judgment as a matter of law." *Id.* at ¶ 8. Even so, Defendants assert that their mid-trial Rule 50(a) motion was sufficient, essentially arguing that a post-verdict motion for new trial was

[4] Defendants filed a separate motion on the jurisdictional issue. We address the motion and argument here.

futile. But a mid-trial motion under Rule 50(a) will not preserve our jurisdiction unless "followed by a post-verdict Rule 50(b) motion." *Id.* at 181-82, ¶¶ 1, 9-11. And Defendants offer no authority for a futility exception. A civil appeal is a statutory privilege and appellants must strictly comply with statutory and rule requirements. *Wendling v. Sw. Sav. & Loan Ass'n*, 143 Ariz. 599, 601 (App. 1984). We lack jurisdiction to consider the argument.[5]

B. Rule 68 Sanctions

¶32 Defendants next challenge the superior court's denial of their motion for Rule 68 sanctions. We review de novo legal issues arising under Rule 68, *Levy v. Alfaro*, 215 Ariz. 443, 444, ¶ 6 (App. 2007), "ascrib[ing] plain meaning to its terms," *Byers-Watts v. Parker*, 199 Ariz. 466, 469, ¶ 10 (App. 2001).

¶33 Arizona Rule of Civil Procedure 68(a) empowers any party to serve an "offer of judgment" on another party proposing entry of judgment in a certain amount to resolve the dispute. If the offeree rejects the offer and "does not obtain a more favorable judgment" at trial, the offeree must pay sanctions of reasonable expert witness fees and double taxable costs incurred after the offer was made, as well as prejudgment interest on unliquidated claims accruing from the date of the offer. Ariz. R. Civ. P. 68(g).

¶34 The superior court denied Defendants' motion for Rule 68 sanctions because Plaintiffs secured a trial judgment and award of taxable costs for $65,507.40, which was "more favorable" than Defendants' $65,000 offer of judgment. Defendants argue the court undervalued their offer of judgment by ignoring the non-monetary terms in defense counsel's cover letter, including a modified wall and regrading, which would have increased their settlement offer to $75,439.20. The superior court rejected this argument, however, because Defendants "did not specify the value of the injunctive relief [they were] willing to undertake at the time the Offer of Judgment was made and the letter written."

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[5] Defendants have reframed the argument in their reply brief as "not challenging the sufficiency of the evidence," but "challenging the jury's verdict because Plaintiffs' claims fail as a matter of law." This court will not address arguments first raised in a reply brief. *Ariz. Dep't of Revenue v. Ormond Builders, Inc.*, 216 Ariz. 379, 385, ¶ 24 n. 7 (App. 2007).

¶35 The court properly denied Rule 68 sanctions because an offer of judgment must "specifically state the sum of money to be awarded," inclusive of "all damages, taxable court costs, interest, and attorney's fees." Ariz. R. Civ. P. 68(b)(1). To ensure meaningful consideration of a proposed judgment, the offer "must contain a specific monetary sum to settle the asserted causes of action" and "be specific enough so that it can be determined, at the time of judgment, whether the offer or the judgment favored the offeree." *Greenwald v. Ford Motor Co.*, 196 Ariz. 123, 125, ¶ 6 (App. 1999); *Smyser v. City of Peoria*, 215 Ariz. 428, 442, ¶ 46 (App. 2007). Defendants assigned no dollar value to the additional terms. Their offer instead proposed to enter judgment "for a combined total of $65,000."

CONCLUSION

¶36 We affirm the superior court's denial of a jury trial, attorney fees and injunctive relief on Plaintiffs' private action under A.R.S. § 48-3613(D). We also affirm the court's denial of Defendants' request for Rule 68 sanctions.

¶37 We deny both requests for attorney fees and costs incurred on appeal because no statute, rule or other substantive authority supports an award. *See* ARCAP 21(a)(2) ("A claim for fees under this Rule must specifically state the statute, rule, decisional law, contract, or other authority for an award of attorneys' fees."). We also decline to award costs on appeal because neither party was entirely successful.

AMY M. WOOD • Clerk of the Court
FILED: AA