IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GERALD FREEMAN and JANICE FREEMAN, *Plaintiffs/Appellants*,

v.

TOWN OF CAVE CREEK, a municipal corporation of the State of Arizona; CAHAVA SPRINGS CORP., a corporation of the State of Minnesota; MORNINGSTAR ROAD PROPERTIES, INC.,[1] and DONALD SORCHYCH and SHARI JO SORCHYCH, husband and wife,
Defendants/Appellees.

No. 1 CA-CV 15-0749
FILED 3-7-2017

Appeal from the Superior Court in Maricopa County
No. CV2012-092643
The Honorable David M. Talamante, Judge

AFFIRMED

COUNSEL

Mahaffy Law Firm P.C., Chandler
By Steven C. Mahaffy
Counsel for Plaintiffs/Appellants

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[1] On the court's own motion, it is ordered amending the caption in this appeal as reflected in this decision. The above referenced caption shall be used on all further documents filed in this appeal.

Sims Murray Ltd, Phoenix
By Jeffrey T. Murray and Kristin M. Mackin
Counsel for Defendant/Appellee Town of Cave Creek

Gammage & Burnham P.L.C., Phoenix
By Cameron C. Artigue
Counsel for Defendant/Appellee Cavaha Springs Corp.

MEMORANDUM DECISION

Judge Patricia A. Orozco delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Maurice Portley joined.[2]

O R O Z C O, Judge:

¶1 Gerald and Janice Freeman (the Freemans) appeal the superior court's post-trial order denying their requests for declaratory judgment, permanent injunction, sanctions, and attorney fees. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The Freemans own and live on 30 acres in rural Cave Creek. Through several conveyances, they were granted an express easement by warranty deed, "for existing roadway as it existed on October 2, 1969" (the Easement). Cahava Springs Corp. (Cahava)[3] owns the adjacent vacant land comprising of 35 acres, which is encumbered, in part, by the Easement. Within the Easement is a gravel road (the Roadway) running the length of the Easement. The Easement and Roadway are approximately one-half mile

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[2] The Honorable Patricia A. Orozco and Honorable Maurice Portley, Retired Judges of the Court of Appeals, Division One, have been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[3] Shortly before trial, Morningstar Road Properties, Inc. purchased a large amount of Cahava's property, including the subject land with Easement. Upon motion at trial, the court joined Morningstar as a defendant. However, we will refer to Cahava for simplicity as throughout the litigation and appellate briefs, the parties continue to do so.

long, traverse through Cahava's property from the public road to the east (Old Stage Road), and dead-end at the Freemans' property to the west. The Easement is the only ingress and egress for the Freemans and their neighbors.

¶3 In early 2012, the Freemans learned that the Town of Cave Creek (the Town) intended to build a non-motorized recreational trail (the Trail) on Cahava's property, with Cahava's permission. The proposed Trail would be entirely on Cahava's property. It would intersect the Easement and Roadway in two locations, both in flat, wide-open places on Cahava's property, but otherwise would be separate from the Easement and Roadway.

¶4 In 2012, the Freemans filed a complaint against the Town, Cahava, and Donald and Shari Jo Sorchych[4] (collectively, the Defendants)

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[4] Donald and Shari Jo Sorchych own and live on the property adjacent to the Freemans, and were granted the same Easement through a separate conveyance. As with the Freemans, the Roadway within the Easement is their only method of ingress and egress, however, they support construction of the Trail. The Freemans contend they named the Sorchychs as nominal defendants for the sole purpose of binding them to any court decisions.

However, this is the third time the Freemans have sued the Sorchychs. In 2004, the Freemans sued for maintenance contribution and unjust enrichment for the subject Easement and Roadway. We held that the doctrine of equitable contribution required Donald Sorchych to pay his share, but denied the claim of unjust enrichment. *Freeman v. Sorchych*, 226 Ariz. 242 (App. 2011). While that case was on appeal, the Freemans sued the Sorchychs in February 2011 arguing that a separate 33-foot exclusive easement for ingress, egress, utilities, and water along the south side of the Sorchychs' property was for their exclusive use—and the Sorchychs could not use it. Although that 33-foot easement was part of a separate deed, it is a physical extension of the Easement in this case. We affirmed the grant of summary judgment, finding that the Freemans did not have exclusive use of the easement. The Freemans also sought Rule 11 sanctions and fees claiming the Sorchychs failed to disclose that they had executed a gift deed for the easement to the Town of Cave Creek, which quitclaimed it back to them. The trial court awarded a fraction of the requested amount, which we affirmed. *Freeman v. Sorchych*, 1 CA-CV 12-0872, 2013 WL 6672431 (Ariz. App. Dec. 17, 2013) (mem. decision). The supreme court denied review of that case.

seeking: (1) a declaratory judgment as to whether the Defendants "may use the Freemans' exclusive easement" and whether Cahava "may give permission to third parties, such as the Town and the public, to use the Freemans' exclusive easement;" (2) judgment under common law private nuisance because the Defendants breached their "duty to not interfere with [Freemans'] private right of the use and enjoyment of their easement;" and (3) a permanent injunction against the Defendants from "trespassing upon [the Freemans'] exclusive easement and from continuing construction of" the Trail.

¶5 The Freemans sought and received a temporary restraining order, which was extended and modified twice by stipulation. Although the order prohibited the Town and Cahava from building the Trail, the Town was permitted to conduct a feasibility study. In denying the Town's motion for summary judgment, the court found that "there is a justiciable controversy" between the Town and the Freemans, specifically whether the Trail constitutes "unreasonable interference" with the Freemans' Easement. After the parties stipulated to forgo a jury trial, a three-day bench trial was held in December 2014 in which the court heard extensive testimony from Mr. Freeman, Mr. Sorchych, a neighbor, Cahava's representative, and several experts, and received 48 exhibits into evidence. After written closing arguments and findings of fact were submitted, the court took the matter under advisement.

¶6 In May 2015, by unsigned minute entry, the court issued its under advisement rulings. The court: (1) declined to enter declaratory judgment because "[Freeman] is not claiming an exclusive use [of the Easement] and Defendants do not deny that they are prohibited from unreasonably interfering with [Freemans'] use of the easement;" (2) dismissed without prejudice the private nuisance allegations as "not yet ripe for determination by this Court" because the Trail had yet to be built; and (3) denied a permanent injunction prohibiting the Town from building the Trail and Cahava from cooperating in such endeavor. The court did, however, grant the Freemans a limited form of injunctive relief because they established that if the Trail was not built to meet certain minimum requirements, "it will no doubt lead to an unreasonable interference with the use" of their Roadway and Easement. Those minimum requirements, nine in total, were detailed in the minute entry. [**Id. @ 3-4**]. The court also struck Freemans' post-trial motions for sanctions, finding they were supplemental to their closing argument, and denied Freemans' request for fees against the Town and Cahava.

¶7 Final judgment was entered pursuant to Arizona Rules of Civil Procedure 54(c) in July 2015, with each party bearing its own fees and costs. In doing so, the court specifically rejected the Freemans' proposed form of judgment because it "exceeds the relief and findings and order of the Court set forth" in the under advisement ruling minute entry. The Freemans' subsequent motion to amend findings of fact and conclusions of law was denied.

¶8 The Freemans timely appealed and simultaneously filed an unsuccessful motion to stay construction of the Trail pending the outcome of the appeal. We have jurisdiction pursuant to Article VI, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 and -2101.A.1 (West 2017).[5]

DISCUSSION

¶9 While interpretation of an easement is generally a matter of law, *see Powell v. Washburn*, 211 Ariz. 553, 555, ¶ 8 (2006), our review is limited to whether the trial court abused its discretion in its ruling, *see Kromko v. City of Tucson*, 202 Ariz. 499, 501, ¶ 4 (App. 2002) (appellate review of trial court's grant or denial of injunction for abuse of discretion); *Ahwatukee Custom Est. Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5 (App. 2000) (appellate review of trial court's denial of injunctive relief for abuse of discretion); *Hunnicutt Const., Inc. v. Steward Title and Trust of Tucson Trust No. 3496*, 187 Ariz. 301, 307 (App. 1996) (appellate review of trial court's decision to award or deny sanctions for abuse of discretion); *Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 205, ¶ 5 (App. 2014) (appellate review of trial court's award of attorney fees for abuse of discretion). A court abuses its discretion when it commits an error of law or fails to consider evidence in reaching a discretionary conclusion or if upon review, "the record fails to provide substantial evidence to support the trial court's finding." *Flying Diamond Airpark, LLC. v. Meienberg*, 215 Ariz. 44, 50, ¶ 27 (App. 2007).

¶10 We do not reweigh the evidence presented in the trial court because, as the trier-of-fact, the trial court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004).

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[5] Absent material revisions, we cite to the current version of statutes and rules unless otherwise indicated.

I. Declaratory Judgment

¶11 The Freemans contend the court erred by denying their request for a declaratory judgment against Cahava declaring that: (1) the express terms of the Easement prohibit any crossing because the Easement was "frozen in time" as of October 2, 1969; and (2) Cahava, as the servient tenement, is prohibited from granting a third party use of the Easement or "placing a permanent obstruction" on the Easement because it would prevent the Freemans from "free-passage over part" of the Easement.

¶12 Under Arizona's declaratory judgment act, A.R.S. § 12–1831 et seq., a justiciable controversy exists only if there is "an assertion of a right, status, or legal relation in which the plaintiff has a definite interest and a denial of it by the opposing party." *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 45, ¶ 10 (App. 2000). "[E]ven though the act is remedial and is to be liberally construed, it is well settled that a declaratory judgment must be based on an actual controversy which must be real and not theoretical." *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz.App. 308, 310 (1972).

¶13 As support for their position, the Freemans rely on our decisions in *Squaw Peak Cmty. Covenant Church of Phoenix v. Anozira Dev. Inc.*, 149 Ariz. 409 (App. 1986), and *Hunt v. Richardson*, 216 Ariz. 114 (App. 2007). The Freemans' reliance is misplaced, as both cases are distinguishable.

¶14 In *Squaw Peak*, a servient tenement sought to erect permanent six-inch-high curbs to run across portions of the dominant tenement's roadway easement. 149 Ariz. at 411. The easement was created by an express grant in a warranty deed for "[a]n easement for ingress and egress 40 feet in width." *Id*. We concluded that the language of the grant unambiguously created an easement exactly 40 feet wide. *Id* at 413. Therefore, because permanent curbs would obstruct traffic over part of the easement and limit ingress and egress over the entire 40-foot wide strip, they were prohibited as a matter of law. *Id.* at 413-14.

¶15 In *Hunt*, a servient tenement installed a fence along the easement and replaced a gate at the end of road. 216 Ariz. at 117, ¶¶ 3-4. The easement stated it was a fifty-foot "[n]on-exclusive perpetual easement for ingress, egress and public utilities." *Id.* at 117, ¶ 3. In reversing a grant of summary judgment, we held that whether the gate was necessary to the servient tenement's use of his property and whether it unreasonably interfered with passage over the easement were questions for the trier-of-fact because "[u]nlocked gates, by their nature, are not the type of

immovable structures that presumptively impede passage." *Id.* at 124-25, ¶¶ 32-35 (citing *Squaw Peak*, 149 Ariz. at 414).

¶16 Here, the express language of the Easement states "for existing roadway as it existed on October 2, 1969." It does not clarify whether the Roadway is the existing location, condition, or quality, nor does it state the dimensions or prohibit any crossing. The Freemans provided no evidence of the exact dimensions of the Roadway as it existed in 1969. Further, Mr. Freeman testified that he has performed extensive repair and maintenance on the Roadway over the years, and evidence in the record suggests he improved the Roadway originally from bed rock to decomposed granite when the Freemans' built their home on the property; both acts presumably in violation of the Easement's express terms as he reads it. The proposed Trail would not be built or lie within the Easement or Roadway, and the two crossings would be open with signs posted on either side designating the crossings; nothing would be installed on or in the Roadway. Such design does not restrict or prevent passage and is not a permanent obstruction remotely akin to the six-inch-high permanent curbs in *Squaw Peak*. Further, unlike *Hunt*, this case was not resolved through summary judgment; the court ruled after a three-day bench trial, with 48 exhibits and extensive testimony.

¶17 The trial court found that the parties agreed the issue before the court was whether the proposed Trail would unreasonably interfere with the Freemans' Easement and, because the Freemans were not claiming an exclusive use and the Defendants did not deny they are prohibited from unreasonably interfering with the Freemans' use, the "factual and legal issues as presented by the parties do not require a declaratory judgment." In other words, there was no actual controversy before the court except the issue of unreasonable interference. Substantial factual evidence was presented during the trial on the topic. The Freemans cite to no trial testimony supporting their arguments for declaratory judgment, and the joint pretrial statement filed shortly before trial addressed only the issue of unreasonable interference. Moreover, the motion to amend findings of fact filed after trial failed to raise or address a claim for declaratory relief. Because the record supports the findings, the court did not abuse its discretion in denying the Freemans' request for declaratory relief.

II. Permanent Injunction for Unreasonable Interference / Findings of Fact and Conclusions of Law

A. Permanent Injunction for Unreasonable Interference

¶18 The Freemans argue the court erred in denying their request for a permanent injunction against the Town prohibiting it from constructing the Trail because any use or crossing will unreasonably interfere with their use, and because in building the Trail, the Town is violating its own guidelines.

¶19 "An easement appurtenant involves two parcels of land—the dominant tenement, to which the right of use belongs, and the servient tenement, which is subject to the use. An easement appurtenant is created to benefit the owner of the dominant tenement in the use of his land." *Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 209 (App. 1991) (citing 3 R. Powell, J. Backman, *The Law Of Real Property* ¶ 405 (1991)). As the dominant tenement, the Freemans only have the right to use the servient tenement's (Cahava) land for a specific purpose. *See Rogers v. Bd. of Regents of Univ. of Ariz.*, 233 Ariz. 262, 266, ¶ 9 (App. 2013). Here, the Freemans can specifically use the Cahava property and Roadway to access their property. As the servient tenement, Cahava may make any use of its property that does not unreasonably interfere with the Easement. *See Hunt*, 216 Ariz. at 121, ¶ 21 (quoting Restatement (Third) of Property: Servitudes § 4.9 (2000)). Determining unreasonable interference is a question of fact for the trier-of-fact. *Id.* at 121, ¶ 23.

¶20 Here, the trial court was the trier-of-fact. Freeman testified that he has between 1200 and 1400 trespassers per year on the Easement; many of which are horseback riders using the Roadway to connect to another trail in the area, some approaching the gate to his property at the dead-end. He testified that nearly every day he sees at least one trespasser, and up to three or four vehicles trespassing, including people driving four-wheelers on the Roadway, spinning their wheels and tearing up the road. Freeman testified that he largely bears the cost to maintain the Roadway and, in fact, sued Sorchych years earlier for maintenance and repair contribution. He stated that when thousands of people are invited to use a public trail, there will be "interference galore." He testified he has seen packs of 20 to 28 horses, which would take approximately 15 minutes to cross an eight-foot-wide section of the Roadway. Freeman acknowledged that he does not have exclusive use of the Easement, and the word "exclusive" is not included anywhere in the warranty deed.

¶21 Upon questioning by the court, Freeman testified that he was agreeable to the Trail being built if the Town did so with certain requirements. Those requirements were: (1) expand the Roadway to 25 feet wide to allow a reasonable trail to go beside; (2) fence off the Trail from the Roadway; (3) install a parking area at the trailhead on Cahava's property; (4) engineer a retaining wall sufficient to support the weight of any traffic on the Roadway for the Freemans and their invitees; (5) professionally engineer the Trail; (6) the Town must carry liability insurance for the Trail; (7) permit the Trail to be used only during daylight hours, not when it was raining or within three days after; (8) the Town must actively enforce trespass violations; (9) install cattle guards so livestock cannot cross the Easement; (10) the Town must provide maintenance for the Trail; and (11) the Town will indemnify the Freemans in the event of any lawsuits resulting from these conditions.

¶22 James Lemon, an experienced civil engineer, testified for the Freemans. Lemon testified that he reviewed the reports generated by the Town and the Town's experts; the Town's guidelines for trail construction, the geotechnical engineering report of Vann Engineering, and the land survey report of Slyder & Associates. He stated that to prepare his analysis of the Trail, he visited the site in February 2013 and took pictures. However, he acknowledged he did not take measurements while on site, had not returned in almost two years, and did not prepare his own survey of the site. Lemon testified that based upon his review, the Trail would negatively impact a significant portion of the Roadway. He admitted that his experience surveying trails is limited to parks and golf courses, not desert terrain; he had not reviewed state and federal trail guidelines; and had not analyzed subsequent addendums to the Slyder land survey, including the addendum proposing to move the Trail location. Lemon further admitted that his testimony was not that construction of the Trail was not feasible, but that "anything could be done with the appropriate amount of time and money."

¶23 Jeffrey Vann, an experienced geotechnical engineer, testified that his firm performed a feasibility survey of the Trail for the Town, including conducting seismic tests and reviewing Slyder's land survey report. Vann testified that the Trail, relative to geotechnical concerns, is feasible if constructed with certain recommendations, such as compaction in areas where the Trail crosses a dip, slope modifications at elevation changes, and plans to incorporate grading and drainage. Vann stated that after arriving at his conclusions and preparing his report, he relayed his recommendations to Slyder, who made the requested slope adjustments to the land survey. Vann testified that in his opinion, the Trail will not

negatively impact or compromise the stability of the Roadway. Vann's report stated: "[t]he following recommendations are presented as a guide . . ." and the "project Civil and Structural Engineer will make the final determination in the need for any" of his recommendations.

¶24 Stephen Slyder, an experienced registered land surveyor, conducted a land survey for the Town to explore feasibility of the Trail. Slyder testified that he walked the property three times before performing the survey, three times after, and was on site for six days while surveying. He stated that he consulted with the trail builder, spoke in detail with Jeffrey Vann, and created two addendums to the survey to address drainage and slope issues.

¶25 Bambi Muller, the Town's trail planner for 15 years, testified that the Trail would connect Cave Creek Regional Park and Spur Cross Ranch Conservation Park. She stated she had walked the property several times with Slyder in preparation for his land survey. Muller testified she has ridden horses all her life, ridden through every trail in Cave Creek and beyond, and, while the Trail may be steep, it is no different than many trails in Cave Creek and the national forests. Muller explained that because all the Town's trails are multi-use (hikers, bikers, and horses), the width does not determine its designation in the Town guidelines ("primitive" vs. "equestrian"), but the average trail width in Cave Creek was two-to-four feet. In her experience, she said it would take a group of 28 horses a few minutes to cross an eight-foot-wide road. Muller testified the Trail would not be constructed or lie within the Easement or Roadway. She testified that the Town would install directional signs with arrows advising users to stay on the designated Trail and off the Roadway, but would otherwise not put anything on or in the Roadway, including striped lines. Muller stated the Town has liability insurance for all its trails.

¶26 Matt Woodson, an experienced trail designer and builder, testified for the Town. He stated that the Trail is no different than the other 100 miles of trails he has built in Arizona, and, in fact, is less rigorous than many. Woodson testified the Trail is feasible; it has the same factors as other trails he builds regularly. He stated that the Trail crossings would not change the Roadway whatsoever and it will look exactly as it does now.

¶27 Donald Sorchych, defendant and the Freemans' neighbor, testified that he has always been in favor of the Trail and would not mind waiting a few minutes to allow horses to cross the Roadway. Sorchych stated the notion that people will ride horses on the Roadway is exaggerated; he uses the Easement every day and has only seen two to three

horseback riders in the 14 years he has lived there, not the 1400 trespassers per year as Freeman testified. He testified that all the horseback riders he has confronted over many years are friendly, they step aside to get out of the way, do not complain or litter.

¶28 In ordering the limited form of injunction, the court set forth nine requirements the Town must abide by for construction of the Trail and its subsequent maintenance: (1) if the Trail does not comply with the Town's design guidelines, there must be a sound engineering reason for doing so; (2) the Trail must not exceed two crossing points over the Easement without revisiting the issue of "unreasonable interference" with the court; (3) once completed, the Town shall be responsible for all maintenance of the Trail including the areas where the Trail and the Roadway intersect; (4) the Town shall establish a planned schedule for maintenance at regular intervals at the Town's sole cost; (5) the Town shall install signage along the Trail that will clearly designate the Trail including the Easement crossings; (6) the Town shall install no trespassing signs warning users to stay on the Trail; (7) the Trail must be built to accommodate horse riders at all times with no less than 4 to 6 feet of usable trail space adequately maintained by the Town; (8) the Trail must be constructed with appropriate drainage and grading to minimize maintenance and adverse impact on the Roadway, as determined by appropriate engineers, trail designers, and contractors; and (9) retaining walls shall be used whenever necessary to maintain the Trail to provide for equestrian use at all times, as determined by appropriate engineers, trail designers, and contractors. These requirements satisfied more than half of Freemans' conditions, whether precisely or indirectly. Nevertheless, the Freemans maintain that the Easement is unambiguous and by its very terms, was "frozen in time" as of October 2, 1969. Therefore, they claim, because the Trail is a "permanent perpendicular" obstruction, it is barred under *Squaw Peak*, as is any improvement or crossing. We disagree, for the reasons discussed *supra* ¶¶ 14-16.

¶29 The Freemans further contend that if we conclude the express terms of the Easement do not bar the Trail (or any improvement or crossing), we must determine whether the trial court properly considered and balanced the parties' interests under *Hunt*, applying the Restatement (Third) of Property: Servitudes § 4.9. The Freemans cite to Comments (c) and (e) and Illustrations 2 and 10 of § 4.9, and Comment (b) of § 4.11 as support.

Section 4.9 provides:

> Except as limited by the terms of the servitude determined under § 4.1, the holder of the servient estate is entitled to make *any use* of the servient estate that *does not unreasonably interfere* with enjoyment of the servitude.

(Emphasis added.)

Section 4.1(1) explains interpreting a servitude:

> A servitude should be interpreted to *give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation* of the servitude, and to carry out the purpose for which it was created.

(Emphasis added.)

Comment (c), Use by holder of servient estate, states, in pertinent part:

> Actions that make it more difficult to use an easement, that interfere with the ability to maintain and repair improvements built for its enjoyment, or that increase the risks attendant on exercise of rights created by the easement are prohibited by the rule stated in this section, unless justified by needs of the servient estate. *In determining whether the holder of the servient estate has unreasonably interfered with exercise of an easement, the interests of the parties must be balanced to strike a reasonable accommodation that maximizes overall utility to the extent consistent with effectuating the purpose of the easement . . . .*

(Emphasis added.)

Illustration 2 provides:

> O, the owner of Blackacre, which is burdened with a driveway easement in favor of Whiteacre, regularly throws trash and nails on the drive and yells obscenities at the residents of Whiteacre as they use the drive. O is not entitled to use the servient estate in this manner because his actions unreasonably interfere with use of the easement.

Comment (e), Creation of additional servitudes, provides, in pertinent part:

> [T]he holder of the servient estate may create additional servitudes in land burdened by a servitude *if the additional servitudes do not unreasonably interfere* with the enjoyment of the prior servitude holders.

(Emphasis added.)

Illustration 10 states:

> O, the developer of a 10-lot subdivision near a lake, retained title to Blackacre, a lot fronting on the lake which included a beach. O granted an appurtenant easement for use of Blackacre for recreational purposes in the deeds conveying each of the 10 lots in the subdivision. Twenty years later, a successor in title to Blackacre granted an easement to the owner of Whiteacre, property outside the subdivision, for recreational purposes. Whiteacre is used as a campground and draws hundreds of visitors during the summer. In the absence of other facts or circumstances, the owner of Blackacre was not entitled to create the additional easement rights because the likely increased use will unreasonably interfere with enjoyment of the previously created easements.

Section 4.11 states, in pertinent part:

> [A]n appurtenant easement . . . *may not be used for the benefit of property other than the dominant estate*.

(Emphasis added.)

Comment (b), Appurtenant easement cannot be used to serve nondominant estate, states, in pertinent part:

> [A]n appurtenant easement cannot be used to serve property other than the dominant estate. The rationale is that use to serve other property is not within the intended purpose of the servitude. This rule reflects the likely intent of the parties by setting an outer limit on the *potential increase in use of an easement brought about by normal development of the dominant estate* . . . the rule avoids otherwise difficult litigation over the question *whether increased use unreasonably increases the burden on the servient estate*.

(Emphasis added).

¶30 The Freemans make three assertions regarding the Restatement: (1) Illustration 2 is analogous to their situation as testified to by Mr. Freeman, that people drive up to their gate at the dead-end and must turn around, those on 4-wheelers spin their wheels and tear up the road, and horseback riders exploring new trails use the Roadway, all of whom are trespassers, amounting to 1200 to 1400 trespassers per year; (2) Illustration 10 establishes that Cahava is not entitled to create additional easement rights (i.e., give permission to the Town to use the Easement) because the likely increased use will unreasonably interfere with their enjoyment of the previously created Roadway and Easement; and (3) Comment (b) of § 4.11 warns of this exact litigation.

¶31 First, § 4.11 is inapplicable. As stated, that rule pertains to increase in easement use through *development of the dominant estate* – the Freemans – and *whether it unreasonably increases the burden on the servient estate* – Cahava. That is not the situation here. Next, Illustration 2 is an extreme example of unreasonable interference by the servient tenement, throwing trash and nails on the drive and yelling obscenities at the residents of the dominant estate. Again, that is not the situation here and, it is important to note, the only evidence of a vast number of trespassers on the Easement and damaging the Roadway is from Mr. Freeman. Lastly, Illustration 10 is the factual scenario from *Leabo v. Leninski*, 438 A.2d 1153 (Conn. 1981). In *Leabo*, the objecting owners won at trial, which was affirmed on appeal under an abuse of discretion standard. *Leabo* is inapplicable here given that the Freemans lost after a trial.

¶32 Absent support to the contrary in the record, we presume that the trial court knows the law (including the Restatement), applies it correctly, and considers the evidence before it. *See State v. Trostle*, 191 Ariz. 4, 22 (1997) (trial judges are presumed to know the law and to apply it in making their decisions); *Fuentes v. Fuentes*, 209 Ariz. 51, 55–56, ¶ 18 (App. 2004) (appellate court presumes trial court considered evidence presented before making a decision). Here, after a three-day trial, the court explicitly found that the Trail would not unreasonably interfere with the Freemans' use provided it was built with nine specific minimum requirements. From our review, substantial evidence supports the trial court's findings. As a result, we conclude the court did not abuse its discretion by balancing the interests of the parties in reaching its judgment.

¶33 The various out-of-state cases the Freemans cite are distinguishable, each dealing with unique and distinguishable fact patterns. Determining unreasonable interference is a fact-specific analysis, narrowly tailored to each case, and the trial judge here was in the best

position to make that finding. *See Leabo*, *supra* ¶ 31 (residential lot owners holding appurtenant easement access to small beach granted injunction for unreasonable interference against beach's owner prohibiting opening of beach to thousands of members of the public, court considered limited size of beach and easement was more than mere right of access, involved "sensitive rights of recreational use, enjoyment and pleasure"); *Kao v. Haldeman*, 556 Pa. 279 (Pa. 1999) (easement owners of private road entitled to injunction to prevent neighbor, with no ownership interest or license to use, from using road to access their property as preference, not necessity); *Gilman v. Blocks*, 235 P.3d 503 (Kan.Ct.App. 2010) (berm/landscaping constructed by servient tenement, which at times was inside the easement, considered unreasonable interference because it blocked dominant tenement's access to pond and dam easement); *Carson v. Elliott*, 111 Idaho 889, 891 (1986) (raised garden erected by servient tenement inside circular area of driveway unreasonably interfered with easement because it occasionally interfered with operation of cars and access to garage); *Potter v. N. Natural Gas Co.*, 441 P.2d 802 (Kan. 1968) (servient tenement of pipeline easement sought reimbursement from dominant tenement for costs of lowering pipeline; court upheld summary judgment for dominant tenement).

¶34 The Freemans also maintain the Town is violating several of its own guidelines for trail construction in building this Trail. Much of the trial testimony centered on this topic. Lemon testified that the proposed Trail violates several guidelines, including slope and surface water/erosion control. He reasoned that because the Slyder land survey was preliminary in nature and not an actual construction plan he would expect to see, he concluded that the Trail negatively impacts the Roadway. Lemon acknowledged, however, that guidelines are not meant to supersede engineering judgment and analysis, including for drainage concerns which could be constructed in the field. Woodson testified that in 99 percent of the trails he has built, he never had construction plans; the guidelines are just guidelines and he relies on a builder's experience in considering such things as drainage while onsite during construction. Vann testified that guidelines take a backseat to sound engineering judgment. On cross, Freeman read from the Town's guidelines, which state, "[t]he design concepts, procedures and technical data are presented herein only as guidelines and are not intended to replace sound engineering judgment and experience."

¶35 During trial, the court stated that "the guidelines have relevancy only if a violation also relates to an unreasonable interference of the [Freemans'] easement, kind of akin to standard of care . . . [s]tandard of

care can be established but you still have to deal with causation." In fashioning a limited form of injunction, the court set nine specific requirements to prevent the Trail from unreasonably inferring with the Freemans' Easement, including: (1) if the Trail does not comply with the Town's design guidelines, there *must be a sound engineering reason* for doing so; (2) the Trail must be constructed with appropriate drainage and grading to minimize maintenance and adverse impact on the Roadway, *as determined by appropriate engineers, trail designers, and contractors*; and (3) retaining walls shall be used whenever necessary to maintain the Trail to provide for equestrian use at all times, *as determined by appropriate engineers, trail designers, and contractors*. "The decision whether to fashion an equitable remedy lies within the trial court's discretion, and we will not disturb the court's decision absent an abuse of that discretion." *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 409, ¶ 106 (App. 2012). We find no abuse of discretion.

B. Findings of Fact and Conclusions of Law

¶36 The Freemans also argue the court erred in failing to make findings of fact separate from conclusions of law in denying their injunction under Ariz. R. Civ. P. 65(h) because "inherent . . . in the court's ruling was the legal conclusion that Cahava may give permission for a third party public entity . . . to use the easement . . . . [and Freeman's] are entitled to know what law the trial court relied upon."

¶37 Rule 65(h), as in effect in 2015, provided that "[e]very order granting an injunction . . . shall set forth the reasons for its issuance and shall be specific in terms." Our supreme court has articulated the reasons for requiring a trial court to state separately findings of fact and conclusions of law:

> First, a defeated party may more easily determine whether the case presents issues for appellate review. Second, findings and conclusions clarify what has been decided and thus provide guidance in applying the doctrines of estoppel and res judicata. Third, the requirement prompts judges to consider issues more carefully because they are required to state not only the end result of their inquiry, but the process by which they reached it.
>
> Finally, and most important, findings and conclusions permit an appellate court to examine more closely the basis on which the trial court relied in reaching the ultimate judgment.

Miller v. Bd. of Supervisors of Pinal Cnty., 175 Ariz. 296, 299 (1993) (internal citations and quotations omitted).

¶38 The trial court order granting the limited injunction is a combination of three orders: (1) the unsigned under advisement minute entry ordering the injunction and detailing the nine minimum requirements for Trail construction and maintenance to prevent unreasonable interference; (2) the unsigned minute entry adopting the Town's proposed form of judgment, specifically rejecting the Freemans' proposed form, and denying attorney fees to all parties; and (3) the signed final judgment reiterating the court's findings in the minute entry. Taken together, the trial court fulfilled its obligation, and we conclude the findings support the judgment and the evidence supports the findings.

¶39 First, it appears the Freemans were easily able to determine whether the case presented issues for appellate review because they appealed, and detailed the issues and their arguments in their opening brief, without additional clarification by the trial court.

¶40 Second, it is clear exactly what had been decided for estoppel and res judicata purposes; declaratory judgment denied, nuisance claim dismissed without prejudice, and a limited form of injunctive relief granted permitting the Town to build the Trail provided it complied with nine specific minimum requirements to prevent unreasonable interference with the Freemans' use of the Easement and Roadway.

¶41 Third, from our review, the trial judge carefully weighed the evidence and considered the issue to be resolved—unreasonable interference. He heard testimony from nine witnesses; received 48 exhibits into evidence; asked comprehensive, clarifying questions of the witnesses; provided the parties with his thoughts on the record at breaks during the proceedings; and in the under advisement ruling specifically addressed unreasonable interference and crafted a resolution meeting the majority of the Freemans' conditions for Trail construction.

¶42 Finally, and most importantly, we can easily examine the basis on which the trial court relied in reaching the ultimate judgment. The only legal conclusion reached, which was the only justiciable legal issue before the court, was that the Trail could not unreasonably interfere with the Freemans' Easement rights and must be built with nine specific minimum requirements. The court did not, as the Freemans argue, find that Cahava may give permission for a third party public entity to *use* the Easement. The fact that the court only used "unreasonable interference"

and did not cite a case or the Restatement is not determinative because the law is settled—Cahava may make any use of its property that does not unreasonably interfere with the Freemans' use of the Easement and Roadway. *See Hunt*, 216 Ariz. at 121, ¶ 21; Restatement (Third) of Property: Servitudes § 4.9. Consequently, the trial court did not abuse its discretion by denying the Freemans' motion to amend findings of fact and conclusions of law.

III. Sanctions and Attorney Fees

¶43 The Freemans argue the court erred in denying their post-trial motions for sanctions and fees, and in denying their request for attorney fees.

A. Denial of Sanctions and Fees

¶44 The Freemans filed two separate motions for sanctions and fees. In February 2015, the Freemans filed a motion for sanctions and fees against Cahava, its principle Mark Stapp, and its counsel. The Freemans argued that because Cahava did not disclose it deeded the subject property to Morningstar Road Properties during the litigation, it committed a fraud upon the court and Stapp committed perjury when testifying at trial. In March 2015, the Freemans filed a separate motion for sanctions and fees against the Town and its counsel. The Freemans asserted that the Town unreasonably expanded or delayed the proceedings by pursuing construction of the Trail with unjustifiable and unreasonable positions designed to harass the Freemans and escalate their fees; such as proposing several different Trail plans, claiming the Town guidelines for trail building were merely permissive, claiming the Trail was feasible to build, and asking Mr. Freeman repetitive questions during his deposition. The Freemans requested the court consolidate their two motions for sanctions and abstain from ruling on the merits of the case until the motions were heard and decided.

¶45 After briefing and argument, the court, in a minute entry, struck the Freemans' consolidated motion as "procedurally inappropriate" because the issues asserted in the motion were supplemental to Freemans' closing arguments. Because the Freemans failed to provide a copy of the transcript of the argument at the status conference, we presume it supports the court's findings and conclusions. *See In re Mustonen's Estate*, 130 Ariz. 283, 284 (App. 1981); ARCAP 11 (a party is responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal).

¶46 The Freemans further argue that the court erred because it must set forth specific reasons and consider the factors enumerated under A.R.S. § 12-350 "[i]n reaching a determination of whether to award fees pursuant to A.R.S. § 12-349." The Freemans have shown no error.

¶47 Under § 12-349, "the court shall assess reasonable attorney fees, expenses . . . if the attorney or party does any of the following:

> 1.Brings or defends a claim without substantial justification.
>
> 2. Brings or defends a claim solely or primarily for delay or harassment.
>
> 3. Unreasonably expands or delays the proceeding.
>
> 4. Engages in abuse of discovery.

"*In awarding attorney fees* pursuant to § 12-349, the court shall set forth the specific reasons for the award and may include the following factors, as relevant, in its consideration . . . ." A.R.S. § 12-350 (emphasis added). The court is required to provide its reasoning and consider the factors *only if* it actually awards sanctions and fees. In contrast, if the court declines to award sanctions, such as here, no requirement to provide specific reasons exists. As a result, we conclude the court did not abuse its discretion in denying the Freemans' request for sanctions and fees.

B. Denial of Attorney Fees

¶48 The Freemans assert they should have been awarded attorney fees as the successful/prevailing party because the court granted them a limited form of injunctive relief.

¶49 In denying attorney fees to all parties, the court found it could not conclude that either the Freemans or the Town were the successful parties in this litigation. The court further found that "[m]any of the positions taken by [the Freemans] at trial were unreasonable and ultimately not accepted by the [c]ourt. This is also reflected in the [c]ourt's rejection of the form of judgment submitted by the [Freemans]." We find no abuse of discretion. *See Cowan*, 235 Ariz. at 205, ¶ 5.

IV. Attorney Fees on Appeal

¶50 All parties request attorney fees and costs on appeal. The Freemans and Cahava request fees and costs under ARCAP 21 and A.R.S. § 12-341.01. The Freemans also seek fees and costs under the private

attorney general doctrine. *See Arnold v. Ariz. Dep't of Health Services*, 160 Ariz. 593, 609 (1989). Finally, the Town requests fees and costs pursuant to A.R.S. § 12-349 for unjustified actions on the part of a party or attorney. *See supra* ¶ 47.

¶51 Because the Freemans are not the successful party on appeal, we decline to award them fees or costs. In the exercise of our discretion, and based upon our determinations above, as Cahava and the Town are the prevailing parties on appeal, we award them a reasonable amount of attorney fees and costs under § 12-341.01 incurred on appeal upon compliance with ARCAP 21. Section 12-341.01.A provides a court with discretion to award reasonable attorney fees to a prevailing party "[i]n any contested action arising out of a contract." We have previously concluded that litigation over unreasonable interference with an easement in a recorded deed arises out of contract and therefore falls within the scope of § 12-341.01. *See Squaw Peak*, 149 Ariz. at 414. Because we award fees under § 12-341.01, we need not address § 12-349.

CONCLUSION

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

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