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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

BRUCE N. PROCTER, Trustee of the
Bruce N. Procter Revocable Living Trust, *Plaintiff/Appellee*,

v.

DONALD M. GRAHAM, II and
TANA ASHCROFT GRAHAM, *Defendants/Appellants*.

No. 1 CA-CV 17-0708
FILED 10-23-2018

Appeal from the Superior Court in Apache County
No. S0100CV201400221
The Honorable Steve Williams, Judge

AFFIRMED IN PART; REVERSED IN PART

COUNSEL

Donald M. Graham, II & Tana A. Graham, Eagar
Defendants/Appellants

The Rigg Law Firm PLLC, Pinetop
By Brett R. Rigg & Shane J. Shumway
Counsel for Plaintiff/Appellee

MEMORANDUM DECISION

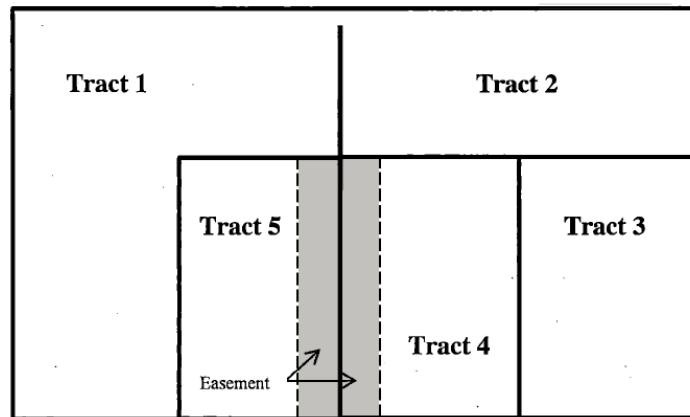
Judge David D. Weinzwieg delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Peter B. Swann joined.

WEINZWEIG, Judge:

¶1 Donald and Tana Graham (“the Grahams”) appeal from the superior court’s denial of their motion for summary judgment and application for attorneys’ fees and its award of attorneys’ fees to Bruce N. Procter (“Procter”) as Trustee of the Bruce N. Procter Revocable Living Trust. We lack jurisdiction over the portion of the appeal challenging the denial of summary judgment. With regard to the issue of fees, we affirm in part and reverse in part.

FACTS AND PROCEDURAL BACKGROUND

¶2 This case is about an easement recorded by the common owner of five contiguous tracts in 2006. The easement ran across Tracts 4 and 5 (the servient tenements) to provide ingress and egress to Tracts 1 and 2 (the dominant tenements). The easement was 30 feet wide and ran along the shared boundary between Tracts 4 and 5, leaving 15 feet of easement on each tract. The following depicts the layout of the tracts and easement:



The individual tracts were later sold to four separate owners: Charles Martin (“Martin”) owns Tract 1, SES 013, LLC (“SES 013”) owns Tract 2, Procter owns Tract 5 and the Grahams own Tract 4.

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¶3 Plaintiffs Martin (Tract 1), SES 013 (Tract 2) and Procter (Tract 5) sued the Grahams (Tract 4) in December 2014 for breach of contract and unjust enrichment. The complaint alleged the Grahams violated the terms of the easement by “placing permanent obstructions” upon the Grahams’ side of the easement to force all vehicular traffic onto Procter’s side of the easement. Plaintiffs sought an injunction to “prohibit[] the actions complained of [t]herein” and to “require [the Grahams] to remove all obstructions whatsoever from the easement.” The Grahams admitted “allowing some boulders, mechanical equipment, and an elk statue to sit in the easement area,” but described the items as temporary, denied “any wrongdoing” and disputed whether the easement was even valid.

¶4 The parties filed dueling motions for summary judgment. Plaintiffs argued the terms of the easement prohibited the Grahams from obstructing the easement and the Grahams’ use was unnecessary, inappropriate and unreasonably interfered with passage. The Grahams argued the easement was invalid and Plaintiffs suffered no damages.

¶5 Plaintiffs Martin and SES 013 settled with the Grahams in October 2016, before responding to the Grahams’ motion for summary judgment. In settlement, Martin and SES 013 stipulated to a final judgment dismissing their claims against the Grahams with prejudice and extinguishing the claimed easement insofar as it burdened the Grahams’ property. They also paid \$37,000 to the Grahams. Under the agreement, the court entered judgment in favor of the Grahams and against Martin and SES 013 on October 31, 2016. The court certified the judgment as final under Arizona Rule of Civil Procedure (“Rule”) 54(b). The final judgment provides, among other things, that “[t]he Purported Easement described in the attached Stipulated Agreement is hereby extinguished as set forth herein and declared to be and have been null and void *ab initio*.”

¶6 Undeterred, Procter continued to press his claims against the Grahams. As the sole remaining plaintiff, Procter fully briefed the summary judgment motions. He also objected to the settlement agreement.

¶7 The court denied both summary judgment motions on December 21, 2016, generally finding that “there exists, in the instant case, genuine issues of material fact, including a dispute over whether a valid easement exists.” The decision did not address any individual arguments.

¶8 On January 20, 2017, five days before oral argument on his objection to the settlement, Procter moved to voluntarily dismiss the lawsuit without prejudice under Rule 41(a)(2). Though unable to reach

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agreement upon a stipulated dismissal, Procter touted the lawsuit as a success, explaining that “the goals asserted by the lawsuit have been fulfilled and there is no further need for litigation.” He pointed to the settlement agreement between Martin, SES 013 and the Grahams, which meant “there is no longer a legal easement burdening Mr. Procter’s property which Mr. Graham used for his personal driveway and that was the basis of this lawsuit” and reported having “recently received a signed Deed that abandons the entire easement.” He also cited written confirmation from the Grahams that “defendant Graham is extending his newly constructed fence so there should no longer be any trespass by the Grahams onto Mr. Procter’s property while accessing the [Grahams’] driveway.”

¶9 The superior court summarily granted Procter’s motion without waiting for the Grahams’ response. The Grahams objected, but then informed the court that the parties had reached a stipulated agreement to voluntarily dismiss the lawsuit. The Grahams asked the court to enter a revised order *nunc pro tunc* dismissing the case with prejudice, but preserving the issue of attorneys’ fees and costs.

¶10 The parties briefed the issue of attorneys’ fees and costs. Procter and the Grahams moved for fees under A.R.S. § 12-349 (litigation conduct). The Grahams also sought fees under A.R.S. § 12-341.01 (contract) and A.R.S. § 12-1103 (quiet title).

¶11 On May 22, 2017, after oral argument, the court denied any award of attorneys’ fees and costs to either party. The court denied fees under A.R.S. § 12-349 because “all [parties] contributed to the delay in reaching a resolution” and denied fees under A.R.S. § 12-341.01 because “both parties were able to obtain elements of what they ultimately sought.” It also denied fees under A.R.S. § 12-1103 because no quiet title action was asserted.

¶12 The Grahams filed a “Motion for New Trial” on the issue of attorneys’ fees. The Grahams argued the superior court “erred as a matter of law” because (1) Procter’s voluntary dismissal meant “the Grahams [were], by definition, the prevailing party” and entitled to their attorneys’ fees; (2) the record indicated the Grahams succeeded on all claims; and (3) the court should have “exercise[d] its discretion” to award fees. The court denied the motion and granted Procter’s request for an award of reasonable attorneys’ fees incurred in responding to the motion under A.R.S. § 12-349. The court concluded the motion “unreasonably expand[ed] proceedings by

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reasserting issues previously argued, considered and ruled on by the Court.”

¶13 The Grahams timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1) and -2101(A)(5)(a).

DISCUSSION

A. Scope of Appeal

¶14 The Grahams spend much of their opening brief contesting the superior court’s denial of their motion for summary judgment. We lack jurisdiction to review the denial of a motion for summary judgment and thus decline to address those arguments. *Orme Sch. v. Reeves*, 166 Ariz. 301, 303 (1990).

B. Application for Attorneys’ Fees

¶15 The Grahams argue the superior court erred by denying their application for attorneys’ fees under A.R.S. § 12-341.01 (contract), § 12-1103 (quiet title) and § 12-349 (litigation conduct). We address each statute in turn.

1. A.R.S. § 12-341.01

¶16 The Grahams argue the superior court “erred as a matter of law” by not awarding their attorneys’ fees under A.R.S. § 12-341.01 because Procter “voluntarily dismissed his claims with prejudice,” which the Grahams argue means “the Grahams are, by definition, the prevailing party and, therefore, are entitled to an award of attorneys’ fees.”

¶17 This argument fails because an award of attorneys’ fees is discretionary under this statute, even for successful parties in contract-related litigation. A.R.S. § 12-341.01(A) (“In any contested action arising out of a contract, express or implied, the court *may* award the successful party reasonable attorney fees.”) (emphasis added).

¶18 We affirm the court’s designation of the successful party if “any reasonable basis exists for it.” *Maleki v. Desert Palms Profl Props., L.L.C.*, 222 Ariz. 327, 334, ¶ 35 (App. 2009) (quotation omitted). We accord such deference “because [the superior court] is better able to evaluate the parties’ positions during the litigation and to determine which has prevailed.” *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13, ¶ 22 (App. 2011). The superior court had a reasonable basis for finding neither Procter nor

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the Grahams were the successful party here. It determined that both parties achieved meaningful litigation goals. “Procter was successful in getting Graham to agree to move a driveway off of Procter’s land and to stop traversing over Procter’s property to access his own. Graham was successful in defending Procter’s efforts to have stationary objects removed from that portion of an easement dispute which Graham placed on his own property.” Because the record supports this conclusion, we find no abuse of discretion.¹

2. A.R.S. § 12-1103

¶19 The superior court properly denied the Grahams’ request for fees under A.R.S. § 12-1103 because no quiet title claims were asserted in the lawsuit and the Grahams never met “all requirements set forth in A.R.S. § 12-1103(B).” *Long v. Clark*, 226 Ariz. 95, 96, ¶ 5 (App. 2010).

3. A.R.S. § 12-349(A)

¶20 The Grahams further argue the superior court erred by denying their motion for attorneys’ fees under A.R.S. § 12-349(A). We review the court’s findings of fact under the clearly erroneous standard but review the statute’s application *de novo*. *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 555, ¶ 27 (App. 2001).

¶21 As relevant here, A.R.S. § 12-349(A) requires a court to impose reasonable attorneys’ fees and expenses against a party or attorney who “[b]rings or defends a claim without substantial justification,” “[b]rings or defends a claim solely or primarily for delay or harassment,” or “[u]nreasonably expands or delays the proceeding.” A claim is “without substantial justification” if it is “groundless” and “not made in good faith.” A.R.S. § 12-349(F).

¶22 The Grahams argue the lawsuit was unjustified because (1) the easement had never been used for access to Tracts 1 and 2, and indeed

¹ The Grahams present two readily-distinguishable decisions in favor of their argument. In *Britt v. Steffen*, 220 Ariz. 265, 268, ¶ 11 (App. 2008), the defendant was designated the successful party after the lawsuit was dismissed *for lack of prosecution*. By contrast, Procter pressed his claims until the end, gained tangible benefits from the litigation and the parties stipulated to a voluntary dismissal. And the decision in *Vicari v. Lake Havasu City*, 222 Ariz. 218, 224, ¶ 21 (App. 2009), merely confirms that a superior court maintains discretion to designate the successful party under A.R.S. § 12-341.01, even where a lawsuit is voluntarily dismissed.

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had been blocked by Plaintiffs, (2) Procter continued to litigate his claims after his co-Plaintiffs settled, and (3) Procter tried to “derail” the settlement by filing a “frivolous” objection without standing.

¶23 The superior court did not err by denying the Grahams’ motion for sanctions and fees under A.R.S. § 12-349(A). The court denied summary judgment to both parties on the merits after extensive briefing and argument. *See Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 497 (App. 1990) (“[T]he existence of disputed facts at the time of the summary judgment hearing indicates a bona fide dispute that is ‘well-grounded’” for purposes of Rule 11.).

¶24 And while the court recognized “the litigation spanned over a few years,” it ascribed that delay to both parties, including the Grahams’ “change in counsel and differences of opinion on the legality of the easement at issue.” The record supports this determination. The Grahams twice had to change attorneys during the lawsuit; first over a conflict of interest and then a difference of opinion. Also contributing to the delay, *both* sides stipulated to continue the proceedings on several occasions and the Grahams asked for more time to conduct discovery. In addition, the Grahams modified their theory during the litigation, first conceding but then contesting the easement’s validity, which required additional discovery and briefing.

C. Motion for New Trial

¶25 The Grahams last argue the superior court abused its discretion (1) in denying their “Motion for New Trial” on the issue of attorneys’ fees and (2) awarding Procter reasonable fees incurred in responding to the motion under A.R.S. § 12-349. Having affirmed the superior court’s denial of the Grahams’ application for attorneys’ fees, we find no error in the court’s denial of a request to reconsider the issue.

¶26 We hold that the court erred, however, in awarding Procter his attorneys’ fees under A.R.S. § 12-349 for having to respond to the Grahams’ motion, which was akin to a motion for reconsideration.

¶27 When reviewing an award of attorneys’ fees under A.R.S. § 12-349, “the question is whether sufficient evidence exists to support his finding of a frivolous claim or defense.” *Phoenix Newspapers, Inc. v. Dep’t of Corrs.*, 188 Ariz. 237, 243 (App. 1997).

¶28 The court awarded fees against the Grahams because their motion “unreasonably expand[ed] proceedings by reasserting issues

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previously argued, considered and ruled on by the Court.” The motion did not, however, merely parrot the same arguments raised and rejected in the Grahams’ original fee application. The motion instead argued the superior court’s decision on attorneys’ fees improperly relied upon facts outside the record and was contrary to the law. The Grahams also presented additional case law for the argument that they were the successful party and entitled to an award of attorneys’ fees. The court distinguished the case law in denying the motion for new trial. Although the court was not persuaded, the motion presented at least a few different arguments and authorities from the original application for attorneys’ fees.

CONCLUSION

¶29 For the foregoing reasons, we affirm the superior court’s orders and judgment, except for its award of attorneys’ fees against the Grahams on their motion for new trial, which we reverse. We also deny Procter’s request for attorneys’ fees incurred on appeal pursuant to A.R.S. § 12-349.



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