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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

SETH A. ELSE et al., *Plaintiffs/Appellants*,

v.

ANTHONY LA RUSSA et al., *Defendants/Appellees*.

No. 1 CA-CV 18-0764
FILED 1-23-2020

Appeal from the Superior Court in Maricopa County
No. CV2016-054335
The Honorable Bruce Cohen, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Diane M. Johnsen joined.

M O R S E, Judge:

¶1 Seth Else and Danielle Else appeal the superior court's grant of the motion filed by Anthony La Russa and Elaine La Russa ("the Landowners") for judgment as a matter of law on the Elses' claim of negligence *per se* and the issue of whether Seth was a trespasser at the time he rode his bicycle into a fence on the Landowner's property. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 One Friday afternoon, Seth decided to take a bike ride after work. He went to what he believed was a system of trails where he had previously run. Eventually, Seth ventured onto an unfamiliar section of the trail. Even though he had never taken this route before, Seth saw bike tracks in the dirt ahead of him and assumed he was still on a trail. Seth did not see a cable fence that the Landowners had erected, hit the cable at approximately 18 miles per hour, and suffered serious injuries. The Elses filed suit against the Landowners, alleging negligence and loss of consortium.

¶3 The Landowners moved for partial summary judgment, asking the superior court to rule that Seth was a trespasser at the time of the accident and to dismiss the Elses' claims for negligence *per se*, gross negligence, and punitive damages. The Landowners' argument rested upon the claim that, despite Seth's misconception, no bike trial ran through their land. After briefing and oral argument, the superior court granted the motion as to punitive damages but denied the motion as to all other matters, finding that genuine issues of material fact existed.

¶4 The matter was set for a four-day jury trial. After the close of the Elses' proof, the Landowners moved for judgment as a matter of law on the same issues on which they had moved for partial summary judgment. The superior court granted the Landowners' motion on the issue of whether Seth was a trespasser at the time of the accident, and on the claim of

negligence *per se*. However, the court denied the motion as to the issue of whether the Landowners were grossly negligent in erecting the fence on their property.

¶5 The only question remaining for the jury was whether the Landowners willfully or wantonly caused Seth's injuries, and the jury returned a verdict in the Landowners' favor. The Elses filed a motion for new trial pursuant to Ariz. R. Civ. P. 59. The court denied the motion and entered final judgment. The Elses timely appealed and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶6 We review the grant or denial of a motion for judgment as a matter of law *de novo*, viewing the facts in the light most favorable to the non-moving party. *Dupray v. JAI Dining Servs. (Phoenix), Inc.*, 245 Ariz. 578, 582, ¶ 11 (App. 2018). A court may grant judgment as a matter of law only if "a reasonable jury would not have a legally sufficient evidentiary basis to find for [a] party" on an issue that is necessary to the party's claim or defense. *Id.* (quoting Ariz. R. Civ. P. 50(a)). When considering a motion for judgment as a matter of law, "the trial court may not weigh the credibility of witnesses or resolve conflicts of evidence and reasonable inferences drawn therefrom[,] but must give full credence to the right of the jury to determine credibility, weigh the evidence, and draw justifiable conclusions therefrom[.]" *Id.* (citations and quotation marks omitted). Because the Elses failed to present any competent evidence to support the existence of a public easement or evidence which showed that the Landowners were negligent *per se*, we affirm the superior court in all respects.

I. Existence of a Public Easement

¶7 The Elses first argue the superior court erred in holding that Seth was a trespasser at the time of the accident.[1] They argue that "[t]he determination of whether Seth legally entered upon the property cannot generally be made as a matter of law." It is generally true that "status as [a] trespasser, licensee or invitee . . . [is] a question of fact for the jury's determination." *State v. Juengel*, 15 Ariz. App. 495, 499 (1971), *disagreed with on other grounds by New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95, 108 (1985). However, the issue here turns solely on the Elses' contention that a public easement for a bike trail existed on the Landowners' property. The

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[1] We construe this partial judgment as a matter of law, as it only resolved one issue related to the Elses' claim of negligence.

superior court correctly found that the Elses presented no evidence upon which a jury could have found that Seth was riding on an easement when he hit the Landowners' fence.

¶8 "An easement is a right to use the land of another for a specific purpose." *Scalia v. Green*, 229 Ariz. 100, 102, ¶ 7 (App. 2011). "Easements usually are created by express conveyance, typically by deed, but may come into being less explicitly, by implication, or against the will of the owner of the burdened estate, by prescription." *Rogers v. Bd. of Regents of Univ. of Arizona*, 233 Ariz. 262, 266 (App. 2013).

¶9 The Elses do not cite any authority for the proposition that an easement arose by prescription or by implication. Instead, they seem to contend that an easement was dedicated for public use over the wash. *See Scalia*, 229 Ariz. at 102, ¶ 7 (describing express easements); *Dabrowski v. Bartlett*, 246 Ariz. 504, 513, ¶ 27 (App. 2019) (discussing implied easements of necessity); *Spaulding v. Pouliot*, 218 Ariz. 196, 201, ¶ 14 (App. 2008) (describing prescriptive easements). For support, the Elses rely upon testimony from their expert witness that the State of Arizona owns the alleged easement, so we therefore assume that to be the position advanced by the Elses on appeal.

¶10 "In the absence of contrary precedent, Arizona courts look to the Restatement." *Paxson v. Glovitz*, 203 Ariz. 63, 67, ¶ 21 n.3 (App. 2002); *see also Dabrowski*, 246 Ariz. at 513, ¶ 21. The Restatement instructs that "[g]overnmental bodies may acquire servitudes by dedication and condemnation, as well as by [all other normal methods of creating an easement]." Restatement (Third) of Property: Servitudes § 2.18(1) (2000). The public may obtain a servitude by dedication, but no public "right of way" may be established by prescription. *Curtis v. S. Pac. Co.*, 39 Ariz. 570, 573 (1932); *see also Kadlec v. Dorsey*, 224 Ariz. 551, 552, ¶ 8 (2010) (discussing the requirements for dedicating private land to public use).

¶11 As evidence to support the existence of an easement on the Landowners' land, the Elses point to: (1) the opinion of their expert witness; (2) evidence that other individuals hiked and biked on the Landowners' land apparently believing it to be a public trail; and (3) two signs near the Landowners' property. Whether taken together or separately, none of these items provide evidence to support the existence of an easement, regardless of the underlying nature of the easement.

¶12 An express easement cannot be established without a writing that complies with the statute of frauds. *Dabrowski*, 246 Ariz. at 513, ¶ 22

(citing A.R.S. § 44-101(6)). The record is devoid of any such writing and, therefore, the supposed public easement cannot be an express servitude. Implied easements "can only be made in connection with a conveyance; that is, an implied easement is based upon the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment." *Koestel v. Buena Vista Pub. Serv. Corp.*, 138 Ariz. 578, 580 (App. 1984). The Elses point to no such conveyance.

¶13 As to a governmental or public easement obtained by dedication, "[a]n effective dedication of private land to a public use has two general components - an offer by the owner of land to dedicate and acceptance by the general public." *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 423-24, ¶ 21 (2004). "Dedication is not accomplished by particular words or forms of conveyance, but does require 'full[ ] demonstrat[ion][of] the intent of the donor to dedicate.'" *Kadlec*, 244 Ariz. at 552, ¶ 8 (quoting *Pleak*, 207 Ariz. at 523-24, ¶ 21). "Proof of facts necessary to constitute dedication must be 'clear, satisfactory and unequivocal.'" *City of Scottsdale v. Mocho*, 8 Ariz. App. 146, 149 (1968) (quoting 23 Am.Jur.2d, Dedication, Sec. 79, at p. 65). "Dedication is not presumed nor does a presumption of an intent to dedicate arise unless it is clearly shown by the owner's acts and declarations." *City of Phoenix v. Landrum & Mills Realty Co.*, 71 Ariz. 382, 386 (1951). There was simply no evidence at trial of any dedication of the Landowners' land, and therefore the alleged "public easement" could not have been created by dedication.

¶14 That leaves only an easement by prescription. Assuming, without deciding, that the State of Arizona can obtain a prescriptive easement for use by the public, the Elses offered no evidence to prove the existence of such an easement. A party claiming an easement by prescription "must establish that the land in question has actually and visibly been used for ten years, that the use began and continued under a claim of right, and [that] the use was hostile to the title of the true owner." *Paxson*, 203 Ariz. at 67, ¶ 22. Testimony at trial reflected, at most, that people have used the area around the Landowners' fence as a trail starting around four years before Seth's accident. There was simply no basis in the evidence to support a claim that a prescriptive easement for public use existed on the Landowners' property.

¶15 The Elses rely heavily upon their expert's assertion that an easement exists. The expert, a licensed architect, based his opinion principally upon two signs in the general area that referenced A.R.S. § 28-815, a statute that addresses "bicycle path usage." But the signs were not

located on the Landowners' property, nor were they situated where Seth entered what he testified he believed was a bike trail. The expert further relied upon a title search document which referenced "facts, rights, interests, or claims which are not shown by public records but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof" and "[e]asements, liens, or encumbrances, or claims thereof, which are not shown by public records[.]" However, an expert's opinion cannot create an easement where the legal requirements for such an easement have not been proven. *See Hafner v. Beck*, 185 Ariz. 389, 393 (App. 1995) ("Although standards for experts' qualifications and admissibility of their opinions have been stretched considerably, we have not yet reached the point when experts can dictate the law."); *see also Siemsen v. Davis*, 196 Ariz. 411, 414, ¶ 13 (App. 2000) (questioning "the resort to expert testimony on an issue of [the legal effect of recorded public easements] that should more properly have been framed as one of law").

¶16 The Elses' expert testified that he based his opinion upon the existence of signage, phone conversations he had with Scottsdale employees, records which did not reference any public easement, and "common sense." None of this, taken together or separately, is competent evidence of the existence of an easement. *See Spaulding*, 218 Ariz. at 201, ¶ 14; *see also Siemsen*, 196 Ariz. at 414, ¶ 13.

¶17 Finally, the Elses argue that because the fence was located on a drainage easement owned by Scottsdale, the jury should have been allowed to make the determination of whether Seth was a trespasser. That easement allows Scottsdale access to the property "for the construction, maintenance, operation, replacement, and repair of levees, dikes, channels, and other works of drainage or flood control." This argument is without merit because, by its own terms, the drainage easement does not provide any right of access to the public at large.

¶18 Given that there was no competent evidence to support the Elses' claim that a public easement for a bike trail existed across the Landowners' property, we affirm the superior court's grant of partial judgment as a matter of law on the issue of whether Seth was a trespasser at the time of the accident.

II. Negligence *Per Se*

¶19 The Elses argue the superior court erred in granting the Landowners' motion for judgment as a matter of law on the Elses' negligence *per se* claim. "[A] claim for negligence *per se* must be based on a

statute [or ordinance] enacted 'for the protection and safety of the public.'" *Steinberger v. McVey ex rel. Cty. of Maricopa*, 234 Ariz. 125, 139, ¶ 56 (App. 2014) (quoting *Good v. City of Glendale*, 150 Ariz. 218, 221 (App. 1986)). "However, our negligence *per se* analysis does not end there; we must also determine: (1) the purpose of [the statute or ordinance in question], and whether [the plaintiff], as alleged in [his] complaint, falls within the class of persons the statute [or ordinance] is intended to protect, and (2) whether we should adopt the standard of conduct defined in [the statute or ordinance in question] as a negligence standard." *Steinberger*, 234 Ariz. at 139, ¶ 57. We have previously recognized that statutes intended for the protection of the public at large, and not for the benefit for a specific class of people, do not create a standard of conduct for the purposes of negligence *per se*. *Tellez v. Saban*, 188 Ariz. 165, 169 (App. 1996) (citing Restatement (Second) of Torts § 288 cmt. b (1965)). "Such [statutes] create an obligation only to the state, or to some subdivision of the state, such as a municipal corporation. The standard of conduct required by such legislation or regulation will therefore not be adopted by the court as the standard of a reasonable man in a negligence action brought by the individual." Restatement (Second) of Torts § 288 cmt. b (1965).

¶20 On appeal, the Elses argue that the Landowners were negligent *per se* by violating Scottsdale Revised Code (S.R.C.) § 18-5 and A.R.S. § 33-1551. We address each law separately.

A. Scottsdale Revised Code § 18-5

¶21 First, the Elses argue that the Landowners violated a public-nuisance ordinance by erecting the fence. That ordinance, in relevant part, provides:

> Except as otherwise permitted by law, each of the following conditions is a public nuisance on any land or in any building in the city and is unlawful, when the condition is or may be (i) discomforting or offensive to a reasonable person of normal sensitivity, or (ii) detrimental to the life, health or safety of individuals or the public:
>
> […]
>
> (11) Plant growth or any other condition, sign, structure, vehicle or watercraft that obstructs or interferes with or renders dangerous the use or passage of any public place, stream or water course.

S.R.C. § 18-5(11).

¶22 As applied to the property at issue, this ordinance protects the public at large from harm caused by "a condition" that obstructs water flowing down the wash. Even assuming this public nuisance ordinance could be used to establish negligence *per se,* the Elses' claim would still fail because the injury Seth suffered when he collided with the fence was not the harm the ordinance was enacted to prevent. Accordingly, we affirm the superior court's judgment as a matter of law on the Elses' negligence *per se* claim based on S.R.C. § 18-5.

B. A.R.S. § 33-1551

¶23 The Elses also rely upon a state statute which provides that:

> A public or private owner, easement holder, lessee, tenant, manager or occupant of premises is not liable to a recreational or educational user except on a showing that the owner, easement holder, lessee, tenant, manager or occupant was guilty of wilful, malicious or grossly negligent conduct that was a direct cause of the injury to the recreational or educational user.

A.R.S. § 33-1551(A).

For the purposes of this statute, "grossly negligent" means "a knowing or reckless indifference to the health and safety of others." A.R.S. § 33-1551(C)(2).

¶24 Our Supreme Court recognized that "the recreational use statute's purpose is 'to encourage landowners and others to open lands to recreational users and to keep the lands open.'" *Normandin v. Encanto Adventures, LLC,* 246 Ariz. 458, 461, ¶ 13 (2019) (quoting *Ward v. State,* 181 Ariz. 359, 362 (1995)). To further this goal, the statute limits common-law liability and provides immunity to landowners unless a recreational-use plaintiff can show the landowner was willful, malicious, or grossly negligent. *Id.* at 460-61, ¶¶ 9-10, and 13.

¶25 The Landowners correctly point out that the jury was instructed to find for the Elses if it found the Landowners acted "with reckless indifference to the results, or to the rights or safety of others." Even assuming, *arguendo*, that the statute applied to this scenario, the standard set forth by A.R.S. § 33-1551 is materially indistinguishable from the standard the jury was instructed to apply.

¶26 The superior court properly granted judgment as a matter of law on the Elses' negligence *per se* claim.

CONCLUSION

¶27 The superior court correctly granted judgment as a matter of law on the issue of whether Seth was a trespasser and on the Elses' claim of negligence *per se*. Accordingly, we affirm the judgment in favor of the Landowners on all the claims. The Landowners request their costs on appeal, pursuant to A.R.S. § 12-342 and ARCAP 21. Because the Landowners have prevailed, we award them their costs.

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