DIVISION ONE
FILED: 03/30/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THOMAS P. JOYNT and JANE A. JOYNT, husband and wife, Plaintiffs/Counter-Defendants/Appellees, v. GARY L. ENDERS and CHERYL L. ENDERS, husband and wife, Defendants/Counter-Claimants/Appellants.	1 CA-CV 08-0047 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court of Maricopa County

Cause No. CV 2007-051281

The Honorable Paul A. Katz, Judge

AFFIRMED IN PART AND VACATED IN PART

Jennings, Strouss & Salmon Phoenix
By Douglas G. Zimmerman
Attorneys for Plaintiffs/Counter-Defendants/Appellees

Rowley Chapman Barney & Buntrock, Ltd. Mesa
By Shane D. Buntrock
Attorneys for Defendants/Counter-Claimants/Appellants

T H O M P S O N, Judge

¶1 Gary L. Enders and Cheryl L. Enders (the Enderses) appeal from the trial court's issuance of a preliminary injunction concerning the use and maintenance of an easement located on their property. The Enderses argue the trial court erred in enjoining them from maintaining and improving the easement and allowing Thomas P. Joynt and Jane A. Joynt (the Joynts) to use the easement for the benefit of land not part of the dominant estate. Additionally, the Enderses argue the court erred in holding them responsible for any necessary repairs to the Joynts' septic system and preventing the Enderses from granting use of the easement to third parties or successors in interest. For the reasons explained below, we affirm in part and vacate in part.

FACTS AND PROCEDURAL BACKGROUND

¶2 This appeal concerns an express easement between two neighboring properties in Navajo County, Arizona, with the dominant estate (Lot 28F) being owned by the Joynts, and the servient estate (Lot 28S) being owned by the Enderses. Initially, the Shepherds owned Lot 28S, which consists of 8.92 acres. The Joynts purchased Lot 28F, a two-acre parcel, in July 1994. On November 22, 1995, the Shepherds granted the Joynts a 65-foot wide access and utility easement over a portion of Lot

28S for the benefit of Lot 28F. The easement runs along the western side of Lot 28S and provides, in relevant part:

> 2. The Easement shall be exclusive and shall be for vehicular and pedestrian access, and for the installation and maintenance of water, telephone, electrical, sewer lines and/or a septic system.
>
> 3. This Easement is being granted for use by the Dominant Land, and it is hereby recognized and understood by Grantee . . . that the granting of this easement is for the initial installation and future maintenance of the driveway into Grantee's property (Lot 28F) and for the installation of utilities into that same lot. It is also understood that there shall be installed a septic system within the easement which will serve Grantee's property. It is also understood that the 65 foot easement on the west side of Grantor's property is to be used for ingress/egress, a turnaround, and extra parking . . . and **the road is to remain as the road stands**. In the future the grantee . . . shall not widen the driveway in any area, nor shall they cause the removal of any additional trees in the 65 foot easement without the written/signed/notarized authorization of the grantor.

¶3 The Shepherds constructed a roadway within the easement, which the Joynts paid for. Also within the easement is a driveway the Joynts use to access Lot 28F. A parking and turnaround area was created near the north end of the easement. Pursuant to the Shepherds' request, the Joynts installed a gate at the north end of the easement near the parking and turnaround area to prevent cars from going over a nearby cliff. The Joynts also installed a septic system further south within the easement. Additionally, the Joynts put up a chain just north of the septic tank line, blocking their driveway. The Shepherds

accessed Lot 28S by a crossing over the southern portion of the easement.

¶4 In 1998, the Joynts acquired Lot 28N, a one-acre parcel directly south of Lot 28F. The Joynts placed a trailer on Lot 28N and made use of the septic system in the easement. Lots 28F and 28N were subsequently combined into one parcel, now known as Lot 28X.

¶5 The Enderses purchased Lot 28S from the Shepherds in May 2005. After the purchase, the Enderses removed trees from the easement and widened the roadway. The Enderses also removed the Joynts' gate and chain and installed three gates on the easement: a 24-foot wide locked rolling gate near the southern end of the easement, a 16-foot wide locked gate on the western boundary of the easement, and a 12-foot wide gate near the northern end of the easement on the western boundary. Keys for all gates were provided to the Joynts.[1] Additionally, the Enderses installed a chain link fence along the western boundary of the easement.

¶6 On March 13, 2007, the Joynts filed a lawsuit against the Enderses for breach of contract and declaratory and injunctive relief, requesting the removal of all fencing and

[1] Initially, when the 24-foot gate was installed, the Enderses mailed the Joynts a key to the gate. When the 16-foot gate was later installed, that key opened the 16-foot gate, but not the 24-foot gate.

gates and for the Enderses to discontinue the use of the roadway and the installation of pipes, structures and utility lines within the easement. The Enderses counterclaimed for breach of easement, trespass, nuisance, declaratory and injunctive relief, alleging the Joynts connected the trailer on Lot 28N to the septic system without permission or authority. An evidentiary hearing was held on June 18, 2007, and continued on August 13. In between those dates, the Enderses dug up the Joynts' septic system and discovered a septic line leading directly to Lot 28N.

¶7 The court issued findings of fact and conclusions of law and granted a preliminary injunction enjoining the Enderses from altering the path of the roadway or placing obstacles within the roadway without the Joynts' consent; from locking the gates at certain times; and from granting use of the easement to third parties or successors in interest. Additionally, the Enderses were ordered to replace the locks on the gates with combination locks. Despite the Joynts' request to relocate the gates and fence to the eastern boundary of the easement, the court did not require any such relocation. The Enderses were also ordered to bear the cost of any necessary repairs or modifications to the Joynts' septic system. The court declined to award attorneys' fees and costs to either party. The Joynts filed a motion for reconsideration, which was subsequently denied. The Enderses timely appealed the preliminary

injunction. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(F)(2).

DISCUSSION

I. The Joynts' Issues

¶8 As a preliminary matter, in their answering brief, the Joynts argue the trial court abused its discretion by approving the location of the fence, approving the 12-foot wide gate, and not awarding them attorneys' fees. The Joynts have not filed a cross-appeal. A cross-appeal is required if an appellee seeks to enlarge its rights or lessen the appellants' rights. Arizona Rule of Civil Appellate Procedure (ARCAP) 13(b)(3). Here, the issues raised by the Joynts seek to enlarge their rights and lessen the Enderses' rights by requesting a modification of the injunction in their favor, and seeking to obtain attorneys' fees. *See Engel v. Landman,* 221 Ariz. 504, 510, ¶ 17, 212 P.3d 842, 848 (App. 2009). Therefore, the Joynts were required to file a cross-appeal to raise these issues and we have no jurisdiction to consider them.

¶9 Additionally, the Joynts ask whether the court will abuse its discretion if it requires the Joynts to abandon the easement. The court did not require the Joynts to abandon the easement. Accordingly, we will not address this argument. *See Velasco v. Mallory,* 5 Ariz. App. 406, 410-11, 427 P.2d 540, 544-45 (1967) (explaining "[w]e will not render advisory opinions

anticipative of troubles which do not exist; may never exist; and the precise form of which, should they ever arise, we cannot predict.").

II. Standard of Review

¶10 We review a trial court's issuance of a preliminary injunction for an abuse of discretion. *Valley Med. Specialists v. Farber,* 194 Ariz. 363, 366, ¶ 9, 982 P.2d 1277, 1280 (1999). An abuse of discretion occurs if the trial court applies incorrect substantive law or an incorrect standard for a preliminary injunction, bases its decision on a clearly erroneous factual finding, or applies the appropriate standard for a preliminary injunction in a manner resulting in an abuse of discretion. *McCarthy W. Constructors, Inc. v. Phoenix Resort Corp.,* 169 Ariz. 520, 523, 821 P.2d 181, 184 (App. 1991). We are bound by the trial court's findings of fact unless clearly erroneous, but review conclusions of law de novo. *Flying Diamond Airpark, LLC v. Meienberg,* 215 Ariz. 44, 47, 156 P.3d 1149, 1152 (App. 2007). We view the evidence and all reasonable inferences in the light most favorable to sustaining the trial court's ruling. *Inch v. McPherson,* 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992).

¶11 A party seeking a preliminary injunction must establish: 1) a strong likelihood of success on the merits; 2) the possibility of irreparable harm if the injunction is not

granted; 3) the balance of hardships weighs in their favor; and 4) public policy favors granting the injunction. *Shoen v. Shoen,* 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). This burden can be met by establishing 1) a probability of success on the merits and the possibility of irreparable harm or 2) the existence of serious questions and that "the balance of hardships tip sharply" in favor of the moving party. *Id.* (citing *Justice v. Nat'l Collegiate Athletic Ass'n,* 577 F.Supp. 356, 363 (D. Ariz. 1983)).

III. Lot 28N

¶12 The Enderses first argue the trial court improperly expanded the easement by finding Lot 28N had a right to access the easement. It is undisputed the easement is for the benefit of Lot 28F only. The trial court ruled as follows:

> [The Joynts] are enjoined and ordered to remove the accessory septic line that they have run to their more recently acquired Lot 28N which has been consolidated with Lot 28F into a single parcel. [The Joynts'] utility lines shall be run through the easement, at any appropriate location determined by [the Joynts], but shall be run to and through the original dominant land, what has now been referred to as "old" Lot 28F.

¶13 "The law is clear that an easement appurtenant[2] to a parcel of land, the dominant parcel, may not be used to benefit another parcel of land to which the easement is not appurtenant

[2] An easement appurtenant involves two parcels of land: the benefitted dominant parcel and the burdened servient parcel. *Ammer v. Arizona Water Co.*, 169 Ariz. 205, 209, 818 P.2d 190, 194 (App. 1991).

even though the two parcels are adjacent under common ownership." *DND Neffson Co. v. Galleria Partners,* 155 Ariz. 148, 149, 745 P.2d 206, 207 (App. 1987). The owner of the dominant parcel may not extend the easement to other land owned by him as such would increase the burden of the servient parcel. *Id.* An easement is overburdened when it is improperly used to benefit property other than the dominant parcel. *See id.*

¶14 In this case, Lot 28F is the dominant parcel. However, the septic line was running directly from the easement to Lot 28N. Without deciding the merits, the easement may only benefit Lot 28F and any use benefitting Lot 28N (although now combined with Lot 28F) is improper and overburdens the easement. Given the law and the facts here, the Enderses have established a probability of success on the merits that Lot 28N is not entitled to access or use of the easement. We also find the Enderses have demonstrated the possibility of irreparable harm.[3] As owners of the servient estate, the Enderses are entitled to rely on the express terms of the easement and not have the burden expanded onto additional property, which the Joynts have done. *See Squaw Peak Cmty. Covenant Church of Phoenix v.*

[3] Although the trial court did not address the issue of harm in its ruling, we can affirm the ruling if it is correct for any reason. *Univ. Mech. Contractors of Ariz., Inc. v. Puritan Ins. Co.,* 150 Ariz. 299, 301, 723 P.2d 648, 650 (1986); *Wertheim v. Pima County*, 211 Ariz. 422, 424, ¶ 10, 122 P.3d 1, 3 (App. 2005).

Anozira Dev., Inc., 149 Ariz. 409, 412, 719 P.2d 295, 298 (App. 1986) (noting easement rights must be determined by the language of the instrument). Here, the express terms of the easement grant a benefit to Lot 28F only. Additionally, there is a concern about adverse possession if Lot 28N continues to use the easement as it has since 1998. Accordingly, the trial court correctly enjoined the Joynts from having a septic line running directly to Lot 28N from the easement.

¶15 However, the Enderses argue that allowing the Joynts to have indirect access from the easement to Lot 28N; running the utility line through Lot 28F to the trailer on Lot 28N, still violates the express terms of the easement and is contrary to Arizona law. The trial court did not grant any such right. The court specifically stated the line should be run "to and through the original dominant land." There is nothing in the injunction allowing the lines to run for the benefit of Lot 28N.

¶16 At the time of the hearing, the Joynts had been running the septic and utility lines directly from the easement to and from their trailer on Lot 28N. This improper use was appropriately enjoined. After the ruling was issued, the Enderses requested a ruling on their application for order to show cause why an injunction should not be issued against the Joynts regarding the benefit to Lot 28N. The court denied the Enderses' request stating that the Joynts "have been ordered to

relocate their one septic line which runs to Parcel 28(N)." Thereafter, the Joynts filed a motion for reconsideration stating the septic line "has been rerun through the easement area and into the original dominant land."[4] In the motion, the Joynts requested a temporary order allowing them to continue using the septic system for their trailer. After considering the Enderses' response and hearing oral argument, the court denied the motion, and there has been no appeal from this ruling.

¶17 When reviewing a trial court's ruling, this court may not consider new evidence presented in a motion for reconsideration. *See Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 57 n.2, ¶ 17, 156 P.3d 1157, 1162 n.2 (App. 2007). Further, we may not consider the Joynts' admission in their answering brief as such evidence was not presented to the trial court. *See GM Dev. Corp. v. Cmty. Am. Mortgage Corp.,* 165 Ariz. 1, 4-5, 795 P.2d 827, 830-31 (App. 1990) (noting that appellate review is limited to the record before the trial court). Therefore, because the trial court properly enjoined the Joynts from using the easement to benefit their trailer on Lot 28N, we

[4] In their answering brief, the Joynts admit they are improperly using the septic line for the trailer located on Lot 28N, but argue such use is temporary and does not overburden the easement. Such improper use clearly overburdens the easement pursuant to Arizona law. *See DND Neffson Company,* 155 Ariz. at 149, 745 P.2d at 207.

affirm such order.[5] However, to the extent such facts and circumstances have changed since issuance of the preliminary injunction, the court should take such facts under advisement when issuing a permanent injunction and/or a final decision on the merits.

IV. Use of Easement

¶18 Next, the Enderses argue the trial court improperly interpreted and rewrote the easement prohibiting them from maintaining the easement without the Joynts' consent. The trial court ordered:

> [The Enderses] may use the easement road for access to a soon to be constructed driveway or roadway into the servient land for ingress and egress onto their property for the benefit of their soon to be constructed residence . . . . However, [the Enderses] are *enjoined and prohibited from altering the path of the existing roadway* or *placing any additional obstacles within the roadway* or easement right of way

[5] In passing, the Enderses mention that the Joynts are driving on the easement to access Lot 28N, overburdening the easement. This issue was not addressed in the injunction. At the hearing, the Enderses raised concerns about adverse possession, and in their amended counterclaim mentioned pedestrian use of the easement. Because this argument is not developed in the brief, we will not address it. *Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, 492 n.2, ¶ 6, 154 P.3d 391, 394 n.2 (App. 2007) (finding an argument waived when it was mentioned in passing in the opening brief and not otherwise developed); *see also* ARCAP 13(a)(6) (stating an argument shall contain citation to authorities and the record); *FIA Card Servs., N.A., v. Levy,* 219 Ariz. 523, 524 n.1, ¶ 5, 200 P.3d 1020, 1021 n.1 (App. 2008). Moreover, to the extent the law is as stated in *DND Neffson Company*, the Enderses may apply for an injunction if the Joynts improperly access the easement for the benefit of Lot 28N. *See generally DND Neffson Co.,* 155 Ariz. 148, 745 P.2d 206.

without the mutual consent of [the Joynts]. (Emphasis added).

¶19 It is not within the function or power of a court to rewrite or alter a contract between parties. *Goodman v. Newzona Inv. Co.,* 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966); *see* Restatement (Third) of Prop.: Servitudes § 4.1 cmt. d (2000) (noting "[e]xpressly created servitudes are typically the result of contractual transactions"). "Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto." *Mining Inv. Group, LLC v. Roberts*, 217 Ariz. 635, 639, ¶ 16, 177 P.3d 1207, 1211 (App. 2008) (quoting *Goodman,* 101 Ariz. at 472, 421 P.2d at 320).

¶20 Contrary to the Enderses' argument, the court did not enjoin them from *maintaining* the roadway without the Joynts' consent. Instead, the court required the Joynts' consent if the Enderses decide to *alter* or *place obstacles* in the roadway. The terms "maintain" and "alter" are separate and distinct. "Maintaining" an easement involves general repair and upkeep, and caring for the appearance. Black's Law Dictionary 965 (7th ed. 1999). To "alter" is to make different, change, or modify. Random House Webster's College Dictionary 39 (1999). The easement specifically provides, and emphasizes: "the road is to remain as the road stands." Because the injunction only

requires consent for the Enderses to *alter* the roadway, but not to *maintain* the roadway, the injunction does not amount to a rewriting of the easement.

¶21 Further, by the express terms of the easement, the trier of fact could find the contracting parties (the Joynts and the Shepherds) intended for the road to remain as it was constructed and not to be altered in any way. *See Long v. City of Glendale*, 208 Ariz. 319, 328 n.5, ¶ 27, 93 P.3d 519, 528 n.5 (App. 2004) (mentioning courts should construe deeds to effect the intentions of the contracting parties). Consistent with that intent, if the Enderses desire to alter the road, and the Joynts have no objection, i.e., both parties with interests in the easement agree to modify the easement, there would be no reason not to alter such roadway. However, due to the wording of the easement, it appears neither party had a right to alter the road without consent of the other party. In its findings of fact, the court determined the Enderses "do not have the right to change the routing of the existing road or to in any way obstruct [the Joynts] continued use of the road or the 65-foot wide easement granted them." This is consistent with preventing the Enderses from altering the easement as opposed to maintaining the easement and from interfering with the Joynts' right to use the easement.

¶22 The Enderses also argue the trial court erroneously limited their use of the easement. We disagree. Although the easement uses the term "exclusive," the Joynts do not challenge the Enderses' right to use the easement.[6] Generally, a servient estate owner "is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude." *Hunt v. Richardson,* 216 Ariz. 114, 121, ¶ 21, 163 P.3d 1064, 1071 (App. 2007) (quoting Restatement (Third) of Prop.: Servitudes § 4.9 (2000)). Here, the trial court's order preventing the Enderses from altering the road and placing obstacles in the roadway is in accord with the purpose of the easement (access and utility) and Arizona law. There is no restriction on the Enderses' actual *use* of the easement. In fact, the court stated the Enderses "have the right to continue

[6] Additionally, we do not find the exclusivity language in the easement precludes the Enderses from making use of the easement. For instance, in *Gray v. McCormick*, 84 Cal.Rptr.3d 777 (Cal. Ct. App. 2008), the California Court of Appeals found a servient tenement owner was precluded from making use of an easement because there was repeated language of exclusivity, all obligations and costs for the easement were imposed on the dominant tenement owner, and the easement had an indemnification obligation. *Gray,* 84 Cal.Rptr.3d at 782-83. Here, the term "exclusive" is only used once. Additionally, it is not clear who bears the costs associated with the easement. Moreover, although there is indemnification language, such indemnification is limited to damage caused by the Joynts' or their employees', agents', or contractors' use of the easement. Further, the language requiring the Grantors' authorization for the removal of trees or widening of the driveway shows the Grantors were not precluded from using the easement. Finally, Frank Shepherd testified in his deposition that the easement was for Lot 28S as well as Lot 28F.

to use the easement land as they see fit, provided that said use does not obstruct or interfere in any way with the easement granted" to the Joynts.

¶23 The Enderses also argue they have a right to improve the easement and the easement needs to be improved. The injunction does not prevent them from improving the easement. A servient estate owner may not improve an easement if such improvement would be inconsistent with the terms of the easement. *Hunt,* 216 Ariz. at 121, ¶ 22, 163 P.3d at 1071. Gary Enders testified he removed trees in order to widen the road and that he widened the road for three reasons: 1) to enable construction vehicles to access the Enderses' property; 2) to allow emergency vehicles access to their property; and 3) to enable the Enderses to access the property year round. The court did not issue findings regarding the removal of trees and widening of the road. However, during the hearing the court stated: "I do believe that the [Enderses] have the absolute right to plant trees and pull out trees and make the place pretty, or ugly, as long as it's not a nuisance, as they might choose. They still own the property, and that's their easement." The court merely enjoined the Enderses from changing the routing or altering the path of the roadway.

¶24 There was no error enjoining the Enderses from altering the path of the road or placing obstacles in the

easement. The Joynts are likely to succeed on the merits because the road is to remain as it stands and "the owner of a right-of-way for ingress and egress has a right to use the full width of the area unhampered by obstructions placed thereon." *Squaw Peak,* 149 Ariz. at 413, 719 P.2d at 299. Additionally, there is a possibility of irreparable harm for which there is no adequate legal remedy. As dominant estate owners, the Joynts have a defined property right entitling them to use the easement and rely on the terms. If the Enderses were allowed to alter the road pending a trial on the merits, the Joynts might not be able to access their property the way they have for many years, which would interfere with enjoyment of their property.[7] Further, the Joynts presented evidence that altering the roadway might interfere with their septic system. Accordingly, because the court did not prevent the Enderses from maintaining, improving, or using the easement, and the Joynts have shown a likelihood of success on the merits and a possibility of irreparable harm, there was no error in this portion of the injunction.

V. Gates and Fence

A. Northern Gate and Fence

[7] Tom Joynt testified Lot 28F is otherwise landlocked.

¶25 Next, the Enderses challenge the court's ruling regarding the northern gate and fence. The preliminary injunction provides:

> if the fence and gate at the northern end of the easement are in any way obstructing or interfering with the historical use of the extra parking and turnaround areas in use by the [Joynts], that portion of the fence and gate shall be relocated within 30 days of this Order.

The Enderses argue this ruling is vague and ambiguous and that such prospective relief is improper because there was no finding the Enderses interfered with the easement. We agree.

¶26 This portion of the injunction does not grant relief to either party and implicitly requires further action. There is no finding whether the 12-foot gate interferes with or obstructs the parking and turnaround area.[8] Further, the trial court failed to issue guidelines about what constitutes obstruction or interference and who makes such determination.

¶27 This portion of the preliminary injunction cannot stand. The court's ruling is vague and ambiguous and does not grant relief to either party. Accordingly, we vacate this portion of the injunction. When this action is decided on the merits, the trial court will need to determine whether the 12-

[8] At the evidentiary hearing, Tom Joynt testified the 12-foot gate interfered with his use of the easement, however, before the Enderses installed the 12-foot gate, the Joynts had a gate in the same vicinity.

foot gate or the fence actually obstructs or interferes with the historical use of the parking and turnaround area.

B. Replacement Locks

¶28 The court found:

> The 24-foot wide gate of and by itself does not interfere with [the Joynts] unobstructed use of the easement, but the way in which it is currently locked does unreasonably interfere with the use of the easement by [the Joynts] and their invitees by unreasonably restricting vehicular and pedestrian access on the roadway and through the easement corridor. Specifically, the locking of this gate precludes delivery trucks, guests, and the [Joynts] themselves from accessing the roadway and easement corridor unless having a key to the current lock. Similarly, the 12-foot wide gate does the same.

The court ordered the Enderses to keep the 24-foot wide southern gate and the 12-foot wide northern gate unlocked between 7:00 a.m. and 7:00 p.m. while the Joynts are at their property, and for the Enderses to replace the "Knox locks" on those gates with combination locks that meet Navajo County fire and emergency codes.[9] The Enderses argue this ruling requiring the locks to be changed was erroneous because they had county approved Knox locks on those gates, for which the Joynts had keys.[10] Because we find the Joynts have not established the possibility of

[9] Alternatively, the court stated the Enderses could instead install electronically controlled gates with keypad access.

[10] The Joynts do not address this argument, but simply request for the court to order the gates be moved to the east side of the easement.

irreparable injury or that a balance of hardships favors them, we conclude the court abused its discretion by ordering the locks to be changed.

¶29 Tom Joynt testified his problem with the locked gates was the difficulty visitors, delivery people, and emergency services would have accessing his property. First, the gates were ordered to remain unlocked between 7:00 a.m. and 7:00 p.m. The Joynts have not established what delivery people or visitors would arrive when the gates are locked. Additionally, prior to Enderses' installation of these gates, Mr. Joynt testified for visitors accessing his property, he would "give [people] the combination" or "a key" to unlock his chain or gate, but that his gate and chain were always open when he was up there. The Joynts, however, were not prevented from providing keys to the new gates to other people.[11] Thus, the Joynts and their visitors will still have access to the Joynts' property even with the Knox locks in place. Further, nothing is preventing the Joynts from placing a key near the gates to allow easier access to their visitors. Finally, the fire department has a master key to the Knox locks, likely making it easier to access the Joynts'

[11] If there was an issue about costs in duplicating keys, as opposed to freely telling someone a combination, such "harm" is remediable by damages. *See Shoen,* 167 Ariz. at 63, 804 P.2d at 792 (explaining to constitute irreparable harm, such harm must not be remediable by money damages).

property in the event of an emergency as opposed to combination locks.

¶30 We fail to see any irreparable harm to the Joynts or how the balance of hardships favors them. Accordingly, we vacate this portion of the injunction ordering the Knox locks to be replaced with combination locks.

VI. Right to Subdivide

¶31 The Enderses challenge the trial court's order regarding potential subdivision of their land. The relevant portion of the injunction provides:

> While the Court has found that [the Enderses] use of the easement roadway as a means of ingress and egress onto the portion of the servient land upon which they intend to build their permanent residence would not violate the grant of easement, it is not the intent of this Court to allow [the Enderses] to subdivide the servient land, Lot 28[S], and resell subdivided parcels whose users would subsequently be allowed to use the easement right of way. Accordingly, [the Enderses] are enjoined from granting any use of the subject easement to any third parties or successors in interest for roadway access or utility location to any subdivided lots which may be created within the servient land. Any purchaser of a subdivided lot shall be required to access their respective properties and locate their required utilities through the current south entrance to Lot 28[S] or upon a new roadway and/or utility corridor designated by [the Enderses] through the existing Lot 28[S] outside of the easement boundary.

The Enderses argue this ruling amounts to an unreasonable restraint on alienation because it prohibits them from developing or using their property. Although we do not find

this to be an unreasonable restraint on alienation, we nevertheless vacate this portion of the injunction because there is no evidence showing the Enderses were planning on subdividing their land.

¶32 In its findings of fact, the court stated the Joynts "expressed a concern during the hearing" that the Enderses might subdivide Lot 28S with potential to sell smaller parcels to others for use. However, the Joynts did not express such a concern. Instead it was Mr. Enders who stated he was concerned the Joynts would subdivide Lot 28N and further overburden the easement. When Mr. Enders was asked whether he could subdivide his property, Mr. Enders responded he was unsure into how many parcels he could subdivide his property. There was no further testimony, or evidence, regarding potential subdivision.

¶33 As the Joynts were seeking an injunction, they had the burden of showing the Enderses were likely to engage in the conduct to be enjoined. *See State ex rel. Babbitt v. Goodyear Tire & Rubber Co.,* 128 Ariz. 483, 487, 626 P.2d 1115, 1119 (App. 1981). All of the evidence showed the Enderses intended to construct a log home on their property for themselves. There was no allegation the Enderses intended to subdivide and sell their land and none of the evidence established the threat of such conduct. *See Dowling v. Stapley,* 218 Ariz. 80, 87, ¶ 21, 179 P.3d 960, 967 (App. 2008) (finding injunctive relief

inappropriate where no specific actions were taken to enjoin). Because this was not an act to enjoin, and the Joynts have not established entitlement to relief, the court abused its discretion. Accordingly, we vacate this portion of the injunction.

VII. Septic System Repairs

¶34 Next, the Enderses argue the trial court erred by holding them responsible for the Joynts' septic system modifications and/or repairs if the system does not comply with Navajo County Code.

¶35 In 1996, the Joynts received a septic permit approving their septic system. In roughly July 2007, the Enderses dug up the Joynts' septic system and had representatives from Navajo County and the Arizona Department of Environmental Quality (ADEQ) inspect the septic system. Apparently upon this inspection, the County and ADEQ raised concerns about the septic system. However, the Navajo County Public Works Department issued a letter stating there were no issues with the Joynts' septic system. The court then ordered:

> [i]n the event that Navajo County determines that the leach field or septic system does not comply with county code, as a result of [the Enderses'] recent complaint, any necessary modifications or repairs to the septic system or the relocation of the roadway shall be borne by [the Enderses].

The Enderses argue that holding them responsible for modifying the Joynts' septic system to comply with county code has a chilling effect on their right to report violations of law and is against public policy. We agree.

¶36 Public policy favors reporting violations of law. *See, e.g., Ledvina v. Cerasani,* 213 Ariz. 569, 574, ¶ 13, 146 P.3d 70, 75 (App. 2006) (holding crime victims have absolute immunity from defamation claims when they report a crime to prosecuting authorities); *Drummond v. Stahl,* 127 Ariz. 122, 126, 618 P.2d 616, 620 (App. 1980) (explaining anyone who makes a complaint to the State Bar for an attorney's unethical conduct is absolutely privileged from being subject to a civil action for defamation). If the Joynts' septic system was not in compliance with county code, public policy favors reporting a violation to the appropriate authorities. Otherwise, the septic system could potentially harm the environment or the Enderses' property. If the Enderses are subject to liability for reporting a problem with the Joynts' septic system, that would have a chilling effect on the public policy favoring reporting.

¶37 In a South Dakota case, an acrimonious relationship between neighbors led one neighbor, Ferebee, to file numerous complaints with various government agencies about the other's violations of certain statutes and ordinances. *Hobart v. Ferebee,* 692 N.W.2d 509, 511-12 (S.D. 2004). In vacating an

order requiring Ferebee to make written complaints to government agencies in affidavit form and pay a $25.00 fee for each complaint contained therein, the court held people have a fundamental right to petition the government for redress of grievances and interference with that right constitutes a prior restraint of speech. *Id.* at 514. The court noted "[t]he right to petition the government does not hinge on an individual's motivation because . . . '[i]t is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.'" *Id.* at 514 (quoting *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 139 (1961)).

¶38 Here, even if the Enderses had an improper motivation for extracting the Joynts' septic system, the Enderses are within their right to report any code violation to the appropriate authority. The septic system is the Joynts' property and thus, it is the Joynts' responsibility to make sure it complies with all applicable codes. If the system is found not to be in compliance with county code, it is not the Enderses' responsibility to correct the system. Further, the Joynts would be responsible for any property damage pursuant to

the indemnification language in the easement.[12] However, the Enderses would be liable if they actually damaged the septic system, and in fact agreed to repair anything they damaged.

¶39 There is no authority for holding someone responsible for modifying another's property because a report is made to a government agency. The court abused its discretion by punishing the Enderses for making a complaint. Accordingly, we vacate this portion of the injunction.

VIII. Attorneys' Fees

¶40 Lastly, the Enderses argue the court erred by not awarding them attorneys' fees. Because the matter is preliminary only, there has been no successful party and the trial court did not err. The Enderses also request attorneys' fees on appeal. We decline to award attorneys' fees on appeal at this time. Considering each party's partial success, we decline to award costs to either party on appeal.

CONCLUSION

¶41 For the foregoing reasons, we affirm the portions of the injunction requiring the removal of the septic line to Lot 28N, enjoining the Enderses from altering and placing obstacles

[12] The easement provides "Grantee shall indemnify, defend, and hold harmless Grantor for, from and against any damage to persons or property occurring on the Easement as a result of Grantee's . . . use of the Easement."

in the roadway, and denying attorneys' fees. We vacate the remaining portions of the injunction addressed in this appeal.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge