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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 12/28/2010  
RUTH WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

ROBERT and LINDA LONG, husband ) 1 CA-CV 09-0474  
and wife, )  
 ) DEPARTMENT E  
Plaintiffs/Appellants, )  
 ) **MEMORANDUM DECISION**  
v. )  
 ) (Not for Publication -  
ROGER and CINDY CLARK, husband ) Rule 28, Arizona Rules of  
and wife, ) Civil Appellate Procedure  
 )  
Defendants/Appellees. )  
 )

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Appeal from the Superior Court in Apache County

Cause No. CV2006011

The Honorable Donna J. Grimsley, Judge

**AFFIRMED IN PART, REVERSED IN PART**

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**T I M M E R**, Chief Judge

¶1 Robert and Linda Long (the "Longs") appeal the trial court's entry of summary judgment denying them relief in their

action to recognize a prescriptive easement over an access roadway (the "roadway") fenced off by neighbors Roger and Cindy Clark (the "Clarks"). The Longs argue the court erred because genuine issues of material fact precluded summary judgment. The Longs additionally contend the court erred by awarding attorneys' fees to the Clarks pursuant to Arizona Revised Statutes ("A.R.S.") section 12-1103(B) (2003) because as a matter of law the Clarks were not entitled to fees under this provision. For the reasons that follow and in a companion opinion, we affirm the entry of summary judgment but reverse the trial court's award of attorneys' fees.

#### **BACKGROUND<sup>1</sup>**

¶2 First American Title Company ("First American") and Chilcott Ranches subdivided land jointly owned and created Dutch Mountain Ranch in 1994. The Longs purchased Lot 21 ("Long property") of this subdivision from First American on October 19, 1994. In 2002, the Clarks purchased Lot 20b<sup>2</sup> ("Clark property"), which is north of and adjacent to the Long property. The covenants, conditions and restrictions ("CC&Rs") for Dutch

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<sup>1</sup> We view the evidence and all reasonable inferences in the light most favorable to the Longs as the parties against whom summary judgment was entered. *State v. Mabery Ranch, Co.*, 216 Ariz. 233, 239, ¶ 23, 165 P.3d 211, 217 (App. 2007).

<sup>2</sup> In 2002, Mrs. Clark purchased the property as her sole and separate property. In September 2003, Mrs. Clark conveyed the property to herself and her husband.

Mountain Ranch reserve a thirty-foot roadway and utility easement along the perimeter of each lot. Accordingly, there are sixty feet of roadway and utility easements straddling the boundary between the Long property and the Clark property.

¶13 The focus of dispute between the parties is the Longs' entitlement to use the roadway that crosses the Clark property to access their property. The Longs contend they used the roadway immediately upon purchase of their property until the Clarks fenced off the roadway in 2004. On January 11, 2006, the Longs initiated this quiet title action to establish a prescriptive easement over the roadway or declare it part of the existing roadway and utility easements. After engaging in discovery, the Clarks filed a motion for summary judgment, which the trial court granted on November 14, 2008, ruling that as a matter of law the Longs failed to use the roadway for the required prescriptive period of ten years and that the roadway lay outside the existing easements. The court subsequently awarded the Clarks \$19,636.05 in attorneys' fees pursuant to A.R.S. § 12-1103(B). After the entry of final judgment, this timely appeal followed.<sup>3</sup>

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<sup>3</sup> The Clarks reurge their prior motion to dismiss this appeal as untimely because the order granting summary judgment on December 15, 2008, was final and appealable, and the Longs failed to appeal within thirty days as required by Rule 9 of the Arizona Rules of Civil Appellate Procedure. We disagree. According to Rule 58(g) of the Arizona Rules of Civil Procedure, "a judgment

¶4 We review de novo the entry of summary judgment. *Hunt v. Richardson*, 216 Ariz. 114, 118, ¶ 8, 163 P.3d 1064, 1068 (App. 2007). The court properly entered summary judgment for the Clarks if no genuine issues of material fact existed, and they were entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c); *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review the court's decision to award fees pursuant to A.R.S. § 12-1103(B) de novo as the propriety of the ruling turns on a matter of law. *Barrow v. Ariz. Bd. of Regents*, 158 Ariz. 71, 80, 761 P.2d 145, 154 (App. 1988).

#### ANALYSIS

##### I. Summary judgment

##### A. Length of prescriptive use

¶5 To succeed on their prescriptive easement claim, the Longs were required to prove by clear and convincing evidence that (1) the roadway had been actually and visibly used for at least ten years, (2) the use occurred continuously under a claim of right, and (3) the use was hostile to the Clark property title. *Harambasic v. Owens*, 186 Ariz. 159, 160, 920 P.2d 39, 40 (App. 1996); *Inch v. McPherson*, 176 Ariz. 132, 135, 859 P.2d

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shall not be entered until claims for attorneys' fees have been resolved and are addressed in the judgment." The order granting summary judgment was not final and appealable because claims for attorneys' fees were pending until the court entered final judgment on November 17, 2009. The Longs filed their notice of appeal on December 15, 2009, which was within thirty days of the entry of judgment. Therefore, this appeal is timely.

755, 758 (App. 1992). The trial court ruled the Longs failed in their burden as the undisputed facts demonstrated use of the roadway for less than ten years. The Longs argue the trial court erred in this conclusion because they introduced sufficient evidence of their use of the roadway for ten years and, alternatively, they established usage for ten years by "tacking" First American's use. We address each argument in turn.

**1. The Longs' length of use**

¶6 The Longs began using the roadway immediately after purchasing their property on October 19, 1994. Thus, in order to satisfy their burden of proof, they were required to demonstrate continuous use of the roadway until October 19, 2004. *Harambasic*, 186 Ariz. at 160, 920 P.2d at 40. The Longs assert they made this demonstration by offering deposition testimony from Robert Long about the timing of the Clarks' construction of the fence to block the roadway:

Q. [By Mr. Shaffery]: [Referring to an exhibit] Is this the fence that the Clarks erected in 2003?

A. I don't believe that it was 2003, but it was somewhere around there. Possibly the following year because we had people working on that road, and I'll have to figure the date.

In 2003 we had that culvert installed and there were no fences. That is why we got there.

Q. But you testified earlier that it was blocked in 2003. Was it blocked in a different way?

A. I don't know what date - when we originally wrote this thing, I didn't remember when Les had done the bridge and the culvert work.

MR. MORGAN [BROWN]: You don't know when it was blocked?

THE WITNESS: I don't recall exactly. . . .<sup>4</sup>

The Longs contend the court improperly made credibility determinations in granting summary judgment by rejecting this testimony and instead adopting Roger Clark's assertion that he and his wife blocked the roadway in 2003. *See Orme Sch.*, 166 Ariz. at 311, 802 P.2d at 1010 (holding summary judgment not appropriate if trial court is required to assess "the credibility of witnesses with differing versions of material facts . . . [or] to choose among competing or conflicting inferences."). We reject the Longs' position for two reasons.

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<sup>4</sup> The Longs point to additional, similar testimony from Robert Long: "Q. So is it possible you used that road up through 2004? A. Yes." Although this testimony was purportedly attached to the Longs' response to the motion for summary judgment as "Exhibit A," the attachment is not in the record. While this appeal was pending, the Longs filed "Exhibit A" with the trial court noting the prior omission; this exhibit does not reflect the quoted testimony, however. Regardless, because the trial court did not have this testimony before it, we cannot consider it in determining the propriety of the court's ruling. *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (stating appellate court's review is limited to the record before the trial court at the time it entered the decision that is the subject of the appeal and appellate court cannot consider any evidence that was not part of that record).

¶17 First, by testifying the Clarks erected the fence "somewhere around" 2003 and "possibly" the next year, Mr. Long speculated about the date the Longs were denied access to the roadway. This testimony was insufficient to forestall summary judgment in the face of Mr. Clark's explicit testimony that he blocked the roadway in 2003. To defeat a motion for summary judgment, a party-opponent "must show that competent evidence is available which will justify a trial on that issue . . . speculation is not competent evidence." *Cullison v. City of Peoria*, 120 Ariz. 165, 168, 584 P.2d 1156, 1159 (1978); see also *Orme Sch.*, 166 Ariz. at 311, 802 P.2d at 1010 ("[I]t would effectively abrogate the summary judgment rule to hold that the motion should be denied simply on the speculation that some slight doubt . . . might blossom into a real controversy in the midst of trial."). Consequently, the court was not required to assess Mr. Long's credibility to grant summary judgment; even assuming he was truthful in his testimony, he did not provide sufficient evidence to raise a triable issue of fact concerning the date when the Clarks blocked the roadway.

¶18 Second, even assuming Mr. Long's testimony was not fatally speculative, it failed to identify when in 2004 the fence was erected. The Longs were required to prove use of the roadway until October 19, 2004. Even if the fence was "possibly" erected in 2004, as Mr. Long asserted, no evidence

suggested the fence was erected after October 19.<sup>5</sup> Consequently, without passing on Mr. Long's credibility, the trial court properly entered summary judgment in favor of the Clarks.

## 2. Tacking

¶9 The Longs next argue the trial court erred by granting summary judgment because there was sufficient evidence of a ten-year prescriptive period after application of the tacking principle. "Tacking" allows the court to consider property use by consecutive users with privity of estate in calculating the duration of the prescriptive period. *Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 209, 818 P.2d 190, 194 (App. 1991). "In the prescription context, privity of estate is created by a conveyance, agreement, or understanding that refers the successive adverse use to the original adverse use and is accompanied by a transfer of the use." *Id.* (citation omitted).

¶10 The Longs contend they demonstrated privity by presenting evidence that the real estate agent who showed Lot 21 to Mr. Long in the summer of 1994 used the roadway several times. This evidence was insufficient to permit tacking, however. The Longs' predecessor-in-interest was First American,

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<sup>5</sup> In their reply brief, the Longs point to the affidavit of Adam McCormack, which avers "the Clarks blocked [the roadway] off in fall of 2004." This evidence was similarly insufficient to forestall summary judgment because Mr. McCormack failed to specify whether the Clarks blocked the roadway before or after October 19, 2004.



which simultaneously owned Lots 20b and 21 at the time the Longs purchased Lot 21 on October 19, 1994. While First American owned both lots, it could not have begun a period of visible, hostile, and continuous use necessary for a prescriptive easement. See *Brown v. Ware*, 129 Ariz. 249, 251, 630 P.2d 545, 547 (App. 1981) (concluding adverse use could not begin when an entire tract of land was held by one owner); James W. Ely, Jr. & Jon W. Bruce, *The Law of Easements and Licenses in Land* § 5:1, available on Westlaw at LELL § 5:1 (Sept. 2010) (stating acquisition of a prescriptive easement requires using land owned by someone other than the user). Consequently, hostile use of the roadway began with the Longs' acquisition of Lot 21 on October 19, 1994; the trial court did not err by declining to select an earlier date of hostile use to account for First American's use of the roadway.

**B. Location of roadway**

¶11 The Longs briefly contend the trial court erred by entering summary judgment because it relied on a survey supplied with the Clarks' reply, and the Longs were deprived of the opportunity to rebut that evidence. We do not discern reversible error.

¶12 In their motion for summary judgment, the Clarks presented Mr. Clark's deposition testimony that the disputed roadway did not lay within the existing easements. In response,

the Longs introduced Mr. Long's deposition testimony referring to the location of the roadway on a map. But as the Longs admit, Mr. Long could not definitively state whether the roadway was located within or outside the existing easements. The Clarks then presented with their reply the affidavit of Daniel Muth, a registered land surveyor, who averred he surveyed the easement located between the Long property and the Clark property and determined that the disputed roadway was not within that easement. He purportedly attached the survey to his affidavit, although the survey is not contained in the record before us.

¶13 The Longs argue the trial court improperly considered the survey without affording the Longs an opportunity to rebut it. Because the Longs failed to raise this argument to the trial court by a motion to strike or other document, the Longs have waived this argument. See *State v. Myers*, 117 Ariz. 79, 90, 570 P.2d 1252, 1263 (1977). Nevertheless, even without the survey, the Clarks presented sufficient evidence of the roadway's location by introducing Mr. Clark's deposition testimony. As previously stated, see *supra* ¶ 7, once the Clarks presented evidence supporting their defense, it was incumbent on the Longs to present evidence justifying a trial. *Cullison*, 120 Ariz. at 168, 584 P.2d at 1159. Because they did not, the trial

court properly adopted the Clarks' position and entered summary judgment.

**C. Roadway preserved by CC&Rs**

¶14 The Longs finally argue the trial court erred by entering summary judgment because an issue of fact existed whether the CC&Rs preserved use of the roadway. Specifically, the Longs point to section 2.03 of the CC&Rs, which provides in relevant part as follows:

A. Public Roads and Rights of Way. All Roadway and Utility Easements, including existing roads or any roads constructed thereon, are public roads and rights of way and Apache County has assumed no responsibility for their care, maintenance or improvement.

B. Existing Roads. No Owner shall relocate any existing roads or any roads constructed by Declarant pursuant to this Declaration which are located within the Roadway and Utility Easements. Declarant advises that any existing roads on the Roadway and Utility Easements do not meet minimum county standards and consist of bladed dirt only and Declarant will no[t] be responsible for the care, maintenance or improvement of any such roads.

C. Construction and Maintenance of Roads.

1. By Owner. Each Owner shall have the right, but not the obligation, to construct roads within the Roadway and Utility Easements or to maintain, improve or widen any existing roads located within the Roadway and Utility Easements. . . .

2. By Declarant. Declarant shall have the right, but not the obligation, to

construct roads within the Roadway and Utility Easements or to improve or widen any existing roads located on the Roadway and Utility Easements. . . .

The Longs contend that because evidence reflected they used the roadway in summer 1994, a question of fact existed whether section 2.03 preserved public use of the roadway. We disagree.

¶15 Section 2.03 states that existing roads within all "Roadway and Utility Easements" are public and cannot be relocated. The CC&Rs define "Roadway and Utility Easements" as those shown on a specified survey recorded with the county recorder. As explained, *see supra* ¶¶ 11-13, the evidence showed the roadway lay outside the existing easements. Therefore, the trial court was justified in rejecting the Longs' contention.

#### CONCLUSION

¶16 For the foregoing reasons and those set forth in our opinion, we affirm the trial court's grant of summary judgment in favor of the Clarks but reverse the attorneys' fees award. We decline to award attorneys' fees on appeal.

/s/  
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Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/  
\_\_\_\_\_  
Philip Hall, Presiding Judge

/s/  
\_\_\_\_\_  
Sheldon H. Weisberg, Judge