NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 09/29/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RANDALL K. KNOWLTON and LINDA J. KNOWLTON, husband and wife,	1 CA-CV 10-0640
Plaintiffs/Counterdefendants/ Appellees,	DEPARTMENT A
v.	**MEMORANDUM DECISION**
STEPHEN P. REPLOGLE,	Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendant/Counterclaimaint/ Appellant.	

Appeal from the Superior Court in Yuma County

Cause No. S1400CV200600846

The Honorable John Paul Plante, Judge

AFFIRMED

DON B. ENGLER, P.C. Yuma
By Don B. Engler
Attorney for Plaintiffs/Counterdefendants/Appellees

WILLIAM S. DIECKHOFF, ESQ. Yuma
By William S. Dieckhoff
Attorney for Defendant/Counterclaimant/Appellant

B A R K E R, Judge

¶1 Defendant/Counterclaimant Stephen Replogle appeals from the trial court's judgment for Plaintiffs Randall Knowlton and Linda Knowlton following a bench trial. The trial court voided a contract by the parties conveying an easement over Replogle's property to the Knowltons in exchange for the Knowltons' surrender of all other legal rights to Replogle's property. For the reasons set forth below, we affirm.

Facts and Procedural History

¶2 The Knowltons and Replogle own adjacent properties. Replogle's property is to the east of the Knowlton's property. To the east of Replogle's property is another parcel, and to the east of that parcel is Shannon Way, a county roadway.

¶3 A canal runs along the northern portion of the Knowlton and Replogle parcels. About half-way across the Replogle parcel, the canal turns forty-five degrees north, and it continues at that angle until it is no longer inside of the Replogle property line. The canal then turns back forty-five degrees and continues east.

¶4 Directly south of the canal prior to its northward turn is a road, which the parties have termed the "Canal Road." This road is usable and provides access to Shannon Way. The Canal Road is part of a United States Bureau of Reclamation right-of-way established in 1960, and it is also part of the Replogle parcel. South of the Canal Road on the western part of

the Replogle parcel is another road, which the parties have termed the "Inside Road." A fence runs between the Canal Road and the Inside Road. The Knowltons and the previous owners of the Knowlton parcel had historically (for at least the past ten years) used the Inside Road rather than the Canal Road to travel to Shannon Way.

¶5 In 2004, the Knowltons and Replogle installed a gate on the Inside Road to limit outside traffic. At some point after the gate was installed, Replogle stopped the Knowltons from using the Inside Road. The Knowltons demanded that Replogle grant or confirm an easement over the Inside Road to them.

¶6 The Knowltons had an existing easement over the Replogle property contained in a 1973 deed. This deed conveyed an easement over the north twenty feet of the Replogle parcel. After various communications between the parties, they executed a deed in 2006. The deed allegedly described an easement using similar language to the 1973 deed, and it granted an easement over the north twenty feet of the Replogle parcel in exchange for the Knowltons' surrender of all other legal rights to the Replogle parcel.

¶7 Prior to execution of the deed, Replogle warned the Knowltons that the legal description may not be correct and requested an extension of time to obtain a survey and clarify

the legal description. The Knowltons denied the request. The trial court found that the Knowltons' refusal to obtain a survey "greatly increased the cost and complexity of this litigation." According to a later survey of the property, the southern boundary of the Canal Road on the western portion of the Replogle parcel was approximately 37.5 feet from the northern boundary of the property. The southern boundary of the Inside Road was approximately 52.5 feet from the northern boundary of the property.

¶8 The Knowltons requested reformation of the deed to reflect an easement over the northern twenty feet of the property as measured from the United States Bureau of Reclamation's right-of-way. This would grant the Knowltons an easement over the Inside Road. Replogle requested that the easement be reformed to conform to the area encompassing the Canal Road. The Knowltons filed this lawsuit, and the court issued a preliminary judgment against Replogle mandating that he keep the Inside Road open to the Knowltons.

¶9 Following a bench trial, the trial court voided the 2006 deed. The court found that the Knowltons had intended to contract for an easement over the Inside Road while Replogle had intended to grant an easement over the Canal Road. Therefore, the court reasoned, reformation of the deed was not appropriate

because the parties never had a "meeting of the minds" as to the easement granted.

¶10 Next, the court found that the Knowltons had a prescriptive easement over the Inside Road. The court found that the Knowltons' and their predecessors' use of the Inside Road was "open, notorious, continuous, and for far more than 10 years." The court granted the Knowltons an easement over the northern fifteen feet of the property as measured from the government right-of-way on the western side of the Replogle parcel. On the eastern portion of the parcel, where the canal veered north, the court granted the twenty-foot easement described in the original 1973 deed. The court also awarded the Knowltons attorneys' fees. Replogle timely appealed. We have jurisdiction under Arizona Revised Statute ("A.R.S.") section 12-2101(B) (2003).

Discussion

1. Whether the Trial Court Erred in Voiding the 2006 Deed for Lack of Mutual Assent[1]

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[1] Replogle states that the issue of mutual assent was never argued by either party in the trial court proceedings. An issue not raised in the pleadings may be tried by implied consent if the record shows the defendant was aware of the issue and did not object when the court considered it. *Hill v. Chubb Life Am. Ins. Co.*, 182 Ariz. 158, 161, 894 P.2d 701, 704 (1995). Here, the record reveals that the trial court raised the issue of mutual assent:

> THE COURT: The only other matter that I just want to raise with counsel is that there is the legal issue of what happens if the court

¶11 Replogle argues that the trial court erred when it ruled that the parties did not have a "meeting of the minds" when they signed the 2006 deed conveying an easement over the northern twenty feet of the Replogle property. Replogle also argues separately that the trial court erred in granting equitable relief in voiding the 2006 deed. Because we view these two issues as having considerable overlap, we resolve both in the following discussion of whether the trial court erred in voiding the deed on "meeting of the minds" grounds.

¶12 We view the issue of whether the trial court erred in finding that the parties did not have a "meeting of the minds" (commonly referred to as "mutual assent," Restatement (Second) of Contracts § 17 cmt. c (1981)) at contract formation to hinge on whether the court properly classified the parties' miscommunication as lack of mutual assent rather than as mutual

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> finds that the parties had completely different – different ideas when they exchanged these deeds, that one party thought one thing, the other party thought another. [Plaintiffs' counsel] has raised the possibility that the court just simply reforms it to means something, but it also has been raised the possibility that maybe it means that nothing happens, and I'm not sure what the answer to that is. I just want counsel to think about that . . . .

It was therefore proper for the trial court to consider this issue.

or unilateral mistake. Mutual assent is an essential element of contract formation, and lack of mutual assent will void a contract unless one of the parties knows or has reason to know of the misunderstanding. Restatement (Second) of Contracts §§ 17, 20. If the Knowltons' mistake here is classified as lack of mutual assent, and if their misunderstanding of the deed was objectively reasonable, then the trial court properly voided the deed.

¶13 If the misunderstanding of the parties is classified as a mutual or unilateral mistake, however, the applicable law is different. Under the Restatement (Second) of Contracts § 154, "A party bears the risk of a mistake when . . . [the party] is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient." Arguably, under this scenario, the Knowltons bore the risk of their error in assessing their easement boundaries when they refused to obtain a survey. If the Knowltons' misunderstanding was a post-formation "mistake," then it is possible that the deed was not properly voided.

¶14 Although not cited by either party in this appeal, we find the case of *Hill-Shafer Partnership v. Chilson Family Trust*, 165 Ariz. 469, 799 P.2d 810 (1990), to be controlling. *Hill-Shafer* involved an almost identical fact-pattern to the

case at hand. There, the seller conveyed a parcel of land to the buyer using a legal description that inadvertently conveyed more land than what the seller intended to sell. *Id.* at 471-72, 799 P.2d at 812-13. The seller refused to obtain a survey and insisted that the land be indentified solely by the legal description contained in the seller's counter-offer. *Id.* at 471, 799 P.2d at 812. When the seller discovered his error, he requested an amendment to correct the legal description. *Id.* at 472, 799 P.2d at 813. The buyer refused and claimed it was entitled to the property included in the plain language of the legal description. *Id.* at 472, 799 P.2d at 813.

¶15 The trial court rescinded the contract for lack of mutual assent. *Id.* at 472, 799 P.2d at 813. We reversed, holding that because the legal description in the contract was not vague or ambiguous, no misunderstanding of it could void a contract for lack of mutual assent. *Id.* at 472, 799 P.2d at 813. We then remanded the case for further proceedings based on the theory of mutual mistake. *Id.* at 472, 799 P.2d at 813. Our supreme court reversed our decision, holding that the trial court properly voided the contract based on lack of mutual assent. *Id.* at 472, 799 P.2d at 813.

¶16 The *Hill-Shafer* court described the dilemma between classifying a misunderstanding as "mutual assent" or "mutual mistake" as follows:

> Generally, if a seller intends to sell and a buyer intends to buy land other than that described in a deed, a case of mutual *mistake* is presented. A mutual *mistake* exists where there has been a meeting of the minds of the parties, and an agreement is actually entered into, but the agreement in its written form does not express what was really intended by the parties.
>
> . . . .
>
> [But] [b]ecause we view the evidence in the light most favorable to buyer, we accept its contention that it intended to purchase whatever the legal description identified . . . . Because seller did not have a similar intent and did not intend to convey whatever was included in the legal description, this case does not present a problem of mutual *mistake* but, rather, a problem of lack of mutual *assent*.
>
> . . . .
>
> If one party thinks he is buying one thing and the other party thinks he is selling another thing, no meeting of the minds occurs, and no contract is formed.

Id. at 473, 799 P.2d at 814 (citations omitted). In response to the court of appeals' holding that the contract could not be voided for lack of mutual assent because it was not ambiguous, our supreme court reasoned that ambiguity "is only one situation in which a court can find a lack of mutual assent." *Id.* at 474, 799 P.2d at 815. The court then held: "As long as the misunderstandings of the parties are reasonable under the specific circumstances of the case, a court may properly find a lack of mutual assent." *Id.* at 475, 799 P.2d at 816.

¶17 Here, the trial court found that the Knowltons' intent was to obtain an easement over the Inside Road and Replogle's intent was to grant an easement over the Canal Road. "[T]he intent of the parties is a question of fact left to the fact finder." *Chopin v. Chopin*, 224 Ariz. 425, 428, ¶ 7, 232 P.3d 99, 102 (App. 2010). We are bound by the factual findings of the trial court following a bench trial as long as they are not clearly erroneous. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). We view the evidence in the light most favorable to upholding the judgment, and we affirm if any evidence supports it. *Id.* at 149, 920 P.2d at 26.

¶18 Although the northern twenty feet of the Replogle parcel did not encompass the Inside Road, or even the entirety of the Canal Road, the northern part of the property was also subject to a government right-of-way. The trial court could reasonably have found that this constituted objective evidence[2] that the Knowltons believed they were contracting for the northern twenty feet of the Replogle parcel as measured from the southern boundary of the right-of-way. Thus, they could reasonably believe that they were contracting for the Inside

[2] Evidence of lack of mutual assent must be "based on objective evidence, not the hidden intent of the parties." *Hartford v. Indus. Comm'n*, 178 Ariz. 106, 112, 870 P.2d 1202, 1208 (App. 1994).

Road. Mr. Knowlton's testimony that "the [Inside] road's always been there" would also support a reasonable belief that the purpose of the contract was to convey an easement over the Inside Road.

¶19 As to Replogle's intent, the Knowltons also testified that they had initially believed that the Replogle property line ran through the middle of the canal.[3] The trial court could have inferred that Replogle also believed that his property line was located in the middle of the canal. Therefore, Replogle's belief that the twenty-foot easement would be measured from this line, thus encompassing the Canal Road, would be reasonable as well. Based on this evidence, the trial court could properly find that the "misunderstandings of the parties are reasonable under the specific circumstances of the case," and that the deed was properly voided for lack of mutual assent. *See Hill-Shafer*, 165 Ariz. at 475, 799 P.2d at 816.

¶20 Replogle argues that the equitable relief of voiding the contract was improper because the Knowltons refused to share in the cost of a proper survey of the area.[4] As stated above,

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[3] The property line is, in fact, north of the canal on the western portion of the parcel. It does not appear that either party was aware of this fact during contract formation.

[4] Replogle also argues that use of the easement will damage his driveway and irrigation berms and that the Knowltons will open the Inside Road to public use. Replogle, however, does not cite to any evidence that the Knowltons have actually

under *Hill-Shafer*, equitable relief is appropriate in such an instance. The trial court, however, found that "[t]here are substantial equities in favor of *both* parties." (Emphasis added.) The Knowltons and their predecessors have continuously used the Inside Road throughout their ownership of their parcel to travel to the nearby county roadway. Thus, the balance of equities does not indisputably favor Replogle. We do not find error in the trial court's remedy.

2. *Whether the Trial Court Erred in Granting the Knowltons a Prescriptive Easement over the Inside Road*

¶21 Replogle next argues that the trial court erred in granting a prescriptive easement over the Inside Road due to insufficient evidence proving the required elements of an easement by prescription. A grant of a prescriptive easement requires: (1) that the land in question has actually and visibly been used for a specific purpose, (2) for ten years, and (3) that the use was non-permissive, meaning it began and continued under a claim of right that was inconsistent with and hostile to the claim of the true owner. *Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 208, 818 P.2d 190, 193 (App. 1991); *see also* A.R.S.

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caused any damage or opened the road to the public. He only expresses concern that such problems will manifest in the future. If the Knowltons at some point in the future cause damage to Replogle's property, these claims are properly brought in a separate suit against the Knowltons, should such damage occur.

§§ 12-521(A), -526(A). Replogle does not contest the first two elements, but argues only that no evidence was presented that the use was non-permissive.

¶22 Replogle's argument, however, misstates the burden of proof. Under Arizona law, "when a person uses an easement over the land of another in an open, visible, continuous and unmolested manner, there is a presumption that the use is hostile to the title of the owner of the land, and under a claim of right, as opposed to the use being permissive." *Harambasic v. Owens*, 186 Ariz. 159, 160, 920 P.2d 39, 40 (App. 1996). It was therefore Replogle's burden to prove that the use was with permission.

¶23 Although Replogle did present some evidence that the Knowlton's use was permissive after he installed a gate over the road, the Knowltons and their predecessors had used the road openly without asking permission for at least ten years prior from 1992 through 2005. Such a situation is sufficient to establish a prescriptive easement. *See id.* (affirming trial court's grant of a prescriptive easement when the easement had been used for greater than ten years without incident prior to the landowner erecting fences and blocking the easement with his truck for the years leading up to the lawsuit). For the same reasons, Replogle's argument that the Knowltons' use of Replogle's gate and key to access the Inside Road barred their

claim that the use was not permissive under waiver, estoppel, and laches also fails.

¶24 Replogle also argues that the dimensions of the easement were unsupported by the evidence because (1) the easement included the fence line between the Canal Road and the Inside Road which is not necessary to use the easement, (2) the easement widened to twenty feet on the eastern portion of the parcel from fifteen feet on the western portion, and (3) the fifteen-foot width was wider than necessary to support one car being driven across the easement. We defer to the trial court's assessment that access to the fence line and access to the fifteen-foot width were necessary for the practical use of the easement. As to the widening of the easement on the eastern portion of the parcel, the trial court found that the twenty-foot width on that side corresponded with the original twenty-foot grant in the 1973 deed, which was undisputed by the parties. We therefore affirm the dimensions of the easement as stated by the trial court.

3. Whether the Trial Court Erred in Awarding Attorneys' Fees

¶25 Finally, Replogle argues that the trial court erred in awarding the Knowltons attorneys' fees under A.R.S. § 12-1103(B). In an action to quiet title, the trial court may award fees under § 12-1103(B) when the party seeking relief has tendered a deed and nominal fee to the adverse party in an

effort to resolve the dispute before seeking judicial relief. An award of fees under § 12-1103(B) is left to the discretion of the trial court, and we will not disturb it absent an abuse of that discretion. *See Jones v. Burk*, 164 Ariz. 595, 598, 795 P.2d 238, 241 (App. 1990). Under the circumstances of this case as cited by Replogle, the trial court would have been within its discretion to decline an award of fees. But Replogle does not argue that the Knowltons did not comply with the statutory requirements of § 12-1103(B), and the Knowltons were ultimately successful in their action. Therefore, Replogle has not shown an abuse of discretion. *See* A.R.S. § 12-1103(B) (stating that "the court *may* allow plaintiff, in addition to the ordinary costs, an attorney's fee to be fixed by the court" if the plaintiff complies with the statutory requirements) (emphasis added).

Conclusion

¶26 For the reasons set forth above, the trial court's ruling and award of attorneys' fees are affirmed. On appeal, the Knowltons request their reasonable attorneys' fees and costs under A.R.S. § 12-1103(B). In our discretion, we decline to award attorneys' fees. The Knowltons are entitled to their costs.

/s/
____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
____
ANN A. SCOTT TIMMER, Presiding Judge

/s/
____
PATRICK IRVINE, Judge