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AUG 28 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SALERO RANCH, LLC, an Arizona limited liability company, Plaintiff/Counterdefendant/Appellant, v. UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, Defendant/Counterclaimant/Appellee.	2 CA-CV 2012-0165 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV10574

Honorable Kimberly A. Corsaro, Judge Pro Tempore

AFFIRMED AS MODIFIED

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E S P I N O S A, Judge.

¶1 Plaintiff/appellant Salero Ranch, LLC appeals from the trial court's award of attorney fees to defendant/appellee Union Pacific Railroad Company pursuant to A.R.S. § 12-1103(B). For the following reasons, we modify the award and affirm as modified.

Factual and Procedural Background

¶2 In August 2010, Salero Ranch and other plaintiffs[1] filed a quiet title action, seeking declaratory and other relief against Union Pacific, including a prescriptive easement across Union Pacific's railroad tracks and right-of-way. Union Pacific filed its answer and a counterclaim to quiet title to its tracks and right-of-way against the prescriptive easement asserted by Salero Ranch. It subsequently filed a motion for summary judgment based in substantial part on the trial court's decision in another action that had been brought against the railroad company, *Tumacacori Mission Land Development, Ltd. v. Union Pacific Railroad Co.*, Santa Cruz Superior Court No. CV09711. In that case, the same trial court had ruled the plaintiff could not obtain any private property interest over Union Pacific's railway because it was a "public highway"

[1]In addition to Salero Ranch, plaintiffs below included The Baca Float Coalition, a nonprofit community association, and Larry L. Leslie, a homeowner. Salero Ranch and Leslie are property owners in Santa Cruz County, Arizona, and The Baca Float Coalition was formed by and on behalf of property owners in Santa Cruz County. On October 13, 2011, Leslie's claims were dismissed with prejudice with each party to bear its own costs and attorney fees. For ease of reference in this decision, the plaintiffs/appellants will be called "Salero Ranch," the only party appealing to this court.

under the Arizona Constitution.[2] However, in May 2011, the court denied Union Pacific's motion for summary judgment, concluding that its previous ruling was "not binding on the court in this case," and allowed Salero Ranch to move forward with its prescriptive-easement claim against Union Pacific.

¶3 In August 2011, this court decided *Tumacacori Mission Land Development, Ltd. v. Union Pacific Railroad Co.*, 228 Ariz. 100, 263 P.3d 649 (App. 2011), in which we held that a prescriptive easement may not be obtained over a railroad right-of-way. Thereafter, Salero Ranch filed a motion for summary judgment in which it argued, in part, that *Tumacacori* was not controlling authority for its prescriptive-easement claim because this court could not overrule the Arizona Supreme Court's decision in *Curtis v. Southern Pacific Co.*, 39 Ariz. 570, 8 P.2d 1078 (1932), which held an easement of passage may be acquired over a railroad right-of-way. Union Pacific filed its response and cross-motion for summary judgment. The trial court denied Salero Ranch's motion and granted Union Pacific summary judgment pursuant to *Tumacacori*, concluding Salero Ranch could not obtain a prescriptive easement over a railway.

¶4 The trial court awarded Union Pacific its costs pursuant to A.R.S. §§ 12-341, 12-1103(B), and 12-1840, and attorney fees pursuant to § 12-1103(B). Union Pacific filed a verified statement of costs and attorney fees and a supporting affidavit,

[2]Information about the trial court's ruling is found in *Tumacacori Mission Land Development, Ltd. v. Union Pacific Railroad Co*., 228 Ariz. 100, ¶ 2, 263 P.3d 649, 650 (App. 2011).

asserting it had incurred $58,686.54 in attorney fees and computerized legal research costs plus $118 in taxable costs.

¶5 Salero Ranch filed a motion for reconsideration of the attorney-fees award, objections to Union Pacific's form of judgment and to its verified statement of costs and fees, and a motion for a new trial on the fees award. The trial court denied the motions and overruled the objections. Salero Ranch timely filed a notice of appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(a).

Discussion

Basis for Award

¶6 Under § 12-1103(B), a court may award attorney fees to a party who brings an action to quiet title to real property if that party timely tenders five dollars to a person or entity who holds an adverse interest or right in exchange for the execution and delivery of a quit claim deed disclaiming any such interest or right. An award of fees under § 12-1103(B) is left to the discretion of the trial court, and we will not disturb the award absent an abuse of that discretion. *See Jones v. Burk*, 164 Ariz. 595, 598, 795 P.2d 238, 241 (App. 1990).

¶7 The purpose of § 12-1103(B) "is to avoid needless litigation," *Mariposa Dev. Co. v. Stoddard*, 147 Ariz. 561, 565, 711 P.2d 1234, 1238 (App. 1985), and "mitigate the expense of litigation to establish a just claim," *Scottsdale Mem'l Health Sys., Inc. v. Clark*, 164 Ariz. 211, 215, 791 P.2d 1094, 1098 (App. 1990). In determining fees under the statute, trial courts should consider several factors, including the merits of

the losing party's claims.[3] *In re Estate of Parker*, 217 Ariz. 563, ¶ 32, 177 P.3d 305, 311 (App. 2008).

¶8 Salero Ranch argues the trial court "failed to take into consideration the merits of [its] claim at the time its action was initiated when determining the amount of attorney fees to award." Salero Ranch maintains the court "should have considered the procedural background in this case," that is, "the fact that although it decided *Tumacacori* by granting summary judgment in favor of Union Pacific, it allowed the litigation to move forward in this case by denying Union Pacific's motion for summary judgment, which directed the trial court to its prior decision in *Tumacacori*." Salero Ranch points out that the court issued a ruling in May 2011, stating that "[d]espite this court[']s prior finding in *Tumacacori* . . . the court finds that granting summary judgment in favor of Defendant Railroad is inconsistent with the current state of the law." After our decision in *Tumacacori*, however, the court granted Union Pacific's cross-motion for summary judgment, explaining it was bound by our decision that "[p]rivate parties may not acquire prescriptive easement rights over a railway."

[3]Additional factors for consideration in awarding attorney fees include: whether litigation could have been avoided; whether assessing fees would cause an extreme hardship; whether the prevailing party succeeded on all its claims; the novelty of the legal questions presented; whether the claims have been previously adjudicated in Arizona; and whether the award would discourage other parties from asserting tenable claims. *In re Estate of Parker*, 217 Ariz. 563, ¶ 32, 177 P.3d 305, 311 (App. 2008). These are essentially the same factors that are considered in determining whether to award attorney fees pursuant to A.R.S. § 12-341.01(A). *Id.* n.15.

¶9 We recognize that Salero Ranch's claims were arguable when it first filed its quiet title action; until this court decided *Tumacacori* there was no direct authority against them. But there is no dispute that Union Pacific complied with the statutory requirements of § 12-1103(B), and was ultimately successful in its action. Thus, we cannot say the trial court abused its discretion by awarding fees to Union Pacific. *See id.* (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).

Amount of Award

¶10 Although trial courts have broad discretion in determining the amount of attorney fees to award to a party, the award must have a reasonable basis in the record. *Assoc'd Indem. Corp. v. Warner*, 143 Ariz. 567, 570-71, 694 P.2d 1181, 1185-86 (1985); *see also Scottsdale Mem'l*, 164 Ariz. at 216, 791 P.2d at 1099 (appellate court will not substitute its discretion for that of trial judge as long as reasonable basis in record for attorney-fees award). "The trial court abuses its discretion as to attorneys' fees only when its view would not be taken by a reasonable [person]." *Moser v. Moser*, 117 Ariz. 312, 315, 572 P.2d 446, 449 (App. 1977).

Hours Expended

¶11 The fundamental rule for calculating an award of attorney fees is that the trial court must determine: (1) the reasonableness of the billing rate, and (2) the hours reasonably expended. *ABC Supply, Inc. v. Edwards*, 191 Ariz. 48, 52, 952 P.2d 286, 290 (App. 1996). "'[J]ust as the agreed upon billing rate between parties may be considered

unreasonable, likewise the hours claimed may also be unreasonable.'" *Id.*, *quoting Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983).

¶12 Salero Ranch asserts the trial court "made no separate findings that . . . Union Pacific's billing rates were reasonable or that the hours claimed to be expended were reasonable."[4] A court, however, is not required to explain its decision to award attorney fees. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 25, 99 P.3d 1030, 1037 (App. 2004) (court not required to explain factual basis of fee award as long as record reflects reasonable basis for it). We presume "the trial court found every fact necessary to support the judgment." *Berryhill v. Moore*, 180 Ariz. 77, 84, 881 P.2d 1182, 1189 (App. 1994). Moreover, Salero Ranch did not ask the court to make factual findings. It therefore waived this argument on appeal. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994) (litigant must request findings of facts to preserve the issue for appeal); *In re Marriage of Pownall*, 197 Ariz. 577, ¶ 27, 5 P.3d 911, 917 (App. 2000) (party's failure to object to the lack of findings supporting an award of attorney fees results in waiver).

¶13 Salero Ranch further argues the trial court abused its discretion in awarding excessive fees "in light of the law and circumstances at the time this case proceeded." Salero Ranch notes that Union Pacific was also the defendant in *Tumacacori* and asserts that its arguments here "mirror" the arguments it made in that case. Salero Ranch

[4]Salero Ranch has not objected to the hourly rates charged by Union Pacific's counsel.

contends that Union Pacific's "billing statements show hours on end of not only research, but inordinate amounts of time drafting simple pleadings that are nearly identical to those previously drafted . . . in *Tumacacori*." Salero Ranch also argues that Union Pacific's total bill of over $58,000 was excessive in a case where no discovery was conducted. However, a party opposing an attorney-fees award "'does not meet his burden merely by asserting broad challenges to the application.'" *State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 594, 845 P.2d 513, 520 (App. 1992), *quoting Arizona v. Maricopa Cnty. Med. Soc'y*, 578 F. Supp. 1262, 1264 (D. Ariz. 1984).

¶14 Salero Ranch does identify as "examples" two specific charges it considers unreasonable.[5] It alleges Union Pacific excessively billed "over 25 hours" for preparing a "simple answer" to Salero Ranch's complaint and a "simple counterclaim." Union Pacific counters that the *Tumacacori* complaint was "two pages long, containing 10 numbered paragraphs of allegations," whereas Salero Ranch's complaint "ran to 16 pages, 106 numbered paragraphs of allegations, and had twelve exhibits attached to it." Union Pacific notes that there were multiple plaintiffs and defendants in this case, in contrast to just one plaintiff and one defendant in *Tumacacori*. Finally, although acknowledging that both cases involved the same constitutional issue, Union Pacific

[5]Salero Ranch asserts "[t]here are numerous other examples of appellee's attorneys billing inordinate amounts of time to draft pleadings when the groundwork for the legal arguments had already been done by Union Pacific in *Tumacacori*." In its briefs, however, it discusses no other examples.

asserts, "this case also raised additional legal issues such as scope of use of the claimed prescriptive easement by many users that did not apply to the single user in *Tumacacori*."

¶15 In a similar vein, Salero Ranch also asserts that Union Pacific unreasonably billed 11.2 hours to draft a motion for summary judgment that "mirrored the arguments in Union Pacific's motion for summary judgment in *Tumacacori*." Union Pacific responds that it spent only 4.6 hours to prepare the initial motion for summary judgment, 1.4 hours to prepare the supporting statement of facts, and .8 hours in additional legal research.

¶16 We find no abuse of the trial court's discretion based on the above arguments. This case involved multiple parties and additional legal issues, including the applicability of *Tumacacori*. Although we might not have awarded all of the fees requested, we cannot say the award of fees based on the time expended "'exeed[ed] the bounds of reason.'" *Assoc'd Indem. Corp.*, 143 Ariz. at 571, 694 P.2d at 1185, *quoting Davis v. Davis*, 78 Ariz. 174, 179, 277 P.2d 261, 265 (1954) (Windes, J., specially concurring).

Redacted Entries

¶17 The party seeking an award of attorney fees has the burden of presenting an affidavit or similar evidence establishing the specific, itemized information required by the rules. *See Schweiger*, 138 Ariz. at 187-88, 673 P.2d at 931-32. The fee application must provide sufficient detail to enable the court to assess the reasonableness of the fees incurred. *Id*. at 188, 673 P.2d at 932. Once the application has been submitted, "the burden shifts to the party opposing the fee award to demonstrate the impropriety or

unreasonableness of the requested fees." *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, ¶ 38, 167 P.3d 1277, 1286 (App. 2007); *see also Tocco*, 173 Ariz. at 594, 845 P.2d at 520 (opposing party's "obligation to demonstrate why any of the billing entries were immaterial, irrelevant or otherwise unreasonable").

¶18 Salero Ranch contends the trial court abused its discretion when it granted attorney fees to Union Pacific based on blacked-out billing entries. Union Pacific asserts that the entries were redacted to preserve attorney-client privileged communications. The contested entries show the date, the timekeeper, the amount of time billed, and a description of the timekeeper's activity, but with the subject matter of the activity removed, *e.g.*, "prepare e-mail to Mr. Sims Re: [redacted] (.2)"; "conference with Mr. Sims Re: [redacted] (.3)," or partially removed.

¶19 To comply with the standard established in *Schweiger*, a billing entry must provide sufficient detail to enable the court to assess the reasonableness of the fees. 138 Ariz. at 188, 673 P.2d at 932. When a party redacts significant portions of the narrative in a billing entry, the trial court is hardly able to assess the propriety of the task and evaluate the reasonableness of the time spent on it. Moreover, the party opposing the fee award is required to "demonstrate the impropriety or unreasonableness of the requested fees." *Nolan*, 216 Ariz. 482, ¶ 38, 167 P.3d at 1286; *accord Tocco*, 173 Ariz. at 594, 845 P.2d at 520. To do so, that party necessarily must have access to sufficiently complete fee information to meet its burden. Documents containing entries that are so redacted as to be meaningless are insufficient.

¶20 Union Pacific justifies its substantive redactions based on attorney-client privilege. However, to allow a party to obtain attorney fees while asserting that significant portions of the fee descriptions are privileged allows the attorney-client privilege to be used not only as a "shield" but a "sword." *See Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 155, 213 P.3d 288, 304 (App. 2009) (party may not "assert the privilege when doing so 'places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege' because the attorney-client privilege 'is not to be both a sword and a shield'"), *quoting State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, ¶ 9, 13 P.3d 1169, 1173 (2000); *cf. Throop v. F.E. Young & Co.*, 94 Ariz. 146, 158, 382 P.2d 560, 568 (1963) (defendant could not block inquiry into the issue he had raised by asserting physician-patient privilege).

¶21 Some of the redacted entries nevertheless contained sufficient information to support the time Union Pacific had billed. Others, however, were obscured to such an extent that neither the trial court nor opposing counsel could have evaluated them properly. For example, one entry only provides, "conference with Mr. Hancock Re: [redacted] (.4)." We conclude it was an abuse of discretion for the court to include such entries in the final fee award and therefore reduce the award to Union Pacific by the amount of those entries, $3,829.50. *Cf. J.W. Hancock Enters., Inc. v. Ariz. State Registrar of Contractors*, 142 Ariz. 400, 410, 690 P.2d 119, 129 (App. 1984) (reducing

attorney-fees award to amount incurred in declaratory judgment action because homeowners did not seek attorney fees in the statutory appeal).

Entries Relating to I-19 Traffic, DPS, and Border Patrol

¶22 Salero Ranch also objects to items it claims are unrelated to the case. It points to June 2010 billing entries concerning "diversion of I-19 traffic" over the contested easement, "personal use of gate [at the contested easement] by DPS and Border Patrol Agents who live in Baca Float," and "correspondence to Border Patrol and DPS Management." Union Pacific responds that "[i]nvestigation concerning all traffic at the subject crossing, including use by Border Patrol and DPS and diversion of I-19 traffic, was clearly at least potentially related to Plaintiffs' claims at the time such investigation was done" and thus "was not excessive or unreasonable." Union Pacific also notes that a successful party is entitled to recover reasonable attorney fees for all stages of litigation and for time spent in connection with legal theories that proved to be unsuccessful.

¶23 In defending the inclusion of these entries in the award, as it did below Union Pacific merely asserts they involved work that was "potentially related" to the claims at issue. But potential is not actual. And entries in an attorney-fees award must be material, relevant or otherwise reasonable, not simply potentially so. *Cf. Tocco*, 173 Ariz. at 594, 845 P.2d at 520 (party may oppose billing entries by showing them to be "immaterial, irrelevant or otherwise unreasonable"). Union Pacific also fails to explain how the entries are related to any stage of litigation or any unsuccessful legal theory. We

therefore further reduce Union Pacific's attorney fees award by the amount of these entries, which total $967.50.

Award of Costs

¶24 Salero Ranch asserts the court abused its discretion by including nontaxable costs in its award of attorney fees. Union Pacific concedes there was error but contends the error was merely clerical; it asserts the court simply awarded Union Pacific's taxable cost of $118 twice, once in the attorney-fees award and a second time in the cost award. Union Pacific also insists the error was waived because Salero Ranch did not object below.

¶25 The rule that a party waives error by failing to object before the trial court is procedural, not jurisdictional, and we may suspend the application of that rule in our discretion. *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 39, 945 P.2d 317, 350 (App. 1996). The purpose of the rule is to prevent surprise. *Stokes v. Stokes*, 143 Ariz. 590, 592, 694 P.2d 1204, 1206 (App. 1984). Both parties acknowledge the trial court made a mistake by adding costs to the attorney-fees award, but disagree about the reason for the mistake.[6] We agree with Union Pacific that the court granted Union Pacific its taxable cost of $118 twice; that mistake is clear from the record before us. In our discretion, we reduce Union Pacific's fee award by another $118.

[6]Although Salero Ranch argues the trial court impermissibly awarded Union Pacific non-taxable costs for "messengers" and "delivery services" as part of its attorney-fees award, we are unable to find support for this argument in the record.

Disposition

¶26 For the foregoing reasons, we affirm the award of attorney fees as modified herein to reflect an adjustment of the award by $4,915, resulting in a total award of $53,771.54. In our discretion, we deny both parties' requests for an award of attorney fees on appeal.[7] Because Salero Ranch has improved its position on appeal, it is therefore the successful party for purposes of awarding costs, *see Henry v. Cook*, 189 Ariz. 42, 43, 938 P.2d 91, 92 (App. 1996), and may recover its costs on appeal upon compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

[7]We note that Salero Ranch changed its position in its Reply Brief, arguing attorney fees on appeal are not available to either party.