IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CHRISTOPHER BO BERGESON, ON BEHALF OF HIMSELF AND AMY LYNN BERGESON, HIS SISTER, A MINOR CHILD, AND THE CHILDREN OF LYNN RENEE BERGESON, DECEASED,
Plaintiff/Appellant,

v.

WEST FRONTIER CONDOMINIUMS HOA, INC., AN ARIZONA CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2013-0045
Filed December 24, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Gila County
No. CV20080002
The Honorable R. Douglas Holt, Judge

REVERSED AND REMANDED

COUNSEL

Lloyd & Robinson, P.L.L.C., Payson
By Arthur E. Lloyd

and

Haralson, Miller, Pitt, Feldman & McAnally, P.L.C., Tucson
By Stanley G. Feldman
Counsel for Plaintiff/Appellant

Allen Law Group, P.L.C., Phoenix
By Lynn M. Allen and J.P. Harrington Bisceglia
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Appellants Christopher and Amy Bergeson ("the Bergesons") appeal from the trial court's grant of summary judgment in favor of appellee West Frontier Condominiums HOA, Inc. ("West Frontier"). On appeal, they argue the trial court erred by ruling issue preclusion prevented their negligence claims against West Frontier from proceeding. Because we conclude the court erred in granting summary judgment, we reverse and remand.

Factual and Procedural Background

¶2 "We view the facts and reasonable inferences in the light most favorable to [the Bergesons], against whom summary judgment was entered." *Lowe v. Pima County*, 217 Ariz. 642, ¶ 3, 177 P.3d 1214, 1215 (App. 2008). West Frontier is the unit owners' association for the Frontier Condominiums. *See* A.R.S. § 33-1241. In October 2005, Lynn Bergeson began renting a unit in the Frontier Condominiums from David and Joan Levengood ("the Levengoods"). The following summer, Lynn, with the Levengoods' approval, had a friend replace a light fixture that was installed in the living room with a ceiling fan. On June 26, 2007, Lynn was found

dead in her unit. An autopsy revealed Lynn died from carbon monoxide poisoning. The parties do not dispute that faulty wiring caused the ceiling insulation to smolder and produce lethal amounts of carbon monoxide.

¶3 The Bergesons filed a wrongful death action against the Levengoods and West Frontier. American Family Insurance Group ("American Family") insured West Frontier, and the policy also provided coverage for individual unit owners for any liability arising out of their "ownership, maintenance, or repair of that portion of the premises which is not reserved for that unit-owner's exclusive use or occupancy." The Levengoods filed a claim with American Family for defense and indemnity under the policy, but American Family denied the claim contending the Levengoods were not insured under the policy for the allegations in the complaint. The Levengoods and Bergesons then stipulated to a judgment against the Levengoods, but agreed the Bergesons would not execute on that judgment. Instead, the Levengoods assigned to the Bergesons their bad faith claim against American Family.

¶4 American Family learned of the Levengoods' assignment and subsequently sought and received a declaratory judgment in federal district court stating the Levengoods' liability did not arise from a common area, and therefore any claim based on their liability was not covered by the insurance policy, and it had no duty to defend the Levengoods. The court found that the ceiling fan and its wiring were under the exclusive control of the Levengoods, and they therefore did not qualify for coverage under the insurance policy. *Am. Family Ins. Group v. Bergeson (Bergeson I)*, No. CV09-0360 PHX DGC, *3-4, 2010 WL 3705344 (D. Ariz. Sept. 14, 2010). The Ninth Circuit affirmed the district court's ruling. *Am. Family Ins. Co. v. Bergeson (Bergeson II)*, 472 F. App'x 604, 605 (9th Cir. 2012).

¶5 Following the Ninth Circuit's ruling, West Frontier moved for summary judgment. West Frontier argued the doctrine of issue preclusion prohibited the Bergesons from arguing West Frontier had control over the faulty wiring because the federal court determined the ceiling fan and its wiring were in the Levengoods' exclusive control. The court granted West Frontier's motion. We

have jurisdiction over the Bergesons' appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Standard of Review

¶6 On appeal from summary judgment, we determine de novo whether the trial court correctly applied the law and whether there are any genuine disputes as to any material fact. *See Dayka & Hackett, LLC v. Del Monte Fresh Produce N.A.*, 228 Ariz. 533, ¶ 6, 269 P.3d 709, 712 (App. 2012). The trial court should grant summary judgment when "the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a).

¶7 We may affirm the trial court's grant of summary judgment if legally correct for any reason. *See First Credit Union v. Courtney*, 233 Ariz. 105, ¶ 7, 309 P.3d 929, 931 (App. 2013). However, we must be cautious in so doing because "[a]ffirming a summary judgment on new grounds . . . may deprive the non-moving party of the opportunity to present facts which are relevant to the new issues, but which were not relevant to the issues raised below." *Rhoads v. Harvey Pubs., Inc.*, 131 Ariz. 267, 269, 640 P.2d 198, 200 (App. 1981). Thus, we "may affirm on new grounds only if there are no conceivable facts which would allow the non-moving party to prevail on the new issues." *Id.*

Issue Preclusion

¶8 The Bergesons argue the trial court erred by granting summary judgment in favor of West Frontier because issue preclusion should not have barred their negligence claim from proceeding. They reason that because the prior federal case dealt only with the alleged negligent acts of the Levengoods, the issue of any negligent acts by West Frontier has not been addressed. Specifically, they argue that the following three issues are not precluded: (1) whether West Frontier negligently failed to oversee the installation of the ceiling fan; (2) whether West Frontier negligently failed to investigate a burning odor reported to it; and (3) whether West Frontier negligently failed to correct wiring issues other than those connected to the fan. To decide whether the court

erred in granting summary judgment, we must first determine what issues the federal judgment necessarily decided.

¶9 Because a federal court issued the judgment at issue here, federal law dictates its preclusive effect. *See Howell v. Hodap*, 221 Ariz. 543, ¶ 17, 212 P.3d 881, 884 (App. 2009). The doctrine of issue preclusion "is designed to 'bar[] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination.'" *Paulo v. Holder*, 669 F.3d 911, 918 (9th Cir. 2011), *quoting Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). The doctrine prevents a party from again litigating an issue when (1) the issue or fact was necessarily decided as part of the previous proceeding and is identical to the one sought to be relitigated; (2) a final judgment on the merits was entered; and (3) the party against whom the doctrine is being invoked was a party or in privity with a party at the previous proceeding. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000). Thus, a party must present all supporting legal arguments and facts the first time it litigates an issue or the party loses the opportunity to do so in subsequent litigation. *See id.*

¶10 In the federal litigation, the parties sought to resolve who had responsibility for the ceiling fan and its faulty wiring that caused the insulation to smolder and consequently caused Lynn's death. Under West Frontier's insurance policy, individual unit-owners "can be an insured, but 'only for liability arising out of the ownership, maintenance or repair of that portion of the premises which is not reserved for that unit-owner's exclusive use or occupancy.'" *Bergeson I*, 2010 WL 3705344, at *3. Reading the insurance policy in light of the declarations and statutes,[1] the district court reasoned that if the Bergesons could demonstrate that the fan or its wiring were in "common areas"—a term apparently synonymous with "common elements," *see* A.R.S. § 33-1202(7)—then American Family would have been required to defend or indemnify the Levengoods. *See Bergeson I*, 2010 WL 3705344, at *3 ("The

[1] Although the district court did not discuss the statutes explicitly, the terminology the court used drew upon the statutory definitions we discuss below and the arguments the parties raised. *See Bergeson I*, 2010 WL 3705344, at *2-5.

question the Court must decide is whether the Levengoods' liability in the Bergeson action arose out of their ownership, maintenance, or repair of a common area of the building.").

¶11 To answer the question before it, the district court had to consider how the declarations and insurance policy were tied to Arizona law. *See Bergeson II*, 472 F. App'x at 606 (Levengoods had exclusive use of ceiling fan and related electrical components "pursuant to homeowners' declarations and Arizona condominium statutes"). The Arizona Condominium Act ("the Act") provides certain mandatory and default rules governing the relationship between condominium associations and those who own individual units. *See* A.R.S. §§ 33-1203, 33-1247(a). Pursuant to A.R.S. § 33-1247(a), the default rule is that the association is responsible for the "maintenance, repair and replacement of the common elements." The Act defines a "common element" as "all portions of a condominium other than the units." § 33-1202(7). It defines a "limited common element" as "a portion of the common elements specifically designated as a limited common element in the declaration and allocated . . . for the exclusive use of one or more but fewer than all of the units." § 33-1202(17). Thus, the default rule is that the homeowners association is responsible for the "maintenance, repair and replacement" of both common elements and limited common elements.

¶12 Section 33-1247(a) allows the homeowners association declarations to modify the default rule. The declarations in this case modify the default rule to the following: "Each Owner will be responsible for care, maintenance, cleanliness, and orderliness of the Limited Common Elements that are within his exclusive . . . control pursuant to the terms hereof . . . . Owners may not, however, modify, paint or otherwise decorate, or in any way alter such Limited Common Elements without prior written approval of the Board or its Architectural Control Committee." They also provide that "[e]ach Owner shall be responsible for the maintenance, repair, or replacement of any . . . fans . . . [or] electrical fixtures . . . which are in the Unit or portions thereof that serve that Unit only." With these exceptions, the declarations leave intact the statutory default

rule of the association's responsibility for common elements and limited common elements.

¶13 To decide how the Levengoods' liability arose, the district court first necessarily had to determine what caused the fire. It found that "the carbon monoxide levels [that killed Lynn] were caused by an improperly installed ceiling fan, which caused a fire in the ceiling." *Bergeson I*, 2010 WL 3705344, at *1. Then, based on its interpretation of the declaration provisions described above and the evidence presented, the district court found that the "fan and its wiring . . . clearly were not common areas" and that therefore "the Levengoods' liability did not arise out of their maintenance, ownership, or repair of a common area, but rather arose out of an item within their sole control—the ceiling fan." *Id.* at *3-4. Therefore, the court reasoned, pursuant to the insurance policy, the fan was also reserved for the Levengoods' "exclusive use" and American Family had no obligation to defend or indemnify the Levengoods. *Id.* at *3-5. Based on that finding, the ceiling fan and its wiring were "limited common elements" within the meaning of the declarations so that by statute they could be considered "designated . . . for the exclusive use" of the Levengoods. *See* § 33-1202(17).

¶14 The Ninth Circuit affirmed this ruling, finding that "[t]he fire that caused Lynn Bergeson's death occurred in the insulation in the ceiling, but every negligent act alleged against the Levengoods related to their ownership, maintenance, or repair of property that was reserved for their exclusive use." *Bergeson II*, 472 F. App'x at 606. More specifically, the court noted these allegations involved "the ceiling fan itself, the electrical fixture into which it was connected, [and] the electrical wire powering it" which were all within the Levengoods' exclusive use "pursuant to the homeowners' declarations and Arizona condominium statutes." *Id.* Thus, the Ninth Circuit also appears to have construed the declarations as designating the ceiling fan and its wiring as for the Levengoods' exclusive use pursuant to § 33-1202(17), and therefore falling within the exclusion of the insurance policy.

¶15 Having determined the issues the federal courts decided, we must evaluate the impact on each of the Bergesons'

three related negligence claims. The Bergesons argue the trial court erred in granting summary judgment on each of its claims because the issues decided in the federal litigation were not dispositive of the claims it raised below. They first argue broadly that issue preclusion does not apply because the issue in the federal action was whether the Levengoods were insured under the HOA's policy, which is not identical to the issue of the HOA's duty and breach. But that argument fails to acknowledge that they are precluded from re-litigating any fact essential to the federal decision. *See Hydranautics*, 204 F.3d at 885. Therefore, their broad argument fails and we consider their more specific arguments.

1. Negligently Failing to Oversee Fan Installation

¶16 The Bergesons argue that the issue of West Frontier's duty to oversee the installation of the ceiling fan was not decided or considered by the federal courts, and therefore the superior court erred in finding this issue precluded and in granting summary judgment to West Frontier. West Frontier responds that the court did not rule that the issue of duty was precluded, but that the factual issue of control was decided in its favor and therefore requires summary judgment on the issue of duty.

¶17 The superior court found that because the Levengoods had exclusive control of the ceiling fan and its wiring, no factual issue of duty remained for the jury to resolve. But the fact that the fan, fixture, and wiring were reserved for the Levengoods' exclusive use does not foreclose the possibility that the Association had a duty to oversee the original installation of the fan. Accordingly, the court erred in entering summary judgment on the issue of duty on this basis. *See Siddons v. Bus. Props. Dev. Co.*, 191 Ariz. 158, ¶¶ 4-5, 953 P.2d 902, 903 (1998) (control of part of premises factual issue for jury and where landlord "retained control over the area where the accident occurred, it would have had a duty to inspect and make safe").

2. Failure to Investigate Burning Odor

¶18 The Bergesons also argue the trial court erred in finding precluded the issue of West Frontier's failure to investigate an odor.

The superior court found the failure to investigate "was also litigated at the district court level, with the Ninth Circuit affirming the fact that [West Frontier] had no duty to investigate the source of any alleged odor." Neither the district court nor the Ninth Circuit, however, considered any claim that West Frontier had been put on notice by one of its employees of a burning odor. *See Bergeson I*, 2010 WL 3705344; *Bergeson II*, 472 F. App'x 604. Moreover, this issue does not involve the status of the ceiling fan or its wiring under the declarations and statutes. The issue was neither identical to one previously litigated nor actually litigated in the previous proceeding and was properly brought before the superior court for consideration. *See Paulo*, 669 F.3d at 917-18. The court therefore erred in finding this issue precluded.

3. Wiring and Junction Box in Common Areas

¶19 The Bergesons next argue the trial court erred in finding precluded the issue of whether West Frontier negligently maintained wiring and failed to install a junction box in a common area under its control. The superior court found the issue precluded because "[d]ue to [the Levengoods'] exclusive control, West Frontier HOA has no duty."

¶20 The district court, however, did not address these allegations, noting specifically that the failure to install a junction box "was never alleged [against the Levengoods] in the Bergeson action." *Bergeson I*, 2010 WL 3705344, at *5. The district court therefore never reached the merits of these allegations; nor were they actually litigated. And its decision does not necessarily foreclose the possibility that West Frontier's alleged negligence in a common area could have contributed in a legally significant way to Lynn's death. Accordingly, the trial court erred in finding this issue precluded on this basis. *See Paulo*, 669 F.3d at 917-18.

¶21 West Frontier argues, however, that the Bergesons failed to meet their burden of establishing a genuine issue of material fact as to each of these claims. But as the Bergesons pointed out at oral argument, this argument was not raised in West Frontier's motion for summary judgment, and the Bergesons have not had an opportunity to present new facts relevant to it. We

therefore decline to consider it. *See Rhoads*, 131 Ariz. at 269, 640 P.2d at 200.

Disposition

¶22 For the foregoing reasons, we reverse the judgment of the trial court and remand for proceedings consistent with this decision.