IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE ESTATE OF BRYANT BENSON

HEIDI HALL, PERSONAL REPRESENTATIVE
OF THE ESTATE OF BRYANT BENSON,
Plaintiff/Appellant,

v.

OLIVIA MADRID, AN INDIVIDUAL;
JULIE MADRID, AN INDIVIDUAL,
Defendants/Appellees.

No. 2 CA-CV 2015-0073
Filed March 2, 2016

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NOT FOR PUBLICATION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)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. PB20071337
The Honorable Kyle A. Bryson, Judge

AFFIRMED

COUNSEL

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Counsel for Plaintiff/Appellant

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By Mark Rubin
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MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 Plaintiff/appellant Estate of Bryant Benson, acting through its personal representative, Heidi Hall, challenges the trial court's order granting summary judgment in favor of defendants/appellees Olivia and Julie Madrid based on statutes of limitations. We affirm for the reasons that follow.

Factual and Procedural Background

¶2 We state the facts in the light most favorable to the estate, the party against whom summary judgment was entered. *See Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 500, 851 P.2d 122, 125 (App. 1992). The decedent passed away in December 2004. His wife, Olivia Madrid, continued to live in the decedent's residence and control his assets. In November 2007, Heidi Hall, who is the decedent's daughter, filed a probate petition seeking formal appointment as the estate's first personal representative. The trial court appointed her in January 2008.

¶3 In March 2008, when Olivia refused to cooperate with the probate proceeding, the personal representative filed an "emergency motion" to enter the decedent's residence "to inventory,

collect and secure [his] personal property." The motion contained an extensive list of property that the personal representative believed remained at the home, including, among other things, several automobiles, inherited jewelry, and equestrian and fishing-related items. The trial court granted the motion in May 2008. Upon entering the residence and conducting the inventory, the personal representative learned that nearly all the decedent's property was missing. By September 2008, at the latest, she believed Olivia had taken the estate's assets.

¶4 Nearly five years later, in June 2013, the personal representative filed a complaint against Olivia Madrid and her daughter Julie. Count one of the complaint sought recovery and possession of the estate's assets pursuant to A.R.S. § 14-3709(A). Count two asserted a claim of conversion. Count three sought double damages against only Olivia pursuant to § 14-3709(D) based on the concealment, embezzlement, conveyance, or disposal of estate property. All property identified in the complaint is the same property originally identified in the emergency motion.

¶5 The Madrids filed a motion for summary judgment arguing the complaint was barred by various limitations periods. In granting the motion, the trial court determined that the estate's statutory claims, counts one and three, were barred by the general four-year statute of limitations, A.R.S. § 12-550. The court further determined that the two-year limitations period provided by A.R.S. § 12-542 precluded the estate's conversion claim, rejecting the estate's argument that the discovery rule should apply.

¶6 After the trial court entered a final judgment pursuant to Rule 54(c), Ariz. R. Civ. P., the Madrids filed a timely motion under Rule 59(*l*), Ariz. R. Civ. P., to alter or amend the judgment to include sanctions pursuant to Rule 11, Ariz. R. Civ. P., and A.R.S. § 12-349. We revested jurisdiction in the trial court to resolve the substantive issues presented in the motion. With that motion now denied, we have jurisdiction over the estate's appeal pursuant to Rule 9(e)(2), Ariz. R. Civ. App. P., and A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

Statutory Claims: Counts One and Three

¶7 The estate first maintains "[t]here is no applicable statute of limitations for the personal representative's duty to marshal assets while a probate case is open." From this premise the estate reasons that there is no temporal limitation on an action to recover property and receive damages under § 14-3709 so long as the administration of the estate is still pending. The estate therefore concludes the trial court erroneously granted summary judgment on the claims under § 14-3709 by applying the catch-all statute of limitations, § 12-550.

¶8 Summary judgment is warranted when the evidence produced creates no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Ariz. R. Civ. P. 56(c)(3); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We review the grant of summary judgment de novo and will uphold a trial court's ruling if it is legally correct for any reason. *Pi'Ilkea, LLC v. Williamson*, 234 Ariz. 284, ¶ 5, n.7, 321 P.3d 449, 450, 454 n.7 (App. 2014). The interpretation and application of statutes similarly present questions of law that we consider de novo. *Patterson v. Maricopa Cty. Sheriff's Office*, 177 Ariz. 153, 156, 865 P.2d 814, 817 (App. 1993). Here, we agree with the trial court's ultimate conclusion that the statutory actions are time barred, but we anchor our reasoning in A.R.S. §§ 14-3108(4) and 14-3709, not § 12-550.[1]

¶9 Arizona's probate code is designed, in part, "'[t]o promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors.'" *In re Estate*

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[1]Section 12-550 applies to "[a]ctions other than for recovery of real property for which no limitation is otherwise prescribed." Because § 14-3108(4) limits the operation of § 14-3709 based on the time a probate proceeding is commenced, it is questionable whether § 12-550 applies to actions under § 14-3709. But we need not decide this issue to resolve the present appeal and therefore do not address it further.

of Winn, 214 Ariz. 149, ¶ 20, 150 P.3d 236, 240 (2007), *quoting* A.R.S. § 14-1102(B)(3). A probate action generally must be brought within two years of a decedent's death, § 14-3108, and a proceeding that remains inactive for two years is subject to dismissal. Ariz. R. Probate P. 15.2(A)(1). Section 14-3108(4) allows for the later appointment of a personal representative in cases such as the one before us in which "no court proceeding concerning the succession or administration has occurred within the two year period." But as we explain in greater detail below, if a proceeding is brought under this exception, the personal representative may possess estate assets only to the extent "necessary to confirm title" in the estate's successors. *Id.*

¶10 Regardless of whether appointment first occurs within two years of a person's death, the personal representative must create a detailed inventory of a decedent's property within ninety days of appointment, A.R.S. § 14-3706(A), and "[a] personal representative is under a duty to settle and distribute the estate of the decedent . . . as expeditiously and efficiently as is consistent with the best interests of the estate." A.R.S. § 14-3703(A). "[D]elay in the administration of estates is not to be tolerated." *In re Shields' Estate*, 15 Ariz. App. 447, 449, 489 P.2d 294, 296 (1971).

¶11 Section 14-3709 empowers a personal representative to discover, inventory, and repossess estate property. Section 14-3709(A) generally creates a right and duty of the personal representative to "take possession or control of" the decedent's property, and the provision expressly authorizes the personal representative to "maintain an action to recover possession of property or to determine its title." The remainder of the statute creates a process for examining people suspected of concealing estate property or information and, when necessary, coercing its surrender through incarceration. § 14-3709(B) through (D). Section 14-3709(D) specifically provides that a court's order to disclose documents or information

> is prima facie evidence of the right of the personal representative to the property in an action brought for recovery of that property, and a judgment shall be for

> double the value of the property, or for return of the property and damages in addition to the property equal to the value of the property.

Because § 14-3709 does not clearly address the issues before us regarding timing and any other limitations, it is appropriate to look to the broader statutory context and historical background to divine the legislature's intended meaning. *See State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, ¶ 24, 229 P.3d 242, 252-53 (App. 2010).

¶12 Section 14-3709 is a blended statute that combines a provision from the 1969 Uniform Probate Code (UPC), 8 U.L.A. (1998), with older Arizona laws. *See Estate of Winn*, 214 Ariz. 149, n.4, 150 P.3d at 240 n.4; *Gonzalez v. Superior Court*, 117 Ariz. 64, 66, 570 P.2d 1077, 1079 (1977); *In re Estate of Jorgenson*, 159 Ariz. 214, 216 n.2, 766 P.2d 87, 89 n.2 (App. 1988). Subsection (A) of § 14-3709 dates to 1974 and enacts § 3-709 of the UPC with only minor stylistic differences; subsections (B) through (D) of § 14-3709 were codified some years later, in 1976, and combine earlier laws dating from our territorial period that were originally adopted from California. *See In re Estate of Newman*, 219 Ariz. 260, ¶¶ 20-21 & nn.5-6, 196 P.3d 863, 870 & nn.5-6 (App. 2008); *Estate of Jorgenson*, 159 Ariz. at 216 n.2, 766 P.2d at 89 n.2; *see also* A.R.S. §§ 14-544, 14-545 (1956); Ariz. Code Ann. §§ 38-812, 38-813 (1939); Ariz. Rev. Code §§ 3969, 3970 (1928); Ariz. Civ. Code §§ 862, 863 (1913); Ariz. Civ. Code §§ 1722, 1723 (1901); *cf. Levy v. Superior Court*, 38 P. 965, 965-66 (Cal. 1895) (quoting California Code of Civil Procedure §§ 1459, 1460).

¶13 Those earlier Arizona statutes provided a summary proceeding in the probate court to discover an estate's assets. *First Nat'l Bank v. Superior Court*, 42 Ariz. 467, 470-71, 27 P.2d 525, 527 (1933); *accord Kay v. Kay*, 53 Ariz. 336, 343, 89 P.2d 496, 499 (1939). The proceeding was "in the nature of a bill of discovery to aid executors and others interested in the estate in locating and inventorying assets of an estate." *In re Schechtman's Estate*, 286 P.2d

345, 346 (Cal. 1955).[2] A court's remedial powers were limited by the terms of the earlier statutes, which did not authorize a court to try a question of title, order the surrender of property, or enter judgment for monetary damages. *See id.* at 347; *McCarthy v. Superior Court*, 149 P.2d 55, 57 (Cal. Ct. App. 1944); *Koerber v. Superior Court*, 206 P. 496, 497-98 (Cal. Ct. App. 1922). The predecessor statutes, in other words, did not provide an independent cause of action; they provided both a means of discovering information and a penalty that would enhance damages in another, appropriate cause of action, such as trover and conversion or replevin. *See Jahns v. Nolting*, 29 Cal. 507, 510-11, 513 (1866);[3] *see also First Nat'l Bank*, 42 Ariz. at 471, 27 P.2d at 527. The latter actions remained subject to ordinary limitations periods, even when brought on behalf of an estate or heir. *See, e.g.*, *Rose v. Dunk-Harbison Co.*, 46 P.2d 242, 243-44 (Cal. Ct. App. 1935); *Raddatz v. Myers*, 276 P. 1069, 1070 (Cal. Ct. App. 1929).

¶14 In its current form, § 14-3709(A) authorizes a personal representative to bring an action to recover possession of an estate's property, as noted above. But this provision is expressly limited where, as here, the action is commenced more than two years after a decedent's death. In that event, "the personal representative has no right to possess estate assets as provided in § 14-3709 beyond that necessary to confirm title thereto in the rightful successors to the estate." § 14-3108(4).[4] This limitation, which was taken from

[2]The probate statutes discussed in *Schechtman's Estate* were reenacted provisions from California's Code of Civil Procedure. *See In re Escolle's Estate*, 25 P.2d 860, 861 (Cal. Ct. App. 1933).

[3]*Jahns* addressed probate statutes later codified in California's Code of Civil Procedure. *Levy*, 38 P. at 965-66.

[4]A successor is someone other than a creditor who is entitled to a decedent's property either by will or law. A.R.S. § 14-1201(53). A successor immediately receives title to property upon a decedent's death. *See* A.R.S. § 14-3101(A); *see also Hallas v. Evans*, 69 Ariz. 14, 18, 207 P.2d 985, 987 (1949) ("The holding of this court has been and the rule is well known that immediately upon the death the heirs are invested with title.").

§ 3-108(a)(4) of the UPC,[5] "preclude[s] the personal representative from selling or otherwise exerting possessory control over assets that had been in the possession of others for more than" the specified period of time. *In re Estate of Yogiji*, 311 P.3d 1224, ¶ 24 (N.M. Ct. App. 2013); *accord In re Estate of Harris*, 352 P.3d 20, ¶¶ 12, 15 (Mont. 2015). Possession is allowed only if it is necessary to "establish[] the validity of title," *Estate of Yogiji*, 311 P.3d 1224, ¶ 24, such as by generating paperwork to perfect title, for example. *Estate of Harris*, 352 P.3d 20, ¶¶ 18-19.

¶15 Section 14-3108(4)'s limitation on the personal representative's right of possession is similarly reflected in the current § 14-3709(D). That provision expands a trial court's power beyond that granted by our predecessor statutes by allowing the probate court to "order th[e] person to turn over the documents" showing "the right, interest or claim of a decedent to any property." § 14-3709(D). In other words, § 14-3709(D) allows "documents" to be repossessed that might "confirm title" under § 14-3108(4).

¶16 "The limitation found in A.R.S. § 14-3108 is not an ordinary statute of limitations which may be waived if not affirmatively pleaded. Rather, it is a statutory limitation on the probate court's power." *In re Estate of Wood*, 147 Ariz. 366, 367, 710 P.2d 476, 477 (App. 1985). The limitation in § 14-3108(4) only applies to actions to recover *possession* of property. A personal representative's duty to inventory assets under § 14-3706(A) is unaffected by late appointment, *see Estate of Yogiji*, 311 P.3d 1224, ¶ 28, as is her right to determine title. *See* § 14-3709(A). Hence, a personal representative may utilize the discovery procedures of § 14-3709(B) through (D) in a probate proceeding even though she might not be able to collect or distribute the property that those efforts uncover. *See Estate of Yogiji*, 311 P.3d 1224, ¶ 30.

¶17 Applying these legal principles to the facts of the case, we conclude the estate's cause of action under § 14-3709(A) was untimely under § 14-3108(4). In count one of the complaint, the

[5]In 1995 our legislature reduced the UPC's three-year time period to two years. 1995 Ariz. Sess. Laws, ch. 287, § 5.

personal representative sought to recover possession of the estate's assets more than two years after the decedent's death. The estate did not cite § 14-3108 in its complaint, and the estate never maintained that it sought possession of any item merely to confirm title in a rightful successor, as the statute permits. At this juncture, any such argument based on this novel legal theory is waived. "Arguments not made at the trial level cannot be asserted for the first time on appeal from summary judgment." *Campbell v. Warren*, 151 Ariz. 207, 208, 726 P.2d 623, 624 (App. 1986); *accord Lansford v. Harris*, 174 Ariz. 413, 419, 850 P.2d 126, 132 (App. 1992) ("On appeal from summary judgment, the appellant may not advance new theories or raise new issues to secure a reversal."). Thus, to the extent the personal representative sought possession of the assets for a reason other than "necessary to confirm title thereto in the rightful successors to the estate," count one of the complaint is barred by § 14-3108(4).[6]

¶18 Count three of the complaint did not assert an independent cause of action. As explained above, it could only increase an award of damages pursuant to § 14-3709(D) "in an action brought for recovery of th[e] property." Absent a timely action to recover such property, § 14-3709(D) cannot support a judgment for the estate. Thus, the trial court correctly granted summary judgment on count three in favor of the Madrids.[7]

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[6]Although the issue has been waived on appeal, nothing in this decision precludes the personal representative from seeking in the probate court possession of property necessary to confirm title.

[7]The estate additionally argues that (1) its 2008 filing initiated a proceeding under § 14-3709 that satisfies any applicable statute of limitations and (2) the estate sought to create a constructive trust over converted property, and, because such a trust is an equitable remedy, "the statute of limitations has no application to equitable remedies." Our analysis under § 14-3108 renders moot these arguments regarding statutes of limitations, and we do not address these issues further.

Conversion: Count Two

¶19 The estate next contends the trial court erroneously found its conversion claim barred by the two-year limitations period established by § 12-542(5). The statute provides, in relevant part, that conversion actions "shall be commenced and prosecuted within two years after the cause of action accrues." *Id.*

¶20 The trial court based its ruling on *Jackson v. American Credit Bureau, Inc.*, in which this court held that a "cause of action 'accrues' at the time of the wrongful taking and not at the time of the discovery by [the] plaintiff of the taking or of the identity of the taker." 23 Ariz. App. 199, 201, 531 P.2d 932, 934 (1975). In *Jackson*, we applied the traditional rule of accrual found in *Stockmen's State Bank v. Merchants' & Stockgrowers' Bank*, 22 Ariz. 354, 197 P. 888 (1921). *Jackson*, 23 Ariz. App. at 201, 531 P.2d at 934. In *Stockmen's*, our supreme court stated that an action accrues at the time of conversion and "the fact that [the plaintiff] had no notice of the conversion did not prevent the running of the statute" of limitations. 22 Ariz. at 364, 197 P. at 892.

¶21 Our supreme court subsequently abrogated this traditional rule—and *Jackson* along with it—in favor of the more equitable discovery rule. *See Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995); *see also Kenyon v. Hammer*, 142 Ariz. 69, 76, 688 P.2d 961, 968 (1984) ("[T]he discovery doctrine has generally been adopted and applied to tort actions in Arizona."). Under this rule, "a plaintiff's cause of action does not accrue until the plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause." *Gust*, 182 Ariz. at 588, 898 P.2d at 966; *accord Albano v. Shea Homes Ltd. P'ship*, 227 Ariz. 121, ¶ 23, 254 P.3d 360, 366 (2011) (limitations periods "generally begin to run after an injury occurs and is (or reasonably should have been) discovered"); *Doe v. Roe*, 191 Ariz. 313, ¶ 29, 955 P.2d 951, 960 (1998). The trial court's reliance on our precedent in *Jackson*, therefore, was misplaced.

¶22 We nevertheless will uphold a trial court's ruling if that court reached a legally correct result for any reason. *See Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996). "'Once the

defendant has established a *prima facie* case entitling h[er] to summary judgment [on a statute of limitations defense], the plaintiff has the burden of showing available, competent evidence that would justify a trial.'" *Id.* at 19, 932 P.2d at 284, *quoting Ulibarri v. Gerstenberger*, 178 Ariz. 151, 156, 871 P.2d 698, 703 (App. 1993) (alteration in *Logerquist*). "The burden of establishing that the discovery rule applies to delay the statute of limitations rest[s] on plaintiff." *Id.*

¶23 Here, the appellees presented a prima facie defense based on the statute of limitations. In response, the estate failed to point to any evidence suggesting it could not have known in 2008, at the latest, of the conversion claim against Olivia Madrid. In May of that year, the estate obtained an order to inspect the decedent's former residence, where Olivia was still residing, in order to inventory and secure the estate property believed to be concealed there or "already . . . disposed of by [her]." The personal representative searched the residence and filed an inventory several months later, stating she had not found most of the estate's property. According to the estate's own statement of facts, the personal representative believed that "substantial assets and information w[ere] missing" and that Olivia was engaged in a pattern of refusing to cooperate or provide information. Because Olivia had been in possession of the estate's assets since the decedent's death, the personal representative therefore believed in 2008 that Olivia had converted the missing property.

¶24 Based on this record, a person exercising "reasonable diligence" would have known of the facts underlying the conversion claim against Olivia in 2008. *Gust*, 182 Ariz. at 588, 898 P.2d at 966. "The discovery rule . . . does not permit a party to hide behind its ignorance when reasonable investigation would have alerted it to the claim," *ELM Retirement Ctr., LP v. Callaway*, 226 Ariz. 287, ¶ 12, 246 P.3d 938, 941 (App. 2010), and "[a] plaintiff need not know *all* the facts underlying a cause of action to trigger accrual." *Doe*, 191 Ariz. 313, ¶ 32, 955 P.2d at 961. The estate offers no explanation for its nearly five-year delay in filing its conversion action against this suspected tortfeasor. Thus, in the absence of evidence creating a genuine factual dispute on the limitations defense, *see id.* ¶ 33, the

trial court correctly granted summary judgment in favor of Olivia Madrid.

¶25 On appeal, the estate only asserts that its 2013 conversion claim is timely as to Julie Madrid because the estate could not have discovered her role in converting estate assets or money until her 2012 deposition. The estate specifically contends, and we accept as true for purposes of summary judgment, that Julie lied in that deposition about Olivia's whereabouts and whether Julie had any bank accounts with funds of approximately $90,000. The estate conceded below in its statement of facts, however, that it knew in 2008 Julie's name was on bank accounts she shared with Olivia. Hence, a timely investigation into Olivia's suspected conversion or a deposition of Julie within the two-year limitations period would have revealed the same information that the estate later discovered regarding Julie's "involvement as a co-conspirator." The estate points to no new information discovered after 2008 that caused Julie to be deposed. In fact, the personal representative avowed that she "only learned about substantial cash and other assets after the . . . Complaint was filed on June 17, 2013."

¶26 For these reasons, the estate's four-year delay in investigating Julie's participation in the suspected conversion does not represent "reasonable diligence," *Gust*, 182 Ariz. at 588, 898 P.2d at 966, and the estate does not argue otherwise. Instead, the estate suggests that diligence in discovery is an "inherently factual issue[]" to be decided by a jury, not a court.

¶27 "When discovery occurs and a cause of action accrues are usually and necessarily questions of fact for the jury." *Doe*, 191 Ariz. 313, ¶ 32, 955 P.2d at 961. Yet "summary judgment is warranted . . . if the failure to go forward and investigate is not reasonably justified." *Walk v. Ring*, 202 Ariz. 310, ¶ 23, 44 P.3d 990, 996 (2002). Accordingly, an appellate court will grant a defendant relief when the record shows no genuine dispute about the plaintiff's diligence and the question can be decided as a matter of law. *See, e.g.*, *Nolde v. Frankie*, 192 Ariz. 276, ¶¶ 9-10, 20, 32, 964 P.2d 477, 480, 482, 484 (1998) (concluding plaintiffs should have known of causal connection between injuries and defendant's conduct); *Florez v. Sargeant*, 185 Ariz. 521, 528, 917 P.2d 250, 257 (1996) (requiring

summary judgment for defendants when plaintiffs "should have known of the events giving rise to their claims long before the statute [of limitations] expired"); *Wyckoff v. Mogollon Health All.*, 232 Ariz. 588, ¶¶ 12-16, 307 P.3d 1015, 1018-19 (App. 2013) (affirming summary judgment when plaintiff knew of illness and workplace condition suspected of causing it, yet failed to timely investigate matter with physicians or file claim within limitations period). Such is the situation here. Despite the personal representative's avowal that she "did not have a reasonable basis to believe that Julie Madrid was involved in conversion of money or assets of the Estate" until the deposition, this was a self-serving and conclusory legal assertion at odds with the record and thus insufficient to create a triable question of fact. *See* Ariz. R. Civ. P. 56(e)(4) (opponent of summary judgment must "set forth specific facts showing a genuine issue for trial"); *Florez*, 185 Ariz. at 526-27, 917 P.2d at 255-56.

Attorney Fees

¶28 The estate requests an award of attorney fees and costs "incurred below and on appeal" pursuant to A.R.S. §§ 14-3709(D), 12-341, and Rule 21(a), Ariz. R. Civ. App. P. The Madrids request their appellate attorney fees under A.R.S. § 12-349, Rule 11, Ariz. R. Civ. P., and Rules 21 and 25, Ariz. R. Civ. App. P., arguing the appeal was frivolous and the estate's claims were brought without substantial justification.

¶29 Given the fairly complex statutes involved in this case and lack of Arizona authorities directly on point, we do not find the estate's action to be frivolous. Nor do we find the appeal to be meritless or improper, given the trial court's erroneous ruling identified in this decision. We therefore deny all parties' requests for attorney fees. We grant the Madrids their costs on appeal pursuant to § 12-341, subject to their compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶30 Because the trial court ultimately reached the correct legal conclusion that the Madrids were entitled to summary judgment, we affirm the court's ruling.