IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

GERALD BOHMFALK AND CYNTHIA BOHMFALK, HUSBAND AND WIFE; AND GERALD T. BOHMFALK AND CYNTHIA A. BOHMFALK, AS TRUSTEES OF THE GERALD T. AND CYNTHIA A. BOHMFALK FAMILY TRUST UNDER AGREEMENT DATED JUNE 15, 1999,
Plaintiffs/Appellants,

v.

COCHISE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF ARIZONA; KEVIN D. SMITH AND KRISTINE L. GOMEZ, HUSBAND AND WIFE; AND SHIRLEY GREGORY, A WIDOW,
Defendants/Appellees.

No. 2 CA-CV 2015-0137
Filed June 20, 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NOT FOR PUBLICATION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. C20130530
The Honorable Charles V. Harrington, Judge

AFFIRMED

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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Gerald and Cynthia Bohmfalk appeal from the trial court's grants of summary judgment in favor of Cochise County ("County") and Kevin Smith, Kristine Gomez, and Shirley Gregory (collectively, "the Neighbors") on the Bohmfalks' claim that their real property was damaged due to flooding caused by the County's maintenance activities on a road accessing the Neighbors' property. They argue the court erred in granting summary judgment to the County after determining the statute of limitations had run and to the Neighbors after determining they had publically dedicated the road to the County and thus had no control over it. The Bohmfalks

additionally argue the court abused its discretion by denying their motion to amend their complaint and their motion to supplement their statement of facts. Because we find no error, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to the party against whom summary judgment was entered." *Thompson v. Pima County*, 226 Ariz. 42, ¶ 2, 243 P.3d 1024, 1026 (App. 2010). The Bohmfalks' real property consists of forty acres in Cochise County. Gomez and Smith (collectively "Smith-Gomez") own a parcel of real property located east of and adjacent to the Bohmfalks' property. Gregory owns the parcel of real property east of and adjacent to the Smith-Gomez property. The Neighbors access their respective properties via Gregory Road, which runs north from East Geronimo Trail, turns west and terminates at the Smith-Gomez's driveway. It does not provide access to the Bohmfalks' property.

¶3 Gregory Road has been on the list of County-maintained roads since at least 1975, except between 1992 and 1994.[1] In 2003, the County designated it a "primitive road," meaning it was not "constructed in accordance with county standards" and is minimally maintained. A.R.S. § 28-6706.

¶4 Between 2002 and 2003, the Bohmfalks noticed flooding damage around their house. In 2004, they contacted the County because they believed the cause of the flooding was its maintenance activities on Gregory Road. Over the next several years, the County

[1]The County dropped Gregory Road from its maintenance list in 1992 because "there [was] no evidence" establishing Gregory Road as a public road. In 1994, however, it was added back to the list of county-maintained roads after the County discovered Gregory Road did, in fact, have a right-of-way establishing it as a public road. During these two years, Gregory and the Smith-Gomez's predecessors-in-interest "worked hard to provide the necessary data" to enable the County to add it back onto the list of County-maintained roads.

worked with the Bohmfalks to alleviate the problem through various means, including installing berms, ditches and cut-outs.

¶5 In 2012, the Bohmfalks sued the County for gross negligence stemming from its "construction work on Gregory Road." In 2014, the Bohmfalks amended their complaint, added the Neighbors, and alleged claims of trespass, diversion of a watercourse, and nuisance against them. The Bohmfalks contended discovery had revealed the east-west portion of Gregory Road "was owned by [the Neighbors] and not the County."

¶6 The County moved for summary judgment, arguing the statute of limitations had passed, thus barring the claim and, in the alternative, the Bohmfalks had not established the elements of gross negligence. The Neighbors also moved for summary judgment on the grounds that Gregory Road was, in fact, a County road and they had no control over any of the County's activities related to it.

¶7 The trial court granted summary judgment in favor of the County and the Neighbors. It concluded the Bohmfalks' claim against the County had accrued, at the latest, in 2008 and therefore was time-barred. The court also ruled the Neighbors had publically dedicated Gregory Road and had no control over the County's activities on it. It further denied the Bohmfalks' motion to amend their complaint to allege trespass, nuisance, and diversion of a watercourse against the County, finding the motion was unduly delayed. We have jurisdiction over the Bohmfalks' appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

The Neighbors' Motion for Summary Judgment

¶8 The Bohmfalks first argue the trial court erred by granting summary judgment to the Neighbors because a genuine dispute of material fact existed as to whether Gregory Road was a public or private road.[2] On appeal from summary judgment, we

[2]The Neighbors claim the Bohmfalks waived any claim that the trial court erred in granting summary judgment by failing to challenge the trial court's conclusions that they had not shown the elements of the claims. However, because the court's ruling could

determine de novo whether the court correctly applied the law and whether there are any genuine disputes as to any material fact. *Dayka & Hackett, L.L.C. v. Del Monte Fresh Produce N.A., Inc.*, 228 Ariz. 533, ¶ 6, 269 P.3d 709, 711–12 (App. 2012).

¶9 Summary judgment is appropriate 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). "Where no evidence exists to support an essential element of a claim, summary judgment is appropriate." *Rice v. Brakel*, 233 Ariz. 140, ¶ 6, 310 P.3d 16, 19 (App. 2013). We will uphold the court if it reached the correct legal result for any reason. *Logerquist v. Danforth,* 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996).

¶10 The Bohmfalks sued the Neighbors for trespass, nuisance, and diversion of a watercourse pursuant to A.R.S. § 48-3615. They alleged the Neighbors "permitted [the County] to construct and maintain" Gregory Road in a manner "which changed the directional flow of water runoff, diverting it onto" the Bohmfalks' property, causing substantial damage and creating a hazard. In their response to the Neighbors' motion for summary judgment, the Bohmfalks asserted that the Neighbors had a duty to control the "method, manner and means of maintaining the east-west portion of Gregory Road."

¶11 Trespass, nuisance, and diversion of a watercourse all require at least that the Neighbors commit an intentional or affirmative act against the Bohmfalks. With regards to trespass in particular, "'[w]ithout an intentional act, the defendant's conduct cannot give rise to'" a claim. *Mountain States Tel. & Tel. Co. v. Kelton*, 79 Ariz. 126, 132, 285 P.2d 168, 172 (1955), *quoting Socony-Vacuum Oil Co. v. Bailey,* 109 N.Y.S.2d 799, 802 (1952). The Bohmfalks thus needed to show the Neighbors intentionally caused the County to maintain Gregory Road in a way that caused water to flood the Bohmfalks' property. *See SWC Baseline & Crismon Investors, L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, ¶ 95, 265 P.3d 1070, 1091

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be read as relying on, in part, Gregory road being a public road to reach its conclusion, we will address the merits of the argument.

(App. 2011) (defendant liable for trespass if he "intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so"), *quoting* Restatement (Second) of Torts, § 158 (1965). The Neighbors need not have intended to commit trespass, but they must have had "'an intent to do the very act which results in the immediate damage.'" *Mountain States*, 79 Ariz. at 132, 285 P.2d at 172, *quoting Socony-Vacuum*, 109 N.Y.S.2d at 802; *see also Taft v. Ball, Ball & Brosamer, Inc.*, 169 Ariz. 173, 176, 818 P.2d 158, 161 (App. 1991).

¶12 Similarly, the nuisance claim required the Bohmfalks to show the Neighbors intentionally, substantially and "unreasonably interfered with [the Bohmfalks'] use and enjoyment of their property, causing significant harm." *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, ¶ 32, 167 P.3d 1277, 1284 (App. 2007); *see also* Restatement § 821D. As to the third claim, the Bohmfalks had to show the Neighbors "divert[ed], retard[ed] or obstruct[ed] the flow of waters in a watercourse . . . creat[ing] a hazard to life or property without securing the written authorization required by [A.R.S.] § 48-3613."[3] § 48-3615.

¶13 However, the record shows that the Neighbors did not perform any intentional or affirmative act with regard to the maintenance of Gregory Road. Gregory bought her property in 1957 and, at that time, "was assured . . . that [Gregory Road] was legally established and maintained." County records further showed that Gregory Road had, with the exception of 1992 to 1994, been on the list of County-maintained roads since at least 1975. The County conducted various types of maintenance work on Gregory Road several times per year, including "routine blading," "sign replacement/removal," "storm repair," and "sign installation," and paid for those activities. Gregory filed four requests with the County between 1997 and 2001 requesting it grade the road or repair potholes, and the County responded by conducting those repairs. But those requests did not direct the County in how to make the repairs.

[3]We assume for purposes of this decision, without deciding, that § 48-3613 supports a private cause of action.

¶14 Smith testified that "anybody" could use Gregory Road because it was not a private road. He further testified he did not pay any assessment taxes for maintenance conducted on Gregory Road, had never paid the County for work done on Gregory Road, and had never refused or granted the County permission to work on Gregory Road.

¶15 The Bohmfalks directed all of their pre-litigation complaints about the maintenance activities to the County. In turn, the relevant County agencies worked with the Bohmfalks to address the problem. The County's only contact with the Neighbors was to seek a right-of-entry agreement with Gregory to construct ditch drainages on her property in an attempt to redirect the water flow. It did not consult, nor have the Bohmfalks alleged it consulted, with the Neighbors during any of the decision-making process related to these efforts or any other maintenance of Gregory Road.

¶16 The record clearly shows—whether it was a mistaken belief or not—the Neighbors and the County *believed* Gregory Road was a public road which the County was charged with maintaining and thus acted accordingly. The Neighbors' only action regarding maintenance of Gregory Road was to file requests for maintenance with the County—conduct entirely consistent with their belief the County, and not they, owned the road.

¶17 The Bohmfalks therefore have not established a triable issue of fact concerning whether the Neighbors intentionally allowed or directed the County to maintain the road in a way which would cause it to flood the Bohmfalks' property—a required element of both trespass and nuisance. *See Mountain States*, 79 Ariz. at 132, 285 P.2d at 171-72; *see also Nolan*, 216 Ariz. 482, ¶ 32, 167 P.3d at 1284. They similarly have not shown the Neighbors undertook any action which diverted a watercourse. § 48-3615(A). Moreover, the Bohmfalks' own expert testified "there is nothing that is defined as a water course under Arizona law that's been diverted or has any application to this case." Because the Bohmfalks could not establish essential elements of these three claims, summary judgment was appropriate. *See Rice*, 233 Ariz. 140, ¶ 6, 310 P.3d at 19.

¶18 The Bohmfalks additionally contend in their reply brief that the Neighbors had a "duty to take measures to avoid harming [the] Bohmfalks while allowing [the] County to maintain Gregory Road." They appear to reason the Neighbors intentionally breached this duty by failing to stop the County's activities despite being aware of the harm it was causing to the Bohmfalks' property.

¶19 The only relevant duty in an intentional tort, such as trespass and nuisance, is "'obviously to refrain from intentional harm to others.'" *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, ¶ 21, 38 P.3d 12, 22 (2002), *quoting Purvis v. Hamwi*, 828 F. Supp. 1479, 1483-84 (D. Colo. 1993). Based on the record in this case, the Neighbors' failure to intervene in the County's actions, when they did not believe they had any right or obligation to do so, cannot reasonably be construed as an intentional harm to the Bohmfalks.

¶20 The Bohmfalks also argue that summary judgment was inappropriate because whether the relevant portion of Gregory Road is a public or private road is a material fact in dispute. They thus appear to contend that these three claims can only properly be brought against the property owners of Gregory Road.

¶21 Liability for trespass and nuisance does not turn on ownership of the land upon which the allegedly tortious activities occur or originate. *See Nolan*, 216 Ariz. 482, ¶ 32, 167 P.3d at 1284; *see also Taft*, 169 Ariz. at 176, 818 P.2d at 161; Restatement § 158. Those claims instead focus on the intentional trespass onto another's land, or intentional interference with that person's reasonable use and enjoyment of their land. *See Mountain States*, 79 Ariz. at 132, 285 P.2d at 171-72; *see also Nolan*, 216 Ariz. 482, ¶ 32, 167 P.3d at 1284. And § 48-3615, by its terms, applies only to the person diverting the watercourse. The Bohmfalks have not presented any evidence showing the Neighbors intentionally directed or controlled the County's activities on Gregory Road; rather, the record clearly shows it was the County controlling and directing those activities. Consequently, whether Gregory Road is technically a public or private road, under the facts of this case, is immaterial.

Motion to Amend the Complaint

¶22 The Bohmfalks next argue the trial court abused its discretion by denying their January 2015 request to amend their complaint to assert claims of trespass, nuisance, and diversion of a watercourse against the County. A court's ruling on a motion to amend a complaint is reviewed for an abuse of discretion. *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R. Co.*, 231 Ariz. 517, ¶ 4, 297 P.3d 923, 925 (App. 2013).

¶23 Amendments are liberally allowed and should be granted "'unless the court finds undue delay in the request, bad faith, undue prejudice, or futility in the amendment.'" *Id.*, *quoting MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996); *see also* Ariz. R. Civ. P. 15(a). "Denial is deemed a proper exercise of the court's discretion when the amendment comes late and raises new issues requiring preparation for factual discovery which would not otherwise have been necessitated nor expected, thus requiring delay in the decision of the case." *Owen v. Superior Court*, 133 Ariz. 75, 81, 649 P.2d 278, 284 (1982).

¶24 The Bohmfalks' December 2013 motion to amend their complaint to add the Neighbors and allege trespass, nuisance and diversion of a watercourse against them indicated they had initially sued only the County because they believed Gregory Road was a public road. The County opposed that motion, asserting, in part, that Gregory Road "is, and has always been, a County road." The trial court granted the Bohmfalks' motion and they filed an amended complaint.

¶25 In November 2014, the Neighbors and the County moved for summary judgment. At that point, all of the discovery and disclosure deadlines had passed. In January 2015, the Bohmfalks filed another motion to amend their complaint to add claims of trespass, nuisance, and diversion of a watercourse against the County. They argued the Neighbors' assertion, "for the first time," in their motion for summary judgment that Gregory Road was a public, and not a private, road justified the amendment, as did newly discovered evidence that the east-west portion of the road lay on the Neighbors' private property. The trial court denied the

motion, finding the Bohmfalks had not shown "why they could not have alleged trespass, diversion of a watercourse, or nuisance when they filed the complaint or when they filed the First Amended Complaint, or immediately after receiving" the County's opposition to their first motion to amend.

¶26 As already discussed, trespass, nuisance, and diversion of a watercourse do not require that the defendant be the property owner of the land upon which the tortious conduct occurred or originated. Thus, any revelations in the true ownership of Gregory Road would not impact the Bohmfalks' ability to allege those claims against the County.

¶27 Moreover, the Bohmfalks' motion to amend in December 2013 makes clear they believed the County owned the road when they initially filed their complaint in 2012. They have not explained why they did not also allege trespass, nuisance and diversion of a watercourse at that time. And the County's opposition to that motion to amend clearly stated its position was that Gregory Road was a public road, undermining the Bohmfalks' contention they were unaware of any dispute over ownership of Gregory Road until the Neighbors' motion for summary judgment was filed. The Bohmfalks' apparent contention that they could only assert these causes of action against the actual owners of Gregory Road and were entirely unaware a dispute existed as to the true owners of Gregory Road until nearly two years after the case began is unpersuasive.

¶28 Additionally, as the trial court noted, the new causes of action have different elements and would have required the County to request an extension of the discovery and disclosure deadlines to discover new facts and evidence. *See* § 48-3615; *see also Nolan*, 216 Ariz. 482, ¶ 32, 167 P.3d at 1284; *Taft*, 169 Ariz. at 176, 818 P.2d at 161. Thus, the County would have been prejudiced. *See Carranza v. Madrigal*, 237 Ariz. 512, ¶ 13, 354 P.3d 389, 392 (2015) (motion to amend seeking to raise new issues prejudices opposing party); *see also Owen*, 133 Ariz. at 81, 649 P.2d at 284. The court did not abuse its discretion by denying their motion. *See Tumacacori Mission Land Dev.*, 231 Ariz. 517, ¶ 4, 297 P.3d at 925.

Motion to Supplement the Statement of Facts

¶29 The Bohmfalks additionally argue the trial court abused its discretion by striking their supplemental statement of facts. We review a court's ruling under Rule 7.1, Ariz. R. Civ. P., for a clear abuse of discretion. *See Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 17, 83 P.3d 56, 60 (App. 2004). An "'[a]buse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Tilley v. Delci*, 220 Ariz. 233, ¶ 16, 204 P.3d 1082, 1087 (App. 2009), *quoting Torres v. N. Am. Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1982).

¶30 At the hearing on the County's motion for summary judgment, the Bohmfalks filed a supplemental statement of facts to include, inter alia, a letter from a County supervisor which had been disclosed by the County "years earlier." The County moved to strike it as untimely. The trial court ruled it would not permit any filings outside of those explicitly listed in Rule 7.1(a) and granted the County's motion to strike the supplemental statement of facts.

¶31 Rule 7.1(a) permits the filing of a motion accompanied by a memorandum, an answering memorandum, and reply memorandum. Outside of their conclusory claim that the trial court's ruling was "an arbitrary enforcement of a hyper-technicality," the Bohmfalks have provided no legal authority or argument as to why the court's decision to follow Rule 7.1 in these circumstances was manifestly unreasonable. *See Tilley*, 220 Ariz. 233, ¶ 16, 204 P.3d at 1087. Their claim that the letter was "inadvertently omitted" from their statement of facts fails to provide good cause for the late filing. The court did not abuse its discretion in striking a supplemental statement of facts filed at the start of oral argument on the motion for summary judgment. *See Schwab*, 207 Ariz. 56, ¶ 17, 83 P.3d at 60.

The County's Motion for Summary Judgment

¶32 The Bohmfalks lastly argue the trial court erred by granting summary judgment in favor of the County, finding their claim was time-barred. As stated above, we review de novo whether summary judgment was appropriate, *Dayka & Hackett,*

228 Ariz. 533, ¶ 6, 269 P.3d at 711–12, and will affirm the court if it is "correct for any reason," *Logerquist,* 188 Ariz. at 18, 932 P.2d at 283.

¶33 Section 12-821, A.R.S., provides that an action against a public entity must be brought within "one year after the cause of action accrues." And a cause of action under § 12-821 "accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01(B); *see also Rogers v. Bd. of Regents of Univ. of Ariz.*, 233 Ariz. 262, ¶ 7, 311 P.3d 1075, 1078 (App. 2013). The plaintiff "must at least possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury," but "need not know all the facts underlying the cause of action to trigger accrual." *Doe v. Roe*, 191 Ariz. 313, ¶ 32, 955 P.2d 951, 961 (1998) (emphasis omitted). When a cause of action accrued is generally a question of fact for the jury, but may be decided as a matter of law if the record shows when the plaintiff was "unquestionably . . . aware of the necessary facts underlying their cause of action." *Thompson*, 226 Ariz. 42, ¶ 14, 243 P.3d at 1029.

¶34 The Bohmfalks filed their complaint in June 2012. The trial court determined their cause of action accrued by 2008 at the latest and their claim therefore was time-barred. It also rejected the Bohmfalks' claims that the continuing tort rule applied, that the County had waived the limitations defense, and that the County was estopped from raising the defense.

¶35 Turning first to the issue of accrual, the pertinent question here is when did the Bohmfalks know or when should they reasonably have known the "cause, source, act, event, instrumentality or condition that caused or contributed to" the flooding which damaged their property. § 12-821.01(B). Because the Bohmfalks filed their complaint on June 26, 2012, their claim would be time-barred if it accrued any earlier than June 27, 2011. § 12-821.

¶36 The Bohmfalks submitted a timeline of events at Gerald's deposition which shows they first discovered the flooding was damaging their property in 2002 to 2003. The timeline states they discovered the cause of the flooding in 2004: the extension of

Gregory Road to the Smith-Gomez property and maintenance activities on the road. In a letter to the Cochise County Highways and Floodplain Department ("CCHFD") dated January 4, 2008, Gerald states the County's maintenance of Gregory Road had "built a very effective channel" which funneled water onto his property. He goes on to state

> the Cochise County Highway Department[']s maintenance activities ha[ve] damaged my property and continue[] to do so . . . . The problem started with Cochise County Road Department Activity and you are the only ones who can do anything about it! . . . I know the nature of the problem, when it began and who started it.

The record thus shows the Bohmfalks "unquestionably were aware" of the necessary facts underlying their cause of action by, at the latest, January 4, 2008. *Thompson*, 226 Ariz. 42, ¶ 14, 243 P.3d at 1029. Because this is more than a year before their claim was filed, the Bohmfalks claim is time-barred. *Id.* ¶ 10; *see also* § 12-821.

¶37 The Bohmfalks argue, however, their claim is not time-barred under the continuing tort doctrine. "[U]nder certain conditions a tort is continuous, and in such cases the limitations period does not commence until the date of the last tortious act." *L.F. v. Donahue*, 186 Ariz. 409, 413, 923 P.2d 875, 879 (App. 1996). If, however, "each claimed act is a separate [tort] causing separate as well as cumulative injury," the continuing tort rule does not apply. *Id.* Under those circumstances, the party cannot assert claims for torts occurring outside the limitation period. *Id.* at 414, 923 P.2d at 880.

¶38 The Bohmfalks allege the County "commits a new tort when it maintains the road without conducting any evaluation of how that maintenance may affect water runoff onto" the Bohmfalks' property. They further state that the County's gross negligence is continuing in nature because "additional damage is inflicted" on the

Bohmfalks' property each time maintenance on Gregory Road occurs.

¶39 Thus, by their own admission, the Bohmfalks have contended that each instance of maintenance by the County is its own distinct tort, inflicting separate damage. Even if each claimed act results in "cumulative injury," the continuing tort doctrine will not apply where each act constitutes a separate cause of action. *Id*. at 413, 923 P.2d at 879. The record shows the Bohmfalks were aware of the facts underlying their claim by 2008 and § 12-821 "do[es] not allow one in [the Bohmfalks'] situation to wait to bring suit until more than a year after acts sufficient to state a claim occur." *Watkins v. Arpaio*, 239 Ariz. 168, ¶ 18, 367 P.3d 72, 77 (App. 2016). The Bohmfalks therefore cannot assert claims for any maintenance activities prior to June 27, 2011. *Id.*; *see also L.F.*, 186 Ariz. at 413, 923 P.2d at 879.

¶40 The Bohmfalks further argue the County waived the right to raise the limitations defense by failing to make such an assertion at the outset of the case and moving to dismiss the case.[4] The statute of limitations is an affirmative defense that may be waived if not timely raised. Ariz. R. Civ. P. 8(c); *see also Uyleman v. D.S. Rentco*, 194 Ariz. 300, ¶ 10, 981 P.2d 1081, 1083 (App. 1999). It is timely raised so long as it is asserted prior to judgment. *Harris Trust Bank of Ariz. v. Superior Court*, 188 Ariz. 159, 165, 933 P.2d 1227, 1233 (App. 1996). The County asserted the statute of limitations as a defense in its answer to the Bohmfalks' complaint and in its motion for summary judgment. And, as the County argues, it needed to engage in discovery to determine the Bohmfalks' position about when the claim accrued and any defenses they might have to application of the statute. Accordingly, the limitations defense is not waived. *See id.*

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[4]The Bohmfalks have also argued the County waived its right to rely on the notice of claim defense by engaging in substantial litigation prior to asserting the defense. We need not address this issue, however, because our conclusion that their claim accrued in 2008 would bar their claim under either the one-year limitation imposed by § 12-281 or § 12-281.01's 180-day limitation.

¶41 The Bohmfalks additionally argue the trial court erroneously relied upon "inducement by threat" case law, rather than "inducement by promise" when ruling that the County was not equitably estopped from asserting the statute of limitations defense. They thus contend the court applied the incorrect legal standard.

¶42 Below, however, the Bohmfalks' only legal authority for their equitable estoppel argument was *Allstate Life Ins. Co. v. Robert W. Baird & Co.*, 756 F. Supp. 2d 1113 (D. Ariz. 2010). That case generally states "because a notice of claim and the statute of limitations are procedural requirements, they are both 'subject to waiver, estoppel, and equitable tolling.'" *Id.* at 1154, *quoting Pritchard v. State*, 163 Ariz. 427, 432, 788 P.2d 1178, 1183 (1990). The Bohmfalks did not cite or develop any argument as to equitable estoppel based on Arizona law or the distinction they now make between inducement-by-threat and inducement-by-promise. Consequently, the trial court was never given the opportunity to rule on the issue and the Bohmfalks have therefore waived it for review. *See Hahn v. Pima County*, 200 Ariz. 167, ¶ 13, 24 P.3d 614, 619 (App. 2001).

¶43 Moreover, the record shows that the Bohmfalks cannot establish the required elements to successfully assert equitable estoppel against the County. A plaintiff asserting that a defendant is equitably estopped from raising the limitations defense must show (1) specific promises by the defendant that prevented the plaintiff from filing suit; (2) those promises actually induced the plaintiff to forbear filing suit; (3) the defendant's conduct would have induced a reasonable plaintiff to forebear filing the suit; and (4) the plaintiff filed the suit within a reasonable amount of time after termination of the conduct warranting estoppel. *Nolde v. Frankie*, 192 Ariz. 276, ¶ 20, 964 P.2d 477, 482 (1998). When asserting equitable estoppel against a public entity, the "state's action [must] bear some considerable degree of formalism under the circumstances" to demonstrate "absolute, unequivocal, and formal state action." *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, ¶ 36, 959 P.2d 1256, 1268 (1998).

¶44 The Bohmfalks' evidence that they were induced by the County into delaying filing suit consists of a series of

correspondence between Gerald and various County officials between 2007 and 2010 regarding his complaints about the flooding. The correspondence also describes various efforts undertaken by the County to alleviate the flooding on the Bohmfalks' property. The correspondence does not, however, contain any statements by the County that it would cease its maintenance activities or pay the Bohmfalks for their alleged damages. And the County clearly stated its opinion that the flooding on the Bohmfalks' property was not caused by its activities on Gregory Road. The County explained that any efforts it undertook to alleviate the flooding were done out of "neighborly concern" in the interest of "being good neighbors."

¶45 The "assurances" the Bohmfalks contend they relied upon thus were "non-committal acts which could not have induced any reasonable person to believe that it was going to pay damages or remedy the" problem. *Roer v. Buckeye Irrigation Co.*, 167 Ariz. 545, 548, 809 P.2d 970, 973 (App. 1990). Nor do they "bear some considerable degree of formalism" establishing "an absolute, unequivocal, and formal [County] action." *Valencia Energy Co.*, 191 Ariz. 565, ¶ 36, 959 P.2d at 1268. Consequently, the County is not equitably estopped from asserting the statute of limitations defense. *Id.*; *see also Nolde*, 192 Ariz. 276, ¶ 20, 964 P.2d at 482.

¶46 The Bohmfalks correctly point out, however, that the County's maintenance on February 16, 2012 falls within the limitation period. That claim, therefore, would be timely. To survive a motion for summary judgment, a plaintiff must produce admissible evidence from which a reasonable jury could find in his favor on each element. *See Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶¶ 20-22, 180 P.3d 977, 981-82 (App. 2008).

¶47 In its answering brief, the County argued that, although the February 2012 maintenance of Gregory Road occurred during the limitation period, "the Bohmfalks did not disclose any computation of damages specific to this incident and therefore cannot prove a claim based on it as a matter of law." *See Tostado v. City of Lake Havasu*, 220 Ariz. 195, ¶ 26, 204 P.3d 1044, 1050 (App. 2008) (actual damages element of gross negligence). The Bohmfalks did not respond to this argument in their reply brief, and instead continued to insist the continuing tort rule applies "because a new

tort is committed each time rain causes [the] Bohmfalks[′] property to flood." We thus accept the County's argument and find the Bohmfalks have failed to show the trial court erred in granting summary judgment on any claim concerning the last grading. *See State v. Morgan*, 204 Ariz. 166, ¶ 9, 61 P.3d 460, 463 (App. 2002) (recognizing failure to file reply brief on issue presented in answering brief as sufficient basis for rejecting appellant's position); *see also Ariz. Dep't of Pub. Safety v. Indus. Comm'n*, 170 Ariz. 275, 277, 823 P.2d 1283, 1285 (App. 1991) ("A failure to reply to arguments raised in an answering brief may justify a summary disposition of an appeal.").

¶48 Moreover, the Bohmfalks have not, with respect to this single act of maintenance, shown the other elements of gross negligence. Generally, whether gross negligence occurred is a question of fact for a jury to determine. *Armenta v. City of Casa Grande*, 205 Ariz. 367, ¶ 21, 71 P.3d 359, 373 (App. 2003). Summary judgment on the issue is appropriate, however, "if the plaintiff fails to produce evidence that is 'more than slight and [that does] not border on conjecture' such that a reasonable trier of fact could find gross negligence." *Id.*, *quoting Walls v. Ariz. Dep't of Public Safety*, 170 Ariz. 591, 595, 826 P.2d 1217, 1221 (App. 1991).

¶49 Gross negligence is

> action or inaction with reckless indifference to the result or the rights or safety of others. A person is recklessly indifferent if he or she knows, or a reasonable person in his or her position ought to know: (1) that his action or inaction creates an unreasonable risk of harm; and (2) the risk is so great that it is highly probable that harm will result.

Id. ¶ 20, *quoting Williams v. Thude*, 180 Ariz. 531, 539, 885 P.2d 1096, 1104 (App. 1994). The misconduct must be "'highly potent'" and, when presented, will "'fairly proclaim[] itself in no uncertain terms. . . . It is flagrant and evinces a lawless and destructive spirit.'" *Walls*, 170 Ariz. at 595, 826 P.2d at 1221, *quoting Scott v. Scott*, 75 Ariz. 116, 122, 252 P.2d 571, 575 (1953).

¶50 The Bohmfalks' complaint alleges, as limited to the February 2012 maintenance, the County was grossly negligent by engaging in that work without "conducting appropriate investigation(s) or making appropriate repair(s)" once the Bohmfalks notified it of the flooding problem they believed was caused by those activities. The record shows that, on February 16, 2012, the County engaged in "routine blading."

¶51 This act of routine maintenance, on a road the County was charged with maintaining and which had been similarly graded and maintained for years, simply does not "fairly proclaim[]" itself as gross negligence. *Scott*, 75 Ariz. at 122, 252 P.2d at 575. Furthermore, the record demonstrates County officials visited the area multiple times and met with the Bohmfalks to ascertain the cause of the flooding and come up with various solutions. The County attempted to rectify the problem through various measures, including installing berms and ditches, closing existing turnouts, and working with the Neighbors to obtain a right-of-entry easement to "open up the drainage ditches for better flow." These attempts to address the Bohmfalks' concerns are not evidence of a "lawless and destructive spirit." *Id.*; *see also Walls*, 170 Ariz. at 596, 826 P.2d at 1222. Because no reasonable trier of fact could find the County's "routine blading" of Gregory Road on February 16, 2012 was grossly negligent, summary judgment was appropriate. *See Logerquist,* 188 Ariz. at 18, 932 P.2d at 283.

Disposition

¶52 For the foregoing reasons, we affirm the trial court's judgment.