IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

BIRCH ROAD, LLC, AN ARIZONA LIMITED LIABILITY COMPANY,
Plaintiff/Appellant,

v.

RANCHO SACATAL, INC., AN ARIZONA CORPORATION; CIMARRON RANCH LAND, LLC, AN ARIZONA LIMITED LIABILITY COMPANY; MARVIN HUDSON AKA JAMES MARVIN HUDSON AND MAUREEN HUDSON, HUSBAND AND WIFE; AND JAMES MARVIN HUDSON,
Defendants/Appellees.

No. 2 CA-CV 2021-0089
Filed May 25, 2022

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NOT FOR PUBLICATION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 Cochise County
No. CV201800127
The Honorable David Thorn, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Eppich concurred and Judge Brearcliffe specially concurred.

S T A R I N G, Vice Chief Judge:

¶1 Birch Road LLC appeals from the trial court's grant of summary judgment in favor of defendants in this action for transferrable access to its land. For the following reasons, we affirm in part, vacate in part, and remand for further proceedings consistent with this decision.

Factual and Procedural Background

¶2 Birch Road owns a plot of land in Cochise County known as the Becker Tract. The Becker Tract is landlocked, with access limited to two privately owned roads that cross land owned by defendants and connect to a county road. In 2004, defendants Cimarron Ranch Land LLC and Rancho Sacatal Inc. executed a "private Agricultural Roadway Easement," granting Birch Road access to the two roads for ingress and egress to its property from the county road. The easement, however, provided it would become null and void in the event ownership of the Becker Tract was transferred.

¶3 By November 2017, Birch Road had been attempting to sell the Becker Tract but claimed it was unable to do so without a permanent easement for ingress and egress. Accordingly, it sent Rancho Sacatal an "Acknowledgment and Recognition of Easement," requesting that defendants convey an "Access Easement" that would "run with the land." Defendants did not sign the acknowledgment, and, in March 2018, Birch Road initiated this action to quiet title and for private condemnation, implied way of necessity, and declaratory relief, each seeking to establish ingress and egress benefitting the Becker Tract that would run with the land.

¶4 Nearly a year later, defendants moved for summary judgment on all claims. The trial court granted the motion and subsequently entered judgment in favor of defendants and awarded them

attorney fees and costs. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).[1]

Summary Judgment

¶5 Birch Road first argues the trial court erred in granting summary judgment in favor of defendants on its private condemnation claim. We review this grant of summary judgment de novo and construe all facts and reasonable inferences in favor of Birch Road. *See BMO Harris Bank, N.A. v. Wildwood Creek Ranch, LLC*, 236 Ariz. 363, ¶ 7 (2015); *Engler v. Gulf Interstate Eng'g, Inc.*, 230 Ariz. 55, ¶ 8 (2012).

¶6 Summary judgment is appropriate where "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). When a party has made this prima facie showing, the non-moving party must present evidence raising a triable issue of fact. *McCleary v. Tripodi*, 243 Ariz. 197, ¶ 21 (App. 2017). Such evidence may not derive from the pleadings and must show "specific facts" demonstrating "a genuine issue for trial." *Id.* (quoting *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 15 (App. 2000)).

¶7 In ruling on summary judgment, the trial court should not weigh witness credibility or quality of evidence or "choose among competing or conflicting inferences." *Orme Sch. v. Reeves*, 166 Ariz. 301, 311 (1990). This court must determine if there were any material factual disputes, or disputes as to inferences drawn from material facts, and if not, whether the court applied the law correctly. *See Cliff Findlay Auto., LLC v. Olson*, 228 Ariz. 115, ¶ 8 (App. 2011); *Santiago v. Phx. Newspapers, Inc.*, 164 Ariz. 505, 508 (1990). And, we are mindful of our supreme court's admonition that "summary judgment should not be used as a substitute for jury trials simply because the trial judge may believe the moving party will probably win the jury's verdict, nor even when the trial judge believes the moving party should win the jury's verdict." *Orme Sch.*, 166 Ariz. at 310 (emphasis omitted).

¶8 "[A] party owning or having a beneficial use in land that is 'land-locked' may bring an action to condemn a private way of necessity across the land of another." *Solana Land Co. v. Murphey*, 69 Ariz. 117, 123

[1]We dismissed a previous appeal in this matter due to the lack of a final, appealable order at that time.

(1949); *see also* A.R.S. § 12-1202(A). A party seeking condemnation must demonstrate a reasonable necessity. *Dabrowski v. Bartlett*, 246 Ariz. 504, ¶ 41 (App. 2019). "After a court determines that a reasonable necessity exists, 'the condemnor makes the initial selection and in the absence of bad faith, oppression or abuse of power its selection of route will be upheld by the courts.'" *Id.* ¶ 50 (quoting *Solana*, 69 Ariz. at 125).

¶9 In its ruling on summary judgment, the trial court, pointing to the existing agricultural easement, stated, "The problem with the Plaintiff's case is . . . the last two lines of . . . § 12-1202 . . . . '[A landowner] . . . may condemn and take lands of another sufficient in area **for the construction and maintenance of the private way of necessity**.'" It continued, "In this case, a road already exists and the Plaintiff has, essentially, a license to use that road." And, the court stated *Siemsen v. Davis*, 196 Ariz. 411 (App. 2000), is "the mirror image of" this case because, as in *Siemsen*, "the Defendant ranchers want to prevent the Plaintiff's land from being developed and interfering with cattle ranching that has occurred in northern Cochise County since the time before Arizona became a state."[2] The court further concluded Birch Road already had "adequate and reasonable access to the land at issue."

¶10 On appeal, Birch Road broadly claims the Becker Tract's lack of "transferrable access to a public highway" entitles it to a private condemnation. Relying on out-of-state case law, it contends that the existing agricultural easement did not preclude its right to a private condemnation and that condemnation is a reasonable necessity. Birch Road also argues that it chose the route of condemnation in good faith based on its prior use, the existing easement, and proximity to a public road. Finally, it asserts no reasonable alternate route exists. Defendants primarily respond that because of the existing agricultural easement, Birch Road has not demonstrated any reasonable necessity for condemnation, notwithstanding that the easement is not transferrable. They also claim that because a "significantly less intrusive route" exists, Birch Road did not select its route for potential condemnation in good faith.[3]

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[2]"When a way of necessity is condemned, its use is not limited to the condemnor; instead the condemned roadway 'becomes an open public way which may be traveled by any person who desires to use it.'" *Siemsen*, 196 Ariz. 411, ¶ 20 (quoting *Solana*, 69 Ariz. at 124).

[3]"A battle such as this involves a clash of [constitutional] values." *Siemsen*, 196 Ariz. 411, ¶ 18. The Arizona Constitution recognizes a

¶11 To the extent Birch Road fully develops any argument, it contends its necessity for condemnation of a path through defendants' property arises from its inability to "sell the Becker Tract for anything close to fair market value" without such transferrable access.[4] In other words, Birch Road purports to assert a right to condemnation in order to provide access to its land, to which it already enjoys access for agricultural purposes, for the purpose of enhancing the land's resale value. But, § 12-1202(A), the statute upon which Birch Road relies, provides for condemnation of a "private way of necessity" that is "necessary for [the] proper use and enjoyment" of one's land. Thus, in order for Birch Road to prevail on appeal, we must conclude that the ability to sell property for a more desirable price falls within the "proper use and enjoyment" contemplated in § 12-1202(A).

¶12 When interpreting a statute, if the "language is clear and unambiguous, we apply it without resorting to other methods of statutory interpretation." *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268 (1994). Here, examining the plain language of § 12-1202(A), we conclude that the ability to sell one's land for a more desirable price is not encompassed by the terms "use" and "enjoyment." *Enjoyment*, Merriam-Webster, https://www.merriam-webster.com/dictionary/enjoyment (last visited Mar. 25, 2022) ("possession and use"). Moreover, Birch Road has not offered, and we are not aware of any, authority supporting its expansive definition of "use and enjoyment." Applying the plain language of § 12-1202(A), Birch Road has not demonstrated any reasonable necessity for condemnation, and, in the absence of any material factual dispute, defendants are entitled to judgment as a matter of law. We affirm the trial court's grant of summary judgment.

Trial Court Attorney Fees

¶13 Birch Road also challenges the trial court's award of attorney fees, claiming it erroneously relied on A.R.S. § 12-341.01(A), which applies in contract-based cases, and defendants "are not entitled to interest on the

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landowner's "right to preserve and protect their private property," but nonetheless provides for condemnation in order to promote effective use of the state's resources. *Id.*; *see* Ariz. Const. art. II, § 17.

[4]A party's opening brief must include its arguments. *See* Ariz. R. Civ. App. P. 13(a)(7). "It is not incumbent upon the court to develop an argument for a party." *Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143 (App. 1987).

judgment at ten percent . . . per annum." We generally review an award of attorney fees for an abuse of discretion. *See Tucson Ests. Prop. Owners Ass'n v. Jenkins*, 247 Ariz. 475, ¶ 8 (App. 2019). However, "[w]hether a cause of action arises out of contract is a question of law we review de novo." *Caruthers v. Underhill*, 230 Ariz. 513, ¶ 58 (App. 2012).

¶14 In its formal judgment, the trial court awarded attorney fees to defendants "pursuant to A.R.S. § 12-341.01" and ordered that "pursuant to A.R.S. § 44-1201(B) interest shall accrue on the [awards of fees and costs] at the rate of ten percent . . . per annum . . . until paid in full." The court had previously reasoned that the action arose out of a contract because "the core of the dispute . . . was the unwillingness of the Defendants to alter the [agricultural easement] and provide to Plaintiff a permanent easement which runs with the land and may be transferred to a subsequent buyer."

Statutory Basis

¶15 Section 12-341.01(A) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." This section applies to claims not necessarily pled as contractual. *See Marcus v. Fox*, 150 Ariz. 333, 335 (1986) ("Regardless of the form of the pleadings, this court will look to the nature of the action and the surrounding circumstances to determine whether the claim is one 'arising out of a contract.'" (quoting *Wenk v. Horizon Moving & Storage Co.*, 131 Ariz. 131, 132 (1982))). "An action arises out of contract . . . if it could not exist 'but for' the contract." *Hanley v. Pearson*, 204 Ariz. 147, ¶ 17 (App. 2003) (quoting *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 543 (1982)). Moreover, for § 12-341.01 to apply, a contract must be "the essential basis of" the action. *Id.*

¶16 Birch Road argues this dispute did not arise from a contract. Specifically, it argues the agricultural easement is not a contract, and even if it were, "it would be incorrect to say that the dispute would not exist 'but for' the Agricultural Easement." Defendants, however, counter that the agricultural easement is in fact a contract. They further claim the easement's "limitations and restrictions were central to the litigation in Birch Road[']s effort to attempt to modify the agreement to unlimited use." Finally, defendants argue "suggestions of modification of the existing easement agreement to expand or relax the restrictions," including adding transferability, "are a significant indicator" that the easement was "at the center of the dispute."

¶17 Assuming without deciding that the agricultural easement is a contract, we agree with Birch Road that the dispute did not arise therefrom for purposes of § 12-341.01(A). That is, we cannot say that the dispute would not have occurred but for the easement or that the easement formed its essential basis. *See Hanley*, 204 Ariz. 147, ¶ 17. At the hearing on summary judgment, Birch Road emphasized its need for a transferrable right of way in order to sell the property. And, on appeal, Birch Road continues to point to the lack of such rights to ingress and egress as precluding its ability to sell the Becker Tract at fair market value, identifying a specific prospective buyer. Even if the agricultural easement had never existed, the result would be the same: Upon sale, the Becker Tract would lack access and Birch Road would be faced with the same dilemma. The dispute's essential basis is better reflected by Birch Road's desire for a legally distinct and transferrable method of access to its property. We vacate the award of attorney fees.

Interest on the Judgment

¶18 Section 44-1201(B) states:

> Unless specifically provided for in statute or a different rate is contracted for in writing, interest on any judgment shall be at **the lesser of** ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered.

(Emphasis added.)

¶19 Accordingly, Birch Road argues the trial court erred in ordering interest at ten percent and should have instead set interest at 4.25 percent, which is equal to the "prime rate at the time of judgment" plus one percent and is less than ten percent. Defendants "do not dispute an interest rate less than 10% per annum if that is a proper interpretation of the statute." We agree with Birch Road's interpretation of the statute. Indeed, when judgment was entered, the prime rate was 3.25 percent. *Data Download Program*, Bd. of Governors of the Fed. Rsrv. Sys., https://www.federalreserve.gov/datadownload/Choose.aspx?rel=H15 (last visited Mar. 25, 2022). In this instance, the court erred.

Attorney Fees on Appeal

¶20 Both parties request attorney fees and costs on appeal. Because defendants cite § 12-341.01, which we have found inapplicable here, as their basis for an award of attorney fees, *see* Ariz. R. Civ. App. P. 21(a)(2), we deny their request. Further, assuming without deciding this provision is applicable, in our discretion, we deny Birch Road's request for attorney fees made pursuant to § 12-1103. However, because the trial court's judgment notwithstanding attorney fees remains intact, defendants are the successful party and are therefore entitled to recover their costs. *See* A.R.S. § 12-341; *Henry v. Cook*, 189 Ariz. 42, 43-44 (App. 1996).

Disposition

¶21 We affirm the trial court's entry of summary judgment but vacate its award of attorney fees and interest and remand for further proceedings consistent with this decision.

B R E A R C L I F F E, Judge, specially concurring:

¶22 The majority concludes that Birch Road has failed to show reasonable necessity because, as the trial court found, it holds an existing limited license to use two farm roads to access its land for agricultural purposes. I am skeptical that a limited license to use a road solely for agricultural purposes—given that, presumably, Birch Road's land may be used for any proper purpose (commercial, residential, industrial, mining, or agricultural)—is sufficient to defeat a claim of reasonable necessity. Arizona's public policy weighs in favor of "unlocking" the "resources of the state." *Solana Land Co. v. Murphey*, 69 Ariz. 117, 124 (1949) (citing *Cienega Cattle Co. v. Atkins*, 59 Ariz. 287, 294 (1942) (condemnation promotes "the public welfare" by preventing private parties from "bottling up and rendering ineffective a portion of the resources of the state")). Limiting access to landlocked property but for a small slice of potential legal uses cuts against that policy. Birch Road, however, has not raised, at least not sufficiently, that aspect of the limited license in its argument for reasonable necessity, complaining instead about the license's transferability.[5] Because Birch Road is currently enjoying access to its property under the limited license sufficient for its needs, and it is only speculative that a successor owner would not be able to secure a similar (or even more extensive)

[5]Indeed, Birch Road has claimed that a named prospective buyer intends to use the land for agricultural purposes.

license, I also conclude that Birch Road has not shown reasonable necessity sufficient to secure private condemnation.