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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

EDNA N. RUCK, a widowed woman, Plaintiff/Appellant, v. RALPH CLAY and MARTHA CLAY, husband and wife, Defendants/Appellees.	2 CA-CV 2008-0104 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV2006-00199

Honorable Stephen M. Desens, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 In this quiet title action, appellant Edna Ruck appeals from the trial court's grant of summary judgment in her favor. She maintains the court erred in reducing the size of the property in which she was granted a life estate and in awarding less than all of the attorney fees she had requested. On the record before us, we cannot say the trial court erred and, therefore, affirm.

Background

¶2 "On appeal from a summary judgment, we view the evidence in [the] light most favorable to the party against whom judgment was granted." *DeSilva v. Baker*, 208 Ariz. 597, ¶ 10, 96 P.3d 1084, 1087 (App. 2004). In 2001, appellees Ralph and Martha Clay invited Ruck and her husband, now deceased, to live on a portion of their property in Cochise, Arizona. The Rucks moved onto the property a manufactured home and made some improvements to the area surrounding it. In 2005, the Clays attempted to evict Ruck, but she claimed a life estate in the property and asked the Clays to execute a quitclaim deed in her favor. When the Clays did not execute the deed she tendered for their signature, Ruck brought this action, asking the court to "quiet title" in the property by granting her a life estate and to award her attorney fees.

¶3 Ruck moved for summary judgment and, after a hearing, the trial court ruled she had "a life estate in the concerned property" and granted partial summary judgment in her favor on that claim. The court found, however, that "material issues of fact . . . [we]re in . . . genuine dispute as to whether or not there [we]re conditions to that life estate and

[whether] the same were breached." It therefore ordered the parties to provide supplemental briefing regarding any conditions attending the life estate. After the parties did so, the court held another hearing on that issue. The court then confirmed Ruck's "life estate in the property," ruled the Clays "ha[d] not met their burden of proof by clear and convincing evidence" and, therefore, found "there [we]re no restrictive covenants or conditions that c[ould] be orally enforced." Accordingly, the court granted summary judgment in favor of Ruck.

¶4 Thereafter, Ruck lodged a form of judgment and moved for an award of attorney fees pursuant to A.R.S. § 12-1103. The trial court entered judgment, apparently in the form submitted by Ruck, granting her a life estate in four acres of property and awarding her $16,425 in attorney fees. Nine days after the judgment was filed, the Clays belatedly objected to Ruck's proposed form of judgment pursuant to Rule 58(d), Ariz. R. Civ. P., and asked the court to extend the time for objection. Finding that the Clays' objection was "timely" and that its prior entry of judgment was "premature as a matter of law," the trial court vacated the judgment.[1] After a hearing, the court entered a new judgment in which it

[1]In vacating its judgment, the trial court noted it had "miscounted the days allowable for the filing" of the Clays' objection. But that observation apparently was incorrect, as was the court's statement that it had prematurely entered the original judgment. The record instead reflects the court waited the requisite period of time before entering Ruck's unchallenged form of judgment. *See* Ariz. R. Civ. P. 5(c)(2)(C), 6(a), 6(e), 58(d). Under those applicable rules, the waiting period for the court's entry of judgment and the time for any objection to the proposed form of judgment began to run on Ruck's mailing of that form of judgment, not on the Clays' receipt of same. Moreover, contrary to the court's finding, the record shows, and the Clays acknowledged below, that their objection to Ruck's form of

awarded Ruck a life estate in the

> property upon which her . . . manufactured home . . . is physically located together with the area surrounding the subject residence which has historically been considered as part of the yard area cared for in the past by [Ruck] which is believed to be rectangular in shape and approximately 137 feet long and 147 feet wide but may in fact be larger.

The court also awarded her $4,500 in attorney fees. Ruck appeals from that judgment.

Discussion

¶5 Ruck argues the trial court erred in entering the second judgment because it "disregard[ed] Cochise County Zoning Regulations in granting" her a life estate in fewer than four acres and because it "utterly failed to support its reduced award of attorney[] fees in any way." "On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998).

¶6 The Clays have not cross-appealed, designated any cross-issues, or argued that the trial court erroneously granted summary judgment. Therefore, we do not address whether

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judgment clearly was not "timely," which is why they requested an extension of time. Both below and on appeal, however, Ruck neither raised nor argued any of these matters and, therefore, has waived any procedural objections to the trial court's addressing the Clays' belated objection, vacating the original judgment, or entering the second judgment. *See Medina v. Ariz. Dep't of Transp.*, 185 Ariz. 414, 418, 916 P.2d 1130, 1134 (App. 1995) ("procedural defects are waived if not raised and preserved in the trial court"); *Carrillo v. State*, 169 Ariz. 126, 132, 817 P.2d 493, 499 (App. 1991) ("Issues not clearly raised and argued on appeal are waived.").

the court erred in ordering summary judgment despite the Clays' averments below that they had not promised Ruck a life estate in the property and despite the court's having found the existence of genuine issues of material fact about whether the alleged life estate was conditional. *See* Ariz. R. Civ. P. 56(c)(1); *cf. Orcutt v. Tucson Warehouse & Transfer Co.*, 83 Ariz. 200, 206, 318 P.2d 671, 675 (1957) ("It is well settled in this jurisdiction that argument by an appellee that error was committed in the lower court will not be considered in the absence of either a cross appeal or cross assignments of error."). Rather, we limit our review to the issues Ruck raises.

¶7 Ruck relies on the Cochise County Rural Zoning Regulations for her argument that the trial court erred in awarding her a life estate in "only 0.46 acres, well below the four acre minimum" site area prescribed in those regulations. She maintains that, because "the minimum site development standards for zoned parcels are mandatory" and because "the minimum site area is [four] acres," she was entitled to a life estate in four acres. But the record before us does not include any transcripts from the summary judgment hearings below or the county zoning regulations on which Ruck relies.[2] Nor does the record show that Ruck ever raised this argument before in the trial court. "[A]s a general rule, '[o]n appeal from

[2]As far as we can tell, Ruck first submitted the Cochise County Rural Zoning Regulations in a "Notice of Filing" that accompanied her opening brief in this court. Even if we could take judicial notice of those regulations, *see* Ariz. R. Evid. 201, we do not consider matters outside the record on appeal that apparently were not presented to or addressed by the trial court. *See Visco v. Universal Refuse Removal Co.*, 11 Ariz. App. 73, 75, 462 P.2d 90, 92 (1969).

summary judgment, a party may not advance new theories or raise new issues to attempt to secure a reversal.'" *Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 950 (App. 2004), *quoting Childress Buick Co. v. O'Connell*, 198 Ariz. 454, n.2, 11 P.3d 413, 418 n.2 (App. 2000) (second alteration in *Mitchell*). And, on review of a summary judgment, we do not consider documents that were not presented to or considered by the trial court. *See GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 6, 795 P.2d 827, 832 (App. 1990); *Overson v. Cowley*, 136 Ariz. 60, 63 n.2, 664 P.2d 210, 213 n.2 (App. 1982). "We, therefore, do not consider this issue on appeal." *Best v. Edwards*, 217 Ariz. 497, ¶ 28, 176 P.3d 695, 702 (App. 2008).

¶8 Ruck also asserts she had "claimed a life estate interest in a four acre parcel of the [Clays'] real property from the outset of the litigation" and, therefore, the trial court "had no authority to award anything less than the four acres originally sought." According to Ruck, "Exhibit A" to her complaint included a legal description of the property in which she claimed an interest that encompassed four acres of land. But, although her complaint refers to an "Exhibit A," no such exhibit is actually included with or attached to the complaint. And even if Ruck concededly claimed a life estate in four acres from this action's inception, as noted above, she failed to provide any transcripts of the hearings on the motion for summary judgment, including particularly the hearing at which the trial court apparently addressed the size of the property subject to Ruck's life estate. Absent such material portions of the record, we cannot determine exactly what evidence or arguments the parties presented

below on that issue. Therefore, we must presume the missing portions of the record support the trial court's ruling. *Beynon v. Trezza*, No. 2 CA-CV 2008-0082, n.5, 2009 WL 975995 (Ariz. Ct. App. Apr. 13, 2009).

¶9 Ruck next argues "[t]he trial court erred in awarding [her] just $4,500.00 of her $16,425.00 attorney[] fees request."[3] As noted above, Ruck tendered a quitclaim deed to the Clays along with five dollars, in compliance with § 12-1103(B), which provides:

> If a party, twenty days prior to bringing the action to quiet title to real property, requests the person, other than the state, holding an apparent adverse interest or right therein to execute a quit claim deed thereto, and also tenders to him five dollars for execution and delivery of the deed, and if such person refuses or neglects to comply, the filing of a disclaimer of interest or right shall not avoid the costs and the court may allow plaintiff, in addition to the ordinary costs, an attorney[] fee to be fixed by the court.

See also Jones v. Burk, 164 Ariz. 595, 597, 795 P.2d 238, 240 (App. 1990) ("[I]f a person refuses or neglects to execute the deed, the court may award the plaintiff his attorney[] fees."). Ruck argues that, because the trial court granted her a life estate, she "was entirely successful" in the litigation, "the Clays were entirely unsuccessful," and therefore she was entitled to all the fees she had requested. We review a grant of attorney fees pursuant to

[3]Without citing any authority or adequately explaining her position, Ruck refers to the Clays' "untimely objection" to her attorney fee request below. But, as discussed in n.1, *supra*, Ruck neither raises as an issue nor argues that the trial court erred in considering and ultimately sustaining the Clays' belated objection to Ruck's proposed form of judgment.

§ 12-1103 for an abuse of discretion. *Sonnenberg v. Ashby*, 17 Ariz. App. 60, 62, 495 P.2d 500, 502 (1972).

¶10 The factors a trial court may consider in determining whether to award fees include:

> (1) the merits of the claim or defense presented by the unsuccessful party; (2) whether the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result; (3) whether assessing fees against the unsuccessful party would cause extreme hardship; (4) whether the successful party prevailed with respect to all of the relief sought; (5) the novelty of the legal question presented; (6) whether the successful party's claim or defense was adjudicated previously in this jurisdiction; and (7) whether an award would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues.

In re Estate of Parker, 217 Ariz. 563, ¶ 32, 177 P.3d 305, 311 (App. 2008). A trial court also has discretion to award less than the total amount of fees requested. *See McNeil v. Attaway*, 87 Ariz. 103, 118, 348 P.2d 301, 311 (1960); *Jones*, 164 Ariz. at 597-98, 795 P.2d at 240-41.

¶11 Contrary to her assertions, Ruck was not entirely successful in her claims because she was granted a life estate in less than the four acres of property she apparently sought. Thus, the trial court was entitled to award less than the full amount of her requested fees. *See Jones*, 164 Ariz. at 597-98, 795 P.2d at 240-41. And, as previously noted, because Ruck failed to provide transcripts of the hearings below, we must presume the evidence and arguments presented there supported the trial court's decision to award her a reduced amount of fees. *See Beynon*, 2009 WL 975995, n.5. In sum, we cannot say the trial court abused its

discretion in its award of attorney fees. *See Sonnenberg*, 17 Ariz. App. at 62, 495 P.2d at 502.

Disposition

¶12 The judgment of the trial court is affirmed, and Ruck's request for an award of attorney fees on appeal, made pursuant to § 12-1103, is denied. The Clays also request an award of attorney fees on appeal but cite only Rule 21, Ariz. R. Civ. App. P., and fail to provide a substantive basis for such an award. We therefore deny the request. *See* Ariz. R. Civ. App. P. 21(c); *In re Wilcox Revocable Trust*, 192 Ariz. 337, ¶ 21, 965 P.2d 71, 75 (App. 1998) ("We will award no attorney[] fees where no basis for the award is cited to us.").

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge