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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BRIAN J. TEGOWSKI and PEGGY S. DIERKING, husband and wife, Plaintiffs/Appellants, v. ANN CONNOLLY, an unmarried woman, and RICHARD F. SACKS, an unmarried man, Defendants/Appellees.	2 CA-CV 2010-0097 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV08677

Honorable Anna L. Montoya-Paez, Judge

REVERSED AND REMANDED

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K E L L Y, Judge.

¶1 Appellants and plaintiffs below, Brain Tegowski and Peggy Dierking (hereinafter Plaintiffs), appeal the trial court's grant of summary judgment in favor of and award of attorney fees to appellees and defendants below, Ann Connolly and Richard F. Sacks (hereinafter Defendants). They also appeal the court's denial of their motion for new trial and its grant of Defendants' motion to strike the motion for new trial. Plaintiffs argue that the court erred in finding that a 1998 deed subjected their property to an easement for ingress and egress by Defendants. Because we determine that the trial court erred in granting summary judgment, we reverse.

Background

¶2 This appeal concerns a thirty-foot wide strip of land, which we will refer to as the Access Roadway. It was first described in a 1964 deed.[1] In 2006, the Access Roadway was the subject of a separate action, *Bareiss v. Tegowski*, in Santa Cruz County, which is not part of this appeal. The disputed portion of the Access Roadway is located on the western side of the Plaintiffs' property. Plaintiffs maintain that they own this portion and that only the parties in *Bareiss* have an easement over the roadway. Defendants claim that the Access Roadway is a permanent easement for the benefit of all who reside in the area.

[1]The 1964 deed conveyed the "South Half of the Northwest Quarter of the Southeast Quarter of Section 25, Township 20 South," subject to a "permanent easement for ingress and egress and utilities to and from said above described parcel, . . . being 30 feet in width." The deed describes the easement as beginning "where the Papago Springs Road enters the Southwest Quarter of Section 25, Township 20" and moving westerly along the North line of the property before heading south along the West line.

¶3 In 1998, Plaintiffs bought property in Santa Cruz County. At the time, a portion of the Access Roadway ran along the western property line of the parcel. In 2004, Plaintiffs erected a gate across a portion of the Access Roadway adjacent to their property, which resulted in the *Bareiss* litigation. In *Bareiss*, the trial court "granted summary judgment on the issue of the existence and validity of [David Bareiss' and Marian Stoddard's] ingress and egress easement over the Access Roadway" and found that Lawyers Title Insurance Corporation of Arizona ("Lawyers Title") held title to the property. Finding that Plaintiffs "had no interest in the real property referred to as the Access Roadway," and therefore no authority to block access, the court issued an injunction, prohibiting them "from obstructing the Access Roadway by gates or any other obstruction."

¶4 In 2007, Lawyers Title conveyed "all of the right, title and interest" in the Access Roadway by quitclaim deed to Plaintiffs and the other owners of property adjacent to the roadway, with each owner receiving title to the portion neighboring their property. After obtaining title, Plaintiffs sent cease and desist letters, threatening suit to individuals using the portion of the Access Roadway conveyed to Plaintiffs by Lawyers Title. Plaintiffs then filed an action for willful trespass against Defendants seeking injunctive and monetary relief.

¶5 Defendant Connolly sent Plaintiffs a quitclaim deed for five dollars ($5.00), pursuant to A.R.S. § 12-1103(B). After receiving no response, Defendants filed an answer and counterclaim seeking to quiet title in the Access Roadway, and moved for summary judgment on their counterclaim. After a hearing, the trial court granted

Defendants' motion for summary judgment, based on language in Plaintiffs' 1998 deed, and awarded attorney fees to Defendants.

¶6 Plaintiffs filed a motion for new trial pursuant to Rule 59(a), Ariz. R. Civ. P., alleging that the trial court's "judgment [was] not justified by the evidence [and was] contrary to law." Defendants filed an opposition to the motion and moved to strike it and its attached exhibits. The court denied Plaintiffs' motion for new trial and granted Defendants' motion to strike. This appeal followed.

Discussion

¶7 "Whether summary judgment is appropriate is a question of law we review de novo." *Ballesteros v. Am. Standard Ins. Co. of Wis.*, 223 Ariz. 269, ¶ 6, 222 P.3d 292, 295 (App. 2009). We review the facts and all reasonable inferences therefrom "in the light most favorable to the nonmoving party."[2] *Aranda v. Cardenas*, 215 Ariz. 210, ¶ 2, 159 P.3d 76, 78 (App. 2007). In general, we will affirm the grant of summary judgment when there are "no genuine issue[s] as to any material fact." *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We must reverse, however, if the court's finding is not supported by the record or constitutes an error of law. *See Kadlec v. Dorsey*, 224 Ariz. 551, ¶¶ 12-13, 233 P.3d 1130, 1132 (2010) (reversing grant of

[2]Defendants assert that because Plaintiffs have failed to comply with Rule 13, Ariz. R. Civ. App. P., in their brief we should rely only on Defendants' statement of facts. We agree that Plaintiffs have not complied with the rule by failing to adequately cite to the record, but we rely on the record presented on appeal and draw our facts from neither party's briefs. *Cf. State v. Griswold*, 8 Ariz. App. 361, 363, 446 P.2d 467, 469 (1968) (appellate court confined to record and "statements made by counsel in their briefs as to what occurred, or what might have occurred had the situation been different, will not be considered").

summary judgment where, based on record, moving party not "entitled to judgment as a matter of law").

¶8 The trial court found that, "[c]learly, there is an available easement to those folks living in the West Half of the Southeast Quarter of section 25." Its finding was based on language in Plaintiffs' 1998 deed, providing that the property was "subject to an ingress and egress easement along an existing road to that parcel located in the West Half of the Southeast Quarter of section 25." Although this language does appear in Plaintiffs' deed, they argue, as they did below, that it refers to a wholly different strip of land than the Access Roadway. We agree.

¶9 Plaintiffs assert that the 1998 deed only burdens their property with an easement running along Hitchcock Lane, a road that traverses the southern part of their property. They base this contention on the fact that they did not own any portion of the Access Roadway in 1998, and claim the portion of the Access Roadway at issue here does not run "along an existing road." Defendants, however, argue that because the benefit of the Hitchcock Lane easement never was granted to neighboring property owners and they have no right to use it, it cannot burden Plaintiffs' property as an easement and could not be the easement referred to in the 1998 deed. But they do not provide any authority or persuasive argument for the contention that their lack of access affects the interpretation of Plaintiffs' 1998 deed.

¶10 We must, therefore, determine whether the trial court correctly interpreted the language of Plaintiffs' 1998 deed. "'[A]n easement is a right that one person has to use the land of another for a specific purpose.'" *Siler v. Ariz. Dep't of Real Estate*, 193

Ariz. 374, ¶ 45, 972 P.2d 1010, 1019 (App. 1998), *quoting Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 208, 818 P.2d 190, 193 (App. 1991) (alteration in *Siler*); *see also* Restatement (Third) of Property (Servitudes) § 1.2(1) (2000) (easement is "a nonpossessory right to enter and use land in the possession of another"). An easement appurtenant—such as the one at issue here—is characterized by the fact that it does not exist absent a connection with a particular piece of land. *Ammer*, 169 Ariz. at 209, 818 P.2d at 194. The two parcels of land involved in an easement appurtenant are "the dominant tenement, to which the right of use belongs, and the servient tenement, which is subject to the use." *Id.*

¶11 Both sides agree that Plaintiffs did not hold legal title to the thirty-foot strip until 2007. As the trial court recognized in *Bareiss*, because prior deeds covering Plaintiffs' property excluded the Access Roadway, the 1998 deed did not confer any interest in the roadway to them. Further, the language relied on by the trial court appeared for the first time in a 1991 conveyance to Plaintiffs' predecessors. That deed conveyed a larger portion of land referred to as Parcel A, of which Plaintiffs' property is a subpart. The deed provided:

> SAVE AND EXCEPT, however, the Northerly 30 feet and the Westerly 30 feet, beginning where Papago Springs Road, as it is now designated, enters said Parcel A . . . .
>
> PARCEL A is subject to an ingress and egress easement along an existing road to that parcel located in the West Half of the Southeast Quarter.

Plaintiffs' 1998 deed did not contain the "SAVE AND EXCEPT" paragraph, but this does not affect its interpretation. *Cf. Federoff v. Pioneer Title & Trust Co. of Ariz.*, 166

Ariz. 383, 389, 803 P.2d 104, 110 (1990) ("The lack of reference to . . . restrictions in [a] later deed d[oes] not extinguish them."). Interpreting the second paragraph, as the court did and as Defendants urge, to refer to the Access Roadway, first described in 1964, renders the previous paragraph superfluous, something we will not do. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 158 n.9, 854 P.2d 1134, 1144 n.9 (App. 1993) (contracts interpreted "in a way that does not render parts . . . superfluous").

¶12 Additionally, the maps submitted with the motion for summary judgment show that the Access Roadway runs from Papago Springs Road and lies at the northern and western portions of the parcel. Hitchcock Lane as shown on the maps runs to the southeast quarter. Thus, nothing in the record suggests that the easement referred to in the 1998 deed is the same easement as the thirty-foot wide strip referred to in the earlier deed as the trial court apparently concluded. Because the 1998 deed did not convey any portion of the Access Roadway to Plaintiffs, that deed, on which the trial court relied in reaching its decision, could not impose on them the burden of the easement. *See Shalimar Ass'n v. D.O.C. Enter*s*., Ltd.*, 142 Ariz. 36, 44, 688 P.2d 682, 690 (App. 1984) (subsequent purchasers take title subject to an easement only, "to the extent that [their] grantor is bound thereby"). Therefore, the trial court erred in determining that the language from the 1998 deed referred to the Access Roadway and in granting summary judgment against Plaintiffs on that ground.

¶13 Because we reverse the trial court's grant of summary judgment, we also reverse the award of attorney fees as premature. *Esmark, Inc. v. McKee*, 118 Ariz. 511, 514, 578 P.2d 190, 193 (App. 1978). And, because we reverse the grant of summary

judgment we need not address Plaintiffs' claims that the court improperly denied their motion for new trial and granted Defendants' motion to strike.

Disposition

¶14 We reverse the trial court's order granting summary judgment and remand the case for further proceedings consistent with this decision.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge