IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CARL T. SANDBERG JR. AND GEETA GAJWANI SANDBERG, HUSBAND AND WIFE; AND CARL AND GEETA SANDBERG, AS TRUSTEES OF SANDBERG TRUST,
Plaintiffs/Counterdefendants/Appellants,

v.

PIMA COUNTY AND VERIZON WIRELESS (VAW), LLC,
Defendants/Appellees,

and

TUCSON ELECTRIC POWER COMPANY AND COX COMMUNICATIONS, INC.,
Defendants/Counterclaimants/Appellees.

No. 2 CA-CV 2023-0189
Filed November 12, 2024

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NOT FOR PUBLICATION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. C20201732
The Honorable Christopher Browning, Judge
The Honorable Wayne E. Yehling, Judge

AFFIRMED

COUNSEL

Stubbs & Schubart P.C., Tucson
By Thomas M. Parsons
Counsel for Plaintiffs/Counterdefendants/Appellants

Laura Conover, Pima County Attorney
By James W. Rappaport, Deputy County Attorney, Tucson
Counsel for Defendant/Appellee Pima County

Lewis Brisbois Bisgaard & Smith LLP, Phoenix
By Eric L. Cook and Petra L. Emerson
Counsel for Defendant/Appellee Verizon Wireless (VAW), LLC

Osborn Maledon P.A., Phoenix
By Eric M. Fraser, William D. Furnish, and Alexandria N. Karpurk
Counsel for Defendants/Counterclaimants/Appellees Cox Communications and Tucson Electric Power Company

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MEMORANDUM DECISION

Judge Kelly authored the decision of the Court, in which Presiding Judge O'Neil and Judge Vásquez concurred.

¶1 Carl and Geeta Sandberg, individually and as trustees of the Sandberg trust, appeal from the superior court's order granting summary judgment in favor of Pima County, Verizon Wireless, LLC, Cox Communications, Inc., and Tucson Electric Power Company (TEP). For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the Sandbergs, the party against whom summary judgment was entered. *See Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, ¶ 2 (2003). Sunset Road, located in Pima County, was established in 1930 pursuant to proceedings which included a petition, a public hearing process, and the filing of field notes, maps and plats in the office of the County Recorder. It was paved in the 1960s and had been used continuously as a public road for decades prior to the Sandbergs acquiring their interest in two properties adjacent to Sunset

Road in 1986 and 1998.[1] The record does not reflect, and no party contends, that the Sandbergs ever initiated any legal action related to the establishment or public use of Sunset Road at the time they acquired their properties, or at any time thereafter, until 2020.

¶3 In 2019, the County authorized Cox, TEP, and Verizon (utility defendants) to construct a utility tower along Sunset Road. In April 2020, the Sandbergs sued the County and the utility defendants, seeking declaratory judgment and asserting claims of trespass and taking stemming from the defendants' activities on Sunset Road. The Sandbergs alleged generally that the County failed to comply with Arizona law in establishing Sunset Road, and therefore could not construct or maintain the road "across any portion" of their property without either acquiring title, utilizing eminent domain, or paying just compensation. The Sandbergs further argued that as a result of the County's noncompliance, it possessed no legal right to "assign, authorize or permit" the utility defendants to engage in commercial activities within Sunset Road's alignment. Thus, the Sandbergs contend, the use and placement of "improvements and other items" within the Sunset Road alignment that "traverses" their property constituted both a trespass and a taking.

¶4 The County and the utility defendants moved to dismiss the complaint, arguing in part that the Sandbergs' claims were barred by the statute of limitations. The superior court took judicial notice of the 1930 county resolution establishing Sunset Road, but denied the motions, finding that the defendants' activities would seemingly "occur in the portion of the roadway that lies on their property." In April 2022, the County, joined by the other defendants, moved for summary judgment, contending again that the Sandbergs' claims were time-barred and that their takings allegation related to acts that occurred before the Sandbergs purchased their property. The court heard oral argument on the motions in September.

¶5 The following month, the Sandbergs filed a motion to amend their complaint, seeking to clarify previous assertions and to add additional claims for nuisance and zoning violation. Specifically, the Sandbergs sought to add claims regarding their neighbors' adjoining property and asserted they had received an assignment of claims from those neighbors.

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[1]Carl Sandberg initially purchased the properties, but later conveyed them to himself and his wife in 2004.

¶6 In January 2023, the superior court granted summary judgment in favor of the defendants. Without deciding whether the County owned title to the land under Sunset Road or its shoulder area, or whether the Sandbergs' claims were barred by the statute of limitations, the court concluded that the County held "a right-of-way for, at a minimum, road use along Sunset Road." The court therefore determined that A.R.S. § 40-283(D) authorized the County to "make available the use of the portions of the right-of-way specifically for utility structures." The court also rejected the Sandbergs' purported assignment of rights from their neighbors, noting that in contrast to the Sandbergs, who "acquired their land interest in their parcels decades prior to the construction of the utility structures at issue in this case," the neighbors' ownership interest began in 2020, after the utility structures at issue were built, and the neighbors therefore "had no takings claim to assign."

¶7 The Sandbergs subsequently moved to vacate and amend the judgment pursuant to Rules 59(a)(1)(F) and 60(b)(6), Ariz. R. Civ. P., while the County, Cox, and TEP sought an award of attorney fees and costs. In June 2023, the superior court denied the Sandbergs' motion and the defendants' requests for attorney fees, but ordered the defendants to submit a proposed form of judgment for its review. The court later entered the defendants' proposed form of judgment and awarded their requested costs, as a final order under Rule 54(c), Ariz. R. Civ. P. The Sandbergs moved to vacate or amend that judgment pursuant to Rules 54, 58, and 59, Ariz. R. Civ. P., and also appealed the court's grant of summary judgment, its denial of their motion to amend the complaint, and its entry of the proposed judgment.

¶8 In October, this court granted a limited remand to allow the superior court to rule on the Sandbergs' second motion to vacate or amend. The court's subsequent order clarified that because the Sandbergs' proposed second amended complaint "added allegations and claims based on the assignment of rights the Court rejected, the Court's [summary judgment] ruling can be inferentially deemed a denial of Plaintiff's Motion to Amend Complaint." The court then entered a final judgment denying the motion to vacate but granting the motion to amend in part to reflect the correct post-judgment interest rate. The Sandbergs then filed a supplemental notice of appeal to include that ruling in this proceeding. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶9 The Sandbergs assert that the superior court erred by granting summary judgment in favor of the defendants. They further contend that the court erred by denying their motion to amend their complaint.

Summary Judgment

¶10 The Sandbergs assert that the superior court misinterpreted statutory law in granting summary judgment and that their claims are not barred by the statute of limitations. "This court reviews a grant of summary judgment *de novo*, viewing the facts and reasonable inferences in the light most favorable to the party opposing the motion and will affirm for any reason supported by the record, even if not explicitly considered by the superior court." *CK Fam. Irrevocable Tr. No. 1 v. My Home Grp. Real Est. LLC*, 249 Ariz. 506, ¶ 6 (App. 2020). Moreover, summary judgment "is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." *Andrews v. Blake*, 205 Ariz. 236, ¶ 13 (2003) (quoting *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Loc. No. 395 Pension Tr. Fund*, 201 Ariz. 474, ¶ 14 (2002)).

¶11 The Sandbergs acknowledge that Sunset Road was built in the 1930s and paved in the 1960s. They contend, however, that "the County did not comply with Arizona law in the establishment of Sunset Road and that the County was not authorized to construct or maintain Sunset Road over or across any portion" of their property without first acquiring title to that property or, alternatively, "the payment of just compensation as required by Article 2, § 17 of the Arizona Constitution." Regarding the establishment of Sunset Road, A.R.S. § 28-7041(C) provides in pertinent part:

> All highways, roads or streets that have been constructed . . . established or maintained for ten years or more by the state or an agency or political subdivision of the state before January 1, 1960 and that have been used continuously by the public as thoroughfares for free travel and passage for ten years or more are declared public highways, regardless of an error, defect or omission in the proceeding or failure to act to establish those highways, roads or streets or in recording the proceedings.

The Sandbergs do not dispute that Sunset Road meets this definition. It is, by statute, a public highway which necessarily contains a public right-of-way. *See State v. Crawford*, 7 Ariz. App 551, 555 (1968) ("[J]ust as the local state law is determinative of the issue of whether or not a public highway exists at all, it is also determinative of the issue of the width and extent of the public right-of-way.").

¶12 The Sandbergs contend this conclusion is contrary to longstanding Arizona law, specifically *State ex rel. Miller v. Dawson*, 175 Ariz. 610 (1993), and further assert that the County may not acquire title to roadways through prescription or adverse possession under that ruling. In *Dawson*, our supreme court concluded that the predecessor statute to § 28-7041 did not permit the state to "acquire title to a public highway through prescriptive rights." 175 Ariz. at 613. However, that court noted that the statute was "curative," and that it had "other significant results." *Id.* The court clarified that the predecessor statute was constitutional as a remedial statute which did not operate as a change to the common law disallowing the creation of public highways by prescription. *See id.* at 612-13.

¶13 Our result here acknowledges the designation of Sunset Road as a public highway under § 28-7041(C), notwithstanding any alleged error, defect or omission in its establishment over ninety years ago. It does not, however, implicate transfer of title to the County by prescription. Moreover, the County here, and in contrast to the state's assertion in *Dawson*, does not claim to have acquired title to the Sandbergs' property by prescription. *See id.* at 611.

¶14 Given that Sunset Road has operated as a public highway long before the Sandbergs acquired their interest in the abutting properties, we address the timing of their lawsuit against the County. "All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward." A.R.S. § 12-821; *see also Cook v. Town of Pinetop-Lakeside*, 232 Ariz. 173, ¶ 8 (App. 2013) ("The 'all actions' language does not lend itself to a limited interpretation that excludes some claims against a public entity." (quoting *Flood Control Dist. of Maricopa Cnty. v. Gaines*, 202 Ariz. 248, ¶ 6 (App. 2002))). Additionally, this court has held that § 12-821 extends to declaratory relief claims. *Rogers v. Bd. of Regents of Univ. of Ariz.*, 233 Ariz. 262, ¶ 17 (App. 2013); *see also Deutsche Bank Nat'l Tr. Co. v. Pheasant Grove LLC*, 245 Ariz. 325, ¶ 17 (App. 2018) (declaratory relief limitations period determined by identifying "the relationship out of which the claim arises and the relief sought" (quoting

Canyon del Rio Invs., L.L.C. v. City of Flagstaff, 227 Ariz. 336, ¶ 21 (App. 2011))).

¶15 A claim of "trespass for injury done to the estate or the property of another" must be brought "within two years after the cause of action accrues," A.R.S. § 12-542(3), and a trespass claim's accrual date is based on whether the trespass is continuous or permanent, *Maricopa County v. Rovey*, 250 Ariz. 419, ¶ 17 (App. 2020). "A claim for continuous trespass does not accrue until the conduct has ended," but a "claim for a permanent trespass accrues when the trespass begins." *Id.* Because a public road cannot be maintained or operated without interfering with adjoining parcels of land, it is properly defined as a permanent trespass. *Id.* ¶¶ 18-19. Accordingly, the Sandbergs' claim that the County did not properly designate Sunset Road for access or public use as required by statute, as well as their claim that the establishment of Sunset Road constituted a trespass and a taking in violation of the Arizona Constitution, accrued when the road was created. *See id.* ¶ 19. Consequently, the Sandbergs' 2020 trespass claim as to Sunset Road was brought decades after the relevant accrual date and has exceeded the statute of limitations period in regard to both the County, *see* § 12-821, and by extension, the utility defendants, *see* § 12-542(3). The Sandbergs' claim that the County committed an unlawful taking of their property rights is time-barred for the same reason. *See* § 12-821; *see also Cook*, 232 Ariz. 173, ¶ 8 ("§ 12-821 applies to 'all' actions against public entities").

¶16 Furthermore, the Sandbergs' claim for declaratory relief sought a judicial determination "that the County's actions in the establishment of Sunset Road were contrary to Arizona law and that the County has no legal right to the continued use and maintenance of Sunset Road over and across [their property] or to assign, authorize or permit the use of Sunset Road" by the utility defendants for "commercial or other purposes." This claim further sought damages "proximately caused by the County's improper actions and the improper use of the Sunset Road" by the utility defendants. Because the Sandbergs' declaratory relief claim arose from their trespass and takings claims, it is subject to the same statute of limitations as those actions and is also untimely. *See Deutsche Bank*, 245 Ariz. 325, ¶ 17; § 12-821; § 12-542(3).

¶17 The Sandbergs' complaint also included a claim against the County and the utility defendants for trespasses beginning in 2019 with the construction of the utility tower. As to those claims, § 40-283(D) provides in pertinent part:

> A board of supervisors may authorize public service corporations, telecommunications corporations, cable operators or video service providers to construct a line, plant, service or system within the right-of-way of any road, highway or easement that is designated for access or public use by plat or survey of record of a subdivision . . . .

The Sandbergs concede that the "rights of TEP, Cox, and Verizon to use the alignment of Sunset Road [are] derivative and they do not have any greater right to use the Sunset Road alignment than the County." As such, their argument that the superior court erred by applying the statute in granting summary judgment to the utility defendants hinges on their claim that the County's establishment of Sunset Road was invalid. Having concluded that Sunset Road was established as a public highway decades before the Sandbergs acquired their land abutting it, and the Sandbergs' claims in opposition thereof are barred by limitation, the court correctly determined that § 40-283(D) authorized the County to grant the utility defendants permission to construct the subject utility tower within its right of way. As a result, this matter did not present any genuine issues of material fact, and the court properly granted summary judgment in favor of the County and utility defendants. *See Andrews*, 205 Ariz. 236, ¶ 13.

Motion to Amend Complaint

¶18 The Sandbergs further assert that the superior court erred by denying their motion to amend their complaint. "A decision on a motion to amend a complaint is within the sound discretion of the trial court, and this court will not disturb that decision absent a clear abuse of discretion." *Tobel v. Travelers Ins. Co.*, 195 Ariz. 363, ¶ 43 (App. 1999).

¶19 "[T]rial on the merits of the claim is favored." *Owen v. Superior Court*, 133 Ariz. 75, 79 (1982). Thus, amending a pleading is permissible "unless there has been undue delay, dilatory action or undue prejudice," *id.*, or "if the amendment would be futile," *First-Citizens Bank & Tr. Co. v. Morari*, 242 Ariz. 562, ¶ 12 (App. 2017) ("A court does not abuse its discretion by denying a request to amend if the amendment would be futile."). "Prejudice is the inconvenience and delay suffered when the amendment raises new issues or inserts new parties into the litigation." *Carranza v. Madrigal*, 237 Ariz. 512, ¶ 13 (2015) (quoting *Owen*, 133 Ariz. at 79).

¶20 The Sandbergs' amended complaint sought to clarify that they were disputing the actions taken by the defendants in the "unpaved area" south of the paved portion of Sunset Road and not seeking to interfere with the public's use of the paved travel lanes. It also sought to include the "previously disclosed assignment" of rights from their neighbors, add claims for encroachment and trespass onto the neighboring property, and add claims for "zoning violation, safety hazard and nuisance." On appeal, the Sandbergs generally assert that their proposed second amended complaint was "relevant to Sandberg's Declaratory Judgment claim" and raises "issues that are the proper subject of judicial relief." They also broadly contend that the amendments were related to "additional actions in which [defendants] trespassed" on both their property and their neighbors' property while the summary judgment motion was pending.

¶21 The Sandbergs sought leave to amend their complaint more than two and a half years into the proceedings, and approximately two years after they received the purported assignment of claims from their neighbors. Moreover, they waited until after all defendants had moved for summary judgment, those motions had been responded and replied to, and the superior court had already heard oral argument on the motions before moving to amend. In addition, this motion, filed after close of discovery, also sought to raise new allegations and issues.

¶22 Accordingly, the record supports a finding that the amended complaint would have caused undue delay or undue prejudice, or both, to the defendants. *See Carranza*, 237 Ariz. 512, ¶ 13 (denial of leave to amend proper when amendment is 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" (quoting *Owen*, 133 Ariz. at 81)). Therefore, the superior court's denial of the motion to amend does not constitute a "clear abuse of discretion." *Tobel*, 195 Ariz. 363, ¶ 43; *see also Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.R. Co.*, 231 Ariz. 517, ¶ 4 (App. 2013) ("Although the trial court did not state the basis for [denying motion to amend], we will affirm if the result is correct for any reason.").

¶23 Furthermore, the superior court explicitly rejected the assignment of rights between the Sandbergs and their neighbors in its summary judgment ruling. On remand, the court confirmed that the motion to amend was "inferentially" denied for this reason. Consequently, to the extent the Sandbergs' motion to amend related to an assignment of rights that the court had already rejected, we find no credible basis to

suppose that the amended complaint would have survived summary judgment. Therefore, granting the motion to amend would have been futile, *see Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 597 (App. 1991) (holding amended complaint to be futile gesture if amended pleading could be defeated by summary judgment motion), and its denial does not constitute an abuse of discretion, *see Morari*, 242 Ariz. 562, ¶ 12.

Attorney Fees

¶24 The Sandbergs request their attorney fees on appeal pursuant to Rule 21, Ariz. R. Civ. App. P., and A.R.S. §§ 11-972(B), 12-348. Because they are not the prevailing party, they are not entitled to an award of attorney fees. The County and utility defendants request their attorney fees pursuant to A.R.S. § 12-341.01, but they have not demonstrated how this action arose out of an express or implied contract. Accordingly, we deny their requests. As the prevailing parties on appeal, however, they are entitled to their costs upon compliance with Rule 21. *See* A.R.S. § 12-341.

Disposition

¶25 We affirm the superior court's grant of summary judgment and denial of the Sandbergs' motion to amend their complaint.