IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DAVID and SHERRY SANGER, husband and wife, Plaintiffs/Appellees, GARY and DEBBIE FRANKLIN, husband and wife, Plaintiffs/Counter-Defendants/ Appellees, v. NICK OEHLER and CANDICE OEHLER, husband and wife, Defendants/Counter-Claimants/ Appellants.	1 CA-CV 05-0219 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. CV 2002-4089

The Honorable James E. Chavez, Judge

AFFIRMED IN PART; REVERSED IN PART

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K E S S L E R, Presiding Judge

¶1 Nick and Candice Oehler (the "Oehlers") appeal the trial court's decision finding that David and Sherry Sanger (the "Sangers") and Gary and Debbie Franklin (the "Franklins") (together, "Plaintiffs") have a prescriptive easement over a portion of the Oehlers' property. They also appeal the trial court's ruling denying their request to order the Franklins to remove portions of their driveway and block wall footings that encroach onto the Oehlers' property; the court found the encroachment to be de minimus. For the following reasons, we find that the trial court erred in holding that a prescriptive easement was established and in declining to order the removal of the encroaching portions of the Franklins' driveway. We affirm the court's ruling with respect to the Franklins' block wall footings.

FACTS AND PROCEDURAL HISTORY

¶2 In August 2002, the Sangers and the Franklins filed suit against the Oehlers for a declaratory judgment that they had a prescriptive easement over a portion of the Oehlers' property they termed "No Name Road." No Name Road is a forty-foot-wide strip of land running north to south along the western edge of the Oehlers' property. The eastern boundary of the Sangers' property abuts No Name Road. To the south of the Sangers' property is Dunlap Road, which runs west to east and connects with No Name Road. The Sangers' address is 1865 Dunlap Road.

¶3 The southern boundary of the Franklins' property abuts the northern boundary of the Sangers' property, with the eastern

border of the Franklins' property abutting No Name Road. North of the Franklins' property lies Sterling Road, which runs west to east and dead ends into No Name Road. The address of the Franklins' property is 1870 Sterling Road.

¶4 No Name Road was built in 1982 by Jim Hancock, a previous owner of the property now belonging to the Oehlers. Hancock had the road constructed with the intent that it be dedicated as a public road to provide access to a planned subdivision. The subdivision was not built, and the road was never dedicated. Hancock and his wife Betty Jo sold the property including No Name Road to Watson Pacific Corporation in January 1988. The sale was secured by a deed of trust on the property that named the Hancocks as beneficiaries. Betty Jo Hancock purchased the property at a trustee's sale, obtaining a trustee's deed dated December 10, 1996. The Oehlers purchased the property from Betty Jo on July 5, 2002. Thus, Betty Jo owned title to the property prior to 1988 and from 1996 to July 2002. The Oehlers' parcel is approximately twenty-eight acres, and at the time of the purchase was undeveloped rural property.

¶5 The Sangers purchased their property in 1977, moved onto the property in January 1979, and began using the property to the east, which later became No Name Road, to access their backyard.[1]

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[1] Mr. Sanger testified at trial that he began to use the adjoining property to access his backyard in 1978. The joint pretrial statement indicated that the Sangers began to use the (continued...)

Because the backyard was terraced and at a lower elevation than the house, they could not drive down to the backyard from the front. They continued to use the neighboring property for access after No Name Road was created.

¶6 In approximately 1990, the Sangers poured a concrete driveway from No Name Road into their backyard. About the same time, they constructed a wood fence around their property, installing a gate for access from No Name Road to the backyard. The gate was not visible from the road and could not be opened from the road, but only from inside the backyard. They stored equipment, trucks, trailers and had a chicken coop in the backyard, which they accessed by the ramp from No Name Road. In 1996 or 1997, the Sangers installed a mobile home in the backyard for David Sanger's mother and step-father, who used No Name Road to access the unit approximately three months of the year.

¶7 The Franklins purchased their property in 1984 and immediately built a house on the property. The Franklins used No Name Road daily to access their property, believing that their property was on a corner lot. They built a three-car garage facing No Name Road in 1990 and constructed a concrete driveway from No Name Road in approximately 1996. They fenced in the property with a chain link fence and installed a gate on the No Name Road side in

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[1] (...continued)
property to access the backyard in 1979; the parties stipulated after Sanger testified that the Sangers moved onto the property in 1979.

approximately 1997. They also constructed a block wall along a portion of No Name Road.

¶8 The public, including the police department, utilities, and neighbors, also used No Name Road.

¶9 The complaint filed by the Plaintiffs alleged that the Oehlers, within days of purchasing the neighboring property of which No Name Road was a part, had constructed a fence to prevent use of the road and had deposited dirt on the road to make it impassable. The complaint sought a permanent injunction confirming a forty-foot-wide prescriptive easement on No Name Road from Dunlap Road to Sterling Road, an order requiring the Oehlers to remove the obstructive fence and dirt and to return the road to its prior condition, and an order enjoining the Oehlers from further attempts to obstruct the road. The complaint also alleged that the Oehlers had damaged the Franklins' fence and gate and sought damages.

¶10 Simultaneously with their complaint, the Plaintiffs filed a petition for a temporary restraining order and preliminary injunction. After the hearing on the preliminary injunction, the Oehlers argued that, to prevail on their prescriptive easement claim, the Plaintiffs were required to show adverse, open, and notorious use of the road different from that of the general public for the statutory period and had not met that burden.

¶11 The court granted the preliminary injunction. The court, citing illustration 23 of the Restatement (Third) of Property

(Servitudes) § 2.17 (2000),[2] found that the Plaintiffs used No Name Road for purposes distinguishable from the public. The court issued a preliminary injunction precluding any further destruction of No Name Road from the southern border of the Oehler property to Sterling Road and enjoining the Oehlers from obstructing the Plaintiffs from accessing their properties by No Name Road.

¶12 The Oehlers answered the complaint and filed a counterclaim for trespass against the Franklins, arguing that a chain link fence and the footings for a block wall built by the Franklins encroached on the Oehlers' property. Prior to trial, the Franklins moved the chain link fence back onto their own property; they conceded, however, that the footings for the block wall encroached 86.5 square feet into the subsurface of the Oehlers' property and that their cement driveway encroached approximately 16.2 square feet onto the Oehlers' property.

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[2] The court quoted the illustration as follows:

> A road in a rural area runs from a state highway through Blackacre past Whiteacre and several other residential properties, to a river. The road is used by the public for access to the river for fishing, boating, and picnicking. It is regularly used by A, the owner of Whiteacre, and owners of the other residential properties for access to their homes. The fact that the road serves the residential properties, as well as providing access to the river, would justify the conclusion that use by A and other residential owners is open and notorious.

¶13 The court conducted a trial over two days, after which the court found that the Sangers had used No Name Road openly and visibly to access their property for more than twenty years, and that the Franklins had done so for about eighteen years. The court found by clear and convincing evidence that Plaintiffs had an easement by prescription over the Oehlers' property. The court further found that the Oehlers had damaged the Franklins' fence, but that the Franklins had failed to prove damages. With respect to the Oehlers' counterclaim for trespass, the court found that the stipulated encroachment was within the area of the prescriptive easement. The court ruled:

> Relatively small portions of the driveway and block wall trespass on defendants' property. Removal of the violating portions of the wall could cause a disproportionate impact on the Franklins, in that they may have to rebuild the wall. The Oehlers produced no evidence at trial that Franklins acted in bad faith or intentionally constructed the driveway and wall across the property line. The Court will not grant equitable relief for a good faith de minimus encroachment where there will be disproportionate impact on the plaintiffs. Golden Press, Inc., v. Rylands at 124 Colo. 122, 235 P.2d 592 (1951). Defendants have a remedy available at law.

The court ordered the preliminary injunction be made permanent. The court denied the Franklins' claim for damages and the Oehlers' petition for removal of the encroachments.

¶14 The Oehlers moved for a new trial. They argued that the foreclosure of the deed of trust in 1996 on the Oehlers' property cut off any rights to a prescriptive easement held by the

Plaintiffs. The Oehlers also argued that the Franklins were not entitled to a balancing of hardship with respect to the encroachments. They further contended that the Plaintiffs had failed to join an indispensable party because the Oehlers' property fell short of Dunlap Road by about thirty feet and the Plaintiffs had not joined the owner of that property.

¶15 The court denied the motion for new trial. The Oehlers timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶16 On appeal from a trial, we view the evidence and reasonable inferences therefrom in the light most favorable to the prevailing party and must affirm if any evidence supports the trial court's judgment. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992). We consider legal questions de novo. *Id.*

¶17 To establish a prescriptive easement, a claimant must show by clear and convincing evidence that use of the property was open and notorious, hostile to the title of the true owner and had begun and continued under a claim of right for ten years. *Harambasic v. Owens*, 186 Ariz. 159, 160, 920 P.2d 39, 40 (App. 1996); *Inch*, 176 Ariz. at 135, 859 P.2d at 758. Rights gained through adverse use vest at the end of the prescriptive period. *Babo v. Bookbinder Fin. Corp.*, 27 Ariz. App. 73, 74, 551 P.2d 63, 64 (1976). A claimant gaining rights through adverse use can gain

no more than the title holder had. *Stat-o-matic Retirement Fund v. Assistance League*, 189 Ariz. 221, 224, 941 P.2d 233, 236 (App. 1997). No equities favor the establishment of a prescriptive easement. *Tenney v. Luplow*, 103 Ariz. 363, 366, 442 P.2d 107, 110 (1968).

I. Prescriptive Easement

¶18 The Oehlers argue that any prescriptive rights that the Plaintiffs may have had were cut off when Betty Jo Hancock purchased the property at a trustee's sale after foreclosing on the deed of trust she held on the property. In making this argument, the Oehlers rely on *Berryhill v. Moore*, 180 Ariz. 77, 881 P.2d 1182 (App. 1994) and *Stat-o-matic*, 189 Ariz. at 221, 941 P.2d at 233.

¶19 In *Berryhill*, the Jacksons purchased the western half of a five-acre parcel of land in April 1976. 180 Ariz. at 80, 881 P.2d at 1185. Mr. Jackson constructed a north-south fence on what he believed to be the eastern boundary to the property to separate it from the neighboring property. *Id.* Mr. Jackson, however, mistakenly constructed the fence sixty feet to the west of the actual eastern boundary line. *Id.* In December 1977, the eastern portion of the five-acre parcel was sold to the McCarters who sold it to the Berryhills in 1981. *Id.* at 80-81, 881 P.2d at 1185-86. In April 1985, the Jacksons sold their property to Moore, retaining a promissory note secured by a deed of trust on the property. *Id.* at 82, 881 P.2d at 1187.

¶20 In 1988, the mistaken boundary was discovered. *Id.* The Berryhills filed a quiet title action. *Id.* Moore filed a counterclaim for quiet title, and the Jacksons filed a counterclaim to protect their lien rights in the property. *Id.* The trial court quieted title in the Berryhills and dismissed the claim by the Jacksons. *Id.*

¶21 This Court affirmed the decision finding adverse possession against Moore, but reversed the judgment against the Jacksons. *Id.* at 89, 881 P.2d at 1194. This Court reached its decision based on the applicable limitations statute, which states:

> A person who has a cause of action for recovery of any lands, tenements or hereditaments from a person having peaceable and adverse possession thereof, cultivating, using and enjoying such property, shall commence an action therefor within ten years after the cause of action accrues, and not afterward.

Id. (citing A.R.S. § 12-526(A) (emphasis omitted). The court reasoned that the language of the statute indicated that only a person with a present right to recover the land was required to bring a claim within the ten-year period. *Id.* at 88, 881 P.2d at 1193. Because the Jacksons as holders of the deed of trust had no right to recover the land unless Moore defaulted on the promissory note, and no evidence indicated that Moore had been in default, the court concluded that the limitations period had not yet begun to run against the Jacksons, and they still held a lien on the disputed property. *Id.* The court rejected the theory that a

lienholder should be required to take notice of the rights of the person in possession of the property at the time the mortgage is taken. *Id.* at 87, 881 P.2d at 1192.

¶22 In *Stat-o-matic*, the disputed property was a portion of a parking lot. 189 Ariz. at 222, 941 P.2d at 234. In December 1984, Shull & Associates acquired an interest in the disputed property by deed of trust, as the security interest for a promissory note. *Id.* In April 1991, Shull assigned its beneficial interest in the deed of trust to Stat-o-matic. *Id.* The debtor defaulted on the underlying note, and Stat-o-matic acquired title by trustee's deed as the highest bidder at the trustee's sale of May 26, 1992. *Id.* Stat-o-matic filed a quiet title action against Assistance League, which claimed the portion of the parking lot by adverse possession. *Id.* Stat-o-matic argued in a summary judgment motion that the limitations period had not begun to run against it until it had acquired the right to possession at the trustee's sale. *Id.* The trial court granted the motion for summary judgment. *Id.* This Court affirmed. *Id.* at 225, 941 P.2d at 237.

¶23 This Court found that *Berryhill* requires that creditors purchasing property at a trustee's sale be given deference and treated more like lienholders than title owners who are discretionary purchasers. *Id.* at 223, 941 P.2d at 235. We noted that the policy of *Berryhill* "protects a lienholder from losing value on a lien where he has no ability to protect the property

from adverse possession" and found that policy applicable to default situations. *Id.* We also noted that an adverse possessor could succeed only to those rights held by the title owner, so that when the title owner held the property subject to the rights of the lienholder, the rights of the adverse possessor were likewise subject to the rights of the lienholder. *Id.* at 224, 941 P.2d at 236. Had Assistance League obtained title by adverse possession prior to the trustee's sale, the ownership of the property would still be subject to the lien and the possibility of foreclosure. *Id.* at 224-25, 941 P.2d at 236-37.

¶24 Here, the earliest date that the prescriptive easement claims could have vested was 1989 for the Sangers and 1994 for the Franklins, ten years after they first occupied their respective properties. Betty Jo Hancock sold her property including No Name Road to Watson-Pacific in January 1988 secured by the deed of trust. The sale occurred prior to the vesting of either prescriptive easement claim. From January 1988 to December 1996, Watson-Pacific owned the property subject to the deed of trust and the possibility of foreclosure. Consequently, at the time any prescriptive easement could have vested, the property was encumbered by the deed of trust and was therefore also subject to the possibility of foreclosure. In December 1996, Betty Jo Hancock, the beneficiary under the deed of trust, purchased the property at a trustee's sale after foreclosure. As a creditor purchasing the property at a trustee's sale, Hancock was entitled

to greater deference than regular purchasers as well as protection from losing value on the lien when she had no ability to protect the property from the prescription claim. *Stat-o-matic*, 189 Ariz. at 223-24, 941 P.2d at 235-36. Because as a lienholder Hancock could not bring a cause of action to quiet title to the property, the limitations period did not run until she acquired the right to recover the property at the trustee's sale.

¶25 The Plaintiffs argue that Hancock reserved a right of possession under the deed of trust.[3] Therefore, they contend, the limitations period against Hancock, which accrued when she and her husband owned the property, continued through the ownership of Watson-Pacific, while Hancock was beneficiary under the deed of trust. The Plaintiffs rely on the following language from the Watson-Pacific deed of trust:

> Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof,

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[3] The Oehlers assert correctly that this argument was not made in the trial court. Acting in our discretion, we address this argument. In addition, the Oehlers contend that the language of the deed of trust in *Berryhill* was identical to the language on which the Plaintiffs rely. The Oehlers ask that this Court supplement the record with a copy of the *Berryhill* deed of trust. We deny the request to supplement the record. Regardless of whether the deed trust of trust in *Berryhill* is identical to that presented here, the *Berryhill* opinion does not indicate that the particular argument made by the Plaintiffs with respect to the language in the deed of trust was made to the *Berryhill* court.

> Beneficiary or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and, in exercising any such powers, pay necessary expenses, employ counsel, and pay his reasonable fees.

The language of this section by itself appears to grant the trustee and Hancock, as beneficiary, general authority to enter the property and to participate in legal proceedings to protect the security of the deed of trust. We do not find, however, that this language authorizes Hancock to bring a cause of action for quiet title such that the limitations period ran against her while she was a beneficiary of the deed of trust.

¶26 Rather, this paragraph is the second of two paragraphs comprising section four of that portion of the deed of trust defining the obligations of the trustor. The first of the two paragraphs states:

> TO PROTECT THE SECURITY OF THIS DEED OF TRUST, TRUSTOR AGREES:
>
> . . . .
>
> 4. To pay before delinquent, all taxes and assessments affecting said property; when due, all encumbrances, charges, and liens, with interest, on said property or any part thereof, which appear to be prior or superior hereto; all costs, fees, and expenses of this trust, including, without limiting the generality of the foregoing, the fees of Trustee for issuance of any Deed of Partial Release and Partial Reconveyance or Deed of

> Release and Full Reconveyance, and all lawful charges, costs, and expenses in the event of reinstatement of, following default in, this Deed of Trust or the obligations secured hereby.

Read in context, the language on which the Plaintiffs rely refers to the duty of the trustor to pay taxes and other financial obligations in a timely manner and authorizes the trustee and the beneficiary to take whatever action is necessary to ensure that such payments are made. The language does not reserve a general right of possession in Hancock or give Hancock the right to initiate a claim for adverse possession or take possession of the property absent a default by Watson-Pacific.

¶27 As discussed in *Berryhill*, the limitations period of section 12-526(A) runs only against a person with a present right to recover property. 180 Ariz. at 88, 881 P.2d at 1193. Hancock had no such right until Watson-Pacific defaulted under the deed of trust. The limitations period against Hancock, therefore began to run anew in 1996 when she purchased the property at the trustee sale. Consequently, the prescriptive period had not yet run when this action was brought in 2002. The trial court therefore erred as a matter of law in finding that the Plaintiffs had a prescriptive easement over that portion of the Oehlers' property now known as No Name Road.[4]

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[4] The Plaintiffs, citing *Stryker v. Rasch*, 112 P.2d 570, 573 (Wyo. 1941), which was discussed in *Berryhill*, argue that such a result is unacceptable because it would permit a property owner (continued...)

II. Encroachments

¶28 The Oehlers also argue that the trial court erred in denying their request for removal of the Franklins' encroaching property on the grounds that the encroachment was de minimus, asserting that the de minimus doctrine is not available to the Franklins because they were negligent in placing the structures on the property.

¶29 In their counterclaim, the Oehlers sought an order of ejectment, in essence seeking a mandatory injunction for the removal of the encroaching subsurface footings of the Franklins' block wall and the encroaching portion of the Franklins' driveway. The parties stipulated that the subsurface footings of the block wall encroached approximately eighty-six square feet onto the Oehlers' property and that the driveway encroached approximately sixteen square feet.

¶30 A grant or denial of injunctive relief is within the discretion of the trial court, and we will not disturb the trial court's ruling absent abuse of discretion. *Horton v. Mitchell*, 200 Ariz. 523, 526, ¶ 12, 29 P.3d 870, 873 (App. 2001). Because the parties did not request the trial court to make findings of fact and conclusions of law pursuant to Rule 52(a), Arizona Rules

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[4] (...continued)
against whom an adverse possession has begun to run, to suspend the running of the limitations period by executing a mortgage. *Berryhill* rejected the reasoning of *Stryker*, as do we. *Berryhill*, 180 Ariz. at 87, 881 P.2d at 1192.

of Civil Procedure, we assume the trial court found every fact necessary to support the judgment and we must sustain the trial court's ruling if any reasonable construction of the evidence supports it. *Berryhill*, 180 Ariz. at 82, 881 P.2d at 1187.

¶31 In *Golden Press v. Rylands*, 235 P.2d 592 (Colo. 1951), on which the trial court relied, the Colorado Supreme Court recognized that, although ordinarily an injunction to remove encroachments will be granted, the court must consider the "peculiar equities" in each case. 235 P.2d at 594-95. The court went on to state:

> Where the encroachment is deliberate and constitutes a willful and intentional taking of another's land, equity may well require its restoration regardless of the expense of removal as compared with damage suffered therefrom; but where the encroachment was in good faith, we think the court should weigh the circumstances so that it shall not act oppressively. . . . Where defendant's encroachment is unintentional and slight, plaintiff's use not affected and his damage small and fairly compensable, while the cost of removal is so great as to cause grave hardship or otherwise make its removal unconscionable, mandatory injunction may properly be denied and plaintiff relegated to compensation in damages.

Id. at 595. The trial court here found that the Franklins' encroachment was done in good faith, that the encroaching portions were relatively small, and that their removal would disproportionately impact the Franklins.

¶32 Relying on *Christensen v. Tucker*, 250 P.2d 660 (Cal. Ct. App. 1952), the Oehlers argue that the Franklins are not entitled to a balancing of the hardships. The *Christensen* court recognized

that a court in equity had discretion to deny an injunction for removal of encroachments "where the encroachment does not irreparably injure the plaintiff, was innocently made, and where the cost of removal would be great compared to the inconvenience caused plaintiff." *Id.* at 663. The court concluded, however, that a defendant was not entitled to the benefit of weighing the relative hardships when the sole proximate cause of the encroachment was the defendant's negligence. *Id.* at 666.

¶33 The Oehlers argue that the encroachments were caused by the Franklins' negligence because the Franklins did not obtain a survey of the property line before constructing their wall and driveway, and that therefore they are not entitled to a weighing of hardships. They contend that *Christensen* recognized that failure to obtain a survey was negligent and precluded the application of the balancing test. *Christensen* involved an owner who built encroachments after knowing of the plaintiff's claim. *Id.* at 666. The court stated that, under such circumstances, the owner was negligent in failing to conduct a survey and was therefore barred from invoking the balancing test. *Id.* at 666. The case did not state that failure to obtain a survey was de facto negligence. Under the standards stated in *Golden Press* and *Christensen*, we find that the record contains evidence to support the trial court's application of the balancing test.

¶34 The trial court specifically found that the Franklins acted in good faith. It made no findings regarding negligence. Mr. Franklin acknowledged that he did not obtain a survey to determine the property line. However, from his testimony, the court could conclude that he made a reasonable effort to determine the correct property line and to construct the wall within that boundary. Mr. Franklin testified that, prior to building the block wall, he consulted "County people" and "other people" who showed him the location of one of the pins for his property line. He used that pin, sited to the Sangers' property, to determine his property line and built the block wall two feet within that line. He testified that he believed that his block wall was at least two feet within his property line. From this evidence the trial court could have concluded that Mr. Franklin acted reasonably in attempting to build his wall within his property line.

¶35 The Oehlers also argue that a total encroachment of more than 100 square feet is not de minimus. The evidence showed that the encroachment of the subsurface footings of the block wall was approximately 1.14 feet at one end to .27 feet at the other, for a total of 86.2 square feet. The Oehlers' property consisted of twenty-eight acres. The footings are approximately eighteen inches underground. The Oehlers presented no evidence that the encroachment caused them injury or affected their use of the property or their prospective use of the property. In contrast, Mr. Franklin testified that he estimated it would cost $8,000 to

$10,000 to tear down and rebuild the block wall.[5] Given this evidence, the trial court could properly find that the encroachment of the footings was de minimus and the removal of the footers would disproportionately impact the Franklins. We find no abuse of discretion in the court's decision to deny the relief requested by the Oehlers with respect to the footings.

¶36 We reach a different conclusion, however, regarding the encroachment of the driveway. The cement slab of the driveway encroaches on the Oehlers' property by .89 feet at one end and by .67 feet at the other end, for a total of 16.2 square feet. Although the extent of the encroachment is less than that of the block wall footings, the parties did not present evidence from which the court could weigh any hardship. The Franklins presented no evidence as to the cost or any other hardship related to removing the encroachment. The only evidence with respect to the driveway, therefore, is that the Franklins' driveway encroached on the Oehlers' property. Under these facts, the trial court abused its discretion in denying the Oehlers' request to order the removal of the encroaching portion of the driveway.

III. Attorneys' Fees

¶37 Both sides request attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(C) (2003). This statute requires the court to award reasonable attorneys' fees "in any contested action upon

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[5] Mr. Franklin testified that, as a property adjustor, he felt qualified to offer the opinion as to the cost.

clear and convincing evidence that the claim or defense constitutes harassment, is groundless and is not made in good faith." A.R.S. § 12-341.01(C). All three elements must be present to award fees under this section. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 33, 20 P.3d 1158, 1168 (App. 2001).

¶38 Because each side prevailed in part, neither has shown the other's prosecution of this appeal is groundless. We find fees are not awardable.

CONCLUSION

¶39 Under *Berryhill*, any prescriptive easement that had vested in the Plaintiffs was subject to the deed of trust of which Hancock was the beneficiary. Because the limitations period cannot run against the lienholder and because *Berryhill* protects the lienholder from a loss of value of the lien, upon foreclosure Hancock purchased the property free of any prescriptive easement. The court erred in finding that the Plaintiffs held a prescriptive easement over the Oehlers' property.

¶40 Further, the court appropriately applied the balancing of hardship test in determining whether to issue an injunction requiring the removal of the encroachment of the Franklins' block wall footings and did not abuse its discretion in declining to issue such an order. However, the court did abuse its discretion in refusing to order the removal of the encroaching portion of the

Franklins' driveway because the Franklins presented no evidence that hardship would result from requiring its removal.

¶41 For the foregoing reasons, we reverse the superior court's holding that the Plaintiffs held a prescriptive easement and refusing to order removal of the encroaching portion of the Franklins' driveway. We affirm that portion of the judgment denying an injunction requiring the removal of the block wall fittings. We remand the case to the superior court for further proceedings consistent with this decision.

DONN KESSLER, Presiding Judge

CONCURRING:

PATRICIA A. OROZCO, Judge

SHELDON H. WEISBERG, Judge