12CA0653 Elk Falls v. Dunwody 5-2-2013

COLORADO COURT OF APPEALS

Court of Appeals No. 12CA0653
Park County District Court No. 10CV65
Honorable Stephen A. Groome, Judge

Elk Falls Property Owners Association, a Colorado nonprofit organization,

Plaintiff-Appellee and Cross-Appellant,

and

The Paul J. Vastola and Suzanne G. Nelson Living Trust; UAD August 10, 2001; Robert W. Phelps; and Kevin O'Connell,

Plaintiffs-Appellees,

v.

Vera B. Dunwody and Drayton D. Dunwody,

Defendants-Appellants and Cross-Appellees.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE J. JONES
Richman and Nieto*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced May 2, 2013

The Wells Law Firm, P.C., Fred D. Wells, Evergreen, Colorado; Montgomery Little & Soran, P.C., Frederick B. Skillern, Echo D. Ryan, Nathan G. Osborn, Greenwood Village, Colorado, for Plaintiffs-Appellees and Cross-Appellant

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2012.

Defendants, Vera B. and Drayton D. Dunwody, appeal the district court's judgment finding implied easements over Juniper Road, Jensen Road, and South Elk Creek Road, and finding that part of South Elk Creek Road is a public road. Plaintiff Elk Falls Property Owners Association (the Association) cross-appeals the district court's denial of its motion for attorney fees. We affirm.

I. Background

John Jensen acquired land, known as Elk Falls, in the 1920s. In 1959, Mr. Jensen's daughter, Alice Berg, and her husband, Elmer Berg, separately owned the relevant and adjacent parcels of that land. Mr. Berg owned the section underlying the roads at issue here. Ms. Berg owned the section that later became Elk Falls Blocks 1 and 2, except for several small lots that had been sold over the preceding decades. That year, Ms. Berg reacquired those lots and resubdivided the land. She recorded a new residential subdivision plat of Elk Falls Block 1 in Jefferson County, which showed, adjacent to the platted property, three roads with extensions into Mr. Berg's land in Park County.[1] The

[1] Park and Jefferson Counties later agreed to move the county boundary eastward approximately 600 feet, so that the boundary

interconnected westerly extensions of these three roads, Juniper Road, Jensen Road, and South Elk Creek Road, are the subject of this case.

Mr. Berg died in 1962, leaving to Ms. Berg the Park County land underlying the road extensions. Before Mr. Berg's death, Mr. and Ms. Berg had begun planning the next subdivision of Elk Falls (Block 2). And a few months after Mr. Berg's death, Ms. Berg subdivided and recorded the plat for Elk Falls Block 2 in Jefferson County. Elk Falls Block 2 lies east of and adjacent to Block 1.

In 1966, Ms. Berg sold a large portion of property, including the portion underlying the disputed roads, to the Elk Falls Ranch Development Company. The Development Company subdivided and sold residential lots on that property, platted as Elk Falls Block 3 (which lies west of and adjacent to Block 1). The Development Company did not subdivide the area underlying the extensions to Jensen and Juniper roads, and further extended South Elk Creek Road to permit owner access to newly subdivided Block 3 lots.

Since at least 1960, the disputed road extensions have

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line now bisects Elk Falls Block 1. By agreement between the counties, Jefferson County maintains a portion of South Elk Creek Road that lies in Park County.

provided "the preferred and primary way of access" to the Block 1 lots, mailboxes, and a lodge that stood between Jensen and South Elk Creek Roads. The roads have also been used continually for hiking, biking, and horseback riding. And portions of the roads have been used by school buses to transport resident children to and from school.

The Dunwodys purchased the parcel of land underlying the road extensions in 2008. Elk Falls property owners continued to use the roads (referred to by the parties as the "disputed roads") as they had for decades. In 2010, the Dunwodys placed boulders across the extensions of Juniper and Jensen Roads, closed off the entrance lane to Block 3 over South Elk Creek Road, and hung a sign on a sawhorse saying "road closed, private road."

The Association, along with some individual Elk Falls property owners, filed an action for trespass and to adjudicate their rights in the roads. The district court granted plaintiffs' motion for a temporary restraining order, which allowed plaintiffs to continue to use the roads pending a final order. After a bench trial, the court found, as relevant here, that (1) the property owners have implied easements over Jensen, Juniper, and South Elk Creek Roads (a) by

prescription, (b) by estoppel, and (c) by virtue of a common development plan; (2) a part of the disputed portion of South Elk Creek Road is a public road; and (3) the Dunwodys and their predecessors-in-interest had notice of the easements. The court subsequently denied the Association's request for an award of attorney fees pursuant to subsection 38-33.3-123(1)(c), C.R.S. 2012.

On appeal, the Dunwodys contend that the district court erred by (1) finding that Elk Falls property owners have implied easements; (2) failing to join Park County as a party to the action; and (3) failing to properly apply section 38-35-109, C.R.S. 2012, Colorado's race-notice recording statute. On cross-appeal, the Association contends that the district court erred by denying its motion for attorney fees pursuant to subsection 38-33.3-123(1)(c). We address each contention in turn.

II. Discussion

A. Easements

An easement is "a right conferred by grant, prescription or necessity authorizing one to do or maintain something on the land of another 'which, although a benefit to the land of the former, may

be a burden on the land of the latter.'" *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1234 (Colo. 1998) (quoting *Barnard v. Gaumer*, 146 Colo. 409, 412, 361 P.2d 778, 780 (1961)). An easement "obligates the possessor [of the land] not to interfere with the uses authorized by the easement." Restatement (Third) of Property: Servitudes § 1.2(1).

The law of implied easements permits courts to find implied property rights honoring the intentions of the parties, even if those rights were not formally conveyed. *Lobato v. Taylor*, 71 P.3d 938, 950 (Colo. 2002). Easements not conveyed by express contract or conveyance are implied easements. Restatement (Third) of Property: Servitudes § 2.8 cmt. b; *see Lobato*, 71 P.3d at 950. Implied easements may be created by prescription, estoppel, map or boundary description, or other circumstances surrounding the conveyance of interests in land. *Lobato*, 71 P.3d at 950; Restatement (Third) of Property: Servitudes § 2.8 cmt. b.

The land benefited by the easement is known as the dominant estate, and the land burdened by the easement is known as the servient estate. *Salazar v. Terry*, 911 P.2d 1086, 1090-91 (Colo. 1996); *Westpac Aspen Invs., LLC v. Residences at Little Nell Dev.,*

LLC, 284 P.3d 131, 135 (Colo. App. 2011). Absent evidence to the contrary, an easement is presumed to benefit the owner of the dominant estate and all subsequent owners by virtue of their property ownership. *See Lobato*, 71 P.3d at 945; Restatement (Third) of Property: Servitudes § 4.5(2).

1. Easements by Prescription

"An easement by prescription is established when the prescriptive use is: 1) open and notorious, 2) continued without effective interruption for the prescriptive period, and 3) the use was either a) adverse or b) pursuant to an attempted, but ineffective grant." *Lobato*, 71 P.3d at 950; *accord Westpac*, 284 P.3d at 135; *see* Restatement (Third) of Property: Servitudes § 2.17 cmt. d (prescriptive rights can be acquired either by adverse use or by use pursuant to an intended but imperfectly created servitude). In Colorado, the prescriptive period is eighteen years. § 38-41-101(1), C.R.S. 2012.

The district court found that plaintiffs had proved each element of their claim for prescriptive easements. As to the last element, the court did not find that the use of the roads had been adverse; but, it found that "the facts surrounding the platting of Elk

Falls" showed that the Bergs intended to create easements over the disputed roads.

On appeal, the Dunwodys do not dispute that Elk Falls property owners have openly and notoriously used Jensen, Juniper, and South Elk Creek Roads for at least eighteen years. They argue only that the use was not adverse and that there was no "attempted but ineffective grant" of the easements because Mr. Berg did not intend to grant the easements, and Ms. Berg did not own the servient land over which she arguably attempted to grant easements.

We review de novo recorded instruments, such as plats. *Bolinger v. Neal,* 259 P.3d 1259, 1263 (Colo. App. 2010). We likewise review de novo the district court's legal conclusions. *Westpac*, 284 P.3d 135; *Brown v. Faatz*, 197 P.3d 245, 249 (Colo. App. 2008). But we will not disturb a district court's determination concerning the existence of a prescriptive easement if the court based its factual findings on competent evidence in the record. *Westpac*, 284 P.3d at 135; *Trask v. Nozisko*, 134 P.3d 544, 550 (Colo. App. 2006). Intent, the key issue as to this claim, is a question of fact. *Bolinger*, 259 P.3d at 1263.

It is undisputed that the historic use of the Jensen, Juniper, and South Elk Creek roads was not adverse. But there is ample evidence in the record supporting the district court's finding that the Bergs attempted to and intended to grant the easements.

Ms. Berg owned the Jefferson County property (subdivided by plat), Mr. Berg owned the Park County property (underlying the easements), and both actively participated in the reacquisition, subdivision, and platting process.[2] The record contains substantial correspondence between surveyors, attorneys, and Jefferson County officials concerning the plat of Elk Falls Block 1, and Mr. Berg is named on every document.

The district court heard testimony from Ira Hardin, who was Jefferson County's acting planning director when the County approved the plat of Block 1. Mr. Hardin testified that when the plat was approved, he had understood that Ms. Berg owned the property underlying the disputed roads. He also testified that the

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[2] The plat labels the area underlying the extensions "MRS[.] ALICE E. BERG (UNSUBDIVIDED)," and only Ms. Berg signed the plat. Because Ms. Berg did not own the property underlying the disputed roads shown on the Elk Falls Block 1 plat document when the plat document was recorded, the district court concluded that there was no express grant of the easements.

roads existed at the time, and that had they not existed, the County would have required a fifty-foot diameter "turnaround" at the end of Juniper, Jensen, and South Elk Creek roads before approving the plat.

On the Block 1 plat document, the extensions of both Juniper and Jensen roads are labeled "50 FOOT RIGHT OF WAY." The extension of South Elk Creek Road is labeled "EXISTING COUNTY ROAD – PROPOSED 60 FOOT R/W." A right-of-way, "when used to describe an ownership interest in real property, is traditionally construed to be an easement." *Hutson v. Agric. Ditch & Reservoir Co.*, 723 P.2d 736, 739 (Colo. 1986); *accord Bijou Irrigation Dist. v. Empire Club*, 804 P.2d 175, 182 n.14 (Colo. 1991).

The Bergs' joint participation in the Block 1 platting process, the representation on the plat that Ms. Berg owned the land underlying the disputed roads, and Ms. Berg's signature on the plat labeling the disputed roads as rights-of-way all support a factual finding that the Bergs jointly intended to grant easements over the extensions of Juniper, Jensen, and South Elk Creek Roads. Their attempt was ineffective, however, because they were mistaken as to the ownership of the servient estate, and they did not record a

corresponding map of the road extensions in Park County.

We are unpersuaded by the Dunwodys' argument that Ms. Berg did not intend to grant easement rights over the disputed roads because the deeds in the chain of title do not refer to such easements. The warranty deed for the relevant property, from Ms. Berg to the Development Company, granted the property "EXCEPT and subject to rights of way, easements, conveyances and reservations for roads . . . ." (Capitalization in original.) And the special warranty deed from the Development Company to the Dunwodys granted the property subject to "[e]xisting roads and rights of way" and excepted the "Right of way for [the Park County portion of South Elk Creek Road] and all roadways as depicted on the recorded plats of Blocks 1, 2, and 3." It is undisputed that the Juniper, Jensen, and South Elk Creek Roads were existing roads for many years prior to Ms. Berg's grant to Development Company, and that they exist to this day. In any event, the lack of specific language in the deeds would not be dispositive.

Thus, we conclude that the district court did not err by finding that plaintiffs have implied easements by prescription over the disputed roads.

2. Easements by Estoppel

An easement by estoppel is an equitable remedy, founded on the principle of preventing injustice. *Lobato*, 71 P.3d at 951; *Bolinger,* 259 P.3d at 1268. Such an easement may be created when (1) the owner of the servient estate permitted use of the land and it was foreseeable that users would substantially change position believing that the permission would not be revoked; (2) users substantially changed position in reasonable reliance on that belief; and (3) injustice can be avoided only by establishment of a servitude. *Lobato*, 71 P.3d at 950-51.

The district court found that the Bergs had acted in a manner which would reasonably have led road users to believe that they were entitled to use the roads for access to their properties. The court also found that recognition of easements by estoppel was necessary to avoid injustice because the "alternate routes are far less convenient to the majority of property owners and sometimes can be hazardous during winter months . . . ."

The Dunwodys do not contend that plaintiffs failed to prove the second and third elements. They argue only that plaintiffs did not prove the first element because the Dunwodys themselves had

not induced reliance by the road users. We conclude, however, that Colorado law does not require a current servient estate owner to have personally induced reliance; thus, we perceive no error in the district court's finding of implied easements by estoppel.

In support of their position, the Dunwodys rely on *Bolinger*, 259 P.3d 1259. In *Bolinger*, a division of this court concluded that a district court did not abuse its discretion by rejecting a claim for an easement by estoppel when the owner of the would-be servient estate "did not have any role in the misrepresentations that induced the change of position" by the owner of the would-be dominant estate. *Id.* at 1268. In so concluding, the division said that neither the plaintiffs nor the division had been able to identify a Colorado case recognizing an easement by estoppel under those circumstances. *Id.*

The Dunwodys' reliance on *Bolinger*, however, is not well-founded. "The Restatement does not have a requirement of deception [for an easement by estoppel], neither does Colorado." *Lobato*, 71 P.3d at 951. In *Lobato* itself, the supreme court held that dominant estate owners had easements by estoppel against the then-current servient estate owner, even though the servient estate

owner had made no representations and induced no change in position by those claiming an easement. 71 P.3d at 955 ("[The current owner's] *predecessors in title* 'permitted [the settlers] to use [the] land under circumstances in which it was reasonable to foresee that the [settlers] would substantially change position believing that the permission would not be revoked.'") (quoting in part Restatement (Third) of Property: Servitudes § 2.10; emphasis added). Thus, we decline to follow *Bolinger* to the extent that it holds that an easement by estoppel requires conduct by the current owner of the burdened land inducing reliance. *See Valentine v. Mountain States Mut. Cas. Co.*, 252 P.3d 1182, 1195 (Colo. App. 2011) (one division of the court of appeals is not bound by the decision of another division).

The Dunwodys argue that *Lobato* does not apply to this case because "there were no deeds through the years establishing that [plaintiffs] had rights to the disputed roads." But *Lobato* does not hold that such deeds are the sole legally recognized means of inducing reasonable reliance. And, in any event, as discussed in Part II.A.1., the relevant deeds conveyed the property subject to those existing roads, "rights of way," and "easements."

Nor are we persuaded by the Dunwodys' contention that *Lobato* is limited to claims for easements pertaining to "profits," and does not apply to claims for easements pertaining to access. Nothing in *Lobato* suggests such a limitation. To the contrary, the court in *Lobato* applied principles applicable to access easements in analyzing the claims before it. 71 P.3d at 945, 950-52. And the court noted, and followed, the "modern trend to apply the same rules to easements of access and to profits." *Id.* at 952 (also noting, quoting Restatement (Third) of Property: Servitudes § 1.2 reporter's note, that "as between easements in the form of access rights and easements in the form of profits 'there are no doctrinal differences between them'").

3. Easements by Common Development Plan

An implied easement also may be created when (1) the owner of a servient estate conveys lots in a common development; (2) subject to an easement declaration. Restatement (Third) of Property: Servitudes § 2.1(1)(b). The easement declaration may appear on a recorded plat, and need not contain the word "easement." *See Bolinger*, 259 P.3d at 1264-65. "Each lot included within the [common development] plan is the implied beneficiary of

all express and implied servitudes imposed to carry out the [common development] plan." Restatement (Third) of Property: Servitudes § 2.14 (1).

The district court found that the Bergs, in platting Blocks 1 and 2, had jointly developed a plan including easements, and that the platting of Block 3 was a continuation of that plan.

The Dunwodys argue that the district court did not have jurisdiction to find an easement by common development plan because Park County Commissioners approved the rezoning of their property. They further argue that the Bergs could not have created easements by virtue of their plats because (1) Ms. Berg did not own the servient estate when she platted Blocks 1 and 2; (2) the plats did not identify the dominant and servient estates; and (3) the plats did not expressly grant easements to the landowners of Elk Falls Blocks 1, 2, and 3.

A determination of this claim would not, in light of our other conclusions, increase or decrease any party's rights. Therefore, we decline to address it.

B. Public Road

Before trial, the Dunwodys moved to join Park County as an

indispensable party pursuant to C.R.C.P. 19, because plaintiffs' action seeking complete adjudication of their interests in the disputed roads involved a determination whether the disputed roads are public. The district court ordered joinder of Park County as a party defendant. Park County entered an appearance, noting "that since no relief is apparently requested from the County or by any party to this case, the County is somewhat mystified as to why it has been joined as a party defendant or, for that matter, a party at all." The County then requested that the court reconsider its joinder order, asserting that the motion to join was untimely, and that involuntary joinder of the County was unwarranted because the County claims no interest relating to the action. The court vacated its order.

In its final order, the court determined that a short stretch of the disputed portion of South Elk Creek Road was a public road.[3] The Dunwodys contend on appeal that the district court erred by finding that part of South Elk Creek Road was a public road without Park County being joined as a party to the action. We are

[3] This section of the road leads to a gate built by the Association in 1977. The court found that the gate effectively marks the end of the public portion of the road.

not persuaded.

A party shall be joined under C.R.C.P. 19(a) if (1) complete relief cannot be afforded to those already parties in the party's absence or (2) the party claims an interest in the subject of the litigation and (a) the litigation may, as a practical matter, impair that interest or (b) absent joinder there is a risk of subjecting those already parties to multiple or inconsistent obligations. A party falling within the ambit of Rule 19(a) is a necessary party, who must be joined if feasible. If joinder is not feasible, the court must determine if the party is indispensable (that is, one in whose absence the case cannot proceed) under Rule 19(b). *See Potts v. Gordon*, 34 Colo. App. 128, 132-35, 525 P.2d 500, 503-04 (1974).

The primary purpose of requiring joinder of a party under Rule 19 is to afford that party due process: where the court may take action that affects the rights of a party, that party is entitled to the opportunity to protect its rights. *See Hidden Lake Dev. Co. v. Dist. Court*, 183 Colo. 168, 173, 515 P.2d 632, 635 (1973); *Potts*, 34 Colo. App. at 132-33, 525 P.2d at 503. There is no such concern here.

As discussed above, the district court did join Park County as

a party to this action.[4] Park County was represented by counsel and was aware of the issues and risks involved in the case (including that the roads might be declared public), but expressed indifference as to the result. It therefore was afforded the opportunity to protect its rights.

Moreover, the district court found that Jefferson County has maintained and paved the relevant section of road, has done so for well over twenty years, and continues to maintain the road pursuant to an agreement with Park County. Thus, from a practical standpoint, Park County's rights were only tangentially at issue.

Nor is there any risk of multiple or inconsistent obligations. The Dunwodys do not claim any such risk, and none is apparent to us.

Lastly, we observe that the Dunwodys do not claim that they suffered any prejudice by virtue of Park County's nonparticipation. True, a portion of one road was found to be public. But the

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[4] We are disturbed by the Dunwodys' counsel's failure to mention this highly relevant fact, and other highly relevant facts pertaining to this issue, in the Dunwodys' opening brief. These omissions appear to be in violation of an attorney's duty of candor toward the court. *See* Colo. RPC 3.3.

Dunwodys' ability to advocate for a contrary finding was not hampered by Park County's nonparticipation.

Under these circumstances, we conclude that Park County was not a necessary party, much less an indispensable party. Therefore, we perceive no abuse of discretion in the district court's grant of Park County's motion for reconsideration of joinder. *See Bittle v. CAM-Colorado, LLC*, 2012 COA 93, ¶ 12 ("We may not overturn a district court's resolution of an indispensable party issue unless it reflects a clear abuse of discretion.").

C. Race-Notice

Finally, the Dunwodys contend that the district court erred by finding that plaintiffs had implied easements because the plats for Elk Falls Blocks 1 and 2 were recorded only in Jefferson County, and the land encumbered by the easements is located in Park County. As a result, the Dunwodys claim that they did not have actual or constructive notice of the claimed easements. We are not persuaded.

When a written instrument conveying interest in real property is recorded, all subsequent owners are charged with constructive notice of that interest. *Franklin Bank, N.A. v. Bowling,* 74 P.3d 308,

314 (Colo. 2003); *see* § 38-35-109(1), C.R.S. 2012. Unless the grantee of a servient estate has notice of an unrecorded easement interest, the grantee who first records an interest may extinguish that easement. *See* Restatement (Third) of Property: Servitudes § 7.14 (an unrecorded servitude is subject to extinguishment under an applicable recording act).

Colorado's recording statute, subsection 38-35-109(1) provides, as relevant here:

> All deeds, powers of attorney, agreements, or other instruments in writing conveying, encumbering, or affecting the title to real property . . . may be recorded in the office of the county clerk and recorder of the county where such real property is situated . . . . No such unrecorded instrument or document shall be valid against any person with any kind of rights in or to such real property who first records and those holding rights under such person, except between the parties thereto and against those having notice thereof prior to acquisition of such rights. This is a race-notice recording statute.

Fundamentally, implied easements are not created by "instruments in writing conveying, encumbering, or affecting the title to real property." *Id.*; *see* Restatement (Third) of Property: Servitudes § 2.8 cmt. b (implied easements are not created by express contract or conveyance; they are not covered by the statute

of frauds).

But Colorado courts recognize that actual notice protects unrecorded interests in real property against subsequent recording. *Martinez v. Affordable Housing Network, Inc.,* 123 P.3d 1201, 1206 (Colo. 2005); *Franklin Bank,* 74 P.3d at 313; *Goodman Assocs., LLC v. Winter Quarters, LLC*, 2012 COA 96, ¶ 24.[5]

Whether there was actual notice presents a question of fact, and we will not overturn the district court's findings regarding notice if there is a basis in the record to support them. *Hornsilver Circle, Ltd. v. Trope*, 904 P.2d 1353, 1356 (Colo. App. 1995).

At trial, the Dunwodys did not dispute that "they had actual notice of the existence of the disputed roads being used by Elk Falls property owners to access their property." On appeal, the Dunwodys argue that despite knowing that property owners used

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[5] Moreover, inquiry notice is sufficient to protect property interests. *See Martinez,* 123 P.3d at 1206; *Franklin Bank,* 74 P.3d at 313; *Goodman Assocs.,* ¶ 24. Inquiry notice "arises when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another." *Franklin Bank,* 74 P.3d at 313. Once there is a duty to inquire, the purchaser is "charged with all knowledge that a reasonable investigation would have revealed." *Id.* Even if the Dunwodys did not have actual notice, we conclude that the facts recounted here support a finding of inquiry notice.

the roads, they did not have actual notice of the extent of plaintiffs' interest in the roads. We conclude that the record supports the district court's determination that the Dunwodys had actual notice.

As previously discussed, the disputed roads had been in existence for over fifty years. The presence of the roads is evident from even a cursory inspection of the property. A former ranch manager testified at trial that the Dunwodys had visited Elk Falls multiple times prior to their purchase of the property to visit their son, who owned a house there. And when they drove to visit their son, they drove over the disputed portions of South Elk Creek and Juniper roads.

Ms. Dunwody is a sophisticated buyer and law school graduate. A title company representative, Ms. Dyer, who had worked on the Dunwodys' closing, testified that, three days before closing, Ms. Dunwody inquired whether South Elk Creek Road was dedicated. Ms. Dyer told Ms. Dunwody that "she couldn't possibly be expecting to cut off a roadway that had been used by the Elk Falls people for all those years, fifty or sixty years." Further, according to an internal title company message, Ms. Dunwody had come to the office with some questions. The message to Ms. Dyer

about Ms. Dunwody's visit said, "According to the Elk Falls B1 Plat there is a 50ft right-of-way. She claims there is an easement that we should be showing on our commitment regarding that." Perhaps as a result of these communications, the warranty deed from the Development Company to the Dunwodys excepted the "Right of way for [the Park County portion of South Elk Creek Road] and all roadways as depicted on the recorded plats of Blocks 1, 2, and 3." As noted above, the disputed roads are shown as rights-of-way on the plat document for Block 1.

Accordingly, we conclude that the district court did not err in finding that the Dunwodys had actual notice of plaintiffs' interests in easements over the disputed roads prior to their purchase of the property.

D. Attorney Fees

The Association contends on cross-appeal that the district court erred by not awarding it attorney fees pursuant to subsection 38-33.3-123(1)(c). We are not persuaded.

The Association was formed in 1965. The primary purpose of this organization was to maintain and repair the roads in the Elk Falls subdivision, including the disputed roads.

Subsection 38-33.3-123(1)(c) provides: "In any civil action to enforce or defend the provisions of [the Colorado Common Interest Ownership Act] or of the [common interest community's] declaration, bylaws, articles, or rules and regulations, the court shall award reasonable attorney fees, costs, and costs of collection to the prevailing party." For this statute to apply, "the purpose of the civil action must be to enforce or defend the provisions of a declaration or bylaws." *Cody Park Prop. Owners' Ass'n v. Harder*, 251 P.3d 1, 8 (Colo. App. 2009). Subsection 38-33.3-103(13), C.R.S. 2012, defines a declaration, as relevant here, as "any recorded instruments however denominated, that create a common interest community . . . including, but not limited to, plats and maps."

The Association argues that it seeks to enforce its rights under the easement declarations on the plats of Blocks 1 and 2. But the district court found, and we agree, that the Association's easements were implied, and therefore not created pursuant to any recorded plat. A plat, as defined in the Common Interest Ownership Act, "depicts all or any portion of a common interest community . . . and is recorded in the real estate records in every county in which any

portion of the common interest community is located." § 38-33.3-103(22.5), C.R.S. 2012. It is undisputed that the easements implied by this action lie outside the plats for Blocks 1 and 2, and that the Block 3 plat did not show easements over the disputed roads. The plat documents were merely evidence tending to support the existence of implied easements; they did not create easements. Therefore, subsection 38-33.3-123(1)(c) does not apply to this action, and we affirm the district court's denial of an award for attorney fees.

Accordingly, we also deny the Association's request for an award of attorney fees incurred on appeal.

The judgment is affirmed.

JUDGE RICHMAN and JUDGE NIETO concur.