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12 IN THE COURT OF APPEALS
13 STATE OF ARIZONA
14 DIVISION ONE

15 PATRICIA BOCCHINO,

16 Plaintiff / Appellee,

17 v.

18 FOUNTAIN SHADOWS
19 HOMEOWNERS ASSOCIATION,

20 Defendant / Appellant.

21 1 CA-CV 16-0710

22 Maricopa County Superior Court
Case No.: CV2015-012434
(Judge Douglas Gerlach)

**NOTICE OF DELIVERY AND
FILING OF TRANSCRIPT**

23 NOTICE IS HEREBY GIVEN that the Appellant / Defendant, Fountain Shadows
24 Homeowners Association, by and through undersigned counsel, gives notice of the delivery
25 and filing of the complete transcript of the Oral Argument held on June 7, 2016.

26 A copy of the transcript is attached, which is hereby concurrently served on
27 Appellee.

28 ///

1 RESPECTFULLY SUBMITTED this 8th day of December, 2016.

2 **Carpenter, Hazlewood, Delgado & Bolen, PLC**

3
4 

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9 ORIGINAL of the foregoing filed
10 this 8th day of December, 2016, with:

10 Arizona Court of Appeal
11 Division One
12 www.AZTurboCourt.gov

13 Copy of the foregoing mailed
14 this 8th day of December, 2016, to:

14 Jonathan A. Dessauls
15 Dessauls Law Group
16 5353 North 16th Street, Suite 110
17 Phoenix, Arizona 85016

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

PATRICIA BOCCHINO,)
)
Plaintiff,)
) CASE NO. CV2015-012434
v.)
)
FOUNTAIN SHADOWS HOMEOWNERS,)
ASSOCIATION,)
)
Defendant.)
_____)

Phoenix, Arizona
June 7, 2016
10:25 a.m.

BEFORE THE HONORABLE DOUGLAS GERLACH
SUPERIOR COURT JUDGE

TRANSCRIPT: ORAL ARGUMENT

Transcript prepared by:
VERBATIM REPORTING & TRANSCRIPTION, LLC

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A P P E A R A N C E S

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1 apply. That -- that was the authority cited by the Plaintiff
2 -- because 12-1810 section (O) says that the remedies there
3 are in addition to other civil remedies. Well, another civil
4 remedy would be the association's attempt to enforce a
5 contract, which is how I view their position here.

6 The cases cited by the association don't assist me
7 because the prevailing party in each case was a prevailing
8 party in a case where that party experienced opposition. They
9 had to overcome some sort of obstacle. That is not what
10 happened, according to the record in this case. That is not
11 what happened when the association obtained its injunction.

12 What we're dealing with here is an issue of contract
13 interpretation. Nobody disputes that the CC&Rs are contracts.
14 What does prevail mean? We go back to the rules of -- of
15 contract construction. We give the words their meaning as
16 they were understood at the time. What were the -- what --
17 what is the commonly understood meaning of prevail? And what
18 courts often do in such circumstances is look at dictionaries.
19 Both the American Heritage and Webster's New Collegiate
20 dictionaries, in the first definition, they're -- prevail is a
21 word that has multiple definitions.

22 But in the first, the primary definition, they at
23 least imply that prevail means triumphing over an opponent, or
24 overcoming opposition. In fact, the American Heritage dic --
25 Dictionary says, prevailed against the enemy, to illustrate

1 what the meaning is. Well, if we don't have -- if we don't
2 have opposition here that was incurred in the effort to get
3 the injunction, then it doesn't seem that we have -- that the
4 association can claim that it prevailed. But I'll certainly
5 with -- lit -- listen to that. However, we may not have to
6 get there.

7 The purpose of filing the petition, at the risk of
8 stating the obvious, was to enjoin the Plaintiff from engaging
9 in certain conduct. If the injunction was not enforceable as
10 written, if the injunction did not comply with due process
11 requirements, then the effort to obtain that injunction did
12 not succeed. And one can hardly be a prevailing party in an
13 effort that -- that failed. So let's begin with a discussion
14 about whether the injunction was enforceable as written. And
15 for that, I would like to turn to the association. Tell me
16 why you think the injunction as written was enforceable.

17 MR. MIESEN: Well, Your Honor, the -- the due
18 process as required for obtaining the injunction offers the
19 other party an opportunity to be heard.

20 THE COURT: No, that's not the due process I'm
21 talking about. I'm talking about the due process notion that
22 must be met before an injunction becomes enforceable.

23 MR. MIESEN: Yes. That it's --

24 THE COURT: The words of the injunction.

25 MR. MIESEN: It -- forgive me. The -- my -- what

1 I'm getting at is that the -- and -- and if I'm not answering
2 your question, I apologize, and you can help me, but is that
3 the injunction's enforceable once it's entered by the court
4 and served upon the party.

5 THE COURT: No. It's not enforceable if it's
6 written in a way that violates due process of it, and -- and
7 permit me, I'll tell you what I'm getting at.

8 MR. MIESEN: Sure.

9 THE COURT: Among other cases, Munari v. Hotham, in
10 order to support a judgment of contempt, the underlying decree
11 -- which would here be the injunction -- must set forth the
12 terms of compliance in clear, specific and unambiguous terms
13 so that the person charged with obeying the decree will re --
14 readily know exactly what duties and obligations are imposed
15 upon him, or in this case, her. Looking at the injunction,
16 what specifically, what exactly does near mean?

17 MR. MIESEN: If you give me just a moment, I'll pull
18 up the injunction.

19 THE COURT: It says the Defendant shall not go to or
20 near the Plaintiff's employers or other protected person's
21 workplace. What does near mean?

22 MR. MIESEN: Yeah. That language is part of the
23 form that the courts have adopted for all injunctions against
24 workplace harassment. So I would posit to the Court that if
25 in fact near is not sufficient, then all injunctions that are

1 currently written on these forms would be unenforceable.

2 THE COURT: Well, that may be the case, but I'm only
3 dealing with this one.

4 MR. MIESEN: Understood.

5 THE COURT: How does -- how does -- in this case,
6 how does the Plaintiff know whether or not she is violating
7 the injunction when -- when the order says don't go near, and
8 there are -- are what, five different addresses there.

9 MR. MIESEN: Uh-huh.

10 THE COURT: What -- what's near?

11 MR. MIESEN: Well, I think the common sense approach
12 to that, Your Honor, is that near is enough to come in contact
13 with, and it -- to the high probability of interaction with --

14 THE COURT: Well, that's -- that's your --

15 MR. MIESEN: -- the protected persons.

16 THE COURT: -- interpretation. But she is not -- no
17 plaintiff is supposed -- is required to call up the other
18 side's lawyer and say, now, here's where I'm going to go, is
19 that near?

20 MR. MIESEN: I think we come back to what you had
21 indicated at the beginning of this, which is we have to use
22 common definitions for terms, as the -- as they're used in the
23 world. And dictionaries provide certainly one -- one
24 authority to help assist --

25 THE COURT: Sure.

1 MR. MIESEN: -- in these types of words.

2 THE COURT: But they won't help on -- they won't
3 help on near. Does near mean 10 feet, 50 feet, 100 yards, 200
4 yards?

5 MR. MIESEN: I -- I -- I --

6 THE COURT: And is that -- is -- is that a subject
7 that could be -- could result in some disagreement?

8 MR. MIESEN: Yeah. I don't think that that renders
9 the injunction unenforceable, however, because --

10 THE COURT: It does if it -- if the Plaintiff
11 cannot, by looking at the injunction, know in the terms of the
12 cases exactly what she is prohibited from doing.

13 MR. MIESEN: Well, I think that she -- I think, Your
14 Honor, that certainly she cannot go to those addresses.

15 THE COURT: What is going to those addresses mean?

16 MR. MIESEN: Well, I mean, I don't know how to be
17 more specific with to. I mean, it -- to is you're -- you're
18 there. You're -- you're physically --

19 THE COURT: Like right in front? Right in front of
20 the -- right in front of the residence?

21 MR. MIESEN: Yes.

22 THE COURT: Okay. I looked up on goggle maps this
23 development. If the Plaintiff wanted to go over to the --
24 Grand Avenue, because she wanted to go to Wickenburg, the
25 shortest, most convenient route for her to take would require

1 her to drive past either the Toothman's residence or the
2 Gaytan residence. Which of those two routes does not violate
3 the injunction?

4 MR. MIESEN: Well, again, Your Honor, I think what's
5 required here is to understand the intent of the injunction,
6 and the language that is included here is intended to avoid
7 conflict, it's intended to avoid interaction with and
8 harassment by the Defendant in the injunction.

9 THE COURT: If -- if she drives past either of those
10 two residences, would you agree she is near those two
11 residence?

12 MR. MIESEN: I -- I -- I don't know if -- if driving
13 past meets the standards, the intentions of the language.

14 THE COURT: You don't know?

15 MR. MIESEN: I don't believe that it does.

16 THE COURT: Well, but how would the Plaintiff know?
17 How does the Plaintiff know when she's given a pay -- a piece
18 of paper that says don't go near?

19 MR. MIESEN: Take the most conservative approach and
20 don't go near.

21 THE COURT: Okay. So --

22 MR. MIESEN: If there's a question of whether --

23 THE COURT: So she has to --

24 MR. MIESEN: -- it's near --

25 THE COURT: So if she wants to go to Wickenburg --

1 MR. MIESEN: Yeah.

2 THE COURT: -- because of this injunction, she is
3 going to have to go out of her way, take a -- a round about
4 way to get there?

5 MR. MIESEN: Well, Your Honor, forgive me, I'm not
6 as familiar with that area. I haven't looked at the maps to
7 know if that --

8 THE COURT: Why didn't you look at it before you got
9 the injunction?

10 MR. MIESEN: At the maps?

11 THE COURT: Yeah.

12 MR. MIESEN: Why --

13 THE COURT: So you knew exactly what you were asking
14 for.

15 MR. MIESEN: Well, we knew what we were asking for,
16 and we were relying on the forms, because we believed that the
17 -- the common sense interpretation of the -- of the language
18 that's on those forms --

19 THE COURT: It's not.

20 MR. MIESEN: -- would have been --

21 THE COURT: It's not. And if you read the cases on
22 injunctions and the specific -- specificity that's required,
23 and I don't mean to be talking down to you, it's --
24 injunctions are not written to be interpreted. Injunctions
25 are to be written specifically so nobody has any doubt about

1 what is or is not permitted, so that you don't go into court
2 and say to a judge, okay, now interpret this injunction one
3 way or the other, so you don't have to go to a police officer
4 and explain what it means. It is there in black and white.

5 And I'll tell you, this comes up in Family Court all
6 the time, and -- and, again, forgive me if -- if you've been
7 in Family Court, where you have to put restrictions on how --
8 on people contacting other people. And you know what happens
9 all the time? We don't use words like near or far or
10 reasonable distance. It's 50 feet. It's 100 yards.

11 I can remember one time in an extreme case involving
12 violence that I prohibited the one ex-spouse from coming
13 within a one-mile radius of the other spouse. That's how you
14 get precision to these things. But to say near, I -- I -- I
15 think is just too inherently ambiguous to be enforceable.

16 But let me give you another example. If the
17 Plaintiff wished -- and I realize the injunction is no longer
18 in effect, or at least that's -- it -- or is it? It -- it's
19 been more than a year.

20 MR. MIESEN: I think it was in effect for a year,
21 Your Honor.

22 THE COURT: Yeah. It -- the -- the one year I --
23 and I assume that one year has passed, because it was issued
24 in March of 2015.

25 MR. MIESEN: That's my understanding.

1 THE COURT: But let's assume that it's still in
2 effect. Okay? If the Plaintiff wished to visit the main
3 branch of the Glendale Public Library, does she violate the
4 injunction?

5 MR. MIESEN: Yes, I believe she would.

6 THE COURT: So she can't go to the Glendale Public
7 Library to check out a book --

8 MR. MIESEN: That is what --

9 THE COURT: -- under the terms of this injunction?

10 MR. MIESEN: Yes, sir.

11 THE COURT: Doesn't that fit within the definition
12 of over broad?

13 MR. MIESEN: Well, when the association conducts
14 business at that branch, it's to protect those that are at
15 those meetings.

16 THE COURT: She's not going -- she's going to get a
17 book, and she is prohibited -- and -- and the other thing, the
18 other thing is there is no time restriction in this
19 injunction. Agreed?

20 MR. MIESEN: Agreed.

21 THE COURT: So the association may not be doing --
22 is -- the association, I assume, or maybe I'm wrong, they
23 don't do business there every day of the week, do they?

24 MR. MIESEN: No.

25 THE COURT: The way this injunction is written, if

1 she goes to the library to check out a book on some day when
2 the association has nothing going on there, she violates the
3 injunction?

4 MR. MIESEN: Well, and these matters were addressed
5 before a Justice of the Peace who believed, apparently, by
6 signing this order, that that wasn't overly broad.

7 THE COURT: Well, was he told that the address that
8 -- that she was prohibited from -- from visiting was the --
9 was a public library, and that she would be -- be prohibited
10 from entering that library at any time, on --

11 MR. MIESEN: I --

12 THE COURT: -- any day of the week?

13 MR. MIESEN: -- I certainly can't recall today what
14 was discussed at that hearing, Your Honor.

15 THE COURT: My guess is that if he'd been told that
16 he would have said, wait a minute. Because it seems on its
17 face rather -- rather unreasonable. Let me ask you another
18 question. Let's assume -- because on this injunction, what we
19 have here is we have the residences of -- well, one couple,
20 and -- and an individual. We have two residences within this
21 -- within this development. And as I read the statute, the
22 only way those residents are entitled to protection by the
23 injunction is if there's association business going on there,
24 because this is an injunction against workplace harassment.

25 These individuals could have gone to court on their

1 own and obtained injunctions against harassment. That,
2 however, would not have entitled the association to attorney's
3 fees if they had simply done it on their own. But we have,
4 you know, we have the facts as they are. And I'm assuming
5 that the reason that these two individual residences are on
6 the injunction is because association business goes on at
7 these residences. Otherwise, they don't even belong on the
8 injunction under the statute.

9 MR. MIESEN: Well, these individuals are officers of
10 the association.

11 THE COURT: Right.

12 MR. MIESEN: And as such, they were listed as
13 protected persons.

14 THE COURT: Right. So I'm --

15 MR. MIESEN: Because --

16 THE COURT: -- so I'm -- I'm going to give you the
17 benefit of the doubt, even though I think an argument can be
18 made that unless there is business going on there, at least
19 throughout the day, every day of the week, that these
20 residences would have more properly the subject of an
21 individual injunction rather than -- than -- than an
22 injunction against workplace harassment. But let's assu --
23 let's concede that for the point -- for the moment, that the
24 injunct -- that there is association business going on at
25 these two residences, and they are entitled to be protected as

1 part of the association's workplace.

2 If the Plaintiff went in front of either residence,
3 carrying a sign that said, whoever it -- Mr. Toothman, Mr.
4 Gaytan, whatever, should be -- or both, should be removed from
5 the board of directors, and walked back and forth in front of
6 those residences, not disrupting traffic, not disrupting any
7 passersby in any way, simply walked back and forth in front of
8 either of the -- or both of those residences carrying the
9 sign, would that violate the injunction?

10 MR. MIESEN: I think it would.

11 THE COURT: Okay. So what you are saying then,
12 because surely you do not disagree that urging the removal of
13 a member of the board of directors is constitutionally
14 protected speech, correct?

15 MR. MIESEN: I believe that -- well, whether the
16 association is restricted by the constitution as to its rules
17 and regulations for its association --

18 THE COURT: That's not the question.

19 MR. MIESEN: -- is a whole other issue.

20 THE COURT: The question, urging the removal of a
21 member of the board of tech -- protectors is -- board of
22 directors is constitutionally protected speech; do you
23 disagree with that?

24 MR. MIESEN: No. I agree with that.

25 THE COURT: So if she's violating the injunction,

1 then she is -- what you are doing is -- urging is that the
2 injunction should be interpreted in a way that limits
3 constitutionally protected speech?

4 MR. MIESEN: Only its location.

5 THE COURT: She -- she would have -- if -- if there
6 were no injunction in place -- some other homeowner could do
7 the same thing --

8 MR. MIESEN: Uh-huh.

9 THE COURT: -- right?

10 MR. MIESEN: Uh-huh.

11 THE COURT: So what you're doing is saying, the one
12 homeowner, you're free to -- to do this activity. But you,
13 Plaintiff, are not. You are limiting her ability to engage in
14 constitutionally protected speech.

15 MR. MIESEN: In front of their home, yes.

16 THE COURT: Right.

17 MR. MIESEN: Uh-huh.

18 THE COURT: Even though the statute says that the
19 injunction is not permitted to do that. ARS 12-1810
20 subsection (L)(2) says that the injunction cannot prohibit
21 constitutionally protected activity.

22 MR. MIESEN: I don't --

23 THE COURT: Picketing is a constitutionally
24 protected activity.

25 MR. MIESEN: Well, prohibit and limit I think are

1 two different things. You -- they're not prohibiting --

2 THE COURT: Well --

3 MR. MIESEN: -- her from --

4 THE COURT: -- it's the same thing here. If she's
5 not permitted to picket -- you know what, let's -- let's --
6 let's change it. Let's say that there's a homeowner's
7 association meeting going on, and she wants to picket in front
8 of the association meeting, you would say she's violating the
9 injunction?

10 MR. MIESEN: I think based on the language of the
11 injunction --

12 THE COURT: Uh-huh.

13 MR. MIESEN: -- there's a high probability that
14 she's in -- that she is.

15 THE COURT: Right. Even though that act -- that
16 activity, leaving aside who's doing it, that activity is
17 constitutionally protected.

18 MR. MIESEN: I think that it can be limited based on
19 location.

20 THE COURT: So you can limit somebody's ability to
21 engage in constitutionally protected speech by prohibiting
22 them from engaging in that speech in certain locations?

23 MR. MIESEN: Yes.

24 THE COURT: And the location that you have
25 identified is not a location where others are prohibited from

1 engaging in that activity?

2 MR. MIESEN: Correct.

3 THE COURT: Okay. I think if you read the cases,
4 that that doesn't work, but in any event. Okay. Anything
5 else you want to say? I've asked all my questions.

6 MR. MIESEN: Well, I believe that ob -- it's very
7 clear that the Court's read the papers, I'm not going to
8 restate everything. We believe that -- that -- to sum it up,
9 that Ms. Bocchino violated the governing documents, the CC&Rs.
10 The association had a right to enforce that. It chose this
11 particular avenue to do so, and was provided an injunction
12 order that was served. I -- I believe that that means the --
13 that the association was the prevailing party. I understand
14 the Court's concerns about enforceability, but --

15 THE COURT: What about -- what -- do -- do you have
16 anything more to add? I read all of your cases on -- on the
17 -- on the issue of prevailing party. And the distinction I
18 draw, as a I said, is those are cases in which there was
19 opposition that was overcome. This is not that case. So --

20 MR. MIESEN: I think the Court, though, and you --
21 you even read something from the dictionaries. I mean, the
22 dictionaries provide overcome opposition. There's a standard
23 of proof that's required. The Justice of the Peace doesn't
24 just say, well, thank you for coming in, I'll sign your order,
25 there -- there are standards that are required. There's

1 evidence that must be shown that there is harassing behavior.

2 THE COURT: Right.

3 MR. MIESEN: I think that's the opposition that --
4 that --

5 THE COURT: Who -- who --

6 MR. MIESEN: -- exists.

7 THE COURT: -- who -- how -- how was your request
8 for an injunction opposed? The law created the opposition by
9 imposing standards --

10 MR. MIESEN: Sure.

11 THE COURT: -- that you had to meet? That's
12 opposition?

13 MR. MIESEN: I believe that would be opposition,
14 Your Honor --

15 THE COURT: Okay.

16 MR. MIESEN: -- absolutely.

17 THE COURT: All right.

18 MR. MIESEN: But aside from that, I think that that
19 was one dictionary's definition. Black's Law Dictionary was
20 cited by one of the cases that I provided to the Court, or a
21 few of the cases that I provided to the Court, and that
22 actually stated prevailing party is the party in whose favor a
23 judgment is rendered --

24 THE COURT: Uh-huh.

25 MR. MIESEN: -- regarding damage -- the amount of

1 damages --

2 THE COURT: Uh-huh.

3 MR. MIESEN: -- awarded.

4 THE COURT: Uh-huh.

5 MR. MIESEN: So --

6 THE COURT: And a --

7 MR. MIESEN: -- in this --

8 THE COURT: And what we find is a judgment in whose
9 favor the -- the party in whose favor the judgment was
10 rendered over opposition from somebody else who was trying to
11 prevent that judgment. That's not an uncon -- that's not a
12 definition that support -- finds that a judgment in an
13 uncontested case --

14 MR. MIESEN: Well, the way I'm reading the Black's
15 Law Dictionary definition is that there's a judgment rendered.
16 There is certainly -- there are standards in -- even in
17 default cases that must be satisfied in order to have a
18 judgment rendered. But the point is that we requested certain
19 relief, we received certain relief --

20 THE COURT: Right.

21 MR. MIESEN: -- that was requested.

22 THE COURT: Right.

23 MR. MIESEN: Judgment was entered.

24 THE COURT: But -- but you know -- you -- you know
25 that if this were a case in which we were dealing with a

1 contract that did not have an attorney's fee provision in it,
2 you would not be able to get attorney's fees.

3 MR. MIESEN: In a -- in a default situation,
4 correct.

5 THE COURT: Right. Or in any situation. Because
6 the stat -- but -- it's a statute that says that it must be a
7 contested matter.

8 MR. MIESEN: Correct.

9 THE COURT: What we're dealing here is with
10 enforcing a contract that chose to use the word prevail.

11 MR. MIESEN: Uh-huh.

12 THE COURT: And as I read the principals of contract
13 construction, prevail means what is commonly understood.

14 MR. MIESEN: Yes.

15 THE COURT: And I haven't found anything that says
16 prevail -- one prevails in a situation where one experiences
17 no opposition. I mean --

18 MR. MIESEN: Well --

19 THE COURT: -- to me, it strikes me as, you know,
20 Arizona State, like every major college, if not every college,
21 football program in the country conducts spring practice 21 --
22 at least it used to be 21 days, at the con -- the conclusion
23 of which, there is a spring game. And they invite the
24 boosters out. I mean, you know, Alabama had over 70,000 at
25 theirs. I think Ohio State had -- had a -- maybe even 100,000

1 at their spring game. And there is a spring game, and there
2 is a winner and a loser. But the winner and the loser are not
3 Ohio State or Arizona State or anybody. The -- the team did
4 not prevail, because they were competing against one another,
5 not against an opponent. The offense may have prevailed over
6 the defense, the defense may have prevailed over the offense.
7 But you don't have a winner. You don't have these schools
8 claiming, we enter the next season with a record of one and 0
9 because we prevailed in this game.

10 MR. MIESEN: Well, Your Honor --

11 THE COURT: It seems to me to be the same thing.

12 MR. MIESEN: -- to tab another analogy here, you
13 know, I was in sports, individual sports, as well as team
14 sports growing up, and even with the individual sports, if
15 someone didn't show up, you know, at wrestling, someone
16 doesn't show up --

17 THE COURT: Right.

18 MR. MIESEN: -- you know, they -- they're
19 disqualified and that person is deemed the -- the winner --

20 THE COURT: Right.

21 MR. MIESEN: -- in that match.

22 THE COURT: Right.

23 MR. MIESEN: They prevailed. They receive a --
24 maybe even a medal, or some kind of trophy, or they have their
25 record --

1 THE COURT: Right.

2 MR. MIESEN: -- as one and zero. If someone doesn't
3 show up --

4 THE COURT: The --

5 MR. MIESEN: -- there's still a prevailing party.

6 THE COURT: Okay. Well, you're making the argument
7 you need to make. I'm not --

8 MR. MIESEN: I --

9 THE COURT: I -- and I will tell you, I -- I will
10 tell you, before I sent the email out, I went on Westlaw and
11 probably spent at least an hour trying to find a case anywhere
12 that dealt with the notions of prevail in whatever form, and
13 uncontested, unopposed, whatever, and I found nothing.

14 MR. MIESEN: Well, the cases that I provided the
15 Court, while perhaps there -- there was an opposing party,
16 because it was on appeal that these cases were coming out,
17 however. So I'm not surprised that the Court doesn't find
18 cases that -- and I certainly didn't find cases, either, where
19 it was an uncontested action, because who's --

20 THE COURT: Right.

21 MR. MIESEN: -- who's appealing that? But --

22 THE COURT: Well, but there could be district court
23 opinions.

24 MR. MIESEN: Yes. However, the standards that were
25 provided, and even the U.S. Supreme Court's definition of what

1 prevailing party is does not have the requirement that it be
2 opposed. And so I think it's --

3 THE COURT: Well, it -- I would suggest to you the
4 reason you don't find that in any of the cases is because it
5 was not an issue.

6 MR. MIESEN: Perhaps so.

7 THE COURT: So the -- so the --

8 MR. MIESEN: We don't have those --

9 THE COURT: They didn't decide one way or the other.

10 MR. MIESEN: Right.

11 THE COURT: So I think what we do is then we fall
12 back on -- on what is the commonly understood definition of
13 prevail.

14 MR. MIESEN: And I'll give you -- and I'll leave you
15 with the analogy that even in sports, you have --

16 THE COURT: Okay.

17 MR. MIESEN: -- prevailers --

18 THE COURT: Okay.

19 MR. MIESEN: -- when people don't show up.

20 THE COURT: Do you -- if -- if, in fact, the
21 injunction as written could not have been enforced, and we
22 don't need to -- to go through that discussion again, can the
23 association nevertheless be deemed the prevailing party? You
24 know, and let me -- and let me state it another way. If -- if
25 -- and I don't say this to be critical or talk down or

1 anything like that, if -- if the -- if, as I said at the
2 beginning, the goal was to obtain an injunction that could be
3 forced against the Plaintiff, and the injunction as written by
4 the judge down there, as written, could not be enforced, is it
5 not fair to say then that the effort did not succeed?

6 MR. MIESEN: I suppose if it caused a change in --
7 in action, it did succeed. Regardless of whether we had to
8 call the police out there to enforce the injunction, it caused
9 a change in action.

10 THE COURT: Yeah. But you don't get -- you don't
11 get attorney's fees under that -- under the provision on which
12 the association is relying unless the association prevailed in
13 the litigation. And if the result was a meaningless
14 injunction, how does the association still prevail?

15 MR. MIESEN: Well, I -- I believe that while the --
16 there's been no determination by the courts that it was --
17 that the form provided by the justice courts is unenforceable.
18 I -- I understand your position, Judge, on that issue. But I
19 believe that even in the entry of the order, a judgment, that
20 the party who received the judgment that's in line with the
21 relief sought in their complaint has prevailed --

22 THE COURT: Are --

23 MR. MIESEN: -- because it obtained the relief it
24 sought.

25 THE COURT: Are you -- are you suggesting or even

1 just coming right out and saying that in -- in trying to
2 resolve the issues that are presented to me, I am not
3 permitted to decide whether or not that injunction was
4 enforceable?

5 MR. MIESEN: No.

6 THE COURT: Okay. I mean, I wouldn't be offended if
7 you did. I'd just like to know -- I would just like to know
8 the reason --

9 MR. MIESEN: Sure.

10 THE COURT: -- so.

11 MR. MIESEN: No, but I -- I believe that even if the
12 injunction is un -- is ultimately unenforceable --

13 THE COURT: Uh-huh.

14 MR. MIESEN: -- I mean, let's even take the
15 situation now. It's been over a year. It's not currently
16 enforceable. Does that mean that the association was not the
17 prevailing party because the injunction expired?

18 THE COURT: No. I think it would mean that if the
19 injunction was unenforceable, it was unenforceable the day
20 that it was -- it was issued. It -- meaning it never had any
21 effect. So that --

22 MR. MIESEN: It caused a change in action.

23 THE COURT: Well, but where in the CC&Rs do you get
24 attorney's fees if you cause a change in action?

25 MR. MIESEN: Well, again, we're getting back to the

1 definition of prevail.

2 THE COURT: Yeah. Okay. All right. Fair enough.

3 MR. MIESEN: They got what they wanted.

4 THE COURT: Okay. All right.

5 MR. MIESEN: I have nothing further.

6 THE COURT: Okay. Anything else? Okay.

7 MR. MIESEN: Thank you.

8 THE COURT: Mr. Dessaulles?

9 MR. DESSAULES: Thank you, Your Honor. I -- I think
10 what -- what we're struggling with here is the con -- is the
11 change -- the difference between prevail and succeed. I think
12 that if the CC&Rs -- by the way, I disagree that the CC&Rs are
13 applicable, and I'll go through that analysis for you shortly.
14 But if the CC&Rs said that the association succeeds, then
15 there might be a different analysis here.

16 I myself spent far more than an hour in response to
17 your email looking for a case. I found nothing. The closest
18 thing I found was the rule. I understand Your Honor says it's
19 not applicable, and I'll tell you why it is in -- in a second,
20 as well. But let me just -- let -- let me focus more on the
21 -- the injunction here. If the Plaintiff walks in a common
22 area, she's violating the injunction.

23 THE COURT: Well, it depends on where the common
24 area is.

25 MR. DESSAULES: Well, actually --

1 THE COURT: Is it -- is it near or far?

2 MR. DESSAULES: Well, if she goes over to her --

3 THE COURT: Or somewhere --

4 MR. DESSAULES: -- friend Nancy's --

5 THE COURT: Or somewhere in between?

6 MR. DESSAULES: If she goes over to her friend Nancy

7 Fisher's house, which is across the street from Donald

8 Toothman's off -- from Donald Toothman's house, does she

9 violate that injunction?

10 THE COURT: I -- that was my --

11 MR. DESSAULES: And --

12 THE COURT: -- that was my question. I'll -- I'll

13 give you another example, and then maybe we can move on.

14 MR. DESSAULES: Yeah.

15 THE COURT: There appears to be a swimming pool and

16 what is I suppose a -- a community clubhouse of some sort --

17 MR. DESSAULES: Yes.

18 THE COURT: -- that is almost directly across the

19 street from the Toothman residence.

20 MR. DESSAULES: That is correct.

21 THE COURT: If the Plaintiff goes and uses the pool

22 or goes in it, does she -- is she near the Toothman residence

23 and does she violate the injunction?

24 MR. DESSAULES: Now --

25 THE COURT: And -- and -- and, you know, we can --

1 I'll -- will certainly allow rebuttal, but my concern there
2 again is the target of an injunction is supposed to be able to
3 look at it and know precisely what is and is not permitted,
4 without having to guess, and without having to ask anyone. I
5 don't know whether using the swimming pool would violate the
6 injunction.

7 MR. DESSAULES: Taking that a step further, Your
8 Honor, in addition to that, they're also -- and the case law
9 on this is very clear, courts can't impose prior restraints on
10 speech. The association, by getting the injunction that
11 prohibits the -- the -- the Plaintiff from carrying the picket
12 sign, as -- as Your Honor suggested, that's a prior -- that's
13 a prior restraint that has a chilling effect on speech. And
14 under the case law that -- that the Defendant cited, one of
15 the requirements of being a prevailing party is that the
16 judicial sanction must be an enforceable entitlement to
17 relief. And that's the Klamath Siskiyou Wildlands Center
18 case. I'm not making any representations in terms of
19 pronouncement, 589 F.3d 1027.

20 Now -- but let me -- let -- let me just take a step
21 back here for examp -- for -- for a second. Because we're
22 operating under the assumption that the -- that the CC&Rs
23 apply, that the Article 17, Section 1, attorney's fee language
24 provides. And I don't think you can divorce the question of
25 what relief are they seeking and in what context from -- from

1 that. There's three bases arguably for the association to get
2 their fees. The first would be ARS 12-341.01. Doesn't apply,
3 it wasn't a contested action.

4 The second would be the attorney's fees provision
5 arising out of the pr -- arising out of the injunction against
6 harassment. And that actually, Your Honor, of all of the --
7 that's the one that's most closely applicable. If you look at
8 Rule 39, it talks about that this is a provision for getting
9 attorney's fees under 12-1810(0).

10 THE COURT: Right. But that's -- but the same
11 statute, Mr. Dessaulles, says it's not to the exclusion of
12 other remedies.

13 MR. DESSAULES: I understand that, Your Honor. But
14 -- now, then you -- you look at the -- the attorney's fees
15 provision. And let me take a step back even further. If you
16 look at -- we cited one case. There's two other cases, one of
17 which is Berry v. 352 E. Virginia, the other of which is
18 Robert Mann Construction v. Liebert Corporation, in order to
19 be the prevailing party in -- in a -- in a lawsuit, you have
20 to ask for an award of fees in the complaint. Both of those
21 case -- Berry says, a fee request based on a contractual
22 provision requires pleading and proof. And -- and in Berry,
23 the Court disregarded the -- because there wasn't a -- a
24 request for fees made based on the contract, Berry said we
25 can't award fees based on the contract.

1 Same thing in Robert Mann. Robert Mann case says
2 you can't get attorney's fees by only generally referring to
3 attorney's fees in -- in a complaint.

4 THE COURT: The --

5 MR. DESSAULES: They didn't even do that.

6 THE COURT: This is your argument that if they
7 wanted to preserve a claim for attorney's fees, it must have
8 been submitted with their petition?

9 MR. DESSAULES: That -- that is -- yes.

10 THE COURT: Okay. I understand the argument. Okay.

11 MR. DESSAULES: Okay. Now, so then we turn to the
12 provision. And, I mean, that leaves us with the contract
13 provision.

14 THE COURT: Uh-huh.

15 MR. DESSAULES: Well, what does the contract
16 provision says (sic)? There's three ways you get fees under
17 the CC&Rs. The first way, to enforce collection of amounts
18 due. Not applicable. Secondly, in connection with any lien.
19 Not applicable. Third way, to enforce compliance with, or
20 specific performance of the terms and conditions of this
21 declaration. The only provision they've cited that implicates
22 the CC&Rs at all is the nuisance provision. And if you look
23 at the nuisance provision it talks about activities taking
24 place upon any lot. It doesn't -- I mean, I -- under the
25 plain language of -- of the nuisance provision, this isn't a

1 nuisance. You can't violate a nuisance statute by sending
2 letters, by sending emails. And I -- I know Your Honor's
3 familiar with -- with the case law regarding that issue. This
4 is -- you don't get --

5 THE COURT: Wasn't though -- and -- and I will tell
6 you that, although my memory is a -- a -- a bit clouded, I
7 read through the supporting -- the materials that were
8 submitted in support of the petition, and it struck me that
9 some of the incidents on which the petition was predicated
10 should not have supported the requested injunction. You know,
11 getting an injunction because somebody makes me feel bad
12 because they called me bad names doesn't work.

13 However, I think there was some activity in that --
14 in there that would have supported the injunction, and I
15 thought that -- and I'm not saying whether this -- it's
16 truthful or not, I'm not going to make that judgment about
17 anybody, because I don't have to, for starters -- but I
18 thought that there was at least some allegation that one of
19 the three protected people, at least one of the three, was
20 threatened by the Plaintiff, physically threatened.

21 MR. DESSAULES: That's not an injunction against
22 workplace harassment. That would be an injunction against
23 harassment. What we have here --

24 THE COURT: Right.

25 MR. DESSAULES: -- is an association stepping in in

1 loco parentis to -- to vindicate --

2 THE COURT: Well, but this person -- the -- the --
3 this was Mrs. Toothman. And she said that she does work for
4 the association in her -- in -- in her papers, that she -- she
5 was in a -- I -- I don't think any of these people are paid
6 employees, but they are people who work for the -- who do work
7 for the association. So here we have somebody who does work
8 for the association, and I believe she said she was being
9 threatened, and the threats pertained to activities that the
10 association had taken.

11 MR. DESSAULES: Well, Your Honor, I'm not sure -- it
12 -- well, that may be a basis for an injunction against
13 harassment. It may also be a basis for an injunction against
14 workplace harassment.

15 THE COURT: Right.

16 MR. DESSAULES: I don't believe it's a basis to
17 implicate the nuisance provision which, by the way, was never
18 alleged in that complaint anyway. What we're doing here is --
19 is after the fact, we're piecing together bits and pieces of
20 the declaration that we think, well, maybe she was violating
21 this, or -- or she could have violated this provision.

22 THE COURT: What --

23 MR. DESSAULES: They proceeded under a statutory
24 provision --

25 THE COURT: -- what --

1 MR. DESSAULES: -- and the law is clear that when
2 you proceed under a statutory provision, you don't get -- that
3 -- that the statutory provision defines the -- the -- the
4 entitlement to relief.

5 THE COURT: What --

6 MR. DESSAULES: And --

7 THE COURT: I think I understand your argument.
8 What I have, I guess it's your exhibit, what page of the CC&Rs
9 are you referring to when you talk about nuisance?

10 MR. DESSAULES: 19.

11 THE COURT: Page 19.

12 MR. DESSAULES: And it talks about a noxious or
13 offensive activity carried on upon any lot, or any part of any
14 -- of the -- of the properties.

15 THE COURT: What section? Oh, 10.

16 MR. DESSAULES: Section 10.

17 (Pause)

18 THE COURT: Okay.

19 MR. DESSAULES: Homeowners associations, the lawyers
20 who represent homeowners associations, Carpenter Hazlewood,
21 are very adept at going to court and getting an injunction to
22 stop someone from committing a nuisance. You don't do it by
23 the statutory provision, which is very narrow, very confined,
24 very restrictive. And you don't certainly get to go after the
25 fact and say, well, this is really what -- our -- our -- our

1 fact pattern kind of fits into section 10 here, so just give
2 it to us. That -- that's in -- in my opinion, that's --
3 that's improper. They don't get fees for that.

4 It -- also, when you talk -- talking about
5 prevailing parties, the -- I -- as I said, I found no case
6 saying that whether -- whether in an uncontested action you
7 can be the prevailing party. I -- I agree that based on the
8 definitions, there has to be some opposition. That being
9 said, you also can't divorce the definition of prevailing
10 party from the context in which it arises. Courts make a
11 determination who the prevailing party is. People don't get
12 to self determine whether they're the prevailing party or not.

13 In -- even in the scenario that -- that Mr. Miesen
14 gave, in the -- the sports scenario where the other team
15 doesn't show up, I would submit to you that when you don't
16 show up, you're deemed to be there, you forfeit. But there's
17 still a -- there's an independent third party that says,
18 you're the winner, you're the loser. And that didn't happen
19 here. If they wanted a request for fees, they should have
20 asked for fees. They shouldn't -- not just simply add
21 something to someone's ledger.

22 And we can talk about the actual entries, as well,
23 in terms of whether they're reasonable, in terms of whether it
24 all relates to this. It -- they don't, and they're not
25 reasonable. I'm happy to go into that analysis, if you'd

1 like. But I -- of -- of -- but I have nothing else to add
2 otherwise.

3 THE COURT: Okay. Don't read anything into this,
4 I'm just -- a question has just occurred to me, but if I were
5 to conclude -- let me put it this way, it -- to get to the
6 point quickly, if I were to accept all of the association's
7 arguments except that the fees to some extent are clearly
8 excessive, what is the ruling on these motions? Do they both
9 get denied, and I send you off to the arbitrator to decide --

10 MR. DESSAULES: No.

11 THE COURT: -- or --

12 MR. DESSAULES: No, Your Honor.

13 THE COURT: Why?

14 MR. DESSAULES: This -- because --

15 THE COURT: Do I go through the --

16 MR. DESSAULES: No --

17 THE COURT: -- the billing statements and cut --

18 MR. DESSAULES: No. The Plaintiff still prevails
19 because in this case, what -- because the process that's
20 followed, it's the original judge that makes a determination.

21 THE COURT: The -- the -- I -- I'm -- I guess I
22 didn't ask my question clearly enough.

23 MR. DESSAULES: Okay.

24 THE COURT: Let's assume, despite your objection, I
25 reach a conclusion that they in fact were the prevailing

1 party, that they can do what they did here. My only concern
2 is with the fee amount itself, that in some instances, it's
3 clearly excessive. Given that, and again, don't read anything
4 into that, I'm not saying I'm going in that direction, but if
5 I were, what is the ruling on these motions?

6 MR. DESSAULES: I have no idea. We're sort of
7 entering on uncharted ter -- uncharted --

8 THE COURT: I mean, do I --

9 MR. DESSAULES: -- territory here.

10 THE COURT: Do -- do I -- do I -- hang on -- do I
11 make a -- do I go through the -- as I said, do I go through
12 the billing statements and say, this is excessive, this
13 wasn't?

14 MR. DESSAULES: That -- that isn't --

15 THE COURT: Or -- or do I send you off to see the
16 arbitrator and ask him to make a call in the first instance?

17 MR. DESSAULES: Well, arbit -- well, I would say
18 that it's -- ordinarily the Court makes the determination to
19 determine reasonableness of fees or -- although, I don't need
20 to --

21 THE COURT: Well --

22 MR. DESSAULES: -- keep hitting this point --

23 THE COURT: -- except that this -- except that this
24 is a compulsory arbitration case, and I -- the only reason
25 I've got it -- I can't tell you how many colleagues I -- that

1 have asked me, why do you have this case? It a \$4,000 case,
2 why do you have it? Because the rule says I have to rule on
3 motions for summary judgment. But on anything less than that,
4 I don't. The arbitrator rules. And I -- I -- quite frankly,
5 I'm -- the reason I'm asking the question is I don't know. I
6 hadn't thought about it until just now.

7 MR. DESSAULES: I -- I hadn't thought about it until
8 just now --

9 THE COURT: Okay.

10 MR. DESSAULES: -- either, Your Honor. I -- I --

11 THE COURT: Okay.

12 MR. DESSAULES: -- believe that if -- if you find in
13 favor of the -- that they -- that they are the prevailing
14 party, that they're entitled to an award of some kind of fees,
15 but that the fees are in some way excessive, I think that --
16 that to then punt that to the arbitrator, I think is probably
17 in -- within Your Honor's scope of deciding the motion for
18 summary judgment to say the amount of those fees that are
19 unreasonable or excessive, and I would ask for additional
20 briefing. If that --

21 THE COURT: Yeah.

22 MR. DESSAULES: -- if that's the path we go down,
23 I'd like to explain why those fees are excessive --

24 THE COURT: Okay.

25 MR. DESSAULES: -- and -- and not applicable.

1 THE COURT: Okay. All right.

2 MR. DESSAULES: But I don't believe we should go
3 down that path for the reasons I have already said.

4 THE COURT: Right. Okay. Very good. Thank you.
5 Rebuttal?

6 MR. MIESEN: Very short, Your Honor.

7 THE COURT: Why don't -- did -- it -- I -- I'm sure
8 you're going to get to it, but I -- I would really like to
9 know your response to the contention that section 10 -- you
10 seem to be relying on section 10, and it doesn't get you where
11 you got.

12 MR. MIESEN: Well, section 10 uses language like
13 offensive activity --

14 THE COURT: Right.

15 MR. MIESEN: -- annoyance. I mean, even in a --
16 even in the definition of harassment, the standard for the
17 injunction is that they are harassed and annoyed. So I think
18 that right there we've got a connection. And it's certainly
19 by proving up the -- the injunction to the judge in that case,
20 the standard we proved was harassed and annoyed. I think
21 anybody who's got an -- if the Court determines that an
22 injunction should be entered, then they have made the
23 determination that there's been some offensive behavior,
24 because harassment is by definition -- it's axiomatic, it is
25 offensive.

1 THE COURT: Yeah, but let -- and I'm sorry I
2 overlooked it, but let's talk about it now, section 10 refers
3 to an annoyance or nuisance to the neighborhood.

4 MR. MIESEN: Uh-huh.

5 THE COURT: Interference with the quiet enjoyment of
6 each owner's respective townhouse, or which in any way
7 increases the rate of insurance. I haven't seen anything
8 about rates -- insurance rates increasing, so let's focus on
9 the first two, nuisance to the neighborhood and interference
10 with each owner's enjoyment. What we've got here, do we not,
11 is a case where -- where a couple of owners have been annoyed,
12 but we don't have anything about the entire neighborhood being
13 frustrated or annoyed or subject to noxious activity. Doesn't
14 section 10 pertain to activity that would affect everyone and
15 not just a couple of people? And if it -- and if the activity
16 affects a couple of people, isn't Mr. Dessaulles correct that
17 the remedy then is for those people to get their own
18 injunctions, rather than the association?

19 MR. MIESEN: Well, I think there was a two part
20 question.

21 THE COURT: Okay.

22 MR. MIESEN: So --

23 THE COURT: The -- there may be more than that, but
24 go ahead.

25 MR. MIESEN: Yeah. I'll try to piece this out.

1 Offend -- no offensive activity shall be carried up -- on --
2 upon any lot or any part of the properties. That's one.
3 Harassing is offensive. That's what I suggest to this Court.
4 In addition, nuisance to the neighborhood, Mr. Dessaulles is
5 relying on this nuisance idea, but there's also this, which
6 shall in any way interfere with the quiet enjoyment of each of
7 the owners of his respective townhouse. I don't -- I -- the
8 way I read that is not that all of the owners are losing their
9 -- their right to quiet enjoyment, but any one of the owners
10 could be losing his right to quiet enjoyment. But in either
11 case, you still have this offensive activity. And I go back
12 to if harassment is not offensive, what is -- what is it? I
13 mean --

14 THE COURT: Okay.

15 MR. MIESEN: -- it is by definition.

16 THE COURT: Okay.

17 MR. MIESEN: Your other point, let's see if I can
18 remember it, now that I went through that, was -- well, since
19 I went all through that, I lost the second part of the
20 question. But the other thing I wanted to say was, to your
21 question regarding whether or not you would rule, assuming in
22 the -- in the hypothetical that you said, you know what, the
23 -- the association's entitled to fees as the prevailing party,
24 but how much is that going to be? I think you're correct. I
25 think to show clearly excessive, it's an evidentiary showing.

1 THE COURT: Okay.

2 MR. MIESEN: And -- and so I think the arbitrator
3 would be the appropriate --

4 THE COURT: Could I -- could I do it? Could I do it
5 in the context, as -- as -- as Mr. Dessaulles at least sort of
6 suggested, if not expressly suggested, in the context of
7 deciding these motions could I ask for evidence to be
8 presented on that -- on that point, and save you the trouble
9 of going back to the arbitrator?

10 MR. MIESEN: Certainly, if you would like to go
11 through that. I -- we -- I think you're right. I --

12 THE COURT: I -- I'm just wondering if there's --

13 MR. MIESEN: -- but I -- my point is --

14 THE COURT: -- any jurisdictional problem. That's
15 --

16 MR. MIESEN: Oh.

17 THE COURT: -- that's my concern is that -- that we
18 do that --

19 MR. MIESEN: I see.

20 THE COURT: -- and then the loser says, wait a
21 minute, you didn't have jurisdiction to decide that issue,
22 and --

23 MR. MIESEN: Because of the compulsory arbitration
24 --

25 THE COURT: Yeah.

1 MR. MIESEN: -- rule?

2 THE COURT: Yeah. And -- and -- and I -- I'm asking
3 you folks to think of the -- off the top of your head and
4 that's --

5 MR. MIESEN: Yeah. I don't --

6 THE COURT: -- not fair, to -- understand that it --
7 it's -- you know, it just may be an interesting discussion,
8 and it won't get any further than that.

9 MR. MIESEN: I don't know about the jurisdictional
10 issue, Your Honor --

11 THE COURT: Yeah.

12 MR. MIESEN: -- without having to dig into it a
13 little bit more.

14 THE COURT: Yeah. Yeah. Okay.

15 MR. MIESEN: But I think that -- I think that it
16 does require a showing. And so there would need to be some
17 evidence to -- by the Plaintiff in this case to show that the
18 fees were clearly excessive. And I think that could be done
19 by the arbitrator, in a -- in a compulsory arbitration case,
20 but I don't know if this Court were to do it, if that creates
21 jurisdiction --

22 THE COURT: Yeah.

23 MR. MIESEN: -- issues to answer that.

24 THE COURT: Okay. Okay. All right. Anything else?

25 MR. MIESEN: That's all I have, Your Honor.

1 THE COURT: Okay. Thank you. Thank you for your
2 briefing and your presentation. I appreciate it.

3 And now I'm going to do something that I don't do --
4 well, I used to do it all the time in Family Court, but I
5 seldom have the opportunity to do it here. And I -- please
6 don't take anything I say to be critical, or to be insulting,
7 it is a heartfelt suggestion. This case needs to settle.
8 There isn't -- it -- it in one sense it's a lot of money, in
9 another sense it isn't. But here's -- here's what I'm
10 thinking.

11 I think the association has a serious risk that it
12 -- it's going to wind up being the losing party in this case,
13 and that in addition to refunding the \$3800 or whatever it is,
14 they're going to be liable to some attorney's fees. The
15 Plaintiff runs the risk of losing this case by winning,
16 because the Plaintiff's claim for attorney's fees in this case
17 arises under 12-341.01(a), not under the terms of the CC&Rs.
18 But even if it did, even if it did arise under the CC&Rs, the
19 standard for deciding what is a reasonable amount of
20 attorney's fees is the same.

21 And I don't know what the Plaintiff's attorney's
22 fees are now, but if this goes on, there is a chance that the
23 Plaintiff will wind up having to eat more in attorney's fees
24 than the Plaintiff gets back from the association. I --
25 again, I don't know what the fees are, they might be quite

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C E R T I F I C A T E

I, KIMBERLY C. McCRIGHT, CET, certified electronic transcriber, do hereby certify that the foregoing pages 1 through 45 constitute a full, true, and accurate transcript from electronic recording of the proceedings had in the foregoing matter.

DATED this 28th day of November, 2016.

/s/ Kimberly C. McCright
Kimberly C. McCright, CET
Certified Electronic Transcriber