IN THE COURT OF APPEAL
STATE OF ARIZONA
DIVISION ONE

PATRICIA BOCCHINO, Plaintiff/Appellee, vs. FOUNTAIN SHADOWS HOMEOWNERS' ASSOCIATION, Defendant/Appellant.	No. 1 CA-CV 16-0710 Maricopa County Superior Court Case No. CV2015-012434

APPELLEE PATRICIA BOCCHINO'S ANSWERING BRIEF

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STATEMENT OF THE CASE

This is a dispute between Plaintiff/Appellee Patricia Bocchino ("Bocchino") and her former homeowner's association, Defendant/Appellant Fountain Shadows Homeowners Association (the "Association"), over the Association's imposition and collection of $3,887.28 in unawarded attorneys' fees and litigation costs relating to an Injunction Against Workplace Harassment that it sought against Bocchino.

The parties filed cross-motions for summary judgment on the Association's authority to impose and collect unawarded attorneys' fees. On July 28, 2016, following oral argument on June 7, 2016, the trial court issued a minute entry ruling granting Bocchino's motion for summary judgment and denying the Association's cross-motion for summary judgment. Specifically, the trial court rejected the Association's argument that it was entitled to impose and collect unawarded attorneys' fees pursuant to a "prevailing party" provision in its Declaration of Covenants, Conditions and Restrictions (the "Declaration").

The trial court ruled:

> [N]o sound reason permits recognizing the Association as the prevailing party for purposes of the injunction. And, if the Association is not the prevailing party, then by the express terms of the CC&Rs on which the Association relies, it has no basis for recovering any attorney's fees incurred in connection with the injunction.

The trial court subsequently issued a signed minute entry, entitled Final Judgment, on October 7, 2016 awarding Bocchino compensatory damages of $3,887.28, reasonable attorneys' fees of $13,625.00, and costs of $450.10.

The Association filed a timely notice of appeal on November 4, 2016.

Jurisdiction exists pursuant to A.R.S. §§ 12-2101(B) and (C).

STATEMENT OF FACTS

Bocchino formerly owned a residence located at 8736 North 67th Lane, Peoria, Arizona 85345. [APP-0067 (Appendix in Support of Appellee's Answering Brief being filed contemporaneously herewith)] The residence was located within the physical boundaries of the Association. [APP-0112] The Association was subject to a recorded Declaration of Covenants, Conditions and Restrictions ("Declaration"), containing the following provision:

> In the event the Association employs an attorney or attorneys to enforce the collection of any amounts due pursuant to this Declaration or in connection with any lien provided herein, or the foreclosure thereof, or to enforce compliance with or specific performance of the terms and conditions of this Declaration, the Owner, Owners and parties against whom the action is brought shall pay all attorneys' fees, costs and expenses thereby incurred by the Association in the event the Association prevails in any such action.

[APP-0082 – APP-0110]

On March 4, 2015, the Association filed in the Manistee Justice Court an *ex parte* Petition for Injunction Against Workplace Harassment (the "Petition") against Bocchino (the "Injunction Action"), then an Owner subject to the above-referenced Declaration provision. [APP-0010 – APP-0031] The Petition did not include a request for attorneys' fees. [APP-0010 – APP-0031] Though the Petition mentioned that Bocchino's property was subject to it, the Association did not allege that Bocchino had violated the Declaration, nor did it attach the document as an exhibit. [APP-0016] On March 5, 2015, following an *ex parte* hearing, the Manistee Justice

Court granted the Injunction Against Workplace Harassment. [APP-0010 – APP-0031] Instead of requesting an award of attorneys' fees or costs from the Manistee Justice Court, the Association charged to Bocchino's account all the fees and costs it claims to have incurred in relation to the matter. [APP-0113]

The Injunction Against Workplace Harassment stated that:

> **NO CONTACT.** Defendant shall have no contact with **Plaintiff employer** or other person while that person is on or at the employer's property or place of business or is performing official work duties except through attorneys, legal process, court hearings and as follows: Mail/Writing,
>
> **NO CONTACT**. Defendant shall have no contact with **Protected Person(s)** except through attorneys, legal process, court hearings and as follows: Mail/Writing,
>
> **PROTECTED LOCATIONS.** Defendant shall not go to or near the Plaintiff employer's or other Protected Person's:
>
> Workplace:
> - Fountain Shadows Homeowners Association: 14100 North 83rd Avenue Unit 200; Peoria, AZ 85381
>
> Other:
> - Fountain Shadows Homeowners Association: 5959 W. Brown, Glendale, AZ 85302
> - Donald Toothman: 8626 N Fountain Drive, Peoria, AZ 85345
> - Donna Toothman: 8626 N Fountain Drive, Peoria, AZ 85345
> - John Gaytan: 6758 W Ruth Avenue, Peoria, AZ 85345

[APP-0032 – APP-0035]

The 14100 North 83rd Avenue address is the business address for Planned Development Services, Inc., the Association's community manager. [APP-0010 –

APP-0031] The 5959 W. Brown address is the Glendale Public Library, where the Association conducts board meetings on occasion. [APP-0130; APP-0012]

Between May 2015 and September 2015, the Association unilaterally applied six charges for its legal fees to Bocchino's account totaling $3,892.28. [APP-0056 – APP-0065] The charges almost perfectly correlate to invoices from Carpenter Hazlewood between January 31, 2015 and September 30. 2015. [APP-0040 – APP-0065] The invoices show that two Carpenter Hazlewood lawyers and a paralegal worked on the Petition and prepared for and attended the *ex parte* hearing for a total of $2,933.78. [APP-0040 – APP-0055]

In addition to the $2,933.78 it incurred preparing for and attending the *ex parte* hearing, Carpenter Hazlewood lawyers also billed the Association for "homeowner's concern over assessment payments not posting to her account" and "providing information on her Association account and steps to alleviate posting delays in the future," communications with Bocchino's counsel regarding the Association's "authority to charge attorneys' fees to the homeowner" for the injunction against harassment proceedings, redacting a copy of the billing records, and providing "payoff calculations" to the Association's community manager. [APP-0040 – APP-0065] These post-hearing charges totaled $933.50 and were included in the total legal fees the Association applied to Bocchino's account. [APP-0040 – APP-0065] After minor credits were applied to her account, in September 2015, Bocchino owed

the Association a total of $3,887.28 for its unawarded attorneys' fees. [APP-0056 – APP-0065]

Bocchino entered into a contract to sell her home on August 25, 2015 with a close of escrow date of September 24, 2015. [APP-0066 – APP-0076] Five days before the anticipated close of escrow, the Association provided a Resale Disclosure Statement to the title company stating that Bocchino's current balance was $4,062.28. [APP-0077 – APP-0078] This balance was comprised of the $3,887.28 in unawarded attorneys' fees and $175.00 for the September 2015 assessment.[1] [APP-0040 – APP-0065; APP-0077 – APP-0078] The Resale Disclosure Statement stated that, "[a]ll fees are due at close of escrow." [APP-0077 – APP-0078]

Bocchino's unit was sold on September 24, 2015. [APP-0066 – APP-0076] The Association received the $4,062.28 listed on the Resale Disclosure Statement plus an additional amount attributed to the seller for advance payment of assessments. [APP-0079 – APP-0081]

[1] The $20.00 difference in the fees billed by Carpenter Hazlewood and those reflected on the Association's internal ledgers, and on the Resale Disclosure Statement, appear to consist of a $25.00 charge on July 31, 2015 and a $5.00 credit on August 21, 2015. [APP-0040 – APP-0065; APP-0077 – APP-0078]

ISSUES ON APPEAL

1. Did the trial judge properly find that the Association was not entitled to collect unawarded attorneys' fees incurred, but never requested or awarded, in an injunction against workplace harassment action?

2. Did the trial judge properly find the Declaration's attorneys' fees provision to be inapplicable?

3. Did the trial judge properly find that the Association was not the "prevailing party" in an uncontested, *ex parte* proceeding?

4. Did the trial judge properly find that the *ex parte* injunction against workplace harassment was unconstitutionally vague and overbroad?

SUMMARY OF ARGUMENT

There is no entitlement to attorneys' fees from an adverse party. Arizona follows the "American Rule" that attorneys' fees are generally not recoverable unless expressly provided for by statute or contract. The United States Supreme Court recently held that deviations from the American Rule must be narrowly construed. *Baker Botts L.L.P. v. ASARCO*, 135 S. Ct. 2158, 2164 (2015).

The Injunction Against Workplace Harassment statute, A.R.S. §12-1810, contemplates the possibility of a party paying "the costs of the action, including reasonable attorney fees," but only after "notice to the affected party and after a hearing." As the Association did not request, and the Manistee Justice Court did not award, attorneys' fees or costs in the *ex parte* Injunction Against Workplace Harassment proceeding and there was neither notice nor a hearing, the Association was not entitled to fees incurred in seeking an Injunction Against Workplace Harassment.

The Declaration, which constitutes a contract between the Association and the owners, provides that, if the Association employs an attorney to "enforce compliance with or specific performance of the terms and conditions of this Declaration, the Owner, Owners and parties against whom the action is brought shall pay all attorneys' fees, costs and expenses thereby incurred by the Association in the event the Association prevails in any such action." Here again, the Association never

requested, and was never awarded, attorneys' fees from the Manistee Justice Court in the Injunction Against Workplace Harassment action.

Instead, the Association apparently takes the untenable position that it is free to decide for itself whether it is entitled to an award of attorneys' fees and the reasonableness of its fees. This position flies in the face of decades of precedent, statutes, and court rules acknowledging the court's integral part in the attorneys' fees calculus and ignores that "[t]he determination of the reasonable amount of attorney fees [is] peculiarly within the discretion of the trial court." *Woliansky v. Miller*, 146 Ariz. 170, 172, 704 P.2d 811, 813 (App. 1985). Arizona law does not permit litigants to self-determine entitlement and amount of fees.

Even if the Court was willing to overlook this transgression in procedure or permit a party to unilaterally declare whether and in what amount it is entitled to attorneys' fees, the Injunction Against Workplace Harassment action was not one seeking to "enforce compliance with or specific performance of the terms and conditions of this Declaration." Nor has a party who obtains an *ex parte* order "prevailed" against an adversary that would trigger the application of this contract provision.

Finally, as the trial court found, the Injunction was unconstitutionally vague and overbroad because it prohibits Bocchino from going "near" the library, even at times that the named individuals are not present, participating in efforts to engage in

removal of directors, or possibly even stepping outside her front door. In obtaining an Injunction that was facially invalid and fails to comply with basic constitutional requirements, and therefore unenforceable, the Association cannot be said to have "prevailed" in the Injunction Against Workplace Harassment action sufficient to trigger the Declaration's attorneys' fees provision.

ARGUMENT

I. STANDARD OF REVIEW

The Court of Appeals reviews a trial court's grant of summary judgment *de novo*. "On appeal from a grant of summary judgment, we view all facts and reasonable inferences therefrom in the light most favorable to the party against whom judgment was entered." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, 315, ¶ 2, 965 P.2d 47, 49 (App. 1998) (citing *Prince v. City of Apache Junction*, 185 Ariz. 43, 912 P.2d 47 (App. 1996)).

Summary judgment rulings that are the product of contract interpretation are also reviewed *de novo*. *See State ex rel. Dep't of Econ. Sec. v. Hayden*, 210 Ariz. 522, 523, ¶ 7, 15 P.3d 116, 117 (2005) ("We review questions of statutory interpretation de novo.") (citing *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 547, ¶ 8, 105 P.3d 1163, 1166 (2005)); *see also Rand v. Porsche Fin. Servs.*, 216 Ariz. 424, 434, ¶ 37, 167 P.3d 111, 121 (App. 2007) ("The interpretation of a contract is a question of law, which we review *de novo*."). The trial judge's summary judgment rulings turned largely on interpretation of the Declaration. The Declaration "constitute[s] a covenant running with the land and form[s] a contract between the subdivision's property owners as a whole and the individual lot owners." *Arizona Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993).

Under the *de novo* standard of review, the trial judge's grant of Bocchino's Motion for Summary Judgment and denial of the Association's Cross-Motion for Summary Judgment must be affirmed. The trial court's ruling can be affirmed if it was "correct for any reason." *KCI Restaurant Management LLC v. Holm Wright Hyde & Hays PLC*, 236 Ariz. 485, 488 n.2, 341 P.3d 1156, 1158 n.2 (App. 2014).

II. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT FOR BOCCHINO BECAUSE THE ASSOCIATION WAS NOT ENTITLED TO COLLECT UNAWARDED ATTORNEYS' FEES FROM HER.

The Association narrowly frames the issue on appeal as "whether the trial court erred in holding that the association was not the prevailing party in the Injunction Against Harassment." However, this erroneously assumes that, if declared to be the prevailing party in the Injunction Action, the Association was entitled to collect the unawarded attorneys' fees that it incurred in that action.

Arizona follows the American Rule. *See Kaufman v. Cruikshank*, 222 Ariz. 488, 490, ¶ 7, 217 P.3d 438, 440 (App. 2009). The American Rule states that "attorneys' fees are not recoverable unless they are expressly provided for either by statute or contract." *Id.* (quoting *Cortaro Water Users' Ass'n v. Steiner*, 148 Ariz. 314, 316, 714 P.2d 807, 809 (1986)). A party's entitlement to attorneys' fees, therefore, turns initially on a valid statutory or contractual basis for such fees. Neither exists here.

A. The Association Was Not Entitled to Attorneys' Fees Under the Injunction Against Workplace Harassment Statute for Obtaining an *Ex Parte*, Uncontested Injunction.

An Injunction Against Workplace Harassment is a statutory action created by A.R.S. § 12-1810. Although the Association largely ignores A.R.S. § 12-1810,[2] the right to fees in a statutory action turns on the language in the statute. *Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 207, ¶ 13, 330 P.3d 961, 964 (App. 2014) ("A.R.S. § 12-341.01(A) does not apply to "'statutory causes of action…We therefore turn to the garnishment statutes to determine whether the award was proper"). The Injunction Against Workplace Harassment statute provides for an award of costs, including *reasonable* attorneys' fees, but only after notice and a hearing. *See* A.R.S. § 12-1810(O) ("On notice to the affected party and after a hearing, the court may enter an order that requires any party to pay the costs of the action, including *reasonable* attorney fees") (emphasis added). The statutory language underscores the obvious fact that courts, not litigants, who decide whether and in what amount attorneys' fees should be awarded.

Because the injunction in this case was issued *ex parte* and never challenged by Bocchino, the Association can claim no entitlement to fees under A.R.S. § 12-1810. If the Association had requested fees (which it did not) and a hearing at which

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[2] The Association erroneously cites A.R.S. § 12-1809 on pages 9-10 of its Opening Brief.

Bocchino contested the injunction had been conducted (which it was not), the Manistee Justice Court could have considered whether to award fees and, if so, in what amount (which it did not). Having failed to comply with the statutory prerequisites to obtaining an award of attorneys' fees under the Injunction Against Workplace Harassment statute, no conceivable basis exists for recovering its attorneys' fees from Bocchino.

B. The Association Was Not Entitled to Attorneys' Fees Under the Declaration's Attorneys' Fees Provision.

1. A.R.S. § 12-1810 Provides the Exclusive Basis for Fees in an Injunction Against Workplace Harassment Action.

Although the Injunction Action arises out of the Injunction Against Harassment statute, the Association contends that an attorneys' fees provision in its Declaration creates its entitlement to attorneys' fees in the Injunction Action.

The Court of Appeals recently rejected this argument in *Brown v. Terravita Community Ass'n, Inc.*, 2015 WL 4600032, 2, ¶ 8 (App. July 30, 2015). "Brown's action arose out of statute and was not an action to enforce any of the provisions of the CC&Rs. The attorney's fees provision of the CC&Rs therefore did not apply."[3]

The same reasoning applies here. The Association did not file a civil action, but an Injunction Against Workplace Harassment action under A.R.S. § 12-1810.

[3] A copy of this memorandum decision is attached hereto as Exhibit 1 pursuant to Rule 111(c)(1)(B) and (C) of the Rules of the Supreme Court of Arizona.

"The fact that the Association's CC&Rs purportedly contain similar terms does not change the nature of the underlying action." *Id.* at ¶ 5; *Bennett Blum*, 235 Ariz. at 209, 330 P.3d at 966 (attorneys' fees provision in contract does not apply to statutory garnishment proceeding: "because garnishment is a statutory cause of action…[t]hat remedy is exclusive"); *accord Keystone Floor & More, LLC v. Arizona Registrar of Contractors*, 223 Ariz. 27, 30, ¶ 11, 219 P.3d 237, 240 (App. 2009) (rejecting A.R.S. § 12-341.01 in judicial review of ROC disciplinary action: "when the action arises out of a statutory obligation and is 'based on a statute rather than contract, the peripheral involvement of a contract does not support the application of the fee statute'") (quoting *Hanley v. Pearson*, 204 Ariz. 147, 151, ¶ 17, 61 P.3d 29, 33 (App. 2003)). Having chosen to proceed under the Injunction Against Workplace Harassment statute, any right to fees stems exclusively from the statute itself.

2. <u>The Declaration's Attorneys' Fees Provision Does Not Apply.</u>

The Declaration provides:

> In the event the Association employs an attorney or attorneys to enforce the collection of any amounts due pursuant to this Declaration or in connection with any lien provided herein, or the foreclosure thereof, or to enforce compliance with or specific performance of the terms and conditions of this Declaration, the Owner, Owners and parties against whom the action is brought shall pay all attorneys' fees, costs and expenses thereby incurred by the Association in the event the Association prevails in any such action.

An Injunction Against Workplace Harassment action is not a collection or foreclosure action. Although the Association contends that it is an action "to enforce

compliance with or specific performance of the terms and conditions of this Declaration," its Petition for an Injunction Against Workplace Harassment does not mention the Declaration except to say that the "property is subject to" it. The Petition does not mention Article XIII, Section 10, or allege Bocchino's non-compliance with the Declaration. Yet the Association argues (at 10) that "issuance of the Injunction…is conclusive that Bocchino violated the Declaration." The Association offers no explanation for this conclusion or why an *ex parte* Injunction Against Workplace Harassment somehow establishes a "conclusive" violation of the Declaration when the Petition cites no provision of the Declaration allegedly violated and the *ex parte* order makes no such finding.

An Injunction Against Workplace Harassment is not an ordinary civil action to "enforce compliance with or specific performance of the terms and conditions of this Declaration." The former consists of an *ex parte* hearing, no discovery, and no hearing unless the defendant requests one and without the usual due process protections that exist in ordinary civil cases. Its purpose is to prevent the harassment of individuals and businesses. By contrast, the Declaration imposes restrictions on the use of one's property and is not intended or designed to regulate behavior. As such, an Injunction Against Workplace Harassment is not a valid means to "enforce compliance with or specific performance of" the Declaration.

The Association argued for the first time in its opposition to Bocchino's motion for summary judgment and cross-motion for summary judgment that the Injunction Action was intended to enforce Article XIII, Section 10, of the Declaration. This section states:

> No noxious or offensive activity shall be carried on upon any Lot or any part of the Properties, nor shall anything be done thereupon which may be, or may become, an annoyance or nuisance to the neighborhood, or which shall in any way interfere with the quiet enjoyment of each of the Owners of his respective Townhouse, or which shall in any way increase the rate of insurance.

Although the Association contends Bocchino's behavior was a "noxious or offensive activity" and "an annoyance or nuisance to the neighborhood," this section does not apply.

The Declaration is a contract between the Association and its members. *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 634, ¶ 5, 2 P.3d 1276, 1279 (App. 2000). The usual rules of contract interpretation, therefore, apply. Contract provisions are not enforced if the terms are vague or uncertain. *Savoca Masonry Co., Inc. v. Homes & Son Const. Co., Inc.*, 112 Ariz. 392, 394, 542 P.2d 817, 819 (1975) ("It is elementary that for an enforceable contract to exist there must be . . . sufficient specification of terms so that the obligations involved can be ascertained"); *Owens v. M.E. Schepp Ltd. P'ship*, 216 Ariz. 273, 278, 165 P.3d 674, 679 (App. 2007) ("the terms of an agreement are sufficiently certain to enforce if they provide a basis for determining the "existence of a breach and for giving an

appropriate remedy") (quoting Restatement (Second) of Contracts § 33(2) (1981)); *see also Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 789 (9th Cir. 2012) ("a contract must be sufficiently definite for the court to ascertain the parties' obligations and to determine whether those obligations have been performed or breached") (citations omitted). Here, the nuisance provision speaks of "noxious" or "offensive" activities that are an "annoyance" or "nuisance." Such terms are too imprecise to be enforceable as to verbal or written communications. *See Sateriale*, 697 F.3d at 789. Even if they are not too vague or uncertain, they are unenforceable because they are too easily applied arbitrarily and unreasonably as the Board of Directors would have the exclusive power to decide whether behavior was "noxious," "offensive," an "annoyance," or a "nuisance."

"The doctrine of nuisance …has always been a restriction on land use." *City of Phoenix v. Fehiner*, 90 Ariz. 13, 16, 363 P.2d 607, 610 (1961); *see also Frank v. Environmental Sanitation Mgmt., Inc.*, 687 S.W.2d 876, 880 (Mo. 1985) ("The crux of a nuisance case is unreasonable land use"). The nuisance provision, when read in context, cannot be interpreted to apply to verbal or written communications of members. *County of La Paz v. Yakima Compost Co., Inc.*, 224 Ariz. 590, 599, 233 P.3d 1169, 1178, ¶ 16 (App. 2010) ("We construe the meaning of a contract provision from the language the parties used"). The language used (*i.e.*, "upon any Lot or any part of the Properties" or done "thereupon") imposes physical restrictions

on the use of property as opposed to restrictions on a person's ability to communicate.

Verbal and written communications like those attributed to Bocchino do not constitute a nuisance, either at common law or within the meaning of this provision, because they do not involve the use of the property. *See, e.g., Booker v. Foose*, 613 S.E.2d 94, 97 (2005) (refusing to find a nuisance for making false police reports about neighbors and videotaping neighbors: "[T]he appellants have presented no evidence that Carolyn Foose has used her property in any way that has substantially and unreasonably interfered with their private use and peaceful enjoyment of their property"); *In re Braverman*, 463 B.R. 115, 120 (Bankr. N.D. Ill. 2011) (refusing to find nuisance where homeowner built a pool and fence but never entered anyone else's land nor affected anyone else's use and enjoyment of his land in building the pool and fence).

It is alarming that an association charged with enforcing deed restrictions is attempting to turn a nuisance prohibition into a general code of conduct, especially since the association's board members protected under the injunction could have more appropriately petitioned for individual injunctions against harassment. Instead, they used the power of the association and its lawyers to obtain an injunction against workplace harassment to apply to their personal residences, and then unilaterally shifted those fees to Bocchino without any judicial oversight.

Thus, the Declaration does not apply to the Injunction Action.

III. THE TRIAL COURT WAS CORRECT IN SUMMARY JUDGMENT FOR BOCCHINO BECAUSE THE ASSOCIATION DID NOT "PREVAIL" IN THE INJUNCTION ACTION.

The Declaration's attorneys' fees provision places a significant limitation on a party's right to attorneys' fees – the party must "prevail[] in any such action." The trial court correctly ruled that the Association did not "prevail" in the Injunction Action and, therefore, was not entitled to attorneys' fees under the Declaration.

The plain meaning of "prevail," as the trial court found, "contemplates some sort of resistance or opposition." [APP-0167 – APP-0168 (citing Webster's New International Dictionary of the English Language (Unabridged) 1797 (3d ed. 2002); American Heritage Dictionary of the English Language 1391 (4th ed. 2000))] A litigant does not "prevail" in an uncontested, *ex parte* proceeding of which the defendant is not even informed or given an opportunity to participate. The Association cites to no authority and Bocchino has found none that would entitle the Association to claim the title of "prevailing party" in the Injunction Action. The Association also fails to explain how it would be entitled to nearly $1,000 in post-hearing attorneys' fees when it did not incur those fees in an "action."[4]

[4] The trial court instructed Defendant to submit an unredacted copy of its counsel's billing records. Because they were not filed, Bocchino has filed a motion to supplement the record on appeal.

This is particularly true since a plaintiff in an Injunction Action is under no compulsion to serve the defendant and the defendant is under no compulsion to oppose the injunction. Yet under the Association's broad reading of its attorneys' fees provision, such a plaintiff would still be entitled to its fees from the other side who has remained unaware of the action or has chosen not to contest it. This is not the conclusion that the attorneys' fees provision's language contemplates when it states that "parties against whom the action is brought shall pay all attorneys' fees, costs and expenses thereby incurred by the Association in the event the Association prevails in any such action."[5]

The Association's attempt to liken these facts (at 12) to an "athlete who did not show up to compete" misses the mark. A closer analogy might be an athlete who was first informed of a race the day after the results were announced. Just because the athlete is later given an opportunity for a rematch does not mean that the athlete who appeared at the original competition prevailed. The fact that Bocchino had the "opportunity" to request a hearing does not entitle the Association to the fees it incurred in and after the *ex parte* proceeding.

To support its argument, the Association cites a series of federal court decisions (at 12-13) that attempt to define a "prevailing party" as one that achieves

[5] As discussed in Section V, the Association also did not prevail because the injunction it obtained was facially invalid and unenforceable.

a judicially sanctioned material alteration between the relationship of a parties. Each of the cases cited by the Association stems from a contested action where a party filed an application for, and was awarded, its attorneys' fees. None of the cases involved an award based on an *ex parte* hearing. Likewise, none of the cases involved a unilateral "award" of fees, by a party who not only found itself to have prevailed, but who also had the unique power to impose charges against the "non-prevailing" party's property, without any oversight, in accordance with its own self-serving interpretation of its governing documents. Furthermore, none of the cases cited involve a party who was awarded attorneys' fees for unrelated services months after the culmination of litigation.

IV. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT FOR BOCCHINO BECAUSE THE ASSOCIATION DID NOT REQUEST, AND WAS NEVER AWARDED, ATTORNEYS' FEES IN THE INJUNCTION ACTION.

The Association devotes several pages to explaining why it should be considered the prevailing party in the Injunction Action but altogether ignores the fact that, prevailing party or not, it never requested or received an award of attorneys' fees from the Manistee Justice Court. Indeed, the Association fails to address this issue in its Opening Brief. Its failure to request or receive an award of attorneys' fees in the Injunction Action is fatal to any claim for the fees incurred in that action.

The Association's failure to request fees in the Injunction Action is fatal to any possible claim or right to fees or costs. *King v. Titsworth*, 221 Ariz. 597, 598, ¶

7, 212 P.3d 935, 936 (App. 2009) (holding that a claim for attorneys' fees not included in the initial pleading cannot be awarded). The fact that the Manistee Justice Court did not award fees is equally fatal to the Association's alleged right to such fees. The Injunction Against Workplace Harassment statute provides for an award of costs, including *reasonable* attorneys' fees, but only after notice and a hearing. *See* A.R.S. § 12-1810(O) ("On notice to the affected party and after a hearing, the court may enter an order that requires any party to pay the costs of the action, including *reasonable* attorney fees") (emphasis added). As neither of these occurred here, the discussion of prevailing party is purely academic and does not alter the outcome.

The award of attorneys' fees is a function of the court hearing the matter. Even if a party has a legal basis for requesting attorneys' fees, a court must still award the fees before that party can claim any right to recover them. The timing, determination, and method of all requests and awards of attorneys' fees and costs, incurred in a litigated matter, are governed by Arizona law. Rule 54(g) provides that, in Arizona, claims for attorneys' fees must be made in the pleading. Ariz. R. Civ. P. 54(g)(1); *see also King*, 221 Ariz. at 598, 212 P.3d at 936. The established method for obtaining the claimed attorneys' fees involves an application accompanied by an affidavit and supporting documents attesting to the reasonableness of fees sought. Ariz. R. Civ. P. 54(g)(2); *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183,

189, 673 P.2d 927, 933 (App. 1983) (describing general information to include in affidavits of counsel and rejecting a fee application as "plainly insufficient" for failing to include this information).

The trial court has a role in awarding fees even where a litigant asserts a mandatory right to fees. *McDowell Mountain Ranch Com. Ass'n, Inc. v. Simons*, 216 Ariz. 266, 271, ¶ 21, 165 P.3d 667, 672 (App. 2007) (citations omitted). Judicial determinations of entitlement and reasonableness prevent one party from forcing the other side to pay for a task that took its attorney an inordinate amount of time to complete or that may have been billed at an excessive rate. *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. at 188, 673 P.3d at 933. Courts serve an indispensable gatekeeping function when it comes to an award of fees that a homeowner's association is not free to bypass.

The Association cites no authority for the proposition that a court serves an optional and wholly dispensable role in awarding attorneys' fees or that it can substitute its own judgment for the court in deciding reasonableness of those fees. Nor was the trial court in this case the proper forum to decide such questions. Any fee requests or awards should have been made in the Manistee Justice Court. Courts do not allow litigants to unilaterally decide entitlement to fees.

Sound reasons exist for not allowing parties to decide whether and in what amount they are entitled to attorneys' fees. Here, the Association decided to award

itself not only the fees incurred in the Injunction Action but also fees that it contends it incurred after the action was concluded. It then collected those fees out of Bocchino's sale proceeds. In collecting attorneys' fees not incurred in the Injunction Action, and in some cases not even related to it, the Association demonstrates the abuse that can occur in allowing litigants to decide issues of fees for themselves.

As the trial court observed in a footnote:

> Each week day that courts are open throughout Arizona, many citizens obtain injunctions against harassment and similar orders without the assistance of an attorney. The three individuals named as protected persons in the injunction faced no impediment to proceeding in the same way. The record fails to establish why, therefore, it was reasonable to retain attorneys given the nature of the conduct alleged, including why it was reasonable to send two attorneys to an uncontested, ex parte hearing and then assess Bocchino for both attorneys' time charges. Whether the attorneys' fees assessed against Bocchino were reasonable in the circumstances presented is not, however, an issue that the court must decide before reaching the result here.

The potential for similar abuses is likely if the Association is correct that parties are free to declare themselves prevailing parties and collect attorneys' fees without so much as a fee award or application. The dual determinations of entitlement to and reasonableness of fees in every situation are not left to the party seeking to collect its fees.

The Association essentially is arguing that courts play no role in the determination of fees. This is particularly alarming when the applicable statute, A.R.S. § 12-1810, expressly states there must be "notice to the affected party and…a

hearing." Despite not requesting or receiving an award of fees, the Association argues (at 20) that Bocchino had the burden of showing that "the attorneys' fees were *obviously excessive*." This begs the question: When? By not submitting any request for fees in the Injunction Action, thereby circumventing any meaningful ability of Bocchino to question or challenge fees, Bocchino had no chance to challenge the fees as "obviously excessive."[6] By not requesting fees in the Manistee Justice Court, the appropriate forum for such a request, the Association also denied Bocchino of her statutory right to notice and a hearing on any request for fees.

The Association's reliance on the *McDowell Mountain Ranch* case is telling. The *McDowell Mountain Ranch* case involved a fee request and adjudication by the presiding judge. 216 Ariz. 266, 165 P.3d 667 (App. 2007). The fee proponent in *McDowell Mountain Ranch* did not merely take it upon itself to decide whether it should be awarded fees and in what amount, but complied with Rule 54(g) and related case law. *Id.; see Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983) (describing general information to include in attorneys'

[6] The fact that more than twenty-five percent (25%) of the fees were incurred after the conclusion of the Injunction Action, however, strongly suggests that the fees would not have been awarded. The fact that it also took two attorneys and a paralegal to perform the same feat that citizens perform every day without legal assistance further suggests that, if the Association had requested fees and she was provided with the requisite notice and a hearing, the requested fees would not have withstood judicial scrutiny.

fee application affidavits and rejecting a fee application as "plainly insufficient" for failing to include this information). The facts of this case, therefore, are factually and legally distinguishable from *McDowell Mountain Ranch*.

Although the *McDowell Mountain Ranch* case states that the burden is on the opposing party to show that the fees sought are "clearly excessive" where an attorneys' fees provision entitles a party to "all fees," it does not shift until after a party first establishes a prima facie entitlement to fees in the amount requested by submitting a fee application consistent with the requirements set forth in *Schweiger v. China Doll Restaurant, Inc.* Because the Association in this case never submitted a fee request to the court that heard the *ex parte* Injunction Against Workplace Harassment action establishing the entitlement to its fees, the burden never shifted. Bocchino cannot be charged with failing to meet a burden she never had.

McDowell Mountain Ranch does not entitle an association to unilaterally charge all fees to a homeowner without requesting or receiving an award. *McDowell Mountain Ranch* case does not give an association the absolute right to its fees without the traditional safeguards that Arizona law imposes. *If* the Association had filed a lawsuit to enforce Article XIII, Section 10, and *if* the Association had prevailed in that action, and *if* the Association requested fees, and *if* the Manistee Justice Court had provided notice to Bocchino and held a hearing, and *if* the court

had awarded those fees, this argument might have some merit. None of these "ifs," in fact, occurred.

It is insupportable to suggest that a party who has never requested fees is somehow entitled to them. Even a mandatory attorneys' fees provision such as the one in *McDowell Mountain Ranch* can be waived. *See Robert E. Mann Const. Co. v. Liebert Corp.*, 204 Ariz. 129, 133, ¶ 12, 60 P.3d 708, 712 (App. 2003) (general request for attorneys' fees waives contract as a basis for award); *King*, 221 Ariz. at 598, 212 P.3d at 936; Ariz. R. Civ. P. 54(g)(1) ("A claim for attorneys' fees must be made in the pleadings"); Justice Court R. Civ. P., Rule 139(e) ("If a party has made a claim for attorneys' fees in a pleading, the party may request that attorneys' fees be included in the amount of the judgment"). Here, the Association was not free to disregard the procedures in place for requesting and receiving fees.

V. THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT FOR BOCCHINO BECAUSE THE INJUNCTION WAS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

The Injunction Against Workplace Harassment prohibited Bocchino from going "near" several locations at all times. This included the Glendale Public Library even when the Association was not conducting a meeting. Bocchino also arguably could be in violation of the injunction simply sitting in her home or traveling to and from it. Under the overly broad language of the injunction, any of the protected persons could have had her arrested and charged criminally if they spotted her at the

library, walking past their house, or standing in front of the Association's property manager's office. Simply put, Bocchino had no way of knowing what conduct or location might cause her to be arrested or incarcerated. *See* A.R.S. §12-1810(N).

Injunctions are unconstitutionally vague and overbroad when it does not spell out the terms "in clear, specific, and unambiguous terms" and the party to be charged will not "readily know exactly what duties and obligations are imposed upon him." *Munari v. Hotham*, 217 Ariz. 599, 604, ¶ 22, 177 P.3d 860, 865 (App. 2008) (internal quotations omitted). An injunction cannot be enforced absent a "specific and definite order of the court." *BMO Harris Bank Nat'l Ass'n v. Bluff*, 229 Ariz. 511, 514, ¶ 6, 277 P.3d 216, 219 (App. 2012). An injunction that is "too vague to be understood," as the trial court acknowledged in its July 28, 2016 minute entry ruling (at 3), fails to survive constitutional scrutiny. *Schmidt v. Lessard*, 414 U.S. 473, 475-76 (1974).

Injunctions also cannot enjoin "activities that are constitutionally protected or otherwise protected by law." A.R.S. §12-1810(L)(2); *see also LaFaro v. Cahill*, 203 Ariz. 482, 487, ¶ 17, 56 P.3d 56, 61 (App. 2002). In an age where information and knowledge, and the right to obtain them, is under daily attack, it is constitutionally offensive that an individual could face the real threat of arrest or incarceration for peacefully visiting a public library or lawfully assembling with others to show her opposition to an association's board of directors.

The trial court's conclusion on this point is a compelling one: By successfully obtaining an uncontested, *ex parte* injunction that on its face was unconstitutional, the Association cannot be said to have "prevailed" in any sense of the term. Such an order was surely not the Association's goal. The fact that the Manistee Justice Court utilized a form order does not render the injunction that it issued free from constitutional attack. The Justice Court was free to modify the form language, like it did when it added the unqualified ban on going to the Glendale Public Library, or ask one of the Association's two lawyers to submit a proposed injunction.

VI. THE COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT FOR BOCCHINO BECAUSE THE ASSOCIATION WAS NOT ENTITLED TO COLLECT UNAWARDED FEES FROM THE ESCROW COMPANY.

In its Summary of Argument, the Association states, "Bocchino paid all of the attorneys' fees, costs and expenses incurred in an action to enforce the Declaration without protest." To the extent the Association is suggesting by this statement that Bocchino has waived the right to challenge the fees or costs, the Association does not provide any argument, citation, or mention beyond the solitary, unsupported sentence in its Summary of Argument. The Association has waived this issue on appeal. *See* Ariz. R. Civ. App. P., Rule 13(a)(7)(A); *see also In re U.S. Currency in Amount of $26,980.00*, 199 Ariz. 291, 299, ¶ 28, 18 P.3d 85, 93 (App. 2000) (refusing to consider a bald assertion offered without elaboration or citation to any legal authority); *Brown v. U.S. Fidelity and Guar. Co.*, 194 Ariz. 85, 93, ¶ 50, 977

P.2d 807, 815 (App. 1998) (rejecting appellants' assertion made wholly without supporting argument or citation of authority); *Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, 491 n.2 ¶ 6, 154 P.3d 393 n.2 (App. 2007) (declining to address the merits of appellant's argument mentioned only in passing in his opening brief, and without citing in any relevant authority).

Substantively, it is an incorrect statement. Bocchino did not "pay all of the attorneys' fees, costs and expenses." Rather, the escrow company paid an amount equal to these charges before sending her the balance of the proceeds. A waiver requires a knowing and voluntary relinquishment of a known right. *See American Continental Life Ins. Co. v. Ranier Const. Co., Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980) (In Banc). In fact, "a litigant asserting waiver by conduct must establish acts by the opposing party that are clearly inconsistent with an intention to assert the right in question." *Russo v. Barger*, 239 Ariz. 100, 103, ¶ 12, 366 P.3d 577, 580 (App. 2016). Had Bocchino personally tendered an unconditional check for these amounts, the Association's assertion might arguably find some footing. But where the payment was made by a third party, and Bocchino was neither required nor expected to sign off on the transfer, one can hardly say Bocchino has knowingly waived a known right. The Association has made no effort to establish that the actions taken by Bocchino were clearly inconsistent with her intention to challenge the Association's authority to charge her for its attorneys' fees.

The Association's passing reference to the idea that she paid these amounts "without protest" further ignores the reality that she was closing on the sale in five days. Did the Association expect her to file this lawsuit and lose the sale? Cancel the sale to challenge the charges and risk a civil suit from the purchaser? Of course, one does not know what the Association expected her to do since the Association's Opening Brief does not expand on this single sentence in its Summary of Argument.

It is inexplicable that a party who has neither requested nor received an award of attorneys' fees, but collects them from a third party, should somehow be allowed to keep those unawarded fees because the other party was unable to stop the series of events from occurring. The Association had no right to the unawarded fees it collected from the escrow company, yet the Association attempts to spin it as Bocchino's fault.

REQUEST FOR ATTORNEYS' FEES

Appellee hereby requests an award of costs and attorneys' fees pursuant to Rule 21 of the Arizona Rules of Civil Appellate Procedure, and A.R.S. §§ 12-341 and 12-341.01.

CONCLUSION

The trial court was correct in granting summary judgment in favor of Bocchino because the Association was not entitled to the $3,887.28 in its unawarded legal fees that it collected from Bocchino's real estate proceeds in relation to an *ex parte* action. Without any statute or contract provision authorizing the award of the Association's legal fees, and without having obtained an award of those fees, the Association's collection of what it unilaterally determined to be the amount of legal fees owed to it by Bocchino was improper.

Obtaining an *ex parte*, uncontested injunction did not entitled the Association to an award of its attorneys' fees under the Injunction Against Workplace Harassment statute. Likewise, the Declaration's attorneys' fee provision did not entitle the Association to charge against Bocchino's account all of the unawarded legal fees it incurred obtaining the *ex parte* injunction, or the nearly $1,000 in post-hearing attorneys' fees it incurred.

The Association's attorneys' fee provision only provides a basis under which the Association may request a court to enter an award of its attorneys' fees, if that court determines that the Association has prevailed in an action brought to enforce compliance with the terms and conditions of the Declaration.

Prior to its collection of fees from Bocchino, no court determined that the Association had prevailed in an action brought to enforce compliance with the terms

and conditions of the Declaration. Courts serve an indispensable gatekeeping function that parties are not free to bypass. The award of attorneys' fees is a function of the court hearing the matter, even where a litigant asserts a mandatory right to fees. Sound reasons exist for not allowing parties to decide whether and in what amount they are entitled to attorneys' fees. Here, for example, the Association decided to award itself fees in incurred obtaining the injunction, but also for fees it incurred after the action was concluded.

As the trial court properly found, the Association was not the "prevailing party" in its *ex parte* injunction action against Bocchino. First, the Association did not "prevail" because it was unopposed in an action of which Bocchino was not informed or given the opportunity to participate. Second, the Association did not prevail because the injunction it obtained against Bocchino was unconstitutionally vague and overbroad, and therefore invalid and unenforceable. Accordingly, had a court been asked to determine whether the Association had prevailed in an action to enforce compliance with the terms and conditions of the Declaration, it could not have been found the Association successful in achieving its desired result.

In its circumvention of the court's role in awarding attorneys' fees, and in its collection of what it impermissibly declared itself entitled to from Bocchino's escrow account, the Association disregarded the procedures in place for requesting

and receiving fees. As a result, it collected fees to which it was not entitled and the trial court was correct in granting Bocchino's motion for summary judgment.

RESPECTFULLY SUBMITTED this 21st day of March 2017.

By: /s/ Jonathan A. Dessaules

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