

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

PATRICIA BOCCHINO,

Plaintiff-Appellee,

v.

FOUNTAIN SHADOWS  
HOMEOWNERS ASSOCIATION,

Defendant-Appellant.

1 CA-CV 16-0710  
Maricopa County No. CV2015-012434

**APPELLANT'S REPLY BRIEF**

Chad P. Miesen (#024910)  
Charlene Cruz (#026692)  
Carpenter, Hazlewood, Delgado & Bolen, LLP  
1400 East Southern Avenue, Suite 400  
Tempe, Arizona 85282  
Phone: (480) 427-2800  
Email: [chad@carpenterhazlewood.com](mailto:chad@carpenterhazlewood.com)  
[charlene@carpenterhazlewood.com](mailto:charlene@carpenterhazlewood.com)  
Attorneys for Appellant

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## ARGUMENT IN REPLY

Appellee Patricia Bocchino (“Bocchino”) argues in her Answering Brief a number of points, most of which are fully addressed and briefed in the Opening Brief filed by Appellant Fountain Shadows Homeowners Association (the “Association”) and do not require further argument—such as whether the Injunction was unenforceable and the meaning of “prevailing party.” The Association will not address those matters except to state that it rejects Bocchino’s arguments on those matters and that the Association’s arguments in its Opening Brief are sufficient.

There are a couple of Bocchino’s arguments that the Association believes it must address and rebut. First, Bocchino argues that [A.R.S. § 12-1810](#) provides the exclusive basis for fees in an injunction against workplace harassment action and that the Declaration’s attorneys’ fees provision does not apply. Second, Bocchino argues that before any business entity can demand payment of attorneys’ fees and costs incurred and owing pursuant to a contract, it must first get a court determination on the subject. The reasons explained below, these arguments must be rejected as unsupported and inconsistent with the law.

A. [A.R.S. § 12-1810](#) and *Brown v. Terravita Community Ass’n, Inc.*

Bocchino claims that [A.R.S. § 12-1810](#) is the exclusive basis for attorneys’ fees and costs and that any fee shifting provision in the Declaration is inapplicable.

This argument lacks legal support and is contrary to Arizona law. In support of her position, Bocchino cites to *Brown v. Terravita Community Ass'n, Inc.*, [2015 WL 4600032](#) (App. July 30, 2015), which is not a published opinion and has no precedential value. More importantly, *Brown v. Terravita Community Ass'n* is distinguishable from this case. In *Brown v. Terravita Community Ass'n*, the court held that a contractual fee-shifting provision did not apply because the litigation at issue related to statutory duties (such as the duty of an HOA to provide records to a homeowner upon request). However, in this case, the Association was seeking to obtain Bocchino's compliance with her obligations under its contract—the Declaration. While the Association used the workplace harassment injunction process, the underlying basis for the claim arose directly under the Declaration because it was her breach of her contractual duties—to not engage in offensive activity—that was at issue.

Ultimately, the Association commenced the Injunction Action and a court, after finding that the Association presented evidence that satisfied the evidentiary threshold for issuing an injunction, issued the Injunction against Bocchino. Therefore, by entry of that order, it was adjudicated that Bocchino was in violation of Article XIII, Section 10 of the Declaration because Bocchino violated the Declaration in that her actions became an annoyance and nuisance and otherwise interfered with the quiet enjoyment of each of the Owners.

As a result of her actions, the Association incurred attorneys' fees, costs and expenses to enforce Bocchino's compliance with the terms and conditions of the contractual Declaration, including filing the Injunction Action and successfully obtaining the Injunction to require performance of her contractual duties. Therefore, by issuance of the Injunction it is conclusive that Bocchino violated the Declaration.

B. Court determination of right to attorneys' fees is not a prerequisite to any demand.

Bocchino argues that a business entity cannot demand performance of a party to pay what is owed without first obtaining a court determination. The Association's actions to be reimbursed for costs it incurred as a result of Bocchino's breach of the contract between them was consistent with the law and with standard practice. In this case, the Association made a demand for what it believed was owed by Bocchino at the time of her property sale. Bocchino did not argue or reject that demand, but rather, she paid it. Then, months later, she requested that a court determine if that was correctly paid or if she was entitled to a refund. Oddly, Bocchino argues that the Association was not even legally entitled to make that demand, but should have gone to court to get the matter settled before there was even a dispute as to what was owed. That is completely illogical. Many times a party to a contract will incur expenses that the contract requires be

reimbursed. For example, lenders will include in loan agreements that if the lender incurs the expense of attorneys' fees and costs, the borrower is required to reimburse. It would be a waste of resources to require that the lender first go to the courts to get a determination before even making a demand for reimbursement.

When there is a dispute that cannot be resolved, then parties may go to court to get a determination and resolution. The trial court in this case could have determined what, if anything should have been paid to the Association; however, the court never got there because it determined that the Association was not the prevailing party, which is the precise issue of this appeal. The Association acted properly in demanding the expenses it was entitled to have reimbursed. A court determination of the amount of attorneys' fees is not a prerequisite to that demand. In this case, if this Court determines that the Association was the prevailing party in the Injunction Action and is entitled to attorneys' fees and costs pursuant to the Declaration, then a determination of the amount that must be reimbursed to the Association will be at issue and addressed.

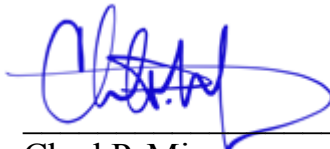
### **CONCLUSION**

The trial court erred when it held that the Association was not the prevailing party in the Injunction Action. In fact, the Association was the prevailing party, and as a result, it was entitled to recover the attorneys' fees and costs incurred in that action. The trial court erred in entering judgment against the Association.

Therefore, the Association respectfully requests that this Court reverse the trial court's ruling, vacate the judgment entered, enter an order requiring the trial court to enter judgment in favor of the Association, and remand to the trial court for a determination as to an award of the Association's attorneys' fees and costs incurred in defending against Bocchino's claims. The Association also requests that this Court award it its attorneys' fees and costs on appeal.

RESPECTFULLY SUBMITTED this 17th day of April, 2017.

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

A handwritten signature in blue ink, appearing to read 'Chad P. Miesen', is written over a horizontal line.

Chad P. Miesen

Charlene Cruz

1400 East Southern Avenue, Suite 400

Tempe, Arizona 85282

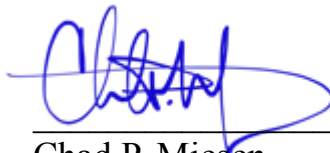
*Attorneys for Defendant-Appellant*

**CERTIFICATE OF COMPLIANCE**

1. This certificate of compliance concerns:
  - A brief, and is submitted under Rule 14(a)(5)
  - An accelerated brief, and is submitted under Rule 29(a)
  - A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)
  - A petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and is submitted under Rule 23(h)
  - An amicus curiae brief, and is submitted under Rule 16(b)(4)
  
2. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains \_\_\_\_\_ words.
  
3. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable.

DATED this 17<sup>th</sup> day of April, 2017.

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



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Chad P. Miesen  
Charlene Cruz  
1400 East Southern Avenue, Suite 400  
Tempe, Arizona 85282  
*Attorneys for Defendant-Appellant*

**CERTIFICATE OF SERVICE**

The undersigned, on the 17<sup>th</sup> day of April, 2017, electronically filed Appellant's Reply Brief in the Court of Appeals Division One; and served a copy to the following parties in compliance with Rule 5(c) of the Arizona Rules of Civil Procedure as follows:

Via first-class U.S. Mail and via email this 17<sup>th</sup> day of April, 2017 to:

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

By: 

Vicki Goslin, Paralegal  
Carpenter, Hazlewood, Delgado & Bolen, LLP