IN THE

SUPREME COURT OF THE STATE OF ARIZONA

STEPHANIE BURKETT, AS TRUSTEE OF THE STEPHANIE RAE BURKETT REVOCABLE TRUST DATED JANUARY 28, 2011,
Plaintiff/Appellee,

v.

JOHN AND ANITA DRYJA, HUSBAND AND WIFE,
Defendants/Appellants.

No. CV-25-0143-PR
Filed Oct. 28, 2026

Appeal from the Superior Court in Pima County
The Honorable Wayne E. Yehling, Judge
No. C20224152
REVERSED IN PART AND REMANDED

Opinion of the Court of Appeals, Division Two
260 Ariz. 1 (App. 2025)
VACATED

COUNSEL:

Evan L. Thompson, Alan R. Hill (argued), Thompson Krone, P.L.C., Tucson, Attorneys for Stephanie Burkett

Brian A. Laird (argued), Laird Law PLLC, Tucson, Attorney for John and Anita Dryja

JUSTICE MONTGOMERY authored the Opinion of the Court, in which CHIEF JUSTICE TIMMER, VICE CHIEF JUSTICE LOPEZ and JUSTICES BOLICK, BEENE, KING, and CRUZ joined.

JUSTICE MONTGOMERY, Opinion of the Court:

¶1 The covenants, conditions, and restrictions ("CC&Rs") under consideration in this matter do two things: they restrict how owners may use their lots, and they allocate the costs of enforcing those restrictions. One provision prohibits any owner or resident from creating or permitting a nuisance on a lot. Another provides that if a court proceeding is "instituted in connection with the rights of enforcement and remedies provided" in the CC&Rs, "the prevailing party or parties shall be entitled to recover" their costs, expenses, and reasonable attorney fees.

¶2 Stephanie Burkett ("Burkett") sued her next-door neighbors, John and Anita Dryja (the "Dryjas"), alleging that their air conditioning unit violated the anti-nuisance provision. The Dryjas prevailed at trial but were denied their attorney fees. The superior court and the court of appeals reasoned that, because the common law already prohibits nuisances, Burkett's nuisance claim against the Dryjas sounded in tort rather than contract, and, therefore, the CC&Rs' fee provision did not apply.

¶3 We hold that a recorded anti-nuisance covenant like the one here is a contractual obligation that one owner may enforce against another, and that it remains enforceable even if the conduct it prohibits also constitutes a tort. Accordingly, we further hold that the attorney fee provision applies to an action to enforce the anti-nuisance provision. Because Burkett instituted a court proceeding in connection with the CC&Rs' rights of enforcement and remedies, and the Dryjas prevailed, the CC&Rs entitle the Dryjas to their reasonable attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 Burkett and the Dryjas own adjoining lots in Moondance Estates, a Tucson subdivision governed by the Moondance Estate

Community Association, Inc. (the "Association").[1] Their homes are "patio homes" situated only a few feet apart. Both lots are subject to the Association's recorded CC&Rs.[2] Relevant to this case, § 10.3 of the CC&Rs states: "If any Court proceedings are instituted in connection with the rights of enforcement and remedies provided in this Declaration, the prevailing party or parties shall be entitled to recover from the losing party or parties any costs and expenses in connection therewith including reasonable attorneys' fees."

¶5 In June 2021, the Dryjas replaced their air conditioning unit with a new unit placed in a different position on their patio. Burkett complained that she could hear noise from the new unit and feel its vibrations inside her home, particularly in her primary bedroom. Efforts to resolve the problem failed. Burkett also complained to the Association, which, after investigating, concluded that the unit was properly installed and was not objectionably loud, and declined to take further action.

¶6 Burkett then sued the Dryjas and the Association. As relevant here, her second amended complaint alleged that: (1) the noise and vibrations from the Dryjas' unit constituted "a nuisance that is prohibited by [§] 7.18 of the CC&R's"; (2) the CC&Rs "constitute a contract between Burkett, Dryja, and the Association"; and (3) the Dryjas breached the CC&Rs by creating the nuisance and by failing to locate the unit as the CC&Rs and the Association's design guidelines required. Regarding the Association, she alleged that it breached the CC&Rs by failing to enforce its provisions against the Dryjas. Burkett also sought injunctive relief to require the Dryjas to halt the noise and to remove, relocate, or replace the unit, and for the Association "to honor and adhere to its governing documents." She also sought damages and attorney fees under A.R.S. § 12-341.01 and § 10.3 of the CC&Rs.

¶7 After a three-day bench trial, the superior court ruled for the Dryjas and the Association on every count. The court acknowledged that Burkett's "concerns are not baseless," but found "that although the [u]nit

---

[1] Burkett brought this action as trustee of the Stephanie Rae Burkett Revocable Trust dated January 28, 2011.

[2] The governing instrument's formal title is the Second Amended and Restated Declaration of Protective Covenants, Conditions and Restrictions for Moondance Estates.

makes annoying noise when heard within [Burkett]'s bedroom, such noise does not constitute an actionable nuisance." The court further found that the noise did not violate the CC&Rs. The court also concluded that Burkett failed to prove that either the Dryjas or the Association "breached any contract or obligation they owe[d]" her.

¶8 The Dryjas and the Association each applied for attorney fees under § 10.3. The superior court awarded the Association $60,000 for its fees and costs, reasoning that Burkett's claims against the Association "were based on contract." But the court denied the Dryjas' request for fees and limited them to their taxable costs. Although it "acknowledge[d] that the CC&Rs create a contractual relationship among all homeowners within the Association," the court characterized Burkett's claim against the Dryjas as "essentially a nuisance claim which could have been asserted against the [Dryjas] irrespective of the existence of the CC&Rs."

¶9 Given how it characterized Burkett's nuisance claim, the superior court applied the "but-for" test as outlined in *Sparks v. Republic National Life Insurance Co.*, 132 Ariz. 529 (1982), and as applied in *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10 (App. 2000), to determine whether the Dryjas were entitled to fees under § 12-341.01. Then, reasoning that "the CC&Rs place no substantially greater duty on the homeowners . . . to avoid creating nuisances than does the common law," the court concluded that the claim "arises out of tort and thus the Dryjas are not entitled to attorney fees under A.R.S. § 12-341.01." The Dryjas appealed the denial of their fee request.

¶10 The court of appeals affirmed. *Burkett as Tr. of Stephanie Rae Burkett Revocable Tr. Dated Jan. 28, 2011 v. Dryja*, 260 Ariz. 1, 6 ¶ 27 (App. 2025). The court reasoned that because the Dryjas' "duty not to create a nuisance arises from tort, Burkett's lawsuit retained its character as a tort claim regardless of the CC&Rs." *Id.* at 2 ¶ 2. Although the court recognized that § 10.3's "in connection with" language is "[a]rguably . . . broader than 'arising out of,'" it deemed the difference irrelevant because a tort claim is "linked, associated, and related to the parties' underlying duties to each other, not to enforcement of the CC&Rs." *Id.* at 4–5 ¶ 20. The court further concluded that the CC&Rs' express prohibition of nuisances was "a distinction without a difference" because "[t]he contractual prohibition simply mirrors the parties' tort duties," and "parties may not contract to create duties that already exist as a matter of

law." *Id.* at 5 ¶ 22 (citing *Travelers Ins. Co. v. Breese*, 138 Ariz. 508, 511 (App. 1983)). Applying the § 12-341.01 "but-for" test as discussed in *Sparks* and *Ramsey*, the court held that Burkett "sought to enforce the Dryjas' underlying tort duties," so the Dryjas were not entitled to fees. *Id.* ¶¶ 23–25.

¶11 We granted review because the enforceability of anti-nuisance and fee-shifting provisions in recorded CC&Rs, which are common in planned communities throughout Arizona, is a recurring issue of statewide importance. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution.

DISCUSSION

¶12 We review de novo the interpretation of CC&Rs, which are contracts. *See Powell v. Washburn*, 211 Ariz. 553, 555–56 ¶ 8 (2006) ("A deed containing a restrictive covenant that runs with the land is a contract."); *Am. Power Prods., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, 367 ¶ 12 (2017) ("We review de novo issues of statutory application and contract interpretation."). We likewise review de novo whether a contractual fee provision applies to a particular claim. *Sirrah Enters., LLC v. Wunderlich*, 242 Ariz. 542, 544 ¶ 7 (2017). As with other contracts, we interpret CC&Rs according to the plain and ordinary meaning of their words, read in context. *See Henderson v. Moskowitz*, 261 Ariz. 8, 10–11 ¶ 10 (2025); *Duffy v. Sunburst Farms E. Mut. Water & Agric. Co.*, 124 Ariz. 413, 416 (1979) ("The words in a restrictive covenant must be given their ordinary meaning."); *Apollo Educ. Grp., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 250 Ariz. 408, 411 ¶ 11 (2021) (noting that we interpret contract terms in context). And "[c]lear and unambiguous restrictive covenants are . . . enforced according to their express terms." *Wilson v. Playa de Serrano*, 211 Ariz. 511, 514 ¶ 10 (App. 2005).

¶13 The three questions on which we granted review, quoted verbatim, overlap:

> 1. Where a written fee-shifting term in recorded CCRs requires an award of attorney's fees to all prevailing parties in any Court Proceedings instituted in connection with the rights of enforcement and remedies under CCRs, is the term

> enforceable as to all prevailing parties in an enforcement action?
>
> 2. Is a written anti-nuisance term in the recorded CCRs of an Arizona HOA enforceable in contract, where the prevailing party is a next-door neighbor of the losing party and therefore has a pre-existing duty in tort?
>
> 3. Did the Court of Appeals err in holding that a pre-existing tort duty renders unenforceable a written contractual term containing the same duty?

Because the answer to the first question rests on answers to the second and third, we begin with the CC&Rs themselves and the nature of the obligations created by §§ 10.3 and 7.18. We then explain why § 12-341.01 and the cases applying it do not govern the Dryjas' fee request, and we conclude by applying § 10.3 according to its terms.

A. The CC&Rs Are an Enforceable Contract Among the Owners

¶14 Burkett argues that, because the CC&Rs are a contract between the owners as a whole and each individual owner, they are "not, in a direct sense, a contract between Burkett and the Dryjas." In her view, the contractual rights the CC&Rs create belong to the Association and the community of owners, so that only her claims against the Association arose from the CC&Rs. She further argues that because she and the Dryjas lacked a contractual relationship, her claims against them sound only in tort. The text of the CC&Rs forecloses this argument.

¶15 Section 10.2 states that each provision of the CC&Rs is "deemed incorporated in each deed" conveying an interest in a lot and, upon an owner's acceptance of title, is "deemed accepted, ratified, adopted and declared as a personal covenant of such Owner." It further provides that each provision "shall be deemed *a personal covenant* to, with and for the benefit of the Association and *with and for the benefit of any other Owner*." (Emphasis added.) And "[a] deed containing a restrictive covenant that runs with the land is a contract." *Powell*, 211 Ariz. at 555 ¶ 8. An owner who accepts a deed to a lot conveyed subject to recorded restrictions becomes bound by them. *Duffy*, 124 Ariz. at 416. The CC&Rs, therefore, are a contract between Burkett and the Dryjas as much as they are between

the Association and Burkett and the Dryjas individually. Turning to the provisions at issue here, the mutual obligations between Burkett and the Dryjas are clear.

¶16 Section 10.3 provides in relevant part:

> In addition to any other remedies herein provided, *each provision of this Declaration* with respect to an Owner, the Unit Estate of an Owner and the Association *shall be enforceable by* Declarant, the Association or *any Owner* by a proceeding for a prohibitive or mandatory injunction or by a suit or action to recover damages . . . . If any Court proceedings are instituted in connection with the rights of enforcement and remedies provided in this Declaration, the prevailing party or parties shall be entitled to recover from the losing party or parties any costs and expenses in connection therewith including reasonable attorneys' fees.

(Emphasis added.)

The anti-nuisance provision, § 7.18, states:

> No Owner or Resident shall create or suffer to exist any use or operation on a Lot which is a public or private nuisance, nor shall any music, noise or sound that is objectionable due to intermittent beat, frequency, shrillness or loudness be allowed to emanate from or to exist within or around a Lot. No Owner or Resident shall allow the use upon a Lot of an exterior loud speaker or any other sound projection device emitting voices for a siren, bull horn or similar noise device unless used solely for security and alarm purposes.

¶17 Section 7.18 binds every "Owner." Section 10.2 makes that obligation a personal covenant of each owner that runs "for the benefit of any other Owner." And § 10.3 authorizes "any Owner" to enforce "each provision" of the CC&Rs "by a proceeding for a prohibitive or mandatory injunction or by a suit or action to recover damages." The burdens and benefits of § 7.18 are therefore reciprocal. "Each lot . . . is not merely burdened by a restriction but it is also clothed with the benefit which is

enforceable against every other lot or parcel." *Powell*, 211 Ariz. at 557–58 ¶ 16 (quoting *Wallace v. St. Clair*, 127 S.E.2d 742, 751 (W. Va. 1962)).

¶18 Thus, as an "Owner," Burkett held a contractual right to enforce § 7.18 against the Dryjas, and the Dryjas, as "Owner[s]," owed her a contractual obligation to comply with § 7.18. Burkett's complaint alleged as much, *supra* ¶ 6, and the superior court recognized "that the CC&Rs create a contractual relationship among all homeowners within the Association."

¶19 The court of appeals was reluctant to read § 10.3 to reach Burkett's claim because "individual homeowners are rarely involved in drafting CC&Rs," and it declined to conclude that "such a reordering of their rights occurred through such indirect language." *Burkett*, 260 Ariz. at 5 ¶ 21. But nothing about §§ 7.18, 10.2, or 10.3 is indirect, and enforcing them does not reorder anyone's rights. Each owner accepted those covenants with title to the owner's lot. *See Duffy*, 124 Ariz. at 416. And unlike the new affirmative obligations an association sought to impose in *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, 538 ¶ 14 (2022), without notice in the original declaration, the anti-nuisance and fee-shifting provisions here appear in the recorded instrument itself. Every owner therefore took title with notice of: (1) the obligation to refrain from nuisances; (2) the authority to enforce the provision; and (3) the potential cost of failing to prevail in litigating its enforcement.

B. A Preexisting Tort Duty Does Not Render § 7.18 Unenforceable

¶20 As noted, the court of appeals concluded that § 7.18's prohibition of nuisances was "a distinction without a difference" because it "simply mirrors the parties' tort duties" and "parties may not contract to create duties that already exist as a matter of law." *Burkett*, 260 Ariz. at 5 ¶ 22. Burkett defends that conclusion, arguing that because § 7.18 "simply reiterates a preexisting legal duty," it is "essentially illusory" and unsupported by consideration. *See* Restatement (Second) of Contracts § 73 (Am. L. Inst. 1981). We disagree for three reasons.

1. The preexisting duty rule does not apply

¶21 First, the preexisting duty rule does not invalidate § 7.18, and the court of appeals' reliance on *Breese* is misplaced. That rule concerns

whether a promise is supported by consideration: "A promise lacks consideration if the promisee is under a preexisting duty to counter-perform." *Breese*, 138 Ariz. at 511. In *Breese*, an injured worker signed an "Election of Remedies" agreement with a workers' compensation carrier that was little more than "an attempt to incorporate the provisions of A.R.S. § 23-1023" into a written document. *Id.* at 510. Because the agreement "set[] forth no duties, responsibilities or undertakings by" the carrier, and the carrier gave nothing beyond what the statute already required of it, the agreement failed for lack of consideration. *Id.* at 511.

¶22 The CC&Rs bear no resemblance to the agreement in *Breese*. They are a comprehensive instrument that governs, among other things, assessments, landscaping, irrigation, and the size of homes, and each owner's acceptance of these obligations is exchanged for the reciprocal obligations of every other owner and of the Association. Thus, the CC&Rs are distinguishable from the contract in *Breese* because they impose exchanged-for duties between "Owners," whereas the carrier in *Breese* gave nothing.

¶23 Furthermore, Arizona law does not require separate consideration for each of the contract's terms. "The fact that part of what is bargained for would not have been consideration if that part alone had been bargained for does not prevent the whole from being consideration." Restatement § 80(2); *see also* Restatement § 79 cmt. c (noting that courts do not ordinarily inquire into the adequacy of consideration and that an agreement may be a mix of both a bargain and a gift); *see generally Demasse v. ITT Corp.*, 194 Ariz. 500, 504–05 ¶¶ 12–16 (1999) (discussing changes to specific terms of an at-will employment contract). *Breese* did not hold otherwise, and it provides no support for excising a single covenant from an otherwise valid and mutually binding declaration.

¶24 Burkett's reliance on § 73 of the Restatement fares no better. Under that section, "[p]erformance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . . ." Restatement § 73. But the requirement of consideration is satisfied "if the consideration includes a performance in addition to or materially different from the performance of the duty." *Id.* § 73 cmt. b. The consideration each owner receives for accepting § 7.18 is not merely another owner's compliance with § 7.18. Rather, it is the full set of reciprocal obligations the CC&Rs impose, most of which no other law

requires. And, as we next explain, § 7.18 itself imposes obligations that differ from, and run to more persons than, the common law duty to refrain from creating a nuisance.

2. Section 7.18 extends beyond the common law duty

¶25 Second, § 7.18 does not "simply mirror[]" the Dryjas' tort duty. At common law, "[a] private nuisance is strictly limited to an interference with a person's interest in the enjoyment of real property." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 4 (1985). A public nuisance "encompasses any unreasonable interference with a right common to the general public." *Id.*

¶26 Section 7.18, by contrast, is a covenant each owner makes, which, under § 10.2, is "for the benefit of the Association and . . . for the benefit of *any other* Owner," and which, under § 10.3, may be enforced by the Association or "*any* Owner." (Emphasis added.) As drafted, § 7.18 permits any owner to bring an action based on a private nuisance committed against any other owner. Section 7.18 thus transforms a common law duty owed to neighbors who are actually harmed or, as to a public nuisance, who suffer a special injury different in kind from the public's, into a subdivision-wide obligation owed to every "Owner" and to the Association.

¶27 Moreover, the text of § 7.18 encompasses conduct the common law does not necessarily reach. It forbids owners and residents from not only "creat[ing]" a nuisance but also from "suffer[ing] to exist" any use or operation on a lot that is a public or private nuisance. And it separately forbids allowing "any music, noise or sound that is objectionable due to intermittent beat, frequency, shrillness or loudness" to "emanate from or to exist within or around a Lot." Consistent with that text, the superior court separately considered whether the unit was "objectionably loud" under § 7.18 and whether it was an actionable nuisance.

¶28 Additionally, § 7.18 categorically prohibits exterior loudspeakers and similar sound projection devices except for security and alarm purposes, a restriction that Burkett acknowledges "add[s] specific duties" beyond the common law. We need not decide the precise extent to which § 7.18's noise standard departs from the common law standard for nuisance. It is enough that the covenant is not coextensive with the Dryjas'

tort duty. And, as explained next, even if the duty were coextensive in the specific instance of the harm Burkett alleged as a next-door neighbor, § 7.18 is still enforceable.

3. Overlapping contract and tort duties may coexist

¶29 Third, and more fundamentally, even if § 7.18 entirely overlapped with the common law duty, the overlap would not render the covenant unenforceable. Nothing in our law prevents parties from promising one another to refrain from conduct that the law independently prohibits with the requisite consideration. *See supra* ¶¶ 21–24. The same conduct may breach a contractual promise *and* a duty imposed by law, and it may give rise to claims in both contract and tort. *See Sirrah*, 242 Ariz. at 545 ¶ 10 ("[N]egligent construction of a residence can simultaneously support contract damages for breach of the Implied Warranty and tort damages.").[3]

¶30 In *Sirrah*, we addressed the implied warranty of workmanship and habitability. *Id.* at 543–44 ¶ 1. We noted it was "imposed by law," and because the law imputed it into the parties' construction contract, it was "a term of the contract." *Id.* at 543 ¶ 1. Accordingly, a claim for its breach arose "from the contract" to trigger the parties' contractual fee provision. *Id.* at 543–44 ¶ 1. And we rejected the argument that *Barmat v. John & Jane Doe Partners A–D*, 155 Ariz. 519 (1987) precluded a fee award, explaining that *Barmat* "does not apply to contract claims." *Sirrah*, 242 Ariz. at 546 ¶ 16. If a duty that the law imputes into a contract is a contract term enforceable under a contractual fee provision, then an express, recorded covenant that each owner accepted with title is no less a contractual obligation, regardless of any overlap with tort law.

¶31 Our freedom-of-contract jurisprudence calls for no less. "The freedom to contract has long been considered a 'paramount public policy' under our common law that courts do not lightly infringe." *Zambrano v. M & RC II LLC*, 254 Ariz. 53, 58 ¶ 10 (2022) (quoting *Consumers Int'l, Inc. v. Sysco Corp.*, 191 Ariz. 32, 34 (App. 1997)). And "[o]ur law

[3] Further, the CC&Rs contemplate that owners' obligations will coexist with those imposed by law. Section 10.4 provides that "no provision hereof shall be construed to excuse any person from observing any law or regulation of any governmental body having jurisdiction over the Project."

generally presumes . . . that private parties are best able to determine if particular contractual terms serve their interests." *1800 Ocotillo, LLC v. WLB Grp., Inc.*, 219 Ariz. 200, 202 ¶ 8 (2008). Nevertheless, "courts will refuse to enforce a contract term if legislation prohibits the term or when an identifiable public policy clearly outweighs enforcement." *Zambrano*, 254 Ariz. at 58 ¶ 11. Consistent with these principles, we have recognized that parties "may otherwise specify remedies that modify common law recovery." *Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc.*, 223 Ariz. 320, 326 ¶ 29 (2010) (explaining that parties to a construction contract may agree to preserve tort remedies for purely economic loss or otherwise specify remedies).

¶32 The CC&Rs reflect exactly that kind of choice. They adopt a covenant governing nuisance-type conduct throughout the subdivision, and they specify the remedies available to enforce it: injunctive relief, damages, and fee shifting. No statute prohibits such a covenant, and Burkett identifies no public policy that outweighs its enforcement. To the contrary, a fee-shifting provision that applies to all prevailing parties both permits every owner to insist on compliance with meritorious claims and deters claims that lack merit.

¶33 The court of appeals therefore erred in treating the overlap between § 7.18 and the common law duty as rendering § 7.18 unenforceable as a contractual obligation between Burkett and the Dryjas.

C. Section 12-341.01 and Its "But-For" Test Do Not Govern

¶34 The determination of each court below that the Dryjas were not entitled to attorney fees relied on cases applying § 12-341.01(A), which provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." In *Sparks*, this Court developed a test for determining when such claims "aris[e] out of a contract" under the statute because tort claims are often asserted between parties who also have a contract. 132 Ariz. at 543. The Court concluded that fees are available when "the cause of action in tort could not exist but for the breach of the contract." *Id.* Applying that test in *Sparks*, the Court held that a claim for an insurer's bad faith arises out of contract because "the tort of bad faith cannot be committed absent the existence of an insurance contract and a breach thereof." *Id.* at 544.

¶35 By contrast, we concluded in *Barmat* that a legal malpractice claim does not arise from a contract. 155 Ariz. at 522–23. We reached this conclusion because the duties arising from the attorney–client relationship, like those arising from "other special relationships long recognized at common law," do not depend on a contract. *Id.* Applying the same "but-for" test, the court of appeals concluded in *Ramsey* that a negligence claim did not arise out of contract because "[t]he test is whether the defendant would have a duty of care under the circumstances even in the absence of a contract." 198 Ariz. at 16 ¶ 27.

¶36 The "but-for" test is derived from the construction of § 12-341.01(A)'s phrase "arising out of a contract." It reflects our conclusion that the Legislature "did not intend that every tort case would be eligible for an award of fees whenever the parties had some sort of contractual relationship." *Barmat*, 155 Ariz. at 524. But *Sparks*, *Barmat*, and *Ramsey* each addressed a discretionary request for fees under the statute, and all lacked a specific fee-shifting agreement. As Burkett's counsel acknowledged at oral argument, that is why § 12-341.01 was considered in those cases. Here, the Dryjas sought fees under § 10.3—an express contractual fee provision.

¶37 Section 12-341.01(A) itself directs that it "shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees." The statute, then, "does not alter the parties' mandatory fee provision." *Sirrah*, 242 Ariz. at 547 ¶ 23. And "it is well-settled in Arizona that '[c]ontracts for payment of attorneys' fees are enforced in accordance with the terms of the contract.'" *McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, 269 ¶ 14 (App. 2007) (quoting *Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333 (App. 1977)).

¶38 Accordingly, when parties have agreed to a fee provision, the question is not whether a claim "aris[es] out of a contract" within the meaning of § 12-341.01(A), but whether the claim falls within the terms of the parties' agreement. *See Sirrah*, 242 Ariz. at 547 ¶ 23.

¶39 The court of appeals acknowledged that § 10.3, not § 12-341.01, governed the Dryjas' request, but it found the statutory cases "instructive" because "we read contracts as incorporating common-law principles, such as the distinction between contract and tort." *Burkett*,

260 Ariz. at 4 ¶ 19. That reasoning improperly substituted a statutory test for express contractual terms.

¶40 Here, the CC&Rs do not award fees in actions "arising out of a contract." They award fees in proceedings "instituted in connection with the rights of enforcement and remedies provided in this Declaration." The two phrases appear in different provisions, serve different purposes, and carry different meanings, as the court of appeals itself acknowledged was "[a]rguably" so. *Id.* at 4–5 ¶ 20. And the common law's distinction between contract and tort does not forbid parties from contracting about conduct that may also constitute a tort. *Supra* ¶¶ 29–33. Importing the statutory "but-for" test into § 10.3 incorrectly rewrote the parties' agreement. *See D.M.A.F.B. Fed. Credit Union v. Emps. Mut. Liab. Ins. Co.*, 96 Ariz. 399, 403 (1964) (stating that where a contract's provisions "are plain and unambiguous upon their face, they must be applied as written, and the court will not . . . add something to the contract which the parties have not put there"). We now turn back to § 10.3's text.

D. Section 10.3 Entitles the Dryjas to Their Attorney Fees

¶41 As noted, the text of § 10.3 applies: (1) when "any [c]ourt proceedings are instituted"; (2) "in connection with the rights of enforcement and remedies provided in" the CC&Rs; and (3) when "the prevailing party or parties" is entitled to "recover from the losing party or parties." Burkett's suit satisfies each element.

¶42 Burkett sued the Dryjas as an "Owner" for violating § 7.18 and for breaching the CC&Rs. She sought a prohibitive or mandatory injunction and damages—the remedies § 10.3 enumerates. And she requested her own attorney fees under § 10.3. Thus, she instituted a court proceeding, and she did so "in connection with" the CC&Rs' rights of enforcement and remedies. "The word 'connection' is commonly defined as a link, an association or a relationship." *Cal. Cas. Ins. Co. v. Am. Fam. Mut. Ins. Co.*, 208 Ariz. 416, 419 ¶ 8 (App. 2004). Here, Burkett's suit did not merely relate to the CC&Rs; it invoked the very rights of enforcement and remedies § 10.3 provides.

¶43 The Dryjas, in turn, are "prevailing part[ies]." The superior court entered judgment in their favor on every count Burkett asserted against them. Nothing in § 10.3 limits the recovery of fees to only the

Association. To the contrary, the provision entitles "the prevailing party or parties" to recover from "the losing party or parties." This language expressly contemplates enforcement proceedings involving multiple litigants on either side. Reading § 10.3 to award fees to some prevailing parties but not others would disregard those terms. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) ("If possible, every word and every provision is to be given effect . . . ."). And because § 10.3 provides that the prevailing parties "shall be entitled" to fees, an award is mandatory rather than discretionary. *See Sirrah*, 242 Ariz. at 547 ¶ 23.

¶44 Burkett contends that the phrase "in connection with the rights of enforcement and remedies" is "not necessarily much broader" than "arising from this agreement," and that the provision reaches only "actions concerning the rights and remedies created by the CC&Rs." Even accepting that reading, her action qualifies. Section 7.18 is a right created by the CC&Rs that "any Owner" may enforce, and Burkett sued to enforce it. Burkett's argument to the contrary depends on the premise that § 7.18 creates no rights beyond those that exist under Arizona law, which is a premise we have rejected. *See supra* ¶¶ 20–33.

¶45 We do not suggest that § 10.3 reaches every lawsuit between owners that merely touches upon the CC&Rs, and we need not define its outer limits here. Nor must we decide the Dryjas' alternative argument that they are entitled to fees because Burkett's claims against the Association were brought to enforce the CC&Rs. It is enough that Burkett instituted a proceeding against the Dryjas to enforce § 7.18 through the rights and remedies § 10.3 provides, and the Dryjas prevailed. Under the plain terms of § 10.3, the Dryjas are entitled to their reasonable attorney fees.

¶46 In sum, we answer each question presented in the affirmative. A written anti-nuisance covenant in a recorded declaration of CC&Rs is enforceable in contract between neighbors even though the common law also imposes a duty not to create a nuisance. The court of appeals erred in holding that the preexisting tort duty rendered that covenant unenforceable. And § 10.3 is enforceable according to its terms as to all prevailing parties in a court proceeding instituted in connection with the CC&Rs' rights of enforcement and remedies.

E. Attorney Fees and Costs on Appeal

¶47 The Dryjas request their attorney fees and costs incurred on appeal and in this Court under § 10.3 and Arizona Rule of Civil Appellate Procedure 21. Because they are prevailing parties in a proceeding instituted in connection with the CC&Rs' rights of enforcement and remedies, we grant their request for reasonable attorney fees and costs upon their compliance with Rule 21. We deny Burkett's request for costs under A.R.S. § 12-341 because she is not the successful party.

CONCLUSION

¶48 We vacate the court of appeals' opinion. We reverse the portion of the superior court's judgment denying the Dryjas' request for attorney fees under § 10.3, and we remand to the superior court to determine the reasonable attorney fees to which the Dryjas are entitled.