DIVISION ONE
FILED: 03/26/2025
MATTHEW J. MARTIN,
CLERK
BY: JR

IN THE

COURT OF APPEALS

STATE OF ARIZONA
DIVISION ONE

GORDON GROSS and LILIANA GROSS, husband and wife; 854 PINE CREEK, LLC, an Arizona limited liability company; BALD EAGLE RETREAT, LLC, an Arizona limited liability company; 1501 RAINBOW VIEW LLC, an Arizona limited liability; LAKESIDE FAMILY INVESTMENTS, LLC, an Arizona limited liability company; STEVEN A KERNAGIS and SANDRA K. KERNAGIS, trustees of the STEVEN AND SANDRA KERNAGIS TRUST DATED MARCH 17, 2014; THOMAS P. ZEHRING and JEANNETTE ROSE ZEHRING, trustees of the ZEHRING LIVING TRUST DATED MARCH 1, 2001; and JEANNETTE ZEHRING; RONALD D. KYER, JR. and DESIREEE KYER, husband and wife

Plaintiffs/Appellees/
Cross-Appellants,

v.

THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION,

Defendant/Appellant
Cross-Appellee.

Court of Appeals
Division One
No. 1 CA-CV 23-0394

Navajo County
Superior Court
No. S0900CV202200042

MANDATE

TO: The Navajo County Superior Court and the Honorable Michala M Ruechel, Judge, in relation to Cause No. S0900CV202200042.

This cause was brought before Division One of the Arizona Court of Appeals in the manner prescribed by law. This Court rendered its OPINION and it was filed on October 10, 2024.

The time for the filing of a motion for reconsideration has

expired and no motion was filed. A petition for review was filed. By order, dated March 4, 2025, the Arizona Supreme Court denied the petition for review. Arizona Supreme Court No. CV-24-0260-PR.

NOW, THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the OPINION of this court; a copy of which is attached hereto.

I, Matthew J. Martin, Clerk of the Court of Appeals, Division One, hereby certify the attachment to be a full and accurate copy of the OPINION filed in this cause on October 10, 2024.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of the Arizona Court of Appeals, Division One, on March 26, 2025.

MATTHEW J. MARTIN, CLERK

By ________jr___________
Deputy Clerk

MATTHEW J. MARTIN
CLERK OF THE COURT

Court of Appeals

STATE OF ARIZONA
DIVISION ONE
STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
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March 26, 2025

Michael Sample, Clerk
Navajo County Superior Court
Navajo County Complex
100 E Code Talkers Dr
P O Box 668
Holbrook AZ 86025-0668

Dear Mr. Sample:

RE: 1 CA-CV 23-0394

GROSS, et al. v. THE SHORES
Navajo County Superior Court
S0900CV202200042

The following are attached in the above entitled and numbered cause:

Original MANDATE
Copy of OPINION

There are no physical record items to be returned to your Court.

If digital exhibits were submitted through the Arizona digital exhibit portal in this case, access to those exhibits by the Court of Appeals will be removed by the Superior Court pursuant to ARCAP Rule 24(c).

MATTHEW J. MARTIN, CLERK

By ________jr____________
Deputy Clerk

A copy of the foregoing
was sent to:

Rick K Carter
Matthew Klopp

Stockton D Banfield
Joseph R Rainey
John R Cunningham
James Luis Csontos
Lauren Elliott Stine
Kristin Leaptrott
Hon Michala M Ruechel

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

GORDON GROSS and LILIANA GROSS, husband and wife; 854 PINE CREEK, LLC, an Arizona limited liability company; BALD EAGLE RETREAT, LLC, an Arizona limited liability company; 1501 RAINBOW VIEW LLC, an Arizona limited liability; LAKESIDE FAMILY INVESTMENTS, LLC, an Arizona limited liability company; STEVEN A KERNAGIS and SANDRA K. KERNAGIS, trustees of the STEVEN AND SANDRA KERNAGIS TRUST DATED MARCH 17, 2014; THOMAS P. ZEHRING and JEANNETTE ROSE ZEHRING, trustees of the ZEHRING LIVING TRUST DATED MARCH 1, 2001; and JEANNETTE ZEHRING; RONALD D. KYER, JR. and DESIREEE KYER, husband and wife,
Plaintiffs/Appellees/Cross-Appellants,

v.

THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION,
Defendant/Appellant/Cross-Appellee.

No. 1 CA-CV 23-0394
FILED 10-10-2024
AMENDED PER ORDER FILED 10-16-2024

Appeal from the Superior Court in Navajo County
No. S0900CV202200042
The Honorable Michala M. Ruechel, Judge

AFFIRMED

COUNSEL

Dyer Bregman Ferris Wong & Carter PLLC, Phoenix
By Matthew A. Klopp (argued), Rick K. Carter, Stockton D. Banfield, Joseph R. Rainey
Counsel for Plaintiffs/Appellees/Cross-Appellants

Jennings Haug Keleher McLeod LLP, Phoenix
By James L. Csontos (argued), Jack R. Cunningham
Counsel for Defendant/Appellant/Cross-Appellee

OPINION

Presiding Judge Samuel A. Thumma delivered the opinion of the Court, in which Judge Jennifer B. Campbell and Judge Michael J. Brown joined.

T H U M M A, Judge:

¶1 This appeal presents a conflict between two bedrock legal principles: (1) the sanctity of contract and (2) the rights of home ownership. The dispute arises out of a residential community governed by Covenants, Conditions and Restrictions (CC&Rs) in place for decades. In 2021, those CC&Rs were amended to prohibit: (1) leases lasting less than 30 days and (2) more than four unrelated individuals leasing property in the community. The dispositive issue here is whether those 2021 amendments were "reasonable and foreseeable." *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, 537 ¶ 10 (2022) (citation omitted).

¶2 Because the short-term lease prohibition banned what the CC&Rs previously allowed, it was not reasonable and foreseeable and is invalid. Because the unrelated individuals prohibition refined and clarified provisions in the CC&Rs, it was reasonable and foreseeable and is valid. Accordingly, for the reasons discussed below, the judgment reflecting that relief is affirmed.

FACTS AND PROCEDURAL HISTORY

¶3 The Shores at Rainbow Lake is a residential community in Pinetop-Lakeside, Arizona. The community consists of 188 residential units (164 detached houses and 24 townhouses) and common areas. The community is subject to Arizona's Planned Communities Act, *see* Ariz. Rev. Stat. (A.R.S.) §§ 33-1801 to -1819 (2024),[1] and is governed by CC&Rs, originally recorded years ago and amended in 2001.[2] The Shores at Rainbow

---

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

[2] Provisions of the CC&Rs before 2001 are not at issue here.

Lake Community Association (Association), as well as any lot owner, may enforce the CC&Rs.

¶4 The CC&Rs included the following provisions regarding owners leasing their residential units:

> Section 2.18: **Residential Use**. All Lots and Parcels shall be used, improved and devoted exclusively to Single Family residential use. . . . [Although largely prohibiting] gainful occupation, profession, trade, business or other nonresidential use [] on any Lot, . . . [t]he leasing of a residence by an Owner thereof shall not be considered a trade or business within the meaning of this section.
>
> Section 2.30: **Leasing of Lots.** No Owner may lease less than his entire Lot. Upon leasing his Lot, an Owner shall promptly notify the Association of the commencement date and termination date of the lease and the names of each lessee or other person who will be occupying the Lot during the term of the lease.
>
> Section 1.30: "**Lot**" means a detached house or townhouse unit -- a "Residential Unit" as used in the CC&Rs -- "intended for independent ownership and use" by an individual, including improvements on each Lot.[3]

The CC&Rs (1) did not specify a minimum duration for leases and (2) defined "Single Family" as "a group of one or more persons each related to the other by blood, marriage or legal adoption, or a group of persons not all so related, who maintain a common household in a Residential Unit."

[3] The CC&Rs contain other potentially relevant lease provisions, including allowing oral leases, Section 1.29, and a provision that the CC&Rs do not "prevent an Owner from . . . selling or leasing a license or contractual right of occupancy in a Lot which is not coupled with an ownership interest in the Lot," Section 2.22. Because the parties do not rely on those provisions in this appeal, they are not addressed here.

¶5 The CC&Rs expressly provided they could be amended "by the written approval or the affirmative vote, or any combination thereof, of Owners representing not less than sixty-seven percent (67%) of the votes in each class of membership." In February 2021, by a vote exceeding this 67% threshold but not unanimously, the Association adopted an amendment replacing Section 2.30 of the CC&Rs (Amendment). The Amendment was recorded in March 2021.[4]

¶6 The Amendment replaced Section 2.30 of the CC&Rs "in its entirety and replaced [it] with the following:"

> **2.30.** **<u>Leasing of Lots</u>**
>
> (A) After December 31, 2021, ***no Lot may be leased for a term of less than thirty (30) days***.
>
> (B) ***No portion of a Lot may be leased, other than the entire Lot, and then only to a Single Family. For purposes of this Section 2.30, a Single Family may not consist of more than four (4) individuals who are unrelated by blood, marriage or legal adoption***.
>
> (C) An Owner who leases his Lot shall provide the following information to the Association at least ten (10) days before the commencement of the lease term:
>
> (i) the commencement date and expiration date of the lease term;

[4] Plaintiffs originally alleged voter irregularities regarding the Amendment, stating in a footnote in their briefing on appeal that "these alternative theories remain to be litigated." The judgment resulting in this appeal, however, dismissed with prejudice "all other claims plaintiffs alleged in this litigation." In briefing leading up to the entry of that judgment, plaintiffs conceded that they had "voluntarily dismissed or are otherwise not pursuing" claims alleging voter irregularities. Accordingly, any such claims have been finally resolved against plaintiffs, with no alternative theories remaining to be litigated.

> (ii) the names and contact information of any adults occupying the Lot during the lease term; and
>
> (iii) the address and telephone number at which the Owner (or Owner's agent) can be contacted by the Association during the lease term.
>
> (D) Any agreement for the lease of a Lot shall provide that the terms of such lease shall be subject in all respects to the provisions of the Project Documents and that any failure by the Lessee to comply with the terms of the Project Documents shall be a default under the lease. Any Owner who leases a lot must provide the Lessee with copies of this Declaration, the Architectural Committee Rules and the Association Rules and is responsible for assuring the Lessee's compliance therewith. The Owner shall be liable for any violations of this Declaration, the Architectural Committee Rules or the Association rules by the Lessees or other persons residing in the Lot and their guests or invitees and, in the event of any such violation, the Owner, upon demand of the Association, shall immediately take all necessary actions to correct any such violations.

(Emphasis added.)

¶7 Plaintiffs, owners who had previously leased their Lots on a short-term basis, filed this suit seeking to invalidate the Amendment. After the Association answered, plaintiffs moved for partial summary judgment. Relying on *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532 (2022), plaintiffs argued the Amendment was invalid because it "enact[ed] entirely new restrictions and affirmative covenants" not contained in or contemplated by the CC&Rs. The Association cross-moved for summary judgment, arguing the Amendment "fully satisfies" *Kalway*.

¶8 After full briefing and oral argument, the superior court issued a split decision. Granting plaintiffs partial relief, the court invalidated Section 2.30(A) of the Amendment as violating *Kalway*, concluding that "placing term restrictions on leases under these circumstances does create an entirely new and different restriction on the Owners' use of their property in a manner that was unforeseeable" when the CC&Rs were recorded. Granting the Association partial relief, the court rejected plaintiffs' challenge to Sections 2.30(B)-(D) of the Amendment, concluding those provisions satisfied *Kalway*.

¶9 After additional motion practice, the court entered a final judgment: (1) invalidating Section 2.30(A) of the Amendment; (2) finding Sections 2.30(B)-(D) of the Amendment were valid; (3) denying both sides' requests for attorneys' fees and (4) dismissing "all other claims Plaintiffs' alleged" with prejudice. The Association timely appealed, and plaintiffs timely cross-appealed. This court has appellate jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶10 The appeal and cross-appeal raise as an initial matter whether *Kalway* applies to this dispute. If *Kalway* applies, the remaining issues include: (1) the appropriate procedure to resolve a *Kalway* dispute; (2) whether the CC&Rs expressly authorized amendments and (3) whether the Amendment was "reasonable and foreseeable" when looking at the CC&Rs, recognizing a "covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way, . . . [b]ut future amendments cannot be 'entirely new and different in character,' untethered to an original covenant." *Kalway*, 252 Ariz. at 537-38 ¶ 10, 539 ¶ 17 (citations omitted). The court addresses these issues in turn.

I. *Kalway* Applies to this Dispute.

¶11 In arguing *Kalway* does not apply, the Association relies on longstanding authority touting the sanctity of contract, including that Arizona law "generally presumes, especially in commercial contexts, 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) (citation omitted). Building on this concept, the Association argues: (1) Arizona's Planned Communities Act governs exclusively and (2) there is no room for *Kalway*'s application of the common law.

¶12 *Kalway* expressly rejected the view that Arizona's Planned Communities Act displaced the common law. *See* 252 Ariz. at 537 ¶ 10. To the contrary, *Kalway* declared that "Arizona law permits the amendment of CC&Rs by a majority vote if such voting scheme is specified in the original declaration. A.R.S. § 33-1817(A). ***But § 33-1817(A) does not displace the common law, which prohibits some amendments even if passed by a majority vote.***" *Id.* (emphasis added). The Association has not shown how factual and procedural differences in *Kalway* mean that directive does not apply here. Nor has the Association shown that, by striking various purported amendments as violating the common law, the *Kalway* directive was non-binding dicta. *See Swenson v. Cnty. of Pinal*, 243 Ariz. 122, 126 ¶ 10 (App. 2017) ("A court's statement on a question not necessarily involved in the case before it is dictum.") (citation omitted). This court has no authority to chart a path different from the one directed by the Arizona Supreme Court in *Kalway*. *See State v. Smyers*, 207 Ariz. 314, 318 ¶ 15 n.4 (2004). And if, as the Association argues, *Powell v. Washburn*, 211 Ariz. 553 (2006) provided a different analysis, the 2022 *Kalway* decision altered that *Powell* analysis. Simply put, *Kalway* applies here.

II. The Issues Presented are Legal Issues Reviewed De Novo.

¶13 Summary judgment is warranted if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). The interpretation of the CC&Rs and the Amendment is a question of law subject to de novo review. *Powell*, 221 Ariz. at 555-56 ¶ 8. Summary judgment should not be granted if the undisputed facts would allow reasonable minds to differ, *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 191 (App. 1994), with the court viewing the facts in a light most favorable to the party opposing summary judgment, *Matter of Est. of Podgorski*, 249 Ariz. 482, 484 ¶ 8 (App. 2020).

¶14 In their cross-motions for summary judgment, each side essentially accepted the other's statement of facts. Although the parties claim they should have won completely, they do not argue that a disputed issue of material fact requires that the grant of summary judgment be vacated. Nor do they argue that a remand for trial is the appropriate remedy. Instead, the competing arguments are that either the Association or plaintiffs were entitled to judgment as a matter of law, not that there is a disputed issue of material fact that needs to be resolved. Thus, the parties argue that the issues can be resolved on appeal without remand.

¶15 *Kalway* also indicates that the issues presented here are questions of law based on the terms of the documents, not disputed issues of material fact that require a trial. In stating that the court "must look to the original declaration itself" to determine whether it "gave sufficient notice of a future amendment," "with any doubts resolved against the validity of the restriction," *Kalway* made clear the inquiry was objective, not subjective. *See* 252 Ariz. at 538-39 ¶ 16 (citation omitted). *Kalway* left no doubt on the point, declaring: "We apply an objective inquiry to determine whether a restriction gave notice of the amendments at issue." *Id.* at 539 ¶ 16 (citing 1 WILLISTON ON CONTRACTS § 3:4 (4th ed. 2021) ("Whether there is mutual assent to the terms of a contract is determined by an objective test, rather than the subjective intentions of the parties.")). This *Kalway* directive confirms that the issue to be resolved here is a legal question to be decided by the court based on the text of the CC&Rs and the Amendment, not a factual dispute to be decided by a finder of fact.[5]

II. Application of the *Kalway* Standard.

¶16 For the Amendment to be valid: (1) the CC&Rs must have expressly authorized amendments and (2) the Amendment must have been "reasonable and foreseeable." *Id.* at 537-38 ¶ 10 (citing, among others, *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 51 ¶ 38 (App. 2010)), 539 ¶ 17 (citations omitted).

[5] This conclusion is consistent with the appellate cases applying *Kalway*, all of which are unpublished. *See Thompson Thrift Dev., Inc. v. Albertson,* 2023 WL 7001798 at *1 ¶1 (Ariz. App. Oct. 24, 2023) (affirming cross-motions for summary judgment; concluding amendment to subdivision was valid under *Kalway*); *Vill. of Oakcreek Ass'n v. Bonham*, 2023 WL 6444337, at *1 ¶ 1, *2 ¶ 12 (Ariz. App. Oct. 3, 2023) (mem. dec.) (affirming grant of motion to dismiss; concluding amendments to covenants banning short-term rentals were invalid under *Kalway*); *MacLeod v. Mogollon Airpark Inc.*, 2023 WL 2582622 at *4 ¶ 20 (Ariz. App. Mar. 21, 2023) (mem. dec.) (concluding purported CC&R amendments were invalid under *Kalway*; vacating superior court judgment and administrative decision); *see also Vista Del Corazon Homeowners Ass'n v. Smith,* 2024 WL 1007275 at *1 ¶ 1, *8 ¶ 37 (Ariz. App. Mar. 8, 2024) (reversing grant of injunctive relief; "short-term rental restriction" amendment "is not enforceable" under *Kalway*); *Preston v. Las Sendas Cmty. Ass'n, Inc.,* 2023 WL 7139326 at *5 ¶ 19 (Ariz. App. Oct. 31, 2023) (affirming denial of injunctive relief; "short-term rental amendment is valid and enforceable" under *Kalway*).

A. The CC&Rs Expressly Authorized Amendments.

¶17 The CC&Rs provide that they may be "amended from time to time." Under the CC&Rs, an amendment required "the written approval or the affirmative vote, or any combination thereof, of Owners representing not less than sixty-seven percent (67%) of the votes in each class of membership." As noted above, the Association relied on this express authority to amend the CC&Rs when adopting and recording the Amendment. The CC&Rs expressly authorized amendments, including (at least procedurally) the Amendment at issue here. *See id.* at 539 ¶ 17.

¶18 There is no assertion that all Owners agreed to the Amendment, recognizing unanimous agreement could amount to a waiver of any objection to the Amendment. *Cf. id.* at 537 ¶ 10 (noting Arizona "common law . . . prohibits some amendments [to CC&Rs] even if passed by a majority vote"). Because there is no unanimity here, the question becomes whether "the original declaration" -- here the CC&Rs -- gave "fair notice of" the Amendment's provisions. *Id.* at 539 ¶ 19.

B. The Short-Term Rental Limitation in the Amendment Was Not "Reasonable and Foreseeable."

¶19 In assessing the validity of an amendment to CC&Rs, "[t]he original declaration must give sufficient notice of the possibility of a future amendment; that is, amendments must be reasonable and foreseeable." *Id.* at 537-38 ¶ 10 (citing, among others, *Dreamland*, 224 Ariz. at 51 ¶ 38). "In defining the contours of reasonableness and foreseeability," *id.* at 538 ¶ 11, *Kalway* variously described the scope of this common law limitation as follows:

- "[W]e hold that an HOA cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations."

- "[I]n special types of contracts, we do not enforce 'unknown terms which are beyond the range of reasonable expectation.' . . . CC&Rs are such contracts."

- "The notice requirement relies on a homeowner's reasonable expectations based

on the declaration in effect at the time of purchase" by the homeowner.

- "The restriction itself [in the original declaration] does not have to necessarily give notice of the particular details of a future amendment; that would rarely happen. Instead, it must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way."

- "[F]uture amendments cannot be 'entirely new and different in character, untethered to an original covenant. Otherwise, such an amendment would infringe on property owners' expectations of the scope of the covenants."

Id. at 538-39 ¶¶ 13-17 (citations omitted). As these quotes show, the *Kalway* standard is more diffuse than a single sentence or directive. Given *Kalway*'s focus on notice, the permissible and prohibited uses of each individual Lot under the CC&Rs before the Amendment are significant. By happenstance, a prior appeal decided by this court provides unique insight into that issue.

¶20 In a 2009 memorandum decision involving The Shores, addressed by both parties in their briefs on appeal, this court held that the CC&Rs did not prohibit short-term leasing. *See Horton v. Hartsook*, 1 CA-CV 08-0095, 2009 WL 2244503 (Ariz. App. July 28, 2009) (mem. decision).[6] *Horton* noted that owners at The Shores "have leased their properties to

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[6] It is unclear whether this 2009 memorandum decision precisely fits within any of the exceptions typically applicable to citing such authority. *See* Ariz. R. Sup. Ct. 111(c). Because both parties cite it without objection and given it construed CC&Rs "virtually identical" to those applicable here, the court refers to *Horton* largely to address what the CC&Rs before the Amendment did and did not allow. *See id.; see also Horton*, 2009 WL 2244503 at 1 ¶ 2 n.2 ("The Declaration [at issue in *Horton*] was recorded on May 19, 1989, in the Navajo County Recorder's Office. Rainbow Cove is part of a larger residential community known as The Shores at Rainbow Lake which is subject to an amended declaration recorded September 6, 2001 [the CC&Rs at issue here]. The two declarations are virtually identical.").

vacationers who stay for periods as short as a few days or a week," adding such "transient occupiers" stay "for a few vacation days." *Id.* at 4 ¶ 13, 5 ¶ 17. Noting owners argued the CC&Rs' "plain language does not preclude short-term leases," *Horton* held that the language of the CC&Rs "unambiguously permits" short-term rentals. *Id.* at 4 ¶ 13. *Horton* further declared the CC&Rs: (1) contained "no restriction on the duration of a lease;" (2) had a "definition of 'single family residential use' [that] does not limit the duration of use or occupancy" and (3) did "not exclude short-term leases." *Id.* at 5 ¶¶ 15-16.

¶21 The serendipity of *Horton* narrows, significantly, the *Kalway* analysis in this appeal. Given the *Horton* declaration that the CC&Rs did not contain any "restriction on the duration of a lease," *id.* at 5 ¶ 15, there can be no claim that the Amendment served to "refine," "correct an error" or "fill in a gap" in the CC&Rs. *See Kalway*, 252 Ariz. at 539 ¶ 17. Thus, for the Amendment restricting short-term leasing to be valid, it must permissibly "change [the CC&Rs] in a particular way" that *Kalway* allows. *Id.*

¶22 Although terse, the *Kalway* analysis striking purported changes to the permissible size of a dwelling shows that the Amendment's short-term lease restriction is not valid. *Kalway* stated the following:

> Amended § 1.3 limits "dwellings" to 60% living space and 40% garage. ***The original declaration provided no limitations on the size of garages or living spaces*** and only required that all residences be "Single Family Dwellings," without defining the term. ***Nothing in the original declaration restricting residences to single-family dwellings would put a property owner on notice that the Other Owners could, by majority vote, now limit the size of his residence.***

Id. at 539 ¶ 22 (emphasis added). *Horton* held that the language of the CC&Rs "unambiguously permits" short-term rentals. *Horton*, 2009 WL 2244503 at 4 ¶ 13. Applying *Kalway*, nothing in the CC&Rs "would put a property owner on notice that the Other Owners could, by majority vote, now limit" the minimum duration of a permissible lease, or preclude altogether leases for a term of less than 30 days. *See Kalway*, 252 Ariz. at 539

¶ 22.[7] Accordingly, and applying the "blue pencil rule," as the superior court correctly found, the following language of Section 2.30(A) of the Amendment is stricken: ~~"(A) After December 31, 2021, no Lot may be leased for a term of less than thirty (30) days~~." *See Kalway*, 252 Ariz. at 537 ¶ 8, 539 ¶ 21 ("Applying the blue pencil rule, we strike unauthorized terms from several amendments and where we find amendments invalid in their entirety, we strike them and concur with the deletion of the amendments stricken by the trial court.") (citing *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 372 ¶ 30 (1999) ("Arizona courts will 'blue pencil' restrictive covenants, eliminating grammatically severable, unreasonable provisions.")).

C. The Amendment Requiring a Lot Be Leased only to a Single Family and the Clarification of "Single Family" in the Amendment Was "Reasonable and Foreseeable."

¶23 Section 2.30(B) of the Amendment provides: (1) "No portion of a Lot may be leased, other than the entire Lot, and then only to a Single Family" and (2) "For purposes of this Section 2.30, a Single Family may not consist of more than four (4) individuals who are unrelated by blood, marriage or legal adoption." In their cross-appeal, plaintiffs argue that these two sentences are contrary to *Kalway*. But because they were reasonable and foreseeable, the superior court properly rejected the challenge to Section 2.30(B) of the Amendment.

1. Plaintiffs' Challenge to the First Sentence of Section 2.30(B) of the Amendment Fails.

¶24 Plaintiffs argue the first sentence of Section 2.30(B) of the Amendment violates *Kalway* because it "use[s] the phrase 'Single Family,' which was previously only used to impose a ***use*** restriction requiring all development to be for 'Single Family residential use' (in other words, homes and not multi-family or commercial), to impose an ***occupancy*** restriction." Plaintiffs further argue that Section 2.18 of the CC&Rs ("Leasing of Lots") limits the permitted uses of Lots, not who can occupy them. Plaintiffs, however, did not make this argument before the superior court, meaning it was waived. *See ADP, LLC v. Arizona Dep't of Revenue*, 254

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[7] In this sense, the CC&Rs here are contrary to those in *Preston*, 2023 WL 7139326, cited by the Association. In *Preston*, the original CC&Rs had use restrictions that were "inconsistent with short-term rentals," meaning the amendments did not run afoul of *Kalway*. *See id.* at 5 ¶ 19. Here, by contrast, the original CC&Rs expressly allowed short-term rentals, *Horton*, 2009 WL 2244503 at 4 ¶ 13, 5 ¶ 17, meaning the Amendment is invalid under *Kalway*.

Ariz. 417, 425 ¶ 25 (App. 2023) ("Because ADP did not present these arguments to be evaluated by the superior court, they are waived."); *Cont'l Lighting & Contracting, Inc. v. Premier Grading & Util., LLC*, 227 Ariz. 382, 386 ¶ 12 (App. 2011) ("[L]egal theories must be presented timely to the trial court so that the court may have an opportunity to address all issues on their merits."). Even absent waiver, plaintiffs' challenge to this first sentence would fail.

¶25 Plaintiffs rely exclusively on *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274 (Tex. 2018). *Tarr* concluded that a "single-family dwelling" restriction "merely limit[ed] the structure that can properly be erected" because it appeared in a provision outlining "structural [and] architectural limitations." 556 S.W.3d at 287. The declaration had a separate provision that limited use to "residential purposes," but was "silent as to whether so-called 'multi-family' use is permitted." *Id*. *Tarr* held that "so long as the occupants to whom Tarr rents his single-family residence use the home for a 'residential purpose,' no matter how short-lived, neither their on-property use nor Tarr's off-property use violates the restrictive covenants." *Id*. at 291.

¶26 Plaintiffs have not shown that Texas law, under which *Tarr* was decided, applies a common law standard that is the same as applied under Arizona law in *Kalway*. Moreover, unlike in *Tarr*, Section 2.18 of the CC&Rs is not silent about multi-family use; it expressly limits use to "Single Family residential use." "Residential use," by itself, would be a use restriction. But by adding the defined term "Single Family," the CC&Rs here also limit who can make residential use of a Lot. Simply put, and contrary to plaintiffs' argument, Section 2.18 imposes both use and occupancy restrictions. For these reasons, and as the superior court correctly decided, plaintiffs' challenge to the first sentence of Section 2.30(B) of the Amendment fails.

2. Refining the Definition of "Single Family" for Section 2.30(A) of the Amendment in the Second Sentence of Section 2.30(B) Did Not Violate *Kalway*.

¶27 Plaintiffs argue that adding the second sentence in Section 2.30(B) ("For purposes of this Section 2.30, a Single Family may not consist of more than four (4) individuals who are unrelated by blood, marriage or legal adoption.") was unforeseeable because "that definition never existed in Section 2.30 and would not apply to any other portion of the deed restrictions." Plaintiffs compare this change to an amendment changing the types and quantity of permissible livestock invalidated in *Kalway*.

¶28 The original declaration in *Kalway* stated: "'No Owner or Occupant shall keep more than six (6) livestock on the Property including, but not limited to, horses/cattle per 3.3 acres.'" 252 Ariz. at 540 ¶ 30. The amendment in *Kalway* capped the number of livestock at 15 (regardless of lot size) and limited "livestock" to "chickens, horses, and cattle only." *Id.* Because the original definition of "livestock" was unclear, after citing dictionaries, *Kalway* stated that "reasonable landowners might interpret 'livestock' to mean only large animals like horses and cattle," and "might believe the original declaration was silent regarding smaller animals, such as chickens." *Id.* at 541 ¶ 31. *Kalway* then concluded that "reasonable landowners may have believed chickens were *not* livestock under the original declaration, and therefore not subject to the number limitation." *Id.* at 541 ¶ 32. That caused *Kalway* to hold that "[a]n amendment that redefines 'livestock' so drastically so that other livestock are prohibited by the amendment is not reasonable or foreseeable." *Id.*

¶29 The change here, however, is far more modest than in *Kalway*. Under the CC&Rs, a "Single Family" is a group of persons, whether related or not, "who maintain a common household in a Residential Unit." The Amendment refines that definition by limiting the unrelated persons part of the definition to no more than four unrelated persons. It was not unreasonable or unforeseeable that a preexisting definition could be refined in this manner. *Cf. id.* at 540 ¶ 24 (finding a new definition of "garage" "was reasonably foreseeable" where original declaration referenced, but did not define, the term).

¶30 Plaintiffs also argue this change was unforeseeable because it "only applies to one provision of [the] 52-page" CC&Rs, asserting this second sentence "effectively redefines an already defined term." But as just discussed, the change refined a term of art used in the CC&Rs. That refinement did not contradict the terms of the CC&Rs and, as such, does not run afoul of *Kalway*. *Cf. id.* at 537-38 ¶ 10, 539 ¶ 17 (recognizing a "covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way, . . . [b]ut future amendments cannot be 'entirely new and different in character,' untethered to an original covenant") (citations omitted).

IV. The Superior Court Did Not Abuse Its Discretion in Denying Plaintiffs' Claim for Attorneys' Fees.

¶31 Plaintiffs challenge the superior court's denial of their claim for attorneys' fees under A.R.S. §§ 12-1103(B) and 12-341.01(A). Both statutes afford the superior court discretion to award attorneys' fees to a

prevailing or successful party. *See RT Auto. Ctr., Inc. v. Westlake Services LLC*, 253 Ariz. 91, 97 ¶ 20 (App. 2022) (A.R.S. § 12-341.01(A) "permits a discretionary award to the successful party in an action arising out of a contract."); *Cook v. Grebe*, 245 Ariz. 367, 369 ¶ 5 (App. 2018) ("As provided in A.R.S. § 12-1103(B), a party prevailing in a quiet title action may recover attorneys' fees" if certain prerequisites are met).

¶32 "The decision as to who is the successful party for purposes of awarding attorneys' fees is within the sole discretion of the trial court, and will not be disturbed on appeal if any reasonable basis exists for it." *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430 (App. 1994). This court "view[s] the record in a light most favorable to upholding the trial court." *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13 ¶ 21 (App. 2011). Particularly in cases like this, with competing claims and decisions in favor and against each side, deciding whether a party is the prevailing or successful party (and whether there is any prevailing or successful party) is within the superior court's discretion. *Id.* The inquiry is further complicated where, as here, there was no monetary damage award requested or made, and each party prevailed in a portion of the litigation.

¶33 When fee shifting is available, not every dispute has a prevailing or successful party eligible for a fee award. *See Ahwatukee Custom Est. Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 637 ¶ 22 (App. 2000) (affirming denial of competing requests for attorneys' fees under terms of applicable CC&Rs; "The trial court denied the requests, finding that both parties were non-prevailing parties. We agree."). Given the relief requested here, and that each party prevailed in part and lost in part, plaintiffs have not shown that the superior court abused its discretion in denying their application for fees incurred in the superior court.

V. Attorneys' Fees and Taxable Costs on Appeal.

¶34 Both sides request an award of attorneys' fees incurred in this appeal and cross-appeal under the CC&Rs. The CC&Rs, however, do not contain a fee-shifting provision applicable here. Both sides also request an award of attorneys' fees under A.R.S. § 12-341.01(A). The CC&Rs and the Amendment constitute a contract. *See Kalway*, 252 Ariz. at 538 ¶ 14. Plaintiffs are the successful parties in the Association's appeal, and the Association is the successful party in plaintiffs' cross-appeal. Accordingly, and for similar reasons discussed above in addressing the superior court's fee award, the fee requests are denied, and each party will bear their own taxable costs incurred on appeal.

CONCLUSION

¶35 The judgment is affirmed.

AMY M. WOOD • Clerk of the Court
FILED: JT