ARIZONA COURT OF APPEALS
DIVISION ONE

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	**Court of Appeals** **Division One** **Case No. 1 CA-CV 21-0275** **Maricopa County Superior Court** **Case No. CV2019-055353**

ADDITIONAL BRIEFING OF DEFENDANTS/APPELLEES PFP DORSEY INVESTMENTS, LLC AND DORSEY PLACE CONDOMINIUM ASSOCIATION

Stephanie K. Gintert (SBN 029640)
WONER HOFFMASTER PESHEK & GINTERT, PC
8767 East Via de Ventura, Suite 201
Scottsdale, Arizona 85258
Telephone: (480) 483-9700
Email: stephanie@whpglaw.com
minuteentries@whpglaw.com
Attorneys for Defendant/Appellee PFP Dorsey Investments, LLC

Edith I. Rudder (SBN 020650)
Nicolas C.S. Nogami (SBN 029027)
CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP
1400 E. Southern Avenue, Suite 400
Tempe, Arizona 85282
Telephone: (480) 427-2800
Email: eadie.rudder@carpenterhazlewood.com
nicholas.nogami@carpenterhazlewood.com
minuteentries@carpenterhazlewood.com
Attorneys for Defendant/Appellee Dorsey Place Condominium Association

TABLE OF CONTENTS

Page

TABLE OF CITATIONS iii

ADDITIONAL BRIEFING 1

1. **If a private agreement – the purchase of a condominium – incorporates a statute by reference, are subsequent statutory amendments incorporated into the agreement?** 1

2. **In this case, were the CC&Rs ever amended to incorporate the 2018 amendments?** 5

3. **If the private agreement did not include the 2018 statutory amendment, would its application violate the private takings prohibition?** 7

4. **Appellees argue that they did not breach their fiduciary duty to Appellants because they strictly complained with the 2018 version of A.R.S. § 33-1228(G). Assuming that the 1986 version applies, have appellees breached their fiduciary duty?** 7

5. **Have Appellants waived any assertion that the 1986 version of the statute applies?** 10

6. **Effect of *Kalway v. Calabria Ranch HOA, LLC, et. al*. opinion on issues raised in supplemental briefing order** 11

CONCLUSION 13

TABLE OF CITATIONS

CASES: **Page**

DePinto v. Landoe, 411 F.2d 297, 300 (9th Cir. 1969) 9

Fenolio v. McDonald, 171 Cal.App.2d 508, 340 P.2d 657 (1959).....4

Galbraith v. Johnston, 92 Ariz. 77, 81, 373 P.2d 587 (1962) 4

Hatch v. Emery, 1 Ariz. App. 142, 146 (App. 1965).....9

Hawkins v. Allstate Ins. Co.,
152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987).....10, 11

Home Builders Ass'n of Central Arizona v. City of Maricopa, 215 Ariz. 146, 151 n. 3, 158 P.3d 869, 874 n. 3 (App.2007).....11

In re MH 2008-000028,
221 Ariz. 277, 280, ¶ 11, 211 P.3d 1261, 1264 (App.2009) 11

In re MH 2008-002659, 224 Ariz. 25, 27, 226 P.3d 394, 396 (App. 2010).....10

Int'l Life Ins. Co. v. Sorteberg, 70 Ariz. 92, 98, 216 P.2d 702, 705 (1950).....10

Kalway v. Calabria Ranch HOA, LLC, et. al.,
CV-20-1052-PR (Mar. 22, 2022) 12, 13

Landi v. Arkules, 172 Ariz. 126, 133, 835 P.2d 458, 465 (Ct. App. 1992) 4

Mountain States Bolt, Nut & Screw Co. v. Best-Way Transp.,
116 Ariz. 123, 124, 568 P.2d 430, 431 (Ct. App. 1977) 4

Powell v. Washburn, 211 Ariz. 553, 555-556 (2006).....1, 2

Rohde v. Beztak of Ariz., Inc., 164 Ariz. 383, 388, 793 P.2d 140, 145 (App. 1990).... 8

Ruelas v. Ruelas, 7 Ariz.App. 98, 101, 436 P.2d 490, 493 (1968).....4

S. H. Kress & Co. v. Evans, 21 Ariz. 442, 449, 189 P. 625, 627 (1920).....4

Standard Insurance Co. v. Cleveland, 86 Ariz. 288, 293, 345 P.2d 210 (1959).....4

Tierra Ranchos Homeowners Ass'n v. Kitchukov,
216 Ariz. 195, 201-02, 165 P.3d 173, 179-80 (App. 2007) 8

Town of South Tucson v. Board of Supervisors, 52 Ariz. 575, 582–83, 84 P.2d 581, 584 (1938)) 11

Trantor v. Fredrikson, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) 10

Wilson v. Stearns, 123 Cal.App.2d 472, 267 P.2d 59 (1954) 4

STATUTES:

A.R.S. §33-1201.....3

A.R.S. §33-1228.....5, 6, 7, 11, 13

A.R.S. §33-1228(G).....7

A.R.S. §33-1228(K).....8

A.R.S. §33-1246(A).....3

A.R.S. §33-1250(C) 2

A.R.S. §33-1255(C) 3

SECONDARY SOURCES:

Restatement (Third) of Property (Servitudes) § 6.13 9

Restatement (Third) of Property (Servitudes) § 6.14 9

ADDITIONAL BRIEFING

Appellees, Dorsey Place Condominium Association (the "Association") and PFP Dorsey Investments, LLC ("PFP Dorsey"), hereby submit their supplemental brief addressing the issues raised in the Court's March 17, 2022 and March 23, 2022 Orders.

1. **If a private agreement – the purchase of a condominium – incorporates a statute by reference, are subsequent statutory amendments incorporated into the agreement?**

In order to properly frame and answer this issue, one must consider what is at issue. Condominium declarations are contractual documents just like any others. They represent an agreement by the Owners within the Association to conduct themselves in a certain manner. Essentially, Condominiums are nothing more than large houses in which a number of Owners live and own pursuant to a contract to which they are all bound; i.e., the Declaration. *Powell v. Washburn*, 211 Ariz. 553, 555-556 (2006) (CC&Rs form a contract between individual landowners and all the landowners bound by the restrictions, as a whole.)

In this arrangement, everyone gets their own room (or Unit) and they all agree (the Declaration) to pay a monthly amount in order to provide for the care and upkeep of the house; i.e., the Common Elements. When a new Owner buys in to the arrangement, that Owner automatically is bound by the terms of the contractual Declaration by virtue of their purchase of a Unit therein. The Declaration is not part

of the purchase agreement between the buyer and seller, but it is a contract to which a new Owner is bound by virtue of their purchase of a Unit in the arrangement.

In this case, the Declaration, which is recorded against the entire Association property, states at Article 13, Section 13.27:

> **References to this Declaration in Deeds**. Deeds to and instruments affecting any Unit or any other part of the Condominium may contain the covenants, conditions and restrictions herein set forth by reference to this Declaration, but whether or not any such reference is made in any deed or instrument, each and all of the provisions of this Declaration are and will be binding upon the grantee-Unit Owner or other Person claiming through any instrument and his, her or its heirs, executors, administrators, successors and assigns.

[IR 51 at Ex. 1 at 56].

The terms of the Declaration are given effect similar to any other contract in Arizona and it has the same limitations. (*Powell*, supra at 557 ¶16). Most Declarations include a clause whereby the Parties recognize they are bound by the appropriate statutory scheme as it may be amended from time to time, in order to ensure that Owners have actual, as well as constructive, notice that they are bound to comply with the statutory terms as they are subsequently amended.

Whether subsequent statutory amendments are incorporated by default into an agreement depends on the language of the applicable statute. If the statute contains language that it applies notwithstanding the terms of a Declaration, then the amended language will preempt the terms of the Declaration. An example is A.R.S. §33-1250(C) related to the use of proxies in association voting, which states:

> "Notwithstanding any provision in the condominium documents, after termination of the period of declarant control, votes allocated to a unit may not be cast pursuant to proxy."

Further, certain statutes include language that makes clear that their provisions apply regardless of language in an association's Declaration. For example, A.R.S. §33-1246(A) provides:

> At the time the unit owners association is organized, the association shall adopt bylaws which provide for each of the following …:

However, some statutes defer to Declarations, such as A.R.S. §33-1255(C), which states, "Unless otherwise provided for in the declaration, all of the following apply…" Here, throughout the Association's Declaration there are explicit references to the Condominium Act, putting Owners on ***actual*** notice that they agree to be bound by the Act, as it may be amended from time to time. Specifically, at Article 1.1, the Declaration states:

> General Definitions. Capitalized terms not otherwise defined in this Declaration shall have the meanings specified for such terms in the Arizona Condominium Act, A.R.S. §33-1201, et. seq., **as amended from time to time**. [IR 51 at Ex. 1 at 1].

[**Emphasis added**]. At Article 1.2.5, the Declaration states:

> "Condominium Act" means the Arizona Condominium Act, A.R.S. §33-1201, et. seq., as amended from time to time. [*Id*.].

Finally, at Article 6.1, the Declaration states:

> The Association shall have such rights, powers and duties as are prescribed by the Condominium Act, other applicable laws and regulations and as are set forth in the Condominium Documents

> together with the such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act.

[*Id.* at 24].

The applicable principles for determining when a contract is unenforceable as against public policy were stated by this Court in *Ruelas v. Ruelas*, 7 Ariz.App. 98, 101, 436 P.2d 490, 493 (1968):

> Generally, an agreement which cannot be performed without violating applicable law, is illegal and void. 17 Am.Jur.2d Contracts s 165, at 521; 17 C.J.S. Contracts s 201, at page 1000. This rule, however, is not inflexible, and the court must look to the legislative intent. *Fenolio v. McDonald*, 171 Cal.App.2d 508, 340 P.2d 657 (1959); *Wilson v. Stearns*, 123 Cal.App.2d 472, 267 P.2d 59 (1954).

The Court in *Mountain States Bolt, Nut & Screw Co. v. Best-Way Transp*., 116 Ariz. 123, 124, 568 P.2d 430, 431 (Ct. App. 1977)[1] held:

> It is the law in Arizona that parties have the legal right to make such contracts as they desire to make, provided only that the contract shall not be for illegal purposes or against public policy.

See, also, Landi v. Arkules, 172 Ariz. 126, 133, 835 P.2d 458, 465 (Ct. App. 1992).

Here, the issue is whether the Parties to the Declaration could contract to apply a prior version of the Statute. That question is answered by considering the language of the Statute. If the Statute contains language that defers to a declaration, then the

[1] Quoting *S. H. Kress & Co. v. Evans*, 21 Ariz. 442, 449, 189 P. 625, 627 (1920); See also, *Galbraith v. Johnston*, 92 Ariz. 77, 81, 373 P.2d 587 (1962); Commercial *Standard Insurance Co. v. Cleveland*, 86 Ariz. 288, 293, 345 P.2d 210 (1959).

Parties could, in theory, utilize a prior version. However, if the Statute is clear that its provisions apply regardless of the parties' agreement, then it will be applied notwithstanding the terms of the Declaration. This applies the Courts' directive that parties to a contract may not contract for acts that go against statute or the contract will be deemed to be illegal and void.

2. **In this case, were the CC&Rs ever amended to incorporate the 2018 amendments?**

This issue is actually two-fold: (1) is the 2018 version of A.R.S. §33-1228 (the "Statute") one that gives deference to an Association's Declaration, making its relevant provisions optional and (2) did the Association's Declaration specifically incorporate the amendments to the Statute by its plain language?

Here, as noted above, the Association's Declaration makes explicit reference to the Condominium Act throughout, putting Owners on actual notice that they agree to be bound by the same, ***as it may be amended from time to time***, thereby incorporating any amendments to the Statute into the contractual Declaration. There can be no argument that the Declaration provides for subsequent amendments to the Statute and confirms that the Parties to it; i.e., the Owners and the Association, have notice of and agree to be bound by the same without the need to amend the Declaration. Therefore, the answer as to whether the Declaration was ever amended to incorporate the 2018 amendments to the Statute is that the Declaration has always

incorporated any amendments to the Statute, including the 2018 version of A.R.S. §33-1228 at issue.

Going one step further, the question becomes whether the Association and its Members could have contracted away compliance with the 2018 version of the Statute answered by considering the language of the Statute at issue and whether it offers deference to the Parties' ability to contract in the Declaration. Here, the Statute has only limited provisions which may be altered by an association's declaration, none of which are at issue in this matter. For example, the Statute allows an association's declaration to be terminated by a larger percentage than provided for in the Statute (here, the percentage was 90% of the Owners). In limited instances, the Statute also allows for an association not to adhere to subsections C, D, E, F, H and I.

However, with regards to the Court's order, the Statute is very clear that subsection (G)(1) of the Statute cannot be contracted away or otherwise avoided by the Parties. Specifically, subsection (K) states:

> Beginning on August 3, 2018 [the effective date of the Statute], any provisions in the declaration that conflict with subsection G, paragraph 1 of this section are void as a matter of public policy.

Therefore, had the Association interpreted its Declaration to include the 1986 version of subsection (G)(1) of the Statute and applied the same, it would have been in violation of Arizona law. Therefore, any application of the 1986 (G)(1) language

by the Association in this matter would have been improper, making the Association's application of the 2018 Statute language, particularly with regards to (G)(1), *per se* reasonable.

3. **If the private agreement did not include the 2018 statutory amendment, would its application violate the private takings prohibition?**

This question is addressed in the prior sections, as the Association's Declaration explicitly incorporates all amendments to the Act and the Association had no choice but to apply the language of the 2018 version of the Statute, particularly with regards to subsection (G)(1) and all other sections which do not allow deference to an association's declaration. This means that even if the Association's Declaration did not include the 2018 amendment, the Association would still be required to utilize all non-deferential language, such as subsection (G)(1). However, as discussed above, the Declaration makes explicit reference to incorporate any and all amendments to A.R.S. §33-1228, therefore, it does include the 2018 amendment, rendering the remainder of this issue moot.

4. **Appellees argue that they did not breach their fiduciary duty to Appellants because they strictly complained with the 2018 version of A.R.S. § 33-1228(G). Assuming that the 1986 version applies, have appellees breached their fiduciary duty?**

This issue raises two sub-issues. First, the 2018 version of the Statute is incorporated into the Declaration and thus, the Association was required to apply it; therefore, the Association met its duties and obligations by adhering to it. This

is particularly true since, pursuant to A.R.S. §33-1228(K), the Association and its Members had no option other than to apply its language, particularly with regards to subsection (G)(1). As discussed at oral argument, the Association's duties owed in the termination and sale process are set forth in the Statute; i.e., the Association must perform specific acts in order to effectuate the process that has been approved by the Membership.

As noted at the outset, a condominium regime is merely a group of Owners who own a large "house" and thus, are entitled to make decisions related to it – the corporate entity association and its volunteer Board of Directors merely carry out certain functions as set forth in the governing documents and under Arizona law. Decisions such as terminations and sale are left to the Owners of the "house" pursuant to the contract between them; i.e., the Declaration. Therefore, the Association met all of its duties and obligations to the members by applying the 2018 version of the Statute.

Second, Arizona law does not proscribe a fiduciary duty for community associations. *Rohde v. Beztak of Ariz., Inc.*, 164 Ariz. 383, 388, 793 P.2d 140, 145 (App. 1990) (a homeowners association did not owe a fiduciary duty to the homeowners). Instead, in Arizona, an association and its board are held to a standard of reasonableness. *See Tierra Ranchos Homeowners Ass'n v. Kitchukov,* 216 Ariz. 195, 201-02, 165 P.3d 173, 179-80 (App. 2007), *citing* Restatement (Third) of

Property (Servitudes) § 6.13; *see also* Restatement (Third) of Property (Servitudes) § 6.14.

Members of an association's board of directors do owe a fiduciary duty to the corporate entity, but there is no legal authority or precedent extending that duty to the individual homeowners. This is in line with Arizona law governing other types of corporations—a corporation's board of directors owes fiduciary duties to the corporation because the corporation as an entity cannot act without the direction of the board. *Hatch v. Emery*, 1 Ariz. App. 142, 146 (App. 1965). The directors themselves operate as trustees to the corporation. *DePinto v. Landoe*, 411 F.2d 297, 300 (9th Cir. 1969). The relationship between director and association exists to preserve that unity of interest and to protect the association from self-dealing by individual board members. The relationship of individual homeowners to their association does not share this unity of interest or the vulnerability of the trusteeship.

Homeowners in association disputes may review the governing documents, petition the board for redress, or seek relief from the courts. Membership in an association is voluntary, as homeowners who do not wish to belong are not forced to purchase property within an association. There is no practical or legal justification for extending Arizona law to create new fiduciary obligations between homeowners and associations and Arizona has not done so.

5. <u>Have Appellants waived any assertion that the 1986 version of the statute applies?</u>

In addition to the fact that this argument has little merit, as discussed above, the Appellants have waived any right to argue that the 1986 version of the Statute applies. Again, given the plain language of the Statute and the Association's Declaration, there is no question that application of the 1986 version would be improper and illegal, so the Appellants were correct in not raising the issue at the trial court or appellate levels. Appellants never relied on the 1986 version of the Statute in their pleadings or briefing and in fact, had relied on the current version of the Statute (effective August 27, 2019, which was after the subject termination and sale) in their First Amended Complaint.

Arizona law is very clear that "new arguments may not be raised for the first time on appeal." See e.g. *In re MH 2008-002659*, 224 Ariz. 25, 27, 226 P.3d 394, 396 (App. 2010); *See Trantor v. Fredrikson,* 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (courts do not consider arguments raised for the first time on appeal except under exceptional circumstances). This rule was "established for the purpose of orderly administration and the attainment of justice," *Hawkins v. Allstate Ins. Co.,* 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987), and protects the party against whom the new argument is asserted from surprise. *Int'l Life Ins. Co. v. Sorteberg,* 70 Ariz. 92, 98, 216 P.2d 702, 705 (1950). The rule is procedural, not jurisdictional; the court "undoubtedly has the power [to review a question raised for the first time on

appeal], but ordinarily will not exercise it. The question is one of administration, not of power." *Hawkins,* 152 Ariz. at 503, 733 P.2d at 1086 (quoting *Town of South Tucson v. Board of Supervisors,* 52 Ariz. 575, 582–83, 84 P.2d 581, 584 (1938)). The rare exceptions to this rule generally involve arguments regarding the interpretation of a statute, *Home Builders Ass'n of Central Arizona v. City of Maricopa,* 215 Ariz. 146, 151 n. 3, 158 P.3d 869, 874 n. 3 (App.2007), or when considering constitutional arguments, *In re MH 2008–000028,* 221 Ariz. 277, 280, ¶ 11, 211 P.3d 1261, 1264 (App.2009).

Here, the argument that the 1986 version of the Statute applies is merely a factual argument based on the language of the Declaration or a legal argument based on basic tenets of contract law. This argument does not call for statutory interpretation or other exceptional circumstance such that the Court has historically granted extraordinary treatment for the argument. As presented, this argument is based on the language of the Declaration and application of Arizona law, not an interpretation of the language of A.R.S. §33-1228 as it merely asks whether the Parties to the Declaration properly included language to incorporate subsequent statutory amendments. Therefore, there are no grounds to consider this argument. However, to the extent the Court does consider this argument, it is ultimately without merit, as discussed above.

6. Effect of *Kalway v. Calabria Ranch HOA, LLC, et. al*. opinion on issues raised in supplemental briefing order

The Arizona Supreme Court's recent decision in *Kalway v. Calabria Ranch HOA, LLC, et. al*., CV-20-1052-PR (Mar. 22, 2022) has no bearing on this matter. The *Kalway* case is limited to situations where an association is amending its declaration to impose new affirmative obligations on homeowners. Specifically, the holding in that case was limited to a finding 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." *Id.* At ¶14. It must also be noted that the *Kalway* matter is very fact-intensive and based on the specific declaration and amendments at issue. *Id*. ¶16 ("We apply an objective inquire to determine whether a restriction gave notice of the amendments at issue.").

Kalway is not applicable to these proceedings. First and foremost, there is no amendment at issue, which is the limited issue before the Court in *Kalway*. This matter concerns the termination of the Condominium, which does not amend the Declaration; in fact, pursuant to the termination process, the Declaration is voided and of no further effect as opposed to being amended. [IR 51, Ex. 2 at 3]. Therefore, *Kalway*'s narrow holding has no bearing on these proceedings.

Further, to the extent one argues that *Kalway*'s holding is broad enough to include termination or voiding of the Declaration as an "amendment," such action was specifically provided for in the Declaration (*See*, Article 13, Section 13.4 [IR51,

Ex. 1 at 49]), so there is no good faith argument that the Appellants were not on notice of the possibility or that the termination of the Condominium was "untethered to an original covenant." *Kalway*, supra at ¶17. Accordingly, *Kalway* has no bearing on this matter.

CONCLUSION

Based on the foregoing, Appellants have waived any argument that the 1986 version of A.R.S. §33-1228 should have been utilized by the Parties in this matter. Further, to the extent that argument is considered, the law and facts of this case make it clear that the Appellees properly utilized the 2018 version of A.R.S. §33-1228 and that the termination should therefore be upheld and the trial court's ruling affirmed.

RESPECTFULLY submitted this 15th day or April, 2022.

WONER HOFFMASTER PESHEK & GINTERT, PC

By /s/ *Stephanie K. Gintert*
Stephanie K. Gintert
8767 East Via de Ventura, Suite 201
Scottsdale, Arizona 85258
Attorneys for Defendant/Appellee PFP Dorsey Investments, LLC

CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP

By
Edith I. Rudder
Nicolas C.S. Nogami
1400 E. Southern Avenue, Suite 400
Tempe, Arizona 85282
Attorneys for Defendant/Appellee Dorsey Place Condominium Association