

**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

**DEFENDANTS/APPELLEES PFP DORSEY INVESTMENTS, LLC
AND DORSEY PLACE CONDOMINIUM ASSOCIATION'S
MOTION FOR RECONSIDERATION**

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¶1 Appellees/Defendants, PFP Dorsey Investments LLC and Dorsey Place Condominium Association (jointly referred to herein as “Appellees”), pursuant to Rule 22, ARCAP, hereby submit their Joint Motion for Reconsideration on the Court’s July 7, 2022 decision (the “Decision”).

¶2 Appellees request that the Court reconsider its application of the Supreme Court’s decision in *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532 (2022), which drove much of the Decision. Appellees make this request because the Court’s reasoning in the Decision results in a problematic abrogation of the Separation of Powers doctrine, Arizona law, and members’ rights in their community association.

¶3 In relevant part, the Decision held that the Xias’ rights within the Association were governed by the 1986 version of A.R.S. §33-1228, which was the version in place when they purchased their Unit. The Court reasoned that, “...when the Xias bought their unit in January 2018, they agreed to be bound by the Declaration, which grants the Association ‘the rights, powers and duties as prescribed by the Condominium Act¹.’” Decision at 5, ¶17. The Court further held that this means the Declaration “incorporated” the Condominium Act such that amendments to the latter by the Legislature represents amendments to the former. Accordingly, the Court held that an amendment to the Condominium Act is only “incorporated” into

¹ A.R.S. §33-1201, et seq.

the Declaration (and therefore binding on the Xias) if the statutory amendment is one that falls within the “Xias’ reasonable expectations based on the declaration in place at the time of the purchase.” Decision at 6, ¶20 (quoting *Kalway*, 252 Ariz. at 544 ¶15).

¶4 Ultimately, the Court held that the Declaration does not provide sufficient notice of the scope of amendment that the 2018 version of the Statute represented and therefore, the Association is obligated to apply the 1986 version of the Statute to the Xias when terminating the condominium. Decision at 9, ¶24.

¶5 Conversely, the Court ruled that the Association is obligated to apply the 2018 version of the Statute to any Owners who purchased their Unit after the Legislature enacted that version.

¶6 Based on this holding, the Court found that the Association improperly applied the 2018 version of the Statute to the Xias and remanded the matter for proceedings consistent with that holding. The Court commented that the 1986 version “potentially provided greater protections to minority shareholders...” and therefore that was the appropriate version to apply. Decision at 2, ¶3.

The Appellees Request That the Court Reconsider Its Application of *Kalway*

¶7 The Court applied the *Kalway* holding in this matter to prohibit the “incorporation” of statutory amendments into declarations on the ground they

represent a situation where “a minority of landowners” are subjected to “unlimited and unexpected restrictions” by a majority of landowners. Decision at 6, ¶19.

¶8 However, the two situations are simply too different to be reconciled in this manner. In *Kalway*, four of five owners in Calabria Ranch got together and, without notice to the fifth owner, passed a number of amendments to the association’s declaration that impacted the fifth owner’s Lot.

¶9 Specifically, the type of restrictions at issue in *Kalway* concern owners’ rights to utilize their land within the Association which arise solely from the parties’ contractual relationship. *Id.* at 545. Without these amendments, the parties in *Kalway* had no obligation to comply with such restrictions.

¶10 The Court in *Kalway* held that “the law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants.” *Id.* at ¶15 (quoting *Boyles v. Hausmann*, 517 N.W.2d 610, 617 (Neb. 1994).

¶11 The *Kalway* decision is limited to situations where a majority of owners approves amended restrictions to a declaration without the consent of the remaining owners. However, in *Kalway*, it must be noted that once passed, the restrictions apply to all owners generally and uniformly.

¶12 To that end, the Supreme Court concluded that several of the subject amendments were invalid and the proper recourse was for the Court to “blue pencil” the subject amendments and either revise them or strike them as appropriate. Ultimately, what remains is a version of the Declaration that incorporates a uniform set of restrictions for the association.

¶13 Here, the *Kalway* decision is completely distinguishable and its application cannot be done in the manner in which the Court has done thus far. First and foremost, the *Kalway* decision concerned conduct of parties to a contract (i.e., the Declaration) and attempts by a majority to alter the terms of that contract against the minority. That is not the situation here. Instead, the parties to the Declaration have not altered the contractual document; instead, its terms remain in place at all times.

¶14 Further, in its Decision, this Court found that in order for statutory amendments to apply to a declaration, owners within an association must agree through explicit “opting in” to those amendments. Without such “opt in”, the Court finds that owners are simply not required to follow the amendments and instead, are bound by a version of a statute no longer in effect. This is notwithstanding the fact that the parties, including the Xias, bought into the Association and agreed to be bound by the Declaration, which included a provision that acknowledged that the Parties are bound by the Condominium Act, as it may be amended from to time. The Court suggests that this provision represents a contractual term to which the Parties

agreed and thus, falls within the purview of the *Kalway* decision. However, the Parties' agreement to follow the law which already applies is not a valid contractual term. As noted nearly a century ago, a "promise to do something which a party is already legally obligated to do is no consideration for a contract." *J.D. Halstead Lumber Co. v. Hartford Acc. & Indem. Co.*, 38 Ariz. 228, 235 (1931); accord *NLRB v. Express Pub. Co.*, 312 U.S. 426, 435-36 (1941).

¶15 Therefore, the facts and applicable laws at issue in *Kalway* and this matter are distinguishable and the Appellees request that the Court reconsider its application of *Kalway* to this matter.

The Appellees Request the Court Reconsider Its Constitutional Concerns

¶16 The Court expresses concern that applying the amendments to A.R.S. §33-1228 without the Xias' consent presents constitutional issues, given Article II's prohibition on laws that impair the obligation of a contract. However, the Court should reconsider this aspect of its ruling.

¶17 The conduct described (applying the current version of an Arizona statute to the Parties' interactions) simply does not "impair the obligation of a contract" since the Parties agreed to be bound by amendments to the Act in the Declaration. This is the obligation at issue and it remains intact regardless of the version of the Statute applied. Whether this is found to be a valid term, it ultimately leads to the same conclusion: that statutory amendments do not impair the obligation of the contract

as it simply requires adherence to the law, something each Party already is obligated to do. Therefore, there is no Article II issue.

¶18 In fact, the Court's holding, which states that a prior version of a statute may be utilized by an owner even when the revised statute explicitly states otherwise (i.e. A.R.S. §33-1228(K)) represents a more stark constitutional issue, as it impacts the Legislature's authority to pass laws in violation of Article III ("The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.").

¶19 The Court's Decision suggests that the only reason A.R.S. §33-1228 can be constitutional is if an owner agrees to it and all its amendments, explicitly, as the Court believes those statutory amendments represent an amendment to the Declaration. The issue with that position is the suggestion that one's need to comply with a revised version of a statute is contingent on an owner's agreement to comply with it. Ostensibly, the Court is granting owners the ability to simply disregard valid laws by contracting around them, or simply opting out of them, regardless of the Legislature's stated intent. See Decision at 8-9, ¶23 ("...substantive amendments to the Condominium Act cannot later be incorporated into the agreement without renewed consent. Thus, the 1986 version of A.R.S. §33-1228 applies.").

¶20 This conclusion is based in part on the Court’s position that the Declaration “grants the Association the ‘rights, powers and duties as are prescribed by the Condominium Act.’” Decision at 5, ¶17. However, while the Declaration notes that the Parties are bound by the Condominium Act, the suggestion that absent this provision, the Parties would not be bound by the Condominium Act is mistaken. This erroneous conclusion is compounded by the Court’s findings that this provision effectively incorporates the Condominium Act into the Declaration, making amendments to the former amendments to the latter.

¶21 This logic usurps the Legislature’s ability to perform its role in passing laws and presents problematic situations going forward. While this issue is related to the Condominium Act, the Court’s decisions suggests that anyone could substitute other laws with no distinction. For example, if one were to replace the Condominium Act with the Fair Housing Act, would parties to a declaration be able to argue that they are not required to comply with revised versions of the Fair Housing Act absent renewed consent? If so, then safeguards for protected classes in the context of community associations would depend on when an owner purchased their unit as opposed to the intent of Congress or the Legislature, leading to issues of discrimination and subsequent recourse. While ostensibly far-fetched, the Court’s Decision as it stands certainly opens the door for these types of discussions.

The Court's Application of *Kalway* Creates an Untenable Scenario for Community Associations

¶22 Notwithstanding the other examples one could imagine, limiting the analysis solely to the Condominium Act, the Court's treatment of amendments to the law being handled in this matter results in an untenable situation for condominium associations. The obvious suggestion is one where a declaration includes language referencing and "incorporating" the Condominium Act (or the Planned Community Act or Nonprofit Corporation Act) an owner will not be required to comply with an amendment to any statute in those Acts unless that Owner "opts in" to said amendment; i.e., these statutory amendments are effectively amendments to the Declaration itself. See Decision at 6, ¶20 ("For these reasons, although the Declaration incorporates amendments to the Condominium Act, an amendment will be included only if it falls within the Xias' 'reasonable expectations based on the declaration in effect at the time of the purchase.'").

¶23 Not only does this Decision fail to correctly apply *Kalway*'s holding, which is limited to situations where a majority of owners amend documents without the consent of the other owners, an association's application of the Court's position results in an untenable situation. Specifically, as the Court now requires the Association to apply the 1986 version of the Statute **to the Xias**, based upon the date they purchased their Unit, it results in different Owners being subject to differing

versions of Arizona law and therefore having differing rights and obligations with regards to Association business.

¶24 Specifically, if the Court finds that the 1986 version of the Statute applies to the Xias, then the 2018 version must apply to Owners who purchased after August 3, 2018. This results in a situation where the Association (which is comprised of the Owners within it) must somehow administer the process in a way that incorporates both versions of the Statute to different subsets of Owners, depending on when they purchased within the Association. This logistical conundrum is certainly not within the expectations of the Parties to the Declaration.

¶25 Applying this logic beyond condominium terminations, which this Decision requires, means associations across the State with similar language must keep a record of every unit that includes the date the owner purchased their unit, the version of the Act in effect on that date, and whether the owner “opted in” to a later version of a statute in order to determine which version applied to that individual owner. Associations would then have to apply different standards to different owners in all situations, thus applying differing levels of protection and rights to them. This simply cannot be the intended consequence of the Court, the Legislature, or the *Kalway* Court, which, if nothing else, found no reason to limit its Blue Lining only to the plaintiff in that matter. Instead, the *Kalway* Court left the owners in Calabria Ranch with a uniform set of restrictions that applied equally to each owner moving

forward. The Court's decision in this matter, however, results in a patchwork of statutory adherence based on when an owner purchased their unit, is not a proper application of *Kalway* or Arizona law.

¶26 Further, the Court noted specifically that part of its reasoning is based on the possibility that the 1986 version of the Statute is more advantageous to the Xias, ostensibly making that a criteria for analysis for future cases. However, the Court's analysis of this issue should be reconsidered.

¶27 Whether a particular version of a statute is more advantageous to a party is a complex and nuanced consideration – and also subjective. Even in this instance, it is unclear whether the 1986 version does afford more protection to the Xias. As discussed at length during oral argument, one of the major tenets of the 2018 version is that Owners have appeal rights that include obtaining their own appraisal. See A.R.S. §33-1228(G)(1)(2018) (“Any unit owner may obtain a second independent appraisal at the unit owners expense and, if the unit owner’s independent appraisal amount differs from the association’s independent appraisal amount by five percent or less, the higher appraisal is final.”). The 1986 version gives only the Association the ability to obtain an appraiser and the subsequent appraisal becomes final unless a majority of the owners disapproves it within 30 days of distribution. *Id.* Therefore, it is debatable whether the 1986 version provides greater protection to owners than the 2018 version.

¶28 Regardless, based on the Court's Decision, future associations and owners would have to determine which version of a statute presents more protections to an owner (again based upon when the owner purchased their unit) and thus, would be the proper one to apply. An association and an owner may disagree. This analysis is not only outside the expectations of parties to declarations, it will also lead to confusion, inequitable results, and potential for abuse.

¶29 Conversely, if a prior version is not more advantageous to an Owner (based on some undefined standard), is the Association to apply a newer version, regardless of whether that Owner opted in? Perhaps the Court would suggest an Owner can choose the version they prefer, but what about the other Owners in the community? If the statute is one which impacts an Owner's ability to utilize its Unit in a certain way, other Owners would have an interest in ensuring that the Owner adhered to the prior version.

¶30 Either way, associations and members are left with non-uniform application of the law and an endless supply of confusion on numerous issues. The following are some illustrations of these potential issues:²

- A.R.S. §33-1261 has been amended multiple times since it was first adopted in 2002. This statute concerns an owner's right to display certain flags on their property. The original version allowed associations to prohibit the display of any flag except for the American

² There are more examples, including issues such as the Fair Housing Act, but word count constraints limit discussion on this topic.

Flag³. Under this version, owners were assured that, if their declaration had a general prohibition on flags, the only flag they would see on their neighbors' units would be the American Flag. However, this statute has been expanded multiple times over the years, and the current version has numerous exceptions, with the most recent version including different versions of the American Flag and Armed Forces Flags along with a number of others.⁴ Under the Court's current holding, if a declaration had language similar to the Association's (i.e. the Parties recognize they are bound by the Condominium Act, as it may be amended from time to time), then owners would be subject to the version of A.R.S. §33-1261 that applied when they bought into the Association. Therefore, owners may not be able to fly the full list of flags enumerated in the revised version(s) and owners who purchased prior to 2002 would not be able to fly any flag until they "opted in" to the latest version. However, would other owners, who may not want to see the additional flags flown next to them, have the right to intervene and argue that when their neighbors opt-in to an amendment, that act affects their own rights and should therefore not be permitted absent approval of those other owners?

- A.R.S. §33-1250 was amended in 2005. Prior to 2005, it permitted owners within a condominium to vote by proxy. After the 2005 amendment, proxies are no longer permitted after declarant control ends. Per the Court's decision, if an owner purchased their Unit prior to 2005, they could be permitted to vote via proxy, while owners who purchased after 2005 could not. Therefore, associations would have to keep detailed records of who can vote by proxy and reconcile the pre-2005 version of the statute with the current version to ensure compliance with both versions during all Association votes, even though both have very different requirements.
- A.R.S. §33-1256 was amended in 2004. Prior to that amendment, associations had a lien on units not only for assessments, but also for monetary penalties imposed against a unit owner for violations of the governing documents (A.R.S. §33-1242(A)(11)). Associations could foreclose on that lien, even if it was comprised only of monetary

³ [A.R.S. §33-1261 \[effective 2002 – 2006\]](#)

⁴ [2022 Ariz. Legis. Serv. Ch. 125 \(H.B. 2158\) \(WEST\)](#)

penalties. If we apply the Court's holding in this matter to pre-2004 owners, associations can again foreclose just for monetary penalties.

- Likewise, with the 2019 amendment to A.R.S. §33-1256, an association can only foreclose three years of its assessment lien for pre-August 27, 2019 owners, instead of six years for any post-August 27, 2019 owner. Again, this scheme does not treat owners equally.

¶31 Ultimately, the Court's Decision results in associations across the State being forced to apply a patchwork of statutory amendments differently to different owners. Mass confusion will arise not only from associations and their members assessing which versions of which statutes apply to each individual unit within an association (and the analysis of how to make that determination), but also being forced to keep detailed records of which Owner has opted in to a newer version of a statute and when they did so in order to determine their rights within the Association. It is not far-fetched to say this will ultimately leave associations struggling to comply with numerous versions of statutes for each election (A.R.S. §33-1250), board removal (A.R.S. §33-1243), amendment vote (A.R.S. §33-1227), or enforcement proceedings (A.R.S. §33-1242). This simply cannot be a proper application of the *Kalway* holding which, if nothing else, resulted in a uniform set of documents that applied equally to each owner within the Association. Failure to reconsider this decision will inevitably cause chaos within the community association industry, which will not be beneficial to either associations or owners.

**The Appellees Request the Court Reconsider Its Finding that Appellants
Are the Prevailing Party in Awarding Attorneys' Fees**

¶32 The issue of whether Appellants are the prevailing party is premature until the trial court ultimately resolves the case. Further, Appellants should not be considered the prevailing party as the case is only remanded for the trial court to reconsider the issues in light of the 1986 version of the Statute, an issue that was never raised by the Appellants. The Appellants, also, were not successful in their arguments regarding the constitutionality of the Statute or whether the Statute allows a termination to include the sale of a portion of the condominium. Thus, Appellees request that the Court reconsider whether Appellants are the prevailing party, or at the very least, withhold determination until the trial court resolves the case.

¶33 Based on the foregoing, the Appellees respectfully request that the Court reconsider its July 7, 2022 decision.

RESPECTFULLY submitted this 22nd day of July 2022.

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CERTIFICATE OF COMPLIANCE

This Certificate of compliance concerns DEFENDANTS/APPELLEES PFP DORSEY INVESTMENTS, LLC AND DORSEY PLACE CONDOMINIUM ASSOCIATION'S MOTION FOR RECONSIDERATION submitted under Rule 22(e).

The undersigned certifies that the motion for reconsideration to which this Certificate is attached uses type of at least 14 points, is double-spaced and contains 3431 words.

The document to which this Certificate is attached does not exceed the word limit that is set by Rule 22, as applicable.

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CERTIFICATE OF SERVICE

Pursuant to Ariz. R. Civ. App. P. 4, the undersigned certifies that the DEFENDANTS/APPELLEES PFP DORSEY INVESTMENTS, LLC AND DORSEY PLACE CONDOMINIUM ASSOCIATION'S MOTION FOR RECONSIDERATION was filed and served as follows:

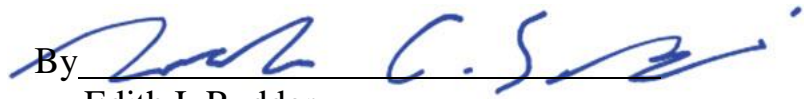
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