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**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 OBJECTION TO
PLAINTIFFS/APPELLANTS’
APPLICATION FOR ATTORNEYS’ FEES**

Defendants/Appellees PFP Dorsey Investments, LLC and Dorsey Place Condominium Association hereby object and respectfully request this Court to use its discretion in denying Plaintiffs/Appellants' request for \$279,674.00 for attorneys' fees as Appellants were not the prevailing party, and if even if they are considered the prevailing party, the requested amount of fees is excessive and unreasonable.¹

I. Appellants Did Not Prevail on Their Statutory Interpretation of A.R.S. §33-1228 or Their Constitutional Argument that A.R.S. §33-1228 Was an Unconstitutional Taking of Private Property.

Appellants argue in their Application for Attorneys' Fees that they were the prevailing party on appeal as they raised statutory and constitutional issues of statewide importance. However, Appellants did not prevail on either of the two issues they raised on appeal. As the Court noted in its Opinion, Appellants argued that "(1) A.R.S. §33-1228 is an unconstitutional taking of private property, and (2) A.R.S. §33-1228 prohibits PFP Dorsey and the Association from forcing a sale of less than the entire condominium for only the appraised value." (Op. ¶13). This Court rejected Appellants' arguments in finding A.R.S. §33-1228 was not unconstitutional as applied because the Appellants agreed to be bound by the Declaration, which granted to the Association the rights, power, and duties prescribed under the Condominium Act. (Op. p. 4, Sec. A; ¶17). Further, this Court

¹ Appellees also requested reconsideration of the Court's finding that Appellants are the prevailing party and awarding attorneys' fees in Appellees' Joint Motion for Reconsideration, filed on July 22, 2022, which is pending before this Court.

rejected Appellants' interpretation of A.R.S. §33-1228 that any sale of the condominium must include the entire condominium. (Op. p. 10, Sec. B.1.). Instead, this Court held that the statute permits a termination agreement to provide for the sale of less than all the units and common elements. (Op. ¶31). Both issues raised by Appellants were rejected by this Court.

This Court ultimately reversed and remanded the case back to the superior court stating that the superior court applied the incorrect version of A.R.S. §33-1228, an issue the Appellants did not raise before the trial court or on appeal. (Op. ¶3; ¶18, fn. 4). In fact, Appellants initially relied on the August 27, 2019 version of A.R.S. §33-1228 in their First Amended Complaint. [IR-39, ¶44]. It was not until the Second Amended Complaint that Appellants relied on the 2018 version of the Statute, which both parties relied upon for the Motion to Dismiss and issues raised by the Parties in this Appeal. [IR-40]. Appellants never raised the issue that the 1986 version of the Statute would apply until this Court raised the issue in request for supplemental briefing. Although this Court has discretion to raise an issue on appeal given the recent decision in *Kalway*, Appellants should not receive the benefit of an award of attorneys' fees when the decision on appeal rests on an issue the parties never litigated at the trial court level. If Appellants had raised the issue that the 1986 version of the Statute applied, this Appeal may never have occurred; or if the superior court granted Appellees' Motion to Dismiss based upon the 1986

version of the Statute, Appellants would not have succeeded on the appeal as this Court has ruled that the Statute is constitutional as applied and a sale of the entire condominium upon termination is not mandatory. Thus, Appellants should not be deemed the prevailing party on appeal and Appellees respectfully request that the Court deny Appellants' request for attorneys' fees.

II. It Is Premature to Determine the Prevailing Party under the Declaration.

Even if Appellants can be deemed to be the successful party on appeal because the case was reversed and remanded, it is premature to determine whether Appellants are the prevailing party in this action. The Condominium Declaration states,

In the event Declarant, the Association or any Unit Owner employs an attorney or attorneys . . . to enforce compliance with or recover damages for any violation or noncompliance with the Condominium Documents, ***the prevailing party in any such action*** shall be entitled to recover from the other party his reasonable attorneys' fees incurred in the action. (Emphasis added).

[IR-51, Ex. 1 at 52 (APP149)]. Appellants argue they are the prevailing party and fees shall be awarded pursuant to the Condominium Declaration. However, the action brought by Appellants against Appellees is still pending and a determination that Appellants are the prevailing party cannot be made until the case is fully resolved. *See generally Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 388-389 (2006) (finding because the Court is remanding the case, making an award of fees is premature on who is the prevailing party). It is premature to determine that Appellants are the prevailing party as this Court has remanded the case back to

the superior court for additional evaluation of the claims under the 1986 version of A.R.S. §33-1228. This Court made no finding on the merits in terms of liability and specifically stated, “we need not address whether the sale at issue would have fulfilled the Association’s fiduciary duty under the 2018 version.” (Op. ¶35). Whether Appellants or Appellees are the ultimate prevailing party in this action is undetermined and thus, Appellants should not be deemed the prevailing party and fees should not be awarded at this time.

III. At Most, Appellants Should Only Be Awarded Fees for Services Involving the Supplemental Briefing.

Appellees are not contending that Appellants’ attorneys are not qualified or experienced attorneys; however, they are being paid (or allegedly will be paid according to their Fee Application) \$279,674.00 on an appeal that ultimately resulted in a reversal and remand on an issue they never raised. Removing the cost of fees spent on the supplemental briefing, counsel charged the Appellants \$212,500.00 (consisting of the appeal assessment and principal briefing, and oral argument preparation) for work on issues on which they did not prevail. “Where a party has achieved only partial or limited success, however, it would be unreasonable to award compensation for all hours expended, including time spent on the unsuccessful issues or claims.” *Schweiger v. China Doll Restaurant*, 138 Ariz. 183, 189 (App. 1983). All of counsel’s work for the appeal assessment, principal briefing, and oral argument preparation focused on the two issues Appellants raised on appeal that this

Court rejected, i.e. the constitutional issue and statutory interpretation. Thus, it would be unreasonable to award compensation for counsel's work on these issues and the fee award should be considerably reduced.

In evaluating the work completed on the supplemental briefing, which is when Appellants' counsel first evaluated the issue of whether the 1986 version of the Statute applies, Appellants are requesting \$60,500.00 based upon the hybrid fee agreement for prevailing on appeal. Although a flat fee is not per se unreasonable, the amount of the agreed upon fee must still be reasonable. *See McDowell Mt. Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, 270 (App. 2007) (“[A] contractual provision providing for an award of unreasonable attorneys’ fees will not be enforced.”). “The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Timmons v. City of Tucson*, 171 Ariz. 350, 357 (App. 1991) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added)). Without considering whether any of the services provided were unreasonable, excessive, or duplicative, the services performed by Appellants’ counsel for the supplemental briefing on an hourly basis would have been \$38,724.00. Appellants’ request for \$60,500 for the supplemental briefing is unreasonable as it is more than 50% of what the hourly rate would have been. Further, Appellants allegedly agreed to pay

\$30,000 in a flat fee, with a potential success fee of \$30,000.² This success fee is a bonus for Appellants' counsel and would be an unreasonable award of fees against Appellees because this bonus is meant to be paid only by Appellees regardless and outside of the agreement between the Parties for an award of fees to the prevailing party. If the Court is inclined to award fees to Appellants, at most Appellants should be awarded \$38,724.00 for the hourly work completed on the supplemental briefing, which is the only issue on which Appellants prevailed on appeal; however, the more reasonable award should be the flat fee agreement of \$30,000 for this work.

IV. The Remaining Requested Amount of Attorneys' Fees Are Unreasonable and Excessive.

If this Court still finds Appellants should be awarded fees related to work on issues that they did not prevail, the full requested amount of \$279,674.00 is unreasonable and should be significantly reduced. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

² It should be noted that the Fee Application states the hybrid fee if Appellants prevailed for the supplemental briefing is \$60,500. (*See* Fee Application, p. 6). However, in the Declaration of Eric M. Fraser, he indicated the Appellants agreed to pay \$30,000 in a flat fee, with a potential success fee of \$30,000, which would total only \$60,000. (*See* Fraser Dec. ¶24). Appellants did not attach a copy of the written fee agreement and thus, the actual terms of the agreement between Appellants and their counsel are unknown.

- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) The degree of risk assumed by the lawyer.

Ariz. Sup. Ct. R. 42, ER 1.5 (a) (2021).

a. The Issues and Amount Involved and the Results Obtained Do Not Justify an Award of \$279,674.00.

This appeal stems from the superior court's order granting a Motion to Dismiss. There were no factual disputes or voluminous records of evidence for the attorneys to review or present to the Court. The issues were quite simple in terms of interpreting A.R.S. §33-1228 and whether the Appellees complied with the statute in the termination and sale of the condominium. Although whether A.R.S. §33-1228 is unconstitutional has not been previously addressed by this Court, the issue of a private taking is a common issue. Appellants' counsel spent over fifty hours on this issue, but only spent about fourteen out of the sixty-two pages of its Opening Brief addressing the issue. *See Hawk v. PC Village Ass'n, Inc.*, 233 Ariz. 94, 100, ¶22

(App. 2013) (“Unsuccessful parties should not be required to pay for tasks that take opposing counsel an unreasonable amount of time.”). The requested fee award is completely disproportionate to the issues and amount involved, especially as the appraised value of the subject condominium is less than the requested fees. [IR-40, ¶32].

b. Counsel’s Hourly Fee Rates Are Unreasonable.

Although Appellants entered into a flat fee agreement with counsel, they attempt to justify the flat fee amount as reasonable because their hourly services equate to amounts close to the flat fee agreement. However, counsel’s hourly rates are unreasonably high and thus, conflate the true value of services rendered.

Every three years, the State Bar of Arizona conducts a survey collecting data on various economic issues for lawyers and law firms called the Economics of Law Practice Survey. The State Bar of Arizona conducted its latest survey in 2019.³ In 2019, the average hourly rate of an attorney in Arizona was \$304 per hour. An attorney with less than five years of experience had an average rate of \$248 per hour. An attorney of 10-19 years of experience had an average rate of \$308 per hour. An attorney of 20-29 years of experience had an average rate of \$325 per hour. Each of Appellants’ counsel’s hourly rate far exceeds the average market rate in Arizona.

³ See Carol Rose, Arizona Lawyers Report on Economics of Practice, Arizona Attorney, September 2019, at 14. Article can be accessed online at <https://www.azattorneymag-digital.com/azattorneymag/library/page/201909/14/>

Eric Fraser, having approximately thirteen years of experience, charges \$565 per hour, over 80% more than Arizona's average rate. Thomas Hudson, having approximately twenty years of experience, charges \$625 per hour, over 90% more than Arizona's average rate. John Bullock, having approximately five years of experience, charges \$290 per hour, over 16% more than Arizona's average rate.

If Appellants' counsel's hourly fee rate were reduced by even 50% based upon an excessively high hourly rate, their amount of fees on an hourly basis would only be approximately \$118,000. This is significantly lower than the hybrid flat fee agreement, which shows that Appellants' request fees for \$279,674.00 is excessive and unreasonable.

c. Fees for Appeal Assessment Would Be Duplicative and Unreasonable.

Appellants are seeking a flat rate fee of \$15,000.00 charged by counsel to provide an assessment to Appellants for an appeal. Osborn Maledon, P.A. was not the original law firm representing Appellants at the trial court level. Osborn Maledon was substituted as counsel after the Notice of Appeal was filed. Thus, counsel's appeal assessment is essentially duplicative work from Appellants' original counsel and was an opportunity for counsel to familiarize themselves with the case and the issues raised at the trial court level. If Appellant had kept their original counsel on appeal, such fees to familiarize themselves with the issues in the case would not have been incurred. Thus, awarding fees for the appeal assessment

would be akin to awarding Appellants their original attorneys' fees when they were not the successful party at the trial court level. Appellees should not be penalized for Appellants' choice to change counsel.

d. A Bonus Success Fee for Prevailing Is Not Reasonable.

Although Appellants contend the hybrid fee agreement is akin to a contingency fee arrangement that shifts the risk and expense of litigation to counsel, Appellants' flat fee agreement with a success fee award does not share the same risk and expense of litigation in a contingency fee agreement. In a contingency fee agreement, if the plaintiff is unsuccessful, the attorney does not recover any fees. In this hybrid fee agreement with Appellants, Appellants' counsel is guaranteed a flat fee amount for the work they perform. Thus, the degree of risk is substantially lower in this hybrid fee agreement compared to a contingency agreement. The success fee award is nothing but an unreasonable bonus to punish the Appellees. Appellants knew fees likely would be awarded to the prevailing party in the action per the terms of the contract between the parties. If Appellants did not prevail, then Appellants would not be responsible for the success fee. Likewise, if Appellants are the ultimate prevailing party, then the success fee would be borne by Appellees through a fee

award, not Appellants. Such a scheme is unreasonable and Appellees respectfully request this Court deduct \$95,000⁴ from Appellants' fee award.

e. Appellants' Submission of Time for Working with Amicus Is Unreasonable.

Appellants are seeking reimbursement of 20.8 hours spent working with Pacific Legal Foundation, which filed an amicus brief in this appeal. The entries related to this work in the submitted Time Report is highlighted in orange, which is attached as Exhibit 1. Pacific Legal Foundation filed its Motion for Leave to File Brief Amicus Curiae with this Court on November 29, 2021, which included a copy of its proposed brief in support of the Plaintiffs-Appellants. Although Pacific Legal Foundation affirmed the amicus curiae brief was authored by attorneys of Pacific Legal Foundation, and no portion was authored by counsel for any party, there are numerous time entries prior to November 29th from Appellants' counsel working with Pacific Legal Foundation on the amicus brief, including specific time entries on 07/29/2021 for 3.60 hours to "Revise all sections of amicus brief; telephone call with Thom Hudson re same;" 9/13/2021 for 0.80 hours to "Email Pacific Legal Foundation re amicus brief;" and 11/19/2021 for 1.00 hours to "Review and comment on amicus brief."

⁴ Comprised of the \$65,000 success fee for the principal briefing and oral argument preparation and \$30,000 success fee for the supplemental briefing.

Awarding fees related to working with Pacific Legal Foundation would violate Arizona Rules of Civil Appellate Procedure 16(b)(3) by funding and contributing money for preparation of the amicus curiae brief, and thus, such fees in the amount of \$11,202.00 should not be awarded.⁵

f. Appellants' Submission of Time from Multiple Reviewers of the Opening and Reply Briefs Are Excessive, Duplicative, and Unreasonable.

As indicated in the Declaration of Eric M. Fraser, multiple attorneys and paralegals were involved in representing Appellants in the appeal. Such overlap among the attorneys caused excessive, duplicative, and unreasonable attorney fees, especially in the drafting of the Opening and Reply Briefs for Appellants. Highlighted in green in the attached Exhibit 1 are entries that are duplicative, excessive, and unreasonable. Eric Fraser was the principal partner responsible for the case. It also appears John Bullock and Michelle Burns were the primary associate and paralegal, respectively, assigned to the case. Mr. Fraser, Mr. Bullock, and Ms. Burns spent well over 150 hours on initial drafting, revising, editing, reviewing, researching, and supplementing the Opening Brief and over 90 hours on the Reply Brief. That amount of time in and of itself is excessive and an

⁵ Appellants may raise the argument that some of the highlighted entries include work on other areas outside of the amicus brief; however, these entries were block billed and it is Appellants' burden to show the requested fees are reasonable and block-billing prevents such a review. *See Sleeth v. Sleeth*, 226 Ariz. 171, 178 (App. 2010).

unreasonable or inordinate amount of time in preparing the briefs; but at the very least, additional time spent by others to review, edit, revise, or confer on the Opening and Reply Briefs would be excessive, duplicative, and unreasonable. In particular, Thomas Hudson, another partner at the firm, spent a considerable amount of time reviewing and editing the briefs, in addition, to “amici,” whom presumably would be Pacific Legal Foundation. Appellants are claiming 16.3 hours spent by Mr. Hudson for a total of \$10,187.50. There also is a time entry on 8/15/2021 for 1.4 hours (\$791.00) to “Revise opening brief to account for revisions from amici and cite check.” The amount of fees should be reduced as duplicative, excessive, and unreasonable.

V. Conclusion.

For all of the aforementioned reasons, Appellants should not be considered the prevailing party on appeal when the two primary issues raised by Appellants were rejected by this Court. At the very least, it is premature to determine whether the Appellants are the prevailing party until the case is resolved on the merits at the superior court level. Appellees respectfully request Appellants’ Application for Attorneys’ Fees be denied, in its entirety.

In the alternative, if this Court still is inclined to award their attorneys’ fees to Appellants, Appellees respectfully request that Appellants’ fees be significantly reduced. Appellants’ fees should be limited to the work performed on the

supplemental briefing, which is the only issue on which they prevailed, albeit on an issue originally raised by this Court. Therefore, Appellees respectfully request that, if this Court determines Appellants are entitled to their fees on appeal, that the award be no more than the flat fee amount of \$30,000 for Appellants' counsel's work on the supplemental briefing.

DATED this 4th day of August, 2022.

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