IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LAVEEN MEADOWS HOMEOWNERS' ASSOCIATION, INC., an Arizona nonprofit corporation, Plaintiff/Appellee, vs. CARLOS MEJIA, a married man, as his sole and separate property; et al., Defendant/Appellant.	1 CA-CV 18-0276 Maricopa County Superior Court No. CV2016-094391

DEFENDANT/APPELLANT'S REPLY BRIEF

DESSAULES LAW GROUP
5353 North 16th Street, Suite 110
Phoenix, Arizona 85016
(602) 274-5400
jdessaules@dessauleslaw.com
Jonathan A. Dessaules, Bar #019439
dwood@dessauleslaw.com
David E. Wood, Bar # 021403
jkubert@dessauleslaw.com
Jacob A. Kubert, Bar # 027445
Attorneys for Appellant Carlos Mejia

TABLE OF CONTENTS

Page

TABLE OF CITATIONS iii

I. INTRODUCTION. 1

II. THE RELEVANT PROCEDURAL HISTORY: THE ASSOCIATION SOUGHT DEFAULT AND A RESULTING FORECLOSURE ON UNDISCLOSED, PROHIBITED ITEMS. 2

III. THE ASSOCIATION'S ACCOUNTING DEMONSTRATES THE CRITICAL DANGER(S) AT ISSUE IN THE APPEAL. 4

A. The Association's math is procedurally barred. 5

B. The Association's continued argument and math violate this Court's instruction and the controlling statute. 7

1. An association may not "assess" unawarded attorneys' fees. 8

2. The "principal sum" wrongly includes at least $3,800 in unawarded fees. 9

C. The "principal sum" includes other amounts that are not subject to foreclosure. 12

D. The "principal sum" is for less than the statutory amount necessary to trigger the right to foreclose. 14

IV. FORECLOSURE BY THE TERMS OF § 33-1807 IS TIED TO THE AMOUNT OF OWED ASSESMENTS, AT THE TIME OF ENTRY. NO STATUTE ALLOWS AN HOA TO DEMAND EVERYTHING DESIRED IN EXCHANGE FOR A PERSON'S HOME. 16

A. Standard interpretation of A.R.S. § 33-1807(A) demonstrates the setting of a threshold for entry of a foreclosure judgment. 17

Page

1. The statute specifically ties the conditions to the remedy, not the cause of action. 18

2. The Association bases its argument on a selective quote of subsection (A) for a misreading of that quote and the statute. 20

3. The correct reading of the Judgment of foreclosure statute negates the Association's misreading of both that statute and -1807(A)..... 24

4. The Association's interpretation is of sub silentio legislative intent to authorize HOA hostage taking. 26

5. The Association does not address the other subsections of § 33-1807 or the in pari materia statutes..... 27

V. THE FORECLOSURE JUDGMENT IS FACIALLY ERRONEOUS AND SUBJECT TO REVERSAL. 27

VI. EVEN IF RULE 60 APPLIED, THE FORECLOSURE JUDGMENT IS REVERSIBLE FOR SEVERAL REASONS. 29

A. Unwarranted damages are a meritorious defense.....29

B. Permitting an equitable remedy of foreclosure for no amounts owed and in violation of statutory bars is not equitable. 30

C. The Judgment is void. 31

VII. CONCLUSION. 32

CERTIFICATE OF COMPLIANCE.....36

CERTIFICATE OF SERVICE.....38

TABLE OF CITATIONS

CASES **Page(s)**

A M Leasing, Ltd. v. Baker,
163 Ariz. 194 (App. 1989) 7

Bocchino v. Fountain Shadows Homeowners Association,
244 Ariz. 323 (Ct. App. 2018) 8, 9, 27

City of Ava v. Yost,
375 S.W.2d 884 (Mo. App. 1964) 32

Cronin v. Sheldon,
195 Ariz. 531 (1999) 20

Davis v. Passman,
442 U.S. 228 (1979) 20

De Anza Land and Leisure Corp. v. Raineri,
137 Ariz. 262 (App. 1983) 19

Estate of Braden ex rel. Gabaldon v. State,
228 Ariz. 323 (2011) 18

Eyman v. Deutsch,
92 Ariz. 82 (1962) 32

Fry v. Garcia,
213 Ariz. 70 (App. 2006) 32

Gonzalez v. Nguyen,
243 Ariz. 531 (2018) 29, 30

Gustafson v. Alloyd Co., Inc.,
513 U.S. 561 (1995) 18

Heatec, Inc. v. R.W. Beckett Corp.,
219 Ariz. 293 (App. 2008) 19

Horizons at Camelback Homeowners Association Inc v. Angulo,
2018 WL 5729362 (Ariz. Ct. App. Nov. 1, 2018) 5

Maricopa County v. ACC,
79 Ariz. 307 (1955) 7

Mid Kansas Federal Sav. and Loan Ass'n of Wichita v. Dynamic Development Corp.,
167 Ariz. 122 (Ariz. 1991) 19

Murphy Farrell Development, LLLP v. Sourant,
229 Ariz. 124 (App. 2012) 34

New Pueblo Constructors, Inc. v. State,
144 Ariz. 95 (1985) 25

North Canyon Ranch Owners Association v. Allen,
1 CA-CV 17-0227, 2018 WL 4017791
(Ariz. Ct. App. Aug. 22, 2018) 9, 13, 23

Patton v. Mohave County,
154 Ariz. 168 (App. 1987) 19

Rutledge v. Leonard,
10-07-00376-CV, 2009 WL 1412859
(Tex. App. May 20, 2009) 20

State v. Espinoza,
229 Ariz. 421 (App. 2012) 32

U.S. Fidelity & Guar. Co. v. Frohmiller,
71 Ariz. 377 (1951) 25

STATUTES **Page(s)**

A.R.S.
§ 12-341.01 35
§ 33-725(B) 25
§ 33-725(C) 21, 24
§ 33-1807.....4, 16, 22, 33
§ 33-1807(A)..... *passim*
§ 33-1807(H) 35
§ 33-1807(I)..... 26

RULES **Page(s)**

Arizona Rules of Civil Appellate Procedure
Rule 14(a)(2)..... 37
Rule 14(a)(5)..... 36

Arizona Rules of Civil Procedure
Rule 60 .....29, 31
Rule 60(C)(5) 29, 30
Rule 60(C)(6) 29

I. INTRODUCTION.

The Association continued an action seeking the remedy of judicial foreclosure to recover only its unadjudicated attorneys' fees; costs; and, as the record demonstrates, statutorily-barred fines, attorneys' fees and costs. The Association acknowledged below that a substantial payment made by Mr. Mejia the day before the default hearing satisfied any unpaid assessments. The matter could have, and should have, ended there with a money judgment for all proven sums to proceed on that finalized action. Instead, the Association persisted in its quest to take Mr. Mejia's home based upon a bloated concept of subject matter jurisdiction in that the authority to hear a case eliminated any question of the trial court's authority to render its sought judicial foreclosure. The substantive statute expressly bars that Judgment and the contents the Association included in its claimed lien for foreclosure. That Judgment must be reversed, including any award of attorneys' fees to seek that Judgment past the date that Mejia paid off his past due assessments.

This Court will see that the Association tries to defend that Judgment by: (1) ignoring the entire statute at issue for, instead, a butchered quotation of a single sentence; (2) confusing the concept of subject matter jurisdiction; and (3) misreading two different statutes to allow it to claim anything toward a foreclosable lien

against the statutory directives barring such accounting practices. Each argument is directly contrary to established interpretation canons, and the plain language at issue.

II. THE RELEVANT PROCEDURAL HISTORY: THE ASSOCIATION SOUGHT DEFAULT AND A RESULTING FORECLOSURE ON UNDISCLOSED, PROHIBITED ITEMS.

The Association claims that Mejia's Opening Brief "significantly mischaracterizes" the case history and then posits that this case raises issues of "subject matter jurisdiction" through the delivery of a "partial payment." [Answ. Br., at 1.] With regard to significant mischaracterization, the record fully supports Mejia's Opening Brief, and the only material matter significantly mischaracterized is the Association's math upon which it hinges its arguments and tries to justify the remedy of foreclosure of Mejia's home, compelling a decision from this Court directing the correct procedure and substance for an action seeking the remedy of judicial foreclosure.

Starting out of order, the trial court found, after the application of Mejia's $5,000 payment, that the Association was owed $-2,152.08 (a negative amount). The Association never filed a motion to reconsider what it now, a year later, labels a mathematical error. Tellingly, the Association only upon contest provided the trial court with the accounting allowing the trial court to actually assess the

credibility of its position and math. Here is the relevant timeline and substance demonstrating how the Association hid prohibited items from the trial court to obtain the equitable remedy of foreclosure of Mejia's home and still mislabels to this Court an unlawfully inflated lump sum as against assessments only.

- 5/11/16 – the Association's Complaint alleged a principal balance due as of 2016 of $8,246.48 with no breakdown or ledger for an accounting. [IR 1.]
- 4/3/17 - the Association filed a Motion and Affidavit for Entry of Judgment by Default again with no breakdown of the lump sum or ledger necessary for accounting. [IR 28-31.]
- 4/14/17 - Mejia filed a Notice that he had paid all past due assessment and noted the lack of a ledger. [IR 36-37.]
- 4/28/17- the Association filed a response, again not providing a ledger or breakdown of the $8,246.48 "principal balance".
- 5/26/17 - in advance of an evidentiary hearing, the Association finally filed a ledger demonstrating that the lump sum calculation included:
    - items back to 2011 in violation of the statute of limitations,
    - at least $3,800.00 in unawarded attorneys' fees,
    - $480 in fines not subject to foreclosure [IR 51.]

    - The mathematical demonstration that as of 5/15/17 the Association continued the expense of proceeding exclusively to obtain unawarded attorneys' fees and barred fines.
- 6/20/17 - the Association's community manager testified that Mejia's check for $5,000 covered all conceivable assessments and late fees since the beginning of 2011. [R.T. 6/20/17, at 32:7-33:3.][1]

III. THE ASSOCIATION'S ACCOUNTING DEMONSTRATES THE CRITICAL DANGER(S) AT ISSUE IN THE APPEAL.

The substantive errors in the Association's math and argument demonstrate the compelling need for this Court to direct that A.R.S. § 33-1807 bars a foreclosure judgment absent a showing—at entry—of the factors related to assessments only, not unexplained lump sums that do not distinguish between assessments, fines, unawarded attorneys' fees, and the like. Further, the Association's arguments and math demonstrate that it attempted to justify a requested foreclosure (and still does) by expanding the limited statutory definition of "assessment" to instead mean whatever the Association includes on its ledger.

---

[1] Mejia will cite to the materials in the official transcripts of proceedings as "R.T. [date] at [page number:line number]."

The Association concedes that the Judgment contains an error. [Answ. Br., at 44-48.] Although it tries to spin what it describes as a "mathematical error" as "Mejia's improper attempt to frustrate the trial court's jurisdiction" (apparently by tendering payment in excess of the assessments), this acknowledgment of error is, in substance, a confession of error that compels vacating the final Judgment and remanding the case for further proceedings. *See Horizons at Camelback Homeowners Association Inc v. Angulo*, 2018 WL 5729362, at *1, ¶ 5 (Ariz. Ct. App. Nov. 1, 2018) (mem. decision).

The Association's analysis of the "mathematical error" highlights numerous other errors in the principal balance awarded. In urging this Court to recalculate the principal balance (against both the numbers in the Ledger, controlling statute, and the testimony of its witness), the Association conveniently glosses over the other errors in its "principal sum." These errors, individually and collectively, compel reversing the Judgment.

A. The Association's math is procedurally barred.

This Court will see in the record that the Association did not file anything in the trial court seeking correction of the negative Judgment awarded. Not only did the Association not see cause to do so, its witness at the hearing for proof as to what assessments are owed testified contrary to its new argument on appeal. The trial court

ordered the evidentiary hearing specifically for proof as to that matter.

> So I am continuing to find that he's in default. Whether or not you want me to rule on whether or not he's satisfied with the payment of assessments, and there's no right to foreclosure, I'm not going to rule on that yet because I don't have anything in front of me at this point in time showing me what amounts and assessments are owed. So we'll go forward with a contested hearing.

[R.T. 6/2/18, at 24:7-13.] At that hearing, the Association's witness reviewed the full ledger, and agreed that the listed assessments and late fees added up to less than the $5,000 payment. Included in that math were entries beyond the statute of limitations that the trial court found applicable, [IR 77, at 8.], and the Association has not challenged.

The Association withdrew its notice of cross-appeal in the original appeal[2] and did not file a notice of appeal for this matter. It cannot attack the Judgment to expand its rights (arguing an alternative amount for foreclosure rights) or to narrow Mejia's rights (arguing an alternative amount to claim that Mejia was still within a foreclosure threshold at time of Judgment). A party that fails to cross-appeal is prohibited from attempting to enlarge rights under a

[2] Order Dismissing Cross-Appeal, CV 17-0539 (Filed 12/20/17).

judgment, including through argument that it was due to a greater sum than awarded. *A M Leasing, Ltd. v. Baker*, 163 Ariz. 194, 195–96 (App. 1989).

> If, however, it is sought by such cross-assignments to attack said judgment with a view either of 'enlarging his own rights thereunder or of lessening the rights of his adversary' he must cross-appeal by conforming with the rules of court by giving notice of appeal. In the absence of a cross-appeal the appellee can defend only as to the items allowed below and cannot present rejected claims.

Maricopa County v. ACC, 79 Ariz. 307, 310 (1955) (internal citation omitted).

B. The Association's continued argument and math violate this Court's instruction and the controlling statute.

On re-direct at the hearing, the Association's witness attempted to undo her acknowledgment that the full ledger mathematically showed no money for assessments owed. She did so by testifying in contradiction to the controlling statute that because the CC&Rs allegedly defined "assessment" to include attorneys' fees, the amount owed as assessments included all prior, unawarded attorneys' fees. There are two critical errors with that argument though, both statutory and dispositive.

1. An association may not "assess" unawarded attorneys' fees.

At the damages hearing, the Association's witness tried to change the math that she testified to by testifying that assessments as defined in the CC&Rs included unpaid attorneys' fees that were reflected in the ledger. [R.T. 6/20/17, at 45:9 – 46:3.] She then testified that these amounts were included in the lump sum that the Association sought as assessments, not as attorneys' fees awarded separately after judicial review.

> Q Okay. So anything extra that we're looking for today are non-assessments and late fees, such as attorney's fees, costs, things of that nature; isn't that correct?
>
> A Yes.

[*Id.* at 33:22-25.] Those ledger amounts for attorneys' fees had not been reviewed by or authorized as reasonable awardable attorneys' fees by any court.

This Court has prohibited that practice. In *Bocchino v. Fountain Shadows Homeowners Association*, 244 Ariz. 323, 324, ¶ 1 (Ct. App. 2018), this Court expressly barred unilateral assessment of unawarded attorneys' fees against a homeowner pursuant to a claimed authority in the CC&Rs. *Id.* ¶ 15. This Court rejected that practice as violating the principle of judicial oversight of such requests and awards. *Id.* A separate panel, analyzing just the plain

language of the statute, has similarly held, "[t]he Association's assessment lien does not include attorneys' fees, costs, and other charges." *North Canyon Ranch Owners Association v. Allen*, 1 CA-CV 17-0227, 2018 WL 4017791, at *3, ¶ 16 (Ariz. Ct. App. Aug. 22, 2018) (mem. decision).

Tellingly, the Association falsely claimed a waiver of an objection to that tactic and does not now attempt to justify that argument made in the trial court even though it tries to still take the benefit of that wrongful math. Contrary to the Association's argument, these unawarded attorneys' fees were objected to through argument of counsel, the questioning of their witness to bring to light the improper accounting and, through Mejia's objection to the proposed judgment. [R.T. 6/20/17, at 33:22-25, 53:16-56:3; IR 69, at 1-3.]

2. The "principal sum" wrongly includes at least $3,800 in unawarded fees.

Against this Court's controlling precedent, the Association still includes unawarded attorneys' fees in the alleged "Principal Sum." The "principal foreclosable balance," of $8,246.48 according to the Association [Answ. Br., at 44-45], grew to $8,843.48 at the time of the damages hearing, though its ledger "showed a balance due of $12,013.54." [IR 61, Exh. B.]

The Association explains this discrepancy by acknowledging that "the Association tracked the attorneys' fees related to the foreclosure action on the ledger accounting." [Answ. Br., at 45.] The Association then points out that someone excluded, in "hand-written calculations," late fees and "[l]itigation attorneys' fees and costs *not included in principal balance* of Judgment" of $3,464.06 to arrive at the Principal Sum demanded. [*Id.* (emphases added).] Thus, the Association suggests that the $8,843.48 is still a foreclosable lien.

But we know this is not true. The Association carefully chose its words, as did its witness in differentiating attorneys' fees charged prior to instituting this cause of action. While it excluded "[l]itigation attorneys' fees and costs" in this case, it notably did not exclude the unawarded attorneys' fees and costs reflected on the ledger and in the $8,843.48. The ledger to which the Association is referring is attached as Exhibit B to its Pre-Hearing Memorandum. [IR 61.] The Association only excluded $3,464.06 in "litigation fees" that it later resubmitted on a *China Doll* application. But, the resulting $8,843.48 balance according to the full ledger still contained at least an additional $3,803.96 in unawarded attorneys' fees for which they never submitted any application or materials for review.

The full ledger was hearing exhibit 6. [IR 53.] The entries for attorneys' fees date back to June 16, 2013. [*Id.*] These attorneys' fees

were later reclassified on the ledger as "DUE M&M CONTING" and later reclassified again back to "ATTORNEY FEES," but the undisputed fact from the complete ledger is that the Association's "principal balance" includes substantial unawarded and unadjudicated attorneys' fees. The line items for attorneys' fees or "M&M CONTING" that were not marked as removed from the principal balance adds up to $3,803.96.

Date	**Amount**
6/01/13	$870.06
7/31/13	$96.92
9/15/13	$367.72
9/15/15	$966.98
12/08/13	$363.42
3/09/14	$22.50
3/09/14	$385.38
12/21/14	$112.50
1/15/15	$75.00
3/26/15	$125.00
8/18/15	$157.50
9/23/15	$.98
10/22/15	$210.00
3/09/16	$50.00
Sum	**$3,803.96**

More precisely, this represents that the Association has argued to this Court that there is no issue about unawarded attorneys' fees, [Answ. Br., at 3], knowing that the principal sum that it presents to this Court as a foreclosable lien for "assessments" included in excess

of three thousand dollars in unawarded and unadjudicated attorneys' fees. It does so against the statute and this Court's mandate that such fees cannot be claimed as assessments, or assessments for the foreclosable lien. The trial court in fact awarded those as part of the principal sum, [IR 77, at 8], which in and of itself is a basis to reverse the Judgment.

C. The "principal sum" includes other amounts that are not subject to foreclosure.

In subtracting just $3,464.06 in "litigation fees," the Association implies that the balance of the "principal sum" is foreclosable. [Answ. Br. at 45, describing the $8,843.48 as "the principal foreclosable balance".] This implies that amounts charged to the account prior to January 1, 2015 are subject to foreclosure under A.R.S. § 33-1807(A).

Here again, this is not correct for an additional reason. The complete ledger shows $480.00 in fines assessed in the three years preceding May 11, 2016. [IR 53.]

Date	**Amount**
5/07/13	$110.00
5/16/13	$25.00
10/07/13	$110.00
1/13/14	$110.00
7/16/14	$110.00
12/08/14	$15.00
Sum	**$480.00**

Fines are excluded as assessments and not subject to foreclosure and therefore also are prohibited as a submitted portion of any principal sum.

> Fees, charges, late charges, monetary penalties and interest charged pursuant to section 33-1803, other than charges for late payment of assessments *are not enforceable as assessments* under this section.

A.R.S. § 33-1807(A) (emphasis added); *North Canyon*, 2018 WL 4017791, at *3, ¶ 16 (holding fines are neither assessments nor foreclosable). Critically, those other items, including fines and attorney fees, even when reduced to a lien "*may not be foreclosed* and is effective only on conveyance of any interest in the real property." A.R.S. § 33-1807(A) (emphasis added).

This leads to the obvious question: Why did the Association exclude these prior pages of its ledger from the materials it submitted to the trial court in asking for a foreclosure judgment through default? The ledger that the Association submitted, though it purports to be "Page 1," notably does not contain an opening balance or starting balance. It simply shows a line item charge on January 1, 2015 of $46.00 and a "BALANCE" as of that date of $6,330.00. In other words, this was clearly a continuation of a ledger that started before January 1, 2015. Why did the Association omit the preceding

pages that clearly showed non-foreclosable "FINES" and "ATTORNEY FEES", assessed to Mejia's account?

Most alarmingly, the Association continues to suggest that the $8,843.48 contains only amounts that are subject to foreclosure when, as discussed above, this is clearly not the case. The Association's confession of mathematical error only serves to highlight the glaring omissions that, at a minimum, compel vacating the Judgment and remanding this matter for further proceedings.

D. The "principal sum" is for less than the statutory amount necessary to trigger the right to foreclose.

In addition to the misrepresentations and omissions discussed above, the "mathematical error" that the Association suggests occurred further underscores the fact that the unpaid assessments, "excluding reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments," did not meet the one year or $1,200.00 statutory threshold by an amount even greater than the trial court found.

The Association's recalculation of the principal balance reflects a "[r]esulting subtotal of $6,431.98 before Mejia's $5,000.00 payment and a "[r]esulting principal balance of foreclosure judgment" after his payment. [Answ. Br., at 46-47.] The Association then concludes that

"the principal balance would not have been a negative amount" but for the "mathematical error." [*Id.*]

The Association's renewed calculation, however, still omits the unawarded attorneys' fees of at least $3,803.96, as discussed above, included in the "principal balance" as well as the $480.00 in non-foreclosable fines. When these amounts are excluded from the Association's new math, there is an even greater negative balance on the lien and unpaid assessments. "[E]xcluding reasonable collection fees, reasonable attorney fees and charges for late payment of and costs incurred with respect to those assessments," the lawful calculation did not meet the one year or $1,200.00 statutory threshold of A.R.S. § 33-1807(A). This is demonstrated by curing the Association's final tally with those amounts:

$8,843.48	Principal sum claimed (which included subtraction of $3,464.06 in litigation-related attorneys' fees and costs appearing on the ledger, as well as subtraction of $120.00 in late charges);
-$2,411.50	All amounts incurred prior to May 11, 2013, as the trial court elected to apply the statutory three-year statute of limitations to the Association's ability to foreclose as opposed to the contractual six-year statute of limitations afforded based on the Declaration;
[-$4,283.96]	[The statutorily barred and improperly included unawarded attorneys' fees and the statutorily barred and improperly included fines.];

[$2,148.02] Resulting subtotal;

-$5,000.00 Mejia's payment;

[-$2,851.98] Resulting principal balance of foreclosure judgment.

As discussed in greater detail below, the failure to meet the threshold at the entry of judgment prohibited the trial court from entering a judgment of foreclosure in this matter. It is a legal error that requires vacating and setting aside the Judgment altogether. The Association argues for the remedy of judicial foreclosure unless a homeowner submits to demands to pay all amounts summarized in a lump sum that hides unawarded attorneys' fees and fines and costs that could not be demanded to prevent a foreclosure. The Association's continued change to its claims without acknowledging the unauthorized items it includes to seek foreclosure demonstrates why this Court needs to issue guidance prohibiting that interpretation of § 33-1807.

IV. FORECLOSURE BY THE TERMS OF § 33-1807 IS TIED TO THE AMOUNT OF OWED ASSESMENTS, AT THE TIME OF ENTRY. NO STATUTE ALLOWS AN HOA TO DEMAND EVERYTHING DESIRED IN EXCHANGE FOR A PERSON'S HOME.

The Association engages in several errors to justify a reading of the Arizona statute to authorize a foreclosure judgment for only attorneys' fees based upon the simple act of filing the action. The

Association wrongly argues that there is a statutory lien created for all claimed costs and fees beyond HOA assessments as a circular attempt to justify such unlawful demands. The statute expressly restricts foreclosable liens to regular assessments only. The Association next confuses causes of actions with the right to a remedy and the claim that any challenge to a foreclosable judgment must equate to a challenge of subject matter jurisdiction. But that conflates the substantive nature of legislation and legislative prerogative to limit or negate statutorily created remedies, as the Legislature did. The Association otherwise does not respond to the statutory analysis of reading a statute as a whole, giving effect and meaning to the entirety of statutory text, or the legal definition of "foreclose".

A. Standard interpretation of A.R.S. § 33-1807(A) demonstrates the setting of a threshold for entry of a foreclosure judgment.

Interpretation of § 33-1807(A) as a whole, and by the long-accepted definition of the material terms therein demonstrate that the Legislature adopted a threshold for imposition of a foreclosure judgment. The mere right to file the action is irrelevant to the remedy threshold set by the Legislature.

The Association violates two key canons of statutory interpretation to justify the foreclosure Judgment for only attorneys' fees. First, that terms in a statute are interpreted in the context of the other surrounding terms. "[N]oscitur a sociis . . . . dictates that a statutory term is interpreted in context of the accompanying words." *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326, ¶ 13 (2011).

> a word is known by the company it keeps (the doctrine of noscitur a sociis). This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.

Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 575 (1995) (internal quotation marks omitted). And second, the employment of words by the Legislature is presumed to adopt the known definition of those words either in existing statutes, *Heatec, Inc. v. R.W. Beckett Corp.*, 219 Ariz. 293, 296 (App. 2008), or as constructed by the courts, *Patton v. Mohave County*, 154 Ariz. 168, 171 (App. 1987).

1. The statute specifically ties the conditions to the remedy, not the cause of action.

The second sentence of subsection (A) refers to the substance of a foreclosure judgment under the statute, with separate substance to a threshold for entering that foreclosure judgment. It is long judicially constructed that "foreclosure" is the imposition of a

"remedy". *E.g.*, *Mid Kansas Federal Sav. and Loan Ass'n of Wichita v. Dynamic Development Corp.*, 167 Ariz. 122, 126 (Ariz. 1991); *De Anza Land and Leisure Corp. v. Raineri*, 137 Ariz. 262, 268 (App. 1983). In conditioning the remedy of foreclosure, "may be foreclosed", the Legislature necessarily knew that it was setting any threshold to that judicial entry of judgment (the remedy), not the cause of action itself.

Mejia outlined in his Opening Brief, and the Association ignored, the meaning of the terms at issue. The Association instead argues assumptive arguments that the right to file a cause of action *ipso facto* conveys a right to a listed remedy. "[T]he foreclosure claim is ripe, triggering the Association's foreclosure right." [Answ. Br., at 27.] This assumptive argument ignores the structure of statutes and the structure of judicial authority to impose remedies, again known to the Legislature. "[W]hether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman*, 442 U.S. 228, 239 (1979).

> cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and relief is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory

> or injunctive relief although his case does not fulfill the "preconditions" for such equitable remedies.

Id. at 239, n.18. The Arizona Supreme Court has noted that distinction as well, specifically in rejecting challenges to the Legislature's restriction of remedies for statutory causes of action. *Cronin v. Sheldon*, 195 Ariz. 531, 540 (1999).

The premise of the Association's entire "subject matter jurisdiction" argument is the unsupported conflation of a bar to a remedy as a claimed jurisdictional bar to the entire action, which has never been Mejia's argument and conflates differing concepts. *Davis*, 442 U.S. at 239; *Cronin*, 195 Ariz. at 540. "[J]udicial foreclosure is a remedy, not a separate cause of action." *Rutledge v. Leonard*, 10-07-00376-CV, 2009 WL 1412859, at *3 (Tex. App. May 20, 2009) (Mem. Opinion).

2. The Association bases its argument on a selective quote of subsection (A) for a misreading of that quote and the statute.

Against the canon that a word is known by the company it keeps, the Association selectively edits to exaggerate the substance of a foreclosable lien by omitting the words and phrases surrounding the threshold set for foreclosure. Yet, those critically bar the Association's argument, actions in the trial court, and the final Judgment.

This Court will see that the Association quotes only some of the second sentence in subsection (A) to wrongly state that it has a lien for:

- assessments,
- charges for late payment of those assessments,
- for reasonable collection fees,
- and for reasonable attorneys' fees, and costs incurred with those assessments.

[Answ. Br., at 26-28.] The Association uses that claim to assert that all monies it demands must be paid to prevent a foreclosure, [*id.* at 28], through a similar misinterpretation of its analogy to the Judgment of Foreclosure statute, A.R.S. § 33-725(C) [*id.* at 28, 30], and the argument that the violence caused by seeking foreclosure for unawarded attorney fees is blessed by a statutory lien for attorney fees [*id.* at 34].

Section 33-1807 instead expressly prohibits a lien for anything other than actual assessments through the two sentences surrounding the Association's selective quote. The Association avoids that plain language by quoting only a portion of the second sentence of subsection (A) to read the sentence as the list of items part of the

statutory lien.[3] The first sentence of subparagraph (A) substantively defines the limited items included within the lien for assessments.

> The association has a lien on any unit for any assessment levied against that unit . . . .

§ 33-1807(A). The third sentence in subsection (A), also ignored by the Association, expressly forbids claims of attorneys' fees as qualifying as an assessment.

> Fees, charges, late charges, monetary penalties and interest charged pursuant to section 33-1803, other than charges for late payment of assessments *are not enforceable as assessments* under this section.

Id. (emphasis added). These sentences omitted by the Association demonstrate that only assessments create a lien for foreclosure, and that all extraneous costs, including attorneys' fees cannot be claimed as assessments. They demonstrate further that the second sentence is properly read as a list of items barred as within the assessment lien but separately included with the lien within a foreclosure judgment ("may be foreclosed"), as follows:

- the [association's lien for assessments],
- for charges for late payment of those assessments,

[3] In fact, to lodge its arguments, the Association only ever refers to its edited quote of the second sentence of subsection (A). The Association never discusses the other sentences or their meaning.

- for reasonable collection fees,
- and for reasonable attorney fees and costs.

That is finally demonstrated by the statute's express bar to foreclosure for attorney fees, which are reserved to separate money judgments.

> The association's lien *for monies other than for* assessments, for charges for late payment of those assessments, for reasonable collection fees and for reasonable attorney fees and costs incurred with respect to those assessments *may not be foreclosed* and is effective only on conveyance of any interest in the real property.

Id. (emphases added). A previous panel already reached that conclusion based upon the plain language reading of the statute as a whole. "The Association's assessment lien does not include attorneys' fees, costs, and other charges." *North Canyon*, 2018 WL 4017791, at *3, ¶ 16 (mem. decision). The Association's misreading, which the trial court adopted, demonstrates why the entirety of a statute is reviewed to engage in interpretation and why the trial court's final Judgment must be reversed as it conflated those items as a foreclosable lien supporting a foreclosure order. Of course, given the limitation for foreclosure set as assessments only, the Association's wrongful inclusion of other unawarded and unadjudicated amounts toward a lien does not change that no

assessments were due to authorize a foreclosure judgment regardless of what the lien contained.

3. The correct reading of the Judgment of foreclosure statute negates the Association's misreading of both that statute and -1807(A).

The Association doubles down on this misinterpretation by arguing consistency with its wrongful reading of the Judgment of foreclosure statute for the proposition that for redemption, a mortgagor is required to pay: the amount owed, including attorneys' fees and costs. [Answ. Br. at 28.] The Association cites A.R.S. § 33-725(C) for that proposition. [*Id.*] Like the Association's misreading of § 33-1807(A), the foreclosure statute states the opposite.

Section 33-725(C) allows for voiding the foreclosure sale upon satisfaction of "the amount due, with costs" of "*the debt for which the lien is held*." (Emphasis added.) Subsection C omits attorneys' fees from the amount due and instead expressly sets the threshold for voiding the sale to paying the debt underlying the foreclosable lien. As plainly clear, not all liens are foreclosable. For example, the Association ignores sentences of 33-1807(A) which provide that the lien for assessments may be foreclosed, but not liens for fees and penalties. Only the debt constituting a foreclosable lien must be paid.

Section 33-725(B) additionally undercuts the Association's argument, as that subsection states expressly that judgments for foreclosures of mortgages and liens shall provide for recovery of "debt, damages and costs." The Legislature expressly left attorney fees off that list, where it is presumptively dispositive that had it intended to include that item, "certainly it would have included such a provision in plain and unambiguous terms." *U.S. Fidelity & Guar. Co. v. Frohmiller*, 71 Ariz. 377, 381 (1951); *New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95, 107 (1985) ("'Costs' is also usually construed to exclude attorney's fees.").

Reference to the Judgment of foreclosure statute is relevant, to demonstrate that the Association continually reads terms and substance into statutes stating the opposite. The redemption amount is limited to the foreclosable lien and not attorney fees. Construing § 33-1807(A) consistently then demonstrates why the Legislature carefully differentiated the foreclosable lien to only true assessments and the threshold for entry of judgment to only a measurement of the foreclosable lien. It was done to substantively mirror the redemption amount and not allow for inflated amounts that contradict the Judgment of foreclosure statute. That is the normal practice.

4. The Association's interpretation is of sub silentio legislative intent to authorize HOA hostage taking.

The record in this matter demonstrates that the Association reads the statute as authorized duress. The principal sum demanded in this action necessarily inflated the amount necessary to prevent foreclosure by thousands of dollars. Thus, because those unlawful amounts were included prior to any authorization, the Association is arguing that any payoff had to include those amounts in spite of the bar from this Court and the statute that unawarded attorneys' fees may not be assessed as such. The record further demonstrates that the Association in this matter did not disclose the nature of its demands until the trial court ordered a hearing on the merits at the demand of Mejia.

Such reading would render homeowner protections a nullity. Section 33-1807(I) requires an HOA upon request to provide a statement "setting forth the amount of any unpaid *assessment* against the unit." (Emphasis added.) That protection and provision to allow for settlement is meaningless if associations can violate the statutory definition of "assessment" with unauthorized amounts to inflate demands and to extort through that process the unauthorized attorneys' fees barred by this Court's command in *Bocchino*. By way of example, the Association submitted as a hearing exhibit its payoff

demand letter to Mr. Mejia, which included some $7,000 in prohibited attorneys' fees and fines which cannot be demanded to prevent foreclosure. [IR 52.]

5. The Association does not address the other subsections of § 33-1807 or the in pari materia statutes.

There are scores of statutory interpretation canons that contradict the trial court's agreement with the Association that an authorized filing of an action seeking foreclosure automatically created a right to that remedy. [Op. Br., at 19-25.] Only some are set forth above for this Court's review. Mejia in his Opening Brief noted that interpretation of the bar to foreclosure as applicable only at the moment of filing violated the distinctions made within the other subsections between "proceedings to enforce the lien" and a "judgment or decree." [*Id.* at 20.] The Association did not respond to that argument. Mejia also directed this Court to several other statutes also distinguishing between actions for foreclosure and foreclosure coming at entry of judgment. [*Id.* at 21.] The Association did not respond to that argument either.

V. THE FORECLOSURE JUDGMENT IS FACIALLY ERRONEOUS AND SUBJECT TO REVERSAL.

The Association tries to block any reversal of this unlawful judgment by continually throwing up the gauntlet that any challenge

must be a challenge to subject matter jurisdiction. Mejia need not make or succeed upon such a challenge as the judgment is subject to this Court's review for reversible error upon the timely objections of Mejia in the trial court.

Mejia appeared in the trial court, objected to the demanded foreclosure judgment, the inclusion of unawarded attorneys' fees as a claimed foreclosable lien, and any foreclosure request where actual assessments were not owed. The trial court ordered a default as to Mejia's liability under the statute, not the nature of or amount of alleged monies owed or right to foreclosure. [IR 58; R.T. 6/2/17, at 24:7-13.] The foreclosure judgment and amounts related to that Judgment were issued after a contested hearing. As the trial court did not issue a judgment of foreclosure or amounts due as a default judgment, only the default as to liability is subject to any heightened standards pursuant to Rule 60.

Mejia previously pointed out that the Judgment of foreclosure and of any amounts due is not subject to heightened thresholds challenging a default judgment. [Op. Br., at 28-29.] The Association has not contested this point.

VI. EVEN IF RULE 60 APPLIED, THE FORECLOSURE JUDGMENT IS REVERSIBLE FOR SEVERAL REASONS.

The errors listed above demonstrate that the trial court issued a ruling that; included statutorily barred amounts within a foreclosable lien, applied a statute that required factors at the time of entry of judgment to instead apply where those factors unquestionably did not exist, and to a negative judgment. Any of those factors satisfied Arizona Rule of Civil Procedure 60 standards for relief and still do, though those standards need not apply to the money portion of the foreclosure Judgment as that was not entered by default. Tellingly, the Association failed to respond on appeal to the grounds for relief pursuant to both Rule 60(C)(5) and (6).

A. Unwarranted damages are a meritorious defense.

Rule 60(c)(6), for "any other reason justifying relief", provides for relief where damages imposed on default are "potentially unwarranted". *Gonzalez v. Nguyen*, 243 Ariz. 531, 535, ¶ 17 (2018). The Arizona Supreme Court has expressly held that evidence of excessive damages entered as a default may be construed as a meritorious defense, and there is no requirement of demonstrating excusable neglect. *Id.* ¶¶ 14-17. In this matter, the final Judgment included monies for a foreclosable lien barred by statute. The final Judgment also entered a foreclosure order barred by the terms of the

statute for a negative amount due. Finally, the trial court awarded attorneys' fees for engaging in litigation to obtain a foreclosure barred by statute. Any or all these errors demonstrate a meritorious defense warranting reversal as this is not a case of "potentially unwarranted" damages, but of statutorily barred damages and foreclosure.

Rather than respond to the grounds and case law demonstrating this, the Association simply claimed that the argument was undeveloped in the trial court. [Answ. Br., at 22.] That failure to respond can and should be treated as a waiver and concession.

B. Permitting an equitable remedy of foreclosure for no amounts owed and in violation of statutory bars is not equitable.

The Association wrongly asserts that no ground for relief pursuant to Rule 60(c)(5) was presented to the trial court, and refused to respond on appeal. [Answ. Br., at 5.] They waived their response wrongly, as Mejia repeatedly argued to the trial court that imposition of a foreclosure based on these statutory errors would create an inequitable judgment. Moreover, Mejia repeatedly outlined that imposing an equitable remedy in violation of the statute was an inequitable result contravening the Legislature's carefully crafted test for issuing such a judgment. As this Court can see with the

compounded errors set forth above, a foreclosure order was issued to satisfy no amount of money owed for the only item foreclosable, assessments. Foreclosure was ordered then only for the Association to chase attorneys' fees which by statutory command negates equity.

C. The Judgment is void.

To attempt to avoid review and reversal, the Association claims that an attack on the final Judgment must meet the threshold for a subject matter jurisdiction attack. For two reasons outlined above, that is an incorrect proposition. First, the right to file an action and qualification for a remedy are distinct. Second, Mejia appeared and timely objected to the contested request for the final judgment as to foreclosure and amounts. Thus, Mejia need not satisfy Rule 60 at all as to those aspects of the final Judgment. Regardless, even if Rule 60 applied to those issues, the final Judgment is void as outside the statute and not within the authority of the court.

"There are three types of jurisdiction: subject matter jurisdiction, personal jurisdiction *and* jurisdiction to render a particular judgment." *E.g.*, *Fry v. Garcia*, 213 Ariz. 70, 73, ¶ 9 n.2 (App. 2006) (emphasis added). The authority to enter a judicial foreclosure order is purely a power created by statute. In Arizona, as elsewhere, the definition of jurisdiction to render a particular judgment includes complying with the limits of the statute granting

that authority. *Eyman v. Deutsch*, 92 Ariz. 82, 88 (1962) (outlining that power as necessarily within the confines of the governing statute); *State v. Espinoza*, 229 Ariz. 421, 428, ¶ 31 (App. 2012). "When the question goes to the power of the court under a statute to determine the controversy or to render the particular judgment in the particular case, the jurisdiction partakes of the nature and character of subject matter and cannot be waived." *City of Ava v. Yost*, 375 S.W.2d 884, 886 (Mo. App. 1964).

VII. CONCLUSION.

The Legislature did not intend to give a homeowners' association carte blanche authority to take a homeowner's home if those homeowners, upon bringing his or her assessment account current, did not also pay every unawarded dime that the association demands (and without giving the homeowner a right to challenge those amounts). It also did not intend to force homeowners to choose between keeping their homes or losing them if they sought to challenge the reasonableness of the unawarded amounts the association was demanding. For the foregoing reasons, the Court should reverse the trial court's final Judgment and ordered foreclosure, remand with instructions to set aside the final Judgment and consider any requested awards of attorneys' fees after first determining the prevailing party.

Many of the errors in the record need not be reviewed as moot should this Court reverse and remand with instructions regarding the final Judgment. Foreclosure was unlawful under § 33-1307. Upon that ruling, this Court need not review the other unlawful entries related to that foreclosure, such as future fees, conveyance of title, abandonment of property, and the like. The only other actions necessary in the trial court upon remand are issuing a separate final money judgment to the Association for any provable fees and costs demonstrated as reasonable for the filing of the action through Mejia's payoff of all actual assessments owed. The trial court will need to review proper attorneys' fees applications for any claims up to that date and strike any demands for attorneys' fees and fines past that date to any party not deemed prevailing. Separately, the trial court will need to determine the prevailing party after that date as the Association's exclusive goal of foreclosure was barred and then review attorneys' fees applications for the prevailing party.

Mejia should receive his reasonable attorneys' fees and costs on appeal. The Association has proceeded for three years, including in defending this appeal, exclusively for a foreclosure that was barred on the date Mejia paid all past due assessments. The extraneous attorneys' fees and other costs were barred math for consideration of a lawful foreclosure judgment based on only assessments owed. As

the Association's sought remedy was not and is not authorized, this Court should award Mejia his reasonable attorneys' fees on appeal. In *Murphy Farrell Development, LLLP v. Sourant*, 229 Ariz. 124, 133-34, ¶¶ 33-34 (App. 2012), a panel of this Court ruled that a party's breaches of a contract do not disqualify that party from being considered the prevailing party under a fees provision where the only sought remedy was denied. In that matter, this Court remanded with instructions to determine the prevailing party in the litigation, including appeal, after review of a remaining request for declaratory judgment. *Id.* at 134, ¶ 37. In contrast, there are no substantive claims left in this matter for review. Gauging the "percentage of success" or "totality of the litigation", *id.* at 134, ¶ 36, the Association's reasonable attorneys' fees and costs for filing the action do not change the barred remedy Mejia has demonstrated at the expense of the far greater costs and reasonable attorneys' fees Mejia expended to defend against the relentless quest for his home. Under the terms of A.R.S. § 33-1807(H), a judgment or decree in an action under that section "shall include costs and reasonable attorney fees for the prevailing party." Section 12-341.01 authorizes an award in an action based upon contract Mejia should receive that award of attorneys' fees as well. Upon request, Mejia will submit all necessary documents necessary for review of the reasonableness of attorneys'

fees or necessary to determine his status as prevailing party or entitlement to fees by contract.

RESPECTFULLY SUBMITTED this 26th day of March 2019.

By: /s/ David E. Wood
Jonathan A. Dessaules
Arizona State Bar No. 019439
David E. Wood
Arizona State Bar No. 021406
Jacob A. Kubert
Arizona State Bar No. 027445
DESSAULES LAW GROUP
5353 North 16th Street, Suite 110
Phoenix, Arizona 85016
Attorneys for Appellant Carlos Mejia