

ARIZONA COURT OF APPEALS

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

MOTION FOR RECONSIDERATION

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Pursuant to Arizona Rule of Civil Appellate Procedure 22, Appellant Carlos Mejia (“Mejia”) respectfully requests that the Court reconsider its May 5, 2020 Opinion affirming the trial court’s default judgment because the Opinion usurps the trial court’s role as “gatekeeper” over the reasonableness of attorneys’ fees and reassigns that role to the very attorney who is seeking payment. In that regard, the Opinion contradicts these principles and effectively overrules *Bocchino v. Fountain Shadows Homeowners Ass’n.*, 244 Ariz. 323 (App. 2018) by giving the HOA’s attorneys the unilateral right to demand unawarded attorneys’ fees without judicial oversight, review, or approval. This gives the HOA’s attorneys the sole and absolute power to decide how much a homeowner must pay.

Arizona courts recognize that trial courts are the gatekeeper for determining the reasonableness of attorneys’ fees sought - not the parties. *Woliansky v. Miller*, 146 Ariz. 170, 172 (App. 1985). This holds true even when fees are sought pursuant to an express contractual fee-shifting provision. *Id.* Similarly, the trial court has “sole discretion” for determining the prevailing party for purposes of awarding attorneys’ fees. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13, ¶ 21 (App. 2011). In sum, the award of attorneys’ fees is “peculiarly within the discretion of the trial court.” *Woliansky*, 146 Ariz. at 172.

In *Bocchino*, the HOA filed an injunction against harassment against homeowner Bocchino and then unilaterally imposed the attorneys' fees it incurred directly to her account. She had no choice but to pay this amount at closing when she sold her home or lose the sale and be in breach with her buyer. After closing, she sued the HOA to recover the attorneys' fees that the HOA imposed on her account and prevailed on summary judgment. Based on the principles discussed above, this Court affirmed the trial court by holding:

The Association further contends that because the fee provision in the Declaration allows the Association to recover "all" the fees incurred, no judicial approval of fees is necessary. Section 12-1810(O) and sound policy dictate otherwise. Even a contractual entitlement to "all" attorney fees incurred can be overcome by an evidentiary showing that the fees were "clearly excessive." Moreover, the Association has cited no authority for the proposition that it was permissible to simply charge Bocchino's Association account for attorney fees it incurred without first receiving an award from the court. Requiring the tribunal that resolves the litigation to evaluate attorney fee claims – as generally required by our statutes and rules – constitutes sound policy. Courts play a significant role in assessing and awarding attorney fees incurred in judicial proceedings.

* * *

On this record, we conclude the Association improperly assessed attorney fees against Bocchino that had not been awarded by the justice court.

Bocchino, 244 Ariz. at 325-326, ¶¶ 15, 16 (internal citations omitted).

Underscoring the public policy of this decision, this Court also said in a footnote, “The parties competing contentions in this case underscore the value of judicial oversight.” *Id.* at fn. 3; *see also McNair v. Maxwell & Morgan, P.C.*, 893 F.3d 680, 684 (9th Cir. 2018) (fees must be “approved by a court” and cannot be that unilaterally imposed).

The Opinion allows an HOA to obtain a foreclosure judgment even if the homeowner pays assessments below the \$1,200 jurisdictional threshold before judgment (or, as in this case, more than the total unpaid assessments) unless the owner also pays all of the unawarded attorneys’ fees and costs the HOA’s lawyers demand. To save his home, Mejia and other owners have no choice but to pay every cent in fees that the HOA’s lawyers are demanding without any opportunity to challenge those fees as reasonable or seek judicial oversight. This eliminates the trial court’s function as gatekeeper and shifts to the HOA’s lawyers the right to decide unilaterally what their reasonable attorneys’ fees are.

If an owner pays all conceivable assessments the day after the foreclosure lawsuit is filed and the HOA demands \$4,000 for a pro forma complaint, the owner has no choice but to pay it. If he refuses because he believes \$4,000 is unreasonable or excessive and the HOA files a motion for summary judgment, the \$4,000 easily could double or triple. The HOA would then file an application for

fees for an additional \$1,000, or more. And the HOA, or more accurately its counsel who often get paid only based on what they can collect, can then foreclose over this additional amount.

The Opinion disincentives Owners to challenge the HOA's fees because any challenge would result in a foreclosable fee award, potentially for a lot more, and deprive the Owner of the right to have a court decide the reasonableness of fees. An owner is left with a Hobson's choice: pay the exorbitant fee award to avoid foreclosure or seek to challenge the exorbitant fee award only to be subject to a fee award for the additional litigation work incurred in challenging the fee award.

As many owners understandably would pay a king's ransom to save their home, the Opinion essentially gives sole and unfettered power to the HOA's lawyer to decide the reasonableness and necessity of their fees. Because the owner was delinquent at the time the suit was filed, he is likely to be hit with fees if he opposes the lawsuit, even if only to challenge fees. The trial court's role in deciding whether and in what amount to award fees, in other words, is handed to the HOA's lawyers who have no incentive to keep their fees reasonable.

In *Bocchino*, this Court recognized that an HOA must first obtain judicial approval of attorneys' fees that it seeks against a member. The instant ruling essentially overrules *Bocchino*. Now, a HOA can easily circumvent *Bocchino* by

demanding payment of unawarded attorneys' fees under the threat of continuing a foreclosure lawsuit to seek even more fees.

Although the majority states that *Bocchino* “does not permit Laveen Meadows to assess unawarded fees or costs,” it does exactly that. The HOA in this case continued with the foreclosure judgment solely because Mejia did not pay the unawarded attorneys' fees and costs they were demanding in addition to the assessments. The Opinion grants the HOA's attorneys the unfettered, absolute right to assess unawarded attorneys' fees to Mejia's account, without prior judicial approval, that he must blindly pay to avoid foreclosure. The only way that a court will perform its gatekeeping function is if an owner wishes to challenge the fees. But the cost of challenging the fees comes with the price of a foreclosure judgment for an even greater amount due to the increased litigation.

This outcome is wholly inconsistent with *Bocchino*, *McNair*, and Arizona law. The Opinion creates the unintended consequence of usurping the trial court's gatekeeping function to determine the reasonableness of fees and has reassigned that role to the HOA. *Woliansky*, 146 Ariz. at 172. No longer is the trial court the “sole” arbiter to determine the winner or whether and in what amount to award fees; the Opinion enables the HOA to declare itself the winner and demand all fees

the moment that the homeowner pays the assessment (even under duress) without any judicial oversight. *Berry*, 228 Ariz. at 13, ¶ 9.

Since this ruling effectively overrules *Bocchino* and Arizona’s well-established law that makes the trial court the sole arbiter to determine fee awards, Mejia respectfully requests that this Court reconsider its Opinion and adopt the dissent’s interpretation of A.R.S. § 33-1807(A), which harmonizes together the express language of the statute (i.e., lien “may” be foreclosed), the Legislative intent that fees are stripped from the equation, *Bocchino* and this Court’s established “sound policy” of requiring the Court to bless fees before a homeowner is required to pay them.

DATED this 20th day of May 2020.

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