

2021 SEP 22 AM 11:03

1 R. L. Whitmer
2 6333 N. Scottsdale Rd.
3 Casita 21
4 Scottsdale, Arizona 85250
5 Pro Per

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF MARICOPA**

8 R. L. WHITMER,
9 Petitioner/Plaintiff.

CV2021-050888

10 v.

**PLAINTIFF'S OBJECTION TO
DEFENDANTS' APPLICATION FOR
AN AWARD OF ATTORNEY FEES
AND COSTS**

11 HILTON CASITAS HOMEOWNERS
12 ASSOCIATION, also known as
13 HILTON CASITAS COUNCIL OF
14 HOMEOWNERS, also known as
15 COUNCIL OF CO-OWNERS, also
16 known as HILTON CASITAS
17 COUNCIL OF CO-OWNERS;

(Assigned to the Honorable
Sara Agne)

18 Defendant/Defendant.

19 The Defendant's ("HOA") application for attorney's fees and costs is without
20 fact findings and without factual and legal foundation, and therefore the Court
21 must deny the request for an award of attorney fees and costs.

MEMORANDUM OF POINTS AND FACTS

22 **THIS LITIGATION SHOULD HAVE ENDED IN MAY 2021 HAD THE DEFENDANT'S ATTORNEY
23 FOLLOWED THROUGH ON HIS SETTLEMENT PROPOSAL.**

24 The following is from the Plaintiff's sworn declaration (Ex. 1):

25 "At the April 23, 2021 Order to Show Cause Hearing the Defendant's
26 attorney, Mr. Butterfield, told the Court that he would contact the Plaintiff and
27 propose a settlement to resolve the Plaintiff's claims in his complaint.

28 Immediately after the Hearing, the Defendant's attorney called me and
proposed a "Voluntary Dismissal Without Prejudice." In the discussion, Mr.

1 Butterfield stated that HOA wanted to settle and proposed the following terms:

2 1) That the HOA would set a date within the parameters of A.R.S
3 § 33-1243(D) to ratify an annual budget and set the annual
4 assessment within the parameters of A.R.S § 33-1255.

5 2) That while A.R.S § 33-1243(J) requires the HOA to have an
6 annual financial audit, review or compilation of the association, it
7 does not require a Certified Public Account perform the annual
8 financial audit, review or compilation, but that as a result of my
9 complaint the HOA would complete having a CPA perform a
10 compilation for 2018, 2019 and 2020. Although Mr. Butterfield
11 claimed that he had already litigated that a CPA was not required
12 and to avoid future litigation he would send me a copy of that
13 decision.

14 3) The parties would bear their own costs.

15 Mr. Butterfield stated he would right away send me a draft of the “Voluntary
16 Dismissal Without Prejudice” and get HOA’s final sign off.

17 I agreed to settle on those terms and followed up with an email (Ex. A). “It
18 was nice chatting with you and I look forward to hearing back from after you
19 speak with your client. Please send me the court’s findings from your case
20 regarding ARS § 33-1243.J.”

21 A week later, on May 1, 2021 I received in the mail a “Voluntary Dismissal
22 Without Prejudice” meant for a different HOA (Ex. B). I immediately emailed Mr.
23 Butterfield – “Your office mailed me the attached filing from CV2021-00451
24 Sundance Ranch HOA. Hopefully, they did not send correspondence intended
25 for me to Sundance Ranch HOA. If there was mix-up, please let me know if there
26 was or was not a mix-up. If there was go ahead and email it to me. Additionally,
27 please send me the court’s findings from your case regarding ARS § 33-1243.J.”
28 (Emphasis added)(Ex. C).

1 Mr. Butterfield never replied to the email, and I never received the draft
2 "Voluntary Dismissal Without Prejudice" as promised, and Mr. Butterfield never
3 contacted the HOA board about his proposed settlement. Had Mr. Butterfield
4 followed through on his proposed settlement the litigation would have ended."

5 The above excerpt is evidenced by Exhibit B of the application as referenced
6 in Mr. Butterfield's time entry of 4/23/2021:

7 "Call with Plaintiff Whitmer regarding issues raised
8 during the Return Hearing and whether negotiated
9 resolution is feasible... (Ex. 2).

10 Exhibit B of the Defendant's application does not show that Mr. Butterfield
11 made any attempt to present or discuss his proposed settlement with the HOA
12 board. Instead, Exhibit B of the application shows that he kept on preparing for
13 the accelerated evidentiary hearing schedule.

14 This litigation should have ended in May 2021 had the Defendant's attorney
15 followed through on his settlement proposal, making the HOA not entitled for fees
16 and costs.

17 **THE DEFENDANT'S APPLICATION FOR ATTORNEY'S FEES AND COSTS LACK ANY**
18 **FINDINGS TO SUPPORT AN AWARD PURSUANT A.R.S. § 12-349.**

19 A.R.S. § 12-349 allows an award of attorneys' fees only if Petitioner's has
20 engaged in one of the following prerequisites:

- 21 "1. Brings or defends a claim without substantial
22 justification.
- 23 2. Brings or defends a claim solely or primarily for delay or
24 harassment.
- 25 3. Unreasonably expands or delays the proceeding.
- 26 4. Engages in abuse of discovery."

27 The Defendant's application does not claim that this action was "without
28 substantial justification", groundless, not made in good faith and "unreasonably
expanded the proceedings." The Defendant cannot show any findings to support
their claim, because the Court did not make any.

1 The Defendant cannot point to any evidence or findings to prove any of the
2 four prerequisites, and therefore their application for attorney fees and costs
3 pursuant to A.R.S. § 12-349 is without foundation and should be denied.

4 Plaintiff brought this action in good faith, and here, as in *Brown v.*
5 *Terravita Cmty. Ass'n, Inc.*¹ (No. 1 CA-CV 14-0455, Ariz. Ct. App.
6 Memorandum Decision Jul. 30, 2015), the HOA and its insurance provided
7 attorneys are moving for an award of attorney fees and cost based on A.R.S. §12-
8 349 even though there is no evidence, nor any findings supporting any of the four
9 prerequisites as required by A.R.S. § 12-349. The Court of Appeals concluded in
10 *Brown* the following:

11 ¶ 8 [B]ecause the superior court did not make the
12 findings required for an award of sanctions, we reject
13 the Association's contention that we may affirm the fee
14 award as appropriate under A.R.S. § 12-349... ("In
15 awarding attorney fees pursuant to § 12-349, the court
16 shall set forth the specific reasons for the award");
17 *Ragone v. Correia*, 236 Ariz. 43, 50, 1 22 (App. 2014)
18 (holding that statutory findings for an award of fees
19 under § 12-349 must be sufficiently specific to allow a
20 reviewing court to test the validity of the judgment);
21 *Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 497
22 (App. 1990).

23 ¶ 10 Because this action does not arise out of
24 contract, we deny the Association's request for an
25 award of attorney's fees on appeal under § 12-341.01.
26 In addition, we determine that the prerequisites to an
27 award of fees under § 12- 349 are not present, and
28 therefore deny the Association's request for fees under
that statute.

THIS CASE INVOLVES THE ENFORCEMENT OF STATUE AND DOES NOT ARISE OUT OF CONTRACT.

To address the HOA's request for fees and costs pursuant to A.R.S. §12-

¹ In accordance with A.R.S. Sup.Ct. Rule 111(c), a copy of the memorandum decision is provided herewith for the Court's consideration as per Rule 111(c)(1)(A) and (C). (Ex. 3)

1 341.01, the Court must note that awards under A.R.S. § 12-341.01 must arise out
2 of contract.

3 In **Brown**, a homeowner in an HOA, appealed a Superior Court's award of
4 attorney's fees to the HOA from the superior court's judicial review of an
5 administrative law decision regarding the HOA's violation of statute. Brown is
6 instructive here as the Court of Appeals in ¶4 of its opinion recited Arizona case
7 law for the enforcement of statutes:

8 "Section 12-341.01(A) provides that "[i]n any contested
9 action arising out of a contract, express or implied, the
10 court may award the successful party reasonable
11 attorney's fees." The statute permits an award of fees
12 only in actions that could not exist but for the breach of
13 contract and does not apply to "purely statutory causes
14 of action," or when a contract serves as the factual
15 predicate of an action but is not the essential basis of it.
16 *Keystone Floor & More, LLC v. Ariz. Registrar of*
17 *Contractors*, 223 Ariz. 27, 30, ¶11 (App. 2009) (citation
18 omitted). To determine whether an action arose out of
19 contract for purposes of § 12-341.01(A), we consider "the
20 nature of the action and the surrounding circumstances"
21 and decide if the contract is the "cause or origin of the
22 dispute." *Id.* at ¶ 10 (citations omitted). *See also A.H. ex*
23 *rel. White v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 190
24 Ariz. 526, 529 (1997) (stating that when an action arises
25 from statutory obligations, "peripheral involvement of a
26 contract does not require the application of § 12-
27 341.01(A)"). For example, in *Keystone*, we held that an
28 administrative proceeding before the Registrar of
Contractors and the subsequent action for judicial review
did not arise out of contract under § 12-341.01(A)
because it focused on the contractor's statutory duties,
not its contractual obligations to the homeowner, even
though those duties and obligations overlapped. 223
Ariz. at 31-32, ¶¶ 14-20."

The Court of Appeals in **Brown** made the following findings regarding
A.R.S. § 12-341.01.B:

1 ¶ 7 We also reject the Association's argument that
2 Brown's complaint for judicial review arises out of
3 contract based on § 12-341.01's policy to "mitigate the
4 burden of the expense of litigation to establish a just
5 claim or defense." The Association correctly identifies
6 the policy of the statute as set forth in § 12- 341.01(B).
7 But, as discussed above, Arizona law is clear that the
8 statute does not apply to all actions that tangentially
9 involve a contract. Further, we observe an equally
10 compelling policy argument that homeowners who
11 initiate administrative actions to enforce their statutory
12 rights should not confront potential liability for attorney's
13 fees simply because a planned community association
14 has chosen to restate its statutory obligations in its
15 governing documents. We hold that the Association was
16 not entitled to recover fees under § 12-341.01."

17 Accordingly, this action as stated many times in the Plaintiff's pleadings is
18 for the enforcement of an administrative law order regarding the HOA complying
19 with the statute A.R.S. § 33-1243(D), A.R.S. § 33-1255 and A.R.S. § 33-1243(J).

20 ARGUMENT

21 **THIS ACTION AROSE OUT OF STATUTE NOT CONTRACT.**

22 The HOA and its insurance provided attorneys are aware from the previous
23 pleadings that this case concerns the enforcement of statute and does not arise
24 out of contract, and in accordance with published cases cited in *Brown* the
25 Defendants are not entitled to an award under A.R.S. §12-341.01.

26 Accordingly, A.R.S. § 12-341.01 cannot apply here, and the Defendant's
27 application for attorney's fees must be denied.

28 **THE HOA BECAME COMPLIANT WITH STATUTE AFTER THE FILING OF THE COMPLAINT.**

It is obvious that this lawsuit was the catalyst that caused the Defendant
HOA comply with statute. The HOA had not adopted an annual budget or
assessment since early 2019. Therefore, the HOA was not in compliance with
A.R.S. § 33-1243(D) in adopting an annual budget, and A.R.S. § 33-1255 setting

1 an annual assessment, as well as performing the annual financial compilation as
2 required by A.R.S. § 33-1243(J). It was not until the Plaintiff file the complaint did
3 the HOA begin to comply with the statutes.

4 Although unpublished. *Hankerson v. Hankerson Mgmt. Co., LLC*, 2013
5 Ariz. App. is instructive in addressing the unique positions of the parties to this
6 case, where no final judgment has been rendered.

7 In *Hankerson*. the Court noted: "Defendants argue that Plaintiff can be
8 deemed the successful party only by application of the so-called "catalyst theory,"
9 under which a plaintiff is the prevailing party if it achieves the desired result
10 because the lawsuit brings about a voluntary change in the conduct of the
11 defendant." See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health &*
12 *Human Res.*, 532 U.S. 598, 601 (2001).

13 Defendants did not prevail in any defense made by the HOA, but only by
14 the Court finding that HOA had become in compliance with statute did the Court
15 dismiss the complaint.

16 Clearly, awarding the Defendant their attorneys' fees and costs is not
17 justified in this matter, especially considering this case should have settled in May
18 2021 had the HOA's attorney followed through on his proposed settlement.

19 **THE FOUR PREREQUISITES UNDER A.R.S. § 12-349 ARE NOT PRESENT HERE.**

20 Because the Defendants did not bring such evidence in their application
21 (which do not exist anyway!), they are not permitted to bring any evidence in their
22 reply.

23 As the Plaintiff's case was brought in good faith, the HOA's request for fees
24 under A.R.S. § 12-349 must be rejected because there is no evidence or findings
25 proving any of the four prerequisites under A.R.S. § 12-349.

26
27 **CONCLUSION**


28 This lawsuit should have settled in May 2021, after the HOA attorney,

1 provided and paid for by its insurance company, promised the Court that he would
2 have a settlement discussion right after the return hearing, which he did.
3 However, the settlement discussions failed because, in an act of bad faith, the
4 HOA's attorney choose to bill more time rather than present his settlement
5 proposal, as agreed to by the Plaintiff, to his client for their consideration and
6 acceptance.

7 Because this complaint does not arise from contract, and A.R.S. §33-
8 1241.01 does not apply in this case, the Defendants' application for attorney fees
9 and costs is without legal foundation. There are no findings of facts in this case to
10 justify a sanction award of fees, without such findings the Court cannot award
11 attorney fees and costs under A.R.S. §12-349, because none of the required
12 elements to apply such an award exist here.

13 Therefore, as in *Brown*, the Defendant HOA's application for attorney fees
14 and costs must be denied in its entirety.

15 Dated this 22nd day of September, 2021.

16
17 

18 R. L. Whitmer

19 ORIGINAL filed this
20 22nd day of September, 2021, with the Court;

21 and a COPY mailed this same date to:

22 Tim Butterfield
23 Carpenter Hazelwood
24 1400 E. Southern Ave., Ste. 400
25 Tempe, AZ 85282
26
27
28

Exhibit 1

1 R. L. Whitmer
2 6333 N. Scottsdale Rd.
3 Casita 21
4 Scottsdale, Arizona 85250
5 602.531.2615
6 Pro Per

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MARICOPA**

9 R.L. WHITMER,

10 Plaintiff,

11 **CV2021-050888**

12 v.

13 **DECLARATION OF**
14 **R.L. WHITMER**

15 HILTON CASITAS HOMEOWNERS
16 ASSOCIATION, also known as
17 HILTON CASITAS COUNCIL OF
18 HOMEOWNERS, also known as
19 COUNCIL OF CO-OWNERS, also
20 known as HILTON CASITAS
21 COUNCIL OF CO-OWNERS,

22 (Assigned to the Hon.
23 Sara Agne)

24 Defendant.

25 I am the Plaintiff in CV2021-050888 where the Defendant Hilton Casitas
26 Homeowners Association (the "HOA") is represented by an attorney, Mr.
27 Butterfield, which is provided by the HOA's insurance carrier.

28 At the April 23, 2021 Order to Show Cause Hearing the Defendant's
attorney, Mr. Butterfield, told the Court that he would contact the Plaintiff and
propose a settlement to resolve the Plaintiff's claims in his complaint.

Immediately after the Hearing, the Defendant's attorney called me and
proposed a "Voluntary Dismissal Without Prejudice." In the discussion, Mr.
Butterfield stated that HOA wanted to settle and proposed the following terms:

- 1) That the HOA would set a date within the parameters of A.R.S § 33-1243(D) to ratify an annual budget and set the annual assessment within the parameters of A.R.S § 33-1255.
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1 financial audit, review or compilation, but that as a result of my
2 complaint the HOA would complete having a CPA perform a
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9 Dismissal Without Prejudice" and get HOA's final sign off.

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11 was nice chatting with you and I look forward to hearing back from after you
12 speak with your client. Please send me the court's findings from your case
13 regarding ARS § 33-1243.J."

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15 Without Prejudice" meant for a different HOA (Ex. B). I immediately emailed Mr.
16 Butterfield – "Your office mailed me the attached filing from CV2021-00451
17 Sundance Ranch HOA. Hopefully, they did not send correspondence intended
18 for me to Sundance Ranch HOA. If there was mix-up, please let me know if
19 there was or was not a mix-up. If there was go ahead and email it to me.
20 Additionally, please send me the court's findings from your case regarding ARS §
21 33-1243.J." (Emphasis added) (Ex. C).

22 Mr. Butterfield never replied to the email, and I never received the draft
23 "Voluntary Dismissal Without Prejudice" as promised, and Mr. Butterfield never
24 contacted the HOA board about his proposed settlement. Had Mr. Butterfield
25 followed through on his proposed settlement the litigation would have ended.

26 During the July 9, 2021 meet and confer for the joint report and scheduling
27 order, Mr. Butterfield once again proposed a "Voluntary Dismissal Without
28 Prejudice" settlement.

1 To which I once again agreed to settle. However, Mr. Butterfield once
2 again failed to follow up on his proposal, forcing the parties to proceed with the
3 joint report and scheduling order.

4 Pursuant to Arizona Rules of Civil Procedure 80(c), I declare under penalty
5 of perjury that the foregoing is true and correct to my belief and knowledge.

6 SIGNED this 22nd day of September 2021.

7
8 
9 _____
10 R.L. Whitmer
11 *Pro Per*

Exhibit A

R. L. Whitmer

From: R. L. Whitmer <rlw@fulcrumgroup.biz>
Sent: Friday, April 23, 2021 3:23 PM
To: 'Tim.Butterfield@carpenterhazlewood.com'
Subject: 408 settlement discussions

Tim,

It was nice chatting with you and I look forward to hearing back from after you speak with your client.

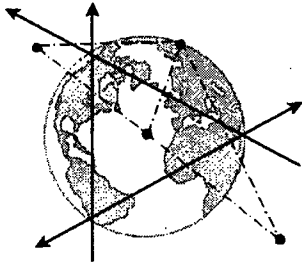
Please send me the court's findings from your case regarding ARS § 33-1243.J.

Regards,

R. L. Whitmer

Fulcrum Group

FORTUNA PREPARATIS - AUDACES FORTUNA IUVAT



Scottsdale, Arizona

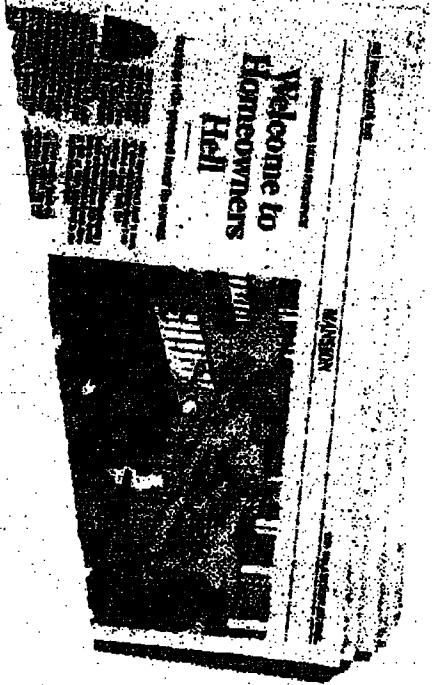
602.531.2615

Exhibit B

HOMEOWNERS | MAIL BAG

To HOA Or Not to HOA

Readers wrote in to voice support, or have a word, for the organizations that govern condos, co-ops and HOAs.



The April 16 Homeowners' column, "Let's Get It In the Streets" in the context of Homeowner Associations, was a real eye opener. I live in an HOA near

Coco. We have a collection of about 100 units. Army buddies during the 1970s. Over the years, the HOA has been a real pain in the neck. We have even gotten into a gun fight. There's been a lot of break too. A beautiful day down the street was built a couple's dream home. I never bothered to read the paper: That use is not allowed in the HOA board chairman which is probably punishment all the hell raising I did as a HOA member. —Christopher S. Durango, CA

When we moved back to Massachusetts from the Atlanta area (talk about a hellish HOA area!), the very first thing I told my Realtor specifically was that I would NOT be buying in an HOA. He thought that was a rather strange request, but okay! I used to hold

CARPENTER HAZLEWOOD
Carpenter, Holliswood, DeLoach & Bolan
ATTORNEYS AT LAW



R.L. Whitmer
6333 N. Scottsdale Road, Casita 21
Scottsdale, Arizona 85250

RECEIVED 0012

...several people were very nice to me for years, but they have grown older and stopped skiing. Now we have new owners who treat me like a servant, complain about things that have nothing to do with the HOA. The owners come up to play and forget to remove toys from the street, drive too fast on

After a few months of living in a home governed by an HOA, we were adamant to sell our place at whatever loss and fee. However,

cars, picks up the garbage, etc. Mother has already been cited for leaving her car in the driveway for more than a day. —William Hestib, Seneca, SC

ILLUSTRATION BY

1 **CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP**
 Attorneys at Law
2 1400 E. Southern Ave., Suite 400
 Tempe, Arizona 85282-5691
3 (480) 427-2800, Facsimile (480) 427-2801
 minutecentrics@carpenterhazlewood.com
 Erin E. McManis - 026310
4 Michelle B. Wellnitz - 035833
 SDANCERCH.0144

5 *Attorneys for Plaintiff*

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF MARICOPA**

8 **SUNDANCE RANCH HOMEOWNERS**
9 **ASSOCIATION, an Arizona non-profit**
 corporation,

10 **Plaintiff,**

11 **vs.**

12 **ROBERT BROWN, JANE DOE**
13 **BROWN; JOHN DOES I-X and JANES**
14 **DOES I-X and their spouses; WHITE**
15 **CORPORATIONS I-X; BLACK**
 PARTNERSHIPS I-X; AND GRAY
 LIMITED LIABILITY COMPANIES I-
 X,

16 **Defendant(s).**

Case No. CV2021-000451

NOTICE OF VOLUNTARY
DISMISSAL WITHOUT PREJUDICE

(Assigned to the
Honorable Randall Warner)

17 NOTICE IS HERBY GIVEN by the Plaintiff that the Plaintiff, Sundance Ranch
18 Homeowners Association, voluntarily dismisses the above-caption matter without prejudice
19 pursuant to Rule 41(a) Ariz.R.Civ.P., no answer or other responsive pleading having been
20

1 filed by Defendant, Robert Brown. Each of the Parties to bear their own attorney's fees and
2 costs incurred herein.

3 RESPECTFULLY SUBMITTED this 29th day of April 2021.

4 **CARPENTER HAZLEWOOD DELGADO & BOLEN, LLP**

5
6 By: /s/ Michelle B. Wellnitz

7 Erin McManis
Michelle B. Wellnitz
1400 E. Southern Avenue, Suite 400
Tempe, Arizona 85282
Attorneys for Plaintiff

8
9 ORIGINAL of the foregoing electronically filed
this 29th day of April 2021 to:

10 The Clerk of the Court
11 Maricopa County Superior Court

12 COPY of the foregoing mailed and emailed
on this 29th day of April 2021 to:

13 Robert Brown
14 8010 W. Hess Ave.
Phoenix, AZ 85043
15 rrbaz3@gmail.com
Defendant

16 By: /s/ Vanessa Fort

17
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21

CARPENTER HAZLEWOOD
ATTORNEYS AT LAW
ERIN MCMANIS, MICHELLE B. WELLNITZ & BOLEN

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 minuteentries@carpenterhazlewood.com
 Erin E. McManis - 026310
4 Michelle B. Wehnitz - 035833
 SDANCERCH.0144

5 *Attorneys for Plaintiff*

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF MARICOPA**

8 **SUNDANCE RANCH HOMEOWNERS**
9 **ASSOCIATION, an Arizona non-profit**
10 **corporation,**

11 **Plaintiff,**

12 **vs.**

13 **ROBERT BROWN, JANE DOE**
14 **BROWN; JOHN DOES I-X and JANES**
15 **DOES I-X and their spouses; WHITE**
16 **CORPORATIONS I-X; BLACK**
17 **PARTNERSHIPS I-X; AND GRAY**
18 **LIMITED LIABILITY COMPANIES I-**
19 **X,**

20 **Defendant(s).**

Case No. CV2021-000451

**ORDER OF DISMISSAL WITHOUT
PREJUDICE**

*(Assigned to the
Honorable Randall Warner)*

21 The Court, having reviewed Plaintiff's Notice of Voluntary Dismissal without
22 Prejudice and good cause appearing:

23 **IT IS ORDERED** dismissing the above-captioned matter without prejudice, each
24 party to bear its own attorneys' fees and costs.

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DATED this _____ day of _____, 2021.

The Honorable Randall Warner



**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

[This is not an official receipt.]

Case Number: CV2021000451

Keyword / Matter #: SDANCERCH.0144

Form Set #5662963

SUMMARY SHEET

ATTORNEY FILING:

Michelle B Wellnitz

Bar Number: 035833, Issuing State: AZ

Email: vanessa.fort@carpenterhazlewood.com

PLAINTIFF SUBMITTING FILING:

Sundance Ranch Homeowners Association

ATTACHED DOCUMENTS LIST:

Notice of Dismissal

Exhibit C

R. L. Whitmer

From: R. L. Whitmer <rlw@fulcrumgroup.biz>
Sent: Saturday, May 1, 2021 4:37 PM
To: 'Tim.Butterfield@carpenterhazlewood.com'
Cc: 'Joanna O'Neal'
Subject: CV2021-00451 Sundance Ranch HOA filing
Attachments: CV2021-00451 Sundance Ranch HOA filing.pdf

Tim,

Your office mailed me the attached filing from CV2021-00451 Sundance Ranch HOA. Hopefully, they did not send correspondence intended for me to Sundance Ranch HOA. If there was mix-up, please let me know if there was or was not a mix-up. If there was go ahead and email it to me.

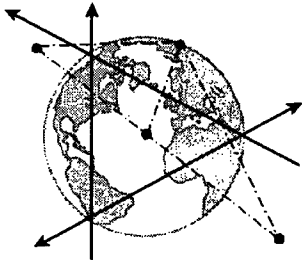
Additionally, please send me the court's findings from your case regarding ARS § 33-1243.J.

Sincerely,

R. L. Whitmer

Fulcrum Group

FORTUNA PREPARATIS - AUDACES FORTUNA IUVAT



Scottsdale, Arizona

602.531.2615

Exhibit 2

04/23/2021	EIR	PRTNR	0.20	200.00	40.00	Review outcome of the Order to Show Cause hearing, pending schedule, and pending efforts of the Association to produce the information and documentation over which Plaintiff brought this action.
04/23/2021	TDB	ASSOC	0.80	200.00	160.00	Attend return hearing at which the deadlines for motion practice, discovery, and evidentiary hearing were set.
04/23/2021	TDB	ASSOC	0.30	200.00	60.00	Call with Plaintiff Whitmer regarding issues raised during the Return Hearing and whether negotiated resolution is feasible or motion practice will be required.
04/27/2021	EIR	PRTNR	0.40	200.00	80.00	Review outcome of Order to Show Cause and consider options for moving forward, including a Motion to Dismiss and related issues.
04/27/2021	TDB	ASSOC	0.20	200.00	40.00	Review and respond to email from Quentin Phillips, general counsel, regarding [REDACTED].
04/28/2021	EIR	PRTNR	0.30	200.00	60.00	Draft communication to carrier regarding outcome of the Order to Show Cause return hearing and briefing schedule through evidentiary hearing in early June.
04/28/2021	TDB	ASSOC	5.60	200.00	1,120.00	Draft Motion to Dismiss arguing Plaintiff's claims are barred by the statute of limitations, are based on an expired OAH decision which exceed the scope of ADRE/OAH's jurisdiction, and fail to state a claim.
04/28/2021	SNH	PRLGL	0.20	95.00	19.00	Prepare draft Notice of Appearance
04/29/2021	EIR	PRTNR	0.20	200.00	40.00	Review the Court's order issued after the Order to Show Cause return hearing regarding deadlines and procedures for the upcoming evidentiary hearing.
04/29/2021	SNH	PRLGL	0.30	95.00	28.50	Finalize and submit Notice of Appearance for processing with Clerk of Superior Court.
04/29/2021	SNH	PRLGL	0.30	95.00	28.50	Analysis of Minute Entry regarding Order to Show Cause Hearing and determination of additional discovery and preparation of answer to Complaint.



Exhibit 3

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT
PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

WILLIAM M. BROWN, *Plaintiff/Appellant*,

v.

TERRAVITA COMMUNITY ASSOCIATION, INC., an Arizona
non-profit corporation, *Defendant/Appellee*.

No. 1 CA-CV 14-0455
FILED 7-30-2015

Appeal from the Superior Court in Maricopa County
No. LC2012-000699-001
The Honorable Crane McClennen, Judge

VACATED

COUNSEL

William M. Brown, Scottsdale
Plaintiff/Appellant

Ekmark & Ekmark, L.L.C., Scottsdale
By Curtis S. Ekmark
Counsel for Defendant/Appellee

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Andrew W. Gould joined.

SWANN, Judge:

¶1 William M. Brown appeals the superior court's judgment granting attorney's fees to Terravita Community Association, Inc. ("the Association"). We hold that the fee award was not authorized under any of the four bases presented to the superior court. Accordingly, we vacate the award.

FACTS AND PROCEDURAL HISTORY

¶2 Brown initiated this action after the Arizona Department of Fire, Building and Life Safety rejected his complaint that the Association, which governs the planned community in which Brown is a homeowner, violated A.R.S. § 33-1805(A) by refusing to produce certain records. The superior court affirmed the administrative ruling, and the Association sought its attorney's fees. The Association moved for fees under A.R.S. § 12-341.01 and an attorney's fees provision in the community's Declaration of Covenants, Conditions, and Restrictions ("CC&Rs"). Brown opposed the motion on the grounds that his administrative complaint did not arise out of contract as required by A.R.S. § 12-341.01 and that, at the time he filed the complaint for judicial review, the governing community documents did not provide for an award of attorney's fees in an administrative action. In reply, the Association cited A.R.S. § 12-349 and Ariz. R. Civ. P. 11 as additional grounds for an award of fees. The court awarded the Association a portion of the fees it requested, but did not specify the statutory or other basis for the award. Brown timely appeals.

DISCUSSION

¶3 Brown contends that the superior court erred by granting attorney's fees to the Association under A.R.S. § 12-341.01 because his appeal of an administrative decision did not arise out of contract. The applicability of § 12-341.01 is a question of statutory interpretation that we review de novo. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 12 (App. 2000).

¶4 Section 12-341.01(A) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees." The statute permits an award of fees only in actions that could not exist but for the breach of contract and does not apply to "purely

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statutory causes of action," or when a contract serves as the factual predicate of an action but is not the essential basis of it. *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, 30, ¶ 11 (App. 2009) (citation omitted). To determine whether an action arose out of contract for purposes of § 12-341.01(A), we consider "the nature of the action and the surrounding circumstances" and decide if the contract is the "cause or origin of the dispute." *Id.* at ¶ 10 (citations omitted). See also *A.H. ex rel. White v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 190 Ariz. 526, 529 (1997) (stating that when an action arises from statutory obligations, "peripheral involvement of a contract does not require the application of § 12-341.01(A)"). For example, in *Keystone*, we held that an administrative proceeding before the Registrar of Contractors and the subsequent action for judicial review did not arise out of contract under § 12-341.01(A) because it focused on the contractor's statutory duties, not its contractual obligations to the homeowner, even though those duties and obligations overlapped. 223 Ariz. at 31-32, ¶¶ 14-20.

¶5 Similarly, in this case the administrative proceeding and judicial review action concerned the Association's statutory obligation to produce records under A.R.S. § 33-1805(A). The fact that the Association's CC&Rs purportedly contain similar terms¹ does not change the nature of the underlying action. Neither the administrative proceeding nor the action for judicial review constituted an action "arising out of a contract" for purposes of applying § 12-341.01(A).

¶6 We reject the Association's contention that such a ruling is contrary to *A.H.*, in which our supreme court held that an action arises out of contract for purposes of § 12-341.01 when a statutory obligation is imputed as part of the parties' contract. 190 Ariz. at 530. The court in *A.H.* noted that it had previously examined the relevant statute (A.R.S. § 20-673(C)) and determined that it was "the functional equivalent of an 'other insurance' clause typical in insurance contracts," and, therefore, it was designed to be statutorily imputed to an insolvent insurer's contract when a statutory fund assumed its rights and obligations. 190 Ariz. at 530. Here, by contrast, we have found no authority – including the plain language of the statute – to support the notion that the Legislature intended to integrate A.R.S. § 33-1805 as part of the declarations, bylaws, articles of incorporation, and rules of all planned communities.

¶7 We also reject the Association's argument that Brown's complaint for judicial review arises out of contract based on § 12-341.01's policy to "mitigate

¹ The relevant portions of the CC&Rs are not part of the record on appeal.

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the burden of the expense of litigation to establish a just claim or defense.” The Association correctly identifies the policy of the statute as set forth in § 12-341.01(B). But, as discussed above, Arizona law is clear that the statute does not apply to all actions that tangentially involve a contract. Further, we observe an equally compelling policy argument that homeowners who initiate administrative actions to enforce their statutory rights should not confront potential liability for attorney’s fees simply because a planned community association has chosen to restate its statutory obligations in its governing documents. We hold that the Association was not entitled to recover fees under § 12-341.01.

¶8 We further hold that the Association was not entitled to an award of fees based on the attorney’s fees provision of the CC&Rs. That provision authorized fee awards to prevailing parties in actions instituted to enforce the CC&Rs.² As we have already discussed, Brown’s action arose out of statute and was not an action to enforce any of the provisions of the CC&Rs.³ The attorney’s fees provision of the CC&Rs therefore did not apply. Further, because the superior court did not make the findings required for an award of sanctions, we reject the Association’s contention that we may affirm the fee award as appropriate under A.R.S. § 12-349 or Rule 11.⁴ See A.R.S. § 12-350 (“In awarding attorney fees pursuant to § 12-349, the court shall set forth the specific reasons for the award”); *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22 (App. 2014) (holding that statutory findings for an award of fees under § 12-349 must be sufficiently specific to allow a reviewing court to test the validity of the judgment); *Wells*

² The CC&Rs were amended during the pendency of Brown’s action to allow the Association to recover fees incurred defending administrative claims and related appeals. We reject the Association’s argument that it was entitled to recover the fees it incurred in the already-pending action after the effective date of the amendment. Cf. *Bouldin v. Turek*, 125 Ariz. 77, 78 (1979) (holding that A.R.S. § 12-341.01 does not apply to actions commenced before its effective date because it is similar to a statute changing the measure of damages, a substantive provision that cannot be applied retroactively).

³ The Association claims in its answering brief that the CC&Rs also provide for an award of attorney’s fees to the prevailing party in an action “arising out of . . . the operations of the Association,” citing, for the first time, Article XVII, Section 17.05(iii) of the CC&Rs. That provision does not, however, appear in the record on appeal.

⁴ We decline the Association’s invitation to find that Brown has waived the issue of the award’s propriety under § 12-349 and Rule 11.

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Fargo Credit Corp. v. Smith, 166 Ariz. 489, 497 (App. 1990) (vacating Rule 11 sanctions because, *inter alia*, trial court failed to "make specific findings to justify its conclusion").

CONCLUSION

¶9 We determine that the Association was not entitled to an award of attorney's fees on any of the four bases it cited in the superior court. We vacate the award.

¶10 Because this action does not arise out of contract, we deny the Association's request for an award of attorney's fees on appeal under § 12-341.01. In addition, we determine that the prerequisites to an award of fees under § 12-349 are not present, and therefore deny the Association's request for fees under that statute. As the prevailing party on appeal, Brown is entitled to an award of his appellate costs upon his compliance with ARCAP 21.



Ruth A. Willingham · Clerk of the Court
FILED: RT