

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

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

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

CV2021-050888

10 v.

**PLAINTIFF'S OBJECTION TO
DEFENDANTS' PROPOSED FORM
OF JUDGMENT**

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
known as HILTON CASITAS
COUNCIL OF CO-OWNERS;

(Assigned to the Honorable
Sara Agne)

16 Defendant/Defendant.

17 As outlined in the Plaintiff's objection to the Defendant's ("HOA") application
18 for attorney's fees and costs filed on September 22, 2021 (Ex. 1), which the
19 Plaintiff incorporates it fully herein, there is not any basis for an award of
20 attorneys' fees and cost under A.R.S. § 12-349 or under A.R.S. § 12-341.

21 Because this complaint does not arise from contract, and A.R.S. §33-
22 1241.01 does not apply in this case, the Defendants' application for attorney fees
23 and costs is without legal foundation, and there are no findings of facts in this
24 case to justify a sanction award of fees. Without such findings the Court cannot
25 award attorney fees and costs under A.R.S. §12-349.

26 Accordingly, the Court should eliminate the references to an award of
27 attorneys' fees and cost in its form of judgment.
28

Dated this 27th day of September, 2021.



R. L. Whitmer

ORIGINAL filed this
27th day of September, 2021, with the Court;

and a COPY mailed this same date to:

Tim Butterfield

Carpenter Hazelwood

1400 E. Southern Ave., Ste. 400

Tempe, AZ 85282

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Exhibit 1

COPY

SEP 22 2021



CLERK OF THE SUPERIOR COURT
C. ATKINS
DEPUTY CLERK

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;
18 Defendant/Defendant.

(Assigned to the Honorable
Sara Agne)

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

21 **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.

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

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

28 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