

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF COCONINO

ROBERT R. HAWK and CECILIA J.  
HAWK, husband and wife,

Plaintiff/Counter Defendants,

vs.

Case No. CV 2011-00775

PC VILLAGE ASSOCIATION, INC., an  
Arizona corporation,

Defendant/Counter Plaintiff.

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REPORTER'S TRANSCRIPT OF TELEPHONIC PROCEEDINGS  
ORAL ARGUMENT

FLAGSTAFF, ARIZONA  
May 24, 2012  
10:05 o'clock a.m.

BEFORE: HONORABLE MARK R. MORAN  
Judge of the Superior Court

PREPARED FOR: J. Gary Linder, Esq. (Certified Copy)

Jonna E. Baker, RPR  
Certified Reporter  
Certificate Number: 50480  
Official Reporter

## 1 APPEARANCES:

2 LAW OFFICE OF TEVIS REICH  
3 By Tevis Reich, Attorney at Law  
4 6 East Dale Avenue  
5 Flagstaff, Arizona 86001  
6 Appearing on behalf of Plaintaiff/Counter  
7 Defendants.

8 JONES, SKELTON & HOCHULI, P.L.C.  
9 By J. Gary Linder, Attorney at Law  
10 2901 North Central Avenue, Suite 800  
11 Phoenix, Arizona 85012  
12 Appearing telephonically on behalf of  
13 Defendant/Counter Plaintiff.  
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## P R O C E E D I N G S

1  
2 THE COURT: Okay. Good morning to counsel and  
3 the parties. This is Judge Moran. This is the time  
4 set for a hearing regarding the case of Hawk versus PC  
5 Village Association, Inc.

6 And who is appearing telephonically? Is  
7 Mr. Linder on the line?

8 MR. LINDER: Hello?

9 THE COURT: Mr. Linder, can you hear me?

10 It's not coming through, so -- can you  
11 hear me now, sir? No. It's not working.

12 MR. LINDER: Your Honor?

13 THE COURT: Yes. Can you hear me?

14 MR. LINDER: Okay.

15 THE COURT: Can you hear me?

16 MR. LINDER: You know, I can. There's a lot  
17 of distortion.

18 THE COURT: Okay. I'll try and speak clearly  
19 and slowly so that you can hear me. We're having some  
20 technical difficulties. All right. I just announced  
21 the case.

22 Mr. Reich is present with his client.  
23 Good morning.

24 And, Mr. Linder, is there anyone on the  
25 phone with you?

1 MR. LINDER: It's just me, your Honor.

2 THE COURT: All right. Great. And this is  
3 just the time to review the application for attorney's  
4 fees. And, also, there was recently a motion for a  
5 stay pending appeal of the Court's ruling so we'll need  
6 to address that, as well.

7 Let's talk about the attorney's fees  
8 first. I have read the response filed by Mr. Reich.  
9 I've read the application for attorney's fees and the  
10 accompanying exhibits to that.

11 Mr. Linder, did you want to argue at all  
12 regarding the reasonableness of the fees requested by  
13 Mr. Reich?

14 MR. LINDER: Your Honor, I would like to -- I  
15 have a request. This is so bad that there's a huge  
16 echo so I can hear myself. I can hear you. There's a  
17 huge echo. Could I get you to call me back from your  
18 line there?

19 THE COURT: Yes, we can. If you'll give me  
20 the number we'll do that.

21 MR. LINDER: My direct number is  
22 602-235-7106.

23 THE COURT: Okay. I'll have my judicial  
24 assistant try that.

25 MR. LINDER: Thank you, your Honor. Okay.

1 (Proceedings in recess.)

2 THE COURT: Okay. We'll recall the case now  
3 that we have our technology fixed with Mr. Linder. And  
4 this is Hawk versus PC Village Association, Inc., CV  
5 2011-775. Time set for hearing regarding the  
6 attorney's fees application by Mr. Reich. Also an  
7 additional request was filed and I received it  
8 yesterday via fax entitled Rule 62(C) motion to suspend  
9 enforcement of Court's March 26, 2012, ruling pending  
10 appeal.

11 So let's address first the  
12 reasonableness of the attorney's fees. I've reviewed  
13 the application and the exhibits attached, and I have  
14 also read the memorandum that Mr. Reich filed in  
15 connection with the reasonableness of the fees.

16 Did you wish to argue that today,  
17 Mr. Linder?

18 MR. LINDER: Yes, your Honor. If you'd like  
19 to entertain argument that would be great.

20 THE COURT: Yes. You can proceed. I've  
21 already read the memorandum and the attachments.

22 MR. LINDER: Yeah. The only thing I'd like to  
23 add, obviously you have our objection to the fee  
24 application, a couple things, one is I believe that  
25 there are some improper arguments contained in the

1 plaintiff's reply to our opposition that I want to  
2 bring to the Court's attention, at least make sure that  
3 my objection to those arguments is at least noted for  
4 the record.

5                   One, there is a discussion in the  
6 plaintiff's reply in which he makes characterizations  
7 regarding alleged representations I made to him  
8 regarding my views of the strengths and weaknesses of  
9 my client's position in the case. And he uses that as  
10 an example of how unreasonable my clients must have  
11 been because of some advice that he thinks that I gave  
12 them. The reality is is is that, you know, Mr. Reich  
13 and I did have candid conversations during this case as  
14 any two litigators should regarding creative ways of  
15 resolving this claim, resolving our various views  
16 regarding the pros and cons of the case moving  
17 forward. But I don't believe that that those  
18 statements, they're clearly not based on any sort of  
19 evidentiary statement of fact attached to them, unless  
20 of course there's some sort of an email or phone call  
21 that was recorded that I don't know about. But as I  
22 sit here today, your Honor, I don't recall the  
23 substance of those conversations, but I think certainly  
24 it doesn't surprise me that we had the conversations  
25 and I would have been candid with him regarding my

1 thoughts.

2                   Having said that, that in no way changed  
3 my opinion nor did it change the fact that I do think  
4 we put in front of your court a novel issue, a rather  
5 interesting issue dealing with the application of the  
6 statutes and newly enacted statutes to CRRs that  
7 predate those statutes, as well as making a claim the  
8 retroactive application of the statutes would be  
9 unconstitutional. Obviously the Court has ruled on  
10 that motion and we, you know, respect the Court's  
11 ruling. And you've seen the fact that we're filing a  
12 notice of appeal. But point is that we certainly had a  
13 novel issue that both sides needed the Court's guidance  
14 with respect to clarification on them.

15                   The only other thing that I wanted to  
16 point out, as well, is there's a section in the reply  
17 that counsel for plaintiffs are -- yeah, counsel for  
18 plaintiff put down about the role that his -- perceived  
19 role that Larry Roland, who is a Tucson attorney,  
20 played in this matter. I don't think that has any  
21 relevance whatsoever to the Court's determination as to  
22 whether or not the fees incurred and the fees that are  
23 being asked for are reasonable. And none of that's  
24 based upon any sort of evidentiary fact put in front of  
25 the Court. I don't think it's something the Court

1 should consider.

2                   And then, lastly, I just want to maybe  
3 point that to make sure -- I mean, our overall argument  
4 is, one, that the award of attorney's fees under  
5 statute is discretionary. It's not -- the amount  
6 provided isn't mandatory within Court's discretion.  
7 And I stand by the arguments we put forth in our  
8 response talking about there be reasonableness of our  
9 request that the fees be reduced accordingly as a  
10 function of the fundamental fairness, and also the  
11 Court's discretion regarding the actual dispute that  
12 was put in front of it. That's all I have to say.

13                   THE COURT: All right. Thank you. Thank you,  
14 Mr. Linder.

15                   Mr. Reich, did you wish to respond? And  
16 you're going to have to use the microphone over there  
17 to respond if you wish.

18                   MR. REICH: Thank you, your Honor. Those  
19 first few factors Mr. Linder mentioned were simply  
20 factors that the Court could consider if we got into an  
21 evidentiary hearing. I don't think we're really at  
22 that point yet.

23                   What I would like to do is present to  
24 the Court what's been marked as Plaintiff's Exhibit  
25 Number 1.

1 THE COURT: You already marked it? Okay.

2 MR. REICH: Yes.

3 THE COURT: What would that be?

4 MR. REICH: This is in preparation for this  
5 hearing this is Mr. Linder's law firm's time and  
6 billing for this particular case. And, really, the  
7 purpose of this is to show during the time through  
8 March 30th Mr. Linder's firm billed \$22,700 for the  
9 defense of the case. We requested up to that point in  
10 our original plea application \$19,000. I think this --  
11 that establishes really with the two law firms billing  
12 at their various rates that the amounts here are  
13 certainly reasonable. Mr. Linder's fees exceeded what  
14 we were requesting as the prevailing party in this  
15 particular case. And I would note that the time spent  
16 by the attorneys here are comparable. I believe that  
17 on the first pages there, on the summary pages there  
18 Jonathan Confer was the original person that I spoke  
19 with in this. He had just graduated law school, taken  
20 the bar exam and was waiting his bar results. And so I  
21 think that when he was billed out there as a clerk so  
22 first initial hours were before he got his bar  
23 results. And the purpose of this is to demonstrate  
24 really that our \$19,000 in fees are certainly  
25 reasonable in the aspect that they charged and billed

1 their client \$22,700 in fees. So we would request all  
2 of the fees that we have incurred up to this date.

3                   And to that extent, I would also like to  
4 present to the Court, this is a second supplemental  
5 affidavit of attorney's fees and costs up through and  
6 to today's date. There was a first one filed with the  
7 reply and here's the second one. This one was filed  
8 when we came in the courthouse this morning and it was  
9 emailed to Mr. Linder. He may or may not have had an  
10 opportunity to take a look at it. But there is a case  
11 that's cited in here, the Larkin v. State case, that  
12 attorney's fees incurred in time spent in establishing  
13 entitlement to an award of attorney's fees is  
14 compensable. So we would request the attorney's fees  
15 that we've incurred basically from the time that we  
16 submitted our original application and affidavit  
17 through today's date.

18                   THE COURT: All right. Mr. Linder, have you  
19 had a chance to look at -- I assume you have your own  
20 billing for this case. That's what Mr. Reich wants me  
21 to take a look at on this exhibit he submitted.

22                   MR. LINDER: Oh, yes, your Honor. I'm the one  
23 who produced those billings to him pursuant to a  
24 subpoena.

25                   THE COURT: All right. So you don't have an

1 objection to admitting that and I can review it?

2 MR. LINDER: I do not.

3 THE COURT: Okay. All right any other  
4 argument, Mr. Linder?

5 MR. LINDER: No, your Honor, not on this  
6 topic.

7 THE COURT: All right. I didn't really need  
8 the reply. And I respect counsels' behind the scenes  
9 preparation, negotiation, disagreement, et cetera.  
10 That's part and parcel of the practice of law. I  
11 hadn't really even considered those two objections that  
12 you made, Mr. Linder, meaning to me it doesn't factor  
13 into the reasonableness determination by the Court  
14 under China Doll. I read the application. I reviewed  
15 each part of the application, each line item of the  
16 application. To me it seemed totally reasonable what  
17 Mr. Reich spent as far as his time and effort. This is  
18 a novel issue, so it's not like you could, you know,  
19 crank out a motion for summary judgment in an hour or  
20 do legal research which would be mere preparation  
21 because you've already litigated this issue. So I  
22 respect the fact that it was a novel issue on both  
23 sides and you had to prepare probably more so than you  
24 normally would.

25 Also realizing that this is the type of

1 thing that goes up on appeal and making a record is  
2 very important. So the original application for  
3 attorney's fees is approved. I do find that it is  
4 reasonable. I find that under all of the factors  
5 necessary for the Court to consider and weigh the work  
6 by counsel that it satisfies the test of China Doll.

7                   Secondly, the first supplemental  
8 application for attorney's fees is also granted. I  
9 think that's also directly related to the work done by  
10 Mr. Reich and it is also reasonable.

11                   I have a problem, though, Mr. Reich,  
12 with the second supplemental affidavit of attorney's  
13 fees. A lot of this has to do with the appeal. And,  
14 frankly, the appeal has been filed; you'll be  
15 litigating that down the road. If the Court of Appeals  
16 wants you to give your fees there, I think these are  
17 more appropriately referred to them for additional  
18 attorney's fees.

19                   With the exception of the last page,  
20 page two, you prepared for this hearing, and I assume  
21 the entry on May 22nd, prepared draft of the  
22 supplemental affidavit regarding attorney's fees and  
23 revise and finalize the same, is that this document I'm  
24 holding, the second supplemental?

25                   MR. REICH: Yes, with -- you're talking --

1 yes.

2 THE COURT: Okay. Okay. The only item I find  
3 relevant to the application for attorney's fees which  
4 would constitute preparation for the original  
5 application for the fee or attending this hearing are  
6 the last two, so that would be the entries for May 23,  
7 prepare for hearing contesting fees, et cetera, and  
8 also the last one, which is prepare for and attend  
9 hearing. So those two items the Court will grant as  
10 reasonable and related to the work done by Mr. Reich  
11 prior to the appeal. The rest I'm not going to allow  
12 at this time. So as to those two on the second  
13 supplemental application, Court grants the request for  
14 the attorney's fees, including any other additional  
15 costs. I didn't see any additional charges. I guess  
16 there was a subpoena issued. So the Court as to the  
17 subpoena and the service of the subpoena will grant  
18 that request for those additional costs in the second  
19 supplemental application. So the original application  
20 and the first supplemental are granted in toto as being  
21 reasonable. The second one, only those parts granted  
22 by the Court will be allowed as reasonable attorney's  
23 fees.

24 Okay. Mr. Linder, did you want to argue  
25 your request now for the -- basically the stay of the

1 Court's order?

2 MR. REICH: If I may, your Honor.

3 THE COURT: Sure.

4 MR. REICH: I think that that might be a  
5 little premature at this point. That was submitted to  
6 me by email just yesterday. Quite honestly, I have  
7 read through it but haven't had a chance to look at it,  
8 respond to it, research it, and I think it's premature  
9 at this point to argue that.

10 THE COURT: Okay. All I did was take out the  
11 rule book and look at the rule which gives you the  
12 answer. But that's fine with me if you want to put it  
13 off and file a written response, I'm okay with that.

14 MR. REICH: Well, it's within the Court's  
15 discretion, so --

16 THE COURT: No. I'll let you do it. I don't  
17 have a problem doing it. I pretty much made up my mind  
18 already, but I can wait and we can -- frankly, I don't  
19 need an oral argument on this. So if you want to file  
20 a written response, I will consider it and issue my  
21 ruling before the end of next week. Is that okay?

22 MR. REICH: Let's go forward today.

23 THE COURT: Okay. Great. Mr. Linder, I read  
24 your motion and the rule. Go ahead and argue if you  
25 wish.

1           MR. LINDER: Your Honor, I don't have any  
2 additional argument apart from what's contained in the  
3 brief that's in front of you. I just have a request,  
4 which would just be that when this is all said and  
5 done, I think this is the direction that we're going to  
6 do this, is whatever your ruling is on this motion I  
7 filed, I'd like for it to all be bundled up into the  
8 same order with all the others. So my appellate  
9 department tells me there's some confusing case law up  
10 there regarding the notice of appeal. That's why we  
11 filed a notice of appeal when we did because there is  
12 concern the clock starts ticking of the date of your  
13 prior minute entry as opposed to the date -- you're  
14 obviously going to end up issuing a final ruling here,  
15 including award for attorney fees and whatever your  
16 decision is on my Rule 62(C) request, and so I would  
17 just like for you to make sure that we do that all at  
18 one time.

19                       So I think probably what is going to  
20 happen is we'll probably do an amended notice of appeal  
21 from that final order so that we've got it all bundled  
22 up into one package, if that makes any sense.

23           THE COURT: Yes, it does. And that's one of  
24 the reasons why I wanted to go forward today and just  
25 resolve this issue. There is no sense stringing it

1 out.

2 MR. LINDER: Yes.

3 THE COURT: So what's the legal basis for  
4 staying my order?

5 MR. LINDER: Well, the legal basis for staying  
6 your order in terms as set forth in our pleading there  
7 is -- as the Court may recall, this is not a lawsuit  
8 about money. This is a lawsuit about the placement of  
9 a for sale sign. The reasons, the policy reasons and  
10 overall business reasons for why the association has  
11 argued in front of this Court that the for sale sign  
12 should not be allowed to be put up pursuant to the  
13 applicable CC&Rs has been briefed at length in front of  
14 the Court.

15 Obviously the damage done to the  
16 association with respect to the placement of the sign  
17 will be done when it's put up. The appellate process  
18 will take I'm assuming between 12 and 18 months to work  
19 through the system. And, effectively, if the Court  
20 doesn't stay its ruling, Mr. Hawk will be able to put  
21 this sign up and, you know, for lack of better words,  
22 the ship will have sailed on that damage to my client.  
23 And those are the arguments set forth in my pleading.

24 Your Honor, in terms of why it is  
25 pursuant to the rule, we would be able to make this

1 request and we think it's sound and it's supported by,  
2 you know, by an application of Rule 62(C) as well as  
3 the equitable principles that go along with it.

4 THE COURT: All right. Mr. Reich, you may  
5 proceed.

6 MR. REICH: Thank you, your Honor. The Court  
7 has ruled on this matter. I believe that the rule says  
8 it's within the discretion. I don't think that  
9 Mr. Linder has set forth any sort of compelling reason  
10 that the Court should stay its order at this point.  
11 The arguments that Mr. Linder put forth not only in  
12 this 62(C) motion but in the motions for summary  
13 judgment, the motions for summary judgment have been  
14 rejected by this Court and there's really no legitimate  
15 reason why this Court should exercise its discretion to  
16 stay its order pending the appeal. And we would  
17 request that the motion be denied.

18 THE COURT: All right. Mr. Linder, anything  
19 further?

20 MR. LINDER: All I would add, your Honor, in  
21 terms of response that I haven't put forth a compelling  
22 reason for the Court to stay, you know, as put forth in  
23 our pleading, I mean, I think we've established that  
24 there's a reasonable basis for believing the  
25 development would fail or suffer economically as a

1 result of the for sale signs. But, also, the reality  
2 is I think that if the Court chooses to not grant my  
3 motion, I think that that would be analogous to the  
4 Court essentially denying our right to an appeal  
5 because of the nature of the dispute. My point being  
6 is that it's a piece of property, it's raw land sitting  
7 there with a sign on it. Given the length of time it  
8 takes to get through the appellate process and since  
9 this is the issue that's in front of the Court, if the  
10 Court allows Mr. Hawk to go ahead and put the sign up  
11 now or, maybe better put, doesn't stay its ruling  
12 ordering us to allow him to put his sign up, my  
13 position would be that the Court would effectively be  
14 ruling that I don't have a right to appeal the Court's  
15 original ruling of the case.

16 THE COURT: Okay. Refresh my memory either  
17 counsel, but I don't think I ever issued an injunction  
18 in this case. The procedural posture was the  
19 complaint, the answer, we went to motion for summary  
20 judgment and argument. I don't recall issuing an  
21 injunction.

22 MR. REICH: In the ruling on the motion for  
23 summary judgment one of the last sentences was that the  
24 defendant is enjoined from removing the sign. And from  
25 my conversation with Mr. Linder, we took that to be a

1 granting of the injunction.

2 THE COURT: All right. But there was no  
3 preliminary injunction prior to the actual hearing in  
4 the Court's ruling. Correct?

5 MR. REICH: That's correct.

6 THE COURT: Yeah. That's what I was referring  
7 to. All right. Great. Thank you.

8 Okay. I'm going to think about this  
9 this morning. I will issue a written ruling.

10 And, Mr. Linder, if you wish as to this  
11 issue we'll send you an email of the Court's written  
12 ruling on the Rule 62 motion today so that you have it  
13 in hand. Okay?

14 MR. LINDER: Yes, your Honor. Appreciate  
15 that.

16 THE COURT: Yes, Mr. Reich.

17 MR. REICH: If I may, your Honor, just because  
18 we're kind of going off the cuff, one of things I would  
19 like to mention and state is is that Mr. Linder's  
20 argument here is based upon an argument that the  
21 properties will be devalued if the sign is allowed to  
22 be posted. And in the motion for summary judgment the  
23 Court specifically struck their affidavits and  
24 their -- well, basically their evidence, evidence  
25 stating or trying to prove that the property would be

1 devalued.

2                   So the point here is is that there is no  
3 evidence in the record to support that by posting a  
4 sign the HOA itself is going to be devalued or somehow  
5 affect -- or that the property values will be  
6 decreased. The evidence is simply not in the record  
7 because the Court struck that.

8                   THE COURT: All right. Thank you. And I  
9 don't really need to go back into the weighing at this  
10 point between the plaintiff's rights and the HOA's  
11 rights. I think that's redundant. It's in the Court's  
12 opinion and the Court of Appeals can review that and  
13 decide if I've done that correctly.

14                   I understand the arguments on both  
15 sides. Frankly, they're pretty much the same, which  
16 is, unless you rule my way I'm going to be devoid of my  
17 rights pending the appeal.

18                   So thank you very much. I'm going to  
19 take it under advisement. I'll issue a ruling today.  
20 I appreciate your appearance. And good luck.

21                   MR. REICH: Thank you.

22                   MR. LINDER: Thank you, your Honor.

23                   THE COURT: I'm going to hang up, Mr. Linder.  
24 We're adjourned. Thank you, sir. Bye-bye.

25                   MR. LINDER: Thank you.

(The proceedings adjourned at 10:32 a.m.)

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1 STATE OF ARIZONA )  
2 )  
3 COUNTY OF COCONINO )  
4 )

ss. REPORTER'S CERTIFICATE

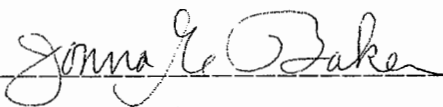
5 I, Jonna E. Baker, do hereby certify that I am a  
6 Registered Professional Reporter and Certified Reporter  
7 in and for the State of Arizona.

8 I further certify that these proceedings were  
9 taken in machine shorthand by me at the time and place  
10 herein set forth, and were thereafter reduced to  
11 typewritten form; that the foregoing constitutes a true  
12 and correct transcript.

13 I further certify that I am not related to,  
14 employed by, nor of counsel for any of the parties or  
15 attorneys herein, nor otherwise interested in the result  
16 of the within action.

17 In witness whereof, I have affixed my signature  
18 this 8th day of June, 2012.

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JONNA E. BAKER, RPR

Certified Reporter

Certificate Number: 50480

Official Reporter