

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FILED AUG 26 2003

PHILIP G. URRY, CLERK
By *[Signature]*

JOHN W. SHAMROCK, a single man; ARTHUR)
A. and LOIS J. GILCREASE FAMILY TRUST)
by ARTHUR A. AND LOIS J. GILCREASE,)
Trustees; DAVID H. HEMMINGS, a single)
man; THE POLLARD FAMILY TRUST by JAMES)
E. and MARIE T. POLLARD, Trustees;)
J.C. & C. INVESTMENTS, L.L.C. by)
ROBERT OLIVER CROMWELL, partner;)
EDWARD E. SMITH and MARGARET SMITH,)
husband and wife; LEWIS REVOCABLE)
TRUST by FRANCIS W. LEWIS and MARLENE)
C. LEWIS, Trustees, JOE KACZMARSKI and)
ADA KACZMARSKI, husband and wife; and)
WILLIAM R. DETOR, a single man,)

1 CA-CV 02-0403

DEPARTMENT A

MEMORANDUM DECISION
(Not for Publication -
Rule 28, Arizona Rules
of Civil Appellate
Procedure)

Plaintiffs-Appellees,)

v.)

WAGON WHEEL PARK HOMEOWNER'S)
ASSOCIATION, a nonprofit Arizona)
corporation,)

Defendant-Appellant.)

Appeal from the Superior Court in Navajo County

Cause No. CV01-0102

The Honorable Dale K. Patton, Jr., Judge

AFFIRMED IN PART, REVERSED IN PART, REMANDED

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Attorneys for Appellees

Mesa

Olcott & Shore, PLLC
By Jonathan J. Olcott
William F. Shore, III
Attorneys for Appellant

Phoenix

T I M M E R, Judge

¶1 Wagon Wheel Park Homeowners Association (the "Association") appeals the summary judgment entered against it on appellees' complaint for declaratory and other relief, and on its counterclaim for breach of contract. The Association argues the trial court erred by misapplying the standing provisions of Arizona Revised Statutes ("A.R.S.") section 10-3304 (Supp. 2002), and by granting appellees' request for attorneys' fees. We address the Association's standing arguments by published opinion filed this date.

¶2 For the reasons set forth in the companion opinion, we affirm the summary judgment. For the following reasons, we affirm the trial court's grant of an award of attorneys' fees, but reverse that portion of the judgment establishing the amount of those fees and remand for a new calculation of the fee award.

DISCUSSION

¶3 The Association argues the trial court erred by awarding appellees \$22,189 for their attorneys' fees pursuant to A.R.S. § 12-341.01. We review the court's ruling for an abuse of discretion. *Robert E. Mann Const. Co. v. Liebert Corp.*, 204 Ariz. 129, 133, ¶ 13, 60 P.3d 708, 712 (App. 2003) (citation omitted).

¶4 The Association contends the court abused its discretion in awarding fees under A.R.S. § 12-341.01 because it failed to apply the factors from *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1811 (1985), and thus did not consider that (1) appellees could have submitted to mediation as suggested by the Association to avoid the litigation, (2) the Association was attempting to amend the 1980 Declaration to cure the deficiencies alleged by appellees when they filed their action, (3) assessing the fees against the Association would cause an extreme hardship, and (4) appellees did not prevail with respect to all the relief they sought. The Association also asserts the court abused its discretion by awarding fees appellees incurred in a previous justice court action between the parties.

¶5 As to the first two arguments militating against the fees award, the trial court may have concluded that the Association might have avoided the litigation by giving up its quest for payment of a \$1,100 fine by one appellee and a \$25 annual assessment from another, by releasing the lien for the fine, and by not insisting that membership in the Association was mandatory until after the proposed amendment to the 1980 Declaration was approved and recorded. The trial court did not abuse its discretion by impliedly finding that the *Warner* factor concerning avoidance of litigation did not operate against appellees' fee request when the Association also could have taken reasonable

actions to attempt to prevent the litigation.

¶6 As to extreme hardship, the Association argues that in light of its \$25 annual per member assessment, the fee award represents more than three years of assessments if every property owner pays. We note, however, that while this may be true, if membership in the Association is now mandatory for lot owners, the Association likely would have the authority to impose a special assessment to raise funds to pay the award. Spread among approximately 180 lot owners, the assessment per owner would be approximately \$125, which one would not generally consider to be a hardship to pay. Therefore, we cannot say the court abused its discretion on these grounds.

¶7 The Association next argues the court erred by awarding fees because the appellees did not substantially prevail in their lawsuit. Specifically, the Association contends the appellees failed in their effort to establish voluntary membership in the Association, eliminate mandatory assessments and liens, and curb changes to the deed restrictions. We disagree. The court granted appellees' motion for summary judgment, which had asked the court to declare that the Association "is a voluntary organization and that it cannot exercise statutory powers to enforce its rules and regulations, including recording liens against property within the subdivision." The court's only limitation was a temporal one: the court voided only those liens and fines imposed before November 30,

2001, the date of the 1980 amendment to the Declaration. Therefore, the appellees substantially prevailed in the relief they sought.


¶8 Finally, the Association argues that some of the fees awarded were for attorneys' fees incurred in prior justice court proceedings between the parties and an appeal to the superior court from those proceedings. The Association lists eleven time entries that it contends were for the previous litigation.

¶9 It appears that some of the entries are for services provided in the previous litigation rather than in this lawsuit. Therefore, we remand to the trial court for a hearing on the disputed entries. If the court finds that the services were rendered in the prior litigation, the fee award should be reduced by the amounts attributable to those services.

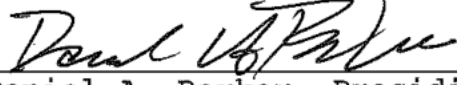
CONCLUSION

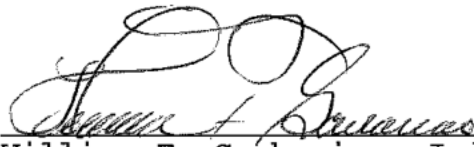
¶10 For the reasons set forth in the companion opinion, we affirm the summary judgment. However, for the reasons explained in this decision, we reverse the portion of the judgment awarding fees and remand to the trial court to exclude from the award any amounts representing legal services rendered in a prior justice court proceeding involving the parties. Finally, in our discretion, we grant appellees' request for an award of attorneys' fees incurred in this appeal pursuant to A.R.S. § 12-341.01. The amount of the award will be determined upon appellees' compliance with Rule 21,

Arizona Rules of Civil Appellate Procedure.


Ann A. Scott Timmer, Judge

CONCURRING:


Daniel A. Barker, Presiding Judge


William F. Garbarino, Judge