

1 CA-CV 02-0403**SHAMROCK v. WAGON WHEEL****Appellate Case Information**

Case Filed: 12-Jun-2002
 Case Closed: 10-Oct-2003

Dept/Composition

Department A
 Hon. Daniel A Barker
 Hon. Ann A. Scott Timmer
 Hon. William F Garbarino

CASE DECISION**26-Aug-2003 OPINION**

Author: AST
 Concur: DAB,WFG
 Dissent:
 Result: AF PT RV PT RM

Filed: _____ Mandate: _____

Disposition of Decision

Affirmed in Part
Reversed in Part
Remanded

Ann Timmer..... Author
Daniel Barker..... Concur
William Garbarino..... Concur

Pacific Reporter: 75 P.3d 132
 Arizona Reports: 206 Ariz 42

REGISTERED LONG CAPTION

001.	JOHN W. SHAMROCK, a single man; ARTHUR)	Court of Appeals
002.	A. and LOIS J. GILCREASE FAMILY TRUST)	Division One
003.	by ARTHUR A. AND LOIS J. GILCREASE,)	1 CA-CV 02-0403
004.	Trustees; DAVID H. HEMMINGS, a single)	
005.	man; THE POLLARD FAMILY TRUST by JAMES)	Navajo County
006.	E. and MARIE T. POLLARD, Trustees; J.C.)	Superior Court
007.	& C. INVESTMENTS, L.L.C. by ROBERT)	CV01-0102
008.	OLIVER CROMWELL partner; EDWARD E.)	
009.	SMITH and MARGARET SMITH, husband and)	
010.	wife; LEWIS REVOCABLE TRUST by FRANCIS)	
011.	W. LEWIS and MARLENE C. LEWIS,)	
012.	Trustees, JOE KACZMARSKI and ADA)	
013.	KACZMARSKI husband and wife; and)	
014.	WILLIAM R. DETOR, a single man,)	
015.)	
016.	Plaintiffs-Appellees,)	
017.)	
018.	v.)	
019.)	
020.	WAGON WHEEL PARK HOMEOWNER'S)	
021.	ASSOCIATION, a nonprofit Arizona)	
022.	corporation,)	
023.)	
024.	Defendant-Appellant.)	
025.)	

1 CA-CV 02-0403**SHAMROCK v. WAGON WHEEL****SPREADSHEET PAGE 1 of 1 (Division One Civil Spreadsheet)****CIVIL SPREADSHEET Page 1**

Ntc App - Trial Ct: 22-Apr-2002	Filed/Docketed: 12-Jun-2002
Cross-Appeal Filed:	
Docket Statmt Due:	Docket Statmt Filed: 12-Jun-2002
First Letter Sent:	Notice to Counsel:
Costs Response Due: 17-Sep-2003	Cost Response Filed: 17-Sep-2003
Costs Reply Due: 29-Sep-2003	Costs Reply Filed: 22-Sep-2003
Costs Denied: 08-Oct-2003	Rule 29 Filed:
	Opening Brief Due: 16-Sep-2002
Opening Brief Filed: 16-Sep-2002	Answer Brief Due: 31-Oct-2002
Answer Brief Filed: 18-Oct-2002	Reply Brief Due: 12-Nov-2002
Reply Brief Filed: 12-Nov-2002	Answer/XOpen Due:
Answer/XOpen Filed:	Reply/XAnswer Due:
Reply/XAnswer Filed:	XReply Due:
XReply Filed:	Record Due:
Record Filed: 12-Jun-2002	
	At Issue: 12-Nov-2002
At-Issue No. 02418	OA Request Due:
OA Request Filed: 03-Dec-2002	OA Denied:
Calendar Date: 18-Feb-2003	OA Granted:
Time:	Under Advisement: 18-Feb-2003
Decision Date: 26-Aug-2003	
	Costs Filed: 05-Sep-2003
Req Atty Fees Filed:	
	MR Due: 10-Sep-2003
MR Filed:	MR Response Due:
MR Response Filed:	MR Denied:
MR Granted:	
	PR Due: 25-Sep-2003
PR Filed:	PR Sent:
	PR Denied:
PR Granted:	Stay/Writ Cert Due:
Stay Request Filed:	
	Mandate: 10-Oct-2003
Terminate:	

Side 1. 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,, Plaintiff/Appellee

(Litigant Group) 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,

Attorneys for Plaintiff/Appellee

James L Tanner, Esq. (AZ Bar No. 4078)

1 CA-CV 02-0403**SHAMROCK v. WAGON WHEEL****Side 2. WAGON WHEEL PARK HOMEOWNER'S ASSOCIATION, a nonprofit Arizona corporation,, Defendant/Appellant
(Litigant Group) WAGON WHEEL PARK HOMEOWNER'S ASSOCIATION, a nonprofit Arizona corporation,****Attorneys for Defendant-Appellant**

Jonathan J Olcott, Esq. (AZ Bar No. 14859)

William F Shore, III, Esq. (AZ Bar No. 7728)

52 PROCEEDING ENTRIES

1. 8-Oct-2000 FILED: costs as it relates to post-judgment proceedings in the superior court (A. Timmer, Judge)
2. 12-Jun-2002 FILED: INDEX OF RECORD (Docketing Statement filed 4/22/02)
3. 12-Jun-2002 FILED: FIRST LETTER (6/12/02)
4. 1-Jul-2002 FILED: LETTER, 7/1/02, to Clerk of Maricopa County Superior Court, RE: Pursuant to A.R.S. 12-322A record on appeal returned. Appeal shall be deemed abandoned.
5. 8-Jul-2002 FILED: LETTER, 7/5/02, to court from Jonathan Olcott, OLCOTT & SHORE, PLLC, RE: Motion to Reinstate appeal.
6. 9-Jul-2002 FILED: RECEIPT, #0201223, \$140.00, Check #8212, Appellant Filing Fee, paid by Jonathan J. Olcott, Attorneys, PLLC, for Appellant Wagon Wheel Park
7. 10-Jul-2002 FILED: CERTIFICATE OF MAILING - LETTER DATED JULY 5, 2002 (Request to Reinstate Appeal)
8. 15-Jul-2002 FILED: ORDER - reinstating this appeal. FURTHER that appellant's opening brief shall be filed on/before 8/16/02. (Dept. M, J. Gemmill, Presiding Judge)
9. 13-Aug-2002 FILED: NOTICE OF FILING STIPULATION AND ORDER TO EXTEND DEADLINE FOR APPELLANT TO FILE OPENING BRIEF (Appellant)
10. 15-Aug-2002 FILED: STIPULATION TO EXTEND DEADLINE FOR APPELLANT TO FILE OPENING BRIEF (Appellant)
11. 19-Aug-2002 FILED: ORDER - extending the time to file the opening brief to/ including 9/16/02. (P. Urry, Judge Pro Tem)
12. 16-Sep-2002 FILED: APPELLANTS OPENING BRIEF.
13. 16-Sep-2002 FILED: APPENDIX TO APPELLANT'S OPENING BRIEF
14. 18-Oct-2002 FILED: APPELLEES ANSWERING BRIEF.
15. 23-Oct-2002 FILED: ORDER - the Clerk, Navajo County Superior Court has to/ including 11/7/02 to transmit record on appeal. (G. Clark, Clerk)
16. 28-Oct-2002 FILED: LETTER, 10/28/02, to James L. Tanner, RE: Upon review of record, the \$70.00 appellee's filing fee was due on/before 7/29/02. Unless fee is paid, appellee shall not be entitled to be heard. (G. Clark, Clerk)
17. 31-Oct-2002 FILED: RECEIPT, #0201963, \$70.00, Check #23285, Appellee Filing Fee, paid by James L. Tanner, JACKSON WHITE GARDNER, for Appellee John Shamrock
18. 1-Nov-2002 FILED: RECORD ON APPEAL (Instruments/Minute Entries - 4 Volumes) (Reporter's Transcripts - 1 Vol. 11/29/01)
19. 12-Nov-2002 FILED: APPELLANTS REPLY BRIEF.
20. 3-Dec-2002 FILED: REQUEST FOR ORAL ARGUMENT (Appellant)

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21. 31-Dec-2002 CALENDARED: CONFERENCE, Dept A, 2-18-03. costs as it relates to post-judgment proceedings in the superior court (A. Timmer, Judge)
22. 7-Jan-2003 FILED: NOTICE OF CONFERENCE, Dept. A, 2/28/03
23. 18-Feb-2003 FILED: ORDER - under advisement (Dept. A, Judges Barker, Timmer, Garbarino)
24. 20-Feb-2003 FILED: ORDER - denying request for oral argument. (Dept. A, E. Voss, Chief Judge)
25. 11-Jul-2003 FILED: APPELLEES' SUPPLEMENT TO ANSWERING BRIEF
26. 15-Jul-2003 FILED: ORDER - designating the supplement to the answering brief as a supplemental citation of legal authority. (Dept. A, A. Timmer, Judge)
27. 6-Aug-2003 FILED: RESPONSE TO APPELLEES' SUPPLEMENT (Appellant)
28. 15-Aug-2003 FILED: REPLY TO RESPONSE APPELLEE'S SUPPLEMENT TO ANSWERING BRIEF
29. 26-Aug-2003 FILED: ORDER - OPINION (AFFIRMED IN PART; REVERSED IN PART; REMANDED) (Dept. A, A. Timmer, CONCURRING Judges Barker, Garbarino)
30. 26-Aug-2003 FILED: ORDER - MEMORANDUM DECISION (AFFIRMED IN PART, REVERSED IN PART, REMANDED) (Dept. A, Judge Timmer, CONCURRING: Judges Barker, Garbarino)
31. 26-Aug-2003 FILED: LETTER, 8/26/03, to Mead Data Central, RE: OPINION filed 8/26/03.
32. 26-Aug-2003 FILED: LETTER, 8/26/03, to West Publishing Co., RE: OPINION filed 8/2/03.
33. 26-Aug-2003 FILED: DHL RECEIPT, #7713667776, to Lexis Nexis
34. 26-Aug-2003 FILED: FEDEX RECEIPT, #841380669029, to West Group.
35. 26-Aug-2003 FILED: GENERAL DISTRIBUTION LIST
36. 5-Sep-2003 FILED: RULE 21 A.R.C.A.P. APPLICATION FOR AWARD OF ATTORNEYS' FEES AND OUT-OF-POCKET EXPENSES (Appellees)
37. 5-Sep-2003 FILED: AFFIDAVIT IN SUPPORT OF APPLICATION FOR AWARD OF ATTORNEYS' FEES AND OUT-OF-POCKET EXPENSES (Appellees)
38. 5-Sep-2003 FILED: STATEMENT OF COSTS (Appellees)
39. 5-Sep-2003 FILED: ORDER - directing the clerk of the court to delete the following text on page 11, FURTHER directing the clerk of this court to add the following text in its place: for these reasons, A.R.S. 10-3304 did not apply to deprive appellees of standing to maintain this lawsuit. In light of our decision, we do not address appellees' additional arguments concerning the applicability of 10-3304. (Dept. A, A. Timmer, Presiding Judge)
40. 5-Sep-2003 FILED: LETTER, 9/5/03, to Mead Data Central, RE: ORDER amending this court's OPINION filed 8/26/03.
41. 5-Sep-2003 FILED: LETTER, 9/5/03, to West Publishing Co., RE: enclosed ORDER amending this court's OPINION filed 8/26/03.
42. 5-Sep-2003 FILED: DHL RECEIPT, #7713667732, to Lexis Nexis
43. 5-Sep-2003 FILED: FEDEX RECEIPT, #841380669073, to Opinions Clerk

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44. 5-Sep-2003 FILED: GENERAL DISTRIBUTION LIST
45. 17-Sep-2003 FILED: OBJECTION TO APPELLEES' APPLICATION FOR AWARD OF ATTORNEYS' FEES AND OUT-OF-POCKET EXPENSES (Appellant)
46. 22-Sep-2003 FILED: REPLY TO OBJECTION TO APPELLEES' APPLICATION FOR AWARD OF ATTORNEYS' FEES AND OUT-OF-POCKET EXPENSES (Appellees)
47. 8-Oct-2003 FILED: ORDER - granting Appellees' application for attorneys' fees and out-of-pocket expenses in the total amount of \$8,899.18 (\$8,702.00 attorneys fees and \$197.12 out-of-pocket costs) FURTHER, granting Appellees taxable costs in the amount of \$234.35. FURTHER, denying Appellees' request for fees and
48. 10-Oct-2003 FILED: AMENDED ORDER - granting Appellees' application for attorney's fees and out-of-pocket expenses in the total amount of \$8,899.18 (8,702.00 attorneys' fees and \$197.18 out-of-pocket costs). FURTHER granting Appellees taxable costs in the amount of \$234.35. FURTHER denying Appellees' request for fees and costs as it related to post-judgment proceedings in the superior court. (Dept. A, A. Timmer, Judge)
49. 10-Oct-2003 FILED: LETTER, 10/10/03, Original MANDATE, Copy of Opinion, and Record, returned to clerk, Navajo County Superior Court.
50. 10-Oct-2003 FILED: LETTER, 10/10/03, to The Bureau of National Affairs, Inc. RE: Case mandated on 10/10/03, from Court of Appeals Div. One Phoenix.
51. 10-Oct-2003 FILED: LETTER, 10/10/03, West Publishing Co., RE: Opinion Filed 8/26/03.
52. 10-Oct-2003 FILED: LETTER, 10/10/03, to Mead Data Central, RE: Opinion filed 8/26/03.

MASTER DISTRIBUTION LIST

1. SOLEPRAC 22351 James L Tanner 1451 N Del Mar Mesa AZ 85203-3804	2. FIRMATTY 81690 Jonathan J Olcott Jonathan Olcott Attorneys PLLC 3401 North 32nd Street Phoenix AZ 85018	3. FIRMATTY 74173 William F Shore III Burdman & Shore PLLC Suite 535 2999 North 44th Street Phoenix AZ 85018
4. JUDGE 74396 Dale K Patton Jr, Judge Navajo County Superior Court Navajo County Complex 100 East Code Talkers Drive Holbrook AZ 86025-0668	5. KEYPOSTN 56021 Clerk Navajo County Superior Court Navajo County Complex 100 East Code Talkers Drive Holbrook AZ 86025-0668	

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

Jackson White, P.C.
By James L. Tanner
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.

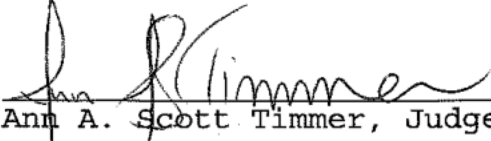
¶8 Finally, the Association argues that some of the fees awarded were for attorneys' fees incurred in prior justice court proceedings between the parties and an appeal to the superior court from those proceedings. The Association lists eleven time entries that it contends were for the previous litigation.

¶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.

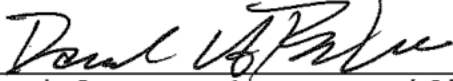
CONCLUSION

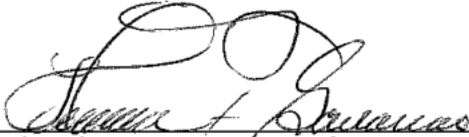
¶10 For the reasons set forth in the companion opinion, we affirm the summary judgment. However, for the reasons explained in this decision, we reverse the portion of the judgment awarding fees and remand to the trial court to exclude from the award any amounts representing legal services rendered in 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