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ARIZONA COURT OF APPEALS

DIVISION ONE

TURTLE ROCK III HOMEOWNERS ASSOCIATION, an Arizona non-profit corporation, Plaintiff-Appellee, vs. LYNNE A. FISHER, Defendant-Appellant.	Case No. 1 CA-CV 2016-0455 Superior Court Case No. CV2015-095897 **MOTION FOR RECONSIDERATION**

Plaintiff-Appellee, through undersigned Counsel and pursuant to ARCAP 22, hereby submits this Motion for Reconsideration on the Opinion filed October 26, 2017. The Opinion contains specific misstatements of law as follows:

1. That *Villas at Hidden Lakes Condos Assoc. v. Geupel Constr. Co.*, 174 Ariz. 72, 81, 847 P. 2d 117, 126 (App. 1992) ("*Villas*") requires a fee schedule to charge fines. *See* Opinion, ¶¶10 and14, October 26, 2017.

2. That fines are per se unreasonable without a fee schedule. *See* Opinion, ¶¶17

and 18.

3. That an association must prove damages. *See* Opinion, ¶18.

MEMORANDUM OF POINTS AND AUTHORITIES

1. *Villas* had nothing to do with fines in this case's context.

In *Villas*, the Court held the association had authority to impose late fees for late payment of assessments under a declaration and statute, but that the retroactive imposition of late fees enacted a year after late payment was unreasonable because the owner was not afforded due process. Contrary to this Court's conclusion, that case did not hold that ad hoc *fines* are per se unreasonable. *See* Opinion, ¶14. The difference between late fees for nonpayment of assessments and fines for violations is that fines can only be imposed after the statutory due process rights of notice and an opportunity to be heard occur. *See* A.R.S. § 33-1803(B). No such due process requirement exists for late fees, hence the need for *Villas*. In this action, Fisher was provided with about ninety (90) letters over a two-year period with the opportunity to be heard at any point if she requested it pursuant to A.R.S. §33-1803(B). The statutory requirements and the voluminous letters resolve any concerns about fairness.

2. Fee schedules were never a requirement under Arizona law.

Nothing in Arizona law states that fines are per se unreasonable without a fee schedule containing violations and accompanying "fine amounts." *See* Opinion, ¶18.

Requiring all violations be categorized and quantified is impossible. For example, one may now argue that a community cannot fine an owner $450 for habitually drag racing down its streets, $175 for spray painting graffiti on the club house, or $250 for throwing glass into a community pool, when these odd violations and amounts are not in the fee schedule. A fee schedule will never be able to quantify every violation because violations are rarely objective. The legislature directly granted associations the power to impose "reasonable" (subjective) fines so long as homeowners get notice and an opportunity to be heard, and the judiciary should not circumvent the Arizona legislature in an attempt to block an association's power to fine by creating new requirements by judicial fiat. *See State ex rel. Lassen v. Harpham,* 2 Ariz. App. 478, 487, 410 P.2d 100, 109 (1966) (court may not "judicially legislate" by adding provisions to a statute); *see also Cohen v. State,* 121 Ariz. 6, 9, 588 P.2d 299, 302 (1978) ("a court should avoid legislating a particular result by judicial construction").

3. Damages were never a requirement to fines, nor should they be.

This Court overruled or ignored over eighty years of Arizona precedent when it held that an association now has "the burden to prove [] damages." Opinion, ¶18. First, Arizona law has always stated that a party seeking to enforce a deed restriction demonstrates adequate harm merely by proving that to tolerate a violation would diminish the protection provided to all homeowners by deed restrictions. *Continental Oil Co. v. Fennemore*, 38 Ariz. 277, 285-86, 299 P. 132 (1931). *See also Ahwatukee*

Custom Estates Mgmt. Ass'n v. Turner, 196 Ariz. 631, ¶19, 2 P. 3d 1276 (App. 2000). In other words, proving damages has never been a requirement because the value of a restrictive covenant is difficult, if not impossible, to quantify. *See* Restatement (Third) of Property: Servitudes § 8.3 (2000).[1] *See also Tierra Ranchos Homeowners v. Kitchukov*, 165 P.3d 173, ¶27, 216 Ariz. 195 (App. 2007) ("[w]e find the Restatement approach to be well-reasoned and see no reason to adopt a different standard by which to review the discretionary decisions of a community association").

Second, because the Court does not define or explain what it means when it says "damages," the populace is left to guess. Damages could now mean, *inter alia*, liquidated damages, punitive damages, general damages, special damages, or even *actual damages*. Actual damages rarely occur in the context of violations, if ever, and certainly not when it comes to the most common violations such as trash on an owner's lot, receptacles being left out overnight, loud parties, dogs off-leash, and the list goes on.

Third, Arizona applies the rule of *expressio unius est exclusio alterius* when interpreting statutes. *State v. Gonzales,* 206 Ariz. 469, 471, 5 11, 80 P.3d 276, 278

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1 Restatement (Third) of Property: Servitudes § 8.3 (2000), comment f ("[i]n many situations denial of injunctive relief is tantamount to denial of all relief because damages may be impossible to establish").

(App. 2003). Adding "damages" as an element to A.R.S. § 33-1803(B)'s elements of (1) notice and (2) an opportunity to be heard is a misapplication of statutory interpretation. The burden of proving due process rights of notice and the opportunity to be heard before imposing reasonable monetary penalties for violations of its governing documents is all that is required by the statute and this Court should not circumvent that express right by creating a "damages" requirement *contra legem*. *See Harpham,* 2 Ariz. App. at 487; *Cohen,* 121 Ariz. at 9.

CONCLUSION

The Opinion was meant to clarify the law, but the exact opposite is true. The Court should revise the Opinion to better reflect the statutory requirements for imposing fines and clarify the significant problems created by its vague holding about an association's burden to prove damages.

DATED this 1st day of November, 2017.

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