

DEC 07 2017

STATE OF ARIZONA
COURT OF APPEALS, DIVISION ONE

AMY M. WOOD, CLERK

BY _____

R. L. WHITMER, an individual
Petitioner/Appellant,

v.

HILTON CASITAS HOMEOWNERS
ASSOCIATION, also known as HILTON
CASITAS COUNCIL OF
HOMEOWNERS, also known as
COUNCIL OF CO-OWNERS, also
known as HILTON CASITAS COUNCIL
OF CO-OWNERS; and MICHAEL
BENGSON, President of the named
Respondent;
Respondents. /Appellees.

0453
Case No. 1 CA-CV 17-0070-

Maricopa County Superior Court

Case No. CV2016-055080

Hon. Aimee L. Anderson

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This appeal is about who has jurisdiction to conduct contempt of court proceedings pursuant to A.R.S. § 32-2199.02.B, and whether an award of attorneys fees and costs can be granted pursuant to A.R.S. §§ 12-349, 12-350, and A.R.C.P. Rule 11 without specific findings that any of the four prerequisites of A.R.S. § 12-349 being present.

Appellant Whitmer (“Petitioner”) is the co-owner of a residence in the Hilton Casitas condominium development near the southeast corner of Lincoln and Scottsdale Roads behind the Scottsdale Hilton Hotel.

In September 2014 the Petitioner filed a complaint with the Arizona Department of Fire, Building and Life Safety¹ that the Hilton Casitas HOA (“HOA” or “Respondent”) had violated A.R.S. § 33-1243.D. The complaint resulted in Administrative Law Judge Decision No. 14F-H1415004-BFS (“Order”) (**IR 1, P. 8-12**)² in which the Administrative Law Judge ordered that the HOA “shall fully comply with the applicable provisions of A.R.S. § 33-1243.D in the future.” (**IR 1, P. 11:26-28**).

As the Respondents have defied the Administrative Law Judge’s Order to

¹ In 2016, the Arizona Legislature passed Senate Bill 1530 which eliminated the Department of Fire, Building, and Life Safety, and substituted in the Arizona Department of Real Estate by adding A.R.S. 32-2199 et seq, and left OAH in place as the administrative law court.

² Electronic Index of Records herein “IR”, and “#” referring to the Document # listed there.

comply with A.R.S. § 33-1243.D, the Petitioner, pursuant to A.R.S. § 32-2199.02.B, petitioned the Maricopa County Superior Court on December 19, 2016 for the enforcement of the Order through a contempt of court proceeding.

In spite of Ariz. Const. Art. 6 Sec. 14.1, the trial court erroneously dismissed the petition for lack of jurisdiction to enforce the Order through a contempt of court proceeding, a relief provided to the Petitioner pursuant to A.R.S. § 32-2199.02.B. The trial court also wrongly awarded attorneys' fees and costs to the Respondent pursuant to A.R.S. §§ 12-349, 12-350, and A.R.C.P. Rule 11 without specific findings that any of the four prerequisites of A.R.S. § 12-349 being present, which is contrary to the law.

The Petitioner is appealing the trial court's erroneous rulings.

II. STATEMENT OF THE CASE

Jurisdiction

This Court has jurisdiction pursuant to Arizona Constitution Article 6, Section 9, and A.R.S. § 12-2101(A)(1).

Nature of the Case

Petitioner co-owns a residence in the Hilton Casitas condominium. The Hilton Casitas condominium is controlled by its Declaration, Bylaws and it is governed by the A.R.S. § 33-1201 et seq, which includes A.R.S. § 33-1243.D. Since the Declaration of Horizontal Property Regime for Hilton Casitas (**IR 1 at**

P.19-74) does not expressly authorize the HOA board to adopt or amend budget. A.R.S. § 33-1243.D requires “any budget or amendment shall be ratified by the unit owners in accordance with the procedures set forth in this subsection.”

On January 7, 2015 the Petitioner obtained the Administrative Law Judge Decision No. 14F-H1415004-BFS (**IR 1, P. 8-12**). In that Decision, the Administrative Law Judge ordered that the HOA “shall fully comply with the applicable provisions of A.R.S. § 33-1243.D in the future.” (**IR 1, P11:27-28**).

The Order entered was certified on February 18, 2015 by the Arizona Department of Fire, Building and Life Safety. The HOA did not appeal the decision.

The Respondents made no attempt to adopt a budget in 2016 as required by the administrative law judge’s order to fully comply with the applicable provisions of A.R.S. § 33-1243.D in the future..

As they were in defiance of the Administrative Law Judge’s order, on December 18, 2016 the Petitioner filed verified complaint seeking the enforcement of the Order through a contempt of court proceedings (**IR 1**).

On January 24, 2017 the trial court held a hearing to show cause, and finding cause the trial court scheduled an evidentiary hearing for February 28, 2017 (**IR 11**).

On February 23, 2017 the trial court, at the request of the Respondents,

postponed the evidentiary hearing to March 16, 2017 **(IR 20)**.

On February 28, 2017 the Respondents filed a motion to dismiss **(IR 22)** claiming that the trial court lacked jurisdiction and requested legal fees and costs pursuant to A.R.S. §§12-341.01, 12-349, and 12-350 (however, later in their applications for attorneys fees and costs the Respondents abandoned their claim for an award pursuant to A.R.S. § 12-341.01 as this case did not arise out contract).

On March 10, 2017, the Petitioner responded to the motion to dismiss arguing “that OAH, as an arm of the State’s Executive Branch, has limited judicial power which does not include the authority to enforce its own orders through contempt proceedings.” **(IR 27, P. 2:2-4)**.

On March 16, 2017, in their reply in support of the motion to dismiss **(IR 29)** the Respondents alleged that the Office of Administrative Hearings (“OAH”) is the proper venue for A.R.S. §32-2199.02 contempt of court proceedings pursuant to the Ariz. Admin. Code R2-19-102(C).

Ariz. Admin. Code R2-19-102(C) If a procedure is not provided by statute or these rules, an administrative law judge may issue an order using the Arizona Rules of Civil Procedure and related local rules for guidance **(IR 29, P.2 L:6-10)**.

On March 21, 2017 the trial court granted the motion to dismiss **(IR 30)** in a minute entry finding:

Pursuant to Ariz. Rev. Stat. Sec. 32-2199.02 the proper venue for a contempt of court hearing (seeking to enforce

the administrative decision) is the Administrative Courts, not the Superior Court.

The Court finds that this Court only has the jurisdiction to review an appeal from an Order issued by an Administrative Law Judge. The Superior Court does not have jurisdiction to hear a contempt action over an Administrative Order. **(IR 30).**

In its minute entry ruling, the trial court also granted the Respondents' request for legal fees and costs, but without making any specific findings that the award was based on A.R.S. §12-341.01 or that any of the four prerequisites of A.R.S. §12-349 were present **(IR 30).**

On March 21, 2017 the Petitioner emailed the acting director of the Arizona Office of Administrative Hearings ("OAH") requesting:

Please find the attached a minute entry ruling from the Superior Court regarding my recent filing for an order of contempt of an administrative law order. In her minute entry ruling Judge Anderson found:

"Pursuant to Ariz. Rev. Stat. Sec. 32-2199.02 the proper venue for a contempt of court hearing (seeking to enforce the administrative decision) is the Administrative Courts, not the Superior Court."

Accordingly, now that the court has ruled that OAH i[s] the proper jurisdictional venue, please inform me where at the Office of Administrative Hearings I can file the contempt complaint and how much the filing fee is. **(IR 32, P. 5).**

On March 23, 2017 the Petitioner received an email letter from the acting director of OAH stating:

“Furthermore, there is nothing in OAH’s enabling statutes (A.R.S. § 41-1092 et. seq.), that would enable OAH to enforce its own decisions through contempt proceedings that it would hold. Administrative tribunals have only those powers specifically prescribed by statute or rule.” **(IR 32, P. 7)**

On March 23, 2017 the Petitioner filed an A.R.C.P. Rule 7.1(e) motion for reconsideration based upon OAH’s March 23, 2017 statement that it lacks “contempt of court” jurisdiction **(IR 32)**.

On April 5, 2017 the Respondents filed a response and once again claimed that “pursuant to R2-19-102(C), an Administrative Law Judge may issue a contempt order over contempt proceedings of the Administrative Orders,” **(IR 34, P. 3: L. 6-10)**

In their April 13, 2017 application **(IR 35)** for attorneys fees and costs the Respondents abandoned their previous claim under A.R.S. §12-341.01, and made their claim under A.R.S. §§12-349, 12-350 and Rule 11, but without presenting any facts or evidence to support their claims, because such facts or evidence does not exist.

The Petitioner asserted in his May 2, 2017 response **(IR 44)** that Respondents had abandoned their claim under A.R.S. §12-341.01, and objected to an award under A.R.S. §§12-349, 12-350 and Rule 11 because the court did not make any specific findings that any of the four prerequisites of A.R.S. § 12-349 being present.

In their May 10, 2017 reply (**IR 45**) in support of their application for attorneys fees and costs, the respondents did not contest that they had no claim under A.R.S. §12-341.01. The Respondents argued that they are entitled for an award pursuant to A.R.S. §§12-349, 12-350 and Rule 11, but without presenting any facts or evidence to support their claims, because such facts or evidence does not exist.

On May 12, 2017 the trial court denied the Petitioner's motion for reconsideration (**IR 46**).

On May 16, 2017 the trial court entered a signed judgment dismissing the case (**IR 47**), and awarded legal fees and costs without any specific findings that any of the four prerequisites of A.R.S. §12-349 are present.

On May 22, 2017 the Petitioner filed a Motion pursuant to A.R.C.P. Rule 59(a)(1)(H) that the "judgment is ... is contrary to law" as the trial court does have jurisdiction pursuant to Ariz. Const. Article 6, Section 14.1 (**IR 49**).

On June 6, 2017 the Respondents, while objecting to the Rule 59(a)(1)(H) motion in their response claimed "that the Petitioner "failed to present newly discovered evidence that would change [the trial court's] prior ruling," (**IR 50, p3:14-15**), and abandoned their previous allegation that an administrative law judge has contempt of court proceedings jurisdiction pursuant to Ariz. Admin.

Code R2-19-1 02(C), and instead argued that enforcement of the Order through contempt of court proceeding is not available to the Petitioner, as the Respondents claimed:

“Petitioner’s only option at this point is to appeal the Court’s Judgment or file a new complaint and /or petition with the Arizona Department of Real Estate regarding the new allegation of the Association’s breach of Arizona Law.” **(IR 50, P.4:10-14).**

On June 16, 2017 the Petitioner replied that “Rule 59(a)1(H) authorizes the Court to vacate a judgment if it is contrary to the law, as it is in this case, namely that the Court has jurisdiction pursuant to Article 6, Section 14.1 of the Arizona Constitution, and the dismissal was based on the wrong assertion that the Court lacks contempt of court proceedings jurisdiction over administrative law orders, and that the jurisdiction is vested with the administrative tribunals.” **(IR 51, P.2:25-28).**

On June 19, 2017 the trial court denied the Petitioner’s Rule 59 motion **(IR 52)** and awarded attorneys fees and cost without any specific findings of any of the four prerequisites of A.R.S. § 12-349 being present.

The trial court entered a final signed judgment on July 24, 2017 **(IR 59).**

On August 18, 2017 the Appellants timely filed their notice of appeal. **(IR 60).**

III. STATEMENT OF FACTS

In 1972 the Hilton Casitas condominium were developed along with the Scottsdale Hilton Hotel on a 20-acre parcel located at the southeast corner of Lincoln and Scottsdale Roads.

On May 22, 1972 the fee title land owners, and the 99 year ground lessor, recorded a Declaration of Horizontal Property Regime for Hilton Casitas (“Declaration”) (**IR 1 at P.19-74**) and created the Council of Co-Owners, an unincorporated association, pursuant to A.R.S. § 33-551 et seq., the Arizona Horizontal Property Regime Act. The Arizona Horizontal Property Regime Act was superseded in 1985 by A.R.S. § 33-1201 et seq, the Uniform Condominium Act, which now governs the Hilton Casitas condominium.

Petitioner co-owns a residence in the Hilton Casitas condominium.

The Petitioner obtained the Administrative Law Judge Decision No. 14F-H1415004-BFS (**IR 1, P. 8-12**) entered on January 7, 2015 and certified on February 18, 2015 by the Arizona Department of Fire, Building and Life Safety. The HOA did not appeal the decision.

The Administrative Law Judge ordered that the Respondents “shall fully comply with the applicable provisions of A.R.S. § 33-1243.D in the future.” (**IR 1, P11:27-28**).

No HOA board meeting was held to adopt the 2016 budget, nor was a unit

owners meeting held to ratify the 2016 budget. The only board meeting held prior to a unit owners meeting was held on February 16, 2016. As per the agenda of that meeting, the board did not adopt a budget (**IR, P. 79**).

On March 24, 2016, the board circulated the meeting notice and a meeting agenda (**IR, P. 76**) for the annual unit owners meeting that was held on March 31, 2016. Instead of providing “a summary of the budget to all the unit owners” prior to a unit owners meeting as required by A.R.S. § 33-1243.D, the board chose to provide a budget (which was not adopted by the board as required by A.R.S. § 33-1243.D) only to the annual meeting attendees, in the meeting.

On August 25, 2016, the HOA board of directors sent out a letter (**IR 1, P. 93**) announcing that the Safeguard security agreement had been renegotiated, and that there would be substantial savings. Without adopting or amending a budget as required by A.R.S. § 33-1243.D and ordered by the Administrative Law Judge, the board announced that they would be putting the savings into a reserve account in a clear violation of A.R.S. § 33-1243.D.

By failing to adopt the 2016 budget the HOA board and its officers completely disregarded the Administrative Law Judge’s order to comply with A.R.S. § 33-1243.D.

On December 18, 2016, the Petitioner filed verified complaint seeking the enforcement of the Order through contempt of court proceedings (**IR 1**).

On January 24, 2017 the trial court held a hearing to show cause, and finding cause scheduled an evidentiary hearing for February 28, 2017 **(IR 11)**.

On February 23, 2017, at the request of the Respondents, the trial court postponed the evidentiary hearing to March 16, 2017 **(IR 20)**.

On February 28, 2017 the Respondents filed a motion to dismiss **(IR 22)** claiming that the trial court lacked jurisdiction and requested legal fees and costs pursuant to A.R.S. §§12-341.01, 12-349, and 12-350 (in their applications for attorneys fees and costs the Respondents did not continue to ask for an award pursuant to A.R.S. § 12-341.01).

In their March 16, 2017 reply in support of the motion to dismiss **(IR 29)** the Respondents contend that the Office of Administrative Hearings (“OAH”) is the proper venue for A.R.S. §32-2199.02 contempt of court proceedings pursuant to the Ariz. Admin. Code R2-19-102(C) **(IR 29, P.2 L:6-10)**

The trial court granted the motion to dismiss **(IR 30)** on March 21, 2017 finding that “the proper venue for a contempt of court hearing (seeking to enforce the administrative decision) is the Administrative Courts, not the Superior Court.” “The Court finds that this Court only has the jurisdiction to review an appeal from an Order issued by an Administrative Law Judge. The Superior Court does not have jurisdiction to hear a contempt action over an Administrative Order.” **(IR 30)**.

The trial court granted the Respondents’ request for legal fees and costs, but

without specific findings that A.R.S. §12-341.01 applied or that any of the four prerequisites of A.R.S. §12-349 are present **(IR 30)**.

On March 21, 2017 the Petitioner emailed the acting director of the Arizona Office of Administrative Hearings (“OAH”) requesting “now that the court has ruled that OAH in the proper jurisdictional venue, please inform me where at the Office of Administrative Hearings I can file the contempt complaint and how much the filing fee is.” **(IR 32, P. 5)**.

In a March 23, 2017 email letter, the acting director of OAH stated that OAH lacked any statutory authority “that would enable OAH to enforce its own decisions through contempt proceedings ... **(IR 32, P. 7)**.

Based upon OAH’s March 23, 2017 statement that it lacked “contempt of court” jurisdiction, the Petitioner filed an A.R.C.P. Rule 7.1(e) motion for reconsideration on March 23, 2017 **(IR 32)**.

The Respondents’ April 5, 2017 response to the motion for reconsideration once again claimed that “pursuant to R2-19-102(C), an Administrative Law Judge may issue a contempt order over contempt proceedings of the Administrative Orders,” **(IR 34, P. 3: L. 6-10)**

In their application and in their reply in support of attorneys fees and costs the HOA abandoned their previous claim under A.R.S. §12-341.01, and made the claim under A.R.S. §§12-349, and 12-350 and Rule 11, but without presenting any

facts or evidence to support their claims, because such facts or evidence does not exist. **(IR 35 and 45)**.

The trial court denied the Petitioner's motion for reconsideration on May 12, 2017 **(IR 46)**.

The trial court entered a signed judgment on May 16, 2017 **(IR 47)** dismissing the case, and awarded legal fees and costs to the Respondents despite the Petitioner's objection **(IR 44)** that trial court failed to find any of the four prerequisites of A.R.S. §12-349 to be present.

The Petitioner, On May 22, 2017, filed a A.R.C.P. Rule 59(a)(1)(H) motion **(IR 49)**, arguing that the trial court's May 16, 2017 judgment **(IR 47)** is a misapplication of the law.

In their June 6, 2017 response, the Respondents abandoned their previous allegation that an administrative law judge has contempt of court proceedings jurisdiction pursuant to Ariz. Admin. Code R2-19-102(C), and instead argued that enforcement of the Order through contempt of court proceeding is not available to the Petitioner.

The trial court denied the Petitioner's Rule 59 motion on June 19, 2017 **(IR 52)** awarded legal fees and costs to the Respondents.

The trial court entered a final signed judgment on July 24, 2017 **(IR 59)**, and, despite the Petitioner's objection **(IR 58)**, awarded legal fees and costs

without finding any of the four prerequisites of A.R.S. §12-349 to be present.

The Appellants timely filed their notice of appeal on August 18, 2017. (IR 60)

IV. STATEMENT OF THE ISSUES

In passing A.R.S. § 32-2199.02.B the legislature clearly provided that an order issued by an administrative law judge is enforceable through “contempt of court proceedings.”

Accordingly, the primary issue for this Court is jurisdiction:

A. Does A.R.S. § 32-2199.02.B give OAH administrative law judges exclusive jurisdiction for contempt of court proceedings?

B. Does the Superior Court have jurisdiction pursuant to Article 6, Section 14.1 of the Arizona Constitution?

C. Can an award of legal fees and costs be made pursuant A.R.S. §§ 12-349 and 12-350, and Rule 11 without the trial court making specific finding that any of the four prerequisites of A.R.S. § 12-349 are present?

V. STANDARD OF REVIEW

[The Court] review[s] an order granting a motion to dismiss for abuse of discretion, *Franzi v. Superior Court*, 139Ariz. 556, 561, 679 P.2d 1043, 1048 (1984), and reviews issues of law, including issues of statutory interpretation, de

novo, *State ex rel. Dep't of Econ. Sec. v. Hayden*, 210 Ariz. 522, 523 ¶ 7, 115 P.3d 116, 117 (2005).

A.R.S. §§ 12-349 and 12-350 authorizes a fee award “to the successful party” provided that any of the four prerequisites of A.R.S. § 12-349 are present for the superior court to apply A.R.S. § 12-350. The trial court’s findings of fact are reviewed for clear error, but its application of the statute is reviewed de novo. See *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 555, ¶ 27, 20 P.3d 590, 598 (App. 2001). *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 12, 6 P.3d 315, 318 (App.2000), citing *Hampton v. Glendale Union High Sch. Dist.*, 172 Ariz. 431, 433, 837 P.2d 1166, 1168 (1992).

VI. ARGUMENT

A. AN ADMINISTRATIVE TRIBUNAL, AS A QUASI-JUDICIAL AGENCY OF THE EXECUTIVE BRANCH, CANNOT HAVE JURISDICTION FOR “CONTEMPT OF COURT PROCEEDINGS” WITHOUT SPECIFIC LEGISLATIVE AUTHORIZATION.

If administrative law judges, as part of the executive branch, were to interpret A.R.S. §32-2199.02, and, as the respondents contend, use Ariz. Admin. Code. Rule R-2-19-102.C to expand their jurisdiction to include contempt of court proceedings (**IR 29, P.2:L. 2-10**), they would clearly be usurping the constitutional powers vested in the Legislature and Judiciary by Article 3 of the Arizona Constitution. “It is fundamental in administrative law that an administrative agency or commission must exercise its rule-making authority within the grant of

legislative power as expressed in the enabling statutes. Any excursion by an administrative body beyond the legislative guidelines is treated as an usurpation of constitutional powers vested only in the major branch of government.” *General Electric Company v. Burton*, 372 F.2d 108 (6th Cir.); *Busey v. Deshler Hotel Co.*, 130 F.2d 187, 142 A.L.R. 563 (6th Cir.); 2 **Am.Jur.2d, Administrative Law**, § 211.

In 2006 the Legislature passed HB2824 (**IR 41, P. 12 -18**) which gave limited jurisdiction to administrative law judges at the Arizona Office of Administrative Hearings (“OAH”) to hear petitions regarding condominium and planned communities statutes and documents disputes. The following year, in 2007, OAH submitted a report in 2007 to the Governor, Arizona Senate President and Speaker of the House of Representatives that included their “checklist to guide both homeowner and association.” In their checklist they acknowledged that their limited jurisdiction does not extend to contempt of court proceedings:

“If the petition item has been decided by a court or previously has been addressed in a hearing before the OAH, it cannot be revisited. OAH has no authority for contempt proceedings or enforcement of prior decisions. However, failure by a party to comply with a decision issued by the OAH may result in the other party seeking enforcement of the Administrative Law Judge's decision through a contempt of court proceeding in Superior Court.” (Emphasis added) (**IR 41, P. 47**)

The trial court erroneously found in its March 21, 2017 minute entry granting the motion to dismiss that “[p]ursuant to Ariz. Rev. Stat. Sec. 32-2199.02 the proper venue for a contempt of court hearing (seeking to enforce the administrative decision) is the Administrative Courts, not the Superior Court.” (IR 30). However, the powers of an administrative law judge under A.R.S. §32-2199.02 are clearly limited to ordering parties to abide by statute, condominium documents, community documents or contract provision at issue, and do not include the ability to hold contempt of court proceedings.

A.R.S. §32-2199.02.A. The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation. All monies collected pursuant to this article shall be deposited in the condominium and planned community hearing office fund established by section 32-2199.05 to be used to offset the cost of administering the administrative law judge function. If the petitioner prevails, the administrative law judge shall order the respondent to pay to the petitioner the filing fee required by section 32-2199.01.

A.R.S. §32-2199.02.B deals with the disposition and enforcement of an administrative law judge’s order.

“The order issued by the administrative law judge is binding on the parties unless a rehearing is granted pursuant to section 32-2199.04 based on a petition setting forth the reasons for the request for rehearing, in which case the order issued at the conclusion of the rehearing is binding on the parties. The order issued by the administrative law judge is enforceable through contempt

of court proceedings and is subject to judicial review as prescribed by section 41-1092.08.” (Emphasis added)

The statutory language of A.R.S. §32-2199.02.B is clear and unambiguous that an administrative law judge’s order can be enforced through the contempt of court proceedings. It is clear and unambiguous that A.R.S. §32-2199.02 does not convey any specific statutory authority (exclusive or not) for an administrative judge to hold contempt of court proceedings, nor is there any such authority found in A.R.S. Title 41, Chapter 6, or anywhere else in the Arizona Revised Statutes.

The Legislature did not give administrative law judges contempt of court jurisdiction, and as part of the Executive Branch they do not have any inherent judicial powers which are reserved to the courts of the Judicial Branch.

The Petitioner has the legal right to have the Superior Court enforce the Administrative Law Judge’s Order to comply with A.R.S. §33-1243.D through contempt of court proceedings. Accordingly, the trial court’s rulings and judgments should be vacated and this case remanded.

B. WITHOUT THE LEGISLATIVE BRANCH VESTING EXCLUSIVE JURISDICTION IN ANOTHER COURT, ARTICLE 6 SECTION 14.1 OF THE ARIZONA CONSTITUTION GIVES THE SUPERIOR COURT JURISDICTION OVER A.R.S. § 32-2199.02.B CONTEMPT OF COURT PROCEEDINGS.

Article 6 Section 14.1 of the Arizona Constitution provides that “[t]he superior court shall have original jurisdiction of: 1. Cases and proceedings in which exclusive jurisdiction is not vested not vested by law in another court.”

The trial court wrongly abandoned its jurisdiction under the Arizona Constitution in its ruling that “[p]ursuant to Ariz. Rev. Stat. Sec. 32-2199.02 the proper venue for a contempt of court hearing (seeking to enforce the administrative decision) is the Administrative Courts, not the Superior Court” (IR 30).

Even if A.R.S. §32-2199.02.B had vested contempt of court proceedings jurisdiction with an administrative law judge, only if the statute conveys exclusive jurisdiction to the administrative law judges would the Superior Court not have concurrent jurisdiction. Because A.R.S. §32-2199.02.B or any other statute does not vest any jurisdiction with an administrative law judge pursuant to Article 6 Section 14.1 of the Arizona Constitution the Superior Court has exclusive jurisdiction over contempt of court proceedings for the enforcement of an administrative law judge’s order under A.R.S. §32-2199.02.B.

The Arizona law is clear in this matter: The Superior Courts lack jurisdiction only if an exclusive jurisdiction is vested by law in another court.

The Respondents have not argued (nor could they) that exclusive jurisdiction is vested by law in another court and no such reasoning has been made by the trial court in its rulings. Therefore the trial court’s finding that it lacks jurisdiction is a wrong application of the law and contrary to the Arizona Constitution, and should be reversed. As a result, the trial court ruling dismissing the case, its judgments and orders should be vacated, and remanded.

C. AN AWARD OF ATTORNEYS FEES AND COSTS UNDER A.R.S. §§ 12-349 AND 12-350 AND A.R.C.P. RULE 11 REQUIRES THAT THE TRIAL COURT MAKE SPECIFIC FINDINGS TO WHICH THE TRIAL COURT FAILED TO DO.

A.R.S. §12-350 requires that the trial court “[i]n awarding attorney fees pursuant to section 12-349, the court shall set forth the specific reasons for the award.” (Emphasis added).

A.R.S. §12-349.A Except as otherwise provided by and not inconsistent with another statute, in any civil action commenced or appealed in a court of record in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party, including this state and political subdivisions of this state, if the attorney or party does any of the following:

1. Brings or defends a claim without substantial justification.
2. Brings or defends a claim solely or primarily for delay or harassment.
3. Unreasonably expands or delays the proceeding.
4. Engages in abuse of discovery.

The trial court’s minute entry rulings and judgments do not contain any specific findings that any of the four prerequisites of A.R.S. § 12-349 are present as required by A.R.S. § 12-350 and A.R.C.P. Rule 11. "In awarding attorney fees pursuant to § 12-349, the court shall set forth the specific reasons for the award ..."
Rogone v. Correia, 236 Ariz. 43, 50, ¶ 22 (App. 2014) citing *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 421, ¶ 28, 224 P.3d 230, 237 (App. 2010).

An award under A.R.C.P. Rule 11 also required the trial court to "make specific findings to justify its conclusion" *Wells Fargo Credit Corp. v. Smith*, 166

Ariz. 489, 497 (App. 1990). See *State v. Richey*, 160 Ariz. 564, 774 P.2d 1354 (1989).

In the Respondent's applications for fees and costs they abandoned their A.R.S. § 12-341.01 claim and in their replies did not dispute Petitioner's contention that the case did not arise out of contract. Therefore, it is undisputed that A.R.S. § 12-341.01 does not apply in this case, nor did they present any facts or evidence to support their claims under A.R.S. §§ 12-349, 12-350 and Rule 11, because such facts or evidence does not exist.

The trial court, in its ruling and judgments did not specifically reason its award of attorneys fees and costs, nor specifically explained its reasoning for awarding attorney fees and costs to the Respondents as required by A.R.S. §§ 12-349, 12-350 and Rule 11, nor did the trial court even cite A.R.S. §§ 12-349, 12-350 and Rule 11 as the basis for its judgments, nor did the Respondents bring any facts or evidence to support their claim, and none of the four prerequisites of A.R.S. § 12-349 are present in this case.

Without specific findings to justify its awards of attorney fees and costs, the trial court awards are contrary to statute and case law and should be vacated.

VII. CONCLUSION

The Petitioner as co-owner of a unit in the Hilton Casitas condominium has a legal right to have the HOA comply with A.R.S. §33-1201 et seq that includes the HOA

adopting an annual budget pursuant to A.R.S. §33-1243.D in order to set unit owner assessments under A.R.S. §33-1255.A which requires that “assessments shall be made at least annually, based on a budget adopted at least annually by the association.”

Because the HOA failed to comply with A.R.S. §33-1243.D, the Petitioner obtained an Administrative Law Judge’s Order that the HOA “shall fully comply with the applicable provisions of A.R.S. § 33-1243.D in the future.” (**IR 1, P. 11:26-28**).

The Petitioner has a right under A.R.S. §32-2199.02.B to have the Order enforced through a contempt of court proceedings in Superior Court, as Article 6 Section 14.1 of the Arizona Constitution mandates that the superior court shall have jurisdiction of “[c]ases and proceedings in which exclusive jurisdiction is not vested by law in another court.” Since there is no statute that vests contempt of court proceedings jurisdiction with the OAH administrative law judges, let alone exclusive jurisdiction, it is irrefutable that the superior court has exclusive jurisdiction over A.R.S. §32-2199.02.B contempt of court proceedings to enforce “[t]he order issued by the administrative law judge.” Accordingly, the trial court’s dismissal of the case for lack of jurisdiction should be reversed.

The awards of attorneys fees and costs must be vacated as there are not any specific findings that any of the four prerequisites of A.R.S. §§ 12-349 are found to

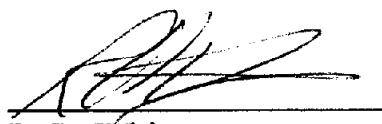
be present, as required by law, for the trial court's granting of attorneys' fees and costs under A.R.S. §§ 12-349 and 12-350, and Rule 11.

In the case before the Court it is impermissible for the court of general jurisdiction, the superior court, to deny the Petitioner his right to be heard when an administrative law judge has no exclusive statutory authority (in fact it has no jurisdiction at all) to conduct contempt of court proceedings.

It is emblematic that by law and in the interests of justice, that the Petitioner should not be left without a legal or judicial remedy. It is also of statewide interest that the Court determine who has jurisdiction over A.R.S. §32-2199.02.B contempt of court proceedings, because if petitioner cannot enforce an administrative law judge's order then Arizona Department of Real Estate should cease accepting petitions, and condominium unit owners and planned community homeowners should file directly into the superior courts.

Accordingly, the Petitioner respectfully requests this Court to reverse the trial court's dismissal of the case for lack of jurisdiction and vacate the judgments and all of the awards of attorneys' fees and costs to the Respondent, and order the trial court to take jurisdiction and hear the case.

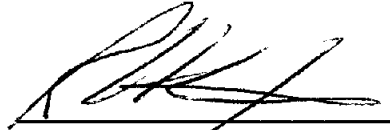
RESPECTFULLY SUBMITTED this 7th day of December, 2017.


R. L. Whitmer
Pro per

CERTIFICATE RE COMPLIANCE

Pursuant to Rule 14, Ariz.R.Civ.App.P., I certify that the attached brief uses proportionately-spaced type of 14 points or more, is double-spaced using a Time New Roman font, and contains 5,268 words.

DATED this 7th day of December, 2017.

A handwritten signature in black ink, appearing to read 'R. L. Whitmer', is written over a horizontal line.

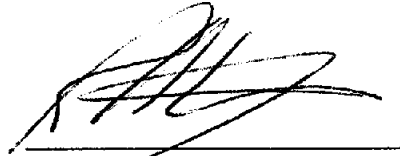
R. L. Whitmer
Pro per

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed with the Clerk of the Court, Arizona Court of Appeals on the 7th day of December, 2017;

And two copies of the foregoing were mailed on the 7th day of December, 2017, to:

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