IN THE
COURT OF APPEALS
OF THE STATE OF ARIZONA
DIVISION ONE

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 Hilton Casitas Homeowners Association, Respondents/Appellees.	Court of Appeals Case No. 1 CA-CV 2017-0543 Maricopa County Superior Court Case No. CV2016-055080

RESPONDENTS'/APPELLEES' ANSWERING BRIEF

Augustus H. Shaw, IV (#021593)
Patrick J. Whelan (#030994)
SHAW & LINES, LLC
4523 E. Broadway Road
Phoenix, Arizona 85040
Phone: 480.456.1500
Fax: 480.456.1515
Attorneys for Respondents/Appellees

TABLE OF CONTENTS

Table of Citations...II-III

Statement of the Case...1

Statement of Facts...2

Issues Presented for Review...5

Standard of Appellate Review...6

Argument...7

I. The Superior Court Properly Determined That It Did Not Have Jurisdiction Pursuant to A.R.S. §32-2199.02...8

II. The Superior Court Properly Determined That It Did Not Have Jurisdiction Pursuant to Article 6, Section 14.1 Under The Arizona Constitution............11

III. The Superior Court Did Not Abuse Its Discretion In Awarding Defendants' Reasonable Attorneys' Fees and Costs To Be Paid By Petitioner Pursuant To A.R.S. §§12-349, 12-350 and Rule 11, *Ariz. R. Civ. P.*, ...12

Request for Attorneys' Fees...20

Conclusion...20

Certificate of Service...21

Certificate of Compliance...22

TABLE OF CITATIONS

Cases | Page(s)

Associated Indemnity Corporation v. Warner,
143 Ariz. 567, 694 P.2d 1181 (1985)..6

Bennett v. Baxter Group, Inc.,
223 Ariz. 414, 422, ¶¶ 31–32, 224 P.3d 230, 238 (App. 2010)........................16

Busey v. Deshler Hotel Company,
130 F.2d 187 (6th Cir. 1942)..7

City of Casa Grande v. Arizona Water Company,
199 Ariz. 547, 555, ¶27, 20 P.3d 590, 598 (App. 2001)........................17

Cooter & Gell v. Hartmarx Corporation,
496 U.S. 384, 399, 405, 110 S.Ct. 2447, 2458, 2461, 110 L.Ed.2d 359 (1990).......14

Democratic Party v. Ford,
228 Ariz. 545, 548, ¶10, 269 P.3d 721, 724 (App. 2012)........................17

Forszt v. Rodriguez,
212 Ariz. 263, 265, ¶9, 130, P.3d 538, 540 (App. 2006)........................6

Franzi v. Superior Court,
139 Ariz. 556, 561, 679 P.2d 1043, 1048 (1984)........................6

General Electric Company v. Burton,
372 F.2d 108 (6th Cir. 1967)..7

Harris v. Reserve Life Insurance Company,
158 Ariz. 380, 762 P.2d 1334 (App. 1988)........................13, 14

Higgins v. Higgins,
194 Ariz. 266, 270, ¶12, 981 P.2d 134, 138 (App.1999)........................18

Hmielewski v. Maricopa County,
192 Ariz. 1, ¶14, 960 P.2d 47 (App. 1997)........................12

Kresock v. Gordon,
239 Ariz. 251, 370 P.3d 120 (App. 2016)......................................17, 18

James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Protection,
177 Ariz. 316, 868 P.2d 329 (App. 1993)..19

Miller v. Board of Supervisors of Pinal County,
175 Ariz. 296, 299, 855 P.2d 1357, 1360 (1993)..................................13

Phoenix Newspapers, Inc. v. Dep't. of Corrections,
188 Ariz. 237, 243, 934 P.2d 801, 807 (App. 1997)....................6, 13, 17

Solimeno v. Yonan,
224 Ariz. 74, 81, 227 P.3d 481, 488 (App. 2010).....................................16

State v. Chapple,
135 Ariz. 281, 297, n. 18, 660 P.2d 1208, 1224, n. 18 (1983)......................14

Statutes

Arizona Revised Statute §12-349..passim

Arizona Revised Statute §12-350..passim

Arizona Revised Statute §32-2199.02..passim

Constitutional Provisions

Article 6, § 14.1 of the Arizona Constitution..............................4, 5, 10, 11

Other Authorities

Arizona Administrative Code Rule 2-19-102(C)..................................2, 8

Arizona Rule of Civil Procedure 11..passim

STATEMENT OF THE CASE

The heart of this case concerns the inability of Petitioner to meet what is probably the most critical prerequisite of any legal system – the proper subject matter jurisdiction and venue requirement for a particular court. A notable and fundamental starting point for the resolution of any legal dispute involves a court's determination of whether or not it is authorized to hear the type of dispute being brought before it. In particular, a court must determine that it has proper subject matter jurisdiction and venue. The very purpose of jurisdiction and venue rules are to function as a means of allocating judicial business among different courts within the same system.

As succinctly stated in the original decision, Arizona Superior Courts only have jurisdiction to review an appeal from an administrative hearing decision. They do not have jurisdiction, nor are they the proper venue, to hear a contempt action over an administrative hearing decision. Accordingly, the issue on appeal examines the well-established procedural rules of the Superior Court, and in particular, a review of the procedural dealings and tactics that Petitioner insisted upon.

STATEMENT OF FACTS

The underlying dispute of this Appeal initiated in September of 2014, when R.L. Whitmer (hereinafter, "***Petitioner***") filed a grievance against his association, Hilton Casitas Homeowners Association[1], asserting a violation of A.R.S. §33-1243D.[2] After review, the administrative law judge ordered that the Association "fully comply with the applicable provisions of A.R.S. §33-1243D in the future (hereinafter, the "***ALJ Order***").[3]

After that, believing that the Association had failed to fully comply with the ALJ Order, Petitioner filed a complaint on December 19, 2016, with the Maricopa County Superior Court seeking enforcement of the ALJ Order through a contempt of court proceeding (hereinafter, the "***Lawsuit***"). (IR #1)[4] Petitioner claimed that the Superior Court had jurisdiction to hear the case under A.R.S. §32-2199.02(B).

Thereafter, on February 28, 2017, the Association filed a Motion to Dismiss for lack of jurisdiction, asserting that the Office of Administrative Hearings (hereinafter, the "***OAH***") was the proper venue for A.R.S. §32-2199.02 contempt of court proceedings pursuant to Arizona Administrative Code R2-19-102(C). (IR #22)

---

[1] 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 its president Michael Bengson (hereinafter, collectively the "***Association***" or "***Defendants***").
[2] A.R.S. §§41-2198.01 & 33-1201 permit a homeowner to file a petition for a hearing concerning violations of planned community documents or violations of statutes that regulate planned communities that will be heard before the Office of Administrative Hearings (hereinafter, the "***OAH***").
[3] *See, Administrative Law Judge Decision,* No. 14F-H1415004-BFS, dated January 7, 2015.
[4] "IR #__" refers to the Maricopa County Superior Court Clerk's Index of Record and Docket Number(s).

After the Motion to Dismiss was fully briefed, the Superior Court dismissed the Lawsuit, finding that:

> **Pursuant to A.R.S. §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 [Superior] 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.**
>
> **The [Superior] Court has the authority to issue contempt orders on Superior Court Orders, not orders of an Administrative Law Judge.**
>
> **The [Superior] Court ... has the authority to enforce injunctions. An order issued by an Administrative Law Judge is not an injunction. Therefore, the Court does not have jurisdiction to issue a contempt order on an order by an Administrative Law Judge.**

Accordingly, via its Ruling/Minute Entry Order of Dismissal dated March 20, 2017, the Superior Court granted the Association's Motion to Dismiss the Lawsuit/complaint for lack of subject matter jurisdiction pursuant to *Arizona Rule of Civil Procedure* 12(b)(1).[5] (IR #30)

However, Petitioner implored the Superior Court, pursuant to Rule 7.1(e), *Ariz. R. Civ. P.,* to reconsider its Ruling/Minute Entry Order of Dismissal based upon an apparent email he received from the acting director of the OAH on March 23,

[5] **<u>*Note:</u>** The above determination by the Superior Court is decidedly noteworthy, as it is, and has been, the foundation and crux of the Association's argument throughout the entire Lawsuit, including and especially, this Appeal at hand.

2017. (IR #32) Nevertheless, Petitioner's Motion for Reconsideration was subsequently denied by the Superior Court on May 12, 2017. (IR #46) And, on May 16th, the Superior Court entered a signed Judgment dismissing the Lawsuit and awarded the Association its reasonable attorneys' fees and costs.[6] (IR #47)

Still undeterred by the Court's ruling, Petitioner then motioned to the Superior Court to vacate its Judgment and grant a new trial. (IR #49) This Rule 59(a)(1)(H), *Ariz. R. Civ. P.* motion claimed that the Judgment was "contrary to law" since the Superior Court had proper jurisdiction pursuant to Article 6, Section 14.1 of Arizona Constitution. The Superior Court subsequently denied Petitioner's motion to vacate the Superior Court's Judgment entered May 16, 2017 (IR #47), and instructed the Association, via its June 20th Ruling (IR #52), to submit a request for an award of fees and costs incurred therein.

The Superior Court formally entered a final signed Judgment against Petitioner on July 24, 2017.[7] (IR #59) And, Petitioner filed the Appeal at hand on August 18, 2017 (IR #60), specifically appealing the Superior Court Judgments entered on May 16th (IR #47) and on July 24th (IR #59) – both of which are based on the Minute Entry Order of Dismissal entered on March 21st dismissing the Lawsuit (IR #30).

---

[6] Awarding Respondents… $23,176.50 in reasonable Attorney Fees and $356.70 in Costs of Suit.
[7] Awarding Respondents in the following amounts and terms in addition to the Judgment entered May 16, 2017: Attorney Fees of $4,775.00; Costs of Suit of $33.50; And for all reasonable costs and attorney fees incurred by Respondents after entry of this Judgment in collecting the amounts listed in this Judgment.

ISSUES PRESENTED ON REVIEW

There are two (2) main issues involved in the Appeal at hand. The crux of Petitioner's Appeal centers on his contention that the Superior Court: (i) wrongly/erroneously dismissed the Lawsuit citing lack of jurisdiction; and (ii) wrongly/erroneously awarded the Association its attorneys' fees and costs to be paid by Petitioner. Specifically, Petitioner seeks confirmation from the Court of Appeals as to:

1. **Does A.R.S. §32-2199.02(B) give the Arizona Office of Administrative Hearings exclusive jurisdiction for contempt of court proceedings?**

2. **Did the Superior Court have jurisdiction pursuant to Article 6, Section 14.1 of the Arizona Constitution?**

3. **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?**

STANDARD OF APPELLATE REVIEW

Because the Superior Court dismissed the Lawsuit pursuant to Rule 12(b)(6), *Ariz. R. Civ. P.*, an appellate court will review the order granting a motion to dismiss for abuse of discretion. *See*, *Franzi v. Superior Court*, 139 Ariz. 556, 561, 679 P.2d 1043, 1048 (1984).

Further, a review of the imposition of sanctions shall be reviewed for an abuse of discretion, viewing "the evidence in a manner most favorable to sustaining the award and affirm[ing] unless the trial court's finding . . . is clearly erroneous." *Phoenix Newspapers, Inc. v. Dep't. of Corrections*, 188 Ariz. 237, 243, 934 P.2d 801, 807 (App. 1997). A trial court abuses its discretion when no reasonable basis exists in the record from which the trial judge could award attorney's fees. *See, Associated Indemnity Corporation v. Warner,* 143 Ariz. 567, 694 P.2d 1181 (1985). Accordingly, this Court shall affirm the Superior Court's ruling "if it is correct for any reason apparent in the record." *Forszt v. Rodriguez*, 212 Ariz. 263, 265, 130 P.3d 538, 540 (App. 2006).

ARGUMENT

The appeal at issue concerns simple procedural matters, not substantive rights. The very brief history of the matter began when Petitioner originally secured an order from an administrative law judge of the OAH. Thereafter, when Petitioner believed the Association breached that ALJ Order, he filed suit in Superior Court to enforce that ALJ Order via a Superior Court contempt of court order.

Consequently, Petitioner's Lawsuit requested and sought enforcement of the administrative decision and order from another court. By his own declarations (in the caption and his prayer for relief in the Lawsuit's complaint), Petitioner filed the Lawsuit with the Superior Court seeking to enforce the ALJ Order. In his complaint, Petitioner claimed that the Superior Court had exclusive jurisdiction pursuant to Section B of A.R.S. §32-2199.02 and cites to non-binding case law.[8]

A.R.S. §32-2199.02(B) holds that an "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."

The Lawsuit's original complaint identifies one cause of action against Defendants: contempt of the ALJ Order. To reiterate, Petitioner was ***not*** seeking an

---

[8] "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." *See, General Electric Company v. Burton*, 372 F.2d 108 (6th Cir. 1967); *Busey v. Deshler Hotel Company,* 130 F.2d 187 (6th Cir. 1942) ****Both of which provide only persuasive authority.***

appeal or judicial review of the ALJ Order; he was asking another court to enforce the ALJ Order. For that reason, the germane instruction of Arizona's Administrative Court R2-19-102(C) is appropriate, which holds that "[i]f 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."

Accordingly, the Association reiterates that the proper venue for A.R.S. §32-2199.02, contempt of court proceedings for administrative decisions is the OAH – not the Superior Court – pursuant to A.A.C. R2-19-102(C).

I. The Superior Court Properly Determined That It Did Not Have Jurisdiction Pursuant to A.R.S. §32-2199.02.

As noted above, a fundamental canon among all legal systems involves the initial determination as to whether or not a given legal body is allowed to hear and decide a particular case. In general, the law of jurisdiction determines whether a court has the power, or authority, to hear and resolve a specific controversy. For a particular court to be an appropriate place to file a case, subject matter jurisdiction must exist. Consequently, a court does not have the right to hear cases that fall outside its jurisdiction.

Once a court determines that it has jurisdiction, it must then determine venue – whether the case has been filed in the proper court among all the courts in a legal system. A.R.S. §12-123 outlines the authority conferred to the Superior Court, expressly indicating that the Superior Court,

> [s]hall have original and concurrent jurisdiction as conferred by the constitution, and concurrent jurisdiction with justices of the peace of misdemeanors where the penalty does not exceed a fine of two thousand five hundred dollars or imprisonment for six months.

As an initial matter, it should be noted that the Lawsuit's original complaint did not explicitly assert that the Superior Court had jurisdiction over the matter. Petitioner asserted that A.R.S. §12-861 and Rule 65(j), *Ariz. R. Civ. P.*, governed. However, it is clear that Petitioner's erroneous citations did not confer jurisdiction to the Superior Court. In fact, the Superior Court never had proper authority to hear Petitioner's Lawsuit.

A.R.S. §12-861 provides the Superior Court with jurisdiction when:

> A person who willfully disobeys a lawful writ, process, ***order or judgment of a superior court*** by doing an act or thing therein or thereby forbidden, if the act or thing done also constitutes a criminal offense, shall be proceeded against for contempt.

(***Emphasis*** added).

Again, to reiterate for purposes of clarity, Petitioner is seeking to enforce the **ALJ Order**… not an "order or judgment **of a superior court**." Further, the acts allegedly violating the ALJ Order in no way "constitute a criminal offense." As such, A.R.S. §12-861 did not, and does not, confer jurisdiction upon the Superior Court to hear a contempt action regarding the ALJ Order (*e.g.,* an order issued by a separate court).

And, as stated above, A.R.S. §32-2199.02 discusses administrative hearing

"[o]rders; penalties; [and] disposition" and subsection (B) states:

> . . . 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).

Following the direction of A.R.S. §32-2199.02(B), it is important to determine what section 41-1092.08 authorizes. A.R.S. §41-1092.08(H) states:

> A party may ***appeal a final administrative decision pursuant to title 12, chapter 7, article 6,*** except as provided in section 41-1092.09, subsection B and except that if a party has not requested a hearing upon receipt of a notice of appealable agency action pursuant to section 41-1092.03, the appealable agency action is not subject to judicial review.

(***Emphasis*** added).

And, "title 12, chapter 7, article 6" only addresses (as it is titled) "**Judicial Review** of Administrative Decisions." As a result, the Superior Court is conferred jurisdiction to review final administrative decisions, ***only in an appeal capacity***, pursuant to A.R.S. §41-1092.08(H) – which is distinctly different from the relief sought by Petitioner in the Lawsuit.

Accordingly, the proper venue for such contempt of court hearing would be the original OAH, pursuant to A.R.S. §32-2199.02(B); not the Superior Court.

II. The Superior Court Properly Determined That It Did Not Have Jurisdiction Pursuant to Article 6, Section 14.1 Under The Arizona Constitution.

Article 6, Section 14.1 of the Arizona Constitution provides that "[t]he Superior Court shall have original jurisdiction of … [c]ases and proceedings in which exclusive jurisdiction is not vested not vested by law in another court." Accordingly, Petitioner is correct in stating that "Arizona law is clear in this matter"… and that "[t]he Superior Courts lack jurisdiction only if an exclusive jurisdiction is vested by law in another court."

However, in a common theme of this matter, Petitioner fails to connect and understand the jurisdictional breakdown articulated by both the Association and the Superior Court. It is quite clear that the Association and the Superior Court both interpret the applicable authorities and Arizona law the same: the Superior Court lacks jurisdiction to hear the Lawsuit because "exclusive jurisdiction is vested by law in another court" – the OAH – pursuant to A.R.S. §32-2199.02(B).

In sum, and as reiterated from the Association's original Motion to Dismiss, the Superior Court was never afforded jurisdiction by the statute or constitution and it is clear that the Superior Court properly dismissed the Lawsuit for lack of proper jurisdiction.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN AWARDING DEFENDANTS' REASONABLE ATTORNEYS' FEES AND COSTS TO BE PAID BY PETITIONER PURSUANT TO A.R.S. §§12-349, 12-350 AND RULE 11, *ARIZ. R. CIV. P.*

The crux of Petitioner's argument challenging the Superior Court's award of attorneys' fees is that the Superior Court did not make the necessary findings required by A.R.S. §12-350, to support its imposition of sanctions under A.R.S. §12-349 and Rule 11, *Ariz. R. Civ. P.* However, it is clear that the Superior Court did not abuse its discretion in awarding the Association its reasonable attorneys' fees pursuant to A.R.S. §12-349, A.R.S. §12-350 and Rule 11(a), *Ariz. R. Civ. P.*

It appears that Petitioner does not necessarily argue against the award of the attorneys' fees under A.R.S. §12-349, but argues for a very literal application of A.R.S. §12-350 – that the Superior Court did not explicitly list out the specific reasons in the judgments awarding the Association its attorneys' fees.

Petitioner brought this exact argument before the Superior Court before in his objection to the Association's *China Doll* Application; and notably before the Superior Court's decision to award the Association its attorneys' fees. From a practical view, it appears evident that the Superior Court took such assertion into consideration in requiring Petitioner to pay the Association's attorneys' fees.

Arizona courts are authorized by rule, statute, and the common law to sanction parties and counsel who engage in untruthful, abusive, wasteful, or harassing conduct in the course of proceedings before the court. *See,* Rule 11, *Ariz. R. Civ. P.;*

A.R.S. §12-349; *Hmielewski v. Maricopa County*, 192 Ariz. 1, ¶14, 960 P.2d 47 (App. 1997). By statute, "[i]n awarding attorney fees pursuant to [A.R.S. §]12-349, the court shall set forth the specific reasons for the award." A.R.S. §12-350. Where "specific reasons" are required (when awarding attorneys' fees under A.R.S. §12-349), such reasons "need only be specific enough to allow an appellate court 'to test the validity of the judgment.'" *Phoenix Newspapers*, 188 Ariz. at 243, 934 P.2d at 807 (App. 1997) (quoting *Miller v. Board of Supervisors of Pinal County*, 175 Ariz. 296, 299, 855 P.2d 1357, 1360 (1993)). While A.R.S. §12-350 requires specific reasons for such an award, it "**mandates no particular form for these findings**." *Id.* (**emphasis** added)

As noted in *Harris v. Reserve Life Insurance Company*, it is for the trial court, not the Appeals Court, to resolve certain considerations[9] in assessing the reasons for an award. *Id.* 158 Ariz. 380, 762 P.2d 1334 (App. 1988). Further, the *Harris* Court reasoned that a decision is discretionary...

> because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more

[9] *E.g.,* The extent of any effort made to determine the validity of a claim before the claim was asserted; The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid; The availability of facts to assist a party in determining the validity of a claim or defense; The relative financial positions of the parties involved; Whether the action was prosecuted, in whole or in part, in bad faith; Whether issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict; The extent to which the party prevailed with respect to the amount and number of claims in controversy; and The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court. *Harris v. Reserve Life Insurance Company,* 158 Ariz. 380, 762 P.2d 1334 (App. 1988).

> immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to 'look over the shoulder' of the trial judge and, if appropriate, substitute our judgment for his or hers.

Id. (quoting *State v. Chapple*, 135 Ariz. 281, 297, n.18, 660 P.2d 1208, 1224 (1983)).

And, according to *Cooter & Gell v. Hartmarx Corporation*, appeals challenging the imposition of sanctions pursuant to Rule 11 typically review the trial court's selection of a sanction under an abuse of discretion standard and its findings of fact under a clearly erroneous standard, are, in practice, indistinguishable in these aspects of Rule 11 proceedings. *Id.* 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990) (holding that in appeals of Rule 11 proceedings, a deferential standard applies to the lower court's factual and legal conclusions, considering that distinguishing between legal and factual issues is "particularly difficult in the Rule 11 context[,]" and that the trial court "is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11.") *Id.* 496 U.S. at 401, 405, 110 S.Ct. at 2459, 2461.

Here, the Superior Court expressly requested from the Association, and subsequently granted, the reasonable attorneys' fees associated with responding to

the motions in the Lawsuit. As such, it is evident that the Superior Court issued this order (reiterating the clear sentiment as to the jurisdictional validity of Petitioner's Lawsuit and awarding the Association's request for attorneys' fees against Petitioner), only after considering the voluminous filings and oral argument of the record. Pursuant to even a cursory review of the record, it is clear that Petitioner's actions required the Association to spend many hours and thousands of dollars in litigation. Petitioner pressed forward, unreasonably expanding the proceedings by forcing the Association's counsel and the Judge to repeatedly reiterate the jurisdictional and venue limitations of the Superior Court.

Contrary to Petitioner's argument that the Association's argument is nothing more than an intentional misreading of the words in A.R.S. §12-349, the plain language of that statute required the Superior Court to assess reasonable attorneys' fees in favor of the Association and against Petitioner. Given this statutory language stating "the court shall assess reasonable attorney fees" if sanctions are assessed, A.R.S. §12-350, Petitioner's arguments are groundless.

Even assuming the "specific reasons" requirement of A.R.S. §12-350 applies to the imposition of sanctions under A.R.S. §12-349, the Superior Court's minute entry orders provide those reasons. Petitioner's litigious behavior, as well as the other forms of conduct as noted in the Superior Court's rulings, unreasonably delayed the proceedings in violation of A.R.S. §12-349(A)(3). Sanctions are

therefore warranted under the Superior Court's statutory, rule based, and inherent powers.

i. The Superior Court's Findings Are Supported By The Record.

Petitioner fails to realize that, based on the record of the case, the Superior Court found that Petitioner "[u]nreasonably expand[ed] or delay[ed] the proceeding," as required by A.R.S. §12-349(A)(3). Under Rule 11, the court's inquiry into violations of the rule should ordinarily be restricted to the record then before the court. Rule 11, *Ariz. R. Civ. P.* "Under §12-349(A)(3), the relevant question is whether a party's or attorney's [Petitioner's] actions caused unreasonable delay and expansion of the proceedings." *Solimeno v. Yonan*, 224 Ariz. 74, 81, 227 P.3d 481, 488 (App. 2010).

The record amply supports the Superior Court's findings and imposition of sanctions under A.R.S. §12-349(A)(3). *See, Bennett v. Baxter Group, Inc.*, 223 Ariz. 414, 422, ¶¶ 31–32, 224 P.3d 230, 238 (App. 2010) (finding that, after viewing the evidence in a manner most favorable to sustaining the award, the Superior Court reasonably could have found record-supported sanctions under A.R.S. §12-349).

The primary basis for sanctions imposed is A.R.S. §12–349. The statute provides that a court "shall assess" as sanctions "reasonable attorney[s'] fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party." A.R.S. §12–349(A). The statute

differentiates between "attorney[s'] fees" (imposed as sanctions) and "damages" (which were not the case here).

Petitioner asserts that the "[superior] court was deceived" by the Association's counsel as to the application of A.R.S. §12-349. However, contrary to Petitioner's contention, the plain language of A.R.S. §12-349(A) shows that the Association was entitled to an award of reasonable attorneys' fees.

As applied, the statute provides that, "if the attorney or party . . . [u]nreasonably expands or delays the proceeding," the Superior Court "***shall*** assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars." A.R.S. §12-349(A)(3) (***emphasis*** added). Under this portion of A.R.S. §12-349, "the fee award is mandatory... The judge must award fees" where factually supported. *See, Phoenix Newspapers*, 188 Ariz. at 243, 934 P.2d at 807; *see also, Democratic Party v. Ford*, 228 Ariz. 545, 548, ¶10, 269 P.3d 721, 724 (App. 2012) (stating if party makes showing required by A.R.S. §12-349, "the award of attorney fees becomes mandatory"); *City of Casa Grande v. Arizona Water Company*, 199 Ariz. 547, 555, ¶27, 20 P.3d 590, 598 (App. 2001) (noting A.R.S. §12-349(A) "mandates an award of attorney's fees if a party" violates the statute).

Rule 11 sanctions can be imposed on a lawyer, the client, or both. The sanctions are partly compensatory and partly punitive. *See*, *Kresock v. Gordon*, 239

Ariz. 251, 370 P.3d 120 (App. 2016). Such sanctions operate as a deterrent that are imposed only on those who violate the rule, and take the form of cost-shifting – compensating a party for expenses incurred because of an opponent's unnecessary, wasteful, or abusive conduct. *Id.*

Rule 11(a), *Ariz. R. Civ. P.,* requires that every pleading, motion and other paper (which includes discovery papers) be signed by at least one attorney of record for the party on whose behalf it is submitted, or by the unrepresented party. Under the Rule, the signature on every filed document constitutes a certification by the party and/or attorney that the pleading "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose... to harass or to cause unnecessary delay or needless increase in the cost of litigation." Rule 11(a), *Ariz. R. Civ. P.*

In Arizona, pro per litigants, such as the Petitioner, are held to the same standards as attorneys regarding procedures, statutes, rules, and legal principles. *Higgins v. Higgins*, 194 Ariz. 266, 270, ¶12, 981 P.2d 134, 138 (App. 1999). As such, Petitioner is held responsible for knowing and understanding the relevant statutes and rules of civil Procedure regarding the award of attorney's fees and costs.

It is also noted that although A.R.S. §12-350 requires a recitation of "the specific reasons" in awarding attorney fees under A.R.S. §12-349, there is no similar

requirement for imposing "double damages [sanctions]...against an attorney or party" "at the court's discretion" under A.R.S. §12-349. Having found that Petitioner's actions warranted sanctions, the Superior Court was statutorily required to award the Association its reasonable attorneys' fees.

Notwithstanding Petitioner's unreasonable application of sanctions, the record shows that the award of attorneys' fees is justified under Rule 11, meaning the "specific reasons" requirement in A.R.S. §12-350 was not implicated. Accordingly, the predicate for Petitioner' challenge to the Superior Court's findings — that the Court was required by A.R.S. §12-350 to identify "the specific reasons" for imposing sanctions under A.R.S. §12-349 — is lacking.

In short, Rule 11 required Petitioner to undertake some reasonable effort to assure that the matter asserted before the court not be illusory, frivolous, unnecessary or insubstantial. *See*, *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Protection,* 177 Ariz. 316, 868 P.2d 329 (App. 1993). However, as clearly indicated by the record and explicitly articulated by the Superior Court's March 20th ruling, even a fairly simple reading of the governing rules of civil procedure would have informed Petitioner that the Superior Court did not have jurisdiction.

It is therefore clear that Petitioner brought the Lawsuit without substantial justification in violation of A.R.S. §12-349(A)(1) and lacked a good faith and nonfriviolous basis in violation of Rule 11(b)(2). Petitioner engaged in conduct that

served only to increase the cost of litigation, delay proceedings, waste judicial resources and harass the Association.

REQUEST FOR ATTORNEYS' FEES

Pursuant to Arizona Rule of Civil Appellate Procedure 21, the Association requests its fees and costs incurred on this Appeal.

CONCLUSION

Petitioner's arguments and authorities afford no basis or reason to depart from the Superior Court's analysis and conclusion. This Appellate Court should affirm.

RESPECTFULLY SUBMITTED this 16th day of January, 2018.

SHAW & LINES, LLC

/s/ Augustus H. Shaw, IV
Augustus H. Shaw, IV, Esq.
Patrick J. Whelan, Esq.
4523 E. Broadway Road
Phoenix, Arizona 85040
Attorneys for Respondents/Appellees