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I. SUMMARY

This appeal is about the trial court's erroneous ruling dismissing this case, for lack of A.R.S. § 32-2199.02 contempt of court proceedings jurisdiction¹.

The Appellees' arguments in their answering brief ("AB") are wrong as a matter of law because: 1) the superior court has A.R.S. § 32-2199.02 contempt of court proceedings jurisdiction under Article 6, Section 14.1 of the Arizona Constitution; 2) A.R.S. § 32-2199.02 does not convey "exclusive jurisdiction" of contempt of court proceedings to the Arizona Office of Administrative Hearings ("OAH"); and, 3) an administrative law judge cannot use Arizona Administrative Code Article 1 § R2-19-102.C to take contempt of court proceedings jurisdiction.

Additionally, the Appellees wrongly argue that an award of attorneys fees under A.R.S. §§ 12-349 and 12-350 does not require specific findings; and that the trial court properly imposed Ariz. R. Civ. P. Rule 11, as the facts are that the Appellant's actions and filings in this matter were made in good faith and consistent with OAH's guidelines²; and because contempt of court proceedings jurisdiction is vested in the superior court by the Constitution.

Accordingly, the trial court's ruling and the judgments should be vacated.

¹ Contrary to the trial court's ruling (**IR 30**), the Appellees misrepresented that this case was dismissed for failure to state a claim "pursuant to Rule 12(b)(6)" (**AB, p.6**),

² Homeowner guidelines on the OAH website (www.azoah.com/Vol42.html): "OAH has no authority for contempt proceedings or enforcement of prior decisions. However failure by a party to comply with a decision issued by 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" (**IR 27, p.14**).

II. ARGUMENT

The trial court dismissed the case for “lack of subject matter jurisdiction pursuant to Rule 12(b)(1)” (**IR 30, p.2**), “A superior courts grant of a motion to dismiss for lack of subject matter jurisdiction is reviewed de novo.” *M-11 Ltd. v. Daniel Gommard & Ariz. Dep't of Transp.* 235 Ariz. 166, 168 ¶6, 330 P.3d 356 (Ariz. Ct. App. 2014). *Church of Isaiah 58 Project of Ariz., Inc. v. La Paz County*, 233 Ariz. 460, 462, ¶ 9, 314 P.3d 806, 808 (App.2013).

The Appellees incorrectly argue that this case is about “simple procedural matters, not substantive rights” (**AB p. 7**). They are wrong. Jurisdiction is a material issue. This issue is substantive and addressed by the Constitution itself. This case started by an action to protect the rights of a property owner to have their HOA comply with the requirements of the A.R.S. § 33-1243.D by bringing an action through the Arizona Department of Fire, Building and Life Safety³, and securing Administrative Law Judge Decision No. 14F-H1415004-BFS (“Order”), and to have that Order enforced by contempt of court proceedings pursuant to A.R.S. § 32-2199.02.B.

The primary question in this case is about the jurisdiction of the superior court to enforce an administrative law judge’s order through contempt of court

³ 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.

proceedings pursuant to A.R.S. § 32-2199.02.B under Article 6 Section 14.1 of the Arizona Constitution that provides “[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 Constitution did not grant jurisdiction to administrative law judges for contempt of court proceedings. A.R.S. § 32-2199.02.B provides for an order of an administrative law judge to be enforced “through contempt of court proceedings.” Therefore, the Petitioner has the right to petition the superior court to enforce the order through contempt of court proceedings.

As the Arizona Constitution clearly grants jurisdiction to the superior court, the rulings and judgments in this case should be reversed.

A. THE SUPERIOR COURT UNQUESTIONABLY HAS JURISDICTION PURSUANT TO ARTICLE 6, SECTION 14.1 UNDER THE ARIZONA CONSTITUTION.

The Appellees’ argument (**AB**, p. 11) that the superior court properly determined that it did not have subject matter jurisdiction pursuant to Article 6, Section 14.1 of the Constitution is wrong as a matter of law.

Article 6, Section 14.1 of the Arizona Constitution provides that “[t]he superior court shall have original jurisdiction of: 1. Cases and proceedings⁴ in which exclusive jurisdiction is not vested by law in another court.” (Emphasis

⁴ Pursuant to A.R.S. §32-2199.02.B “... an administrative law judge’s order is enforced through “contempt of court proceedings ...” (Emphasis added).

added). The Appellees have failed to cite a specific constitutional citation that vests exclusive jurisdiction over “contempt of court proceedings” in the administrative law tribunals, because the Arizona Constitution did not vest any such jurisdiction (exclusive or not) in the administrative law tribunals.

Therefore, only the superior court has jurisdiction here, as the Arizona Supreme Court has determined that “The jurisdiction of the Superior Court is general because it has the power or jurisdiction to hear and determine all classes of cases and controversies except those otherwise carved out specifically by the Constitution and placed in an inferior court.” *Hash's Estate v. Henderson*, 109 Ariz. 174, 178-79, 507 P.2d 99, 103-04 (1973). “The superior courts have jurisdiction in all cases and proceedings in which jurisdiction shall not have been vested exclusively in some other court.” *Arizona Corp. Commission v. Mountain States Tel. & Tel. Co* (1951)71 Ariz. 404, 228 P.2d 749.

Since there is no constitutional “carve out” of jurisdiction over “contempt of court proceedings,” only the trial court has the subject matter jurisdiction in this case. Arizona courts have consistently found subject matter jurisdiction to be “the power to hear and determine cases of the general class to which the particular proceedings belong ...” *First National Bank Trust Co. v. Pomona Mach. Co.*, 107 Ariz. 286, 288, 486 P.2d 184, 186 (1971); citing *Arizona Public Service Co. v. Southern Union Gas Co.*, 76 Ariz. 373, 265 P.2d 435 (1954); *Tube City Mining*

Milling Co. v. Otterson, 16 Ariz. 305, 146 P.2d 203 (1914). *see also State ex rel Neely v. Rodriguez*, 165 Ariz. 74, 76 n. 4, 796 P.2d 876, 878 n. 4 (1990) ("Subject matter jurisdiction relates to the constitutional or statutory power of a court to decide a case."); *State v. Chacon*, 221 Ariz. 523, ¶ 5, 212 P.3d 861 (2009) "Subject matter jurisdiction is the power of a court to hear and determine a controversy.", quoting *Marks v. LaBerge*, 146 Ariz. 12, 15, 703 P.2d 559, 562 (App. 1985).

The superior court lacks jurisdiction only if the Arizona Constitution grants exclusive jurisdiction to another court, and there is no such provision in the Arizona Constitution granting "contempt of court proceedings" jurisdiction to administrative law tribunals. Accordingly, the trial court's judgments, dismissing the case pursuant to Rule 12(b)(1) for "lack of subject-matter jurisdiction" should be reversed and remanded.

B. A.R.S. §32-2199.02 DOES NOT ELIMINATE THE SUPERIOR COURT'S JURISDICTION.

In their answering brief, the Appellees wrongly argue that the "Superior Court properly determined that it did not have jurisdiction pursuant to A.R.S. §32-2199.02." A.R.S. §32-2199.02.A clearly limits the powers of administrative law judges to ordering parties "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." A.R.S. §32-2199.02.B provides that an

administrative law judge's order is binding on the parties unless it is petitioned to be reheard pursuant to A.R.S. § 32-2199.04. Which, if reheard, the order issued at rehearing is binding. However, A.R.S. § 32-2199.02.B goes on to state:

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.

The Appellees bizarrely and wrongly contend that because A.R.S. § 41-1092.08(H) cites A.R.S. § Title 12, Chapter 7, Article 6 for judicial review, the superior court is excluded from having A.R.S. § 32-2199.02.B contempt of court proceedings jurisdiction. The constitutional jurisdiction of the superior court is not eliminated because A.R.S. § 41-1092.08 provides a process for a judicial review of administrative law decisions by the superior court.

The statute does not state, nor imply that an administrative law judge has the power to enforce administrative law orders through contempt of court proceedings, and certainly cannot be construed as conveying any constitutional grant of jurisdiction. The Arizona Supreme Court has held that in determining jurisdiction, the presumption is in favor of retention rather than divestiture of jurisdiction. See *Dockery v. Central Arizona Light & Power Co.*, 45 Ariz. 434, 443, 45 P.2d 656, 659 (1935); *Varnes v. White*, 40 Ariz. 427, 431, 12 P.2d 870, 871 (1932); *State v. Villados*, 55 Hawaii 394, 520 P.2d 427, 430 (1974); *Paley v. Coca Cola Co.*, 389 Mich. 583, 593, 209 N.W.2d 232, 235-36 (1973). "Because the divestiture of

jurisdiction is a serious matter, before a party can claim that an act or statute has the effect of divesting jurisdiction [...] the law in favor of such divestment must be clear and unambiguous.” *Villados*, supra, 520 P.2d at 430. Any doubt is resolved in favor of retention of jurisdiction. *Paley*, supra, 389 Mich. at 593, 209 N.W.2d at 235. The Appellees have no basis to infer that the legislature meant to divest the superior court of jurisdiction without the legislature explicitly and clearly enunciating such intent. There is no such language in A.R.S. § 32-2199.02 divesting the superior court of jurisdiction, and if it was, it would not be constitutional because it could not carve out the superior court jurisdiction pursuant to the Arizona Constitution for the simple reason that only a constitutional amendment can carve out the superior court’s jurisdiction, and it can only be effectuated by the Legislative Branch pursuant to Article 4, Section 1(1) of the Arizona Constitution⁵, which requires a vote of the people, as part of the Legislative Branch.

While A.R.S. § 32-2199.02B does not vest jurisdiction in the administrative law judge, its provisions expressly grants a relief of enforcement of the administrative law judge’s order through contempt of court proceedings. Therefore, the Petitioner has the right to seek that relief and the superior court

⁵ Ariz. Constitution Article 4, Section 1(1): “The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature;”.

should take jurisdiction because the Arizona Constitution clearly vested that jurisdiction in the superior court.

C. THE AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO A.R.S. §§ 12-349 AND 12-350, AND RULE 11 ARE WRONG AS A MATTER OF LAW.

The Appellees cite *Phoenix Newspapers, Inc. v. Dep 't. of Corrections*, 188 Ariz. 237, 243, 934 P.2d 801, 807 (App. 1997) as their basis for an abuse of discretion review, but contrary to their argument the Court reviewed that case de novo.

“However, the application of the fee statute is a question of law subject to de novo review. See *Roberts v. State*, 179 Ariz. 613, 880 P.2d 1159 (App.1994). We hold that the trial court erred in awarding attorneys' fees pursuant to A.R.S. section 12-349.” *Phoenix Newspapers, Inc. v. Dep 't. of Corrections*, 188 Ariz. 237, 243, 934 P.2d 801, 807 (App. 1997).

The Appellate Court ruled “Because all three elements-groundlessness, bad faith and intent to harass-must be present, Judge Galati misapplied the statute by awarding attorneys' fees to defendant without the requisite finding of intent to harass and without a correct basis for finding the claim groundless. Accordingly, we reverse the award of attorneys' fees pursuant to A.R.S. section 12-349.” (Id.).

Subsequent to *Phoenix Newspapers*, the Legislature added “[e]ngages in abuse of discovery” as a fourth prerequisite to A.R.S. § 12-349, and now requires

at least one of the prerequisites must be present, but as stated in the Opening Brief, A.R.S. §12-350 still 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 of any of the four prerequisites of A.R.S. § 12-349 to be 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).

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 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 award of attorneys fees.

The Appellees' answering brief fails to present or refer to any findings that any of the four prerequisite elements pursuant to A.R.S. § 12-349 are present in the record, because the trial court did not make any. Without specific findings to justify its awards of attorney fees and costs, the trial court's award is contrary to statute and case law.

The Appellees' claim that the trial court awarded sanctions pursuant to A.R.S. § 12-349 is wrong because the trial court did not make any findings, but also because A.R.S. § 12-349 does not provide a basis for an award of attorneys' fees against a party whose unsuccessful claim was nonetheless fairly debatable. "See *City of Casa Grande*, 199 Ariz. at 556, ¶ 30, 20 P.3d at 599 (upholding the trial court's denial of attorneys' fees in a statutory interpretation case requiring considerable analysis because the unsuccessful party's position was fairly debatable) (citing *Lynch v. Lynch*, 164 Ariz. 127, 132-33, 791 P.2d 653, 658-59

(App.1990)). Therefore, the award of attorneys' fees was improper. *Johnson v. Mohave County* 206 Ariz. 330, 334, ¶19, 78 P.3d 1051, 1054 (App. 2003)

Accordingly, because jurisdiction is vested by the Constitution in the superior court, and the Appellant's filing were made in good faith following the OAH's Homeowner guidelines, the trial court judgments should be vacated, even if this Court will affirm the trial court's ruling that it lacks jurisdiction.

D. THE APPELLEES' ATTORNEYS' ACTIONS IN THIS CASE ARE WORTHY OF SANCTIONS UNDER ARIZ. R. CIV. APP. P. RULE 25.

As the Appellees did not dispute the statement of facts in the Opening Brief, they have therefore conceded that the HOA and its purported president failed to abide by the Administrative Law Judge's Decision/Order No. 14F-H1415004-BFS to comply with A.R.S. § 33-1243.D in adopting and then later amending the HOA's 2016 annual budget, and that the claim against them was properly presented and stated.

When confronted with the OAH's "Homeowner Petitions Against An Association" article to educate the public (**IR 27, p. 14**) that was presented to the trial court in the Petitioner's response to the motion to dismiss, the Appellees falsely contended in their reply that an administrative law judge may use the Ariz. Administrative Code Rule R-2-19-102(C), to have jurisdiction over contempt of court proceedings (**IR 29, p.2:6-10**). Then again in their response to the motion

for reconsideration, the Appellees restated that “pursuant to R-2-19-102(C), an Administrative Law Judge may issue a contempt order over contempt proceedings of the Administrative Orders” (IR 34, p.3:6-9). In both their trial court pleadings and their answering brief, the Appellees have failed to provide a constitutional and statutory basis for an administrative law tribunals having exclusive contempt jurisdiction, because there is no such provision in the Constitution or statute.

However, in their Rule 59 response, the Appellees abandoned that claim by stating: “Petitioner’s only option at this point is to appeal the Court’s Judgment or file a new complaint and/or petition⁶ 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).

It is obvious that the Appellees’ attorneys purposely ignored the constitutional provision vesting jurisdiction in this matter in the superior court. When challenged in March 2017, they initially put forward the legal theory that an administrative law judge could use an administrative rule promulgated under the Arizona Administrative Procedure Act to gain jurisdiction. Then in June 2017 they abandoned it, and now they have reversed their reversal in their answering brief!

It is also obvious that the Appellees’ attorneys have no problem filing

⁶ The Appellant filing another petition with OAH is only a useless exercise meant to needlessly expand and delay the proceedings, as OAH’s Homeowners guidelines state: “If the petition item has been decided by a court or previously has been addressed in a hearing by OAH, it cannot be revisited.” (IR 27, p. 14; & www.azoah.com/Vol42.html).

unjustified pleadings as they did in 1CA-CV 17-0741, filed by the Appellees and their attorneys, which this Court dismissed on its own motion for lack of jurisdiction (Appendix A).

The Appellees, in a desperate attempt to mislead the Court that this case should be reviewed for “abuse of discretion” (AB p.6), falsely contend in their answering brief that the case was dismissed pursuant to Rule 12(b)(6) “failure to state a claim upon which relief can be granted”, as opposed to the trial court’s March 21, 2017 minute entry which clearly states:

“IT IS ORDERED granting Respondents’ Motion to Dismiss Petitioner’s Complaint for lack of subject matter jurisdiction pursuant to Ariz. R. Civ. P. 12(b)(1).” (**IR 30, p. 2**)

As the Appellees’ attorneys’ incorporated the above minute entry into their form of judgment as signed by the trial court (**IR 47, p. 1:22-23**), there can be no doubt that their misrepresentation in their answering brief was intentional, and worthy of Rule 25 sanctions. Ariz. R. Civ. App. P. Rule 25 is the appellate mirror of Ariz. R. Civ. P. Rule 11. Rule 11(a) 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.

As 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.*

It is clear that the Appellees' attorneys' intent in this case is to frustrate the Appellant's right to have the Order enforced pursuant to A.R.S. § 32-2199.02. Instead of correcting the HOA's failure to abide by the Order and comply with A.R.S. § 33-1243.D⁷, they filed a motion to dismiss falsely contending that "the Superior Court is not conferred jurisdiction by the constitution" (**IR 22, p. 3:18-19**), and have made blatant misrepresentations to this Court.

Accordingly, this Court should impose Ariz. R. Civ. App. P. Rule 25 sanctions on the Appellees' attorneys for their misconduct.

⁷ The HOA continues to flaunt the Order to comply with A.R.S. § 33-1243.D.

III. CONCLUSION

Article 6 Section 14.1 of the Arizona Constitution mandates that the superior court shall have original jurisdiction of “[c]ases and proceedings in which exclusive jurisdiction is not vested by law in another court.” Since there is no constitutional provision and statute that vests contempt of court proceedings jurisdiction with administrative law tribunals, it is irrefutable that the superior court has exclusive jurisdiction over A.R.S. §32-2199.02.B contempt of court proceedings for the enforcement of “[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 a result of reversing the trial court’s ruling regarding the jurisdiction. Even if this Court will affirm the trial court’s ruling that it lacks jurisdiction, the Appellant’s filings in this matter were based on the OAH’s guidelines and in good faith, and there are not any specific findings of any of the four prerequisites of A.R.S. §§ 12-349 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. An award without specific findings is contrary to the law and should be vacated.

Given that the Appellees do not dispute the facts that they failed to comply with the Order which gave rise to this action, they, through their attorneys during

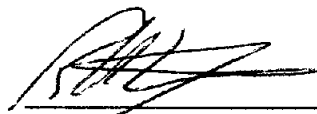
this appeal and at the trial court proceedings, have defended this case without substantial justification, and have unreasonably expanded the judicial process. The Appellees and their attorneys have damaged the Appellant by causing the dismissal of the Appellant's rightful relief.

The Appellant is self-represented and not entitled to attorney fees, yet has been forced to expend countless hours pursuing his rights to have the HOA comply with statute and the Judge's order to comply with A.R.S. § 33-1243.D, and writing the briefs in this appeal. It would only be just for this Court to sanction the Appellees' attorneys pursuant to Rule 25.

Pursuant to Arizona Rule of Civil Appellate Procedure Rule 21, the Appellant respectfully requests all of his costs incurred in this Appeal (including, but not limited to, filing fees, printing, postage and mileage).

Accordingly, the Petitioner respectfully requests this Court to reverse the trial court's dismissal of the case and vacate the judgment and the awards of attorneys' fees and costs to the Respondent, as requested in the Opening Brief.

RESPECTFULLY SUBMITTED this 12th day of February, 2018.

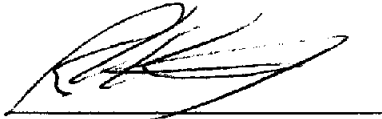


R. L. Whitmer
Pro per

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 3,873 words.

DATED this 12th day of February, 2018.

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 12th day of February, 2018;

And two copies of the foregoing were mailed on the 13th day of February, 2018, to:

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APPENDIX A

