ARIZONA SUPREME COURT

TURTLE ROCK III HOMEOWNERS ASSOCIATION, Plaintiff / Appellee v. LYNNE A. FISHER, Defendant / Appellant.	No. CV-17-0339-PR Court of Appeals Div. 1 No: 1CA-CV-16-0455 Maricopa County Superior Court No: CV2015-095897

BRIEF OF AMICUS CURIAE
COMMUNITY ASSOCIATIONS INSTITUTE
FILED WITH THE WRITTEN CONSENT OF THE PARTIES

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INTEREST OF CAI AS AMICUS CURIAE

CAI is a national nonprofit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide for effective guidance for the creation and operation of community associations. CAI is now an international organization with over 33,000 members and 60 chapters across the United States and the globe. Its members include community associations and board members, other community volunteer leaders, community managers and affiliated professionals and other service providers.

CAI regularly expresses its position on issues of potentially national concern and advocates on behalf of community associations and their residents before legislatures, regulatory bodies and the courts. CAI also publishes a bimonthly magazine offering information on current issues affecting community associations, sponsors educational and training opportunities through numerous seminars, workshops and conferences and maintains a searchable research library and the largest collection of resources available on community association management and governance. CAI is the leading national organization that provides resources and guidance to the community association industry and is representing not only itself, but also its tens of thousands of members on this important issue.

THE PETITION PRESENTS ISSUES OF BOTH GENERAL IMPORTANCE AND STATEWIDE CONCERN

The issues addressed in this case are of general importance and statewide but also national concern, as the impact on community associations is certainly substantial and states look to other states for guidance in this developing area of law. It is estimated that over 1.9 million Arizona residents live in one of the approximately 9,500 community associations throughout Arizona (more than 25% of Arizona residents) and approximately 69 million people live in about 342,000 community associations throughout the United States. *See, The Community Association Fact Book, National and State Statistical Review for 2016*: https://www.caionline.org/AboutCommunityAssociations/Statistical%20Information/2016StatsReviewFBWeb.pdf. If the issues ruled upon by the Court of Appeals in this case are not addressed by this Court, the Court of Appeals' published ruling will not only be cited as authority throughout Arizona, but may also be cited as persuasive authority in other states across the nation. Accordingly, this issue is a serious with broad implications that should be addressed by the Supreme Court.

ARGUMENTS

I. The Opinion creates uncertainty and confusion.

The Opinion leaves the reader bewildered, questioning, "When *are* monetary penalties legally enforceable?" The Opinion states, "A stipulated damages provision made in advance of a breach is a penalty, and is generally unenforceable." (Op. ¶ 17.) Nearly in the same breath, the Court requires that, for a monetary penalty to be enforceable, it must be shown in a fee schedule "timely promulgated." (Op. ¶ 18.) Based on the Court's own analysis, however, a fine schedule promulgated prior to a breach is a "stipulated damages provision made in advance of a breach" and is "generally unenforceable." (Op. ¶ 17.)

Causing further confusion, the Court requires an association to "prove its damages" without providing any guidance as to how an association can accomplish this task. (Op. ¶ 18.) Unlike many other contracts, breaches of the association's governing documents do not often result in easily quantifiable damages. The Court's imposed requirements have essentially removed the statutory right of planned communities, condominium associations, and timeshare associations ("associations") to impose reasonable monetary penalties.

Associations are left with two options: (1) No longer impose reasonable monetary penalties and lose an important enforcement mechanism; or (2) Attempt to create a fee schedule that is unlikely to comply with the Opinion, because, per the

Opinion, the fee schedule must both (a) be pre-determined in a schedule of fines (which the Court of Appeals has stated is "generally unenforceable") and (b) relate to damages of the association.

Although the Opinion addresses A.R.S. § 33-1803(B), which governs planned communities, the term "reasonable monetary penalties" is also used in A.R.S. §§ 33-1242(A)(11) and 33-2206(F)(2), governing condominiums and timeshares respectively. If this Opinion is not corrected, it will cause confusion for all associations. Furthermore, this Opinion creates confusion for owners within these associations as to the validity of fines imposed.

Associations and the public should be able to know, with reasonable certainty, whether a monetary penalty is enforceable. Instead, the Opinion foreseeably creates chaos and endless amounts of litigation if not addressed,

II. Based on its misplaced reliance on contractual stipulated damage provisions, the Court of Appeals exceeded its judicial authority by imposing requirements on planned communities not found in the statutes and curtailing trial courts' discretion to determine the reasonableness of monetary penalties.

The Court's analogizing monetary penalties to contractual penalties is misplaced because the Arizona legislature granted planned communities the right to impose reasonable monetary penalties. The Court's misplaced analogy results in multiple improper applications of the law.

A. The Court exceeded its judicial authority by replacing the judgment of the legislature with its own.

Rather than relying on the express statutory language of A.R.S. § 33-1803(B), the Court mistakenly relied on common law principles. The Arizona Supreme Court has long held that the determination for what is 'good public policy' "is for the executive and legislative departments and that the courts must base their decisions on the law as it appears in the constitution and statutes." *Harrison v. Laveen*, 67 Ariz. 337, 344, 196 P.2d 456, 460 (1948). Through A.R.S. § 33-1803(B), the Arizona legislature decided it is good public policy to allow planned communities to "impose reasonable monetary penalties." Therefore, common law principles rendering contractual penalty provisions unenforceable as a matter of public policy are irrelevant. *See Dobson Bay Club II DD, LLC v. La Sonrisa de Siena, LLC*, 242 Ariz. 108, 115 ¶ 39, 393 P.3d 440, 456 (2017).

Furthermore, the legislature did not impose limitations or require fee schedules for monetary penalties; rather, the only requirement is that monetary penalties must be reasonable. In the very same statute, the legislature limited late fees to "fifteen dollars or ten percent of the amount of the unpaid penalty." A.R.S. § 33-1803(B). The legislature imposed no similar restriction on monetary penalties. Therefore, by enacting A.R.S. §33-1803(B), the legislature determined it is good public policy to allow planned communities to impose reasonable monetary penalties, with no other requirements.

The Opinion in effect overrides the legislature's decision as to what is good public policy by imposing additional restrictions. Thus, the Court exceeded its judicial authority.

B. Monetary penalties allowed by A.R.S. § 33-1803(B) do not require proof of damages to be enforceable because the purpose of penalties is enforcement, whereas the purpose of damages is compensation.

The Court added a requirement for planned communities to prove damages for monetary penalties, stating, "Even if a fee schedule existed, the HOA had the burden to prove its damages." (Op. ¶ 18.) The Court again incorrectly analogized monetary penalties to contractual damages.

A.R.S. §33-1803(B) does not require planned communities to prove damages to impose reasonable monetary penalties. The primary purpose for planned communities to enforce monetary penalties is to effect compliance, not compensate associations for injuries.

The term "monetary penalty" is used throughout Arizona statutes relating to governmental entities. *See* A.R.S. §§ 41-796, 49-304, 20-1241.08, 15-1449. The primary purpose of such monetary penalties is, again, to effect compliance, not compensate for damages. Nowhere in the Arizona statutes does the legislature require a governmental agency to prove damages to enforce "monetary penalties."

The legislature chose to give planned communities the same right to impose "monetary penalties," and, like governmental agencies, planned communities should not be required to prove damages to enforce these penalties.

C. The trial court's discretion to determine what is reasonable should not be artificially restricted.

Trial courts determine what is "reasonable" in all areas of the law. Scores of doctrines and decisions in tort, contract, and constitutional law require trial courts to determine what is reasonable. Instead of leaving trial courts with the discretion granted by the legislature, the Court here has imposed artificial limitations on that discretion. Like other situations where trial courts determine what is reasonable, here, the trial courts should be able to determine if, given the facts, a monetary penalty is reasonable.

D. Other States that Provide Statutory Authority for Planned Communities to Impose Fines Do Not Require a Showing of Damages.

A majority of the States have adopted some form of statutory regime that governs planned communities in a similar fashion to the Arizona Planned Communities Act. Of the thirty States that have adopted a form of planned communities act, only four have withheld statutory authority to issue fines for violations of the governing documents. The compelling interest in maintaining oversight with respect to this significant statutory authority is evident in the various statutory regimes that many States have adopted. However, even in light of the

interest held by governments and courts regarding the power given to planned communities to impose fines and monetary penalties, no other State that we are aware of requires planned communities to prove damages as prerequisite to imposing fines.

California, for example, has adopted a complex statutory regime imposing multiple burdens on homeowners associations in order to exercise their right to levy violation fines on their members. The Davis-Sterling Act, which governs California planned communities, requires planned communities first to adopt a fine policy and schedule of monetary penalties before homeowners can be assessed for violations. CAL. CIV. CODE § 5850. Section 5855(c) of the Davis-Sterling Act differentiates between monetary penalties and damages assessed by explaining that the Board's duties to provide notice are the same regardless of whether discipline, such as a fine, is imposed, or monetary charges corresponding to damages suffered by the homeowners association are assessed. CAL. CIV. CODE § 5855(c). Moreover, California has statutorily imposed on homeowner associations the obligation to conduct internal dispute resolution with a neutral arbitrator if the recipient of a violation notice wishes to dispute the imposition of a violation. CAL. CIV. CODE § 5900, *et seq*. The dispute resolution process codified by the California legislature requires the homeowners association and the aggrieved member to present evidence regarding whether the violation actually existed and whether the discipline imposed,

including possible monetary penalty, was reasonable when compared with the violation. *Id.* Nothing in California law that we are aware of requires a homeowners association to prove damages in order to impose a violation fine.

Even with this heightened standard regarding review and oversight of monetary penalties, when California Courts have analyzed the actions of homeowners associations in imposing fines, the analysis has included no requirement that the association prove damages. In the case of *Liebler v. Point Loma Tennis Club*, 47 Cal.Rptr.2nd 783 (1995), the California Court of Appeals conducted a thorough analysis of the statutory requirements for imposing fines on homeowners and ultimately ruled that the homeowners association had the authority to impose the fines it charged. In *Liebler*, the violation arose because the rules of the community confirmed that the rights to use the recreational facilities of the community, including the tennis courts, were tied to and could not be separated from the right to occupy a Unit within the community. *Id.* Thus, because Mr. Liebler leased his Unit to tenants, his tenants had the right to use the tennis courts and not him. *Id.* However, he continued to use the tennis courts. *Id.* There were no damages suffered by the Point Loma Tennis Club by Mr. Liebler's use of the tennis courts. *Id.* Yet, the California Court of Appeals upheld the Point Loma Tennis Club's right to impose fines. *Id.*

Colorado is another state that has adopted a statutory regime for imposing fines that is significantly more stringent than the statutory requirements found in the Arizona. The Colorado legislature apparently felt compelled to set tight parameters on community associations' ability to impose fines and adopted statutory requirements mandating that homeowners associations adopt fine policies that "include[] a fair and impartial fact-finding process concerning whether the alleged violation actually occurred and whether the unit owner is the one who should be held responsible for the violation." COLO. REV. STAT. § 38-33.3-209.5(2)(b)(I). By statute, homeowners associations in Colorado are also required to provide an "impartial decision maker" to review the violation and fines for reasonableness. COLO. REV. STAT. § 38-33.3-209.5(2)(b)(II). Yet, Colorado statutes governing fines do not establish any requirement that an association prove damages in order to be able to assess fines. To the contrary, Colorado case law repeatedly iterates the maxim that "a fine is solely a monetary penalty", whereas damages, or restitution in a criminal context, are aimed at making the aggrieved party whole. *People v. Stafford*, 93 P.3d 572, 574 (Colo Ct.App. 2004).

Many States have found numerous ways to regulate homeowners associations' authority to impose monetary penalties without requiring the associations to prove damages. Florida, Nevada, North Carolina and Virginia have addressed the issue by setting the maximum amount that can be imposed for a single

fine as well as the maximum aggregate amount for fines related to a single violation. *See* FLA. STAT. ANN. § 720.305(2); NEV. REV. STAT. §§ 116.3102 and 116.31031; N.C. GEN. STAT. §§ 47F-3-102(12) and 47F-3-107.1; *and* VA. CODE ANN. § 55-513(D). Additionally, Virginia statutes expressly confirm that "the amount of any charges so assessed shall not be limited to the expense or damage to the association caused by the violation". VA. CODE ANN. § 55-513(D). Oregon, Utah and Washington do not set maximum fines that can be imposed, but require an established fine policy before fines can be imposed. *See* OR. REV. STAT. § 94.630; UTAH CODE ANN. § 57-8a-208; *and* WASH. REV. CODE § 64.38.020.

While Arizona's fine statutes are less restrictive than some states, the Arizona Court of Appeals has unilaterally imposed on homeowners associations the extreme and singular burden of proving damages, which exceeds the burdens imposed by any other state.

E. The Restatement Supports the Ability of Homeowners Associations To Impose Fines and Monetary Penalties without Proving Damages.

The Arizona Supreme Court has held that Arizona follows the Restatement when interpreting restrictive covenants. *Powell v. Washburn,* 211 Ariz. 553, 557, ¶ 14, 125 P.3d 373, 377 (2006). The Restatement explains fines as follows:

> Fines and penalties are commonly used to deter violations of use restrictions and ensure compliance with prior approval requirements. They are particularly potent enforcement tools if the amount is secured by the association's lien for unpaid assessments and charges against the

> property. The power to impose fines or penalties has been sometimes denied common-interest communities on the ground that only the government may exercise such powers, but the prevailing view regards fines and penalties as legitimate tools of the common-interest community. The amounts must be reasonable, and the procedures adopted must provide property owners with notice of their potential liabilities and a reasonable opportunity to present the facts and any defenses they may have.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.8 cmt. B (2000). Consequently, the Restatement recognizes homeowners associations' ability to impose fines as an effective tool for violation enforcement despite the opinion in some jurisdictions that only the government should have the power to impose monetary penalties. Nothing in the Restatement suggests that monetary penalties should be tied to damages. To the contrary, the Restatement explains that some jurisdictions have withheld from homeowners associations the ability to impose fines specifically because such charges are so similar to civil penalties, which have no connection to damages. *See id.*

The Arizona Court of Appeals improperly rejected the Restatement's treatment of monetary penalties as civil penalties imposed by governments. Instead, the Court of Appeals created a new standard and imposed a new burden of requiring homeowners associations to prove damages in order to impose fines. Such a holding is contrary to the Restatement and must be reversed.

III. The Court of Appeals misapplies the *Villas* opinion and improperly requires associations to adopt and promulgate fine schedules prior to levying any monetary penalty.

The Court of Appeals relies heavily on *Villas at Hidden Lakes v. Geupel Const. Co.*, 174 Ariz. 72, 847 P.2d 117 (App. 1992) for the proposition that "ad hoc fines are per se unreasonable." However, such reliance is misplaced, and the Court of Appeals is creating new law in this area. The Court of Appeals fails to distinguish between "fines" (also referred to as "monetary penalties") and "late fees" in its reliance on the *Villas*, which is an important distinction. The Court in *Villas* only addressed the imposition of late fees and held that retroactive late fees were unreasonable. The *Villas* Court was troubled that the association retroactively imposed late fees, without notice, over a year after the defendant failed to pay assessments. Most importantly, the association in *Villas* never charged late fees to any other owners prior to the retroactive application of late fees to the defendant:

> [A]lthough the Association always had the power to enact a late payment penalty, it did not do so until October, 1987. Before that date, the Association did not require an owner to make a choice between making a timely monthly assessment payment and incurring a late penalty for failing to make a timely payment. We conclude that an owner who may have acted on the premise that the Association's only penalty for late payment of a monthly assessment was an interest charge of 12%, and who might have timely paid the monthly assessment rather than a late payment penalty, should not be subject to a late payment charge enacted many months after the date of delinquency. For that reason, we hold that, as a matter of law, the Association's imposition of a retroactive late fee was unreasonable, arbitrary, and an abuse of discretion. *Id.* at 81

In contrast to the late fees addressed in *Villas*, the monetary penalties that are the subject of the Opinion are treated in a different fashion. Late fees are ordinarily

imposed in connection with an installment debt as a flat fee or percentage of the installment due (similar to interest), and the debtor knows that a late fee will be assessed for a late payment. *Id.* In contrast, monetary penalties are not assessed based on installment debts – they are levied based on an owner's specific action or inaction and the condition of the owner's property.

Unlike late fees, there is no 'one size fits all' violation or corresponding monetary penalty. Instead, there are countless types of violations with varying degrees of severity. Based on the Opinion, an association may now be required to adopt a fine schedule with individual fine amounts for every different type of imaginable violation. Must the association specifically address RV parking? Overgrown weeds? Late night parties? Vacation rentals? Barking dogs? A comprehensive fine schedule is nearly impossible to adopt, unlike a simple late fee schedule, as addressed in *Villas*.

Furthermore, the Arizona legislature has acknowledged the difference between late fees and monetary penalties by specifically limiting the amount/percentage of late fees that planned communities may charge to its homeowners. Pursuant to A.R.S. 33-1803, a planned community may charge the greater of fifteen dollars or ten percent of the amount of the unpaid assessment. However, there is no corresponding statute that addresses the maximum amount of monetary penalty that associations may impose. Instead, monetary penalties for

violations of an association's governing documents must simply be "reasonable." See A.R.S. 33-1803. Late fees are clearly treated differently than monetary penalties in the association context, and these fees are not interchangeable.

If the Opinion is upheld, the Court of Appeals will be creating new law with respect to these issues. However, this is an area of law that the legislature should control whenever possible – not the courts. The legislature has clearly expressed its opinion on this subject and determined that associations may assess monetary penalties against its homeowners so long as those monetary penalties are reasonable. There are no additional requirements. Any further requirements imposed by the courts are wholly unnecessary and contrary to the intent of the legislature.

CONCLUSION

For the foregoing reasons, CAI urges this Court to carefully consider the broad legal and practical implications of the Opinion and to grant the Association's Petition and reverse and vacate the Opinion. Alternatively, CAI urges this Court to grant review and consider depublication of the Opinion pursuant to Rule 23(m) and Rule

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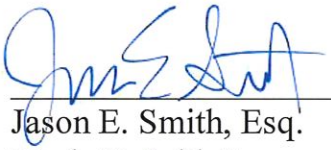
28(e), ARCAP, so that it cannot be cited as binding authority in any future case affecting community associations.

DATED this 17th day of January 2018.

CARPENTER HAZLEWOOD DELGADO & BOLEN, LLP



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CERTIFICATE OF SERVICE

The undersigned counsel for Amicus Curiae on the 17th day of January 2018, electronically filed its Brief in the Arizona Supreme Court and served copies to the following parties in compliance with ARCAP 4(g):

Via first-class U.S. Mail and via email this 17th day of January 2018, to:

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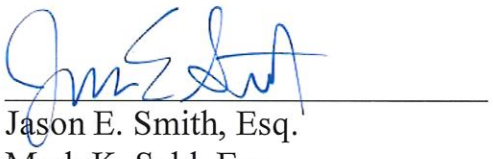

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CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns:

   [ ] A brief, and is submitted under Rule 14(a)(5)
   [ ] An accelerated brief, and is submitted under Rule 29(a)
   [ ] A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)
   [ ] a petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and is submitted under Rule 23(h)
   [X] An amicus curiae brief, and is submitted under Rule 16(b)(4)

2. The undersigned certifies that the brief/ to which this Certificate is attached uses the type of at least 14 points, is double-spaced, and contains 3,370 words.

3. The document to which this Certificate is attached [X] does not, or [ ] does exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable.

DATED this 17th day of January 2018.

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Written Consent Form

I, Lynne A. Fisher by signing below, hereby give my written consent for Community Association Institute (CAI), through counsel, to file a Brief of Amicus Curiae in support of the petition for review, filed by Turtle Rock III Homeowners Association. I understand that a Brief of Amicus Curiae is a document, filed with the court, and written by someone other than a party to the case. I understand that a Brief of Amicus Curiae is written to persuade the court to take certain action. In this case, the Brief of Amicus Curiae from CAI will recommend that the Arizona Supreme Court accept review of the petition and overturn the decision of the court of appeals.

Name: Lynne A. Fisher

Date: 1/12/18

Signature: Lynne A Fisher