Supreme Court case no. S211596

SUPREME COURT of CALIFORNIA

Tract 19051 Homeowners Association et al.,
Plaintiffs and Appellants,

v.

Maurice Kemp et al.,
Defendants and Respondents

OPENING BRIEF ON THE MERITS

TURNER LAW FIRM, APC
Keith J. Turner [SBN152685]
429 Santa Monica Blvd., Suite 500
Santa Monica, California 90401
Phone: 310.454.6190
Fax: 310.882.5563
Email: kjt@turnerlawapc.com

Attorneys for Defendant, Court of Appeal Respondent and Supreme Court Petitioner Eric Yeldell

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Fax: 310.882.5563
Email: kjt@turnerlawapc.com

Attorneys for Defendant, Court of Appeal Respondent and Supreme Court Petitioner Eric Yeldell

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Staff Memo 99-32 titled *Award of Costs and Contractual Attorney Fees to Prevailing Party* (June 17 1999) 21

ISSUE TO BE BRIEFED AND ARGUED

The issue this Court asked to be briefed and argued:

> Is a prevailing homeowner entitled to attorney fees under Civil Code section 1354 in an action by the homeowners association to enforce its governing documents as those of a common interest development (CID) when the homeowner prevailed because it was later determined that the subdivision was not such a development and its governing documents had not been properly reenacted?

SUMMARY OF ARGUMENT

This case revolves around interpreting Civil Code section 1354(c), which is part of the statutory regime covering common interest developments: "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." A straightforward construction of this statute would conclude that the provision is mandatory, and it is reciprocal. That means that either a prevailing plaintiff or a prevailing defendant is entitled to recover attorney fees. But that is not what happened here.

The plaintiffs sued to enforce the homeowners association's governing documents and lost because the trial court determined the subdivision was not a common interest development. Not surprisingly, the court awarded petitioner and defendant Eric Yeldell his attorney fees. The Court of Appeal, however, took a surprising turn. Although it affirmed Yeldell's judgment, it reversed his fee award, holding that since there was no common interest development, he was not entitled to a fee award under section 1354(c).

That is not a proper construction of the statute and should not be the law regarding this bilateral attorney fees provision.

First, the plain language of section 1354(c) leads to the conclusion that a prevailing defendant should recover his attorney fees. The statute says that "the prevailing party" is entitled to recover, not the "prevailing defendant" or "prevailing plaintiff" (as some fee statutes do). Thus, the statute is reciprocal, not unilateral. The statute also says the party "shall" recover his fees. This means recovery is mandatory, not discretionary. And finally, the statute covers any "action to enforce the governing documents" of the subdivision. Recovery is hinged solely on the basis of plaintiff's action, not whether a court ultimately determines that the subdivision is a common interest development.

Under settled rules of statutory construction, this Court need not go any further. The plain language of the statute provides our answer.

But other considerations also support Yeldell's construction of section 1354(c). As this Court has explained (in the Civil Code section 1717 context), the primary purpose for the Legislature to make an attorney fees provision reciprocal is to ensure mutuality of remedy for the parties. If both sides have an even-handed chance to recover attorney fees if they prevail, it prevents parties from making oppressive use of one-sided attorney fees provisions. Such a concern is particularly acute when you have a lone homeowner (like Yeldell) arrayed against a homeowner's association and multiple individual homeowners.

In addition, the mutuality of remedy rationale reasons that if an opposing party would have been able to recover fees under the statute, then the statute must be seen as being reciprocal. Here, no one disputes that the association plaintiffs would have been

able to recover their attorney fees had the trial court found there was a common interest development and that Yeldell had violated some restriction levied by the association. The reverse must be true as well: Since Yeldell prevailed, he should recover his attorney fees.

A contrary interpretation leads to the absurd results that are not favored in statutory construction. The most absurd of the results of the Court of Appeal's construction of section 1354(c) is that it favors plaintiffs suing under a questionable common interest development ("CID") over plaintiffs suing under a genuine CID. The genuine plaintiffs, if they lose, will have to pay the prevailing defendant's attorney fees while the false CID plaintiffs do not. That cannot be what the Legislature intended in section 1354(c).

Finally, the Court of Appeal's heavy reliance on its earlier ruling in *Mount Olympus Property Owners Assn. v. Shpirt* (1997) 59 Cal.App.4th 885 is wholly misplaced. First, *Mount Olympus* concerned whether a prevailing plaintiff could recover attorney fees, not the issue here, namely whether a prevailing defendant can obtain fees when it is determined there is no common interest development. Second, that court engaged in no analysis and no statutory construction of section 1354—that lack of analysis undercuts any force of its assumption that if there is no CID there are no fees. *Mount Olympus* is inapplicable, and even if it does apply, it is not persuasive and wrongly decided based on the analysis above.

This Court should reverse the Court of Appeal's ruling and construe section 1354(c) to mean what it plainly says: A prevailing defendant is entitled to recover his fees if the plaintiff is suing to enforce the governing documents, regardless of whether it

is ultimately determined that there is a common interest development.

STATEMEMT OF THE CASE

This action was filed in 2008 to enforce the governing documents[1] of a single-family home subdivision of 94 homes in the Baldwin Vista area of Los Angeles, known as Tract No. 19051. (Ct.App. Decision, p. 5.) The plaintiffs were the subdivision's voluntary homeowners association (which is open to homeowners in Tract 19051 and some adjacent tracts), along with 52 individual lot owners (collectively "the Association"). (Decision, pp. 2 and 6.) The defendant owned one of the lots in Tract 19051.[2] (Decision, p. 5.)

The governing documents that the Association was suing to enforce were the Declaration of Restrictions ["DORs"], which the developer had recorded in 1958 when it created Tract 19051. (Decision, pp. 2 and 5.) The Association claimed that Yeldell's remodeling project violated the two-story height restriction in the DORs, even though other homes in the subdivision already violated that restriction.[3]

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1 Civil Code section 1351(j) provides: "'Governing documents' means the declaration and any other documents, such as bylaws, operating rules of the association, articles of incorporation, or articles of association, which govern the operation of the common interest development or association." (Civil Code, § 1351, subd. (j).)

2 The originally named defendant was Maurice Kemp, the then owner of Lots 22 in Tract No. 19051. Before the case was tried, Kemp defaulted on his construction loan. Petitioner Eric Yeldell purchased Kemp's home at a trustee's foreclosure sale and was granted leave to intervene in this action.

3 At least eight other two-story homes had been constructed in Tract 19051 (Lots 2, 4, 15, 33, 34, 37, 46, and 66). (RA 46-63; 224-25, 229-234.) After the appeal was filed, the Association's attorney, Ken Mifflin, and/or his wife began constructing their own two-story home in the tract. (RA 70-78.)

The DORs "expired by its own terms on January 1, 2000, and contained no provision for extending that date." (Decision, pp. 2-3.) As the Court of Appeal explained, a "declaration of restrictions may be extended (1) by the unanimous vote of 100 percent of the property owners; (2) by the vote of a lesser number of owners as provided in the declaration; or (3) in common interest developments only, by compliance with specified statutory procedures. It is undisputed that the first two methods of extending a declaration are inapplicable to this case. As to the third method, the parties agree that the sole statutory procedure that applies, if at all, is found in section 1357." (Decision, p. 3, citation omitted.) Section 1357, which is part of *Davis-Stirling Common Interest Development Act* (Civil Code §§ 1350 *et seq.*) (the "Act"), provides that if a declaration for a common interest development does "not provide a means for the property owners to extend the term of the declaration," the term can be extended "if owners having more than 50 percent of the votes in the association choose to do so." (Civil Code § 1357.)

The Association alleged that "[o]n December 30, 1999, pursuant to Civil Code Section 1357, upon a vote of more than 50% approval of the lot owners and Association members, the Association recorded an Amendment extending the CC&Rs [DORs] for a period of 11 years, to December 31, 2010." (RA 117, ¶14.) Thus, since the DORs had expired long before this suit was filed, the main issue in the case was whether Tract No. 19051 was "common interest development" under Act and whether the section 1357 procedure could be used to extend its governing documents.

The trial court and the Court of Appeal both held that whether Tract 19051's DORs were properly renewed and enforceable depended on whether the subdivision is a "common interest development" under the Act, "such that the majority's renewal of the declaration was permitted by Civil Code section 1357.1" (Decision, pp. 2, 10-12.) The trial court denied the Association's separate requests for a TRO and a preliminary injunction, because the Association could not establish that Tract 19051 was a common interest development. (Decision, p. 6.) In ruling on the merits later, the trial court found that the subdivision is not a common interest development, in part because there were no common areas and membership in the association was voluntary. (Decision, pp. 8-10.) As a result, section 1357 did not apply and the alleged renewal of the declaration was ineffectual. (Decision, pp. 8-10.) Because the DORs had expired, the trial court entered judgment for Yeldell. The Court of Appeal agreed that the subdivision was not a common interest development and thus affirmed that judgment. (Decision, pp. 2, 10-12.)

The Association sought to recover its attorney fees pursuant to section 1354(c). (Decision, p. 7.) Before Yeldell intervened in the action, the Association had obtained an interlocutory judgment, which included an award of $112,000 in attorney fees to the Association under section 1354(c). (Decision, p. 7.) That interlocutory judgment and the attorney fees award were later vacated by the trial court. After the eventual trial on the merits ended in Yeldell's favor, he was awarded his attorney fees.

Although the Court of Appeal affirmed Yeldell's judgment, it reversed his attorney fee award, relying on its previous *Mount Olympus* decision. (Decision, pp. 12-13.) That attorney fee reversal prompted Yeldell's petition for review with this Court.

ARGUMENT

I. YELDELL, AS THE PREVAILING PARTY, SHOULD RECOVER HIS ATTORNEY FEES UNDER SECTION 1354(c), REGARDLESS OF WHETHER THE SUBDIVISION IS ULTIMATELY DETERMINED TO BE A COMMON INTEREST DEVELOPMENT.

Yeldell, as the "prevailing party," is entitled to his attorney fees under Civil Code section 1354(c), because that statute's language is mandatory and reciprocal. That right should *not* be defeated or precluded because it was determined that the subdivision was not a common interest development, nor because its governing documents had not been properly reenacted.

A. The General Rules On Attorney Fees (The "American Rule") And On Statutory Construction.

California follows what is commonly referred to as the American Rule, which provides that each party in a lawsuit must ordinarily pay his own attorney fees." (*Trope v. Katz* (1995) 11 Cal.4th 274, 278-79 ("*Trope*").) The American Rule is codified in Code of Civil Procedure section 1021, which provides: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. . . ." (Code Civ. Proc., § 1021.) The Legislature has created various exceptions to the American Rule by enacting various attorney fees statutes. (See *Stirling v.*

Agricultural Labor Relations Bd. (1987) 189 Cal.App.3d 1305, 1311 ("*Stirling*") [citing over 25 examples of statutory "prevailing party" attorney fees provisions, such as Civil Code §§ 55, 86, 789.3(d) & 815.7].) In addition, based on its "'inherent equitable authority,'" this Court has created judicial exceptions that provide recovery of attorney fees to prevailing parties. (*Trope*, 11 Cal.4th at pp. 278-79.)

Civil Code section 1354(c) is one of the Legislature-created attorney fees provisions. "In an *action to enforce the governing documents*, the prevailing party *shall* be awarded reasonable attorney's fees and costs." (Civil Code § 1354(c), emphasis added.) The fundamental issue here thus involves construing this statute.

The Court's "primary task in construing a statute is to determine the Legislature's intent." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733 ("*Jarrow Formulas*").) "'The plain language of the statute establishes what was intended by the Legislature.'" (*Id.* at p. 735.) "To discover that intent we first look to the words of the statute, giving them their usual and ordinary meaning." (*Trope,* 11 Cal.4th at p. 279, citations omitted.) "'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to [extrinsic] indicia of the intent of the Legislature....'" (*Jarrow Formulas,* 31 Cal.4th at p. 735.) "In interpreting that language [of the statute], we strive to give effect and significance to every word and phrase." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284 ("*Copley Press*").)

"Well-established canons of statutory construction preclude a construction [that] renders a part of a statute meaningless or inoperative." (*Copley Press,* 39 Cal.4th at p. 1285.) Also, "[i]f the statutory language is ambiguous and susceptible of differing

constructions, we may reasonably infer that the legislators intended an interpretation producing practical and workable results rather than one resulting in mischief or absurdity." (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919 ("*City of Santa Monica*").)

B. The Plain Language Of Section 1354(c) Shows It Is Reciprocal And Mandatory In Any Suit Seeking To Enforce Governing Documents.

The language in section 1354(c) is straightforward. It says that a "prevailing party" in an action to enforce governing documents "shall" be awarded attorney fees. It is patent, then, that the Legislature's intent was to create a reciprocal and a mandatory attorney fees provision. In fact, the terms "prevailing party" and "shall" are used in many attorney fees statutes and contractual provisions.

One example is Civil Code section 55, which provides that "[t]he prevailing party in the action" under section 55 "shall be entitled to recover reasonable attorney's fees." (Civil Code § 55.) This Court recently described Section 55 as being a "broadly worded two-way fee-shifting clause." (*Jankey v. Song Koo Lee* (2012) 55 Cal.4th 1038, 1045 ("*Jankey*"). *Jankey* held that fee-shifting applied to a prevailing defendant because "[t]wo aspects of the plain language of section 55 are dispositive." (*Id.* at pp. 1045-46.)

1. "Prevailing party" means that the statute is reciprocal—either a prevailing plaintiff or a prevailing defendant can recover.

The first dispositive aspect was that the statute allowed fees for a "prevailing party," not just a prevailing plaintiff. "The Legislature knows how to write both unilateral fee statutes, which afford fees to either plaintiffs or defendants, and bilateral

fee statutes, which may afford fees to both plaintiffs and defendants." (*Jankey,* 55 Cal.4th at p. 1045.) "'When the Legislature intends that the successful side shall recover its attorney fees no matter who brought the legal proceeding, it typically uses the term 'prevailing party.'" (*Id.*, quoting *Stirling,* 189 Cal.App.3d at p. 1311.) *Stirling* listed many examples of statutory "prevailing party" attorney fees provisions: Bus. & Prof. Code, §§ 7044, 7169; Civil Code §§ 55, 86, 789.3(d), 815.7, 1584.5, 1584.6, 1714.1(b), 1717, 1717.5, 1811.1, 1942.5, 2983.4 & 3250; Code Civ. Proc., §§ 128.5, 396b, 527.6(h), 547(e), 731.5, 1021.4, 1021.6 & 1032(b); Gov't Code §§ 19765 & 91012; Pub. Contract Code § 20464; Pub. Resources Code § 25455; Pub. Util. Code § 453.

Other attorney fees provisions authorize a fee award only to one side by using such terms as "plaintiff" or "defendant." (*Compare* statutes that provide attorney fees to only the plaintiff [*see e.g.,* Bus. & Prof. Code, §§ 7398 & 21140.4; Civil Code § 52(a) & 1785.31(d)] *with* statutes that provide attorney fees to only the defendant [*see e.g.,* Code Civ. Proc., §§ 391(c), 399, 490.020, 585.5(e), 1021.7, 1030 & 1235.140; Prob. Code, § 703[.)

A third variety of attorney fees statutes are a "hybrid" between reciprocal and unilateral. The hybrid statute usually operates as a unilateral statute, awarding attorney fees only to a prevailing plaintiff, but in the case where the plaintiff's claims were not brought in good faith, it operates *against* the plaintiff by awarding award attorney fees to a prevailing defendant. (*See e.g.,* Civil Code §§ 1780(e), 1785.31 & 1788.30(c).)

Section 1354(c) plainly falls into the first category since it uses "prevailing party," and thus, as in *Jankey*, attorney fees should be awarded to a prevailing defendant (like

Yeldell).

2. "Shall" means Yeldell's fee recovery is not discretionary but mandatory.

The second dispositive aspect of section 55 emphasized by *Jankey* is the mandatory language: "*shall* be awarded reasonable attorney's fees and costs." (*Jankey,* 55 Cal.4th at pp. 1045-46, emphasis added.) This Court explained "that the Legislature has routinely and clearly differentiated, using 'may' in circumstances where it intends a fee award to be discretionary and 'shall' in circumstances where it intends an award to be mandatory."[4] (*Id.* at p. 1046)

Section 1354(c) also uses this mandatory language, "shall." As with section 55, a fee award under section 1354(c) cannot be seen as discretionary.

Thus, applying the lessons from *Jankey* and similar cases, it is inescapable that the Legislature chose in section 1354(c) to enact a reciprocal and a mandatory fee statute, granting both prevailing defendants and plaintiffs the right to a fee award. Since Yeldell was a prevailing defendant, section 1354(c) should apply to him.

3. Since the Association sued to "enforce the governing documents," namely the DORs, section 1354(c) is triggered.

The language of section 1354(c) covers "an action to enforce the governing documents." The Association filed this action to enforce the governing documents,

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[4] *Compare, e.g.,* Civil Code, § 52.1(h) ["the court may award the petitioner or plaintiff reasonable attorney's fees"] and Civil Code, § 3426.4 ["the court may award reasonable attorney's fees"] *with* Civil Code, § 1785.31 (d) ["prevailing plaintiffs ... shall be entitled to recover ... reasonable attorney's fees"] and Civil Code, § 3344 (a) [prevailing party "shall ... be entitled to attorney's fees"].

namely the DORs (specifically, the height and setback restrictions in the DORs). (Decision, p. 5.) Thus, the reciprocal, mandatory fee-shifting should kick in, whether the Association or Yeldell prevailed.

Nothing in the language of section 1354(c) says that it only applies if the plaintiff proves there is a common interest development. Indeed, as discussed more fully below, neither case law nor a logical interpretation of section 1354(c) provides for an exception to reciprocal fee-shifting in an action to enforce governing documents when it is later determined that the association, development, subdivision or tract was not a common interest development. Such an exception would not make any sense. If the Legislature creates a reciprocal and mandatory fee-shifting statute, it is meant to cover *any* suit within that subject area, because that will discourage both frivolous pursuit and frivolous defense of such a suit. How the merits of the suit actually come out, and thus whether the rest of the statutory regime applies is irrelevant to whether the fee statute (and its purpose of discouraging frivolous litigation) applies.

C. Section 1354(c) Should Apply To A Prevailing Defendant Like Yeldell, Because That Ensures The "Mutuality of Remedy" That Facilitates Accomplishing The Statute's Purposes.

As already explained, the statutory language "prevailing party" makes an attorney fee provision (like section 1354(c)) mutual or reciprocal. The "primary purpose" or "fundamental purpose" of making an attorney fees provision mutual or reciprocal is "to ensure mutuality of remedy for attorney fee claims ..." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610 ("*Santisas*"); accord *International Industries, Inc. v. Olen* (1978) 21

Cal.3d 218, 223.) Thus, a reciprocal attorney fees provision puts *both* the plaintiff and the defendant on an equal footing, so that they are treated evenhandedly, and "[t]he simplest definition of evenhanded has always been 'equitable' . . . and 'dealing equitably with all.'" (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1151 (citations omitted).) This "mutuality of remedy" also prevents the oppressive use of one-sided attorney fee provisions. (*Santisas,* 17 Cal.4th at p. 610; *Trope,* 11 Cal.4th at p. 285.)

For a reciprocal attorney fees provision to function as intended, parties need reasonable prospective assurance of whether they will or will not be able to recover their attorney fees if they win, and whether they will have to pay their opponent's fees if they lose. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1090-91 ("*PLCM Group*"); *Santisas,* 17 Cal.4th at p. 610.) In other words, "Sauce for the goose is sauce for the gander" or, "Same monks, same haircuts." (*Newman v. Checkrite California, Inc.* (E.D.Cal. 1994) 156 F.R.D. 659, 660, fn. 1.)

For example, the Legislature enacted Civil Code section 1717 to "establish mutuality of remedy when a contract makes recovery of attorney fees available only for one party and to prevent the oppressive use of one-sided attorney fees provisions." (*PLCM Group,* 22 Cal.4th at pp. 1090-91, citations omitted.) Accordingly, attorney fees provided for by contract are considered to be provided "by statute, rather than by contract," because of the legislative intent and purpose "'to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions and to eliminate distinctions based on whether recovery was authorized by statute or by contract.'" (*Id.*) This "mutuality of remedy" doctrine should apply to statutory attorney

fees like Section 1354(c) in the same way that this Court has applied the doctrine to contractual fees under Section 1717—make them reciprocal.

In fact, section 1354(c) is even broader than section 1717. It is an independent statutory source that gives rise to a right to recover attorney fees in *all cases* in "an action to enforce the governing documents." Section 1717, by contrast, allows for attorney fees in "any action on a contract" *but only if* the contract on which the action is based contains an attorney fees provision. (*Damian v. Tamondong* (1998) 65 Cal.App.4th 1115, 1124.) Also, while section 1717 fees cannot be awarded "where an action has been voluntarily dismissed," no such limitation exists under section 1354(c). (*Salehi v. Surfside III Condominium Assn.* (2011) 200 Cal.App.4th 1146, 1156 ("*Salehi*"); *Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873, 878.)

This Court has held that the "mutuality of remedy" doctrine ensures that a prevailing defendant is entitled to attorney fees as long as an action involves the contract or statute that provides for attorney fees, even if the defendant prevails by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the contract or statute. (*Santisas,* 17 Cal.4th at p. 611; *Hsu v. Abbara* (1995) 9 Cal.4th 863, 870 ("*Hsu*") ["The statute would fall short of this goal of full mutuality of remedy if its benefits were denied to parties who defeat contract claims by proving that they were not parties to the alleged contract or that it was never formed"].) Otherwise, "the right to attorney fees would be effectively unilateral — regardless of the reciprocal wording of the attorney fee provision allowing attorney fees." (*Santisas*, 17 Cal.4th at p. 611.)

Also, a "prevailing party" attorney fees clause means that the prevailing party is entitled to fees, "whether incurred offensively or defensively." (*Turner v. Schultz* (2009) 175 Cal.App.4th 974, 980.)

Thus, in many decisions regarding "reciprocal" attorney fees provisions, courts have held that even though the statutory scheme containing the fee provision was not applicable, the prevailing defendant was nevertheless entitled to attorney fees if the plaintiff would have been entitled to recover plaintiff's attorney fees if plaintiff had prevailed. (*See, e.g., Hsu,* 9 Cal.4th at pp. 870-871; *Mechanical Wholesale Corporation v. Fuji Bank Limited* (1996) 42 Cal.App.4th 1647, 1661 ("*Mechanical Wholesale*"); *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 842; *Jones v. Drain* (1983) 149 Cal.App.3d 484, 489-490; *Care Constr., Inc. v. Century Convalescent Centers, Inc.* (1976) 54 Cal.App.3d 701, 707 ("*Care Construction*").)

Mechanical Wholesale, for example, dealt with former Civil Code section 3176 (now Civil Code section 8558), which provides that the prevailing party shall recover its attorney fees "[i]n any action against ... [a] construction lender *to enforce ...a bonded stop notice*." (Civil Code § 8558, emphasis added.) There, a contractor sued a construction lender to enforce a bonded stop notice, and sought attorney fees under section 3176. However, defendant prevailed by showing that no bonded stop notice existed, and sought attorney fees.

Plaintiff argued that since the court found that the statutory scheme did not apply and that no bonded stop notice existed, defendant could not recover attorney fees. The Court of Appeal held that since plaintiff would have been entitled to attorney fees had it

prevailed in enforcing the alleged bonded stop notice, defendant was similarly entitled to fees as the prevailing party, whether or not the statute sued on applied. (*Mechanical Wholesale,* 42 Cal.App.4th at pp. 1660-61.) "We need not be concerned as to why the stop notice claim was invalid; it is only necessary for [defendant] to have shown that it defeated the claim. Such invalidity will not bar fees to which a prevailing party is otherwise entitled." (*Id.* at p. 1661.)[5]

Applying the "mutuality of remedy" doctrine here should mean that a prevailing homeowner *is* entitled to attorney fees under section 1354 when in an action by the homeowners association to enforce its governing documents as those of a common interest development (CID), the homeowner prevailed by showing that the subdivision was not such a development and its governing documents had not been properly reenacted.

Here, the Court of Appeal did something the Legislature did not elect to do and created something unprecedented in California -- a hybrid fee-shifting statute that is generally reciprocal, but becomes unilateral *in favor of, rather than against,* a plaintiff that makes a meritless claim that it is a CID. In no instance has the Legislature decreed that result, and such result serves no California public policy. Accordingly, the Court of Appeal's decision should be reversed.

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[5] In rendering its decision, *Mechanical Wholesale* expressly noted that in "a different but analogous context, courts have sustained a right to recover attorney fees under section 1717, even though the contract which contained the relevant attorney fee clause was found to be invalid or unenforceable." (*Id.* at p. 1662, n. 14 , citing *Jones v. Drain* (1983) 149 Cal.App.3d 484, 490 & *Care Constr., Inc. v. Century Convalescent Centers, Inc.* (1976) 54 Cal.App.3d 701, 707.)

D. A Prevailing Defendant (Like Yeldell) Should Recover Attorney Fees Under Section 1354(c), Because The Plaintiff (The Association) Would Have Been Entitled To Fees Had It Prevailed.

One prong of the "mutuality of remedy" doctrine provides for "recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed." (*Santisas*, 17 Cal.4th at p. 611.) For instance, in holding that any fee award had to be reciprocal, the court in *Mepco Services, Inc. v. Saddleback Valley Unified School Dist.* (2010) 189 Cal.App.4th 1027, explained that "[r]ather than look to the jury's verdict for guidance as to whether [the school district] would have been entitled to its attorney fees, we look to the pleadings to determine whether [the school district's] cross-complaint sought "enforcement of the bond," such that it would have been able to recover its attorney fees under bond's attorney fee provision." *Id.,* at p. 1047. The pertinent inquiry was "whether that party would have been entitled to attorney fees in *a hypothetical situation* in which that party did prevail on its claims." (*Id.*, emphasis added.)

Thus, the pertinent inquiry here is not whether the Act actually applied, but rather, whether the Association would have been entitled to attorney fees if it *had* prevailed.

And no one, neither the Association nor Yeldell, has ever disputed that the Association would have been entitled to attorney fees had it prevailed on its claims. If it had been able to show that the subdivision was a common interest development and that Yeldell had violated some restriction in the DORs, the Association would have recovered its attorney fees. In fact, the Association was awarded $112,000 in attorney fees in the

interlocutory judgment, which was later vacated after a full hearing on the merits.

Since the Association could have recovered its fees had it prevailed, the mutuality of remedy analysis requires that Yeldell recover his attorney fees when he prevailed. But the Court of Appeal here turned this reasoning on its head: Yeldell is the prevailing party but he must pay his own attorney fees. Thus, the Court of Appeal did what the Legislature could not have intended -- transformed a mandatory reciprocal right into a unilateral right.

Looking to comparable law regarding contractual attorney provisions under section 1717 is helpful here. Thus, if the CC&Rs here had an attorney fees clause and Yeldell had prevailed by proving that they were inapplicable, invalid or unenforceable, Yeldell would have been entitled to his attorney fees pursuant to section 1717, which makes contractual attorney fees provisions by law bilateral or reciprocal despite what the contract states. (*Santisas*, 17 Cal.4th at p. 611.)

For Yeldell to prevail because the tract was not a common interest development is analogous to defeating a contract CC&Rs claim because the contract was inapplicable or unenforceable. (See *Mechanical Wholesale*, 42 Cal.App.4th at 1661, n. 14.) And since Yeldell would have been entitled to attorney fees under section 1717 by proving that the CC&Rs (Declarations) were unenforceable, he similarly should be entitled to his fees under section 1354(c) by proving that the Act does not apply because there is no common interest development.

E. Construing Section 1354(c) To Deny Fees To A Prevailing Defendant Like Yeldell When No Common Interest Development Is Found To Exist Would Lead To Absurd Results.

Even if one construes section 1354(c) to be ambiguous or susceptible to differing constructions, the statute should be interpreted to give it a "practical and equitable result," rather than one resulting in "mischief or absurdity." *(City of Santa Monica*, 43 Cal.4th at p. 919.) Similarly stated, "'[w]hen uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation. In this regard, it is presumed the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences.'" (*Hart v. Autowest Dodge* (2007) 147 Cal.App.4th 1258, 1262, citation omitted.)

Construing section 1354(c) to not award a prevailing defendant fees if a common interest development does not exist, leads to a number of absurd results. The first is that it puts plaintiffs attempting to enforce CC&Rs, who make meritless claims that there is a common interest development ("CID"), *in a better position* than plaintiffs in a true CID attempting to enforce CC&Rs. If the legitimate CID plaintiff loses, *it becomes liable for the defendant's attorney fees*. But if a plaintiff falsely claiming to be a CID loses, it is *not* liable for defendant's attorney fees – *defendant must pay its own fees*. Such "false CID" plaintiffs are thus "rewarded" for their meritless claims by not having to pay the defendant's attorney fees.

It is an absurd result to put false CID plaintiffs in a better position than the true CID.

Another absurd result from the Court of Appeal's statutory construction is that it gives plaintiffs with a questionable claim of being a CID a vehicle for forcing abusive settlements. As the court in *Care Construction* explained regarding adhesion contracts: "Should the Defendant lose in litigation, he must pay legal expenses of both sides and even if he wins, he must bear his own attorney fees. One-sided attorney fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims." (*Care Construction,* 54 Cal.App.3d at p. 704.)

This oppression is magnified in CID disputes, where typically it is "many" (the CID association or, as here, numerous plaintiffs) against "one," producing "an inherent inequality of position." (See *California Law Revision Commission Tentative Recommendation,* "Alternative Dispute Resolution in Common Interest Developments, December 2002, at p. 2.) Here, there originally were 52 plaintiffs and only one defendant. Each of the "many" has a much lower per-person risk regarding attorney fees than the "one."

Assume there is one defendant and 50 plaintiffs, and both sides incur $100,000 in attorney fees. Under the Court of Appeal's statutory construction here, if the Association won, Yeldell is solely liable for $200,000. But if Yeldell wins, he still bears his $100,000 in fees and the 50 Association plaintiffs would each only bear a $2,000 share of their $100,000 in fees.

Therefore, Yeldell would bear 100 times the risk of each plaintiff.

Regarding the analogous attorney fee provision in section 1717, the California Law Revision Commission warned: "Any unilateral requirement to reimburse attorney

fees or other litigation expenses distorts access to the courts: It burdens one side with a financial risk that the other side does not have to bear in pursuing justice. Such manipulation of the judicial process should not be permitted." (Staff Memo 99-32 titled *Award of Costs and Contractual Attorney Fees to Prevailing Party* (June 17 1999), p. 32.)

Likewise, construing section 1354(c) in the one-sided way the Court of Appeal did creates such a disproportionate financial risk that it manipulates the judicial process and opens the door to abusive settlements.

The final absurd result is illustrated by the court's decision in *Salehi,* 200 Cal.App.4th 1146. There, a condominium owner sued the association for violating the CC&Rs by failing to "'appropriately maintain and repair'" the property and to "maintain an adequate reserve fund for the replacement of the common area facilities." (*Id.* at p. 1151.) Shortly before trial, plaintiff (who was an attorney) dismissed the breach of the CC&Rs and related causes of action, proceeding only on fraud and negligent misrepresentation claims. In response, defendant sought attorney fees under section 1354(c) incurred in defending against the eight dismissed causes of action, which the trial court denied.

In reversing and holding that defendant should recover its fees, the Court of Appeal was particularly critical of attorney-plaintiff's "faulty reasoning" in deciding to dismiss the CC&R claim, making plaintiff liable for the prevailing defendant's attorney fees. (*Id.* at pp. 1150, 1155.)

Likewise here, the Court of Appeal's strained reading of section 1354(c) rewards the Association's counsel's "faulty reasoning" in pursuing a questionable claim that the subdivision was a common interest development. It is an absurd result that a statutory construction (like that employed by the Court of Appeal here) encourages frivolous or meritless suits.

F. Denying A Prevailing Defendant Attorney Fees If the Plaintiff is Found Not to Be a CID Could Encourage Plaintiffs to Maintain Meritless Litigation, Wasting Scarce Judicial Resources.

Another fundamental problem with denying a prevailing defendant (like Yeldell) attorney fees under section 1354(c) is that it encourages the continuance of frivolous and pointless litigation, wasting scarce judicial resources. Specifically, if a plaintiff determines that its claim that it is a CID is meritless, denying the prevailing defendant attorney fees could encourage the false CID to continue the litigation until the end, rather than dismissing it early to reduce its exposure to the prevailing defendant's attorney fees.

The purpose of section 1354(c), like all attorney fees provision, is to discourage meritless litigation. If a genuine CID association sues a member homeowner alleging a breach of the governing documents, but then concludes during the litigation that its claim is meritless or that it will otherwise lose the case, the association could reasonably decide that it is in its best interests to voluntarily dismiss the case.

And even though the trial court would likely determine that the defendant homeowner "realize[d] its 'litigation objectives' and was the prevailing party on a 'practical level'," and was therefore entitled to attorney fees under section 1354(c) (See

Salehi, 200 Cal.App.4th at p. 1150), the association would still "cut its losses" by dismissing early rather than proceeding to final judgment and incurring even greater fees. Thus, in this situation, the plaintiff is encouraged not to continue pointless litigation. This reduces the waste of scarce judicial resources.

On the other hand, if the rule is that a false CID plaintiff is not liable for a prevailing defendant's attorney fees, the plaintiff association that files suit with doubts about its CID status may decide that it should not voluntarily dismiss but rather *continue*. This is because if it proceeds to a final judgment, even if it knows it is likely not to be found a real CID, it will *not* be liable for the defendant's attorney fees.

Thus, under the Court of Appeal's interpretation of section 1354(c), the association would be encouraged to continue the pointless litigation to final judgment, wasting the scarce resources of the already overly-burdened court system.

It is an absurd and counterproductive result to encourage associations to continue litigation to get an actual judicial determination that theirs claims were *false*, rather than have associations benefit by dropping litigation they realize has questionable merit.

G. The Court of Appeal's Reliance On *Mount Olympus* Is Misplaced.

In holding that section 1354(c) was not a reciprocal attorney fees provision, the Court of Appeal relied on its earlier decision, *Mount Olympus Property Owners Assn. v. Shpirt* (1997) 59 Cal.App.4th 885. (Decision, pp.12-13.) But *Mount Olympus* involved a fundamentally different situation and considered a different legal issue on section 1354(c) attorney fees. *Mount Olympus* does not apply here.

Mount Olympus concerned whether a *prevailing plaintiff* was entitled to attorney fees under section 1354(c). Plaintiffs (the homeowners association and one individual homeowner) claimed that defendants violated the CC&Rs by not seeking the association's approval of their construction plans, that defendants' construction debris and noise constituted a nuisance and violated the CC&Rs, and that defendants' proposed construction violated the individual plaintiff's view easement rights. (59 Cal.App.4th at p. 889.) The individual homeowner plaintiff won at trial by proving that defendants' construction activities violated the CC&Rs, and was awarded attorney fees under section 1354. (*Id.* at pp. 891-893.)

The Court of Appeal reversed that fee award, holding that the prevailing plaintiff was not entitled to attorney fees under section 1354, because the subdivision was not a common interest development (CID).[6] After spending several pages analyzing whether the subdivision qualified as a CID under the Act, the court discussed plaintiff's other basis for recovering attorney fees. (*Id.* at p. 896.) The *Mount Olympus* court engaged in *no* statutory construction of section 1354. Further, because it held that the prevailing *plaintiff* was not entitled to attorney fees under section 1354, it did not, for obvious reasons, discuss any of this Court's pronouncements on reciprocity and mutuality of remedy—it simply said the prevailing plaintiff was not entitled to fees.

Even more importantly, what *Mount Olympus* also did *not* consider was whether a *prevailing defendant* is entitled to attorney fees under section 1354 if the plaintiff would

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[6] Ultimately, the Court of Appeal remanded the fee issue for determination whether the individual plaintiff could recover under Code of Civil Procedure §2033(o), since defendants had failed to admit a fact during discovery that was later proven at trial. (59 Cal.App.4th at p. 896.)

have been entitled to attorney fees under 1354 if the had prevailed on its claims. That, of course, is the issue involved here – whether Yeldell, as a prevailing defendant, is entitled to fees when there is no common interest development. Therefore, the *Mt. Olympus* court's ultimate ruling does not apply here. In that case, "mutuality of remedy," the doctrine that should be applied here, simply was not triggered.

Indeed, it is axiomatic that a "case is not authority for a proposition not considered." (*Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 198.) Furthermore, "the language of an opinion must be construed with reference to the facts of the case, and the positive authority of a decision goes no farther than those facts. A decision is not authority merely for what it says, but for the points actually involved and actually decided." (*Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, 962.)

Since *Mount Olympus* did not consider whether section 1354(c) applies to a prevailing defendant in an action to "enforce the governing documents," where the association or tract was not a common interest development, it should be irrelevant to Yeldell's right to prevailing party attorney fees.

Finally, the Court of Appeal's citation of *Miller & Starr* §34:66 in its Opinion (Decision, pp. 12-13) is also misplaced and circular, because the sole authority *Miller & Starr* cites is *Mount Olympus*. Since *Mount Olympus* provided no reasoned rationale and since its holding does not apply to a prevailing defendant, the cited *Miller & Starr* discussion also does not help here.

H. A Prevailing Defendant's Right To Attorney Fees Under Section 1354(c) Is Not Defeated By Sections 1352 Or 1374.

Civil Code sections 1352 and 1374, two of the statutes cited in *Mount Olympus* in holding that the subdivision was not a common interest development under the Act, should not defeat Yeldell's right to attorney fees here.

*S*ection 1352 provides: "This title applies and a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed, provided, all of the following are recorded: (a) A declaration. (b) A condominium plan, if any exists. (c) A final map or parcel map..." (Civil Code § 1352.) *S*ection 1374 provides: "Nothing in this title may be construed to apply to a development wherein there does not exist a common area as defined in subdivision (b) of Section 1351." (Civil Code § 1374.)

The common-sense purpose of sections 1352 and 1374 is to say that an association that is not a common interest development is not subject to the host of requirements and obligations that the Act imposes on a CID. These requirements include preparation and distribution of annual operating budgets (§§ 1363 and 1365); levying regular and special assessments sufficient to perform its obligations (§ 1366); maintaining common areas (§ 1364); providing numerous notices to association members (e.g., §§ 1365(e), 1365(f), 1369.590, 1367.1(k) and 1378(c)), complying with an "Open Meeting Act" (§1363.05) and making accounting records, meeting minutes and other documents available for member inspection (§ 1363(e)).

Neither section 1352 nor 1374 speaks to attorney fees or a right to recover fees. Nor did *Mount Olympus* cite these statutes on the question of the right to recover fees. (*Mount Olympus*, 59 Cal.App.4th at pp. 894-895.) Instead, that court looked at these statutes as part of its analysis as to whether a CID existed.

Thus, sections 1352 and 1374 do not prevent (much less even speak to whether) a prevailing defendant like Yeldell from recovering attorney fees under section 1354(c).

II. THE ACT'S LEGISLATIVE HISTORY FURTHER SUPPORTS A CONSTRUCTION OF SECTION 1354(c) AS AWARDING ATTORNEY FEES TO A PREVAILING DEFENDANT LIKE YELDELL.

This Court can consider legislative history to either "[buttress] a plain language construction," or if the statutory language is ambiguous. (*Jarrow Formulas*, 31 Cal.4th at pp. 735-736.) The legislative history of the Act supports construing section 1354(c) as providing attorney fees to a prevailing defendant even if there is no common interest development.

In 1985, California enacted the *Davis-Stirling Common Interest Development Act* (Civil Code §§ 1350 *et seq.*), which governs the formation, operation, and management of common interest developments. As discussed above, the Act imposes burdensome and expensive obligations on associations subject to the statutory regime.

The attorney fees provision at issue here was originally added to the Act in 1990. It originally provided attorney fees to the "prevailing party" in "any action to enforce the declaration." (Request Judicial Notice [RJN], Exh. A.)

The California Building Industry Association (which opposed the amendment) stated that amending Section 1354 to add the recovery of attorney fees to the prevailing party would be "legislating away from the American Rule that each party stands its own legal costs." (RJN, Exh. B.) This recognizes that section 1354(c) created a mandatory, reciprocal fee provision that would apply to either a prevailing plaintiff or a prevailing defendant.

In 1993, the Legislature replaced the term "declaration" with "governing documents" to broaden the statute's reach, and placed the reciprocal attorney fees provision in a new subparagraph, 1354(f). (RJN Exh. C.) "The Legislature obviously intended to broaden the availability of attorney fee awards by authorizing attorney fees in an action to enforce the governing documents rather than just the declaration." (*Kaplan v. Fairway Oaks Homeowners Association* (2002) 98 Cal.App.4th 715, 719.) This broadening of the statute's reach also supports construing the statute to award fees to a prevailing defendant like Yeldell.

In 2004, the attorney fees provision was moved without substantive change from 1354(f) to 1354(c), the statute at issue in this case. (RJN, Exh. D.)

As is the case with section 1354, nothing in the legislative history to sections 1352 and 1374 suggests that the Legislature intended that these provisions affect the recovery of attorney fees under section 1354.

Section 1352 was added in 1985 as part of the original Act, some five years before the attorney fees provision in section 1354. Thus, the Legislature could not have had the

fees provision in mind when it enacted section 1352, and nothing in the legislative history of 1354(c) mentions section 1352.

Although section 1374 was added to the Act after the fee provision (in 1994), the legislative history of section 1374 makes clear that its purpose is to say that those developments that do not have a common area to maintain do not have to comply with the host of CID requirements and obligations elsewhere in the Act. It is intended to protect non-common area developments from being inadvertently subject to onerous CID requirements.

For example, a Senate Rules Committee analysis stated:

> The Davis-Stirling Common Interest Development Act regulates CIDs. . . . . The Act requires community associations to elect a board of directors, prepare and approve an annual operating budget, collect association dues, enforce rules and regulations, and maintain the common areas. . . . The author wants to clarify and reinforce existing CID law so that it does not apply to a homeowners association that has no common area to maintain.
>
> (RJN, Exh. E.)

Similarly, a Senate Local Government Committee analysis repeated this language and added that "property owners sometimes create community associations with no common maintenance areas, for fighting neighborhood crime or reviewing development projects. These community associations are not subject to the Act. AB 67 clarifies that the Act applies only to community associations that are formed to manage and maintain

developments with common areas." (RJN, Exh. F.) *See also*, Republican Analysis of the Assembly Housing and Community Development Committee dated as "Analyzed: 7/5/94" (RJN, Exh. G); and, Enrolled Bill Report" on AB 67 by the Department of Consumer Affairs (RJN, Exh. H.)

Finally, the Position Letter of the California Building Industry Association. recognized that "AB 67 is a very important clarification of law which will help ensure that property owners do not find themselves subject to rules and regulation which they had no reason to believe existed at the time they purchased their property." (RJN, Exh. I.)

Thus, section 1374's legislative history supports a construction that it has nothing to do with whether a prevailing defendant, like Yeldell, can recovery attorney fees.

III. CONCLUSION

This Court should reverse the Court of Appeal's decision. This Court should hold that the attorney fees provided by Civil Code section 1354(c) apply to a prevailing defendant, a homeowner, in an action brought against the defendant by a subdivision's homeowners association to enforce its governing documents, even if that subdivision is not a common interest development.

DATED: October 30, 2013

Respectfully Submitted,

By: /s/ Keith J. Turner
Keith J. Turner
Attorney for Petitioner Eric Yeldell

4837-1127-9894, v. 11

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 8,354 words, including footnotes, which is less than the maximum amount permitted by the Rules of Court. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: October 30, 2013

/s/Keith J. Turner
Keith J. Turner

4823-3628-1353, v. 1

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

Tract 19051, et al., v Maurice Kemp, et al.

Supreme Court of the State of California Case No. S211596

I am over the age of 18 and not a party to the within action; I am employed in the County of Los Angeles at 429 Santa Monica Blvd., Suite 500, Santa Monica, CA 90401. On the date below I served the following document:

OPENING BRIEF ON THE MERITS

The document was served by the following means on all parties listed below:

Ken Mifflin, Esq.
The Law Offices of Mifflin & Associates
4309 South Western Ave.
Los Angeles, CA 90062

Robert L Jones
4081 S. Cloverdale Ave.
Los Angeles, CA 90008

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 30, 2013 at Santa Monica, California.

/s/Max Master
Max Master