Supreme Court case no. S211596

SUPREME COURT of CALIFORNIA

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

v.

Maurice Kemp et al.,
Defendants and Respondents

REPLY BRIEF ON THE MERITS

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SUMMARY OF REPLY ARGUMENT

This Court asked the parties to address whether Defendant Eric Yeldell's right to prevailing-party attorney fees under Civil Code section 1354[1] is precluded because it was later determined that Plaintiffs' subdivision was not a common interest development (CID) and its governing documents had not been properly reenacted. Section 1354(c) provides that "[i]n an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs."

Here, a homeowners association and a number of individual plaintiffs (collectively the "Association") filed an action to enforce governing documents—a declaration of restrictions for their subdivision—alleging that the subdivision was a CID and that Defendants breached those DORs. The Association also sought attorney fees. Defendant Yeldell prevailed because the Association could not prove that it was a CID or that the DORs were otherwise effective. As the prevailing party, the trial court awarded Yeldell attorney fees against the Association.

Section 1354(c) provides for an award of attorney fees to the "prevailing party"—*either* plaintiff or defendant, whichever prevails. It also

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[1] All further undesignated statutory references are to the Civil Code. The *Davis Stirling Act* was re-numbered effective January 1, 2014. Section 1354(c) is now section 5975(c), but the language is identical.

provides attorney fees "shall be awarded"—the award is mandatory. Despite the statute's plain language, the Association contends the statute does not apply because the subdivision was not a CID, even though the Association alleged that the subdivision was a CID and claimed at all times that the Association was entitled to its attorney fees incurred in enforcing its governing documents.

In the context of this argument, the Association contends that Yeldell prevailed by arguing that the *Davis Stirling Act* (Act) did not apply to this case "in any way, shape or form." However, Yeldell never argued that the Act did not apply in any way, shape or form or that section 1354(c) did not apply to this case. Rather, Yeldell prevailed because the Association could not prove that it was a CID or that its DORs were effective.

Much of the Association's Answering Brief argues that Yeldell's right to attorney fees is precluded by sections 1352 and 1374.[2] However, neither 1352 nor 1374 states that a prevailing defendant is not entitled to attorney fees in an action to enforce the governing documents under section 1354(c). Rather, the intent of sections 1352 and 1374 is that an association that is not a CID is not subject to the host of requirements and obligations the Act imposes on CIDs.

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[2] Effective January 1, 2014, section 1352 was re-numbered as section 4200 and 1374 was re-numbered as section 4201.

The rest of the Association's arguments ignore that since section 1354(c) contains the two dispositive aspects that make it *reciprocal and mandatory*—"prevailing party" and "shall be awarded"— the mutuality-of-remedy doctrine applies. Under that doctrine, if a plaintiff suing to enforce a specific subject matter (e.g., a contract or a bonded stop notice) seeks attorney fees under a reciprocal and mandatory fee-shifting statute, and would have been entitled to attorney fees under that statute if plaintiff had prevailed, the defendant is entitled to defendant's attorney fees even if defendant prevails by proving the subject matter void, ineffectual or nonexistent. That doctrine, which is based on fairness, ensures the Legislature's "reciprocity" mandate is preserved.

In every analogous case by this Court and the Courts of Appeal, mutuality of remedy has been applied to award attorney fees to the prevailing defendant. None denied the prevailing defendant attorney fees because defendant prevailed by proving the subject matter plaintiff sued to enforce was void, ineffectual or nonexistent, or because the overall statutory scheme the plaintiff sued on did not generally apply to the plaintiff. *Mount Olympus Property Owners Assn. v. Shpirt* (1997) is the only case cited by this Court of Appeal in support of its decision, but *Mount Olympus* did not deal with an analogous situation and is not relevant. (59 Cal.App.4th 885 ("*Mt. Olympus*").)

Here, the Association brought an action to enforce its governing documents as those of a CID, triggering the mandatory and reciprocal fee-shifting statute, section 1354(c). Further, the Association would indisputably have been entitled to its attorney fees had it prevailed. In fact, in a later-vacated interlocutory judgment, the Association was awarded $112,000 in attorney fees.

Applying mutuality of remedy is the equitable outcome. If not applied, the statute the Legislature enacted to be "reciprocal"—two-way—becomes "unilateral"—one-way. That unilateral provision can be used as an instrument of oppression to force settlements of unmeritorious or abusive claims, and creating such instrument is not only something the Legislature could not have intended, but is also something the Legislature specifically sought to prevent. Moreover, several other absurd or otherwise unintended consequences will result from this Court of Appeal's decision.

The Association does not offer one policy ground or equitable reason that it should prevail. Further, not one of the few authorities the Association relies on, actually support its arguments or the Court of Appeal's decision. Either, for example, the authority does not apply to the facts of this case (e.g. *Gil v. Mansano*) or it is misstated (e.g., *Blue Lagoon Cmty. Assn. v. Mitchell*).

Finally, the Association misstates that the Court of Appeal "ruled" that Yeldell could not "reap a windfall" by being awarded attorney fees. In fact, the Court of Appeal did not even imply that. Rather, based on the Court

of Appeal's misreading of *Mount Olympus, supra,* 59 Cal.App.4th 885, it ruled that because no CID existed, the Act did not apply, and therefore Yeldell could not be awarded attorney fees under 1354(c). As discussed in Yeldell's Opening Brief, *Mount Olympus* is not relevant or controlling because it concerned whether a prevailing plaintiff could recover attorney fees. That is not the issue here, which is whether a prevailing defendant can obtain fees.

The mutuality-of-remedy doctrine and the statutory-interpretation rules are discussed separately below, but they intertwine. They are "two sides of the same coin." Under that doctrine and those rules, 1354(c) should be interpreted to award attorney fees to Defendant Yeldell to prevent inequitable, unreasonable and absurd consequences the Legislature did not intend.

The Court of Appeal's decision should be reversed.

ARGUMENT

I. EVEN THOUGH THE ASSOCIATION DID NOT PROVE IT WAS A CID, YELDELL SHOULD RECOVER ATTORNEY FEES UNDER SECTION 1354(c) BECAUSE THE ASSOCIATION BROUGHT AN ACTION TO ENFORCE GOVERNING DOCUMENTS AND YELDELL PREVAILED.

As the "prevailing party," Yeldell is entitled to attorney fees under section 1354(c) because that statute's "plain language" is mandatory and

reciprocal and the Association filed an action to enforce governing documents. Yeldell's right to attorney fees should *not* be defeated because the Association could not prove it was a CID or because the governing documents were not effective.

A. THE "PLAIN LANGUAGE" OF SECTION 1354(C) MAKES IT A BROADLY-WORDED, RECIPROCAL FEE-SHIFTING STATUTE MANDATING AN ATTORNEY FEES AWARD IN ANY ACTION SEEKING TO ENFORCE GOVERNING DOCUMENTS.

The parties agree that the "goal in construing a statute is 'to determine and give effect to the intent of the enacting legislative body.'" (*Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 490 (citation omitted) (*"Holland"*).) To construe a statute, courts must determine the Legislature's intent. To do so, courts first look to the statute's plain language, giving the words their usual and ordinary meaning. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733 ("*Jarrow Formulas*"); "'If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls.'" (*Holland, supra,* 58 Cal.4th at p. 490 (quotation omitted).)

The Superior Court correctly awarded Yeldell his attorney fees as the prevailing party under the plain language of section 1354(c). The Association agrees that section 1354(c) is not ambiguous, yet it goes on to

argue that two other statutes—sections 1352 and 1374—determine the application of section 1354(c). That argument should be rejected; section 1354(c)'s plain language should end the discussion.

The Association also states that section 1354(c) is "*the*" Act's fee shifting provision. (Answering Brief ("AB") at p. 3.) But in fact it is just one of many attorney fees provisions provided in the Act.[3]

1. THE ASSOCIATION'S "ACTION TO ENFORCE" TRIGGERED SECTION 1354(C), BASED ON THE PLEADINGS AND BECAUSE THE ASSOCIATION WOULD HAVE RECOVERED ATTORNEY FEES IF IT HAD PREVAILED.

Section 1354(c)'s plain meaning is that it applies here because the Association brought "an action to enforce" its governing documents (the DORs). Yet, without any legal precedent for support, the Association contends that it is "axiomatic" that if the Act does not apply because there never was a "compliant" CID, then 1354(c) does not apply either. (AB at pp. 4, 6.) It further argues that this "necessarily means" that to have an "action to enforce" there must be valid governing documents "compliant" with the Act. (*Ibid.*) Those arguments are not axiomatic; they are wrong.

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[3] For example, section 5145 provides that a CID member who prevails in a civil action to enforce the member's election related rights shall be entitled to reasonable attorney's fees and court costs. (formerly § 1363.09.) Section 5380 provides that the prevailing party in an action to enforce the various managing agent duties regarding CID related funds provided in that section shall be entitled to recover reasonable legal fees (formerly § 1363.2(e) .)

Section 1354(c) covers "an action to enforce the governing documents." Nothing in that statute says that it only applies if a CID exists.

To determine if the Association brought an action "to enforce governing documents" within the meaning of section 1354(c), the pertinent inquiry is not whether the Act actually applied, so that there were actually CID governing documents. Rather, the pertinent inquiry is whether "look[ing] to the pleadings" the Association sought to enforce governing documents such that the Association would have been entitled to attorney fees in the *hypothetical situation* in which it prevailed on its allegations. (See *Mepco Services, Inc. v. Saddleback Valley Unified School Dist.* (2010) 189 Cal.App.4th 1027, 1047.)

Alleging it was a CID, the Association filed this action to enforce governing documents—the DORs (Decision at p. 5; RA 117, ¶¶ 10, 14, 32.) Moreover, the Association sought to recover its attorney fees pursuant to section 1354(c). (Decision at p. 7; RA 117, e.g., ¶¶ 23, 32.).

Looking to the pleading, the Association would have been entitled to recover its attorney fees had it prevailed; that is undisputed. In fact, the Association was awarded $112,000 in attorney fees, under section 1354(c), in a later-vacated interlocutory judgment. (Decision at p. 7.) Thus, the Association brought an "action to enforce," triggering section 1354(c).

In various ways, the Association states that Yeldell's defense to its action to enforce the DORs was that the Act "does not apply at all, in any

way, shape or form, to this case." (AB at pp. 1, 5, 8.) Yeldell never made that argument.

Yeldell prevailed because the Association could not prove it was a CID, which it needed to do to prove that it had extended the DORs by the procedure provided by section 1357. (Decision at p. 2.) The only arguments Yeldell advanced regarding the Act were that the subdivision was not a CID and therefore the DORs could not be extended.

If the Legislature creates a reciprocal and mandatory fee-shifting statute, it is meant to cover *any* suit within the subject area, because, among other things, 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 such of its purposes as discouraging frivolous litigation) applies.

2. BECAUSE SECTION 1354(C) IS BOTH RECIPROCAL AND MANDATORY, THIS COURT SHOULD CONSTRUE THAT STATUTE LIKE THIS COURT HAS CONSTRUED SIMILAR BROADLY-WORDED FEE-SHIFTING STATUTES, SUCH AS SECTIONS 55 AND 1717, AND HOLD THAT 1354(C) REQUIRES THE AWARD OF ATTORNEY FEES TO YELDELL.

Section 1354(c)'s plain wording makes it a broadly-worded, reciprocal and mandatory fee-shifting statute similar to such sections as 55 and 1717. The Association illogically argues that section 1354(c) is narrower than other reciprocal and mandatory fee-shifting statutes, such as sections 55

and 1717, because 1354(c): (1) refers to "an action" rather than to "any action," and (2) is expressly limited to "'an action to enforce the governing documents' of a CID." (AB at pp. 9, 10-14.)

The Association contends that section 1354(c) is "narrowly tailored." (AB at pp. 1, 9, 14.) But, like section 55, which is a broadly-worded fee-shifting statute recently interpreted by this Court, section 1354(c) is mandatory and reciprocal because it contains two "dispositive" aspects. (*Jankey v. Song Koo Lee* (2012) 55 Cal.4th 1038, 1045-46 ("*Jankey*").) It is "reciprocal" because it awards attorney fees to the "prevailing party"—*either* plaintiff or defendant. (*Ibid.*) And, it is mandatory because it says attorney fees "shall be awarded." (*Ibid.*) Its language is, like that of section 55, plain, straight-forward and broadly-worded.

The Association admits that the language "in any action to enforce" "signifies a *broad* applicability." (AB at p. 11, emphasis added.) But, several times, the Association argues that 1354(c) is a limited statute, in part because it uses the term "in *an* action to enforce" rather than "in any action." (AB at pp. 11-15, emphasis added.)

For example, the Association states that section 1717 is a "broadly worded statute," because it applies "in any action on a contract," and then contends that unlike section 1717, section 1354(c) is "limited" because it applies to "'an action to enforce the governing documents' of a CID" and is "worded differently and far more narrowly than 1717." (AB at p. 14.)

Also, the Association attempts to distinguish 1354(c) from section 3176 (now section 8558), which was the statute at issue in *Mechanical Wholesale Corporation v. Fuji Bank Limited* (1996). (42 Cal.App.4th 1647 ("*Mechanical Wholesale*").) After acknowledging that the language of section 3176 was "broad," the Association asserts that "*none* of this broad language . . . appears in Section 1354(c)," and that "Section 1354(c) does not apply 'in any action' but only in a particular type of action." (AB at p. 15, emphasis added.) In making its claim, the Association emphasizes the following language of section 3176: "In *any* action against ... [a] construction lender to enforce payment of a claim stated in a bonded stop notice, *the prevailing party* shall be entitled to collect *from the party held liable by the court for payment of the claim,* reasonable attorney's fees." (AB at pp. 14-15.)

Finally, the Association contends that "Defendants reliance upon various statutes awarding attorneys' fees 'in any action' or that apply generally to all types of actions is misplaced because Section 1354(c) does not contain such broad language." (AB at pp. 13-14.)

In fee-shifting statutes, "any" and "an" (or "a") mean the same thing. The Association cites no authority for its contention that they do not. Nor does it provide even one example of when the phrase "in any action to enforce" would include something that "an action to enforce" would not, because they both include *every* "action to enforce."

These terms are used interchangeably, sometimes within the same statute, as is the case with the reciprocal fee-shifting statute Labor Code section 218.5:

> In *any action* brought for the nonpayment of wages ... the court shall award reasonable attorney's fees and costs to the prevailing party .... This section shall not apply to *an action* brought by the Labor Commissioner. This section shall not apply to *a surety* issuing a bond ... or to *an action* to enforce a mechanics lien.... This section does not apply to *any action* for which attorney's fees are recoverable under Section 1194.

(Emphasis added.)

In 2004, section 1354's attorney fees provision was revised. (RJN, Exh. D.) The first sentence of section 1354(f), which read "[i]n any action specified in subdivision (a) to enforce the governing documents," was moved to 1354(c) and the wording changed to "in an action to enforce the governing documents." (*ibid.*)

The Association first states that the language of 1354(f) was "substantially similar" to that of section 1354(c) (AB at p. 7.) Later, after again acknowledging that the language "in any action to enforce" signifies a "broad applicability," the Association does an about face regarding the similarity between 1354(f) and 1354(c), and asserts that a "substantive change" was made when the first sentence of section 1354(f) was moved to

section 1354(c). (AB at p. 12.) The Association argues that "the scope of the provision's applicability was truncated" by the change to "an action." *(Ibid.)*

The California Law Revision Commission ("CLRC"), however, which proposed and drafted the foregoing revision, contradicts that latter position. (*Recommendation: Alternative Dispute Resolution in Common Interest Developments* (September 2003) at p. 711.) The CLRC stated "the first sentence of former subdivision (f) is continued *without substantive change* in subdivision (c)." (*Ibid.*, emphasis added.)

The Association's contentions that sections 1717 and 3176, for example, are broader than 1354(c), fail for additional reasons. The Association ignores that section 1717 applies only if the contract provides for the award of attorney fees incurred to enforce the contract. Section 1354(c) is not so limited; it does not require the governing document being enforced include an attorney fees provision.

Likewise, the language "*from the party held liable by the court for payment of the claim*[4]," emphasized by the Association in an attempt to demonstrate why section 3176 is broader than section 1354(c), actually

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[4] In fact, after "[r]eading section 3176 as a whole ... and remembering the need to avoid an absurd result," the *Mechanical Wholesale* court went on to ignore that language. *Id.,* 42 Cal.App.4th 1660-61.

proves the opposite. That language is limiting; section 1354(c) does not contain any such limiting language.

The Association argues also that section 3176 is broader than section 1354(c) because section 1354(c) "does not apply 'in any action' but only in a particular type of action." (AB at p. 15.) That argument is meaningless. Of course it applies only to a particular type of action; section 3176 and the other fee-shifting statutes all apply only to a particular type of action.

Section 3176, for example, applied to "any *action to enforce* . . . a bonded stop notice" (the current version of that section, section 8558, applies to "*an action to enforce* . . . a bonded stop notice"). If any reciprocal fee-shifting statute literally applied to "any action," it would swallow the American Rule[5] and the other fee-shifting statutes.

Applying the lessons from *Jankey, supra,* and similar cases and the settled statutory-construction rules, this Court need go no further. The statute's plain language provides the answer – the Legislature chose in section 1354(c) to enact a reciprocal and mandatory fee statute providing that the prevailing party (Defendant Yeldell) *shall* be entitled to his attorney fees because the Association brought an action to enforce its governing documents as those of a CID.

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[5] The American Rule says that the parties to a lawsuit will bear their own attorney fees unless a contract or statute provides otherwise. It is codified in California *Code of Civil Procedure* § 1021.

B. UNDER SETTLED STATUTORY INTERPRETATION RULES, SECTIONS 1352 AND 1374 DO NOT PREVENT AN ATTORNEY FEES AWARD UNDER SECTION 1354(C), EVEN THOUGH NO CID EXISTS.

The Association greatly relies on its assertion that sections 1352 and 1374 mandate that 1354(c) does not apply in this case. (e.g., AB at pp. 5, 12, 14.) That assertion is erroneous for at least three reasons.

First, under the plain meaning of section 1354(c), Yeldell is entitled to his attorney fees because the Association brought an action to enforce governing documents and Yeldell is the "prevailing party." Second, interpreting section 1354(c) to not apply even though the Association would have been entitled to attorney fees had it prevailed, leads to absurd consequences the Legislature could not have intended. Third, the legislative history supports the commonsense reading of the Act—that sections 1352 and 1374 do not prevent applying section 1354(c). Each of these reasons is further discussed in the following sections.

1. SECTION 1354(C)'S PLAIN WORDS DO NOT REFER TO SECTIONS 1352 OR 1374.

This case revolves around the interpretation of section 1354(c), which provides "[i]n an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs."

To construe a statute, this Court must determine the Legislature's intent. Generally, that determination is based on the statute's plain language,

giving the words their usual and ordinary meaning. (*Jarrow Formulas, supra,* 31 Cal.4th at p. 733; *Trope v. Katz (1995),* 11 Cal.4th 274, 278-79 ("*Trope*").) But, if the statute is ambiguous or susceptible to different constructions, it is read to give practical and workable results and not absurd consequences. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919.) Moreover, it is not read literally if that would result in absurd consequences the Legislature did not intend. (*Holland, supra,* 58 Cal.4th at p. 490.)

Section 1354(c) is a mandatory and reciprocal attorney fees statute, and its plain, clear and unambiguous language says that a prevailing defendant should recover his attorney fees. Recovery is hinged solely on plaintiff's action, not whether a court ultimately determines that the subdivision is a CID.

The Association states that if the Legislature intended for an attorney fees award under the Act, even if the Act was deemed not to apply, the Legislature would have used such words as "in <u>any</u> action brought under this Act, the prevailing party shall be awarded reasonable attorney's fees." (AB at p. 6.) That is, however, what section 1354(c) says regarding governing documents. It says that in *any* action brought to enforce governing documents ("any" and "an" mean the same thing), the *prevailing party shall* be awarded attorney fees. The Legislature has not desired to award attorney

fees in every single action relating to the Act; it has awarded fees only in certain actions.[6]

Thus, under the settled statutory-construction rules, this Court need not go beyond 1354(c). Its plain language provides the answer. Yeldell, the prevailing party, shall be awarded his attorney fees.

2. 1354(c) SHOULD NOT BE INTERPRETED TO NOT APPLY IF NO CID EXISTS, BECAUSE THAT WOULD RESULT IN SEVERAL ABSURD CONSEQUENCES.

At most, sections 1352 and 1374 are ambiguous or susceptible to differing constructions regarding their application to section 1354(c). Despite the Association's contrary assertions, there is no "plain language" in sections 1352 and 1374 mandating that section 1354(c) is inapplicable to this case because the Court of Appeal determined that there was no "common area" that qualified the subdivision as a CID. (AB at p. 4.)

Since, at most, sections 1352 and 1374 are ambiguous or susceptible to differing constructions regarding section 1354(c), they should *not* be read to prevent an attorney fees award to Yeldell under section 1354(c), because that construction would lead to absurd consequences the Legislature could not have intended. (*City of Santa Monica, supra, 43* Cal.4th at p. 919.) Moreover, even if they were not ambiguous, they should *not* be literally read

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6 See Footnote 3, *supra*.

to prevent that award, because such a reading likewise leads to those absurd consequences. (*Holland, supra,* 58 Cal.4th at p. 490.)

a) SECTIONS 1352 AND 1374 DO NOT HAVE "PLAIN LANGUAGE" PREVENTING THE APPLICATION OF SECTION 1354(c) AND ARE, AT MOST, AMBIGUOUS OR SUSCEPTIBLE TO DIFFERING CONSTRUCTIONS.

Section 1352, which was added in 1985 by the original Act, provides that "this title applies and a common interest development is created whenever" certain conditions are met. And, the subdivision did not meet those conditions.

Section 1374, which was added to the Act in 1994 by AB 67, provides that: "[n]othing 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. This section is declaratory of existing law."

The Association's "plain language" position is mistaken for several reasons.

Neither section 1352 nor section 1374 speaks to if a prevailing defendant like Yeldell can recover attorney fees under section 1354(c).

Section 1374 applies by its terms to "a development." Neither Yeldell, nor any of the plaintiffs in this action, are "a development." Yeldell is the "prevailing party," which under 1354(c) "shall" be entitled to his

attorney fees, and the Association is no more than a group of plaintiffs who brought "an action to enforce governing documents" as those of a CID.

The Association asserts that "Section 1352 states, without qualification, that "'[t]his title applies...' *only* when the conditions necessary to create a CID are met." (AB at p. 5, emphasis added.) But, the word "only" does not appear in section 1352. Moreover, section 1374—which provides that the Act's requirements and obligations don't apply to a "development" without a common area—was enacted five years after section 1352, and if section 1352 was as crystal clear and all-encompassing as the Association contends, then the Legislature would not have thought section 1374 necessary.

b) THE COURT OF APPEAL'S DECISION LEADS TO ABSURD CONSEQUENCES.

The Court of Appeal interpreted section 1354(c) to not award a prevailing defendant fees if a CID does not exist. That interpretation results in a number of absurd consequences the Legislature could not have intended.

The Association does not argue that those consequences are not *per se* absurd. Rather, regarding those consequences and the rule that a statute should not be interpreted to produce unreasonable results or absurd consequences the Legislature did not intend, the Association advances the following circular reasoning: "*it is hardly absurd that the result is exactly what was intended.*" (AB at pp. 10-11, emphasis added.)

Twice, the Association asserts that Yeldell "misrepresent[s] that a prevailing defendant could never recover attorney's fees under 1354(c) if [Yeldell is] not allowed to recover them." (AB at pp. 5, 8.) The Association also claims that *Salehi v. Surfside III Condominium Assn.* (2011), 200 Cal.App.4th 1146, 1150 ("*Salehi*") supports the Association's arguments because it shows that when the plaintiff is a CID "the prevailing party defendant may be awarded fees." (AB at p. 16.)

But, contrary to the Association's claims, Yeldell's Opening Brief stresses that a prevailing defendant will be awarded attorney fees if a true CID plaintiff brings an action to enforce governing documents and loses. (Opening Brief ("OB") at p. 19.) That in no way supports the Association's arguments. What it does is highlight one absurd consequence of the Court of Appeal's decision—that plaintiffs attempting to enforce CC&Rs, who make meritless claims that a subdivision is a CID, are put *in a better position* than plaintiffs in a true CID.

Other absurd consequences of that decision are that it transforms a reciprocal and mandatory statute into a unilateral statute that works in favor of plaintiffs falsely claiming to be a CID, creating a vehicle for forcing abusive settlements; it rewards the Association's counsel's "faulty reasoning" in pursuing a questionable claim of being a CID; and it could encourage continuing frivolous or pointless litigation, wasting scarce judicial resources.

The Association contends the consequence regarding wasting judicial resources, as discussed in Yeldell's Opening Brief at pages 22 to 23, is "patently frivolous" based on the following irrelevant reasoning: "[t]his was a legitimate dispute that ultimately resolved in Defendants' favor. Similarly, all of the considerations raised by Defendants are already addressed by authorities awarding fees and sanctions for frivolous or vexatious litigation." (AB at p. 11.) Also, regarding wasting judicial resources, the Association contends that Yeldell fails to cite any authority supporting his contention." (*Ibid.*) First off, no court found any merit to the Association's allegations. Second, Yeldell's contentions are supported by logic and *Salehi*, *supra,* 200 Cal.App.4th at p. 1150. The Association offers no explanation why Yeldell's reasoning is false.

c) 1354(c) APPLIES DESPITE THE ASSOCIATION NOT BEING A CID, BASED ON A COMMONSENSE READING OF THE ACT AND THE LEGISLATIVE HISTORY.

This Court can consider legislative history to either "[buttress] a plain language construction" or if the statutory language is ambiguous. (*Jarrow Formulas*, *supra,* 31 Cal.4th at pp. 735-36.) The Act's legislative history supports construing section 1354(c) as providing attorney fees to a prevailing defendant even if no CID exists.

The commonsense reading of sections 1352 and 1374 indicates they are intended to say that a homeowners association for a "development"

without a common area is not subject to the myriad requirements and obligations the Act imposes on CIDs. Those requirements and obligations 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)).

Nothing in the legislative history of 1354(c) suggests it was intended to be affected by 1352 or 1374. Likewise, nothing in the legislative history of 1352 or 1374 suggests they were intended to affect 1354(c).

Section 1352 was added 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 or suggests it was to be affected by it.

The Association's quotation of the least relevant portion of the legislative history noted in Yeldell's Opening Brief—the portion essentially restating the language of section 1374—attempts to obscure the Legislature's intent regarding section 1374. (AB at p. 12.) The legislative history supports the commonsense reading of section 1374—it is intended to protect non-common-area developments from being inadvertently subject to onerous

CID requirements. (OB at pp. 27-30.) It purpose is summed up in the Position Letter of the California Building Industry Association: "AB 67 is a very important clarification of law which will help ensure that property owners do not find themselves subject to rules and regulations which they had no reason to believe existed at the time they purchased their property." (RJN, Exh. I.; OB at pp. 27-30.) Nothing suggests that section 1374 was intended to affect the reciprocal and mandatory fee-shifting statute—section 1354(c).

C. THE ASSOCIATION'S OTHER "PLAIN MEANING" ARGUMENTS ARE SIMPLY MISSTATING INAPPLICABLE DECISIONS.

1. THIS COURT MAY AWARD ATTORNEY FEES TO PREVAILING PARTIES UNDER ITS INHERENT EQUITABLE AUTHORITY (*BLUE LAGOON*).

Attempting to support its claim that "'equitable principles' [cannot] be used to render section 1354(c) applicable to a situation where it did not apply on its face" (AB at p. 7), the Association misstates the holding of *Blue Lagoon Community Assn.* v. *Mitchell* (1997). (55 Cal. App.4th 472 ("*Blue Lagoon*").)

In *Blue Lagoon,* a CID association brought a petition under section 1356 seeking the Superior Court's permission to amend a declaration by a percentage of votes less than that required by the declaration. (*Supra, 55 Cal.App.4th* at pp. 473-74.) The association members who objected (the

"objectants") prevailed and sought attorney fees under section 1354(c) and other equitable principals. (*Id.* at 476.)

The Court denied them fees, because the petition proceeding was not adversarial and the objectants were not enforcing the governing documents as required by 1354(c). (*Blue Lagoon, supra, 55 Cal.App.4th* at pp. 477-78.) The court did not make the statement the Association asserts it did, expressly or implicitly. After noting that "[t]he objectors . . . argue that 'equitable principals' support an award of statutory fees because the Association's petition violated its fiduciary duty," the court went on to suggest that there was no inequity. (See *Id.*)

In any event, this Court has the power to create judicial exceptions providing for recovery of attorney fees to prevailing parties based on its inherent equitable authority. (*Trope, supra,* 11 Cal.4th at 279 ("we have relied on our "inherent equitable authority" to develop three additional exceptions—the common fund, substantial benefit, and private attorney general theories of recovery." (Citations omitted).)

2. THE HOLDING OF *MT. OLYMPUS* IS NOT RELEVANT, BECAUSE IT DID NOT INVOLVE A PREVAILING DEFENDANT.

In *Mount Olympus*, the court denied attorney fees to a prevailing *plaintiff* that was found not to be a CID. (*Supra,* 59 Cal.App.4th 885.) That case did not involve a prevailing defendant.

Because the plaintiff did not prove a CID existed, plaintiff was not entitled to attorney fees under section 1354(c). The issue of whether a prevailing defendant is entitled to attorney fees under section 1354(c) was not discussed by the court in *Mount Olympus*.

There is nothing in the court's holding that provides that *Mount Olympus* is relevant to Yeldell's right to attorney fees here. Yeldell was the prevailing party because the Association did not prove it was a CID. However, that does not change that this was an action to enforce the Association's governing documents. Therefore, the plain language of section 1354(c) provides that Yeldell is entitled to his attorney fees.

3. BECAUSE THE ASSOCIATION BROUGHT AN ENFORCEMENT ACTION, ITS ASSERTION THAT SECTION 1354(c) CANNOT BE APPLIED BECAUSE YELDELL IS USING THE ACT "DEFENSIVELY" IS NOT APPLICABLE (*GIL V. MANSANO*).

Section 1354(c)'s applicability is not defeated by the Association's misplaced reliance on *Gil v. Mansano* (2004) 121 Cal.App.4th 739 ("*Gil*"). Citing to *Gil*, the Association contends that "where, as here, the statute is used defensively and the language authorizing recovery of attorney's fees is limited to 'actions to enforce,' an award of attorney's fees is not authorized." (AB at p. 7.) *Gil*, however, is inapposite.

In *Gil*, the parties signed a release that included the following attorney fee provision: "'In the event action is brought to enforce the terms

of this [Release], the prevailing party shall be paid his reasonable attorney fees and costs incurred therein.'" (*Supra*, 121 Cal.App.4th at p. 742.) The Plaintiff thereafter sued the defendant "for fraud, a tort." The court denied the defendant attorney fees because the attorney fee provision required action be brought to enforce the terms of the release, and a "tort claim does not enforce a contract." (*Id.,* at p. 743.)

Here, the Association brought "an action to enforce" its alleged governing documents, the DORs.

II. BECAUSE THE PRINCIPALS UNDERLYING MUTUALITY OF REMEDY APPLY TO THIS CASE TO THE SAME EXTENT AS TO THE SECTIONS 1717 AND 3176 CASES, THAT DOCTRINE SHOULD BE APPLIED TO AWARD YELDELL ATTORNEY FEES.

The principals underlying mutuality of remedy apply equally to the award of attorney fees under the reciprocal and mandatory attorney fees provision in this case, section 1354(c), as they do to such awards under section 1717.

The Association attempts to elude mutuality of remedy by asserting it is merely a contract doctrine that does not apply to section 1354(c). In support, it states that section 1717 "*expressly authorizes* mutuality of remedy in any contract action." (AB at p. 14, emphasis added.) It states also that "the policy considerations that give rise to the mutuality of remedy doctrine

in the contract context do not apply here, as there is no unequal bargaining power, oppression, or leverage involved in the Legislature's enactment of a statute." (AB at pp. 8-9.)

That last statement is a non sequitur. And, the Association does not offer any explanation why "unequal bargaining power, oppression, or leverage" would not result from this Court of Appeal's decision if mutuality of remedy is not applied.

The other statement is mistaken; the term "mutuality of remedy" does not appear anywhere in section 1717. The Association's position ignores also that, although the subject matter of section 1717 is "contracts," attorney fee awards under section 1717 are by *statute*, as they are under section 1354(c); they are not by contract. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1091, citations omitted.)

Courts apply mutuality of remedy to section 1717 cases because that section mandates that if a contract contains an attorney fees provision (even if unilateral), that provision is deemed reciprocal—giving the right to recover to *either* party. (*Care Constr., Inc. v. Century Convalescent Centers, Inc.* (1976) 54 Cal.App.3d 701, 705 ("*Care Construction*") (Citation omitted).) Mutuality of remedy ensures reciprocity. (See, e.g., *Santisas v. Goodin* (1998) 17 Cal.4th 599, 610 ("*Santisas*"); accord *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 223.) And, reciprocity means the right to an

award is "mutual." Ensuring reciprocity by applying mutuality of remedy avoids absurd or other consequences the Legislature could not have intended.

Section 1354(c) provides for reciprocity in attorney fee awards, exactly like section 1717. Thus, mutuality of remedy—which has already been applied outside the section 1717 context—should be applied to section 1354(c) as it is to section 1717. (*Mechanical Wholesale, supra,* 42 Cal.App.4th 1647.)

The decisions of this Court and the Courts of Appeal hold that mutuality of remedy means the prevailing defendant is entitled to attorney fees under the applicable fee-shifting statute, even if the defendant prevails by proving the subject matter the plaintiff sued to enforce was inapplicable, invalid, unenforceable, or nonexistent. (*Santisas, supra,* 17 Cal.4th at p. 611; *Hsu v. Abbara* (1995) 9 Cal.4th 863, 870 ("*Hsu*").) Otherwise, "the right to attorney fees would be effectively unilateral — regardless of the reciprocal wording of the attorney fee provision allowing attorney fees." (*Santisas, supra,* 17 Cal.4th at p. 611.)

Further, the Legislature's reciprocity mandate, and applying mutuality of remedy, are intended to prevent the oppressive use of one-sided attorney fee provisions. (*PLCM Group, supra,* 22 Cal.4th at pp. 1090-91.)

In *Care Construction*, the court described the disadvantaged position in which a unilateral fee provision places the party unable to recover attorney fees, and noted that such provision can be used to force abusive settlements:

"[s]hould he 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. [Citation omitted.] Section 1717 was obviously designed to remedy this evil." (*Care Construction, supra,* 54 Cal.App.3d at p. 704. [Citation omitted]).)

The Association makes the same arguments made by plaintiffs in the 1717 cases and in *Mechanical Wholesale.* (*Supra,* 42 Cal.App.4th 1647.) Those plaintiffs had sued to enforce a specific subject matter (a contract or a bonded stop notice), alleging that the subject matter existed. Those plaintiffs also sought attorney fees alleging a reciprocal and mandatory fee-shifting statute applied to that action. But, the defendant prevailed by proving the subject matter sued on to be inapplicable, invalid, unenforceable, or nonexistent. Then, to avoid the reciprocal and mandatory fee-shifting statute the plaintiffs had alleged applied, plaintiffs argued that because their allegations were untrue, the defendant could not get his fees, even though the plaintiffs would have been entitled to attorney fees had they prevailed. The result they argued for, which is the same result the Association seeks here, is hardly equitable. The Association seeks what those plaintiffs sought—to turn a reciprocal provision into a unilateral one.

Every California case to deal with this issue soundly rejected the above argument. The Court of Appeal's decision in this case stands alone.

A consequence of the Court of Appeal's decision is that it produces the same "evil" the Legislature intended to cure by enacting section 1717; it turns a reciprocal fee-shifting statute into a unilateral one, which can be used as a vehicle to force abusive settlements.

The Association asserts also that Yeldell is attempting "to evade" the American Rule. But that Rule, which provides that *neither* the plaintiff *nor* the defendant can recover attorney fees[7], has never been at issue in this case. Here, a reciprocal fee-shifting statute is at issue, and the Association sought its attorney fees under that statute and has never disputed that it would have been entitled thereto had it prevailed. The Association is attempting to evade the reciprocal statute, by transforming it into a unilateral statute.

Mechanical Wholesale illustrates mutuality-of-remedy's application outside the contract context. That case dealt with former section 3176 (now section 8558)—a reciprocal and mandatory attorney fees provision that is substantially similar to section 1354(c). (*Mechanical Wholesale*, *supra,* 42 Cal.App.4th 1647.) Section 3176 provides that *the prevailing party shall* recover its attorney fees "[i]n any action against ... [a] construction lender *to enforce ...a bonded stop notice.*" (§ 3176, emphasis added.).

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7 See Footnote 5, *supra.*

There, a contractor sued a construction lender to enforce a bonded stop notice, and sought attorney fees under section 3176. *(Mechanical Wholesale, supra,* 42 Cal.App.4th at pp. 1660-61.) But, defendant prevailed by showing that no bonded stop notice existed, and sought attorney fees. (*Ibid.*) In ruling for defendant, the court specifically found that the Legislature intended that the California statutory stop notice provisions were to "be applied only to California works of improvement." (*Id.* at p. 1656.) Therefore, the court found that the statutory scheme did not apply to the alleged "bonded stop notice."

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 held that since "there was 'an action' 'against a construction lender' on a 'bonded stop notice' in which the [defendant] construction lender was clearly the 'prevailing party'", defendant was entitled to fees, whether or not the statute sued on applied. (*Mechanical Wholesale, supra,* 42 Cal.App.4th at p. 1661.)

In *Mechanical Wholesale*, mutuality of remedy trumped the fact that the statutory scheme was not applicable, and in rendering its decision, the court 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." (*Mechanical Wholesale, supra,* 42 Cal.App.4th at p. 1662, n. 14 (citations omitted).)[8]

Thus, it has been held that even though the subject matter the plaintiff sued to enforce was invalid or nonexistent, or the statutory scheme containing the fee provision was not generally applicable to the plaintiff, the prevailing defendant was still entitled to attorney fees if plaintiff would have been entitled to recover attorney fees if plaintiff had prevailed. (*See, e.g., Hsu, supra,* 9 Cal.4th at pp. 870-871; *Mechanical Wholesale,* 42 Cal.App.4th at p. 1661; *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 Construction, supra,* 54 Cal.App.3d at p. 707.)

The *Mount Olympus* case also does not preclude applying the mutuality-of-remedy doctrine here because it had nothing to do with mutuality of remedy. The prevailing plaintiff in *Mount Olympus* was precluded from recovering attorney fees under section 1354(c) because he had not proved that the subdivision was a CID. There was no mutuality-of-

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[8] The Association asserts that Yeldell "misstate[s] the court's reasoning in footnote 14 of that case ..., as the footnote actually refers to invalid contracts, not invalid statutes." (AB p. 15.) That statement is irrelevant. Yeldell's point was that the *Mechanical Wholesale* court analogized to the section 1717 cases in applying mutuality of remedy to section 3176. Moreover, attorney fees awards under 1717 are by statute. (*PLCM Group, supra,* 22 Cal.4th at pp. 1090-91)

remedy issue because the defendants were not entitled to attorney fees because they lost the case.

The application of mutuality of remedy should mean that Yeldell, the prevailing party, *is* entitled to attorney fees under section 1354(c) in this action by the Association to enforce its governing documents as those of a CID, even though the Association failed to prove it that was a CID or that its governing documents were otherwise effective.

III. CONCLUSION

No California Court decision has done in analogous circumstances what the Court of Appeal's decision did in this case; its decision stands alone.

The Court of Appeal's decision is against public policy. It is not only inequitable, it produces absurd consequences the Legislature could not have intended and an "evil" the Legislature specifically mandated against.

This Court should apply the dispositive language of 1354(c) and the mutuality-of-remedy doctrine and award Yeldell his attorney fees, because:

- Section 1354(c) is reciprocal and mandatory;
- The Association filed an action to enforce governing documents, alleging that the subdivision was a CID and seeking attorney fees under 1354(c);
- The Association would have been entitled to its attorney fees against Yeldell had it prevailed; and,

- Yeldell prevailed.

The Court of Appeal's decision should be reversed.

DATED: March 28, 2014

Respectfully Submitted,

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

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the California Rules of Court, I hereby certify that this brief contains 7,371 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: March 28, 2014

/s/ Keith J. Turner
Keith J. Turner

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:

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

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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 March 28, 2014 at Santa Monica, California.

/s/Stephanie Huang
Stephanie Huang

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