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

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| ZENIFF VANDERRAN,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>VICKI MERTES, board member;<br>PATRICIA TURNER, board member;<br>ERIN FREEMAN, board member;<br>BRYAN SCALZO, board member;<br>CAMBRIA OCOTILLO HOMEOWNERS ASSOCIATION, an Arizona non-profit corporation,<br><br>Defendants/Appellees. | 1 CA-CV 09-0227<br><br>DEPARTMENT C<br><br>**MEMORANDUM DECISION**<br>(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) |

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-014252

The Honorable Robert H. Oberbillig, Judge

**AFFIRMED**

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B. David Anderson — Mesa
Attorney for Plaintiff/Appellant

Carpenter, Hazlewood, Delgado & Wood PLC — Tempe
by Mark A. Holmgren
J. Roger Wood
Attorneys for Defendants/Appellees

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**I R V I N E**, Presiding Judge

**¶1** Appellant Zeniff Vanderran ("Vanderran") appeals the trial court's grant of summary judgment in favor of Appellees Cambria Ocotillo Homeowners Association ("HOA"), a non-profit Arizona corporation, and HOA board members Vicki Mertes, Patricia Turner, Erin Freeman, and Bryan Scalzo (collectively, the "Board").

## FACTS AND PROCEDURAL HISTORY

**¶2** Vanderran filed a petition to remove the entire HOA board of directors, alleging that they had no legal authority to serve as a Board. Appellees filed a Motion for Summary Judgment, which the trial court granted, stating that "[p]ursuant to A.R.S. § 33-1813 and alternatively, A.R.S. § 10-3810, Plaintiff's claims for relief fail as a matter of law."

**¶3** Around September 2006, members of the HOA circulated a petition to recall the existing board of directors pursuant to Arizona Revised Statutes ("A.R.S.") section 33-1813 (2007). Rather than face a recall vote, the entire board resigned. None of the Appellees were part of the board that resigned.

**¶4** After the entire board resigned, the HOA was unable to conduct business. A meeting to elect a new board was properly noticed to members but it was unlikely that the necessary quorum would be present at that meeting. Several homeowners, including Appellees Mertes, Turner, and Freeman filed a claim in Maricopa County Superior Court pursuant to A.R.S. § 10-3160 (2004), which

provides for appointment of an election judge when it is "impractical or impossible for any corporation to call or conduct a meeting of its members, delegates or directors, or otherwise obtain their consent, in the manner proscribed by its articles of incorporation, bylaws[,]" etc.[1]

**¶5** The homeowners' request for appointment of an election judge was heard by Judge Kenneth Fields on September 27, 2006, the same day the annual meeting to elect board members was scheduled. At the hearing, the parties, both represented by counsel, asked the court to waive the quorum requirement for that evening's meeting. Both parties assumed they would not have a quorum (approximately 51% of the HOA's 417 members) and thus would not be able to elect a new board.

**¶6** At the hearing, Judge Fields stated, "[t]he Association will be whoever is elected tonight, at least the board of the Association." After argument, he stated, "[t]he board that's elected tonight will be at least an interim board, and I'll let the homeowner's association, plaintiffs, or anyone else that is interested meet with you to see if you can resolve this. If you can, fine, then this case is moot. If it's not, then we'll come back and I'll appoint an election judge to assist the Association out of this current situation . . . but I

[1] *Mertz, et al., v. Cambria Ocotillo Homeowners Association*, CV2006-014273.

think the bylaws need to be amended to prevent this from happening sometime in the future. ” (Emphasis added.)

**¶7** Two of the five people currently serving on the Board, Vicki Mertes and Patricia Turner, were elected at the meeting that evening, as was Erin Freeman, who no longer serves on the Board. Bryan Scalzo was elected to the Board at a 2007 meeting. These individuals are Appellees in this case. Following the September 27, 2006 election of board members, the plaintiffs in CV2006-014273 voluntarily dismissed the suit against the HOA pursuant to Arizona Rules of Civil Procedure Rule 41(a), stating that “[t]he parties have resolved their differences.”

**¶8** On August 20, 2007, Vanderran filed a Petition for a Removal of Entire Board of Directors from Homeowners Association. In the petition, Vanderran claimed that the installation of the Board elected on September 27, 2006 “was illegitimate and in violation of the rights of the other homeowners.” Appellees requested summary judgment on the basis that § 10-3160 “applies only in situations where a corporation does not have a board of directors.” The trial court granted Appellees’ Motion for Summary Judgment. Appellant timely appealed and we have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

## DISCUSSION

**¶9** Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz.R.Civ.P. 56(c). A motion for summary judgment should be granted "if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). In reviewing a grant of summary judgment, "we view the facts in the light most favorable to the party against whom judgment was entered." *Great Am. Mortgage, Inc. v. Statewide Ins. Co.*, 189 Ariz. 123, 124, 938 P.2d 1124, 1125 (App. 1997). We determine de novo whether any genuine issues of material fact exist and whether the superior court erred in applying the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). On appeal, we will uphold the trial court's decision if it is correct for any reason, even if the reason was not considered by the trial court. *See Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986).

**¶10** Vanderran argues that the trial court erred by concluding that he could not commence removal proceedings under A.R.S. § 10-3160. He presents the following issue for review:

"[s]hould a homeowner in a Homeowners Association be allowed to sue under A.R.S. [§] 10-3160, when it is alleged that the current, illegitimate 'Board' of Directors is serving as a Board without right or authority to do so and are actually not Board members at all, but rather are usurpers and pretenders, who (while acting as Board members) are breaching their duty of good faith to homeowner's of the HOA, causing damage."

**¶11** Appellees argue that § 10-3160 "grants courts broad authority to make orders regarding the governance of corporation, [but the] statute does not include any provision for removal of board members." Appellees claim that A.R.S. § 33-1813 provides the "appropriate mechanism" for removal of the board of directors of the HOA. Vanderran, however, does not ask for relief under this statute. He "asserts that only A.R.S. [§] 10-3160 applies to the facts of this case." Therefore, we only consider the application of § 10-3160 to this case.

**¶12** We disagree with Vanderran's argument that he should be allowed to remove the Board under § 10-3160. Two Arizona statutes govern removal of board members from homeowners' associations. Arizona Revised Statutes § 33-1813 relates specifically to removal of board members from homeowners' associations. Arizona Revised Statutes § 10-3810 permits courts to remove corporate directors "in a proceeding commenced either by the corporation or by its members holding at least twenty-

five per cent of the voting power" if the court finds that the director(s) engaged in fraudulent conduct and removal is in the best interests of the corporation. In contrast, § 10-3160 provides judicial relief for a non-profit corporation that cannot conduct a meeting of its members. Section 10-3160 states, in pertinent part, that:

> A. If for any reason it is impractical or impossible for any corporation to call or conduct a meeting of its members, delegates or directors, or otherwise obtain their consent, in the manner prescribed by its articles of incorporation, bylaws, or chapters 24 through 40 of this title, on petition of a director, officer, delegate or member, the court may order that such a meeting be called or that a written ballot or other form of obtaining the vote of members, delegates or directors be authorized, in such a manner as the court finds fair and equitable under the circumstances.
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> B. In a proceeding under this section the court may determine who the members or directors are.

**¶13** In this case, Judge Fields determined it was impractical or impossible for the HOA to have quorum at the September 27, 2006 meeting to elect a new Board. He waived the quorum requirement, stating several times that the board elected that evening would be "at least" an interim board. We interpret this to mean that he was not foreclosing the possibility that it could also be a permanent Board.

**¶14** At the end of the hearing, Judge Fields stated that the parties would only need to return to court if they did not resolve their dispute. They resolved their dispute and did not return to court. Consequently, the elected Board served its term.

**¶15** Section 10-3160 gives courts the power to order that meetings be called when it is impractical or impossible for "any corporation" to do so. It does not empower courts to remove a corporation's board members, the relief Vanderran seeks. Therefore, the trial court properly granted summary judgment in favor of Appellees.

**¶16** In addition to arguing that the September 27, 2006 meeting established an interim board only, Vanderran raises several other arguments. He asserts that the Board failed to "keep up the common areas in areas where no Board members lived" and failed "to stop the sending of unwarranted weed notices, which appear to be harassment and an illegitimate attempt to increase revenues." Because Vanderran did not raise these issues to the trial court, we will not consider them. *See Dillig v. Fisher*, 142 Ariz. 47, 51, 688 P.2d 693, 697 (App. 1984) (holding that an argument not raised before the trial court cannot be raised for the first time on appeal).

**¶17** Vanderran also argues that the Board failed to "consistently give notice of meetings to all members" and failed

"to follow the governing documents of the HOA" but provides no support for these allegations. A party who fails to present argument or authority to support a claim of error has waived the claim. *See AMERCO v. Shoen*, 184 Ariz. 150, 154 n.4, 907 P.2d 536, 540 n.4 (App. 1995).

**¶18** Vanderran claims the Board prevented "one member, Cindy [Nguyen], from running for a position on the Board when she was in good standing[,]" allowed Board members to vote twice in the election of Bryan Scalzo, and sent out a "letter stating there would be no nominations from the floor, at the next election of Board members, then taking a nomination from the floor at the next, small, remotely held, poorly noticed election, resulting in the election of . . . [Bryan] Scalzo." Vanderran does not have standing to sue on behalf of Cindy Nguyen so we will not consider the claim. Similarly, he has a remedy at law for the remaining concerns - obtain signatures from twenty-five percent of the homeowners to commence removal proceedings pursuant to A.R.S. § 33-1813. Vanderran cannot challenge the propriety of an election or seek removal of board members under § 10-3160.

**¶19** The trial court awarded Appellees $38,500 in attorneys' fees and $3,754.10 in costs with 10% interest from the date of judgment. Appellant asks this court to vacate that award. Appellees ask this court to affirm the trial court's

judgment and also award attorneys' fees for this action pursuant to A.R.S. § 12-341.01 (2003) and Rule 21 of the Arizona Rules of Civil Appellate Procedure. We affirm the trial court's grant of attorneys' fees and costs. We decline to grant Appellees' attorneys' fees on appeal.

**CONCLUSION**

**¶20** For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of Appellees and its award of attorneys' fees and costs.

/s/
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PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Judge

/s/
_____
DONN KESSLER, Judge