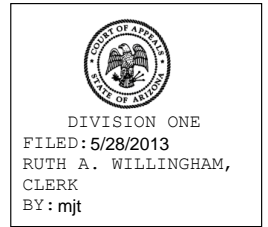


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

PONDEROSA DOMESTIC WATER ) No. 1 CA-SA 13-0108  
IMPROVEMENT DISTRICT, a domestic )  
water improvement district )  
organized and existing under the ) DEPARTMENT E  
laws of the State of Arizona, )  
 )  
Petitioner, ) Navajo County  
 ) Superior Court  
v. ) Nos. CV2007-0615  
 ) CV2007-0626  
THE HONORABLE ROBERT B. VAN WYCK, )  
Judge of the SUPERIOR COURT OF )  
THE STATE OF ARIZONA, in and for ) **DECISION ORDER**  
the County of NAVAJO, )  
 )  
Respondent Judge, )  
 )  
PINETOP LAKES ASSOCIATION, an )  
Arizona homeowners association; )  
MALRY CONSTRUCTION, L.L.C., an )  
Arizona limited liability )  
company; SHAWN K. MORRISON; )  
FRANK M. SMITH, as Trustee of )  
MONEY PURCHASE PENSION PLAN OF )  
FRANK M. SMITH & ASSOCIATES, )  
INC.; JAMES L. PARKINSON and EUN )  
S. JEON; JOHN D. BLACKMORE and )  
DONNA J. BLACKMORE; CHASE L. )  
CALDWELL and MARCELLA PATTON, )  
JAMES C. RILEY and NANCY RILEY, )  
Husband and wife, )  
 )  
Real Parties in Interest. )  
\_\_\_\_\_ )

This special action came on regularly for conference on May  
22, 2013. The court, Presiding Judge Patricia K. Norris, Judge

Diane M. Johnsen, and Chief Judge Lawrence F. Winthrop participating, has considered the special action petition of the Petitioner, Ponderosa Domestic Water Improvement District ("the District"). The District seeks relief from an order of the trial court filed November 2, 2012, allowing in part the Pinetop Lakes Association ("the Association"), an Arizona homeowners association, to pursue breach of contract and just compensation claims against the District on behalf of all lot owners governed by the Association. The District also seeks relief from the trial court's orders issued April 9, 2013. For the following reasons, we accept jurisdiction of the trial court's ruling allowing the Association to pursue breach of contract and just compensation claims against the District on behalf of all lot owners governed by the Association, and we grant relief. We otherwise decline jurisdiction and make no comment as to any other issues raised by the District.

We accept jurisdiction of this special action because the District has no equally plain, speedy, or adequate remedy by appeal, see Ariz. R.P. Spec. Act. 1(a); *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 252, ¶ 3, 63 P.3d 282, 283 (2003), and to clarify questions of law. See *Vo v. Superior Court*, 172 Ariz. 195, 198, 836 P.2d 408, 411 (App. 1992).

The Association governs approximately 1,763 lots in twenty subdivisions, including 71 lots in the Bent Oak subdivision. Although the subdivisions governed by the Association have substantially similar covenants, conditions, and restrictions ("CC&Rs"), each subdivision has its own set of CC&Rs to which the property owners in each respective subdivision must adhere.

The District is a lot owner in and member of the Bent Oak subdivision, and is therefore subject to Bent Oak's CC&Rs, which restrict the properties in the Bent Oak subdivision to "residential use only," and prohibit any commercial activity or individual water systems. The Association alleges that the District breached the Bent Oak CC&Rs by drilling water wells on the District's lot. Consequently, the Association seeks damages for breach of contract.

The trial court's November 2, 2012 order allows the Association to pursue claims on its own behalf and on behalf of all members of the Association, not just the members of the Bent Oak subdivision. Thus, under the court's order, property owners in subdivisions not subject to the Bent Oak subdivision CC&Rs may be included in the contract damage claim against the District.

Although those Association members who own property located outside the Bent Oak subdivision are represented by the

Association and may even be subject to rules and regulations promulgated by the Association that affect all property owners under the Association's ambit, nothing makes the District or any other Association member subject to the CC&Rs of subdivisions other than their own. Consequently, the Association members outside the Bent Oak subdivision lack the contractual privity with the District necessary to maintain a breach of contract claim against it under the Bent Oak CC&Rs. See generally *Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, 30, ¶ 16, 270 P.3d 852, 857 (App. 2011) (recognizing that "privity of contract must exist before a party may seek to enforce a contract" (citing *Stratton v. Inspiration Consol. Copper Co.*, 140 Ariz. 528, 530-31, 683 P.2d 327, 329-30 (App. 1984))).

The trial court's order also allows the Association to pursue a claim for just compensation on behalf of all members of the Association - and not just those property owners in the Bent Oak subdivision whose property rights are diminished or taken by the District's condemnation action. However, neither the Association nor any property owners have filed an inverse condemnation action against the District, see *Pima County v. Bilby*, 87 Ariz. 366, 370, 351 P.2d 647, 649 (1960); *State v. Mabery Ranch Co.*, 216 Ariz. 233, 242, ¶ 35, 165 P.3d 211, 220 (App. 2007), and the District's complaint in eminent domain

specifically named as defendants only those lot owners in the Bent Oak subdivision who did not previously consent to an amendment of the Bent Oak CC&Rs. The trial court's consolidation of the underlying cases should not have allowed the Association, through representational standing, to bring into the condemnation action any property owners who had not previously sought just compensation. See *Torosian v. Paulos*, 82 Ariz. 304, 315, 313 P.2d 382, 390 (1957) (holding that "an order of consolidation does not thereby affect a merger of the cases consolidated"); *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) (stating that consolidation of cases for trial "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another"); see also *Assoc'd Grocers v. Indus. Comm'n*, 126 Ariz. 412, 414, 616 P.2d 87, 89 (App. 1980) (distinguishing consolidation from joinder). Accordingly,

**IT IS ORDERED** accepting jurisdiction of the District's special action petition only as to the trial court's ruling allowing the Association to pursue breach of contract and just compensation claims against the District on behalf of all members governed by the Association.

**IT IS FURTHER ORDERED** vacating that portion of the trial court's order allowing the Association to pursue breach of

contract claims on behalf of Association members who do not own property in the Bent Oak subdivision. This order does not preclude the Association from pursuing breach of contract claims based on alleged breach of the Bent Oak CC&Rs on its own behalf and on behalf of lot owners in the Bent Oak subdivision, and we make no comment on the propriety of such claims.

**IT IS FURTHER ORDERED** vacating that portion of the trial court's order allowing the Association to pursue claims for just compensation on behalf of Association members who are not named defendants in the District's complaint in eminent domain or have not otherwise filed an inverse condemnation claim against the District. We make no comment on the propriety of the trial court's remaining orders.

**IT IS FURTHER ORDERED** denying the District's request for attorneys' fees.

**IT IS FURTHER ORDERED** that the clerk of this court provide a copy of this Decision Order to the Honorable Robert B. Van Wyck, a Judge of the Superior Court, and to each party appearing herein.

\_\_\_\_\_  
/S/  
LAWRENCE F. WINTHROP, Chief Judge