

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT  
PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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AHWATUKEE BOARD OF MANAGEMENT, INC., an Arizona  
non-profit corporation, *Plaintiff/Appellee*,

*v.*

FENG QIN, an Arizona resident, *Defendant/Appellant*.

No. 1 CA-CV 14-0538  
FILED 10-15-15

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Appeal from the Superior Court in Maricopa County  
No. CV2013-000064  
The Honorable Mark H. Brain, Judge

**AFFIRMED**

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COUNSEL

Ryley, Carlock & Applewhite, PC, Phoenix  
By John M. Fry, Naomi E. Thurston  
*Counsel for Plaintiff/Appellee*

Law Offices of J. Roger Wood, PLLC, Tempe  
By J. Roger Wood  
*Counsel for Defendant/Appellant*

**MEMORANDUM DECISION**

Presiding Judge Diane M. Johnsen delivered the decision of the Court, in which Judge Kent E. Cattani and Judge John C. Gemmill joined.

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**J O H N S E N**, Judge:

¶1 Feng Qin appeals from the superior court's entry of summary judgment in favor of the Ahwatukee Board of Management ("ABM") ordering Qin to comply with ABM's rules and regulations and remove a screen structure in his patio. For the following reasons, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 ABM is a non-profit corporation that operates a planned community in Phoenix. *See* Arizona Revised Statutes ("A.R.S.") section 33-1802(4) (2015) (defining "planned community").<sup>1</sup> By owning a home in the community, Qin is a member of ABM. *See id.* (owners are "mandatory members" of a planned community).

¶3 Pursuant to A.R.S. § 33-1803 (2015), ABM provided written notice to Qin that his property was in violation of the community's rules and regulations and that he needed to repair a stucco wall in his backyard and remove a structure on his patio. After Qin did not correct the alleged violations, ABM filed a complaint in superior court asserting breach of contract and seeking injunctive relief.

¶4 In due course, the court granted ABM's motion for summary judgment, ordering Qin to remove the structure and to comply with the property restrictions. The court determined the stucco wall issue was moot because Qin had repaired the wall before ABM filed its motion. Qin filed a motion for reconsideration, which the court denied. He then filed a motion for relief from judgment pursuant to Arizona Rule of Civil Procedure ("Rule") 60(c), which the court also denied.

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<sup>1</sup> Absent material revision after the relevant date, we cite a statute's current version.

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¶5 After entry of a final judgment, which included an award of ABM's attorney's fees and costs, Qin timely filed this appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (2015).

**DISCUSSION**

**A. The Superior Court Properly Granted Summary Judgment.**

¶6 The superior court shall grant summary judgment "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). In reviewing a summary judgment, we must determine *de novo* "whether any genuine issues of material fact exist and whether the trial court properly applied the law." *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15 (App. 2007). We view the facts in the light most favorable to Qin, the party against whom judgment was entered. *See id.*

**1. The screen structure.**

¶7 In its motion for summary judgment, ABM alleged Qin had erected an unsightly backyard structure "consisting of metal poles holding up a shower curtain" without approval from ABM's Architectural Review Committee.

¶8 On appeal, Qin argues ABM lacks the power to promulgate rules and regulations such as those it sought to impose against him. ABM responds that Qin cannot raise this argument for the first time on appeal. It is true that "[l]egal issues and arguments must be presented to the trial court and generally cannot be raised for the first time on appeal." *Lemons v. Showcase Motors, Inc.*, 207 Ariz. 537, 541, n.1, ¶ 17 (App. 2004). Nevertheless, in moving for summary judgment, ABM had the burden of proving it was entitled to judgment as a matter of law. *See* Ariz. R. Civ. P. 56(a); *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 16 (App. 2012). One of the elements necessary to ABM's claims was its authority to promulgate rules and regulations. Accordingly, our *de novo* review of the superior court's grant of summary judgment requires us to confirm that ABM had legal authority to issue the applicable rules and regulations.

¶9 If a property owner accepts a deed containing property restrictions, that owner is bound by the restrictions. *Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333 (App. 1977). Deed restrictions run with the property and "form a contract between the subdivision's property owners as a whole and the individual lot owners." *Ariz. Biltmore Estates*

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*Ass'n v. Tezak*, 177 Ariz. 447, 448 (App. 1993). Qin purchased property that was subject to a previously recorded Declaration of Covenants, Conditions and Restrictions. See A.R.S. § 33-1802(3) (defining "declaration" for purposes of the Planned Communities Act). In accepting the deed to his property, Qin was bound by that recorded declaration. See *Heritage Heights*, 115 Ariz. at 333. The declaration establishes ABM and provides that the "powers, rights and duties of ABM . . . may be adopted in its Articles of Incorporation and By-laws." ABM's By-laws, in turn, authorize the Board of Directors to promulgate rules and regulations, which it did.<sup>2</sup>

¶10 As relevant here, ABM's rules and regulations require that all shades, screens and awnings be approved by the Architectural Review Committee and kept in good condition. Qin does not dispute that he erected the screen on his patio without approved from the Architectural Review Committee. Further, our review of the record reflects no genuine issue of material fact that Qin's structure did not comply with the ABM rules. Photographs in the record reveal a structure assembled of metal poles, white plastic or vinyl, and wood located directly in front of a patio window or glass door. Although Qin argues he erected the structure not to provide shade but to protect his home from golf balls, under the rules, the purpose of the structure does not matter. Qin violated the community rules and regulations by erecting the screen structure without approval from the Architectural Review Committee. Accordingly, the superior court did not err in granting ABM's motion for summary judgment and ordering Qin to remove the structure.

**2. The stucco wall.**

¶11 After ABM filed its complaint, Qin repaired the stucco wall, bringing it into compliance with the community rules. In its motion for summary judgment, ABM acknowledged this compliance, and, at oral argument, Qin's attorney confirmed that Qin had repaired the wall. Accordingly, in ruling on ABM's motion, the superior court concluded the

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<sup>2</sup> Arizona law supports the authority of a planned community to establish such rules. See A.R.S. § 33-1802(2) (defining "community documents" as "the declaration, bylaws, articles of incorporation, if any, and rules, if any").

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issue was moot, and the judgment did not award ABM separate relief or damages relating to the stucco wall.<sup>3</sup>

¶12 Although Arizona courts are not constitutionally limited to considering only cases or controversies, our courts exercise judicial restraint by declining to consider moot questions. *Kondaur Capital Corp. v. Pinal County*, 235 Ariz. 189, 192-93, ¶ 8 (App. 2014). ABM argues the wall issue is moot, and we agree. By the time ABM filed its motion for summary judgment, Qin had brought the wall into compliance with the community rules.

**B. The Superior Court Did Not Abuse Its Discretion in Denying Qin's Rule 60(c) Motion.**

¶13 Qin argues the superior court erred in denying his motion brought pursuant to Rule 60(c).<sup>4</sup> "Trial courts enjoy broad discretion when deciding whether to set aside judgments under Rule 60(c)." *Woodbridge Structured Funding, LLC v. Ariz. Lottery*, 235 Ariz. 25, 29, ¶ 21 (App. 2014). We review the superior court's denial of Qin's Rule 60(c) motion for an abuse of discretion. *See id.* at 29-30, ¶ 21.

¶14 Rule 60(c) allows the superior court to grant relief from a judgment for the following reasons:

- (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud . . . misrepresentation or other misconduct of an adverse party; (4) the judgment is void;

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<sup>3</sup> Qin did not assert a counterclaim seeking affirmative relief regarding the wall. *See Chaparral Dev. v. RMED Int'l, Inc.*, 170 Ariz. 309, 315 (App. 1991).

<sup>4</sup> In opposing the motion, ABM argued it was premature because Qin filed it before judgment was entered. The superior court, however, did not rule on the motion until after it entered judgment. Qin also argues on appeal that the superior court "ignored" a motion he filed pursuant to Rule 59. The court treated Qin's motion for reconsideration as a motion made pursuant to Rule 59 and issued an order denying it.

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(5) the judgment has been satisfied, released or discharged . . . or (6) any other reason justifying relief from the operation of the judgment.

Ariz. R. Civ. P. 60(c).<sup>5</sup>

¶15 Qin argues that the poor performance of his counsel constituted excusable neglect, thereby qualifying him for relief under Rule 60(c). Qin also points out that "within weeks of the February 2014 oral argument, Qin's attorney was disciplined by the State Bar of Arizona and notice of his suspension was provided to the Court."

¶16 Our supreme court has held that a party may obtain relief under Rule 60(c) for an attorney's refusal or failure to act only if the attorney's actions fall within Rule 60(c)(1), which requires a showing of "mistake, inadvertence, surprise or excusable neglect." See *Panzino v. City of Phoenix*, 196 Ariz. 442, 445, 449, ¶¶ 7, 24 (2000) (rejecting "positive misconduct rule," under which attorney error would be a separate basis for relief and limiting application of Rule 60(c) "to those cases involving legally excusable activity."). The test of excusable neglect by a lawyer is "whether the neglect might befall a reasonably prudent lawyer under similar circumstances." *Ellman Land Corp. v. Maricopa County*, 180 Ariz. 331, 339 (App. 1994). In *Panzino*, our supreme court assumed, for purposes of the opinion, that the lawyer's actions "comprised longstanding and pervasive neglect, that he completely abandoned his client, and that [the plaintiff] was relatively free from negligence." *Panzino*, 196 Ariz. at 444, ¶ 3. Even so, the court held the party was not entitled to relief under Rule 60(c). *Id.* at 449, ¶ 24. The court reasoned that "[a]lthough abandonment by a lawyer may afford his client - the injured principal - the right to bring an action against the lawyer, it does not affect the client's responsibility for the actions of his lawyer." *Id.* at 447, ¶ 17.

¶17 Here, Qin's lawyer filed a one-page response to ABM's motion for summary judgment, failing to address the screen structure. At oral argument, the lawyer conceded that the screen structure must come down, apparently without his client's permission. The manner in which Qin's attorney handled the case does not provide a basis for relief under Rule

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<sup>5</sup> Qin's motion does not specify which subsection of Rule 60(c) he relies upon.

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60(c)(1) because it was not legally excusable.<sup>6</sup> Accordingly, the superior court did not abuse its discretion in denying relief on the basis of Qin's lawyer's actions.

¶18 The other reason Qin offered as a basis for relief in his Rule 60(c) motion was that he is from another country and "is neither fluent in English, nor familiar with the American judicial process." Early in the proceedings, Qin's first attorney filed a motion asking the court to appoint a qualified Mandarin interpreter. The court granted this motion and appointed an interpreter to assist Qin at all future hearings.

¶19 Qin offers no legal authority for why his inability to speak fluent English constitutes a basis for relief under Rule 60(c). Accordingly, the superior court did not abuse its discretion in denying Qin relief from the judgment entered against him.

CONCLUSION

¶20 For the foregoing reasons, we affirm the judgment of the superior court. ABM requests attorney's fees on appeal pursuant to A.R.S. § 12-341.01 (2015). In the exercise of our discretion, we will award ABM an amount of reasonable attorney's fees and taxable costs incurred on appeal subject to compliance with Arizona Rule of Civil Appellate Procedure 21.



Ruth A. Willingham · Clerk of the Court  
FILED : jt

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<sup>6</sup> By order dated February 21, 2014, Qin's lawyer was suspended from the practice of law for six months. His suspension took effect on March 24, 2014. The oral argument on ABM's motion for summary judgment took place on February 28, 2014, at which time Qin's lawyer was still authorized to practice law. There is no evidence in the record to suggest that the lawyer's suspension was related to Qin's case. In denying Qin's Rule 60(c) motion, the superior court noted that the suspension of Qin's lawyer did not become effective until after the court had entered summary judgment in this matter.