DIVISION ONE
FILED: 03/22/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARTHUR A. and LOIS J. GILCREASE FAMILY TRUST by ARTHUR A. and LOIS J. GILCREASE, Trustees; TIMOTHY P. LODICE, a single man; KENNY R. and BEVERLY KENDALL, husband and wife; MICHAEL T. ROACH, a single man; RAYMOND J. ESCOBAL, JR., a married man dealing with his sole and separate property; DAVID H. HEMMINGS, a single man; J.C. & C. INVESTMENTS, L.L.C. by ROBERT OLIVER CROMWELL, partner; THE LEWIS REVOCABLE TRUST, MARLENE C. LEWIS, Trustee, a single woman; and LARRY ROMO, a single man, Plaintiffs/Appellees/ Appellants, ROSEMEAD PROPERTIES, INC., Answering Plaintiff/ Appellant/Appellee, DONALD M. and PATRICIA A. MCKERLIE, husband and wife, Answering Plaintiffs/ Appellees, v. WAGON WHEEL PARK HOMEOWNERS ASSOCIATION, a non-profit Arizona corporation; EVERTT E. BYERS and ALTAMAE G. BYERS, husband and	No. 1 CA-CV 11-0206 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

wife; LEO REX LEE and MARY ALICE)
LEE, husband and wife; SHIRLEE N.)
HAARHUES and ELLWIN HAARHUES,)
wife and husband; JACQUELINE B.)
FAULKNER and DAVID W. FAULKNER,)
wife and husband; WINIFRED)
PURTON, a single woman; MAMIE LEA)
ROTHWELL and GERALD REX ROTHWELL,)
wife and husband; NORMA FRANKE)
and BERNARD N. FRANKE, wife and)
husband; THE HAARHUES FAMILY)
TRUST, SHIRLEE N. HAARHUES and)
ELLWIN H. HAARHUES, TRUSTEES; THE)
BYERS REVOCABLE LIVING TRUST,)
EVERTT E. BYERS and ALTAMAE G.)
BYERS, TRUSTEES; HERNAN and CAROL)
L. SALAZAR, husband and wife;)
PETER D. TOSI, JR., and JEANNE R.)
TOSI, Trustees for the PETER D.)
and JEANNE R. TOSI TRUST; GEORGE)
M. and LENORE S. BARRIENTOS,)
Trustees for the GEORGE M. and)
LENORE S. BARRIENTOS TRUST;)
ESTATE OF WILLIAM DETOR; ESTATE)
OF SHIRLEE H. HAARHUES,)
)
Defendants/Appellees,)
)
BRAD LEWIS, a single man; YVONNE)
BEVACQUE, a single woman; GARY)
PHILLIP & CAROL ANN HOLDCROFT,)
husband and wife,)
)
Answering Defendants/)
Appellees.)
)

Appeal from the Superior Court in Navajo County

Cause No. S-0900-CV-00200500217 and S-0900-CV-0020040040
(Consolidated)

The Honorable Thomas L. Wing, Judge, Retired

REVERSED AND REMANDED

Jackson White PC Mesa
By James L. Tanner
Christina Morgan
Attorneys for Plaintiffs/Appellees/Appellants

Bryan Cave Phoenix
By Steven Hirsch
Appearing Specially for Answering Plaintiff/Appellant/Appellee
Rosemead Properties, Inc.

And

Robert W. Geake Phoenix
Attorneys for Answering Plaintiff/Appellant/Appellee
Rosemead Properties, Inc.

The Brown Law Group PLLC Phoenix
By Donald O. Loeb
Attorneys for Defendants/Appellees Wagon Wheel

DeConcini McDonald Yetwin & Lacy Tucson
By John C. Lacy
Attorneys for Defendants/Appellees/Salazar

Howard A. Chorost, PC Tucson
By Howard A. Chorost
Attorneys for Answering Plaintiff/Appellees McKerlie

J O H N S E N, Judge

¶1 Several property owners appeal judgments entered against them in favor of a homeowners association. For the reasons that follow, we reverse and remand the judgments.

FACTS AND PROCEDURAL HISTORY

¶2 Wagon Wheel Park is a residential subdivision of mobile homes and manufactured housing situated on individual lots in Pinetop/Lakeside. Wagon Wheel Park was established on July 28, 1960, by the recording of a Declaration of Restrictions

("Declaration") in the Office of the Navajo County Recorder. The Declaration provided that it could be amended by a majority vote of property owners. The Declaration did not mention and the associated plat that was recorded did not reflect the existence of any community common areas, nor were any common areas dedicated or conveyed appurtenant or otherwise to the individual lots.

¶3 In September 1971, some of the lot owners created the Wagon Wheel Park Homeowners Association ("the HOA"), a non-profit corporation. In October 1971, David Foil and L.C. Hall – the developers – and Transamerica Title Insurance Company (as trustee) quitclaimed 12 lots to the HOA. For awhile, the HOA maintained the lots using contributions from members. After nine years, a majority of the property owners voted to amend the Declaration. The amended preamble approved by that vote in 1980 noted the existence of the HOA, but said nothing about mandatory membership or common areas.

¶4 In 1999, the HOA recorded an amendment to its bylaws that purported to announce that all property owners automatically were members of the HOA, and that as such they were required to pay assessments imposed by the HOA. In March 2001, several lot owners filed suit against the HOA, arguing that it was not a valid mandatory homeowners association and could not force them to pay assessments. The superior court

entered judgment in favor of the lot owners, and this court affirmed. *See Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, 43, ¶ 1, 75 P.3d 132, 133 (App. 2003). We held in that case that a voluntary HOA could not be converted into a mandatory HOA simply by amending the HOA's bylaws. *Id.* at 45 ¶ 11, 75 P.3d at 135.

¶5 Meanwhile, a majority of lot owners voted to amend the Declaration to make membership in the HOA mandatory. The amended Declaration was recorded in November 2001, and the HOA thereafter began levying assessments against lot owners. When some of the lot owners refused to pay, the HOA sued them in justice court. These suits were transferred to Navajo County Superior Court and consolidated in a case we will refer to as *Romo-Cool*. The defendants argued that they did not have to pay the assessments because they were not members of the HOA. In 2004, the superior court granted summary judgment for the HOA, finding that the 2001 amendment to the Declaration made membership in the HOA mandatory.

¶6 In 2004, while that action was still pending, other lot owners began circulating a proposed amendment to the Declaration aimed at rendering the HOA a voluntary organization. After notarized signatures from a majority of the lot owners were gathered, the amendment was recorded. These lot owners then filed a complaint against the HOA in 2005 ("the *Gilcrease*"

action). The *Gilcrease* complaint alleged that the 2001 amendment making the HOA mandatory was invalid, and, in the alternative, that the 2004 amendment superseded the 2001 amendment, rendering the HOA once again voluntary.

¶7 The superior court consolidated *Romo-Cool* and *Gilcrease* and ordered all property owners to be joined in the action. After a three-day trial to the court on the *Romo-Cool* issues, the superior court entered judgment in favor of the HOA. The superior court then entered judgment in favor of the HOA on the *Gilcrease* issues, incorporating the judgment from *Romo-Cool*. Ultimately, the trial court determined that the 2001 amendment was valid, membership in the HOA was mandatory for all lot owners and the 2004 amendment was not valid. The court awarded $338,000 in attorney's fees in favor of the HOA, payable by the lot owners.

¶8 The *Romo-Cool* and *Gilcrease* lot owners timely appealed. Additionally, Rosemead – which was compelled to join the case because it owns a single lot in the Park – appealed the superior court's judgment that held the lot owners jointly and severally liable for the HOA attorney's fees.

¶9 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).[1]

DISCUSSION

¶10 The facts here are much like those our court examined in *Dreamland Villa Community Club, Inc. v. Raimey*, 224 Ariz. 42, 226 P.3d 578 (App. 2010). Dreamland Villa was a residential community divided into lots. *Id.* at 43, ¶ 2, 226 P.3d at 412. There were no common areas in the community. *Id.* Dreamland's Declaration of Restrictions provided that amendments could be made by a vote of the owners of a majority of the lots. *Id.* at 43-44, ¶ 4, 226 P.3d at 412-13. In 1961, the Dreamland Villa Community Club incorporated as a nonprofit corporation to provide and maintain recreational facilities for its members in the community. *Id.* at 43, ¶ 3, 226 P.3d at 412. Membership in the Community Club was voluntary, and only members could use its facilities. *Id.* In 2003 and 2004, the Community Club recorded an amendment to the Dreamland Declaration that required lot owners to pay assessments imposed by the Community Club in order "to promote the recreation, health, safety and welfare of the residents . . . and for the improvement, maintenance, and replacement of the Common Areas." *Id.* at 44, ¶ 6, 226 P.3d at

[1] Absent material revision after the relevant date, we cite a statute's current Westlaw version.

413. The Community Club then began filing lawsuits against property owners who failed to pay the assessments. *Id.* at ¶ 7.

¶11 Property owners counterclaimed, arguing the amended Declaration was void and they could not be forced to join a nonprofit corporation or have assessments levied against them. *Id.* The superior court ruled in favor of the Community Club, finding that "when a homeowner takes a deed containing [a] deed restriction that allows for amendment by the vote of a majority of homeowners, that homeowner implicitly consents to the subsequent majority vote to make membership in a homeowner association mandatory," citing *Shamrock* for this proposition. *Id.* at 45, ¶ 10, 226 P.3d at 414 (alteration in original).

¶12 On appeal, this court identified the relevant question as "whether deed restrictions for a community without common areas, containing only restrictive covenants pertaining to each lot owner's personal residence, can be amended by majority vote of lot owners to require membership in an association and the imposition of assessment." *Id.* at 49, ¶ 30, 226 P.3d at 418. We concluded that the mere fact the Dreamland Declaration allowed for the possibility of amendment did not mean all the property owners had implicitly consented to membership in a mandatory community club. *Id.* at 51, ¶ 36, 226 P.3d at 420. We also noted that although under the Restatement (Third) of Property (Servitudes) § 6.3(1) (2000), a majority of the

property owners may vote to create an association to manage common property and impose assessments, that principle did not apply to Dreamland Villa because the so-called common areas in that development were owned by the Community Club, not the property owners. *Id.* at 49, ¶ 30, n.14, 226 P.3d at 418. Accordingly, we reversed the judgments in favor of the Community Club. *Id.* at 51, ¶ 40, 226 P.3d at 420.

¶13 Here, nothing in the 1960 Declaration or the 1980 amendment to the Declaration suggests that Wagon Wheel Park had a mandatory HOA. Simply because the Declaration may be amended by a majority vote does not mean that "one group of lot owners may, in effect, take the property of another group in order to fund activities that do not universally benefit each homeowner's property or areas owned in common by all." *Id.* at ¶ 36. Also, as with the Dreamland Villa community, there are no common areas in Wagon Wheel Park. The HOA argues that the lots it received by quitclaim in 1971 were intended for the use of all the lot owners, and so should be viewed as common areas. In actuality, however, the lots were deeded to the HOA; they were not deeded to the lot owners or accepted by them in a manner intended to be appurtenant to the lots. *See* Restatement (Third) of Property (Servitudes) § 6.2(2) (2000) ("'Common property' means property rights of an identical or a similar kind held by the individual owners as appurtenances to the individually owned lots or

units."). The lot owners never consented, either explicitly or impliedly, to accept a property interest in any common areas, nor agreed to become members of the HOA.

¶14 Because the facts in this case are controlled by our holding in *Dreamland*, the superior court erred by ruling that membership in the HOA was validly imposed on each lot owner.

CONCLUSION

¶15 For the reasons set forth above, we reverse each of the judgments and remand for proceedings consistent with this decision. We award the *Gilcrease*, et al., lot owners their costs and reasonable attorney's fees on appeal pursuant to A.R.S. § 12-341.01(A), contingent on their compliance with Arizona Rule of Civil Appellate Procedure 21. We award Rosemead its costs on appeal contingent on its compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
PHILIP HALL, Judge