

Arizona Supreme Court Rejects Unforeseeable HOA Restrictions

The provision in your subdivision's Declaration of Covenants, Conditions, and Restrictions (CC&Rs) that authorizes amendments by a vote of the homeowners is not a blank check to adopt any restriction the majority of owners want.

The recent Arizona Supreme Court opinion in *Kalway v. Calabria Ranch Estates HOA* ruled that the power to amend is limited. The CC&Rs must give sufficient notice of the possibility of a future amendment, which must be reasonable and foreseeable. A statement in the CC&Rs that their purpose is to "protect" the subdivision is too broad to put the owners on notice of any particular future amendment.

When the homeowners in Calabria Ranch Estates bought their lots, they were subject to only a few typical restrictions. The CC&Rs stated that the purpose of the restrictions was to "protect the value, desirability, attractiveness and natural character of the Property." The restrictions also provided for amendment by a majority vote.

Four of the five owners of the multi-acre lots voted to adopt amendments that the trial court judge later characterized as



"sweeping changes." The amendments changed some definitions and added others, created new restrictions, and enacted new enforcement measures against owners for violations.

As examples, the amendments prescribed the minimum size of a single-family dwelling, the minimum percentage of living space and the maximum percentage of garage space. Also

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Cameras in Schools: Safety Necessity or Invasion of Privacy?



During the last two decades, schools and students in the United States have become the targets of mass shootings and attacks. Each time one of these tragic incidents occurs, school officials check and recheck their safety protocols to ensure their schools can ensure the safety of their students and staff. One tool that is often considered to prevent attacks before they happen is surveillance through the use of cameras. A study performed by the National Center for Education Statistics shows that in the 2019-2020 school year, 91% of schools employed security cameras to varying degrees. Schools that do not have cameras become outliers of a growing national standard. However, placing cameras in schools is not without criticism or legal limitations.

Strategically placed cameras allow a single person to monitor several locations at once, such as entrances, hallways and school grounds, providing a measure of security that would

SEE **CAMERAS** ON BACK PAGE



Christina Noyes was named as one of AZ Business Magazine's Most Influential Women in Arizona in 2022.

Scott Malm spoke at the State Bar of Arizona Annual Convention on the topic of Arizona's new homestead legislation. Scott also spoke at the annual convention of the Land Title Association of Arizona of the topic of title insurance claims.

Kent Cammack, Chris McNichol and **Robert Williams** spoke at the Arizona Trustees Association.

Kent Cammack spoke at the United Trustee Association Conference in Las Vegas.

Chris McNichol continues to teach various classes to real estate brokers and agents at the Arizona School of Real Estate and Business.

Appellate lawyer **Charles W. "Chas" Wirken** spoke at the 2022 Summit of the Appellate Judges Education Institute, a national gathering of appellate judges and appellate staff attorneys. Also, Chas was honored by Chambers USA in the 2022 edition of America's Leading Lawyers for Litigation: Appellate.

Melissa San Angelo and **Victoria Buchinger** presented "Community Service – the Key Ingredient to Every Career Stage," at the Ignite520 Conference to members of Tucson's Young Professionals.

Carrie O'Brien presented on a panel focusing on HIPAA/ FERPA privacy and delegation as it relates to school health office staff.

Six of the firm's attorneys were selected for inclusion in the 2022 Southwest Super Lawyers and Rising Stars lists, including:

Kent E. Cammack, Business Litigation

Peter Collins, Jr., Insurance Coverage

Christina M. Noyes, Franchise/Dealership

Séan P. O'Brien, Bankruptcy: Business

Robert Williams, Bankruptcy, Rising Stars

Charles W. Wirken, Appellate

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added were new restrictions on the number of non-dwelling structures and their maximum square footage and height. No improvements could obstruct the mountain views of neighboring lots. No improvement could be constructed within fifty feet of property lines, not even landscaping. All construction plans had to be approved by a majority vote of the owners. Subdivision of lots was prohibited without majority approval and lots created by subdivision would have no vote. The definition of "livestock" and the number permitted was changed. Landscaping maintenance requirements were also added.

Kalway sued to invalidate the amendments. He argued they were invalid without unanimous consent because they imposed unforeseeable new restrictions. The other owners argued they could adopt any amendments they wanted because the original declaration and an Arizona statute authorized amendments by a majority vote.

The case worked its way up the judicial ladder, from the superior court, through the court of appeals, to the Arizona Supreme Court. The high court granted the petition for review filed by Gust Rosenfeld appellate attorney Charles W. Wirken because it raised "issues of statewide importance regarding the scope of an HOA's authority to amend CC&Rs."

After hearing oral argument, the Supreme Court rendered a written opinion observing that CC&Rs are a contract between

the owners that is interpreted "to reflect the reasonable expectations of the affected homeowners." Accordingly, the court ruled that the amendment power "may be used to amend only those restrictions for which the HOA's original declaration has provided sufficient notice," thus making them "reasonable and foreseeable." A general-purpose statement is "too broad and subjective to give notice of future amendments." Therefore, "an HOA cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations." The original declaration "does not have to necessarily give notice of the particular details of a future amendment.... Instead, it must give notice that [it] can be amended to refine it, correct an error, fill in a gap, or change it in a particular way. But future amendments cannot be entirely new and different in character, untethered to an original covenant."

Applying those principles, the Supreme Court struck the invalid amendments and awarded Kalway attorneys' fees.

*Charles W. Wirken | 602-257-7959 | cwirken@gustlaw.com
Chas' appeals practice has involved a broad range of cases and issues in both state and federal appellate courts. His practice also focuses on the resolution of business disputes.*

Voter Initiative Would Affect Assets of Arizonans

On the ballot this November is Proposition 209, a voter initiative called the Predatory Debt Collection Act, which would boost the amount of assets shielded from creditors. Among other things, it would limit the interest rate on medical debt and increase the amount of equity in homes, vehicles, bank accounts and household goods protected from collection by creditors.

In particular, the initiative would increase the homestead exemption amount— which was raised just this year from \$100,000 to \$250,000— to an even higher \$450,000.

Various debtor-friendly groups sponsored and support the initiative. Opponents, including creditors and lenders, and some Chambers of Commerce and other business and government organizations, believe the initiative would make it more difficult for people in Arizona to access credit, start businesses, and afford housing.

*Christopher M. McNichol | 602.257.7496 | mcnichol@gustlaw.com
Chris focuses his practice on general commercial transactions and litigation, with an emphasis on real property matters.*

*Robert Williams | 602.257.7989 | rwilliams@gustlaw.com
Rob focuses his practice on civil litigation, creditors' rights, commercial bankruptcy, restructurings, related litigation, appeals, and mediation.*

Arizona Supreme Court Limits Punitive Damages in Tort Cases

The Arizona Supreme Court released its opinion in *Swift v. Carman*, reiterating strong and narrow limitations on punitive damages in tort cases. Courts have previously held that for punitive damages to be appropriate, the defendant's conduct must be intended to cause harm, motivated by spite, or be outrageous conduct that created a serious risk of harm. However, previous cases discussing punitive damages primarily addressed intentional actions, not outrageous conduct. *Swift* addressed the type of outrageous conduct required for punitive damages in a negligence case.

The court reiterated that conduct warranting punitive damages requires an "evil hand guided by an evil mind." This means that there must be both tortious conduct, which is the evil hand, and cognizance of the danger that conduct causes. In negligence cases, the evil mind is shown when a defendant knows, or purposely ignores, the unreasonable and substantial risk of harm their conduct causes. It is not enough that a defendant is able to appreciate the risk of harm after the fact. A plaintiff must show that a defendant appreciated the risk at the time of the conduct and consciously continued with actions despite that knowledge.

Punitive damages are meant to deter and punish conduct that is both societally intolerable and creates a risk of harm, such as criminal conduct. While criminal conduct is not required for punitive damages, that is the level of unacceptability negligent conduct is meant to reach in order to be considered outrageous. The court cautioned future plaintiffs requesting punitive damages and specifically articulated that facts warranting punitive damages in a negligence case are meant to be a rare circumstance.

*Courtney L. Kramer | 602.257.7432 | ckramer@gustlaw.com
Courtney focuses her practice on medical negligence and health law defense.*



Gust's **James Kaucher** sponsored a women's self-defense class for female employees of GR's Tucson office. Pictured are (from left to right): **Victoria Kirlin**, **Samantha Lancelot** (standing), instructor **Jenna Herder** (also standing), **Victoria Buchinger**, and **Marnie Prince** (owner of the Tucson Junk King franchise).



Gust attorneys **Tom Chauncey** and **Joseph Estes** attended the firm's annual blood drive with the American Red Cross at our Phoenix office. Our attorneys and staff donated nearly 30 units of blood, which will help up to 90 patients in need.

NEW FACES



Kari B. Zangerle

Kari Zangerle has almost 30 years of experience in her litigation and health care law practice. She has substantial trial experience representing health care institutions of all sizes and practitioners in medical and general negligence, commercial and employment matters.

Kari serves as local operations counsel for several facilities without in-house counsel and with national counsel for various health systems. She has coordinated crisis response teams, worked with local, state and federal authorities, and represented clients before CMS, OIG, OHRP, FDA, Arizona Department of Health Services, and numerous other administrative agencies.

Kari has represented hospitals and practitioners in fair hearings, acted as a hearing officer, and worked on credentialing matters. She represents physicians and entities in medical research matters and previously served as a chair for Institutional Review Boards (IRB).

Kari most recently acted as Chair and Co-Chair of the IRB with the Phoenix Children's Hospital for 15 years. She oversees clinical trials and currently serves as an alternate member. Kari also has experience in representing facilities in managed care disputes and health plans in bad faith litigation.

She is a member of the American Health Lawyers Association, Health Law Section of the American Bar Association, Arizona Association of Health Care Lawyers, and a past member of the Sandra Day O'Connor American Inns of Court. Kari is a frequent lecturer on health care law subjects.



Robert C. Stultz

Robert (Bob) Stultz focuses his practice on health care institutions and providers in medical malpractice, employment law, and other civil and commercial litigation matters. He also represents health care providers before licensing boards.

Bob previously had a broad-based practice that included medical malpractice, medical and non-medical product liability, construction litigation, and general liability.

He earned his J.D. from the Sandra Day O'Connor College of Law at Arizona State University. Bob received his bachelor's degree from the University of Central Florida.



Maddalena Savary

Maddalena Savary practices litigation with a focus on appellate and commercial practice. Maddalena joined the firm after clerking for the Arizona Supreme Court and the Arizona Court of Appeals and serving as legislative counsel for a nonprofit advocacy organization. Maddalena began her career interning in every branch of government including the Arizona Supreme Court, Governor Ducey's Office of General Counsel, the Secretary of State Elections Division, the Arizona Attorney General's Civil Rights Division, and the Arizona House of Representatives Rules Office.

Maddalena graduated with honors from the Sandra Day O'Connor College of Law at Arizona State University, earning the highest pro bono distinction, the W.P. Carey/Armstrong Award Prize for Public Service, the Jonathan Paul Schubert Scholarship, the Graduate and Professional Student Association Outstanding Mentor Award, the Rebecca and Michael Berch Scholarship, the Judge Mary M. Schroeder 1st Year Pro Bono Achievement Award, and the Carstens Family Fund Merit Scholarship. Maddalena earned her paralegal degree from Pima Community College and her Bachelor of Arts in Psychology cum laude from the University of Arizona.

ET·Y·MOL·O·GY COR·NER

Inflation vs. Recession

In its original sense, "inflation" meant to blow up or inflate with wind (15th C. English). It was first used to mean an increase in prices in 1838 American English. The Federal Reserve, in an attempt to reduce current inflation without causing a recession (from the Latin "recessionem" meaning the act of receding or going back), has incrementally increased the interest rate banks charge one another to borrow funds. This results in increased rates banks charge their customers. Wall Street investors seem unsure of this policy, as reflected by the daily stock market swings. Time will tell.

*Richard B. Hood | 602.257.7470 |
rbhood@gustlaw.com. Rick, our etymologist, practices
in the areas of commercial law and litigation.*

The Best Lawyers in America® 2023 Honors 37 Gust Rosenfeld Attorneys

Selected by their peers for inclusion in a given practice area, chosen Gust Rosenfeld attorneys included two "Lawyer of the Year" recipients and seven awarded "Ones to Watch."

The 29th edition of The Best Lawyers in America® includes attorneys in 147 practice areas, covering all 50 states and the District of Columbia. Best Lawyers® selections are based on an exhaustive peer-review survey and more than 13 million detailed evaluations of lawyers by other lawyers. Lawyers are not required or allowed to pay a fee to be listed; therefore, inclusion in Best Lawyers® is considered a singular honor.

+ Denotes being named "Ones to Watch" for a specific category. * Denotes being named "Lawyer of the Year" for a specific category.



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Andrew J. McGuire
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Real Estate Law

Christina M. Noyes
Corporate Law, Franchise Law

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Commercial Litigation
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Personal Injury Litigation – Defendants
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Construction Law
Litigation – Construction
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Gust Rosenfeld attorneys **James Giel** (left) and **Carrie O'Brien** (right), along with **Blake Brei** from co-event partner Stifel, are pictured volunteering at the Blessings in a Backpack Fundraising Event, which filled 2,000 bags and provided a \$1,250 donation. These meals will go to children who rely on school-provided meals during the week but don't have enough food on the weekends.

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CAMERAS FROM FRONT PAGE

ordinarily take many people to accomplish. If a serious situation appears to be occurring or has the potential to occur, school staff can take action to address the situation in a more timely manner with camera monitoring.

In addition, cameras can provide an after-the-fact record of what occurred. Physical altercations among students or theft or vandalism of school property are examples of events that, when recorded, provide evidence of the perpetrators' identity and prevent future incidents.

However, schools must understand and observe privacy concerns and legal limitations of video surveillance. Cameras should not be placed where there is a reasonable expectation of personal privacy – restrooms or locker rooms, for example. In one case in Tennessee, the court ruled that the school district violated the students' constitutional right to privacy by installing and operating video surveillance equipment in the boys' and girls' locker rooms at the school.

Recordings of videos should be viewed only by people designated by the school and those with a need to view the

video related to the school's business. Additionally, photos or videos depicting students may constitute an educational record when the photos or videos are directly related to a student. As such, access to such photos or videos is limited by the Federal Education Record Privacy Act, also known as "FERPA."

Due to the tragic deadly attacks upon school staff and students around the country, school districts have been required, by necessity, to consider taking extraordinary measures to ensure student and staff safety, spending money on devices such as surveillance cameras rather than in the classroom. In so doing, however, they must balance security concerns with legal restrictions that protect the privacy of individuals.

*Susan Plimpton Segal | 602.257.7425 | spsegal@gustlaw.com
Susan focuses her practice on public law and employment law.*

*Christopher P. Thomas | 602.257.7675 | cthomas@gustlaw.com
Chris concentrates his practice on education law.*

PHOENIX OFFICE

One E. Washington St.
Ste. 1600
Phoenix, AZ 85004-2553
Telephone: 602.257.7422
Facsimile: 602.254.4878

TUCSON OFFICE

One S. Church Ave.
Ste. 1900
Tucson, AZ 85701-1627
Telephone: 520.628.7070
Facsimile: 520.624.3849

ALBUQUERQUE OFFICE

Telephone: 888.749.4415
DENVER OFFICE
Telephone: 303.648.4042
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LOS ANGELES OFFICE

Telephone: 310.620.3083
WICKENBURG OFFICE
Telephone: 928.684.7833
CHICAGO OFFICE
Telephone: 312.505.3599

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