ARIZONA COURT OF APPEALS

DIVISION TWO

Bank of New York Mellon, fka Bank of New York, as Trustee for the certificate holders of CWALT, Inc., Alternative Loan Trust 2005-63, Mortgage Pass Through Certificates Series 2005-63, Appellee / Plaintiff, v. Wendle V. Lehnerd, Appellant / Defendant.	No. 2-CA-CV 2014-0160 Pinal County Superior Court No. CV201402273

REPLACEMENT OPENING BRIEF

OF

APPELLANT/DEFENDANT WENDLE V. LEHNERD

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INTRODUCTION

Wendle V. Lehnerd ("Lehnerd") brings this appeal in a forcible detainer action asserted against him by the Bank of New York Mellon ("the Bank") related to possession of residential real estate located in Pinal County.

The issue on the merits is whether the trial court erred in denying Lehnerd's motion to dismiss for lack of jurisdiction. Lehnerd brought that motion based upon the prior exclusive jurisdiction doctrine recognized by this Court in *Tonnemacher v. Touche Ross & Co.* 186 Ariz. 125, 128-29 (App. 1996), the Arizona Supreme Court in *Forst v. Intermountain Building & Loan Assn.*, 49 Ariz. 246, 252-54 (1937) and the United States Supreme Court in *Kline v. Burke Construction Co.*, 260 U.S. 226, 229-31 (1922). Under that doctrine, where federal and state courts share concurrent jurisdiction, "[i]n an action *in rem* or *quasi in rem*, the first court to acquire jurisdiction over the property has jurisdiction to the exclusion of the other." *Tonnemacher*, 186 Ariz. at 129.

Before the Bank filed this forcible detainer action, Lehnerd had filed an action in the United States District Court for the District of Arizona naming the Bank as a defendant and relating to title issues on the same property at issue here. As set forth herein, the prior jurisdiction of the federal district court over this property precluded jurisdiction in the trial court under the prior exclusive jurisdiction doctrine, and the trial court erred in denying the motion to dismiss.

Ironically, while showing that the trial court had no jurisdiction is relatively straightforward, showing this Court has appellate jurisdiction to make that decision is much more complex. Here, the trial court indicated it would issue a judgment by minute entry and subsequently issued a minute entry finding Lehnerd guilty of forcible detainer and awarding the Bank immediate possession. Lehnerd promptly appealed from this ruling. However, the ruling was silent as to the award of attorney's fees, even though the Bank had provided an attorney's fees application to the trial court. As a result, Lehnerd, through no fault of his own, is now thrust into the thicket that has and continues to bedevil practitioners and *pro se* parties alike: that of the rules governing when a notice of appeal is effective.

The implementation of recent amendments to the Arizona Rules of Civil Appellate Procedure have gone a long way in clarifying the area and rectifying some of the seemingly unfair results that previously arose. However, due to the recency of the implementation of the new rules, there is not a wealth of authority on the application of those rules.

Further complicating this issue is that this appeal is from an eviction action, governed by the Arizona Rules Procedure for Eviction Actions ("RPEA") rather than the Arizona Rules of Civil Procedure ("ARCP"). The RPEA is in many respects different from the ARCP, and there is little authority interpreting its provisions, particularly as they relate to whether certain orders are appealable.

The uncertainty caused by these factors has resulted in Lehnerd making several alternative arguments, depending upon how the Court treats the finality of the various orders in this case. In summary, Lehnerd's position is that:

1) The minute entry ruling qualified as a final appealable order under the rules and statutes governing eviction actions;

2) If the Court determines that the minute entry ruling was not an appealable order, the subsequent judgment was likewise not final because it purported to decide some, but not all issues under ARCP Rule 54(b)—which is not permitted under any provision in the RPEA—and the Court should exercise its discretion to treat the notice of appeal as a special action or suspend the appeal and revest jurisdiction in the trial court to enter a final judgment from which an appeal can be taken; and

3) If the Court determines that the subsequent judgment was final, Rule 9(c) should be interpreted to permit the notice of appeal to be treated as filed on the date of, but after the final judgment—an interpretation inconsistent with the recent opinion from Division One in *Camasura v. Camasura*, 720 Ariz. Adv. Rep. 30 (August 27, 2015) but consistent with goals set forth in the State Bar Petition that proposed the rule.

This is not a case where Lehnerd slept on his rights and did not file a timely appeal. Likewise, it is not a case where Lehnerd deliberately filed a premature

appeal and ignored clear directions from the trial court that the order he was appealing was not final. He received an order he was told was to be a judgment that awarded immediate possession to the Bank, and he filed his notice of appeal. Whether by direct appellate review, special action, or suspension of the rules, the interests of justice and fairness will be served by this Court exercising jurisdiction and determining this case on the merits.

Lehnerd requests that this Court find that it has jurisdiction and that the trial court did not. Lehnerd further requests that the Court vacate the December 23 Judgment, the December 2 Ruling, and remand to the trial court to dismiss the action if the federal action is still pending at that time.

STATEMENT OF THE CASE AND OF THE FACTS

I. The Forcible Detainer Complaint.

On September 14, 2014, the Bank filed a complaint in Pinal County Superior Court (CV-201402273) against Lehnerd alleging forcible detainer of property generally described as 33276 N. Cherry Creek Road, Queen Creek, AZ 85242[1] (herein "the Property"). Complaint (First Index of Documents of Record on Appeal (herein "1ROA") 1) ¶¶ 2,5[2]. The Bank requested Lehnerd be found guilty of forcible detainer and be ordered to vacate the Property immediately, that the Bank be awarded immediate and exclusive possession of the Property, awarded the reasonable rental value of the Property during the forcible detainer, as well as attorney's fees and costs. *Id.* pp.4-5.

II. Lehnerd's Motion to Dismiss for Lack of Jurisdiction is Denied by the Trial Court.

A. The Motion to Dismiss was based on the federal district court's prior exclusive jurisdiction.

In response, to the Bank's Complaint, Lehnerd filed a motion to dismiss for lack of jurisdiction ("the Motion to Dismiss")(1ROA 8). In the Motion to Dismiss,

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[1]The Complaint set forth the legal description of the property as "LOT 104, OF THE VILLAGE AT SAN TAN HEIGHTS PARCEL 5, ACCORDING TO THE PLAT OF RECORD IN THE OFFICE OF THE COUNTY RECORDER OF PINAL COUNTY, ARIZONA, RECORDED IN CABINET D, SLIDE 48."

[2]The Clerk of the Pinal Superior Court provided an initial Index of Record on Appeal and two subsequent updates, each beginning with the number 1. They will be referred to in this brief as 1ROA, 2ROA and 3ROA respectively.

Lehnerd advised the trial court that he had previously filed an action against the Bank related to the Property on August 14, 2014 which was pending in the United States District Court for the District of Arizona ("the Federal Court").(*Id.* pp. 1-2).

Lehnerd argued (among other things) that the trial court lacked jurisdiction to hear the forcible detainer action under the doctrine of prior-exclusive jurisdiction, "which says that a court will not assume in rem jurisdiction over property that is already under the jurisdiction of another court of concurrent jurisdiction." (1ROA 8, 2-3, citing *United States v. Bank of New York & Trust Co.*, 296 U.S. 462, 478 (1936); *United States v One 1985 Cadillac Seville*, 866 F.2d 1142, 1145 (9th Cir. 1989)). Quoting from the United States Supreme Court, Lehnerd point out that the "principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted." (1ROA 8, p. 3, citing *Farmers' Loan & Trust Co. v. Lake Street Elevated R. Co.*, 177 U.S. 51, 61 (1900)). Rather "[i]t applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property." (*Id.*)

Lehnerd further quoted the purpose of the rule as stated by the United States

Supreme Court: "If the two suits are in rem or quasi in rem, so that the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other." (1ROA 8, p.3 citing *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195 (1935)) The rule promotes comity between the courts, the harmony of which "is compromised by state and federal judicial systems attempting to assert concurrent control over the res upon which jurisdiction of each depends." (1ROA 8, p.3, citing *United States v. $2,542 in U.S. Currency*, 745 F. Supp. 378, 379-80 (D. Vt. 1990)) Lehnerd concluded that the "Pinal County Superior Court, therefore, must yield to the jurisdiction of the U.S. District Court that has assumed prior jurisdiction." (1ROA 8, p.3)

B. The Bank's Response to the Motion Failed to Address the Prior Exclusive Jurisdiction Doctrine.

The Bank opposed the Motion to Dismiss (1ROA 6). The Bank admitted that prior to the August 19, 2014 Trustee's Sale of the Property, Lehnerd had unsuccessfully sought injunctive relief from the Federal Court, and that the issues as to the merits of Lehnerd's arguments were, at the time the motion was filed, pending before the Federal Court. (*Id.* pp. 2-3) The Bank argued that Lehnerd "fails to cite any record from the pending United States District Court case where that court has asserted jurisdiction over the issue of possession to the Property." (*Id.* p. 3) The Bank further argued that Lehnerd's position "would be contrary to

the findings in the case of *Curtis v. Morris*, 186 Ariz. 534, 925 P.2d [sic] (1996), where the Arizona Supreme Court found that examining the merits of title was not permissible because of the special nature of forcible detainer actions." (*Id.* p. 4) The Bank cited several cases holding that a forcible detainer action is a summary statutory remedy limited only to the right of possession of property, and did not involve issues of title. (*Id.* p.4) The Bank summarized its argument by stating that "[Lehnerd] should make his arguments about title, trustee's sales issue and such in the federal case, which he is doing, but the issue of possession is clearly an isolated issue limited to the courts in the State of Arizona." (*Id.*)

C. Lehnerd's Reply in Support of the Motion to Dismiss

Lehnerd filed a reply in supporting his Motion to Dismiss, (1ROA 9) pointing out that the Bank failed to show that the Federal Court had stated it did not have jurisdiction over the claims, and reiterating the doctrine that if two suits "are in rem or quasi in rem, so that the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other." (1ROA 9, pp. 3-4)

D. The trial court denies the motion to dismiss, but does not address the prior-exclusive jurisdiction doctrine.

On October 31, 2014, the trial court entered a minute entry denying the Motion to Dismiss. (1ROA 11) In so ruling, the trial stated, in part:

> Defendant's allegation that this Court lacks jurisdiction is in direct opposition to the statutory intent of the forcible detainer laws and contrary to *Curtis v. Morris*, 186 Ariz. 534, 925 P.2d 259 (1996). In *Curtis* the Arizona Supreme Court looked at whether the trial court had authority to consider a forcible detainer action when an earlier case was filed in a separate trial court and the issue of title was raised. Although the two court cases dealt with the same property, the Arizona Supreme Court held that the issues raised in each case were not substantially identical and that the forcible detainer action was limited to the issue of possession.

(*Id.* p.2) In its ruling, the trial court did not consider the distinction between the *Curtis* case, where the forcible detainer action and the title dispute were both filed in Arizona state courts, and the present case where the previous case was pending before the federal court, a sovereign separate from the trial court in which the forcible detainer was filed. (*Id.*)

III. The Contested Hearing

The contested hearing on the forcible detainer action took place on November 21, 2014.(1ROA 10, 1ROA13).The Bank presented its case in the form of argument from counsel. (11/21/14 Transcript; 5:21-8:9; 8:21-24) At the close of the Bank's case in chief, counsel for the Bank stated "[a]nd with that, I would ask that the court grant judgment as to possession, leaving the other issues to be resolved in the other case." (*Id.* 7:20-22) Bank's counsel further advised the trial court that he had brought a form of judgment to the hearing, which he appears to have shown Lehnerd and handed to the trial court, but which does not appear as

part of the record. (*Id.*) Lehnerd also presented his case. (11/21/14 Transcript; 9:16-15:25)

During the hearing, the Bank requested attorney's fees through a China Doll Affidavit which the trial court indicated it desired. (11/21/14 Transcript; (*Id.* 17:13-16; 18:5-8)The trial court further indicated it would take the matter under advisement, and that "by next week or the week after you will have my decision in the form of a minute entry." (*Id.* 17-21-18:2) The trial court further stated to the Bank's counsel: "And I have your form of judgment if I need it." (*Id.*18:2)

At the end of the hearing, the trial court stated "I'll give you my **judgment** in the form of a minute entry." (11/21/14 Transcript; 18: 23-24)(emphasis supplied)

The trial court issued a minute entry dated November 21, 2014, the same day as the hearing, which stated that the trial court took the matter under advisement, and ordered the Bank's counsel to submit a China Doll Affidavit for Attorney's Fees. (1ROA 13)The Bank filed an application for Attorney's Fees and Costs on December 1, 2014. (1ROA 15)

IV. The December 2, 2014 Ruling

In a minute entry entitled "Ruling" which was signed and filed on December 2, 2014, ("December 2 Ruling") the trial court found Lehnerd "guilty of forcible detainer" and ordered that "his rights relative to the property are terminated."

(1ROA 14, p.2) The Ruling further stated that "[t]he Plaintiff is awarded immediate and exclusive possession of the property." (*Id.*) The Ruling was silent as to an award of attorney's fees. (*Id.*)

V. Lehnerd's Notice of Appeal

On December 5, 2014, Lehnerd filed a notice of appeal "from the Judgment entered on December 2, 2014". (1ROA 16) Lehnerd also posted a cash bond on appeal on that date. (1ROA 17, 18, 19)

VI. The Bank's Subsequent Motion for Award of Attorney's Fees and Entry of Judgment.

On December 19, 2014, The Bank filed a Motion for Award of Attorneys' Fees and Entry of Judgment. (1ROA 20) The Bank stated that the December 2, 2014 Ruling "wherein the Defendant was found guilty of forcible entry [sic] and detainer and immediate and exclusive possession of the real property was awarded to Plaintiff, but the Ruling was silent as to Plaintiff's oral motion for attorneys' fees and costs and the Application for Attorneys' Fees And Costs." (*Id.*, p.2) The Bank requested the award of attorney's fees and the entry of judgment in the form it provided. (*Id.*, p.3)

VII. The December 23, 2014 Judgment

On December 23, 2014, the trial court entered a[nother] judgment in favor of the Bank and against Lehnerd ("the December 23 Judgment"), and awarded the Bank $2,660.00 in attorney's fees and "costs and fees" in the amount of $547.

(2ROA2, pp.1-3) The judgment stated that "[t]he Court expressly determines that there is no just reason for delay in entry of final judgment in this matter, and hereby expressly directs, **pursuant to Arizona Rules of Civil Procedure, Rule 54(b),** that final judgment be entered in favor of the Plaintiff and against the Defendants pursuant to the Plaintiff's Complaint and the Ruling." (*Id.* p.2)(emphasis supplied)

VIII. Initial Briefing, Appointment of Pro Bono Counsel and Request for Additional Briefing.

Lehnerd filed an opening brief on March 7, 2015, (3/7/15 Opening Brief), the Bank filed an answering brief on May 18, 2015 (5/18/15 Answering Brief), and Lehnerd a reply brief on June 7, 2015 (6/7/15 Reply Brief).

On July 31, 2015, this Court appointed the undersigned, pursuant to the Court of Appeals Pro Bono Representation Program, in an order which also stated the following:

> Upon review of the record and briefing, this court, through its pro bono coordinator, has determined that the appointment of pro bono counsel in this appeal, pursuant to the Court of Appeals Pro Bono Representation Program, would benefit the court's review of this appeal, including, but not limited to, issues that relate to the court's jurisdiction, finality of judgments, application of Rules 54(b) and (c), Ariz. R. Civ. P., and interpretation and application of recent amendments to the Arizona Rules of Civil Appellate Procedure, particularly Rules 3 and 9.

(7/31/15 Order)

In accordance with this Court's order set forth above, as well as this Court's order dated October 1, 2015 (10/1/15 Order), Lehnerd, through appointed pro bono counsel, submits this Replacement Opening Brief.

STATEMENT OF THE ISSUES

1. Does this Court have appellate jurisdiction over this appeal?
2. If this Court does not have appellate jurisdiction, should it exercise its power to suspend the appeal and remand to the trial court so that appellate jurisdiction can be perfected?
3. In the alternative, if the Court does not have appellate jurisdiction, should this Court use its discretion to treat the notice of appeal as a petition for special action?
4. Did the trial court err in denying the motion to dismiss and failing to apply the prior exclusive jurisdiction doctrine?

ARGUMENT

I. THIS COURT EITHER HAS APPELLATE JURISDICTION, OR THE MEANS TO EXERCISE REVIEW THROUGH A SPECIAL ACTION OR THROUGH OTHER PROCEDURES THAT WILL CORRECT ANY JURISIDICTIONAL DEFECTS.

The right to appeal in civil cases is statutory, not absolute. *Anderson v. Valley Union High Sch., Dist. No. 22*, 229 Ariz. 52, 54, ¶3(App. 2012). Therefore, this Court must independently review its jurisdiction in each civil appeal—even where the parties do not raise the issue—and dismiss where statutory appellate jurisdiction does not exist. *Robinson v. Kay*, 225 Ariz. 191, 192, ¶4 (App. 2010).

A. This Action and its Appeal are Governed by the Statutes and Rules related to Eviction Actions, not the Arizona Rules of Civil Procedure.

1. Forcible Detainer Actions are governed by A.R.S. § 12-1171 *et. seq.* and the Rules of Procedure for Eviction Actions.

As a forcible detainer, this action is a special proceeding governed by Title 12, Chapter 8, Article 4 of the Arizona Revised Statutes. *See* A.R.S. § 12-1171, *et seq.* Forcible detainers are not "civil actions" governed by the Arizona Rules of Civil Procedure, but instead are "eviction actions" governed by the Arizona Rules of Procedure for Eviction Actions ("RPEA"). RPEA, Rule 1 ("These rules shall govern the procedure in the superior courts and justice courts involving forcible and special detainer actions…"); RPEA Rule 2 ("All eviction actions are statutory summary proceedings and the statutes establishing them govern their scope and

procedure."). The Arizona Rules of Civil Procedure apply only when incorporated by reference into the RPEA.[3] RPEA Rule 1.

> 2. Appeals from Forcible Detainer Actions, taken as in other civil cases, are generally from final judgments but, in appropriate circumstances, the Court may suspend the appeal to permit appellate jurisdiction to be perfected, or treat the appeal as a special action.

This Court's jurisdiction over forcible detainer actions appealed from the superior court is governed by A.R.S. § 12-1182(A) which states: "[i]n a forcible entry or forcible detainer action originally commenced in the superior court, an appeal may be taken to the supreme court as in other civil actions." A.R.S. § 12-1182(A); *Morgan v. Continental Mortgage Investors*, 16 Ariz. App. 86, 91 (1971)(noting §12-1182 applies to the court of appeals when the original action commenced in the superior court). *See also* RPEA Rule 17 ("Appeals from the superior court shall be governed by A.R.S. § 12-1182 and The Rules of Civil Appellate Procedure.")

This Court's appellate jurisdiction in civil cases is governed by A.R.S. § 12-2101(A) and the Arizona Rules of Civil Appellate Procedure. Appellate jurisdiction is generally "limited to final judgments which dispose of all claims and all parties."*Robinson v. Kay*, 225 Ariz. 191, 192 ¶4 (App. 2010); A.R.S. § 12-2101(A)(1).

[3] Rule 1 provides two exceptions relating to ARCP Rule 80(i) and Rule 42(f) not applicable to this appeal.

Even where the notice of appeal does not vest this Court with jurisdiction, in the proper circumstances the Court may, in its discretion, treat the notice of appeal as a special action. *Ruesga v. Kindred Nursing Ctr., L.L.C.*, 215 Ariz. 589, 594 ¶16 (App. 2007). Moreover, as discussed more fully below, under the 2014 and 2015 amendments to the Arizona Rules of Civil Appellate Procedure, other remedies are available to cure premature or otherwise defective appeals. *See, e.g.*, ARCAP Rule 9(c), and Rule 3(b).

Lehnerd filed his notice of appeal from the December 2 Ruling, but after that notice was filed, the trial court entered the December 23 Judgment with ARCP Rule 54(b) language which included an award of attorney's fees and costs. This Court's jurisdiction turns on the finality and appealable nature of these two orders.

3. Judgments in Eviction Actions are Governed by A.R.S. §12-1178 and the Rule 13 RPEA, not the Arizona Rules of Civil Procedure.

Judgments in eviction actions are governed by A.R.S. §12-1178 and RPEA Rule 13. *See* RPEA Rule 1. A.R.S. §12-1178(A) states: "If the defendant is found guilty of forcible entry and detainer or forcible detainer, the court shall give judgment for the plaintiff for restitution of the premises, for all charges stated in the rental agreement and for damages, attorney fees, court and other costs and, at the plaintiff's option, all rent found to be due and unpaid through the periodic rental

period, as described in § 33-1314, subsection C, as provided for in the rental agreement, and shall grant a writ of restitution."

RPEA Rule 13 sets forth four items for the trial court to review (Rule 13(a)(1)-(4)), and provides for different forms of judgment (Rule 13(b)(1)-(4). Rule 13(c) provides for relief granted, including damages; Rule 13(d), rent concessions; Rule 13(e) late fees in mobile home park and recreational vehicle park evictions, Rule 13(f), attorney fees "if the court determines that such fees are provided for by statute or in a written contract" and Rule 13(g) injunctive relief where permitted by law.

The RPEA does not incorporate by reference ARCP Rule 54 or any of the judgment-related rules contained in the Arizona Rules of Civil Procedure. The RPEA also contains no counterpart to ARCP Rules 54-59. RPEA Rule 15 provides for relief from judgments or orders, and appears in large part to be a counterpart to ARCP Rule 60(c).

B. Under the RPEA, the December 2 Ruling was an Appealable Order.

1. The December 2 Ruling was in the form the trial court indicated it would enter judgment, and did not indicate that any further matters pending or request a further form of judgment.

At the time the December 2 Ruling was issued, there were strong indicia that it was a final appealable judgment. At the end of the hearing, the trial court stated "I'll give you my judgment in the form of a minute entry." (11/21/14 Transcript;

18: 23-24) The December 2 Ruling was a signed minute entry. (1ROA 14 p.2) In the December 2 Ruling, the trial court made no reference to any further proceedings pending which had not been addressed. (*Id.*) It made no reference to a request for a further form of final judgment. (*Id.*) Indeed, the Bank had already provided the trial court with a form of judgment which the trial indicated it would use if needed, but chose not to use.

2. The December 2 Ruling awarded the Bank "immediate and exclusive possession of the property, which is a function of the judgment under the RPEA and A.R.S. § 12-1178.

The December 2 Ruling did, however, state that the Bank "is awarded immediate and exclusive possession of the property." (1ROA 14 p.2) This is the province of the judgment under A.R.S. § 12-1178(A) and RPEA Rule 13(c)(1)("Except as provided in subsection (2) of this section, if the judgment is for the plaintiff, possession of the premises shall be awarded to the plaintiff."). There is no provision under the RPEA for a pre-judgment award of possession of property to a party. *See RPEA, generally.*

3. The absence of finality certification does not preclude the December 2 Ruling from being a final judgment since the RPEA neither requires finality certification nor incorporates ARCP Rule 54(b) by reference.

That the December 2 Ruling did not contain a certification regarding whether there were matters pending and whether the entry of judgment was directed does not preclude the December 2 Ruling from being a final judgment

under the RPEA. The RPEA does not incorporate by reference ARCP Rules 54(b) or 54(c), the Rules requiring such certification in civil cases. Further, the RPEA does not contain any provisions that independently require such certification.

4. Under the circumstances, the trial court's silence on the Bank's attorney's fees application could have been inferred as an implicit denial.

The December 2 Ruling was silent on the Bank's application for attorney's fees. (*Id.*) However, that application had been filed the day before the December 2 Ruling was entered. And, as set forth above, the trial court neither made reference to a pending attorney's fees application in the December 2 Ruling nor did it use the form of judgment previously provided by the Bank with a provision for attorney's fees. Even after the trial court had received the application for attorney's fees, it took no action on that application for over twenty days (after the Bank separately requested such a ruling on December 19). But for the subsequent actions in which the trial court, pursuant to motion, awarded fees in the December 23 Judgment, the December 2 Ruling appeared to be intended as a final judgment on the merits. Based on these facts, the inference could certainly be drawn at the time that the trial court had implicitly denied the application for attorney's fees, and that the December 2 Ruling was a final judgment.

5. The RPEA does not prohibit the entry of judgment before attorney's fees are resolved, and so the lack of a specific ruling on attorney's fees does not preclude finality.

Moreover, regardless of the trial court's intent, nothing in the RPEA requires that attorney's fees be resolved before entry of judgment. *See* RPEA *generally*. The RPEA does not incorporate by reference ARCP Rule 58(g), which requires in civil actions that "except as provided for in Rule 54(b), a judgment shall not be entered until claims for attorney's fees have been resolved and are addressed in the judgment." Nor does the RPEA incorporate by reference Rule 54(b) which provides that a claim for attorney's fees "may be considered a separate claim from the related judgment regarding the merits of a cause."

Absent provisions such as those now found in ARCP Rule 54(b) and Rule 58(g), the fact that a judgment does not include an award of attorney's fees on a claim does not preclude the entry of final judgment on the claim. *Title Ins. Co. of Minnesota v. Acumen Trading Co., Inc.*, 121 Ariz. 525, 526, (1979); *Trebilcox v. Brown & Bain, P.A.*, 133 Ariz. 588 (App. 1982), *disapproved on other grounds*, *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 524 (1987). An attorney's fees award under A.R.S. § 12-341.01 is inextricably bound with the underlying contract claim such that it is a part of that claim. *Id.*

6. Unlike ARCP Rule 58(a), the RPEA does not require that attorney's fees be determined before judgment is final.

It is true that A.R.S. § 12-1178(A) provides for the judgment to include an award of attorney's fees, and RPEA Rule 13(f) provides for the award of such fees "if the court determines that such fees are provided for by statute or in a written

contract." But, unlike ARCP Rule 58(g), there is nothing in the RPEA that precludes the entry of judgment before attorney's fees have been decided.

As set forth above, the absence of a decision on attorney's fees did not preclude the entry of final judgment under the RPEA. While the Bank could argue that it should have been awarded fees, that argument goes to whether the judgment was correct, not whether it was final.

7. For the reasons set forth above, the December 2 Ruling was a final judgment and Lehnerd's notice of appeal was timely and not premature.

For the reasons set forth above, Lehnerd respectfully submits that the December 2 Ruling was a final appealable judgment of the trial court. As such, the notice of appeal was not premature.

The notice of appeal was also timely. Lehnerd did not sleep on his rights. Within three days of the December 2 Ruling that ordered "immediate possession" to the Bank and which the trial court had previously described as a "judgment", Lehnerd filed his notice of appeal, also describing the December 2 Ruling as a "judgment". In doing so, Lehnerd acted in compliance with the Residential Eviction Information Sheet, the publication and distribution of which is mandated by the Arizona Supreme Court, (RPEA Appendix A) which provides in part that: "Parties wishing to appeal from a judgment have five days to do so after a judgment is entered. . ."

8. Lehnerd's timely notice of appeal deprived the trial court of its jurisdiction to award attorney's fees in the December 23 Judgment.

Lehnerd's Notice of Appeal was filed on December 5, 2014. The Bank did not file its Motion for Award of Attorneys' and Entry of Judgment until December 19, 2014. The Bank cited no provision of the RPEA that provides for this type of motion after the entry of final judgment. Nor did the Bank cite any rule or statute that provided the trial court with the jurisdiction to enter such an order after a notice of appeal had been filed.

Prior to the 1999 Amendments to the Arizona Rules of Civil Procedure—which provided that a claim for attorney's fees could be considered a separate claim under Rule 54(b) and which required that attorney's fees issues be decided before a judgment was final unless otherwise certified under Rule 58(g) (See ARCP State Bar Committee Notes to the 1999 Amendments to Rule 54(b))—this Court addressed whether the trial court retained jurisdiction to determine an award of attorney's fees when the underlying judgment had been previously appealed. *Trebilcox v. Brown & Bain, P.A.*, 133 Ariz. 588 (App. 1982). This Court held that the trial court was divested of jurisdiction to hear an award of attorney's fees after the judgment on the underlying merits had been appealed. *Id.* 133 Ariz. at 591. As set forth in the 1999 Amendments to the Rules of Civil Procedure, the holding in *Trebilcox* led to the changes in the rules which permit attorney's fees issues to be

addressed after an appeal. *See* State Bar Committee Notes to ARCP Rule 54(b), 1999 Amendments.

Under the RPEA, there are no provisions similar to those adopted in the 1999 Amendments to the ARCP. Therefore, under the reasoning set forth in *Trebilcox*, unless otherwise provided for by a time-extending motion, the notice of appeal divested the trial court of jurisdiction to enter the award of attorney's fees on December 23, 2014.

9. The Application for Attorney's Fees and Motion for Entry of Judgment does not qualify as a time-extending motion that would nullify Lehnerd's notice for purposes of appeal.

As set forth above, the RPEA has no provision for the Application for Attorney's Fees and Entry of Judgment that would be effective after the timely filing of a notice of appeal. The RPEA also does not incorporate by reference ARCP Rules 50(b), 52(b), 59(l) or 59(a), which are the motions that extent appeal time under ARCAP Rule 9(b)(version of Rule effective until January 1, 2015). RPEA Rule 15 does provide for relief from judgments or orders, but this provision is not specifically referenced in ARCAP Rule 9, and therefore the time extensions set forth in that rule should not apply. Further, although a hybrid, RPEA appears to be most closely related to ARCP Rule 60(c). Under the version of ARCAP applicable in December of 2014, ARCP Rule 60(c) was not included as a time-extending motion for purposes of filing a notice of appeal. Thus, even if the

Bank's Application for Attorney's Fees and Entry of Judgment were treated as a RPEA Rule 15 motion, the filing of that motion would not have nullified the previously filed notice of appeal or reinstated jurisdiction in the trial court for purposes of ruling on that motion.[4]

10. Lehnerd's appeal of the December 2 Ruling was effective.

For the reasons set forth above, Lehnerd respectfully submits that his notice of appeal was timely filed and provides the basis for appellate jurisdiction in this Court.

C. If the December 2 Judgment is Not Appealable, the December 23 Judgment is Also Not an Appealable Final Judgment under the RPEA.

If the December 2 Ruling is deemed not to be a final judgment because it does not dispose of all claims and parties, the December 23 judgment suffers from the same defect and therefore cannot be considered final either. As set forth above, ARCP Rule 54(b) is not incorporated by reference into the RPEA, and the RPEA does not have a functional equivalent to ARCP Rule 54(b). Therefore, there is no mechanism in the RPEA under which the trial court has the authority to certify as "final judgments" any judgment that does not dispose of all claims and parties.

[4]The 2015 Revisions to ARCAP Rule 9(e)(1)(e) adds motions for relief under ARCP Rule 60 to the list of time-extending motions "if the motion is filed no later than 15 days after entry of judgment." This provision is inapplicable here because the events at issue occurred in December 2014, before this version of the Rule took effect, and the Bank's motion was filed 17 days after the entry of the December 2 Ruling.

In this case, in the December 23 Judgment provided that trial court "expressly determines that there is no just reason for delay in entry of final judgment in this matter, and hereby expressly directs, pursuant to Arizona Rules of Civil Procedure, Rule 54(b), that final judgment be entered in favor of Plaintiff and against the Defendants [sic]…." (2ROA 2, p.2) However, under the current version of Rule 54, which was effective at the time the judgment was entered, a final judgment upon all claims is governed by Rule 54(c), not Rule 54(b). Rule 54(c) states that "a judgment shall not be final unless the court states "that no further matters remain pending and that the judgment is entered pursuant to Rule 54(c)." ARCP Rule 54(c). Rule 54(b) certification, on the other hand, by its own terms is applied where final judgment is directed "as to one or more but fewer than all of the claims or parties." ARCP Rule 54(b).

By certifying final judgment under ARCP Rule 54(b), rather than 54(c), the December 23 judgment by its own terms holds itself out as granting final judgment as to some, but not all of the claims or parties before it. However, the RPEA does not provide for certification of judgments that do not dispose of all parties and claims. Therefore, the December 23 judgment cannot constitute a final judgment under the RPEA.

D. If Neither The December 2 Ruling Or The December 23 Judgment Are Final Appealable Orders Under The RPEA, This Court Still Has Other Options That Would Permit Review.

If neither the December 2 judgment nor the December 23 judgment are final judgments for purposes of A.R.S. § 12-2101, and this Court does not technically have appellate jurisdiction because no final judgment has yet been entered, the Court still has at least two options that would lead to the just result of Lehnerd's appeal being heard on the merits.

1. The Court may suspend the appeal a revest the trial court with jurisdiction to enter a final judgment.

One option the Court may exercise if there is currently no appealable judgment on file is to suspend this appeal for good cause "and revest jurisdiction in the superior court to consider and determine specified matters." ARCAP Rule 3(b). "The primary purpose of Rule 3 is to make clear the power of the appellate courts, in the furtherance of justice, to relieve litigants of the consequences of noncompliance." Comment to Rule 3. Here, this Court has the power to suspend this appeal, revest jurisdiction in the superior court for the purpose of entry of a final appealable judgment by the trial court, which could then be followed by a timely notice of appeal by Lehnerd, and appellate jurisdiction then reinstated in this Court. As set forth in this brief, good cause has been shown to take this action, and Lehnerd moves that the Court exercise its discretion and suspend this appeal as set forth above.

2. The Court may treat the notice of appeal as a petition for special action.

The other alternative this Court has available if neither the Dec 2 Ruling or the December 23 Judgment is a final appealable order, is to treat Lehnerd's appeal of the December 2 Ruling as a petition for special action. *See Rusega v. Kindred Nursing Center, LLC*, 215 Ariz. 589, 594 ¶ 16 (App. 2007). Here, special action jurisdiction would be warranted because, without a final judgment there would be no "equally plain, speedy, and adequate remedy by appeal" A.R.R.P Sec. Actions 1(a). Moreover, virtually all of the arguments here are purely legal arguments. *Ruesga*, 215 Ariz. 589, 594, 161 P.3d 1253, 1258 (App. 2007).

In the event the Court does not exercise its discretion to suspend this appeal as set forth above, Lehnerd moves that the Court treat his appeal As a Special Action.

E. If The Court Determines That The December 2 Ruling Was Not A Final Judgment And The December 23 Judgment Was Final, ARCAP Rule 9(C) Should Be Applied To Make The Notice of Appeal Effective Upon The Entry Of The December 23 Judgment.

If the Court does determine that the December 23 Judgment is a final appealable order and the December 2 Ruling was not, the premature filing of the notice of appeal should be cured by ARCAP Rule 9(c) which provides:

> A notice of appeal or cross-appeal filed after the superior court announces a order or other form of decision—but before entry of the

> resulting judgment that will be appealable—is treated as filed on the date of, and after the entry of, the judgment.

ARCAP Rule 9(c).

In so arguing, Lehnerd recognizes that he is taking a position contrary to that set forth in the recent case from Division One of this Court: *Camasura v. Camasura*, 720 Ariz. Adv. Rep. 30, No. CV 14-0309 FC (slip op. Aug. 27, 2015). In *Camasura*, the Court interpreted Rule 9(c) narrowly to only apply to decisions which would be appealable if immediately followed by the entry of judgment. (*Id.* ¶¶11-15) As set forth below, Lehnerd respectfully submits that this narrow interpretation does not alleviate the problems which caused the State Bar of Arizona to propose this change to the ARCAP and that an interpretation more in keeping the with goals of the rule amendments should be adopted.

Instead, Lehnerd believes ARCAP Rule 9(c) should be interpreted to mean what it appears to say: that a premature appeal is cured upon the entry of the final judgment, at least as to the matter from which the appeal was taken, and certainly when the premature appeal was taken from a decision on the merits and the only remaining issue is the determination of attorney's fees.

To support this position, Lehnerd first turns to a review of the State Bar Petition from which these rule changes arose.

1. The State Bar Petition Proposed Current ARCAP 9(c) and other rule changes to alleviate the pitfalls associated with the timing of filing an effective notice of appeal.

The amendments to Rule 9(b)(2)(B)(now, in slightly modified form, Rule 9(c)) were initiated by a petition from the State Bar of Arizona on January 8, 2013 ("the Petition"). The Petition requested amendments to Rules 54 and 58 of the Arizona Rules of Civil Procedure and Rule 9 of the Arizona Rules of Civil Appellate Procedure. (*Id.*) As stated by the Petition, "The proposed changes are intended to simplify the procedures for perfecting an appeal and to avoid unnecessary risks of malpractice, unfair confusion of *pro per* litigants, and inefficient use of court resources through an approach modeled on that taken by the Federal Rules of Appellate Procedure." (Petition, at 1) The Petition noted that "appeals are frequently dismissed for lack of 'jurisdiction' due to technical noncompliance with rules interpreted by numerous judicial decisions that can be difficult to apply in practice." (Petition at 1) "As the case law has evolved," the Petition stated, "it can rightly be said that the rules no longer serve the goal of securing a clear path to decisions on the merits," and "[a]ll too often, the rules create unnecessary hurdles to review that serve neither the interests of the court nor those of the public." (*Id.* at 2)

The Petition focused on the body of case law, beginning with *Barassi v. Matison*, 130 Ariz. 418 (1981). Among the cases cited as examples were *Smith v.*

Arizona Clean Elections Comm'n, 212 Ariz 407, 131 P.3d 1187 (2006) and *Craig v. Craig*, 227 Ariz. 105, 253 P.3d 624 (2011)(any notice of appeal filed when any superior court action other than a purely ministerial act is pending remains a nullity) and *Baumann v. Tuton*, 180 Ariz. 370, 84 P.2d 256 (App. 1994)(appeal filed while a time-extending motion is pending is a "nullity".) (*Id.* at 2-3). The Petition argued: "These judicially imposed limitations on jurisdiction have evolved to the point where they no longer serve the interests of efficiency, clarity or justice. Instead, the current rules frequently generate extensive wasteful motion practice and consume significant court resources without serving the public interest." (*Id.*at 2.)

The Petition identified the following as among the most common challenges practitioners and the courts face: "(1) ascertaining whether an order of a Superior Court is, or is intended to be, a final, appealable "judgment," (2) determining the extent to which a putative judgment resolves a case as to all claims and all parties, (3) curing jurisdictional defects arising from premature notices of appeal, and (4) addressing the timing complications caused by the filing of various post-judgment motions." *Id.* The Petition also identified several recurring scenarios which created difficulty including the following examples of relevance to this case:

- Trial courts frequently sign orders that are not intended to resolve an entire case. Though a court often has independent reasons for signing its orders, it is difficult for practitioners to know whether to file a (potentially defective) notice of appeal and seek clarification of the

trial court's order or to wait for the court to sign an unambiguous form of judgment.

- Trial courts sometimes sign successive orders, each of which may be intended to resolve the case, but which omit key provisions essential to an appealable judgment (such as resolving claims for attorneys' fees). Taken together, multiple signed orders may constitute a judgment; but the practitioner is left to guess when the appeal time starts to run.

Id. The Petition stated: "[e]ach of the above scenarios poses undue risk to appellants, because the current Arizona approach requires a notice of appeal to be filed at precisely the correct juncture."

The Petition juxtaposed the previous "Arizona approach" with the approach of the federal rules, as interpreted by the Petition. The Petition interpreted the federal rules as preserving "appeals in most cases when a litigant files a notice of appeal within thirty days after learning of the court's decision – a much more straightforward, predictable, and elegant approach." As interpreted in the Petition, the federal rules "provide straightforward procedures by which technical defects can be cured, either through corrective measures taken by litigants or by operation of law." (*Id.*, 4-5).

The Petition quoted FRAP 4(a)(2): "a notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." (*Id.*, 4) "This language," the Petition said "which is carried into the proposed amendments to ARCAP 9,

encourages parties to notice appeals promptly after becoming aware of the court's decision without imposing the risk that the appeal may become defective based upon subsequent procedural events." (*Id.***, 5)**(Emphasis added)

The Petition asserts that while the federal approach was "arguably more lenient than the current Arizona approach" it was nevertheless "more consistent with the policy expressed in Ariz. R. Civ. P. 1 and ARCAP 1, that the rules 'be construed to secure the just, speedy, and inexpensive determination of every action.' (*Id.* 5) (The 1roa 13

proposed amendment to ARCAP 9 contains language substantially similar to that of FRAP 4(a)(2).

2. The Interpretation of Rule 9(c) in *Lopez v. FoodCity.*

In *Lopez v. Food City*, 234 Ariz. 349, 351 ¶¶ 6-7 (App. 2014), this Division considered the possible application of ARCAP Rule 9(b)(2)(B)—current Rule 9(c). In that case, Lopez filed a notice of appeal from a minute entry granting a motion for judgment as matter of law, but which specifically stated it was in lieu of a formal judgment for jury fees only and that a formal written order should be submitted for its signature. 234 Ariz.at 350 ¶3. This Court held that the *Barassi* exception did not apply because the notice of appeal was filed before the trial court ruled on a statement of costs that also sought sanctions under ARCP Rule 68(b), and therefore the remaining tasks were not simply ministerial. *Id.* ¶4. This Court

noted that "[a]lthough we would arguably have jurisdiction to hear Lopez's appeal under the newly amended Rule 9(b)(2)(B), Ariz. R. Civ.App. P.," Lopez's case was not pending at the time Rule 9 became effective.

3. The interpretation of Rule 9(c) in *Camasura v. Camasura.*

On August 2, 2015, Division One of this Court however, took a different view of the possible application of Rule 9(b)(2)(B)/Rule 9(c) in *Camasura v. Camasura*, 720 Ariz. Adv. Rep. 30, No. CV 14-0309 FC (slip op. Aug. 27, 2015). In *Camasura*, the family court had ordered dissolution of the marriage by a signed minute entry, which did not address legal decision-making, parenting time or the award of attorney's fees. (*Id.* ¶¶ 1-2).The court also ordered Wife to submit a proposed form of decree of dissolution consistent with the minute entry and an attorney's fees application.(*Id.* ¶2)

Husband filed a notice of appeal, after which, the family court issued an order advising, among other things, that the March 12 order was not intended to be a final order for appellate purposes because it did not address all of the issues to be included in the dissolution decree. (*Id.* ¶¶2,3) Thereafter, the family court issued a decree of dissolution which included an award of attorney's fees. (*Id.*¶4) Husband did not file a new or amended notice of appeal after the decree was entered. (*Id.*)

Division One determined that the notice of appeal was premature because the family court did not intend it to serve as the final decree, it did not determine

attorney's fees or parenting time and did not contain an express determination under Rule 78(B) of the Arizona Rules of Family Law Procedure. (*Id.* ¶¶6-8)Finding that the *Barassi* exception did not apply, the Court turned to consider the application of ARCAP 9(b)(2)(B), effective 2014, or ARCAP 9(c), effective 2015. (*Id.* ¶6)

The Court noted that ARCAP 9(c) mirrors Federal Rule of Appellate Procedure ("FRAP") 4(a)(2), and that "[the State Bar of Arizona petition requesting the rule change that added ARCAP 9(b)(2)(B) in 2014 specifically referenced and quoted FRAP 4(a)(2), encouraging the Arizona Supreme Court to adopt a functionally equivalent sentence." *Id.* ¶ 12.The Court "presume[d] the Arizona Supreme Court purposely followed the language of FRAP 4(a)(2) when adopting ARCAP 9(b)(2)(B), effective 2014, and ARCAP 9(c), effective 2015." *Id.* Citing to the "great weight" Arizona courts generally accord federal interpretation of rules Arizona has adopted from analogous federal rules, the Court further "presume[d] the Arizona Supreme Court, when adopting ARCAP 9(b)(2)(B) and then ARCAP 9(c) was aware of and embraced the United States Supreme Court's definitive interpretation of FRAP 4(a)(2) in *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 111 S. Ct. 648, 112 L. Ed. 2d 743 (1991)."

The Court noted that in *FirsTier*, the Supreme Court explained that FRAP 4(a)(2) "permits a notice of appeal filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment." *Id.* ¶14, citing 498 U.S. at 274. However, the Supreme Court also stated "that a premature notice of appeal relates forward to the date of entry of a final 'judgment' only when the ruling designated in the notice is a 'decision' for purposes of the rule, *id* at 274 n.4, and 'only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment," *id.* at 276." *Camasura*, ¶14.

The Court concluded "that ARCAP 9(c) should be interpreted to mean the same as the nearly identical sentence in FRAP 4(a)(2)." *Id.* ¶ 16.Applying the United States Supreme Court's construction of FRAP 4(a)(2) to ARCAP 9(c), the Court concluded that ARCAP 9(c) did not apply to preserve Husband's appeal because the March 12 order "was not appealable because it did not finally resolve all pending matters." *Id.* ¶ 15. Essentially, the Court ruled that ARCAP 9(c) was a codification of the limited *Barassi* exception, already the law in Arizona.

4. Rule 9(c) should be interpreted to permit parties to file notices of appeal promptly after learning of the trial court's decision and should not be limited to the *Barassi* exception.

Lehnerd respectfully submits that Rule 9(c) should be interpreted to expand the narrow *Barassi* exception to permit notices of appeal filed after a decision on

the merits but before final judgment is entered, regardless of whether intervening non-ministerial decisions are made by the trial court.

a. Interpreting Rule 9(c) to simply codify Barassi is contrary to the goals set forth in the State Bar Petition that proposed the Rule change.

Interpreting Rule 9(c) to simply codify the *Barassi* exception would be contrary to the stated goal of the petition to correct the perceived unfairness in the procedures for perfecting appeals at the time the petition was filed. Nothing in the State Bar Petition that gave rise to current Rule 9(c) indicates a perceived need to codify by rule the limited *Barassi* exception. To the contrary, the request for the rule changes in that petition arose precisely because of the view that the *Barassi* exception was too limited. And while the Court in *Camasura* made specific mention of the State Bar's encouragement to adopt language similar to FRAP Rule 4, there was nothing in the petition that supports the notion that the State Bar thought it was promoting the limited *Barassi* exception hiding in FRAP Rule 4 clothing. Rather, the intent of the petition was to provide a rule pursuant to which premature notices of appeal would become effective upon final judgment.

To support its narrow interpretation of ARCAP Rule 9(c), the Court in *Camasura*, cited to cases recognizing that Arizona gives "great weight" to federal interpretation of similar federal rules. (*Barassi*, Slip. Op. ¶13) However, Arizona does not blindly follow federal interpretation. *See, e.g., Cullen v. Auto-Owners*

Ins. Co., 218 Ariz. 417, 420 ¶12 (2008)(Declining to following United States Supreme Court's interpretation of Civil Procedure Rule 12(b)(6)). Here, given the context in which ARCAP 9(c) was proposed, there is specific reason to doubt whether the Arizona Supreme Court intended ARCAP 9(c) to mean the same thing as the United States Supreme Court's interpretation of its federal counterpart.

Rather, the interpretation should be in accord with the goal of encouraging prompt notice of appeal and avoiding the risks of losing the right to appeal an otherwise meritorious case simply because the filing of the notice of appeal was not precisely timed according to what in some circumstances could be a Byzantine set of rules and factors.

b. Interpreting Rule 9(c) to be limited to the Barassi exception is contrary to the plain language goals espoused by the Prefatory Comments to the 2015 Amendments to the ARCAP.

The interpretation limiting Rule 9(c) to be a codification of the *Barassi* exception is also contrary to the spirit of the 2015 revisions to the Arizona Rules of Civil Appellate Procedure as set forth in the Prefatory Comment to the 2015 Amendments. The comment states that the amendments restyle the rules to "make the rules more understandable by using clearer and simpler language." ARCAP, Pref. Com. to 2015 Amendments. "The restyled rules avoid long sentences, ambiguous terminology (such as the word "shall"), and legal jargon." *Id.* The intent in the differences in wording from the prior rules 'is to make the ARCAP

easier to understand and use." *Id.* Further "[t]he amended rules incorporate substantive matters contained within comments to the former ARCAP, and these rules therefore delete almost all of those comments." *Id.*

By its terms, Rule 9(c) applies where a notice of appeal is filed "after the superior court announces an order or other form of decision—but before entry of the resulting judgment that will be appealable…." The only two prerequisites for the Rule 9(c) to apply, under its plain meaning, is that the notice of appeal was filed "after the announcement of an order or other form of decision" and before "the resulting judgment that will be appealable." Nothing in the plain language of Rule 9(c) requires that "the order or other form of decision" be of the type where no other matters other than ministerial matters remain before judgment is entered. It is certainly a reasonable interpretation of Rule 9(c) that a notice of appeal from a decision on the merits before attorney's fees have been decided will become effective upon entry of the resulting appealable judgment.

The use of the term "resulting" judgment does not clarify the rule as a *Barassi* exception codification. It is well settled in Arizona that all interlocutory rulings are subsumed in the judgment for purposes of appeal. *Decola v. Fryer,* 198 Ariz. 28, 30 ¶5 n. 2 (App.2000). **A** judgment results from all of the interlocutory orders subsumed in it.

To reach the *Camasura* interpretation of Rule 9(c), one can neither rely upon the plain language of Rule 9(c), nor a comment that indicates that this is simply the *Barassi* exception, nor even prior Arizona case law. One must look to the U.S. Supreme Court's interpretation of a parallel statute. In this regard, such an interpretation is the antithesis of the user friendly restyling suggested by the Prefatory Comments to the 2015 Amendments.

Further, while practitioners and *pro se* parties now arguably have the benefit of *Camasura,* that is of no assistance to those, like Lehnerd, who did not have the benefit of that interpretation of Rule 9(c) when it mattered.

If Rule 9(c) was intended to codify the limited *Barassi* exception, rather than create a cure for certain premature notices of appeal, the Arizona Supreme Court could have easily adopted the language from *Craig v. Craig*, 227 Ariz. 105, 107, ¶¶13-14 (2011) to the effect that:

> A notice of appeal made after a final decision, where the decision of the court could not change and the only remaining tasks are ministerial, will be treated as filed on the date and after entry of the final judgment. No notices of appeal filed before the final judgment other than those described in this rule will qualify.

This is not, however, what Rule 9(c) says.

c. Interpreting Rule 9(c) as the codified Barassi exception is more problematic for practitioners and pro se parties than having no Rule 9(c) at all.

Indeed, treating Rule 9(c) as the codified *Barassi* exception makes the

difficulties for the practitioner and *pro se* litigant worse, not better. Prior to the recent rule changes to ARCAP, there was nothing in the rules that seemed to permit a notice of appeal to be filed before a final appealable judgment. *Barassi* had created an exception, albeit limited, which went beyond the language of the rules, but assisted in certain cases. Here, however, Rule 9(c) appears to allow premature notices of appeal to be perfected upon the filing of a final judgment—when in fact, under *Camasura*, it only has that effect in a limited number of cases already covered by the *Barassi* exception. Those misled by the language of Rule 9(c) have been hurt, not helped, by its adoption. Under this interpretation, Rule 9(c) does not help to clear the minefield—it arguably adds another mine.

d. A broader interpretation of Rule 9(c) will not lead to piecemeal appeals and will encourage the prompt filing of notices of appeal.

Certainly, the Court in interpreting Rule 9(c) must avoid an interpretation which opens up a Pandora's Box of premature appeals that become effective upon filing and which lead to piecemeal appeals that disrupt the process of both the trial court and this Court. But here, it seems, a distinction should be made between the filing of notices of appeal and when those notices are deemed effective. Under the current practice, the only penalty for filing a premature appeal is that it is deemed a nullity for purposes of effecting an appeal. Indeed, the Court may take judicial notice of the practice in recent years of practitioners to file multiple "prophylactic"

notices of appeal in an attempt file a notice whenever a ruling or judgment may be a final appealable order. This practice is generated from the concern that the failure to file a notice of appeal at precisely the right time will result in the loss of appellate jurisdiction. Thus, the current interpretation of procedure already encourages the multiple filings of notices of appeal, when there is any ambiguity as to what constitutes a final appealable judgment.

Interpreting Rule 9(c) to permit parties to promptly file notices of appeal from rulings that would then become effective upon the entry of final judgment would not create piecemeal appeals. The notices of appeal would not be effective until the entry of final judgment. Further, such an interpretation would put a premium on a party acting promptly after it becomes aware of a court's decision, to protect its rights on appeal. Rewarding prompt action, as opposed to the accurate calculation of the precisely correct time to file a notice of appeal, is in keeping with the construction of these rules "to achieve the just, speedy, and inexpensive resolution of appeals." ARCAP Rule 1(c).

In this case, if the Court determines that the December 2 Ruling was not final and the December 23 Judgment was final, ARCAP Rule 9(c) should be interpreted to operate to make Lehnerd's notice of appeal effective upon the entry of the December 23 Judgment. Lehnerd respectfully requests that this Court adopt the interpretation of Rule 9(c) set forth above.

II. THE TRIAL COURT ERRED BY DENYING LEHNERD'S MOTION TO DISMISS.

On the merits, Lehnerd appeals the trial court's denial of the motion to dismiss for lack of jurisdiction.

A. Standard of Review

This Court reviews orders denying a motion to dismiss for lack of jurisdiction *de novo. State ex rel Montgomery v. Mathis*, 231 Ariz.103, 109 ¶ 18 (App. 2012).

B. A court which exercises *in rem* jurisdiction over property maintains jurisdiction over that property to the exclusion of courts of other sovereigns which would share concurrent jurisdiction.

This Court has recognized that, as between federal and state court courts, "[i]n an action *in rem* or *quasi in rem*, the first court to acquire jurisdiction over the property has jurisdiction to the exclusion of the other." *Tonnemacher v. Touche Ross & Co.*, 186 Ariz. 125, 129 (App. 1996) citing *Kline v. Burke Construction Co.*, 260 U.S. 226, 229-31 (1922). *See also, Chapman v. Deutsche Bank Nat. Trust Co.*, 651 F.3d 1039, 1043-47 (9th Cir. 2011). Indeed, Arizona has long recognized the application of the prior exclusive jurisdiction doctrine when two courts of different sovereignty share concurrent jurisdiction over property:

> These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty.'

Forst v. Intermountain Bldg. & Loan Ass'n, 49 Ariz. 246, 252-53(1937).

C. Quiet-title actions and forcible detainer actions are *in rem* and/or *quasi in rem* proceedings under Arizona law.

The prior exclusive jurisdiction doctrine applies only to actions classified as *in rem* or *quasi in rem.See Tonnemacher*, 186 Ariz. at 129.In*State ex rel. Indus. Comm'n v. Smith*, 6 Ariz. App. 261, 263 (1967), this Court, dealing with an *in rem* question in a probate case, quoted with approval the following portion of the Restatement which defining *in rem* and *quasi in rem* proceedings:

> Proceedings in rem and quasi in rem. Where a thing is subject to the power of a State, a proceeding may be brought to affect the interests in the thing not merely of particular persons but of all persons in the world. Such a proceeding is called a proceeding in rem, as distinguished from a proceeding brought to affect the interests in the thing of particular persons only, which is called a proceeding quasi in rem.

Id., 6 Ariz. App. 261, 263, quoting Restatement (First) of Judgments §32, com. a.

The Arizona Supreme Court has classified quiet-title actions as *in rem*. *Snow v. Kennedy*, 36 Ariz. 475, 486 (1930)(quiet title action *in rem*). As such, they are therefore subject to the prior exclusive jurisdiction doctrine.

While Arizona courts do not appear to have specifically characterized forcible detainer actions, by their nature they fall into the category of *quasi in rem* proceedings. As stated in the Restatement quoted by *Smith,* a *quasi in rem* proceeding is "brought to affect the interests in the thing of particular persons only…."Restatement (First) of Judgments § 32, com. a. The purpose of a forcible detainer action is to determine the right to possession in property. The object of a forcible detainer action "is to afford summary, speedy, and adequate remedy for obtaining possession of premises…." *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204 (1946). Possession is a type of property interest. *Grady v. Barth*, 233 Ariz. 318 ¶12 (App. 2013). Since a forcible detainer action is a proceeding brought to affect the possessory property interests of particular persons in a premises, it falls squarely within the definition of a *quasi in rem* action.[5]

Because the proceedings before the Federal Court and the trial court both qualify as *in rem* or *quasi in rem*, the doctrine of prior exclusive jurisdiction applied. Under that doctrine the trial court should have granted Lehnerd's motion to dismiss.

D. In denying Lehnerd's Motion to Dismiss, the trial court incorrectly relied upon cases involving abatement—which involve competing claims by courts of the same sovereignty.

[5] This court has described other interests related to property as *quasi in rem*. *See Matter of 1978 Dodge Trans-Van*, 129 Ariz. 362 363 (App. 1981)(constructive trust is in the nature of a *quasi-in-rem* proceeding).

The trial court's minute entry ruling did not address the prior-exclusive jurisdiction argument Lehnerd made. (1ROA 11pp.1,2**)** Instead, it erroneously concluded that *Curtis v. Morris*, 186 Ariz. 534 (1996) controlled and foreclosed Lehnerd's argument.(1ROA 11 pp.1,2). In *Curtis*, the Arizona Supreme Court resolved a conflict between Division One and Division Two of the Court of Appeals over whether the expanded definition of forcible detainer to include transactions in which property is sold meant that the merits of title could now be tried in an action for forcible detainer. The defendant in *Curtis* moved to dismiss a forcible detainer action because of the existence of a prior-pending ejectment action involving title. *Id.* at 534. The trial court denied the motion, and Division One affirmed, holding that "there was no abatement because the two cases presented different issues." *Id.* The Arizona Supreme Court agreed, holding that while the relationships in which the remedy of forcible detainer had been expanded to include transactions in which there was a hold over in possession after foreclosure through a trustee's sale where property had been sold and title transferred, the only issue that could still be litigated in such action, whatever the relationship, was possession.

Curtis involved two pending matters in different courts under the same sovereign, the State of Arizona. The issue of abatement addressed in *Curtis* can only arise between two courts under the same sovereign. *Tonnemacher v. Touche*

Ross & Co., 186 Ariz. 125, 128 (App. 1996)(abatement inapplicable when two actions are filed in federal and state court because they operate under different sovereigns). It does not apply to actions pending in different jurisdictions. *Id.*

The trial court should have applied the prior exclusive judgment doctrine and granted Lehnerd's motion to dismiss. The trial court erred in not granting the motion.

CONCLUSION

Based upon the foregoing, Lehnerd requests that this Court:

1. With respect to the assertion of the Court's jurisdiction to hear this appeal, if the Court determines a final judgment has not been entered, either treat this appeal as a petition for special action, or suspend this appeal so that a final judgment and subsequent notice of appeal can be entered so that a determination can be made on the merits;

2. With respect to the merits, vacate the judgment entered, including the award of possession, attorney's fees and costs, reverse the trial court's order denying the motion to dismiss, and remand to the trial court for further proceedings consistent with this Court's decision.[6]

RESPECTFULLY SUBMITTED this 10th day of November, 2015.

DEPASQUALE & SCHMIDT, PLC

_____/s/ Mark J. DePasquale_____

Mark J. DePasquale

[6]During the pendency of this appeal, Lehnerd's action in the Federal Court was dismissed with prejudice and Lehnerd has filed an appeal with the Ninth Circuit Court of Appeals, which is currently pending. If the federal action is still pending at the time of remand, the trial court should dismiss the action. If the federal action is no longer pending, the issue may be moot. This determination may be made by the trial court at the appropriate time, consistent with the decision of this Court.

CERTIFICATE OF COMPLIANCE

This certificate of compliance concerns a brief, and is submitted under Rule 14(a)(5). The undersigned certifies that the brief to which this certificate is attached uses type of at least 14 points, is double-spaced and contains 11,416 words. The document to which this certificate is attached does not exceed the word limit that is set by Rule 14, A.R.C.A.P.

___/s/ Mark J. DePasquale_____

Mark J. DePasquale