

1 Steven C. Mahaffy, ASBN. 022934  
2 MAHAFFY LAW FIRM, P.C.  
3 PO Box 12959  
4 Chandler, Arizona 85248  
5 Phone: 480-659-7180  
6 Fax: 480-659-5614  
7 [steve@mahaffylaw.com](mailto:steve@mahaffylaw.com)

8 *Attorneys for Plaintiffs*

9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

10 **IN AND FOR THE COUNTY OF MARICOPA**

11 GERALD FREEMAN and JANICE FREEMAN,  
12 husband and wife,

13 Plaintiffs,

14 v.

15 TOWN OF CAVE CREEK *et. al.*,

16 Defendants.

Case No. CV2012-092643

**FREEMANS' MOTION FOR  
ARCP 11 SANCTIONS and for  
FEES PURSUANT TO A.R.S. §12-349  
AGAINST THE TOWN OF CAVE  
CREEK AND ITS COUNSEL**

(Assigned to the Hon. David M.  
Talamante)

**(Oral Argument Requested)**

18  
19 Comes now Plaintiffs Gerald and Janice Freeman ("Freemans"), by and through their  
20 attorneys, Mahaffy Law Firm, PC, by Steven C. Mahaffy, and pursuant ARCP 11 and A.R.S.  
21 §12-349 and the Court's inherent power to sanction bad faith conduct during the litigation  
22 process and file this motion for sanctions under ARCP 11 and for fees pursuant to A.R.S. §  
23 12-349 against Defendant Town of Cave Creek and its counsel, Jeffrey Murray and Kristin  
24 Mackin.  
25  
26  
27  
28

1 Filed contemporaneously herewith in support of this motion is the declaration of  
2 Plaintiff, Gerald C. Freeman.

3 Further, Freemans request this Court to abstain from ruling on the merits of this  
4 case until the Freemans' motion for sanctions against Cahava (filed February 25, 2015)  
5 and the instant motion for sanctions and for attorneys' fees have been heard and decided  
6 by the Court. Freemans respectfully request the Court to consolidate these issues before  
7 making any ruling or determination on the merits of the Freemans' case.  
8

### 9 **Background**

- 10
- 11 1. The declaration of Plaintiff, Mr. Freeman, sets forth in more detail the chain of  
12 events which precede the filing of this entire case, and specifically, the filing of this  
13 Motion for Rule 11 Sanctions, sanctions for failing to abide the ethics rules 2.1, 3.1,  
14 3.3, 4.1 and 8.4, and attorneys' fees and costs pursuant to A.R.S. § 12-349.  
15 Landownership in the United States historically came with a "bundle of rights" that  
16 we all remember since the first day of property law in law school. In this case, the  
17 Freemans' bundle of rights has been knocked off their very backs, trampled,  
18 broken, and stomped into the ground. The following paragraphs set forth some of  
19 the highlights of the Freemans' story:  
20
  - 21 2. In short, three years ago, on about February 28, 2012, Mr. Freeman observed a  
22 work crew grubbing a trail along Morning Star Road. Mr. Freeman asked the crew  
23 about the continuing route when reaching Old Stage Road. Dennis Smith and Alan  
24 Thomason showed Mr. Freeman, and stated that the route will be "on this road" to  
25 past Cave Creek wash and then veer off onto Cahava Spring's property. All of  
26  
27  
28

1 these actions were taken by the Town in violation of A.R.S. § 9-500.12 Notice of  
2 Action; no notice whatsoever was given to Freemans; and in violation of A.R.S. §  
3 9-500.13, Compliance with Court Decisions.

4 3. The Freemans, in their strong desire to protect their property rights before it was too  
5 late, filed their initial complaint on April 13, 2012 and also sought and obtained a  
6 temporary restraining order (which has stayed in place through agreement of the  
7 parties); thereafter, the saga began as the Town of Cave Creek, through their legal  
8 counsel, Jeffrey Murray and Kristin Mackin continued to defend against the Freemans  
9 and to advocate for their ill-conceived notions and positions, which were unjustified,  
10 which were designed to harass the Freemans, all the while escalating the Freemans'  
11 attorneys' fees and costs, and which actions entitle Freemans to reasonable attorney  
12 fees, expenses and, at the Court's discretion, double damages of not to exceed five  
13 thousand dollars against the attorneys or/or the Town.

14 4. Thereafter, as the Court is well aware, over the next 2.5 years, the Town proposed  
15 seven different plans for a trail which directly would impact the Freemans' legal,  
16 deeded easement. Even as the Town submitted their proposed findings of fact and  
17 conclusions of law, and their written closing argument, the Town (through its counsel)  
18 continued to blame Freemans for their actions and suggested that Freemans didn't  
19 properly analyze and deconstruct each of the seven different plans. They  
20 disingenuously turned it back on Freemans in their closing argument documents saying  
21 they had to make all of the different trail iterations because the Freemans changed the  
22 argument. See the Town Closing Argument; p.2, ll.14-18.

1 5. The unjustifiable positions and unreasonable defense positions taken by the Town and  
2 its attorneys, resulted in the Freemans being forced to spend a great deal of their own  
3 money to pay their ever escalating attorneys' fees, pay for numerous costs, pay for  
4 expert witness fees, and subject themselves to anxiety and ongoing stress. Necessarily,  
5 the attorneys' fees, costs, expenses, costs for expert witnesses which were needed to  
6 prosecute this action against the Town, were astronomical. Even the Town's last 'plan'  
7 was proposed just two (2) working days before trial. This Court recognized this  
8 vexatious moving of the trail plans stating that the Town presented a "moving target."  
9 TR1, p.235, ll.17-25. The Freemans have spent in excess of \$100,000 in fees and  
10 expenses in their efforts to force the Town to abide by their own guidelines and to  
11 respect private property rights in easements. Freemans endured alone in their efforts to  
12 "fight City Hall;" persons with lesser means would never have been able to prosecute  
13 this action against the Town, holding the Town responsible for its actions, and would  
14 have been forced to capitulate to the wonton desires of the town to impose its "wish  
15 list" of trails.

19 6. For example, after Freemans expert, James Lemon, pointed out that an Equestrian  
20 trial, by the Town's definition, had to have a 10' easement and 4' – 6' foot bed, the  
21 Town through its attorneys Mr. Murray and Ms. Mackin, disingenuously began to  
22 call the project a "primitive trail" (according to Trail Guidelines, a primitive trail  
23 has a narrower easement and foot bed). The argument is disingenuous because  
24 Town, through Muller, told their experts, in writing, that Town wanted a 10 foot  
25 easement for an equestrian trail. At trial, Town caused their expert to obfuscate the  
26  
27  
28

1 distinction between an equestrian trail and a primitive trail. Mr. Murray and Ms.  
2 Mackin persisted in pushing a false position by asserting it would be a primitive  
3 trail for hikers. It was a disingenuous ploy designed to harass and to cause more  
4 financial hardship on the Freemans.

- 5
- 6 7. Mr. Murray and Ms. Mackin and the Town ignored the Town Trail Guidelines  
7 which were adopted as law by the Town, which are clearly NOT permissive but are  
8 mandatory by use of the word “shall” and not “may.” “A Project Trail Plan shall be  
9 prepared in adherence to the guidelines presented herein.” See Section 2.1 TOCC  
10 Technical Design Guidelines – Trails.  
11
- 12 8. Nevertheless, Town attorneys continue to argue that the guidelines are permissive.  
13 But a review of the Guidelines reveals: “with the exception of requirements  
14 mandated by TOCC codes and ordinances, all guidelines provided are subject to  
15 change or variation at the discretion of the zoning administrator and/or town  
16 manager.” Section 1.3 of the Technical Design Guidelines. Town produced no  
17 evidence at trial as to which requirements were mandated by TOCC codes and  
18 ordinances, and of those that were not mandated whether Town intended to modify  
19 the guidelines; as such, town of cave Creek technical design guidelines-trails are the  
20 law to which Town must adhere. Exhibit 39 at trial. For Town attorneys to  
21 disingenuously continue to argue throughout that the guidelines are merely  
22 permissive as applied to the town was and is misleading and escalated Freemans’  
23 fees and costs.  
24  
25  
26  
27  
28

- 1 9. James Lemon testified in his deposition (and again at trial) that Town trail violated  
2 certain provisions of Town's Technical Design Guidelines. Yet not once did Town  
3 present any evidence that Town intended to exercise its discretion and change or  
4 vary *any* of the guidelines.  
5
- 6 10. Counsel for the Town and the Town were put on notice in the initial Complaint that  
7 the trail plans were in violation of the town ordinances; yet, rather than admitting  
8 that they were in violation and agreeing to not persist in their plans to build a trail,  
9 throughout nearly three years of litigation, in their closing argument, Town again  
10 deceitfully states that the guidelines are "permissive." Again, this position held by  
11 the Town resulted in running up the Freemans' fees and costs as the Town continued  
12 to push a position which had no merit. See TOCC Closing Argument. P.2, l. 3-6.  
13
- 14 11. Further, the counsel for the Town, and the Town, knew that the Town's plan was not  
15 feasible early into the litigation. Well before trial, the Town and its counsel knew  
16 that Freemans' expert, James Lemon, would testify that his review of the Vann  
17 Engineering plan clearly showed that the back slopes to cut in a trail would cause  
18 the roadway above to collapse with vehicle traffic. TR1, p.181, l. 15-23.  
19
- 20 12. As set forth more fully below, the unjustifiable defense set forth by the Town and its  
21 counsel in this litigation is grounds for the imposition of attorneys' fees, expenses,  
22 and double damages, in addition to sanctions under Rule 11 and the rules of ethics.  
23 The Town and its counsel knew or reasonably should have known that the defenses  
24 were without substantial justification.  
25  
26  
27  
28

1 13. The Town, as a political subdivision of this state, has the weight, the power and the  
2 financial resources to beat down citizens through its use of evasive and disingenuous  
3 positions, by holding unjustified positions, and by harassing its citizens. The Town  
4 paid for the surveys, engineering analyses and attorney fees, something that Cahava  
5 apparently did not participate in to any degree.  
6

7 14. The Town obtained continuances which served its purpose to generate more plans  
8 and harass the Freemans with additional surveyors, markers and consultants  
9 prowling the property. Each time Freemans were ready to proceed to trial, the  
10 analysis changed. Freemans then had to change all of the documents and exhibits  
11 that were ready for trial, only to have to re-do everything for the next time when the  
12 Town decided to go forward to trial. Counsel for the Town, even at the 11<sup>th</sup> hour in  
13 October, 2014, asked for a continuance, which was an unreasonable delay, and  
14 which needlessly continued to wear the Freemans down financially.  
15  
16

17 15. In another egregious example of unnecessary cost run-ups, during two days of  
18 depositions Mr. Murray and Ms. Mackin bombarded Mr. Freeman with questions on  
19 inane details from 10:01 a.m. until 4:14 p.m. – which is 6 hours and 13 minutes,  
20 repetitively asking the same questions in different ways all the while knowing the  
21 attorney fees were being run up hour by hour. When it came time for the deposition  
22 of James Lemon, they reduced his deposition time by hours because Murray and  
23 Mackin had to pay for his time.  
24  
25

26 16. Mr. Murray and Ms. Mackin had a duty to check the facts under Rule 11. Their  
27 disingenuousness was bold faced and an outright fabrication when they filed court  
28

documents which repeatedly said that they **“never had any intention of overlaying the easement”**. TOCC FOF’s. p. 3. 1.15-18. Pre- trial motions.

17. At no time did the Town ever tell the truth in how trails were to be used until Mr. Freeman testified to the fact it was 24/7 by horses, mountain bicycles with lights, hikers, pedestrians, pack animals, skate boards, and a host of other things. TR3, p.32, 1.11-25 & p.33, 1.1-9.

18. Bambi Muller testified that the General Plan shows the Town intends to build trails over private property. The Town uses the trails map as a sword and as a shield. On the one hand, the trails map was approved by vote in the General Plan and thus carries the weight of the general plan. But when called to task as a “taking,” as Freemans have done, the Town dismisses the trail map as nothing more than a ‘wish list.’ Wantonly and knowingly putting forth a trail in the General Plan that “took” private property and depicted public trails through private residences is worthy of the most severe sanctions.

19. The trail at issue is well known to be on private property yet it was neither disclosed nor added to the General Plan, but Town acts as if it was a Town vetted, reviewed and Planning Commission approved trail. The so-called “Cahava trail” at issue in this case is not part of the trail plan that is in the General Plan. The Town, through Muller and the Town’s attorneys pass this off nonchalantly as her ‘wish list.’ TR3, p.5, 16-25 & p.6, ll. 1-4.

20. No one from the Town ever contacted the Freemans or other affected parties, even though the trails were depicted on the General Plan as approved trails (and are



1 shown that way yet today). The General Trail Plan shows a trail on the Freemans'  
2 property which runs right through their house. Yet Ms. Muller nonchalantly  
3 dismissed it as a wish list. It's been an expensive wish list for the Freemans who  
4 have spent over \$100,000 to date resisting the weight and financial resources of the  
5 Town and their "free" legal defense, including payment of attorney fees by Arizona  
6 Municipal Risk Retention Pool (AMRRP).  
7

8 21. The Town used these trail maps as "fact" in 'selling' this to the general public in  
9 Town Council meetings.  
10

11 22. The Town and its attorneys used the imprimatur of the "voter approved" General  
12 Plans and disingenuous arguments in trying to take the property. Ms. Muller  
13 admitted that the trails she depicted were her wish list. TR3, p.5, 16-25 & p.6, ll. 1-  
14 14. Muller's 'wish list' has caused expensive and severe consequences for the  
15 Freemans. In fact, it has been a financial calamity that the Town enjoyed  
16 perpetrating just because they could.  
17

18 23. Town council was informed in February 2014 that the Town insurer through its  
19 Municipal Risk Coverage is providing full defense coverage through Mr. Murray's  
20 law firm. The Town was told they have incurred essentially no expense in the  
21 defense of this case. See Minutes of Regular Town Council Meeting February 3,  
22 2014 at page 9 (recitation of comments by Mr. Gary Birnbaum, attorney for Town).  
23

24 **Freemans are entitled to fees under A.R.S. § 12-349.**  
25

26 24. When, such as in this case, a request for fees is made under § 12-349, the trial judge  
27 reviews the course of the proceedings and the conduct of the parties from the  
28

1 commencement of the action to decide whether the proceedings have been  
2 unreasonably expanded or delayed. A.R.S. § 12-349 specifically *includes* “this  
3 state and political subdivisions of this state” . . . as historically, the state and  
4 political subdivisions of this and any other state, are the very entities our federal  
5 and states constitutions were drafted in order to protect ordinary, average citizens  
6 and property owners like the Freemans. If the Town wanted to take the Freemans’  
7 property for public use, it had a legal means to do so through its power of eminent  
8 domain.  
9

10 § 12-349. Unjustified actions; attorney fees, expenses and double damages;  
11 exceptions; definition  
12

13 A. Except as otherwise provided by and not inconsistent with another statute,  
14 in any civil action commenced or appealed in a court of record in this  
15 state, the court shall assess reasonable attorney fees, expenses and, at the  
16 court's discretion, double damages of not to exceed five thousand dollars  
against an attorney or party, including this state and political subdivisions  
of this state, if the attorney or party does any of the following:

- 17 1. Brings or defends a claim without substantial justification.
- 18 2. Brings or defends a claim solely or primarily for delay or harassment.
- 19 3. Unreasonably expands or delays the proceeding.
4. Engages in abuse of discovery.

20 B. The court may allocate the payment of attorney fees among the offending  
21 attorneys and parties, jointly or severally, and may assess separate  
amounts against an offending attorney or party.

22 C. Attorney fees shall not be assessed if after filing an action a voluntary  
23 dismissal is filed for any claim or defense within a reasonable time after  
24 the attorney or party filing the dismissal knew or reasonably should have  
25 known that the claim or defense was without substantial justification.  
26  
27  
28

1 The statute holds “bringing a claim” and “defending a claim” to the same  
2 standard.

3 In *Hamm v. Y & M Enterprises*, 157 Ariz. 336, 338 (Ariz. Ct. App. 1988), the sole  
4 issue on appeal was the propriety of the trial court's award of attorney's fees to Y & M  
5 Enterprises. The decision to award fees was also not dependent on the party who had  
6 prevailed on the merits.

7  
8 The Court of Appeals stated:

9  
10 Here, the request for attorney's fees was based on A.R.S. § 12-349(A)(3),  
11 which provides that the court shall assess attorney's fees if the court finds that  
12 an attorney or party, inter alia, "unreasonably expands or delays the  
13 proceeding." The award of attorney's fees under this statute is not linked to a  
14 decision on the merits. In fact, it is conceivable that attorney's fees could be  
15 awarded during the course of proceedings to a party who ultimately does not  
16 prevail on the merits. The award of attorney's fees under § 12-349 does not  
17 have the relationship to the judgment on the merits found in *Mark Lighting*  
18 and *Acumen Trading*. When a request for fees is made under § 12-349, the  
19 trial judge reviews the course of the proceedings and the conduct of the  
20 parties from the commencement of the action to decide whether the  
21 proceedings have been unreasonably expanded or delayed.

22 The following Arizona statute sets forth the factors this Court must consider – and  
23 set forth as findings – when determining to award attorneys’ fees:

24  
25 **A.R.S. § 12-350. Determination of award; reasons; factors**

26 In awarding attorney fees pursuant to *section 12-349*, the court shall set forth the  
27 specific reasons for the award and may include the following factors, as relevant, in  
28 its consideration:

1 . . .

- 2 3. The availability of facts to assist a party in determining the validity of a  
3 claim or defense.
- 4 4. The relative financial positions of the parties involved.



1           Concerning factor (5) the Town defended in this action, if not in whole, then in  
2 part, in bad faith. Giving the Town every benefit of the doubt when its employee Ms.  
3 Muller first used the Town “trails wish list” as a template, obtained a license from  
4 Cahava, and attempted to create a trail on Freemans’ easement, once the Town was  
5 served with Freemans’ Complaint, learned the particulars of how the trail unreasonably  
6 interfered with the Freemans’ use, and how it was not feasible to be built in the proposed  
7 location, the Town could have seen the error of its ways and affirmatively stated that it  
8 would not proceed with the trail. But no, the Town had to continually insist that a trail  
9 would be built at the cost of the Freemans, craft iteration after iteration of all the  
10 proposed trail locations, hire a U.S. Forrest Service trail builder as an expert witness on  
11 the eve of trial, refuse to comply with its mandatory ordinances, and corroborate with  
12 Cahava as to ways it could potentially circumvent even this Court’s ruling (by  
13 transferring the property shortly prior to trial to a non-party who would not be bound by  
14 the ruling of the Court.)(See Freeman’s Motion for Sanctions against Cahava and  
15 Joinder of Indispensable parties). As stated above, Mr. Murray had an obligation as an  
16 attorney to review and re-evaluate his client's position as more facts came to light. This  
17 he failed to do - all of which demonstrate the Town’s bad faith in this case.

18           Concerning factor (6), issues of fact in this case were determinative of the validity  
19 of the Town’s defense were *not reasonably* in conflict. The Town’s own expert agreed  
20 that the trail would need significant modification to be feasible and to comply with Town  
21 ordinances. The Town knew that it didn’t comply with Arizona law when it failed to  
22 provide Freemans with notice of its plan to interfere with their easement. The Town was

1 nefarious and underhanded when working together with the other defendants, Cahava  
2 and Sorchychs, in order to push the Town trail through no matter who or what stood in  
3 its way. The Town apparently believes it is still part of the old west. Another example  
4 of which is that presently, as posted on the Town website, it states:

6 The Town of Cave Creek is asking residents who are interested in participating in  
7 a group to review the Cave Creek Town Code to please submit a letter of interest  
8 before 4pm on March 12, 2015 to Carrie Dyrek, Town Clerk at  
9 cdyrek@cavecreek.org.

10 Seemingly, the Town may be considering an amendment to its trail ordinances so  
11 that in the future it doesn't have to comply? This is just another example of why the  
12 Freemans are in desperate need of this Court to protect them against the Town. Under  
13 normal circumstances, a review of the Town Code would be performed by lawyers who  
14 would insure the code complies with State and Federal law, and later, would be approved  
15 by the city council. It is highly unusual for the Town to advertise a broad request for  
16 residents to "participate in a group to review the Town Code." This is another example  
17 of bullying behavior by the Town.

19  
20 **Sanctions under Rule 11 are appropriate:**

21  
22 In *Standage v. Jaburg & Wilk, P.C.*, 177 Ariz. 221, 230 (Ariz. Ct. App. 1993) the  
23 Arizona Court of Appeals addressed the imposition of Rule 11 sanctions stating:

24 Allen had an obligation as an attorney to review and re-evaluate his client's  
25 position as the facts of the case developed and--although he should have known at  
26 the outset that the claims were frivolous--if he did not know at the outset, as he  
27 became aware of information that should reasonably lead him to believe there was  
28 no factual or legal bases for his position, he was obligated to re-evaluate any

1 earlier certification under Rule 11. *See Boone v. Superior Court*, 145 Ariz. 235,  
2 241-42, 700 P.2d 1335, 1341-42 (1985); *Gilbert v. Board of Medical Examiners*,  
3 155 Ariz. 169, 184-85, 745 P.2d 617, 632 (Ct. App. 1987).

### 4 **Conclusion**

5 Based upon the foregoing, Freemans move this Court for the imposition of  
6 sanctions against Defendant Town of Cave Creek and its counsel, Jeffrey Murray and  
7 Kristin Mackin under Rule 11, A.R.C. P. and the Ethical Rules, and request an award of  
8 reasonable attorneys' fees pursuant to A.R.S. § 12-349 expenses and, at the court's  
9 discretion, double damages of not to exceed five thousand dollars against Mr. Murray,  
10 Ms. Mackin, and the Town of Cave Creek, for defending claims without substantial  
11 justification, defending claims solely or primarily for delay or harassment, and for  
12 unreasonably expands and/or delaying the proceedings.  
13

14 Further, Freemans request that the Court allocate the payment of attorney fees  
15 among the offending attorneys and parties, jointly or severally, and may assess separate  
16 amounts against an offending attorney or party, including the Town and its counsel, they  
17 persisted in the defense in this matter well after the attorneys and the parties knew or  
18 reasonably should have known that the defense was without substantial justification.  
19

20 RESPECTFULLY submitted this 30<sup>th</sup> day of March, 2015.  
21

22 **MAHAFFY LAW FIRM, P.C.**

23 By /s/ Steven C. Mahaffy

24 Steven C. Mahaffy, ASBN 022934

25 P.O. Box 12959

26 Chandler, AZ 85248

27 *Attorneys for Plaintiffs*

1  
2  
3 **CERTIFICATE OF MAILING OR DELIVERY**

4 ORIGINAL of foregoing electronically filed  
5 Via AZTurboCourt.gov  
6 This 30th day of March, 2015 with:

7 The Clerk of Superior Court  
8 Maricopa County, Arizona

9 Copies of the foregoing were mailed and  
10 emailed this same day to:

11 Jeffrey T. Murray  
12 Sims Murray Ltd.  
13 2020 N Central Ave. Ste 670  
14 Phoenix AZ 85004-4581  
15 *Attorneys for Town of Cave Creek*

16 George U. Winney  
17 Gammage & Burnham, PLC  
18 Two North Central Avenue, 15<sup>th</sup> Floor  
19 Phoenix, Arizona 85004  
20 *Attorneys for Cahava Springs Corp.*

21 A copy of the foregoing was mailed to:

22 Donald and Shari Jo Sorchych  
23 PO Box 4887  
24 Cave Creek, Arizona 85327  
25 *Defendants pro per*

26 By: /s/ Leah K. Mahaffy  
27 Leah K. Mahaffy  
28