IN THE SUPREME COURT OF MISSOURI

No. SC94693

THE ARBORS AT SUGAR CREEK HOMEOWNERS ASSOCIATION, *et al.*,

Plaintiffs-Appellants,

v.

JEFFERSON BANK AND TRUST COMPANY ET AL.,

Defendants/Respondents/Cross-Appellant.

Appeal from the Circuit Court of St. Louis County
Hon. Gloria C. Reno & James R. Hartenbach

SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT JEFFERSON BANK AND TRUST COMPANY AND RESPONDENT MCKELVEY HOMES, LLC.

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STATEMENT OF FACTS

Introduction

The ten individual Plaintiffs in this case ("Homeowners") own five homes in The Arbors at Sugar Creek, an eighteen lot subdivision in Des Peres, Missouri. (LF 901-02[1], Fourth Amended Petition). The subdivision's original developer, Evolution Development LLC, created the subdivision in 2005. (Id.). By May 2010 when this suit was filed, the developer had sold only the five homes that Homeowners bought. (LF 902, ¶¶ 7, 8). The developer eventually defaulted on its loans from Defendant Jefferson Bank & Trust Co. ("the Bank"). (PITr. 309-310). The Bank foreclosed, and acquired title to the thirteen unbuilt lots. (Id.). To arrange completion of the subdivision, the Bank entered into an option contract with Defendant McKelvey Homes, LLC ("McKelvey"). (PITr. 311-312). Under that contract, McKelvey has the option to buy lots from the Bank, build homes on them, and sell them. McKelvey has built and sold one home ("the Komlos Home"), to Mr. and Mrs. Komlos. (Tr. 553-555).

[1]References to the Legal File appear in this brief as "LF", followed by the page number; to Appellants' Appendix to Substitute Brief by page number, *e.g.,* "A38"; to the Preliminary Injunction Transcript as "PITr. ___"; and to the Permanent Injunction Transcript as "Tr. ___".

The disputes between the parties center on interpretation of a subdivision declaration[2] that the original developer had recorded and made applicable to all eighteen lots. All parties agree that any home built in the subdivision must conform to the Declaration, including its architectural covenants and design review provisions. The parties disagree, however, on many issues, among them the following:

(1) Does the current homeowners' association, the ASC Homeowners' Association, Inc., have authority to govern the subdivision and apply the architectural review provisions? (See Appellants' Point Relied On II).

(2) Must the three directors of the governing association all be selected from among the resident owners, or may non-resident officers of corporate lot owners also serve as directors? (See Appellants' Point Relied on I).

(3) Was an amendment to the Declaration, adopted at an open meeting of lot owners, that permitted officers of non-resident lot owners to serve on the association's board valid and effective, or did that amendment violate the implied covenant of good faith and fair dealing? (See Appellants' Point Relied On I).

(4) Does Article X require that all homes in the subdivision be of a specific architectural style, so that all homes must have hip roofs, stone and stucco

[2]Declaration of Covenants, Conditions and Restrictions for The Arbors at Sugar Creek, A33 - 70.

exteriors, angular wall and roof shapes, a limited color palette, and other features, although those features are not anywhere mentioned in the Declaration? (See Appellants' Points Relied on III and IV).

(5) Did the two Bank officers who were elected to the Association Board "rubber stamp" McKelvey's design for the Komlos Home (an attractive home that does not have all of the design features for which Plaintiffs argue), or did they conscientiously discharge their review responsibilities for the benefit of the subdivision as a whole? (Appellant's Points Relied on II and IV).

(6) Must the Komlos home be razed for lack of valid approval in accordance with Article X? (Fourth Amended Petition, Count V, LF 917).

After extensive summary judgment practice and six days of evidentiary hearings on claims for preliminary and permanent injunction, the trial court answered all of these questions in Defendants' favor, on the basis of detailed findings of fact and conclusions of law. (LF 1376-1402; App. A2-A28). The Court of Appeals entered an opinion reversing the trial court's judgment on one ground; it disagreed with the trial judge's finding of fact that the amendment to the Declaration's residency requirement did not violate the implied covenant of good faith and fair dealing. (Court of Appeals Opinion at 20-21). One judge in the Court of Appeals dissented, agreeing with the trial court that the Bank had not violated the covenant of good faith and fair dealing, but had acted reasonably, particularly in light of the real estate collapse of 2008-2012 and the resulting

regulatory pressures on banks dealing with non-performing real estate loans. (Opinion of Gaertner, J., dissenting, at 3). This Court granted transfer, and the entire appeal, including the Bank's cross-appeal of the denial of certain relief it sought, is therefore now before this Court.

Establishment of the Subdivision and the Declaration

In about 2005, Evolution Development L.L.C. owned the real property that is the subject of this action and began to develop it as a residential subdivision, The Arbors at Sugar Creek. (LF 325). It divided the property into eighteen lots, and in 2006, before the first home was sold, recorded a Declaration of Covenants, Conditions and Restrictions (the "Declaration"). (Decl., pp. 29–67; App., A32–70). In 2005, Defendant Jefferson Bank and Trust Company ("Jefferson Bank") loaned approximately $3.9 million to the Original Developer (PITr. 335). There was an additional $1 million loan made in February 2006 (Id.). These loans were secured by a deed of trust on the lots and common ground. (LF22, Petition, ¶11)(Prelim. Tran. 335). The Bank acknowledged that the Lots covered by its deed of trust were subject to the Declaration. (A60, Prelim. Tr. 336).

The Declaration provided for the creation of "The Arbors at Sugar Creek Homeowners Association," a not for profit corporation charged with responsibility for operation of the subdivision. (Declaration, §§3.1, 3.3, A38-39). After identifying "Community" as the property constituting the Subdivision, the Declaration states, "[t]he success of the Community is dependent upon the support

and participation of every Owner in its governance and administration. This Declaration establishes the Association as the mechanism by which each owner is able to provide that support and participation." (A38*)*. There was to be a Board of Directors of the Association, composed of no fewer than three members. (§3.5).

The Declaration provided for a "Period of Declarant Control," a time period defined in §3.5(b)(1), during which control of the Association would rest with "Declarant." "Declarant" was a term defined to mean "Evolution Developments, L.L.C., its successors and assigns, if such successors or assigns should acquire more than one unimproved Lot from the declarant for the purpose of constructing a Dwelling Unit thereon …" (Declaration §1.7).

During the "Period of Declarant Control," Directors would initially be appointed by the Declarant. (Declaration, §3.5(b)(1)). There would then be a gradual transition to resident control. After twenty-five per cent of the lots had been sold to Owners other than the Declarant, a meeting would be called at which one Director who was an Owner would be appointed, to replace one of the Declarant-appointed Directors. (Id.) After more than 66.67% of the lots had been sold so that the Period of Declarant Control ended (or if the Period of Declarant Control had ended earlier), a meeting would be called for the purpose of electing three Directors. (Id.).

The original Declaration provided that, except for Directors appointed by the Declarant, "for purposes of serving as a Director, an Owner shall be a Member in

Good Standing who is a resident of the Community. An Owner shall be deemed to include any officer, director or trustee of any corporate, partnership or trust Owner of a Lot as determined by a duly authorized notice to the Board from such Owner." (§3.5(a)).

Amendments to the Declaration are governed by Article XII. (A54). Section 12.1(b) provides, "Subject to Articles IX [Development Rights and Special Declarant Rights] and X [Architectural Covenants and Design Review], and as otherwise provided therein, this Declaration, including the Plat, may be amended only by vote or agreement of the Owners of Lots to which sixty-seven percent (67%) of the votes in the Association are allocated." (A55). Certain subjects—including the Declarant's rights, the duties of the Association with respect to maintenance and the power to levy assessments—could not be affected by amendments. No amendment could be made "to eliminate the requirement that there be an Association and Board unless adequate substitution is made, without the written consent of the Director of Planning of the City of Des Peres." (Id.)

Article X addressed the subject of Architectural Covenants and Design Review. Its stated purpose was to "maintain the uniform quality and aesthetics of exterior architectural design for the best interests of the Community as a whole." (A51). No Owner could commence an "Alteration" (a term defined to include new construction) without prior written consent of the Board of the Association. (§10.1, A51). In approving or rejecting an application for an Alteration, "the

Board shall consider harmony of exterior appearance with existing improvements in the Subdivision, including architectural design, height, grade, topography, drainage (including, but not limited to, whether or not the Alteration would decrease any permeable areas on the Property or increase any impermeable areas on the property), color and quality of exterior materials and detail, location, construction standards and other criteria."

While, as its language states, Article X required the Directors to "consider" the matters listed, it did not either require or forbid the use of particular architectural designs, building materials, colors, roof types or other features. (Id.). Various Homeowners testified that in purchasing their homes they relied on marketing materials provided by the original developer that described materials and design features to be used. (e.g., Testimony of Katherine Lemley, Tr.227-28). The marketing materials were not incorporated by reference or otherwise referred to in the Declaration. (Declaration, A32-A70).

The Individual Plaintiffs

Between 2006 and 2009, Homeowners bought five of the eighteen lots. Their five homes were the only homes built during that period. Homeowners are Gregg and Katherine Lemley, Timothy and Martha Farrell, Mark and Corinne Stock, Lee and Jaclyn Ori and William and Bonnie Choi (collectively,

"Plaintiffs"). Mr. and Mrs. Lemley are two practicing attorneys that have represented the remaining Plaintiffs. (Tr. 298).[3]

The Original Homeowners Association

The Original Developer formed a homeowners association bearing the name contained in the Declaration: the "Arbors at Sugar Creek Homeowners' Association" (the "Original Homeowners' Association"). This Original Homeowners' Association forfeited its charter because it failed to file an annual statement with the Missouri Secretary of State (LF 376, LF 356 and PITr. 346). The Original Homeowners' Association never appointed any officers or directors. (PITr. 419, Exhibit N, p. 103). Mr. Jarvis, a principal with the Original Developer, testified the Original Homeowners' Association never took any action whatsoever, never set up a bank account and he was not aware of any votes being taken by members, directors and/or officers (Exhibit N, pp. 101-103, 105, 117).

Default and Foreclosure

The development failed because only five homes were sold during a five-year period. (Tr. 513-4). The developer defaulted on its loans from the Bank. In March 2010, the Bank became the owner of the remaining thirteen lots and common ground in the Subdivision by virtue of a foreclosure sale. (LF 902). The Bank wished to arrange for completion of the Subdivision by a single builder.

[3] "Tr." is a citation to the Trial Transcript filed in the referenced matter.

(PITr. 310-311). After careful consideration, it elected to contract with McKelvey Homes for that purpose (Prelim. Tr. 312-313). In selecting a builder, the Bank was careful to choose an established builder with a long history. McKelvey was a respected home builder with 114 years of experience building homes in the St. Louis area. (Tr. 554). As John Dulle, president of the Bank, testified, "Most of the subdivision had already gone through one foreclosure, I didn't think it was a good thing it would go through another one." (PITr. 311-312).

Filing of This Suit

Before any of McKelvey Homes' plans were presented for approval in accordance with the Declaration's requirements, Plaintiffs objected generally to any home that McKelvey Homes might build in the Subdivision. (LF, Exs. H, I, pp. 94, 96; LF, Docket Sheet, p. 1). At that time, there was no authorized homeowners' association for the Subdivision.

Plaintiffs acted to form a new homeowners' association. They named the new association "The Arbors at Sugar Creek Homeowners Association, Inc." (LF 264). ("Plaintiffs' Homeowners' Association"). Plaintiffs did not receive any assignment of the rights from the Original Homeowners' Association or the original Declarant; only the owners of the Plaintiffs' five lots participated in the formation of their Association. (LF. 129). Plaintiffs' Homeowners' Association expelled the Bank, owner of 13 of 18 lots. (Tr. 447; PITr. 346). Plaintiffs asserted that this new Plaintiffs' Homeowners' Association was the proper homeowners'

association for the Subdivision. (LF 377, Letter). Further, Plaintiffs' Homeowners' Association attempted to appoint a Design Review Committee to administer the new building requirements of the Declaration. (LF, Letter, p. 262). Plaintiffs filed a Notice with the Recorder of Deeds to notify the public that the Plaintiffs' HOA was to administer the Declaration in the Subdivision. (LF, Notice, p. 264).

Plaintiffs' Homeowners' Association sent McKelvey a letter stating as follows:

(i) Plaintiffs had appointed a Design Review Committee;

(ii) that any application for an Alternation including new homes had to be submitted to the Committee;

(iii) that any such plans had to be submitted to an agent in Jefferson City, Missouri; and

(iv) that the Plaintiffs' Committee had already voted to disapprove any alteration (home) described or depicted in McKelvey's marketing materials. (Exhibit P-14, Page 18).

Plaintiffs filed the present action on May 27, 2010. (LF 21-27, Petition). They sought a declaratory judgment resolving the disputes between the parties, including whether the plans for new homes in the subdivision violated the Declaration. (Id.). Plaintiffs were both the individual Homeowners and Plaintiffs'

Homeowners' Association. Plaintiffs filed notices of lis pendens on the date they filed suit. (LF 989).

The Formation of ASC Homeowners Association, Inc.

In order to create an authorized homeowners' association, in 2010, the Bank obtained from the Original Developer an assignment of the Declarant's Rights pursuant to Section 9.3 of the Declaration. (Tr. 456). The Bank invited all of the lot owners to a meeting to consider the formation of a homeowners association (LF 139-141). Sixteen of eighteen lot owners attended the meeting, which was held in September 2010. The Bank cast the votes of its lots, which were seventy-two (72%) of the lots in the subdivision, in favor of forming a new homeowners association, the ASC Homeowners' Association, Inc. (hereafter, "the ASC Homeowners Association"). It voted to amend the Declaration to identify the new association as the governing association for the Subdivision. Homeowners refused to vote. (Tr. 315, 316, 342).

Plaintiffs challenged the authority of the ASC Homeowners' Association, Inc. as the authorized homeowners' association for the Subdivision. (Tr. 316). On January 27, 2011, on motion for summary judgment, the trial court[4] determined that the ASC Homeowners Association, Inc. was the duly authorized homeowners' association for the Subdivision. (LF 424, Order).

[4] Honorable James Hartenbach, before whom the case was then pending.

Eventually, the three-member governing Board of the ASC Homeowners Association, Inc. included: John Dulle and Michael Ross, elected by Jefferson Bank as owner of 13 of 18 lots, and Gregg Lemley, president of Plaintiffs' Homeowners' Association, elected by the Plaintiffs who are owners of 5 of the 18 lots in the Subdivision. (Tr. 297, 340).

Although Mr. Dulle and Mr. Ross were officers of the Bank, a corporate owner of lots in the subdivision, Homeowners challenged their authority to serve as members of the Board because they are not residents of the Subdivision. Plaintiffs alleged that the Declaration required all Board Members, even those who qualified as officers of corporate landowners, to be residents of the Subdivision. (PITr. 316). Defendants disagreed with the interpretation of the Declaration espoused by Plaintiffs. Nevertheless, in accordance with provisions of the Declaration, a meeting of the lot owners in the Subdivision was called and the Declaration was amended to eliminate any requirement that Board Members be residents. (*Id.*)

Thereafter, on July 1, 2011, McKelvey Homes presented to the Board of the ASC Homeowners Association, Inc. its plans to build a home on Lot 13 of the Subdivision for the Komlos family (the "Komlos Home"). (Tr. 380). The majority of the Board, based on their knowledge, the information submitted, and recommendations of experts, approved those plans. (*Id.*) The purchase price for the Komlos Home is $835,000.00. (PITr. 305-307 & Ex. K). McKelvey Homes

expended hundreds of thousands of dollars in the construction of the Komlos Home and in marketing the Subdivision. (Tr. 555, 570).

Plaintiffs challenge the approval of the Komlos Home and request that the trial court order that it be torn down. (Tr. 319–320). They contend that the Board did not act "reasonably" in making its decision.

Plaintiffs also complain about the modification of the grading and landscape plans approved by the City of Des Peres and a myriad of other grievances to show how Jefferson Bank has not acted reasonably. The City of Des Peres considered and approved revised grading and landscape plans pursuant to its administrative processes to allow future residents to have a suitable backyard, and the revised grading did not impact the lots of Plaintiffs. (Tr. 407, 408, 411, 412, 544).

There were two evidentiary hearings on Plaintiffs' claims. The first hearing was on Homeowners' request for a preliminary injunction to stop the construction of the Komlos Home. At a two day hearing, Plaintiffs offered testimony of Homeowners Gregg Lemley, Jacquieline Ori, and Bonnie Choi and expert witnesses architect Dennis Bolazina and appraiser Ernest Demba. Mr. Dulle, Mr. Ross and James Brennan of McKelvey testified for Defendants. Judge Hartenbach denied the preliminary injunction. (LF, Order, p. 763).

The second evidentiary hearing was conducted by Judge Gloria Reno over four days in the spring of 2012; its purpose was to resolve all of Plaintiffs outstanding claims for declaratory and injunctive relief. Witnesses Jacqueline Ori,

Dennis Bolazina, and Katherine Lemley testified for Plaintiffs. (Tr. 2-376). John Dulle and James Brennan testified for defendants. (Tr. 374-548). By this time, Plaintiffs had presented, by summary judgment, their argument that the amendment to the Declaration eliminating any residency requirement for officers of corporate owners violated the covenant of good faith and fair dealing.

Judge Reno's Findings

On December 20, 2012, Judge Reno entered twenty-six pages of detailed findings and conclusions. Among them were the following:

(1) Article X of the Declaration "does not require homes in the subdivision to be of a uniform design or the same as the others. " (Finding 27, A8).

(2) Even the first five homes built in the subdivision are in many respects different from one another. "The evidence disclosed that there are substantial differences as between the five existing homes of Plaintiffs, as built. While there are some common features, they are not identical or substantially the same." (Finding 31, A9).

(3) While the Declaration did prohibit certain structures, uses and activities, it "did not prohibit certain design features or materials that Plaintiffs claim are prohibited in the Subdivision." (Finding 34, A9-A10).

(4) The Board of the Association acted reasonably when it approved the design for the Komlos home. (Finding 38, A10).

(5) The Board acted reasonably, in reliance on the opinion of an independent architect concerning the Komlos home being in compliance with the indenture. (Finding 39, A10).

(6) Plaintiffs' challenge to the authority of the ASC Homeowners' Association was without merit. (Finding 56, A15). That Association was properly established by vote of a supermajority of 13 of 18 lots in the subdivision. (Finding 60, A16).

(7) The Declaration does not give Homeowners' five lots the right to control the subdivision; rather owners of two thirds of the lots may amend the indenture. (Finding 621 A16-A17).

(8) The Period of Declarant Control had not expired. Even if it had expired, that fact would be irrelevant because the Declaration had been validly amended to eliminate any residency requirement, so that Mr. Ross and Mr. Dulle qualified as directors and were properly so elected by the lot owners. (Findings 67-68 (A17-A18).

(9) Plaintiffs' claim that the amendment changing the residency requirement was enacted in violation of the covenant of good faith and fair dealing was without merit. The Bank did not "engage in any sham or manipulation." The Bank "acted in good faith" and "followed the express provisions of the indenture." (Finding 76, A20.)

The Bank's Counterclaims

The Bank filed Counterclaims with its Answers to Plaintiffs' petitions, including its answer to the Fourth Amended Petition. (LF 1022). Count II of those Counterclaims alleged slander of title in connection with filing of the *lis pendens*. Count III alleged abuse of process in bringing of this action. Plaintiffs moved for summary judgment on those claims, asserting that there were no disputed issues of material fact on the question whether the Bank was entitled to relief. (LF 764 et seq.) They asserted, inter alia, that a filing of a lis pendens cannot form the basis of a slander of title action, that they lacked the intent requisite for an abuse of process action, and that the Bank had not been damaged by their actions.

The Bank opposed this motion, asserting that there were disputed issues of material fact, both on the issues of intent and the issues related to damages, that precluded summary judgment. (LF 919 et seq., LF 937).

The Final Judgment

On January 22, 2013, Judge Reno entered final judgment for Defendants on all claims of Plaintiffs, and disposed of all other remaining claims in the action. (A29). Her final judgment required the lot owners to reimburse the Bank the amount of $418.27 per lot for common area expenses that the Bank had incurred in 2012. It granted Plaintiffs' motion for summary judgment on the Bank's counterclaims for abuse of process and slander of title. (A29-A30). This appeal and cross-appeal followed.

POINTS RELIED ON

(Related to Homeowners' Appeal)

I. THE TRIAL COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT DETERMINING THAT THE ASC HOMEOWNERS' ASSOCIATION, INC. HAD THE AUTHORITY TO GOVERN THE SUBDIVISION [RESPONDS TO HOMEOWNERS' POINT II].

DeBaliviere Place v. Veal, 337 S.W.3d 670, 677 (Mo. banc 2011)

Sherwood Estates Homes Association, Inc. v. Schmidt, 592 S.W.2d 244 (Mo. App. 1979)

II. THE TRIAL COURT CORRECTLY RULED THAT THE DIRECTORS OF THE HOMEOWNERS' ASSOCIATION WERE NOT REQUIRED TO BE SUBDIVISION RESIDENTS, BECAUSE THE AMENDMENT TO THE DECLARATION ELIMINATING ANY RESIDENCY REQUIREMENT WAS LAWFULLY ADOPTED, AND, IN ADDITION, THE PERIOD OF DECLARANT CONTROL HAD NOT ELAPSED ALLOWING JEFFERSON BANK AS SUCCESSOR DECLARANT TO APPOINT DIRECTORS WITHOUT REGARD TO RESIDENCY REQUIREMENT [RESPONSE TO PLAINTIFFS' POINT I].

Hawthorn Bank v. F.A.L. Investments, LLC., 449 S.W.3d 61, 65 (Mo. App. W.D. 2014)

Jennings v. Bd. of Curators of Missouri State Univ., 386 S.W.3d 796, 798 (Mo. App. S.D. 2012)

Rocky Ridge Ranch Property Owners Association v. Areaco Investment Co., 993 S.W.2d 553 (Mo. App. 1999)

III. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE BOARD OF THE DULY AUTHORIZED HOMEOWNERS' ASSOCIATION "ACTED REASONABLY" IN APPROVING THE BUILDING OF THE KOMLOS HOME BECAUSE MESSRS. DULLE AND ROSS TOOK ACTION TO PROPERLY UNDERSTAND THE MEANING OF THE APPLICABLE PROVISIONS OF THE DECLARATION, SOUGHT PROFESSIONAL OPINIONS AS TO WHETHER THE PROPOSED HOME COMPLIED WITH THE REVIEW PROVISIONS OF THE DECLARATION OR WOULD DIMINISH THE VALUE OF THE EXISTING HOMES, INFORMED THEMSELVES AS TO HOW VARIOUS STYLES AND BUILDING MATERIALS WOULD FIT WITHIN THE SUBDIVISION, ACTED TO BENEFIT OF THE ENTIRE SUBDIVISION, AND DID NOT

BREACH ANY DUTY OWED TO PLAINTIFFS [RESPONSE TO PLAINTIFFS' POINT III].

Pellegrini v. Fournie, 501 S.W.2d 584, 565 (Mo. App. 1973)

IV. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE BOARD OF THE HOMEOWNERS' ASSOCIATION PROPERLY DETERMINED THAT THE KOMLOS HOME COMPLIED WITH THE DECLARATION BECAUSE, HAVING FOUND THE BOARD ACTED REASONABLY, THE TRIAL COURT PROPERLY DEFERRED TO THE DETERMINATION OF BOARD IN INTERPRETING AND APPLYING THE REQUIREMENTS OF THE DECLARATION AND, FOR THE ADDITIONAL REASON, BECAUSE SUCH BOARD'S INTERPRETATION OF THE REQUIREMENTS OF THE DECLARATION WAS CORRECT [RESPONSE TO PLAINTIFFS' POINT IV].

V. THE TRIAL COURT DID NOT ERR IN ORDERING PLAINTIFFS AND THE OTHER LOT OWNERS IN THE SUBDIVISION, ON A PRO RATA BASIS, TO REIMBURSE JEFFERSON BANK FOR THE MAINTENANCE COSTS THAT IT EXPENDED IN 2012 ON BEHALF OF THE LOT OWNERS IN THE SUBDIVISION DURING THE PENDENCY OF THIS CASE BECAUSE THE TRIAL COURT IN THIS EQUITY CASE HAD THE AUTHORITY TO MAKE

EQUITABLE ORDERS TO DO EQUITY, AND FOR THE FURTHER REASON THAT PLAINTIFFS DID NOT OBJECT TO THE EVIDENCE PRESENTED IN SUPPORT OF THE MOTION UPON WHICH THE COURT RELIED IN MAKING THE ORDER [RESPONSE TO PLAINTIFFS' POINT V].

Hamill v. Hamill, 972 S.W.2d 632 (Mo. App. 1998)

VI. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFFS' CLAIMS FOR DAMAGES BECAUSE PLAINTIFFS' CLAIMS FOR DAMAGES ALL ASSUMED THAT DEFENDANTS BREACHED THE DECLARATION, WHICH DEFENDANTS DID NOT [RESPONSE TO PLAINTIFFS' POINT VI].

Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976) (en banc)

POINTS RELIED ON

(Related to Cross-Appeal of Jefferson Bank & Trust Co.)

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS ON COUNT II OF THE JEFFERSON BANK COUNTERCLAIM (SLANDER OF TITLE) BECAUSE THERE WERE AT LEAST DISPUTED ISSUES OF MATERIAL FACT ON ALL ELEMENTS OF SUCH A CLAIM, IN THAT: (A) AS A MATTER OF LAW THE MAY 27, 2010 LIS

PENDENS FILED WAS NOT AUTHORIZED BY MO. REV. STAT. § 527.260; (B) THERE WAS AN ISSUE OF FACT RELATIVE TO WHETHER THE UNAUTHORIZED LIS PENDENS WAS MALICIOUSLY PUBLISHED; AND (C) THERE WAS AN ISSUE OF FACT RELATIVE TO WHETHER THE FILING OF THE LIS PENDENS CAUSED PECUNIARY LOSS OR INJURY TO DEFENDANTS.

Tongay v. Franklin Cnty. Mercantile Bank, 735 S.W.2d 766, 770 (Mo. App. 1987).

First Nat'l Bank of St. Louis v. Rincon, Inc., 311 S.W.3d 857, 865 (Mo. App. 2011)

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS ON COUNT III OF THE JEFFERSON BANK COUNTERCLAIM (ABUSE OF PROCESS) BECAUSE THERE REMAINED ISSUES OF MATERIAL FACTS INCLUDING WHETHER: PLAINTIFFS IMPROPERLY FILED THIS LAWSUIT; PLAINTIFFS HAD AN IMPROPER PURPOSE IN FILING THIS LAWSUIT; AND DEFENDANT WAS THEREBY DAMAGED, THE ESSENTIAL ELEMENTS OF AN ABUSE OF PROCESS CLAIM.

Wessler v. Wessler, 610 S.W.2d 650, 651 (Mo. App. 1980).

Nat'l Motor Club of Mo., Inc. v. Noe, 475 S.W.2d 16, 23–25 (Mo. 1972).

ARGUMENT

STANDARD OF REVIEW

The trial court determined certain issues by summary judgment. (*See* App., Judgment, p. A1; App., Judgment, pp. A29–31). Those issues are addressed in Points Relied on II and VI of Homeowners' appeal and Points Relied On I and II of the Bank's cross-appeal. This Court reviews the grant of summary judgment on a *de novo* basis. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993) (en banc).

The trial court decided the remaining issues, those addressed by Homeowners' Points I, III, IV and V, after a full evidentiary hearing. The standard of review on those issues is that of *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976) (en banc). This Court should affirm the judgment of the trial court on those issues, unless there is no substantial evidence to support the judgment, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.*at 32. This Court must defer to the trial court's determination of contested factual issues; its view of the evidence; its assessment of the evidence; and its judgment as to the credibility of witnesses and the weight to be given to a witness' testimony. *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. 2012) (en banc); *Sneil, LLC v. Tybe Learning Ctr., Inc.*, 370 S.W.3d 562, 567 (Mo. 2010) (en banc); *Bd. of Educ. of the City of St. Louis v. Mo. State Bd. of Educ.*, 271 S.W.3d 1, 7 (Mo. 2008) (en banc); *State ex rel. Moore v. Brewster*, 116 S.W.3d 630, 639 (Mo. App. 2003).

SUMMARY OF THE ARGUMENT

Homeowners' six points relied on can be distilled to three principal issues whose resolution is necessary to disposition of their appeal. Those issues, and the logical order in which to address them, are:

(1) Does the homeowners' association organized by the Bank, the ASC Homeowners' Association, Inc., have the legal authority to function as the governing association under the Declaration? [Addressed in Homeowners' Point II].

(2) Do Mr. Dulle and Mr. Ross qualify to serve as directors of that association, although they do not live in the subdivision? [Addressed in Homeowners' Point I].

(3) Did the directors of the association, with Mr. Dulle and Mr. Ross casting the affirmative votes, violate Article X of the Declaration when they approved the McKelvey design for the Komlos Home? [Addressed in Homeowners' Points III and IV].

The authority of the ASC Homeowners Association to govern the subdivision has two sources, each in itself fully sufficient. First, the Bank secured an assignment of Declarant's rights, which included the right to form a homeowners' association. The Bank then exercised that right to form the ASC Homeowners Association, which governs the subdivision today. Second, even had it received no such assignment, the Bank as holder of voting rights to two-thirds of

the lots, could amend the Declaration under Article XII to designate the ASC Homeowners Association as the governing association.

The Bank acted properly in effecting that amendment. The Declaration itself contemplated the possibility of a substitute association. The substitution was necessary because the corporate charter of the original association was irretrievably forfeited. Indeed, had there been no substitution there would be no governing association at all. The association that Homeowners attempted to form, and from which they expelled the Bank, never qualified legally as a substitute association under the Declaration. Nowhere in their briefs in the Court of Appeals or this Court have Homeowners even contended that the trial court erred in failing to designate their association as the governing association. The ASC Homeowners' Association thus has authority to govern the Arbors at Sugar Creek, as Judge Hartenbach, Judge Reno and the Court of Appeals concluded.

Mr. Dulle and Mr. Ross qualify to serve on the board of the association. Even as originally recorded, the Declaration permitted officers and directors of corporate lot owners to serve on the association board without expressly requiring that they live in the subdivision. Any doubt on the issue was resolved when the Bank, at a duly notified open meeting of lot owners following the procedure specified in Article XII of the Declaration, voted its lots in favor of an amendment to the Declaration eliminating any residency requirement. Nothing in the

Declaration or Missouri decisional law prohibits amendment of a subdivision indenture to change the qualifications of directors.

Homeowners failed in their effort to establish a breach of the covenant of good faith and fair dealing. After considering all testimony offered by both sides on this subject, including that of Mr. Dulle and Mr. Ross, the trial court found that the Bank acted in good faith in amending the Declaration. The amendment did not impose new restrictions on Homeowners' lots, and so does not run afoul of the principle that an amendment imposing new restrictions requires unanimous approval. The finding that the residency amendment was valid is the only one supported by the evidence, and should be affirmed. Mr. Dulle and Mr. Ross were qualified directors.

Likewise, the trial court's finding on the third principal issue—that the McKelvey plans for the Komlos home did not violate Article X of the Declaration and that Mr. Dulle and Mr. Ross acted reasonably in considering them and in voting to approve them—is not only supported by substantial evidence, but is the only correct finding based on this record. As the trial court found, while the Declaration requires the directors to consider a number of factors in approving plans for improvements, it does not require that all homes be of uniform design or have all of the features and materials that Homeowners assert were important to them. In fact, even the five homes built for the Homeowners are not of uniform design. As the trial court found, Mr. Dulle and Mr. Ross were fully aware of the

duties they owed to all of the lot owners—Homeowners and the Bank alike. They acted consistently with those duties in approving the design for the Komlos home as consistent with the stated purpose of Article X of the Declaration: maintaining the "uniform quality and aesthetics of exterior architectural design for the benefit of the Community as a whole."

Homeowners' Points Relied On V and VI are subordinate points that can be quickly disposed of. The small subdivision fee assessments that are complained of in Point V were properly assessed and are duly owed. In fact, the Homeowners have never paid anything toward the upkeep and maintenance of the subdivision. Point VI, related to entry of judgment for the Bank on Homeowners' damages claims, rests on the success of Homeowners Points I through IV which are, as shown above, without merit.

The Court should reject all of Homeowners' points on appeal, and affirm the trial court's judgment to the extent it resolved disputed issues in favor of the Bank and McKelvey.

I. THE TRIAL COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT DETERMINING THAT THE ASC HOMEOWNERS' ASSOCIATION, INC. HAD THE AUTHORITY TO GOVERN THE SUBDIVISION [RESPONDS TO HOMEOWNERS' POINT II].

Plaintiffs argue that the ASC Homeowners' Association, Inc. cannot be the duly authorized homeowners' association in the subdivision because it did not receive an assignment of rights from the Original Homeowners' Association. (Appellants' Substitute Br., p. 40). Citing language from this Court's opinion in *DeBaliviere Place v. Veal*, 337 S.W.3d 670, 677 (Mo. banc 2011), Homeowners assert that for the ASC Homeowners Association to be a valid successor, there must have been a transfer of rights and duties from the original developer's defunct association. (*Id.*). Because there was no such assignment, Homeowners argue, the approval of the Komlos home plans by the board of the ASC Homeowners' Association was invalid, and the home was therefore constructed without the approval of improvements that is required by Article X of the Declaration. (Appellants' Substitute Brief at 25).

Homeowners' assertion that an assignment from the original association is necessary for a successor to be legitimate is inconsistent with their own prior conduct. In April 2010, the owners of the five lots on which homes had been built formed their own homeowners' association, without receiving any assignment of

the rights from the Original Homeowners' Association or the original Declarant and without the participation of 13 of 18 lots in the Subdivision. (*Id.* 129). Plaintiffs' Homeowners' Association promptly expelled Jefferson Bank, owner of 13 of 18 lots. Plaintiffs asserted that this new Plaintiffs' Homeowners' Association was the proper homeowners' association for the Subdivision. (LF, Letter, p. 377).

Plaintiffs' Homeowners' Association then attempted to appoint a Design Review Committee to administer the new building requirements of the Declaration. (LF, Letter, p. 262). Plaintiffs even filed a Notice with the Recorder of Deeds to notify the public that the Plaintiffs' Homeowners' Association was to administer the Declaration in the Subdivision. (LF, Notice, p. 264). Plaintiffs obviously believed that they could form the Plaintiffs' HOA without an assignment from the Original Homeowners' Association and administer the Declaration, contrary to the position they now assert.

In fact, neither of the competing associations here could receive an assignment of rights directly from the Original Homeowners' Association. That organization, shortly after its formation, forfeited its charter for failing to file the required documents with the Secretary of State. (LF, Aff., p. 128). It ceased to exist and could not act. *Beavers v. Recreation Ass'n of Lake Shore Estates, Inc.*, 130 S.W.3d 702, 710 (Mo. App. 2004). It could not be revived. It never even had officers and directors (PITr. 419, Exhibit N, p. 103), so that (unlike in the *DeBaliviere Place* case in which the court held that the president of the former

homeowners' association could sign an assignment as part of winding up its affairs) there was no one available to sign an assignment, even as part of a winding up process. No assignment was possible. (LF 129, Dulle Affidavit).

Thus, if it were accepted, Homeowners' present argument—that an assignment from the original association is necessary for a successor association to function—would mean that there could never be a functioning homeowners association in the Arbors at Sugar Creek. Homeowners contest the authority of the ASC Homeowners Association, but nowhere in their Substitute Brief do they argue that their own association—which asserts no claims in the Fourth Amended Petition and remains a plaintiff in this case in name only—has the right to govern the subdivision. Homeowners have thus abandoned any claim that their own homeowners' association has governing authority in the Arbors at Sugar Creek.

If a valid assignment of rights from the original association was necessary to empower a successor, and no assignment was possible, there could never be a valid successor association here. There would be no body with authority to approve plans for improvements to the vacant lots. This would mean either that homes could be built on those lots without any architectural review—an outcome that no party to this lawsuit advocates—or, even more incongruously, that no new homes could be built at all, because no approval of plans could be obtained because there is no one authorized to approve them.

Contrary to Homeowners' argument, Missouri decisions do not require this result. In addition to assignment from an original homeowners' association, a successor homeowners' association can acquire rights in at least two other ways, either of which is sufficient: by assignment from the original developer, and by designation as a substitute association in accordance with the terms of the Declaration. Both of these occurred here.

A. The Assignment of Rights by the Original Developer

It is clear that an original developer can assign rights to a successor. For example, in *Sherwood Estates Homes Association, Inc. v. Schmidt*, 592 S.W.2d 244 (Mo. App. 1979), the right to enforce indenture restrictions was transferred from the developer to a homeowners' association.

One of the authorities on which Homeowners rely, *Valley View Village South Improvement Association, Inc. v. Brock*, 272 S.W.3d 927 (Mo. App. 2008), in fact suggests that a subsequent homeowners' association can, as the Bank argues here, acquire rights by assignment from the original developer. In *Brock*, as here, the original homeowners' association in a subdivision was defunct. (*Id.* 932). A new homeowners' association was started and sought to control certain common areas including a water system. The lot owners challenged the authority of that homeowner's association to control the water system because it was not the assignee of *either* the original homeowners' association *or* the original developer, who had to the rights to the water system. In denying that the new association

owned or controlled the water system, the court explained: "The weakness in Respondent's position is the finding that Appellant was not a *successor developer*." (*Id*.) (emphasis added). The implication of the *Brock* court's holding is that if the appellant there had been a successor developer, it would have had the rights to the water system. In short, rights of the Original Developer can be transferred.

In the present case the Bank, the owner of 13 of the 18 lots, in August 2010, obtained from the Original Developer, the Declarant under the Declaration, an assignment of Declarant's rights under the Declaration. (*Id.* 131; LF, Aff., p. 131; LF, Assignments, pp. 277–283).[5] That assignment states that the Original Developer/Declarant was the person/entity that had the right to form the Original Homeowners' Association. (*Id*.). The Bank then proceeded to form an Association, exercising the assigned rights.

[5] Evolution Developments was the Original Developer of the Subdivision. (LF 127, Affidavit). It filed the Declaration. Pursuant to the Declaration, the developer (the Declarant) formed a homeowners' association, a nonprofit corporation (the Original Homeowners Association), which entity was administratively dissolved in 2006 because the Declarant did not file the requisite reports with the Secretary of State. (*Id.* 127–128).

The assignment of the Declarant's rights was authorized by §9.3 of the Declaration: "Transfer of Rights." (App., Decl., Art. III, pp. 38–40; *Id.* A51). That section provides, "The Declarant may transfer, assign or convey any and all Special Declarant Rights contained in §9.2 to a successor Declarant in a written instrument …." Declarant Rights continue "until all present or future Lots within the Property have been completed and conveyed to third parties." (App., Decl. §9.2).

All lots in the subdivision have not been completed; twelve remain vacant. The Declarant Rights thus remain in place and were validly assigned to Bank. An assignment of a developer's rights to another entity under restrictive subdivision covenants was approved in *Sherwood Estates Homes Association, Inc. v. Schmidt*. 592 S.W. 2d 244.

The assignment was legally sufficient; it provides in relevant part: "Assignor does hereby assign, transfer, delegate and convey to Assignee [the Bank] *all of the Assignor's rights, title and obligations under the Declaration*, including, but not limited to …." (LF, Assignment, p. 278) (emphasis added). The assignment was clear and complete. All of the rights of the Declarant under the Declaration were assigned. *Keisker v. Farmer*, 90 S.W.3d 71, 74 (Mo. 2002) (en banc) ("In assignment, the assignor gives all rights to the assignee."). The assignment, therefore, included the requirement to complete the subdivision (§9.2 of the Declaration), the obligation to have building plans approved or disapproved

by a homeowners' association, and the right to establish and maintain a homeowners' association to carry out the requirements of the Declaration (Art. III of Declaration).

Homeowners argue that the assignment from the original Developer could not have been sufficient, because under the Declaration the homeowners' association had to be formed before the first lot was sold. (Appellants' Substitute Brief at 43). Elsewhere, however, the Declaration prohibits an amendment that would eliminate the Association (Article XII). It was obviously not the intent of the Declaration to permit the developer to avoid the requirement of an Association by allowing the original Association to lapse irretrievably during the Period of Declarant Control. Recognizing an implied right of the developer to organize a substitute association when necessary, assignable to a successor, is consistent with the purpose of the Declaration.

B. Designation as a Successor Association

Assignment from the original developer was not even necessary to vest authority to govern in the ASC Homeowners' Association, because of the second means available to empower a successor homeowner's association: substitution in the manner provided for in the Declaration.

The original homeowners' association, The Arbors at Sugar Creek Homeowners' Association, Inc., was the Association under the original Declaration because it was so designated in the Declaration itself. Article I defined

the term "Association" to mean "the Arbors at Sugar Creek Homeowners' Association, a Missouri nonprofit corporation, and its successors and assigns, organized under Article III of this Declaration." Article III, at Section 3.3, provided that "The operation of the Community shall be vested in the Association." Article XII permitted amendments of the Declaration if approved by vote of owners of two-third of the lots. While certain provisions could not be amended, Article I, designating the original association as the governing association, was not among them and so could be amended. Article XII in fact expressly contemplated an amendment providing for a "substitution" of the Association. ("No Amendment may … eliminate the requirement that there be an Association and Board unless adequate substitution is made, without the written consent of the Director of Planning of the City of Des Peres." A55).

The Declaration itself thus sensibly afforded the lot owners a remedy for the situation where the original Association was defunct and unable or unwilling to assign its rights. By a two-thirds vote, the lot owners can amend the Declaration to designate a substitute Association. That is exactly what occurred here. The Bank, the owner of over 70% of the lots in the Subdivision, after giving due notice to Plaintiffs who owned the remaining five lots in the Subdivision, called a meeting of all of the lot owners. At that meeting, the lot owners organized a homeowners' association. (*Id.* 132). Sixteen of the 18 lot owners were present. Another was on the telephone, so that 17 of the 18 lot owners were present at the meeting. (*Id.*).

The five lots represented by Plaintiff homeowners in this case refused to participate in the meeting. Thirteen lots, representing 72% of the all lots in the subdivision, voted to establish the successor homeowners' association. (*Id.* 132-133). They also voted to amend the Declaration to make the ASC Homeowners Association, Inc. the governing association.

As the Court of Appeals held, the existence of this alternative route to a successor association distinguishes this case from the principal authority on which Homeowners rely, *DeBaliviere Place Ass'n v. Veal*, 337 S.W.3d 670 (Mo. banc 2011). In that case, this Court looked beyond the original declaration only because the declaration failed to specify a procedure for assigning rights and liabilities. Here, in contrast, the Declaration defines the original association (identified by name) or its "successors" as the governing Association. It permits amendments of the Declaration by two thirds vote. It does not exclude from that amendment power the provision that designates the governing association. It specifically contemplates the designation of a substitute Association. The Declaration here is clear that a substitute association may be designated by amendment to the Declaration. The Bank followed the Declaration, and the amendment designating the ASC Homeowners Association, Inc. as the governing association was valid and effective.

II. THE TRIAL COURT CORRECTLY RULED THAT THE DIRECTORS OF THE HOMEOWNERS' ASSOCIATION WERE NOT REQUIRED TO BE SUBDIVISION RESIDENTS, BECAUSE THE AMENDMENT TO THE DECLARATION ELIMINATING ANY RESIDENCY REQUIREMENT WAS LAWFULLY ADOPTED, AND, IN ADDITION, THE PERIOD OF DECLARANT CONTROL HAD NOT ELAPSED ALLOWING JEFFERSON BANK AS SUCCESSOR DECLARANT TO APPOINT DIRECTORS WITHOUT REGARD TO RESIDENCY REQUIREMENT [RESPONSE TO PLAINTIFFS' POINT I].

Plaintiffs contend that Members of Board of Directors of ASC Homeowners Association, Inc. (the "Board"), John Dulle and Michael Ross, were not eligible to serve on the Board because they were not residents of the Subdivision. After a full hearing on the issues, the Trial Court found that the residency requirement for members of the Board was properly amended by more than 67% of the lot owners, even if the period of Declarant Control as defined by the Declaration had expired.

As shown in Section I, pursuant to the assignment of the Original Declarant's rights and at a duly called meeting of the lot owners of the Subdivision, the ASC Homeowners Association, Inc. was formed. (PITr. 315). Plaintiffs initially refused to participate in that homeowners' association. Thus, all three members of the Board were elected by the owner of the remaining thirteen

lots in the Subdivision, Jefferson Bank. (*Id*.). Thereafter, Plaintiffs challenged the authority of the ASC Homeowners' Association, Inc. (*Id*. 316). The Trial Court determined that the ASC Homeowners Association, Inc. was the duly authorized homeowners' association.

Plaintiffs also challenged the authority of the three members of the Board because they were not Subdivision residents. (*Id*. 316). Judge Hartenbach did not rule on that challenge in his grant of partial summary judgment. Thereafter, a meeting of the lot owners convened. (*Id*. 316). The residency requirement contained in the Declaration was eliminated by an amendment to the Declaration that was approved by more than 67% of the lot owners in the Subdivision. (*Id*.).

The Declaration permits the lot owners to amend the Declaration. Article XII, Section 12.1(b) provides:

> By Owners. Subject to Articles IX and X, and as otherwise provided herein, this Declaration, including the Plat, may be amended only by vote or agreement of the Owners of Lots to which sixty-seven percent (67%) of the votes in the Association are allocated ….

(App., Decl., p. A54–56). More than 67% of the lots in the Subdivision voted to amend the Declaration to eliminate any requirement that Members of the Board of the Homeowners' Association be residents in the Subdivision. (PITr. 316).

The Declaration does not give Plaintiffs' five lots the absolute right to control or block all business of the Subdivision; rather, the Declaration grants lot

owners of more than 67% of the lots in the Subdivision the right, as a democratic super-majority, to amend the Declaration as circumstances require. After the amendment, the lot owners elected and appointed Mr. Dulle, Mr. Ross, and Plaintiff Gregg Lemley to be the members of the Board. (*Id*. 319). This newly constituted Board, thereafter, properly conducted the business of the Subdivision, including the approval of the plans to build the Komlos home. (*Id*. 313–331; Tr. 322–323, 473).

Homeowners' attack on the amendment eliminating the residency requirement has two parts. First, they argue that by voting its lots to adopt the amendment the Bank violated the covenant of good faith and fair dealing. Secondly, they assert that the amendment in effect imposed a new restriction on all the lots in the subdivision, including their own, so that the amendment could not be adopted without unanimous consent of all lot owners. Both arguments are without merit.

A. There Was No Breach of the Implied Covenant of Good Faith and Fair Dealing.

Inherent in every contract, including the Declaration here, is an implied covenant of good faith and fair dealing. Missouri courts have adopted *Restatement (Second) of the Law of Contracts* § 205 (1981): "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." Whether a party to a contract has exercised good faith is a question

of fact that is dependent to a great extent on credibility determinations to be made by the fact finder. *Hawthorn Bank v. F.A.L. Investments, LLC*., 449 S.W.3d 61, 65 (Mo. App. W.D. 2014). A party seeking relief for an alleged breach of this covenant must both plead facts supporting relief on this theory, and prove those facts. *See*, *Jennings v. Bd. of Curators of Missouri State Univ.*, 386 S.W.3d 796, 798 (Mo. App. S.D. 2012). Plaintiffs did neither here. In the Fourth Amended Petition, the operative pleading at time of trial, Homeowners did not plead any breach of the covenant of good faith and fair dealing. Nor did they prove any such breach

(1) There Was No Subterfuge or Evasion Here.

The easiest case in which a breach of the covenant of good faith and fair dealing can be found is one in which a party has acted dishonestly by engaging in a subterfuge or evasion. *Restatement (Second) of the Law of Contracts* § 205, comment d. (1981), cited in *Missouri Consol. Health Care Plan v. Community Health Plan*, 81 S.W.3d 34, 47 (Mo. App. W.D. 2002).

This is not such a case. The trial court expressly found, after hearing the witnesses testify, that the Bank did not engage in any sham or manipulation. (A20). This finding was correct. As the record reflects, the challenged amendment to the Declaration was adopted at a subdivision meeting of which all lot owners, including Homeowners, had been given notice. Owners of sixteen of the eighteen lots attended in person, and an owner of the seventeenth lot attended by telephone.

As at all meetings of the lot owners, a court reporter attended, and prepared a verbatim transcript. This is not subterfuge or evasion.

The Declaration accorded the Bank the voting power to amend the Declaration. It exercised that power openly, in order to accord itself representation on the Board of a subdivision in which it owned thirteen of eighteen lots.

Homeowners argue that conduct of the Bank here is like that of the developer in *Rocky Ridge Ranch Property Owners Association v. Areaco Investment Co.*, 993 S.W.2d 553 (Mo. App. 1999). The *Rocky Ridge* case bears a facial similarity to this one; in each case there was an amendment of subdivision governance documents effected by owners of two-thirds of the lots. The similarity ends there. The facts and governing law in the two cases are fundamentally different.

In the *Rocky Ridge* case, the developer originally told buyers that only 1,200 lots would be platted. After it had sold about one half of the original lots in the subdivision (and so lost the ability to amend the restrictions, which required approval of owners of two thirds of the lots), the developer was ordered by the U.S. Department of Housing and Urban Development to sell no more lots. Nonetheless, and for the sole purpose of exercising the power to amend, the developer platted an additional 1,150 unsalable lots and asserted that it had thus regained the unilateral power to amend that it had lost when it had sold more than one third of the original lots to purchasers. The developer lost in the trial court,

and the judgment against it was affirmed. The Court of Appeals correctly found that the platting of the new, unsalable lots was a "voting sham" and a "devious attempt to circumvent" the two-thirds requirement. 993 S.W.3d at 556. That case thus involved bad faith in the sense of "subterfuges and evasions" designed to deprive the other party of agreed-to benefits from the contract.

As the trial court held, the present case is not one of sham or evasion. The lots that the Bank owned, and voted in favor of the challenged amendments, were original lots in the subdivision, platted by the original developer. Unlike the developer in *Rocky Ridge*, the Bank planned to develop its lots. It intended to do so in accordance with Article X of the Declaration. As noted, the amendment related to the residency requirement for directors was adopted openly, in order to afford the Bank representation on the Board of Directors proportionate to its lot ownership. Unlike the developer in *Rocky Ridge*, the Bank and McKelvey won in the trial court, and so come to this Court with the benefit of the trial court's factual finding that the Bank acted in good faith. This case is not the *Rocky Ridge* case.

(2) There Was No Violation of the "Spirit of the Transaction."

The implied covenant of good faith and fair dealing can be violated even absent subterfuge or evasion, if one party acts in bad faith by exercising "a judgment conferred by the express terms of the agreement in such a manner as to evade the spirit of the transaction or so as to deny [the other party] the expected benefit of the contract." *Missouri Consolidated Health Care Plan*, 81 S.W.3d at

46. Plaintiffs invoke this "spirit of the transaction" aspect of the covenant of good faith and fair dealing here. (See Appellants' Substitute Brief at 29). A plaintiff seeking to prevail on this theory bears a heavy burden. Such a plaintiff asks the courts to abrogate an express contract right of the other party, not on the basis of any contract language, but because the other party has somehow acted unfairly in its exercise of express contract rights, and so deprived the complaining party of a reasonably expected benefit of the contract.

Applying this theory presents the risk that a court might improperly rewrite the parties' bargain, imposing on one party burdens and obligations for which that party did not contract. As the Court of Appeals for the Southern District recently stated, citing earlier authority of the Eighth Circuit Court of Appeals and of this Court, the implied covenant of good faith cannot be made "an ever flowing cornucopia of wished-for legal duties"; nor can it "give rise to new obligations not otherwise contained in a contract's express terms." *Jennings v. Bd. of Curators of Missouri State Univ.*, *supra*, 386 S.W.3d at 798 (Mo. App. S.D. 2012), citing *Comprehensive Care Corp. v. Rehab Care Corp.*, 98 F.3d 1063, 1066 (8th Cir. 1996); *see Glass v. Mancuso*, 444 S.W.2d 467, 478 (Mo. 1969)(cited therein). That is the result Homeowners seek here.

A contract plaintiff seeking relief on the theory that its expectations were unreasonably thwarted by wrongful conduct of the other party must, at the least, prove what its expectations were. Plaintiffs assert that the "benefit" they were

denied was the right to "govern themselves"; that is to have a board consisting entirely of residents of the subdivision. (Appellants' Substitute Brief at 31-32). The Court of Appeals erroneously accepted this argument, finding a breach of the covenant of good faith and fair dealing because a benefit expected by the Homeowners--"a board composed solely of the Subdivision's residents" (Court of Appeals Opinion at 21)--did not come into being.

The flaw in this theory is that there is no evidence to support it, and Appellants cite none in their Substitute Brief. Had homes been constructed on all lots in the subdivision, the goal of a Board of Directors composed solely of residents would have been obtained. In fact, that goal is still attainable. Once this litigation is over and Plaintiffs' *lis pendens* is removed so that McKelvey can build and sell homes on the remaining lots, the only voters for directors will be resident homeowners, and they can choose directors from among their number.

To prove their theory that they were denied an expected benefit of the contract by the Bank's actions, Plaintiffs would have had to prove that they had a reasonable expectation that the Board of Directors would be composed only of residents at a time when only five of the thirteen lots had been sold. Plaintiffs assert in their substitute brief that they had such an expectation (Appellants' Substitute Brief at 29), but the assertion is not supported by the three record references they cite, or anything else in the trial court record. The excerpts of Homeowner testimony cited (Pr. Tr. 31-35, 87-90, 235-236) all relate to

Homeowner expectations about what features would be included in the houses in the subdivision, not about who would serve on the Board of Directors.

There is simply no evidence in the record that at the time they bought their homes Homeowners or the original developer contemplated a failure of the subdivision followed by a developer default on its loans. There is no evidence that they considered who would serve on the association board in that event. In this case no one's expectations were fulfilled. Everyone involved at the outset—the initial developer, the Bank and the Homeowners—no doubt expected that the subdivision would be successfully built out in accordance with the original plan. This did not happen. In the ordinary course, resident directors would constitute a majority of the board only after two-thirds of the lots were sold. That fact refutes any claim that Homeowners expected control before then, particularly in the event of a developer default.

The Homeowners' lots were subject to all the provisions of the Declaration, including Article XII, giving the owner of two-thirds of the lots the right to amend. When the Bank became the owner of thirteen lots, the Bank was justified in exercising its Article XII authority to assure it had representation on the Association Board proportionate to its lot ownership. The Amendment was necessary to preserve a basic function of the Association: insuring representation to all lot owners. As the Declaration provided:

> The success of the Community is dependent upon the support and participation of *every Owner* in its governance and administration. This Declaration establishes the Association as the mechanism by which *each Owner* is able to provide that support and participation.

Declaration, Article XII, A38. (Emphasis supplied). The Bank, as owner of thirteen lots, had every right to assure itself a role in governance and administration of the subdivision.

If (contrary to fact) some Homeowner had testified to an expectation that a foreclosing lender would not participate in governance of the Association, but would remain on the sidelines and allow the owners of five lots to control the subdivision and the fate of the lender's real estate, that expectation would not have been reasonable. The Bank acted in good faith in attempting to adopt measures that would benefit all lot owners by permitting the subdivision to be built out in accordance with the Declaration. The trial court so held, and its holding is supported by the record. Homeowners' arguments based on the covenant of good faith and fair dealing are without merit.

B. The Amendment to the Residency Requirement Did Not Require a Unanimous Vote of the Lot Owners.

Homeowners contend that the amendment changing the residency requirement constituted a "new restriction" on their lots that required unanimous lot holder approval. This argument is without legal or factual basis.

It is well-settled law in Missouri that restrictive covenants in subdivision declarations may be amended by fewer than all property owners if the changes are uniformly applied and do not add any additional restrictions or burdens to the lot owners. *LaBrayere v. LaBrayere*, 676 S.W.2d 522 (Mo. App. 1984) (holding that amendment was valid where subdivision declaration provided that restrictions could be amended by an affirmative vote of eight of the twelve lots, and eight lots voted to release the entire subdivision from a restriction on subdividing lots).

The type of burden or restriction that cannot be imposed upon a lot owner by an amendment to an indenture is one that imposes a financial servitude or restrictions upon the alienation or use of their property. *Webb v. Mullikin*, 142 S.W.3d 822, 824 (Mo. App. 2004) (nullifying an amendment that would allow the building of a subdivision swimming pool and require lot owners to pay for it). Plaintiffs presented no evidence at trial that they would suffer from any financial servitude or be restricted in the sale or use of their property by the amendment changing the residency requirement for directors. The trial court affirmatively determined that the change in the residency requirement contained in the Declaration did not impose any financial obligation on Plaintiffs or in any way restrict their ability to use or sell their lots. (App., Findings, p. A72). The trial court found, rather, that the amendment allowed all lot owners to participate in the governance of the Subdivision and that the application of the amendment was uniform. (*Id*. A19–20).

Plaintiffs seek to bring themselves within the rule of *Webb v. Mullikin* by stating that the amendment in question enables persons who do not have a long-term interest in the Subdivision to alter all standards governing the Subdivision. (Appellants' Substitute Brief at 33-34). In fact, the questioned amendment did not change the standards that govern the quality of the Subdivision or homes built there. The duties imposed upon lot owners, homeowners, and the governing body of the Subdivision did not change. The only effective change was to give all lot owners in the Subdivision a voice. There is no evidence in the record that the change in the residency requirement imposed any financial burden on Plaintiffs or restricted their use or ability to sell their property. The change did not require unanimous consent of the lot owners.

C. The Period of Declarant Control Never Expired.

Even if the amendment to the residency requirement was somehow invalid, Mr. Ross and Mr. Dulle still qualified to serve on the Board as appointees of a successor to Declarant, appointed at a time when the Period of Declarant Control had not expired. As shown above, the Bank acquired from the original developer a full assignment of its rights as Declarant, including the power to appoint directors during the Period of Declarant Control.

The Bank acquired the Declarant's obligations as well as its rights. It was obligated to complete the common improvements to the subdivision.

The Period of Declarant Control never expired because, as the record developed at the hearing on the preliminary injunction showed, none of the triggering events occurred. Homeowners contend that Evolution Development LLC's sale of certain lots to a related entity, Hanover Homes, was such a triggering event. The trial court, in its findings, determined that the transfer of lots to Hanover Homes was nothing more than an intra-company transfer to facilitate the acquisition of new capital for the Original Developer. (App., Findings, pp. A17-18, ¶67). The trial court correctly found that there was no expiration of the Period of Declarant Control. (*Id.*). It found that Jefferson Bank is the successor to the Declarant with all of its rights under the Declaration, including the power to appoint directors. (*Id.*).

Whether the Period of Declarant Control expired is in any event irrelevant because, as indicated above, the lot owners voted to eliminate the residency requirement for members of the Board. As stated in the trial court's findings: "Consequently, the Court finds that the Indenture after the first amendment no longer requires members of the Board to be residents of the Subdivision. Mr. Dulle and Mr. Ross are and were, therefore, qualified to serve as Members of the Board of the ASC HOA." (*Id.* ¶69). The trial court found this after hearing and seeing all of the evidence and the witnesses, being able to judge their knowledge and credibility.

This Court should affirm the trial court's finding that the directors of the homeowners' association are not required to be residents of the Subdivision and were, therefore, duly authorized to act on approval of the Komlos Home design and other matters.

III. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE BOARD OF THE DULY AUTHORIZED HOMEOWNERS' ASSOCIATION "ACTED REASONABLY" IN APPROVING THE BUILDING OF THE KOMLOS HOME BECAUSE MESSRS. DULLE AND ROSS TOOK ACTION TO PROPERLY UNDERSTAND THE MEANING OF THE APPLICABLE PROVISIONS OF THE DECLARATION, SOUGHT PROFESSIONAL OPINIONS AS TO WHETHER THE PROPOSED HOME COMPLIED WITH THE REVIEW PROVISIONS OF THE DECLARATION OR WOULD DIMINISH THE VALUE OF THE EXISTING HOMES, INFORMED THEMSELVES AS TO HOW VARIOUS STYLES AND BUILDING MATERIALS WOULD FIT WITHIN THE SUBDIVISION, ACTED TO BENEFIT OF THE ENTIRE SUBDIVISION, AND DID NOT BREACH ANY DUTY OWED TO PLAINTIFFS [RESPONSE TO PLAINTIFFS' POINT III].

After hearing all the evidence, the trial court made detailed findings concerning Homeowners' claim that the Komlos home violated Article X of the

Declaration. (Findings 15 through 53, A5-A15). The Court concluded that the Board, including the two Bank representatives on the Board, acted reasonably in considering and approving the design for the Komlos home and that its judgment that the plans conformed to Article X should not be second-guessed. (Finding 51, A14). It also found that the Board's interpretation of the Declaration was correct (Finding 53, A15), and that the position of Homeowners—that Article X mandated that new homes in the subdivision be identical to theirs in design and materials—was incorrect. (Finding 36, A10).

This Court should give deference to the trial court's findings. *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976) (en banc). Likewise, this Court should defer to the trial court's findings on contested factual issues, the trial court's view of the evidence and the trial court's view of the credibility of witnesses. *Pearson v. Koster,* 367 S.W.3d 36, 43 ((Mo. 2010) (en banc).

Plaintiffs divide their challenge to these findings into two Points Relied On. The first point (Appellants' Point III) argues that the trial court erred in using a deferential standard to review the actions of the Association Board because, they assert, the Board did not act reasonably and in good faith. The second point (Appellants' Point IV) argues that, whatever standard is used, the Board made the wrong decision, because the Komlos plans do not comply with Article X. Both Points are without merit.

The trial court stated:

17. Missouri law is well settled that subdivision restrictions requiring approval of building plans are valid. *Ashelford v. Baltrusaitis*, 600 S.W.2d 581 (Mo. App. 1980); *LeBlanc v. Webster*, 483 S.W.2d 647 (Mo. App. 1972). "It is likewise settled that restricted covenants are to be strictly construed, are not to be extended by implication to include anything not clearly expressed in them. If there is a substantial doubt of their meaning, such doubt should be resolved in favor of free use of the property." *Pellegrini v. Fournie*, 501 S.W.2d 584, 565 (Mo. App. 1973).

18. The Courts have likewise held that persons or parties exercising the right to approve plans must act in a "reasonable" manner *Ashelford v. Baltrusaitis*, *supra; LeBlanc v. Webster, supra*. If there is a difference of opinion about whether plans fall within that which is permitted by the Indenture, the determination of the homeowners' association is given deference. *Bennett v. Huwar*, 748 S.W.2d 777 (Mo. App. 1988)." (A 5-6).

Plaintiffs assert that these usual principles do not apply here because they do challenge the "reasonableness of the Board's decision" (Appellants' Substitute Brief at 48) and because the actions of the Bank representatives on the Board should be scrutinized with a "special intensity" because the Bank had a financial interest in development of its lots in the subdivision.

The two "Rule of Necessity" cases that Homeowners cite, *Barker v. Secretary of State*, 752 S.W.2d 437 (Mo. App.1988), and *Stonecipher v. Poplar Bluff School District*, 205 S.W.3d 326 (Mo. App. 2006), which did not involve subdivision governance at all, are wholly inapposite. Subdivision trustees are not, and cannot be, quasi-judicial officers free of competing interests whenever an application for approval of improvements comes before them. Rather, trustees are necessarily interested. They serve as trustees only because they (or in the case of corporate officer trustees, their organizations) have property interests in the subdivision. Any decision a trustee makes might affect the value or use of that trustee's own property. That fact does not, however, require that subdivision board action be subject to scrutiny using a "special intensity" standard.

Mr. Ross and Mr. Dulle acted reasonably and in good faith, as the trial court found. Testimony at trial indicates the Board members considered the terms of the Declaration and endeavored to ensure their decision complied with them. (Tr. 403-5, 450). McKelvey forwarded plans to the Board for the Komlos Home which the Board reviewed thoroughly. (PITr. 326-329, 348-9, 385). The Board reviewed the opinion of an architect concerning whether or not the Komlos Home complied with the requirements of the Declaration. (PITr. 324, 326). Moreover, they hired an appraiser to determine whether the Komlos Home would cause the existing homes in the Subdivision to suffer a diminution in value. (PITr. 305-7). The appraiser determined that there would be no diminution in value caused by construction of

the Komlos Home.[6] The appraiser valued the Plaintiffs' houses in the Subdivision between $670,000 and $860,000 which supported the conclusion they would not be reduced in value by construction of the Komlos Home at a cost of $835,000. (PITr. 305-307 & Ex. K). Moreover, Messrs. Dulle and Ross visited other neighborhoods in the Greater Metropolitan Area of St. Louis to determine if homes of various styles and materials can be harmonious. (Tr. 385-401).

Based on the foregoing and all of the information they reviewed, the Board members concluded that the Komlos Home was of uniform quality and aesthetics, and therefore, in compliance with the Declaration. Mr. Lemley, a Homeowner and lawyer-representative for the other Homeowners as well as a current member of the Board, had previously taken the position that all of McKelvey's homes were non-compliant with the Declaration without ever having met with a representative of McKelvey or hiring any experts. Despite receiving notice of the Board meeting scheduled for the review of McKelvey's plans for the Komlos Home, and after over a year had elapsed since he made his unilateral and uninformed decision, Mr. Lemley did not offer any evidence to the Board that indicated in any fashion that the Komlos Home was not compliant with the Declarations. The Board acted

[6] Indeed, Plaintiffs' appraiser at the trial confirmed there would be no diminution in value caused by the Komlos Home. (PITr. 222-3).

reasonably in not accepting Homeowners' arguments. The trial court's holding that the Board did act reasonably should be affirmed.

IV. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE BOARD OF THE HOMEOWNERS' ASSOCIATION PROPERLY DETERMINED THAT THE KOMLOS HOME COMPLIED WITH THE DECLARATION BECAUSE, HAVING FOUND THE BOARD ACTED REASONABLY, THE TRIAL COURT PROPERLY DEFERRED TO THE DETERMINATION OF BOARD IN INTERPRETING AND APPLYING THE REQUIREMENTS OF THE DECLARATION AND, FOR THE ADDITIONAL REASON, BECAUSE SUCH BOARD'S INTERPRETATION OF THE REQUIREMENTS OF THE DECLARATION WAS CORRECT [RESPONSE TO PLAINTIFFS' POINT IV].

The Board's approval of the Komlos home plans as consistent with Article X of the Declaration was not only the result of a reasonable process, it was correct. (App., Findings, p. A28, ¶116). Plaintiffs' claim that the Declaration requires all new homes in the Subdivision to be like their homes is not supported by the express provisions of the Declaration.

The purpose of the Declaration's architectural review provisions, contained in Article X (the "Purpose Provision"), is stated as follows:

> This Article contains a procedure for review and approval of exterior alterations of the original design of the buildings and Units. "The purpose of this review is to maintain the uniform *quality* and *aesthetics of exterior architectural design* for the best interests of the *Community as a whole.*

(emphasis added). The purpose of the review procedure is to benefit "the Community as a whole," not just the owners of the first five homes built. The two goals of the review procedure contained in the Declaration's Purpose Provision are to maintain (1) "quality" and (2) "aesthetics" of exterior architectural design. Quality is the degree of excellence in the design. Aesthetics is defined as "a pleasing appearance of effect: Beauty." Webster's Ninth New Collegiate Dictionary 61 (9th ed. 1987).

The stated purpose of the review of proposed plans for additions or new units in the Subdivision was not to achieve uniformity of exterior architectural design, as Plaintiffs claim, but to maintain uniform quality and aesthetics of architectural design. Assessment of the beauty of exterior design is very much a subjective judgment.

Section 10.1 of the Declaration outlines the review procedure. Section 10.1(a) provides that "no owner shall commence any alteration … without the prior written consent of the Board in accordance with this Article X." Section 10.1(c) requires an owner to submit an application to the Board for

approval. Section 10.1(e) outlines what the Board *considers* in reviewing such an application.

> [T]he Board shall consider harmony of exterior appearance with the existing improvements in the Subdivision, including architectural design, height, grade, topography, drainage (including, but not limited to, whether or not the Alteration would decrease any permeable areas on the Property or increase any impermeable areas on the Property), color and quality of exterior materials and detail, location, construction standards, and other such criteria. The Board may approve with such conditions as it deems reasonable and necessary under the circumstances, including by way of example and not limitation, that the Owner comply with local code and, prior to commencement of any work, that the Owner provide evidence that all applicable local governmental permits have been obtained and that the Owner's contractor(s) has appropriate insurance coverage naming the Association as an insured or additional insured.

(App., Declaration, pp. A50-53).

The Declaration does not mandate anything. It tells the Board to "consider" the subjects listed. An additional indication of this discretion that the Declaration vested in the Board is contained in Section 10.2, which provides: "Design Review Criteria. Pursuant to Section 4.5, the Board may prepare and maintain criteria,

guidelines and procedures for implementation of this Article X, and may amend same from time to time."

Article X of the Declaration does not require that new homes in the Subdivision be of a uniform design or the same as the homes already built. It allows for discretion to approve homes that are architecturally diverse, provided quality and aesthetics of exterior architectural design are maintained. Broad discretion is provided to the reviewers.

The core dispute seems to revolve around the definition of the word "harmony," as contained in the first sentence of 10.1(e):

> [c]onsider *harmony* of exterior appearance with the existing improvements in the Subdivision, including architectural design, height, grade, topography, drainage (including, but not limited to, whether or not the Alteration would decrease any permeable areas on the Property or increase any impermeable areas on the Property), color and quality of exterior materials and detail, location, construction standards, and other such criteria.

(emphasis added).

Plaintiffs argue that the word "harmony" requires the Board to approve only plans that are uniform in appearance to or substantially the *same* as current homes in the Subdivision, in essence a determination of sameness—that is, that the new

home must be the same or substantially the same as the existing homes in the Subdivision.

Plaintiffs' argument is not meritorious. First, the Original Developer could have specified in the Declaration specific design and material requirements if all houses were intended to be the same, but it expressly did not. Moreover, if Plaintiffs' argument were to be followed, each home after the original home in the Subdivision should have been a substantially uniform copy of the original home, but they are not. There has been a substantial evolution in the five homes of the Plaintiffs. They are not the same as the other existing homes in the Subdivision. All agree that there is no recognized architectural style among the current houses.[7]

"Harmony" as used in the Declaration obviously does not mean "the same as" because each of Plaintiffs' homes is different from each of the others. Rather, the plain meaning of "harmony" refers to whether individual components fit together and are compatible with other parts as a whole. The evidence disclosed that there are substantial differences between Plaintiffs' five existing homes, as

[7] Mr. Bolanzini and other witnesses for Plaintiffs acknowledged that various design elements among Plaintiffs' five homes have evolved. The first two homes were square. The Ori home is U-shaped. The Choi home is a ranch style. (Tr. 97–100). Other examples include the introduction of chimneys, grass, location of garage, colored window casements, swimming pools etc. (Tr. 193–195).

built. While there are some common features, they are not identical nor substantially the same.

Plaintiffs would have this Court now determine that Article X of the Declaration mandates that all houses in the Subdivision must, among other things, have a contemporary style, be custom-designed with exteriors consisting entirely of stone and stucco building materials, and contain architectural shingles with glass fibers, low pitched roofs, casement windows oriented to the south, and a variety of other features and requirements. However, the Declaration does not expressly prescribe any such criteria or items.

Contrary to Homeowners' argument that siding and brick are prohibited in the Subdivision, the Declaration contains no such prohibition. The Declaration does not require any specific type of shingles. It does not mandate any specific design, architectural style, or material. If the Original Developer had intended to prohibit or require certain features or materials, the Declaration could have been written in such a way to require or prohibit any design or building material. The Declaration was of record when Plaintiffs acquired their lots in the Subdivision, and Plaintiff Katherine Lemley, an attorney, specifically reviewed the Declaration before the purchase of the lot now owned by Mr. and Ms. Lemley. If she wanted such materials and designs excluded she could have required the Original Developer to add prohibitions to the Declaration. She did not. While the Bank's

deed of trust was subordinate to the Declaration, it was never subjected to mandatory application of the original developer's design ideas.

Plaintiffs claim that brick and siding are prohibited in the Subdivision. However, the Declaration specifically requires homeowners to maintain their siding (App., Declaration, A44, §5.2) and allows homeowners to use brick in the building of fences. (*Id.* §10.2(b)).

Plaintiffs claim that when they decided to build in the Subdivision, they were under the impression that all of the homes in the Subdivision would contain certain features such as stucco and stone exterior, southern facing windows, etc. However, the indenture contains no such requirements or restrictions. Plaintiffs' five homes evolved in design elements from two-story to a ranch home. Plaintiffs point to certain advertisements of the Original Developer as support for their position. Yet, those materials contain the clear caveat that the Original Developer is free to make changes and substitutions at any time. (Tr. 327-328). The marketing materials of the original developer were not referred to in the Declaration or made a part thereof.

Much of Homeowners' argument on this point (Appellants' Substitute Brief at 55-62) consists of an attempt to relitigate factual issues that they lost in the trial court. Much of it is based on testimony of Plaintiffs themselves and their experts, which the trial court did not credit.

Even Plaintiffs' architectural expert, Mr. Bolazina, acknowledged that it is the Declaration that must be used by the Board when reviewing an application for an Alteration, including a new home. He admitted that the Declaration does not say a new home *must* be harmonious, but merely that the Board should consider harmony. (Tr. 184). Mr. Bolazina admitted also the Declaration refers to wood, brick and masonry as approved materials for an Alteration. (Tr. 184). He acknowledged the Declaration does not require, or even mention, the stucco finish that is essential, in Plaintiffs' opinion, to having an approvable design. (Tr. 184).

Plaintiffs copy into their Brief Exhibit P-11 (Substitute Brief at pages 57-59). Plaintiffs represent to this Court that this was a "chart prepared by architect Dennis Bolazina …" that sets forth contrasting architectural characteristics (Plaintiffs' Substitute Brief at 56).

Exhibit P-11 was not prepared by Mr. Bolazina as represented by Plaintiffs. Instead, it was prepared by Homeowners' counsel. Mr. Bolazina testified:

Q. Now, you didn't write down any of your opinions or prepare a report or anything along those lines?

A. No, I did not.

Q. And you did not prepare the original of Exhibit P-11; isn't that right?

A. I did not.

Q. Ok. That was drafted by Mr. Blaesing or somebody from his office; isn't that right?

A. Correct.

Q. The first time you saw it was about a week before your deposition on September 12, 2011; isn't that right?

A. Correct.

(PITr. 155-6).

The chart is full of errors. The Komlos Home does not have vinyl siding as represented. (Tr. 591). Mr. & Mrs. Lemley's home includes black, which is beyond the color palette described in the exhibit. The Komlos Home does not have vinyl windows. (Tr. 585-6). Plaintiffs' homes were not, "designed to accommodate and respect the existing topography of the Subdivision." Quite the contrary, Plaintiffs' builder used dynamite and heavy equipment to change the topography of the Subdivision in order to build Plaintiffs' homes. (Tr. 537).

Plaintiffs under oath made similar statements when trying to distinguish their homes from the Komlos Home. Mrs. Lemley testified that she entered into an agreement with the original developer, "because the subdivision is a rolling landscape, …". (Tr. 229). In addition, she testified that, "the rolling landscape would not be disturbed and the homes would complement the rolling landscape versus it would be flattened so that you could plop any house down on any lot."

(Tr. 229). She testified that it was "fundamental" in the reasoning on fitting houses on the lot to preserve the rolling landscape. Under oath, she said, "you work into the landscape versus, I guess, raping the landscape to build a house on it. So that they [the original developer] used the topography that was there and then they specifically tried to plan it so that whatever mature trees were there could stay and then there were a lot of trees planned to be planted in the subdivision to sort of continue on that green fundamental ideal." (Tr. 242).

There was only one witness who testified at any hearing in this matter that was not hired as an expert witness, a party or party representative – Denis Knock, the City Engineer and Director of Public Works for Des Peres, Missouri for the past 25 years. Mr. Knock testified that he was familiar with Mrs. Lemley's lot. (Tr. 534). He indicated disagreement when informed about Mrs. Lemley's testimony that her house worked into the landscape or topography of the site. (Tr. 535). He testified that he was familiar with the developer, Evolution Developments, and in particular, the grading that was done on site. (Tr. 536-7). He testified that the original developer did not work with the existing topography or rolling landscape but instead, had, "… to do a lot of blasting to remove the rock that was underneath the soil," so much so that, "…the neighbors complained, and the County came out to set up monitors pertaining to the shaking of ground." (Tr. 537). The Original Developer changed the topography of the site with dynamite in order to build Plaintiffs' homes. (Tr. 537). Indeed, Mrs. Lemley's lot had four

mature trees removed before her house was constructed. In addition, the elevation of her lot was reduced by over eight feet of dirt that was removed from her property in order to facilitate the construction of her house. (Tr. 535-7). Finally, Mr. Knock confirmed that neither McKelvey Homes nor the Bank had used any dynamite for any grading work that they had done in the Subdivision. (Tr. 538).

The argument that the Plaintiffs built their homes, "based on the Developer's vision for the Subdivision and in reliance on the protections afforded by the Declaration…", is without factual basis. (Plaintiffs' brief, p. 4). Mrs. Lemley testified unequivocally that she reviewed the Declaration the first time she met with her builder. (Tr. 228). There was no reliance on the Declaration. In fact, she testified that she knew, "that certain things could be amended before [she] got involved in the subdivision." (Tr. 302). Indeed, Mr. and Mrs. Lemley, both practicing attorneys, executed a contract with their builder in which the builder stated, "quality features are *subject to change* and we reserve the right to substitute materials of similar quality at our sole discretion without notice…". (Tr. 328 & Exhibit P-1) (Emphasis added). Plaintiffs' Brief indicates the Developer represented that homes in the Subdivision would be of a certain style. (Plaintiffs' Brief, p. 5), but the representations of the Original Developer were not included in the Declaration.

The testimony of Plaintiffs' appraisal expert, Ernest Demba, was similarly unconvincing. Mr. Demba, an appraiser, had done nothing with respect to the case

as of July 1, 2011 when the Board met to review McKelvey's plans for the Komlos Home. (PITr. 180). Although an appraiser, he did not appraise any of the Plaintiffs' homes or the proposed home to be built by McKelvey. (PITr. 182). Nevertheless, Mr. Demba prepared search criteria that showed ranges of homes in the area of Plaintiffs' homes to be priced between $445,000 and $925,000. (PITr. 205). Mr. Demba testified that the land value throughout the Subdivision was consistent, so he did not consider land values. (PITr. 210). The research Mr. Demba conducted showed the house proposed to be built by McKelvey had an approximate value of $495,100, exclusive of land. (PITr. 222). Whereas, his file indicated the Choi house, exclusive of land, was valued at $370,000, some $125,000 less than what was proposed to be built for Mr. & Mrs. Komlos. (PITr. 222). Similarly, Mr. Demba's records indicated the improvements on the Lemley lot were worth $459,000, some $35,000 less than the improvements to be built for Komlos. (PITr. 223). Likewise, Mr. & Mrs. Stocks' improvements were valued at $494,800, an amount within $300 of what was proposed to be built for Komlos.

If anything, Mr. Demba's testimony showed that the improvements that make up the Komlos Home were more valuable than that of the Lemley's and/or the Choi's. And if anything, Plaintiffs' homes would reduce the value of the Komlos Home.

The Board fully investigated the matter and reached a reasonable result, particularly since no evidence was presented that was any way contrary to the

result. The evidence adduced at trial in no way impacts that well reasoned decision. As such, in accordance with the *Bennett* case, this Court should not substitute its judgment for that of the Board, even if it disagrees with the result.

In short, the four corners of the Declaration militate against Plaintiffs' position in this case. The Board was correct in its understanding that the Declaration allowed the Komlos Home to be built. The Declaration does not require the home to be razed as requested by Plaintiffs in the trial court. There is substantial evidence in the record to support the trial court's determination that Board members Dulle and Ross acted in a reasonable manner, and the trial court properly deferred to their judgment as to whether the Komlos Home complied with the Declaration. In addition, as shown above, their interpretation of the Declaration was correct.

V. THE TRIAL COURT DID NOT ERR IN ORDERING PLAINTIFFS AND THE OTHER LOT OWNERS IN THE SUBDIVISION, ON A PRO RATA BASIS, TO REIMBURSE JEFFERSON BANK FOR THE MAINTENANCE COSTS THAT IT EXPENDED IN 2012 ON BEHALF OF THE LOT OWNERS IN THE SUBDIVISION DURING THE PENDENCY OF THIS CASE BECAUSE THE TRIAL COURT IN THIS EQUITY CASE HAD THE AUTHORITY TO MAKE EQUITABLE ORDERS TO DO EQUITY, AND FOR THE FURTHER REASON THAT PLAINTIFFS DID NOT OBJECT TO THE EVIDENCE PRESENTED IN SUPPORT OF THE MOTION UPON WHICH THE COURT RELIED IN MAKING THE ORDER [RESPONSE TO PLAINTIFFS' POINT V].

Although Plaintiffs have owned homes in the Subdivision going back to as early as 2007, none of them have contributed anything to the upkeep of the Subdivision. (Tr. 443; LF, Motion, pp. 1328-1330). Since the foreclosure in March of 2010, Jefferson Bank has paid for all of the Subdivision's maintenance, including the maintenance of the drainage ponds, street lights, and other common subdivision operational costs. (Tr. 493). The Bank has and continues to advance these operational costs made on behalf of all lot owners in the Subdivision. When the ASC Homeowners Association, Inc. attempted to make assessments pursuant to the Declaration, Plaintiffs refused to recognize such assessments and claimed

that the ASC Homeowners Association, Inc. was not the duly authorized homeowners' association for the Subdivision and that the Board members did not have the authority to make assessments under the Declaration for all of the reasons set forth in this appeal. (LF, Fourth Amended Pet., pp. 901–918). In the meantime, legitimate Subdivision expenses were being advanced by Jefferson Bank for the benefit of all the lots in the Subdivision since the ASC Homeowners Association, Inc. had insufficient funds. (LF, Mot., pp. 1328–1371).

In October 2012, the Bank filed a motion (the "Motion for Reimbursement"), with proof of payment attached, requesting the Trial Court to order each of Plaintiffs and McKelvey Homes, Inc. to reimburse the Bank for such lot owners' *pro rata* portion of the 2012 (to date) costs for the common expenses paid by the Bank on their behalf. (LF, Mot., pp. 1328–1370). The motion requested that each of Plaintiffs' five lots be ordered to pay one eighteenth of the total or $418.27. (*Id*.)

Plaintiffs filed objections to the motion. (LF, Opp'n to Mot., pp. 1371–1374). Plaintiffs' objections, as raised by Plaintiffs on appeal, are that Jefferson Bank has no basis for recovery of the moneys advanced on behalf of Plaintiffs and the other lot owners because (1) Jefferson Bank did not request such as a counterclaim in its pleadings; (2) Jefferson Bank did not present competent evidence to establish its claim; and (3) the procedure contained in the Declaration for making assessments against the lot owners was not followed.

The Motion for Reimbursement was taken up by the trial court. Judge Reno issued her order on November 20, 2012 (LF, Order, p. 1375), which was incorporated into its Final Judgment. (App., Judgment, pp. A29–31).

Plaintiffs, as lot owners in the Subdivision, do not and cannot claim that they should not share in paying for the common expenses of the Subdivision. They cannot claim that, if advanced for them, they should not pay their *pro rata* share. Plaintiffs' Opposition to the Motion did not claim that the maintenance costs Jefferson Bank advanced were not paid by the Bank or that the amount of the costs were not reasonable.

The Bank did, by its Motion for Reimbursement, request the reimbursement for money it had advanced on behalf of all the lot owners. Courts in equity have the authority to enter orders to do equity in equity cases. *Hamill v. Hamill*, 972 S.W.2d 632 (Mo. App. 1998). In *Hamill*, the trial court ordered a party to execute a lease as a condition of transferring certain property. The appellant therein claimed, as Plaintiffs do herein, that the order to sign the lease was beyond the pleadings of the opposing party. At page 633, this Court held:

> In an equitable action, the court has the inherent power to adjust equity between the parties. The rules of pleading do not apply with the same stringency to causes in equity. Equity may shape the remedy to meet the demands of Justice with rigid adherence to any determined form compatible with fairness.

Id. 633 (citing *Osterberger v. Hites Constr. Co.*, 599 S.W.2d 221, 229 (Mo. App. 1980)). Jefferson Bank met that threshold.

If Plaintiffs had a problem with any of the costs, they could have requested discovery with respect to the Motion. They did not. Plaintiffs' opposition to the Motion did not raise any objection on evidentiary issues, nor did it challenge the evidence attached to the Motion.

In sum, the trial court, as a matter of fairness in this case, believed that Plaintiffs should bear a *pro rata* burden for the common expenses of the Subdivision for the year 2012. A motion was filed. Plaintiffs could have required discovery and/or a hearing on the motion. They did not. Plaintiffs are properly bound by the order entered. The trial court did not err in ordering each of Plaintiffs, as lot owners, to reimburse Jefferson Bank $418.27 for advanced common maintenance expenses.

VI. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFFS' CLAIMS FOR DAMAGES BECAUSE PLAINTIFFS' CLAIMS FOR DAMAGES ALL ASSUMED THAT DEFENDANTS BREACHED THE DECLARATION, WHICH DEFENDANTS DID NOT [RESPONSE TO PLAINTIFFS' POINT VI].

The final judgment (App., pp. A29–30) dismissed certain damage claims asserted by Plaintiffs for the reason that all of such claims or elements thereof were

inconsistent with the trial court's findings. (App., Findings, pp. A2–29). Plaintiffs acknowledge that all of their damage claims fail if there was no violation of the Declaration. (Appellant's Substitute Brief at 68).

After listening to testimony and reviewing all of the evidence presented by the parties, the trial court believed and credited the evidence of Defendants. The trial court's finding precluded any damage claim.

Murphy v. Carron applies as this Court reviews the case. 536 S.W.2d 30. There was no breach of the Declaration by Defendants. Therefore, the trial court did not err in dismissing Plaintiffs' damage claims.

RESPONDENT/CROSS APPELLANT JEFFERSON BANK'S POINTS ON APPEAL

Standard of Review

The cross appeal involves the trial court's grant of summary judgment with respect to Jefferson Bank's counterclaims Counts II (slander of title) and III (abuse of process). (App., Final Judgment, p. A29-30). Consequently, the standard of review is *de novo* review by this Court. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS ON COUNT II OF THE JEFFERSON BANK COUNTERCLAIM (SLANDER OF TITLE) BECAUSE THERE WERE AT LEAST DISPUTED ISSUES OF MATERIAL FACT ON ALL ELEMENTS OF SUCH A CLAIM, IN THAT: (A) AS A MATTER OF LAW THE MAY 27, 2010 LIS PENDENS FILED WAS NOT AUTHORIZED BY MO. REV. STAT. § 527.260; (B) THERE WAS AN ISSUE OF FACT RELATIVE TO WHETHER THE UNAUTHORIZED LIS PENDENS WAS MALICIOUSLY PUBLISHED; AND (C) THERE WAS AN ISSUE OF FACT RELATIVE TO WHETHER THE FILING OF THE LIS PENDENS CAUSED PECUNIARY LOSS OR INJURY TO DEFENDANTS.

Count II of Jefferson Bank's counter-claim is for slander of title due to Plaintiffs' filing an unauthorized *lis pendens* in May, 2010. Slander of title has three essential elements: (1) false words concerning the title to property; (2) malice in the publication of such; and (3) injury to the party whose title was slandered. *Tongay v. Franklin Cnty. Mercantile Bank*, 735 S.W.2d 766, 770 (Mo. App. 1987). In a slander of title case involving a *lis pendens*, the filing of an unauthorized *lis pendens* is a substitute for the first prong, "false words." *First Nat'l Bank of St. Louis v. Rincon, Inc.*, 311 S.W.3d 857, 865 (Mo. App. 2011) ("[B]ecause the use

of *lis pendens* in this case was not authorized by Section 527.260, we determine that the wrongful filing of the invalid notices is sufficient to meet the 'false words' requirement.").

A. The May 27, 2010 Lis Pendens Did Not Assert Any Claim Based Upon Any Equitable Right, Claim or Lien Designed to Affect Real Estate.

Section 527.260, the Missouri *lis pendens* statute, provides for the filing of a *lis pendens* notice: "[I]n civil action, *based on any equitable right, claim or lien, affecting or designed to affect real estate*, the plaintiffs shall file for record, with the recorder of deeds of the county in which such real estate is situated a written notice of the pendency of the suit …" Mo. Rev. Stat. § 527.260 (emphasis added). The key to determine whether the *lis pendens* is authorized under the statute is whether the lawsuit of which the notice purports to give notice is "based on any equitable right, claim or lien."

For example, in *First National Bank of St. Louis*, the plaintiff bank filed a civil action based upon a breach of contract relating to a promissory note, a security agreement, and a personal guaranty signed by the defendants. *First Nat'l Bank of St. Louis*, 311 S.W.3d at 859. The personal guaranties promised the prompt payment of any and all indebtedness and other obligations and gave to the bank "a general lien and right of set-off upon and to every deposit account the guarantors had with that bank." (*Id.*). However, when the bank filed its lawsuit on

the note and personal guaranties, it filed a notice of *lis pendens* with the recorder of deeds containing the legal description of real estate titled in the individual guarantors' names. (*Id.*). The individual defendants, like Jefferson Bank in this case, filed a counterclaim for slander of title against their properties, alleging that the bank did not have any claim of lien or equitable right against their properties, rather only a suit to determine an obligation under the contractual personal guaranties. (*Id.*).

The appellate court found that the bank's notices were invalid because they "falsely informed potential purchasers that its pending suit would affect title to the residences when the bank had no basis for an **equitable right, claim or lien." (***Id.* 865) (emphasis added).

If Plaintiffs argue that they may file a *lis pendens* without recourse, the *First National Bank of St. Louis* case destroys that contention. To file a notice of *lis pendens* the litigation must be authorized pursuant to §527.260—that is, the litigation must involve an equitable right, claim or lien and the *lis pendens* must relate to those claims. (*See also, Barnard v. Barnard*, 568 S.W.2d 567 (Mo. App. 1978) (*lis pendens* legally insufficient in a fraudulent conveyance case); *McIlwrath v. Hollander*, 73 Mo. 105 (Mo. 1880) (*lis pendens* not proper in a will contest case because no equitable right, claim, or lien relating to real property was involved).

Here, Plaintiffs' litigation does not seek to assert any equitable right, claim, or lien against the 13 lots of the Subdivision not owned by Plaintiffs. The *lis*

pendens filed by Plaintiffs describes what they are trying to accomplish by this litigation. At LF, Lis Pendens, p. 991, the document identifies three purposes for the declaratory judgment litigation herein: (a) "stating the requirements for new home construction in the" Subdivision; (b) "finding that the plans of Jefferson Bank & Trust Co., Inc. and McKelvey Homes LLC for construction of new homes in the Subdivision violate the" Declaration; and (c) "finding that the Bank and/or McKelvey does not has (sic) the right or authority to rename the Subdivision."

There is no claim of equitable right, claim, or lien being asserted by the description of the declaratory judgment in the *lis pendens*. Plaintiffs are not asserting any claim that will affect title to any of the property owned by Jefferson Bank. In fact, the *lis pendens* acknowledges Jefferson Bank as "Owner" of the property. Where in the description of the litigation do Plaintiffs indicate any claim against any of the property described as being owned by Jefferson Bank? (LF, Dulle Aff., pp. 993–994, ¶¶1–8). The title to the lots owned in the Subdivision is not disputed; Plaintiffs do not claim to have any ownership interest in those lots. The lawsuit does not assert any lien or encumbrance against the title. The lawsuit has nothing to do with any equitable claim or ownership of any lot owned by Jefferson Bank or McKelvey homes.

There is a good policy reason for the *lis pendens* statute to be so restrictive. A *lis pendens* is a powerful weapon. It permits a party, without judicial review, to preclude an owner from alienating his/her property. Plaintiffs used the *lis pendens*

herein exactly for that purpose, preventing Jefferson Bank and McKelvey Homes from conveying the property free of any cloud and preventing McKelvey Homes from conveying property free from any cloud when it builds a home for a customer. (LF, Brennan Aff., pp. 960–961, ¶¶1–4).

The fact of the matter is that the Declaration that Plaintiffs want interpreted is already public record. Any buyer must abide by the terms of the Declaration. There is no justification for Plaintiffs to cloud Jefferson Bank's title with a matter that was already public record.

The Court of Appeals relying on *State ex rel. Bannister v. Goldman*, 265 S.W.3d 280, 284 (Mo. App. 2008), granted a writ of prohibition, pending the outcome of the appeal, against the Trial Court's order that Plaintiffs remove the *lis pendens*. What *Bannister* holds concerning a *lis pendens* during an appeal does not determine whether the *lis pendens* is valid under §527.260. The granting of the writ should not be interpreted that the *lis pendens* in this case was authorized by §527.260. The writ panel relied upon *State ex rel. Shiek v. McElhinney*, 176 S.W. 292 (Mo. App. 1915), in determining that a suit to enforce a restrictive covenant that runs with the land affects the real estate. That case was not an unauthorized *lis pendens* case, rather the issue there was one of proper jurisdiction—that is, whether the case should have been initiated in St. Louis County or in the City of St. Louis. Moreover, it did not hold that the plaintiffs therein had an equitable right, claim, or lien in the land covered by a *lis pendens*.

The *lis pendens* filed by Plaintiffs was not authorized.

B. There Was A Disputed Issue of Fact Whether Plaintiffs filed the Unauthorized Lis Pendens With Malice.

By affidavit, Plaintiff Katherine Lemley denied that the notice of *lis pendens* was filed with malice. (LF, Aff., p. 1100, ¶3). Notwithstanding the denial, malice in law imputes malice from "the mere intentional doing of a wrongful act to the injury of another without legal justification or excuse." *First Nat'l Bank of St. Louis*, 311 S.W.3d at 868 n.3.

Ms. Lemley and her husband are both attorneys. This is not a case where a party might not have understood the requirements for a valid *lis pendens.* In Jefferson Bank's statement of uncontested facts, the bank, based upon the affidavit of Mr. Dulle, asserted that "the lawsuit does not affect the ownership or title to the lots owned by Jefferson Bank or McKelvey Homes or the common ground in the Subdivision," (LF, Statement, pp. 1212–1214) to which Plaintiffs responded that they admitted that the ownership of the property is not contested, but that the suit "affects the real property owned by the Bank and McKelvey in the Subdivision." (*Id.*). Plaintiffs go on to admit that "part of the relief they seek in this lawsuit relates to the interpretation and enforcement of the Declaration." (*Id.* ¶ 8). While the lawsuit impacts what kind of house may be built upon the real estate, at no time do Plaintiffs assert any "equitable right, claim or lien." They knew that their suit and its goals as set forth in the *lis pendens* did not conform to the purposes of

Section 527.260. They wrongfully asserted that the only requirement for a *lis pendens* was that it must have a reasonable relationship to the lawsuit filed. (LF, Opp'n, pp. 1187–1210, ¶3).

Moreover, if acting with pure intent, Plaintiffs would not have overreached with the scope of the property described in the *lis pendens*. There was no need to include the common ground of the Subdivision within the property described in the notice. No homes were going to be built on the common ground. Plaintiffs only wanted to force McKelvey and Jefferson Bank to build homes just like Plaintiffs' on the 13 remaining lots.

A jury is entitled to make the determination as to whether Plaintiffs acted with malice.

C. There Was A Disputed Issue of Fact Relative Whether the Bank Suffered Injury.

In support of its position that Jefferson Bank had been damaged, an affidavit of James Brennan, President of McKelvey Homes, was filed. (LF, Aff., pp. 960–961). Mr. Brennan testified that: "If the lawsuit herein and notice of *lis pendens* filed by Plaintiffs on May 28, 2010 with the Recorder of Deeds of St. Louis County, Missouri against all of the undeveloped lots and common ground in the Subdivision had not been filed by plaintiffs, McKelvey would have purchased by this time a number and, possibly all, of additional lots from Jefferson Bank at the Contract purchase price of at least $200,000.00 per lot." (*Id*.). Plaintiffs filed no

countervailing evidence. This testimony shows that Jefferson Bank has suffered economic damages from the wrongful filing of the *lis pendens*. There remains a genuine issue of fact for the trier of fact on the issue of damages suffered by Jefferson Bank.

In sum, there are remaining issues of material fact to be determined by the trier of fact with respect to Count II of Jefferson Banks' counterclaim. Therefore, the trial court erred in granting summary judgment on Jefferson Bank's slander of title counterclaim.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS ON COUNT III OF THE JEFFERSON BANK COUNTERCLAIM (ABUSE OF PROCESS) BECAUSE THERE REMAINED ISSUES OF MATERIAL FACTS INCLUDING WHETHER: PLAINTIFFS IMPROPERLY FILED THIS LAWSUIT; PLAINTIFFS HAD AN IMPROPER PURPOSE IN FILING THIS LAWSUIT; AND DEFENDANT WAS THEREBY DAMAGED, THE ESSENTIAL ELEMENTS OF AN ABUSE OF PROCESS CLAIM.

Count III of Jefferson Bank's counterclaim is for Plaintiffs' abuse of process in filing this lawsuit. To sustain an action for abuse of process, the facts must demonstrate an illegal and improper use of such process that is not warranted or authorized, an ulterior motive in exercising such process, and damages. *Wessler v.*

Wessler, 610 S.W.2d 650, 651 (Mo. App. 1980). The test employed is whether the process has been used to accomplish some unlawful end or to compel the opposite party to do some collateral thing that he could not be compelled to do legally. Or, stated somewhat differently, the privilege of process may not be used for an unlawful purpose such as using the litigation to extract money or anything of value from another. *Nat'l Motor Club of Mo., Inc. v. Noe*, 475 S.W.2d 16, 23–25 (Mo. 1972).

> The essence of abuse of process is not commencement of an action without justification but is the misuse of process justified in itself for an end other than that which it was designed to accomplish. No liability is incurred where the defendant has done nothing more than pursue the lawsuit to its authorized conclusion regardless of how evil his motive may be ….
>
> Even assuming plaintiff's motives were bad, that alone is not sufficient to sustain a finding that the plaintiff abused process. While an ulterior motive may be inferred from an abuse of process the converse does not hold.

Wessler, 610 S.W.2d at 651–52 (emphasis added).

Plaintiff Katherine Lemley filed an affidavit denying that Plaintiffs filed the lawsuit for a reason other than to obtain the relief prayed for therein and denying that Plaintiffs filed the lawsuit with malicious intent. (LF, Aff., p. 1100, ¶¶4–5).

However, Plaintiff Lemley also attached to her affidavit a Motion to Compel Arbitration filed by Plaintiffs within a matter of days after this lawsuit was filed. (LF, Mot., pp. 1108–1111).

In that motion, Plaintiffs outline that there are concerns about the Subdivision and the interpretation of the Declaration governing the Subdivision. (*Id*. ¶1). In paragraph 3 of that motion, Plaintiffs represent to the Trial Court that paragraph 11.3 of the Declaration contains a mandatory alternative dispute resolution procedure, including binding arbitration, to resolve all the disputes. In addition, in paragraph 6 of the motion, Plaintiffs reiterate that the very dispute at issue in this case must be submitted for resolution by arbitration. In other words, Plaintiffs knew that the filing of this lawsuit was not the proper remedy to resolve disputes. They knew that the Declaration required them to file an arbitration proceeding, not a lawsuit.

The question is, why did they file the lawsuit? It was not to obtain the relief that they now seek in this case. In paragraph 4 of the motion, Plaintiffs state:

> Plaintiff filed this suit against Defendants on May 27, 2010. **The action was filed in order to allow for notice to be given to third parties by way of a *lis pendens* recorded in the office of the St. Louis County Recorder of Deeds**. However, in compliance with ADR Provision, Plaintiffs simultaneously filed with their Petition a

> Motion to Stay these proceeding pending alternative dispute resolution.

(emphasis added).

In short, this lawsuit was not filed to have the judicial system determine the disputes. It was to put a cloud on the title of the property owned by Jefferson Bank by filing a *lis pendens* notice. A jury hearing this evidence could very well believe that Plaintiffs filed this lawsuit to stop Jefferson Bank from being able to sell vacant lots to McKelvey Homes. A jury could well believe that Plaintiffs filed this lawsuit to prevent McKelvey Homes from building and transferring homes to its customers, and not to resolve disputes over the meaning of the Declaration.

With respect to the issue of whether Plaintiffs' ulterior motive in filing this lawsuit damaged Jefferson Bank, as indicated above, an affidavit of James Brennan, President of McKelvey Homes, was filed. (LF, Aff., pp. 960–961). Mr. Brennan testified that:

> If the lawsuit herein and notice of *lis pendens* filed by Plaintiffs on May 28, 2010 with the Recorder of Deeds of St. Louis County, Missouri against all of the undeveloped lots and common ground in the Subdivision had not been filed by plaintiffs, McKelvey would have purchased by this time a number and, possibly all, of additional lots from Jefferson Bank at the Contract purchase price of at least $200,000.00 per lot.

Plaintiffs filed no countervailing evidence. This testimony shows that Jefferson Bank has suffered economic damages from the improper filing of this lawsuit.

With respect to each the three essential elements of Jefferson Banks' abuse of process claim, there remain genuine issues of fact for the trier of fact. Therefore, the trial court should not have granted summary judgment in favor of Plaintiffs on Counts II and III Jefferson Bank's counterclaim.

This Court should reverse the Trial Court's grant of summary judgment against Jefferson Bank with respect to its slander of title and abuse of process claims and remand those claims for trial.

CONCLUSION

For all of the foregoing reasons, this Court should affirm:

- The trial court's grant of summary judgment establishing that the ASC Homeowners' Association is the duly authorized homeowners' association to govern the Subdivision in accordance with the Declaration;
- The trial court's determination that Messrs. Dulle and Ross are authorized to serve as directors of the ASC Homeowners' Association;
- The trial court's determination that Messrs. Dulle and Ross acted reasonably in approving the Komlos Home to be built in the Subdivision;

- The trial court's determination that the approval of the Komlos Home to be built in the Subdivision was proper and in compliance with the provisions of the Declaration;

- The trial court's judgment ordering the Plaintiffs to pay a pro rata portion of the common expenses of the Subdivision in 2012 advanced by Jefferson Bank on behalf of all the lot owners in the Subdivision; and

- The trial court's dismissal of Plaintiffs' damage claims.

With respect to the appeal of Jefferson Bank, this Court should reverse the trial court's grant of summary judgment with respect to Counts II (Slander of Title) and III (Abuse of Process) of Jefferson Bank's counterclaims and remand the same for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Brief complies with Rule 55.03 and the length limitations contained in Rule 84.06(b), in that there are 20,136 words in the brief (except the cover, signature block, certificate of service, and appendix) according to the word count of the Microsoft Word word processing program used to prepare the brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of April, 2015 the foregoing brief was filed electronically with the Clerk of Court and served by operation of the Court's electronic filing system upon:

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