IN THE SUPREME COURT OF MISSOURI

No. SC95865

FIRST NATIONAL BANK OF DIETERICH,

Respondent,

v.

POINTE ROYALE PROPERTY OWNERS' ASSOCIATION, INC.

Appellant.

APPEAL FROM THE TANEY COUNTY CIRCUIT COURT
HONORABLE TONY WILLIAMS, JUDGE

SUBSTITUTE REPLY BRIEF OF APPELLANT POINTE ROYALE PROPERTY OWNERS' ASSOCIATION, INC.

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The Bank argues that "successors in title" is ambiguous and urges the Court to apply certain rules of construction to determine the intent of the parties. Resp. Corrected Sub. Br. at 15. The Bank's argument fails for three reasons. First, the intent of the parties to the POA Declaration is clear. Accordingly, the principles of *expressio unius est exclusio alterius* and *ejusdem generis* do not apply. Secondly, even if those principles did apply, the Bank misapplies them. Finally, the Bank's construction renders the terms "successors in title" meaningless and contradicts the intent of the parties.

a. The reference to "successors in title" is not informed by the preceding reference to the Owner's "heirs, devisees, personal representatives and assigns."

The Bank argues that the reference to "successors in title" in the sentence addressing the personal obligation to pay past due assessments ("the personal obligation clause") is informed by the reference to the Owner's "heirs, devisees, personal representatives, and assigns" in the prior sentence addressing the creation of the lien for past due assessments ("the lien clause"). *See* Resp. Corrected Sub. Br., at 17. The Bank reaches this conclusion by misapplying two rules of construction: (1) *expressio unius est exclusio alterius ("expressio unius")* and (2) *ejusdem generis.*

Although these maxims are rules of construction, they are not rules of law and cannot be used to override the intent of the parties. *City of Caruthersville v. Faris,* 146 S.W.2d 80, 86 (Mo. App. 1940). Additionally, rules of construction are only applied

when a contract is ambiguous.[1] *Bailey v. Federated Mut. Ins. Co.*, 152 S.W.3d 355, 358 (Mo. App. W.D. 2004). Even if the Declaration were ambiguous, *expressio unius* and *ejusdem generis* do not help the Court discern the parties' intent in this case and should not be applied.

(1) Expressio Unius

Expressio unius means that the express mention of one thing implies the exclusion of another. *Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266, 269 (Mo. banc 2005). This maxim must be used with great caution and "only when it would be natural to assume by a strong contrast that that which is omitted must have been intended for the opposite treatment." *Id.*

Expressio unius does not apply in this case. *Expressio unius* applies when a statute or contract expressly enumerates the subjects or things on which it is to operate or the persons affected by it and implicitly excludes the subjects or things not listed. *Wilbur Waggoner Equipment Rental and Excavating Co., Inc. v. Bumiller*, 542 S.W.2d 32, 39

[1] The Declaration provision at issue is not ambiguous. It states: "If Assessments have become delinquent, such Assessments shall bind such property in the hands of the then Owner, his heirs, devisees, personal representatives and assigns. The personal obligation of the Owner to pay such Assessments shall remain his personal obligation and shall pass to successors in title." Def. Ex. A at Tab B, p. 17, § 7, ¶2; Appx. A60. This provision is not susceptible to more than one reasonable interpretation and a bank that acquires title after a foreclosure is a "successor in title."

(Mo. App. E.D. 1976). In construing the statute or contract, the subjects or things or persons not expressly mentioned are considered excluded. *Id*. For example, in *Schudy v. Cooper*, this Court held that even if the statute in question were ambiguous, leasing improved real property to a commercial tenant is not among the activities deemed to be a "revenue producing enterprise" because the General Assembly excluded "commercial leases" by expressly including "residential leases" as a "revenue producing enterprise" in the statute but failing to mention "commercial leases". *Schudy v. Cooper*, 824 S.W.2d 899, 901 (Mo. banc 1992). Accordingly, even though leasing property to a commercial tenant is a "revenue producing enterprise" under the common meaning of the term, the General Assembly abandoned the common meaning by expressly listing residential leases and omitting commercial leases. *Id.*

In *Schudy*, there was no mention of "commercial leases" in the list of activities that constituted a "revenue producing enterprise" even though "residential leases" was on the list. Accordingly, it made sense to exclude "commercial leases" as a "revenue producing enterprise" because if the General Assembly had intended to include "commercial leases" in the list, they would have done so since they included "residential leases." That same type of logic doesn't hold up when applied to the present case because here, we have two different "lists." The first "list" addresses the types of owners whose property may be subject to a lien—"the then Owner, his heirs, devisees, personal representatives and assigns." Def. Ex. A at Tab B, p. 17, §7, ¶ 2; Appx. A60. The second "list" enumerates the types of owners from whom the Association can collect past due assessments—"the Owner" and his "successors in title." Def. Ex. A at Tab B, p. 17, §7, ¶

2; Appx. A60. The lien clause and the personal obligation clause are two different sentences addressing two different things. For that reason, *expressio unius* doesn't apply.

(2) Ejusdem Generis

The rule of *ejusdem generis* does not apply when a contract is unambiguous. *Matthews v. First Christian Church of St. Louis*, 355 Mo. 627, 633 (Mo. 1946). However, even if the Declaration were ambiguous, the doctrine of *ejusdem generis* does not assist this Court in determining the parties' intent in this case.

Under the rule of *ejusdem generis*, "where general words follow particular ones, the general ones will be limited in their meaning and restricted in their operation to things of like kind and nature with those particularly specified." *Cades v. Mosberger Lumber Co.*, 291 S.W.178, 179 (Mo. App. 1927). The rationale behind the rule is to provide guidance to the intention of the parties and prevent an unintended construction of general language. *Standard Operations, Inc. v. Montague*, 758 S.W.2d 442, 444 (Mo. banc. 1988). It does not apply when it is clear from the language that no such limitation was intended. The rule need not be used when it creates more hindrance than help. *Payne v. Grimes Real Estate Co.*, 660 S.W.2d 755, 757 (Mo. App. E.D. 1993). Moreover, the rule does not apply where the specific words signify subjects greatly different from another one or where the specific words embrace all objects of their class, so that the general word must bear a different meaning from the specific words or be meaningless. *State v. Eckhardt*, 232 Mo. 49, 322 (Mo. 1910).

b. The Bank's construction of the Declaration renders "successors in title" meaningless.

The Bank's application of the rule of *ejusdem generis* renders "successors in title" meaningless. Missouri courts have held that the rule of *ejusdem genris* should not be applied when the particular words embrace all objects of their class, and, therefore, render the general language meaningless. *City of Caruthersville v. Faris,* 146 S.W.2d 80, 86 (Mo. App. 1940). Such was the holding in *City of Caruthersville v. Faris,* 146 S.W.2d 80, 86 (Mo. App. 1940). In that case, the Court of Appeals was asked to decide if the broader language of a statute allowed a city to expand its cemetery by condemning the defendant's land or whether the condemnation of private property was limited by more particular language in the statute under the principle of *ejusdem generis*. *Id.* There, the statute in question stated: "Private property may be taken by the cities of the third class for public use for the purpose of establishing, opening, widening, extending, or altering any street, avenue, alley, wharf, creek, river, watercourse, market place, public park or public square, and for establishing market houses, and *for any other necessary public purposes*." *Id.* Accordingly, the issue was whether "for any other necessary public purposes" was limited by the particular language that preceded it. *Id.* The Court of Appeals held that the language wasn't limited to the particular words that preceded it since the "general provision quoted above either confers power upon the city to condemn the land to enlarge its cemetery *or it has no meaning.*" *Id.*

Likewise, the Bank's construction renders the term "successors in title" meaningless. To better demonstrate how the Bank's construction renders the term

meaningless, it is helpful to compare the Bank's argument to an example of the rule of *ejusdem generis* provided by this Court in *Standard Operations, Inc. v. Montague*. 758 S.W.2d 442, 444 (Mo. banc 1988). In that case, the court explained the rule of *ejusdem generis* by way of example: "…a document referring to 'horses, cattle, sheep and other animals' will usually be construed as including goats, but not bears or tigers." *Standard Operations, Inc. v. Montague*, 758 S.W.2d 442, 444 (Mo. banc 1988). Thus, in the example provided by the Missouri Supreme Court, the general term—"other animals"—is construed to be limited to animals of a similar type or class, such as farm animals, like a goat, but not exotic animals, like a tiger. The term—"other animals"—is not, however, *defined* as "horses, cattle, and sheep." It includes animals other than "horses, cattle, and sheep." The problem with the Bank's application of the rule of *ejusdem generis* is that the Bank essentially *defines* "successors in title" as "heirs, devisees, personal representatives, and assigns." Such a construction renders the term "successors in title" meaningless since the construction does not have any meaning beyond the specific terms—"heirs, devisees, personal representatives, and assigns." Accordingly, the rule of *ejusdem generis* does not apply. [2]

[2] Another problem with the Bank's application of the rule of *ejusdem generis* is that it ignores the fact that the sentences containing the specific class of people—"heirs, devisees, personal representatives and assigns"—is addressing a different topic than the sentence containing the broader language—"successors in title." One addresses the creation of a lien secured by the property. The other sentence addresses the personal

c. The Bank's construction of the Declaration frustrates the intent of the parties.

The Bank argues that if the developer had intended for "successors in title" to be interpreted more broadly than "heirs, devisees, personal representatives and assigns" in the personal obligation clause, the developer would have used the term "successors in title" in the lien clause as well. Resp. Corrected Sub. Br. at 24. This argument is nothing more than a red-herring. [3]

The enforcement and interpretation of the lien clause is not an issue on appeal before the Court. Pointe Royale has long ago conceded that Pointe Royale's liens were eliminated by the Bank's foreclosure. As a result, what the developer intended when drafting the lien clause doesn't matter for purposes of this appeal.

The Bank attempts to create an ambiguity by focusing its analysis on the lien clause. As previously set forth, the personal obligation clause is unambiguous. No rules

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obligation to pay the assessments. Because the sentences address different topics, the rule of *ejusdem generis* is inapplicable.

[3] Pointe Royale does not concede that the phrase "the then Owner, his heirs, devisees, personal representatives and assigns" is a limitation on the lien clause or in any way limits the lien enforcement rights of Pointe Royale against any person or entity. However, this issue is not before the Court on appeal and as such, Pointe Royale sees no point in setting forth its arguments on the matter. To the extent it was discussed by the Southern District in its Opinion, it is only dicta.

of construction are necessary. Even if the Court accepted the Bank's suggestion that the personal obligation clause was ambiguous, the rules of construction and contract interpretation provided by the Bank do not assist this Court in determining the intent of the parties.[4]

d. The Judgment should be reversed.

The POA Declaration's language is clear and unambiguous. Where contract terms are unambiguous, the court must enforce the terms as written. *MIF Realty v. Pickett*, 963 S.W.2d 308, 311 (Mo. App. W.D. 1997). The intent of the parties can be determined from the plain and ordinary language used in the Declaration. That language indicates that the parties intended to make all successors in title—including banks that purchase property at a foreclosure sale—personally liable for the payment of past due assessments. Accordingly the trial court judgment finding in favor of Bank should be reversed.

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[4] The Bank also argues that the Declaration does not use the term "joint and several liability" and notes that the Southern District observed that it was "inherently possible" for an owner's obligation to "remain his personal obligation" and to "pass to successors in title." Resp. Corrected Sub. Br. at 31. It's true that the POA Declaration does not use the term "joint and several liability." Pointe Royale was describing the effect of the language and the intent of the Developer when it used the term. The purpose of including this language was to allow the Association to collect from the delinquent owner and/or the successor in title.

Reply to Respondent's Response to Point II

a. Issue Presented to Trial Court

The next argument presented by the Bank is that because Pointe Royale did not argue to the trial court that Pointe Royale POA is not a condominium association subject to the provisions of Chapter 448, Pointe Royale is barred from making that argument on appeal. The Bank's argument is based on the principle that a party is not entitled to claim error on the part of the trial court when the party did not give the court an opportunity to rule on the question. See e.g. *Niederkorn v. Niederkorn,* 616 S.W.2d 529, 535 (Mo. App. E.D. 1981).[5] The Bank's argument is inapposite to the present case since the trial court had an opportunity to rule on the question and, in fact, did so. Because the trial court had an opportunity to rule on the question, Pointe Royale is not barred from claiming an error in the trial court's ruling on the issue.

[5] An example of where this principle would be applicable and useful is where one party offers an exhibit into evidence without laying the proper foundation and the opposing party fails to object. The court then enters a judgment in favor of the party who offered the exhibit into evidence. The party who failed to object cannot claim error by the trial court in admitting the exhibit since that party failed to give the trial court an opportunity to correct and rule on the issue.

The purpose of the rule requiring a party to present an issue to the trial court is "to prevent surprise to the opposing party and permit the trial court an opportunity to fairly identify and rule on the issue." *Winston v. Reorganized Sch. Dist. R-2, Lawrence Cnty., Miller*, 636 S.W.2d 324, 327 (Mo. banc 1982). Every case that the Bank cites to in support of its argument is distinguishable from the present case because in those cases, the trial court did not have an opportunity to rule on the issue being raised on appeal. *See e.g. Mayes v. St. Luke's Hosp. of Kansas City,* 430 S.W.3d 260 (Mo. banc 2014) (trial court did not have an opportunity to rule on the claims that section 538.225 is unconstitutional because plaintiffs failed to present the claims to the court.); *Niederkorn v. Niederkorn*, 616 S.W.2d 529, 535-36 (Mo. App. 1981) (party was precluded from raising on appeal claim that the trial court erred by appointing a guardian ad litem for the purpose of interviewing a child when the party failed to call to the trial court's attention the alleged error or give the trial court an opportunity to rule on the issue).

The Bank's argument also fails from a policy perspective. Taken to its logical extreme, the Bank's reasoning would require a party to anticipate and object to every possible way a trial court could misapply the law before final judgment is entered. While attorneys and parties can make educated predictions about how a court will rule based on case law and reasoning, attorneys are not mind readers. It is impossible for an attorney or party to anticipate every way a trial court may misapply the law before a judgment is rendered. And, the more illogical the reasoning, the less likely an attorney would be able to predict the judge's ruling. The unintended consequence of such a requirement would be the affirmance of the most ill-reasoned trial court decisions simply because the

reasoning was so illogical, the attorney did not think the trial court would possibly apply such absurd reasoning. It defies logic and defeats the purpose of our appellate system to require an attorney to object to a trial court's reasoning before the final judgment containing its reasoning has been rendered.

Because the trial court had an opportunity to rule on the question of whether the Uniform Condominium Act applied to the Pointe Royale and in fact did so, the Bank's argument is without merit. Accordingly, Pointe Royale's claim is not barred.

b. Pointe Royale Did Not Invite Error

The Bank claims that Pointe Royale led the trial court into error by suggesting Section 448.3-116 applied. Pointe Royale did not suggest to the trial court that Section 448.3-116 applied. Rather, Pointe Royale argued that even if it did apply, the trial court was misapplying the statute. While it is true that a party may not lead a trial court into error and then complain about the action on appeal, the Bank provides no actual example of Pointe Royale leading the trial court into error. In support of its position, the Bank references pages 42, 59, and 60 of the Supplemental Legal File. These references to the legal file do not demonstrate Pointe Royale leading the trial court into error. Page 42 of the Supplemental Legal File refers to a portion of the argument made by Pointe Royale in its trial brief and pages 59 and 60 refer to Pointe Royale's suggestions in support of its Findings of Fact and Conclusions of Law. These documents addressed the reason why the Bank's argument to the trial court regarding Section 448.3-116 was meritless—specifically, that Section 448.3-116 deals with liens rather than the underlying obligation to pay assessments and that subsection 6 of the Section states that it does not prohibit

actions to recover assessments. Supp. L.F. 42, 59, 60. Pointe Royale never argued that Chapter 448.3-116 applied to Pointe Royale POA; it merely pointed out that Bank's interpretation of the statute is incorrect.[6] Accordingly, Pointe Royale did not invite error.

Reply to Respondent's Response to Point IV

The Bank's final argument is that Pointe Royale asserts error for a ruling that the trial court did not make in Point IV.

In Point IV, Pointe Royale asserts:

> The trial court erred in finding that Pointe Royale POA was not entitled to attorney's fees, late fees, and interest incurred in connection with the collection of assessments that accrued prior to the Bank's foreclosures, because under Missouri law, a party may recover attorney's fees when expressly authorized by a contract, in that the POA Declaration contain a covenant giving Pointe Royale the right to collect reasonable attorney's fees, and late fees in connection with delinquent assessments. App. Sub. Br. at 4-5.

[6] The Bank also accuses Pointe Royale of playing a game of "Hide the Pea"[6] by "saying nothing about the Condominium Owners' Association's absence…" Resp. Corrected Sub. Br. at 37. The Bank has overlooked Footnote 4 of Pointe Royale's Substitute Brief which acknowledges that the COA was not appealing the judgment. Pointe Royale has hidden no peas.

Pointe Royale claimed this error based on the trial court's finding "…that [because] Pointe Royale POA . . . [was] not entitled to the payment of dues accruing prior to the foreclosure of the Deeds of Trust, the Court also finds that Pointe Royale POA …[was] not entitled to payment of attorney's fees, late fees, interest, and lien filing fees accruing prior to the foreclosure of the Deeds of Trust." L.F. 164, 165.

Contrary to Bank's argument, the trial court ruled that Pointe Royale POA was not entitled to attorney's fees, late fees, and interest incurred in connection with the collection of assessments that accrued prior to the Bank's foreclosures. While it is true that the trial court's denial of attorney's fees to Pointe Royale was based on the trial court's finding of the Bank as a prevailing party, this finding was an error because the POA Declaration's obligate successors in title to pay past due assessments and entitle Pointe Royale to the collection of attorney's fees, late fees and interest in connection with the collection of assessments. Accordingly, the trial court's finding that Pointe Royale POA was not entitled to attorney's fees, late fees, and interest should be reversed.

CONCLUSION

The trial court's judgment should be reversed. The POA Declaration obligates successors in title to pay delinquent assessments that accrued prior to the transfer of title. The Bank is a successor in title. The trial court erred by not enforcing this provision against the Bank because the language in the Declaration is clear and unambiguous. Likewise, the trial court erred in applying the Missouri Uniform Condominium Act to Pointe Royale because Pointe Royale is not a condominium association and is, therefore, not subject to the Missouri Uniform Condominium Act. Even if Pointe Royale was

subject to the Missouri Uniform Condominium Act, the trial court misapplied Section 448.116 because the extinguishment of a lien does not extinguish the underlying obligation to pay assessments. Finally, the trial court erred in not awarding Pointe Royale attorney's fees. For all these reasons, this Court should reverse the trial court's judgment.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

COMES NOW Karl Finkenbinder, of Schenewerk & Finkenbinder, Attorneys at Law, L.L.C., and states that this Brief complies with the limitations contained in Supreme Court Rule 84.06.

I further state that the number of words contained in this Brief are 3,613, that the number of lines contained in this Brief are 388, and that this Brief was prepared with and formatted in Microsoft Word 2011 for Mac.

/s/Karl Finkenbinder__
Karl Finkenbinder

CERTIFCIATE OF SERVICE

COMES NOW Karl Finkenbinder, of Schenewerk & Finkenbinder, Attorneys at Law, LLC, and states that the Substitute Reply Brief of Appellant Pointe Royale Property Owner's Association, Inc., was electronically filed with the Clerk of the Court via the Electronic Filing System pursuant to Supreme Court Rule 103.08, on December 30, 2016. A copy of Appellant's Substitute Reply Brief was also delivered electronically on this day to the following counsel for Respondent: Richard Schnake: Rschnake@nnlaw.com; and Donald Ingrum: Don@ingrumlaw.com.

/s/ Karl Finkenbinder__
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