Supreme Court of Missouri

No. SC95865

FIRST NATIONAL BANK OF DIETERICH,

Respondent,

v.

POINTE ROYALE PROPERTY OWNERS' ASSOCIATION, INC.,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF TANEY COUNTY, MISSOURI
Honorable Tony W. Williams, Judge

CORRECTED
RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Circuit Court of Taney County. Respondent First National Bank of Dieterich agrees that this Court has jurisdiction.[1]

The Bank foreclosed its deeds of trust on certain condominium units in Pointe Royale Subdivision. Pointe Royale Property Owners' Association (the "POA") and Pointe Royale Condominium Owners' Association refused to release their liens, in order to clear title, without payment of assessments and that accrued between the dates the deeds of trust were recorded and the dates when the Bank bought the units at foreclosure. The Bank paid all amounts demanded and then sued the Associations. In Count I, it sought a declaration that the Associations were obligated to release their liens and a declaration as to what the Bank owed for dues and assessments accruing after the foreclosures, sought a refund of dues and assessments that it had paid pursuant to the Associations' improper demands; sought an injunction to prohibit the Associations from denying the Bank and its successors and

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[1] Parenthetically, for correctness, the Bank's name was "First State Bank of Red Bud," not "Redbud." It merged with and now is known as First National Bank of Dieterich, not "Dieterick." L.F. 101 ¶ 1. *See* App. Sub. Br. at 1.

assigns the use of amenities, and requested an award of attorneys' fees and costs. In Count II, it asserted a claim for slander of title. The Associations counterclaimed.

The trial court entered judgment in favor of the Bank on January 26, 2015, with respect to Count I, and it denied the Associations' counterclaim. L.F. 11, 160–70. It left the slander of title claim unresolved, since that claim hinges on the judgment on Count I, but it found that the judgment "is final for the purposes of appeal in that there is no just reason for delay." L.F. 170. *See* Rule 74.01(b).[2] There were no after-trial motions. L.F. 11. The judgment thus became final for purposes of appeal on February 25, 2015. Rule 81.05(a)(1).

The Associations filed a Notice of Appeal on either February 27 or March 3, 2015. L.F. 11, 171. The docket sheet shows that the Notice of Appeal was filed on February 27, and the circuit clerk signed and dated her memorandum, showing that she mailed the Notice of Appeal to this Court, that day, but the clerk's actual filing stamp date was March 3. L.F. 11, 171,

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[2] The Southern District held that the judgment is appealable. First Nat. Bank v. Pointe Royale Property Owners' Ass'n, No. SD33797, 2016 WL 3564205, at *3–*4 (Mo. App., S.D., June 29, 2016). Neither party takes issue with that ruling.

173. Regardless whether the Notice of Appeal was filed February 27 or March 3, it was timely. Rule 81.04(a).

Subsequently, although Appellant's Substitute Brief apparently says nothing about it, the *Condominium* Owners' Association abandoned its appeal. *See* App. Br. at 1 n.1, *First Nat. Bank v. Pointe Royale Property Owners' Ass'n,* No. SD33797, 2016 WL 3564205 (Mo. App., S.D., June 29, 2016). It filed no brief in the Court of Appeals, which results in affirmance of the judgment against the Pointe Royale Condominium Owners' Association, since the failure to file a brief abandons any claim of error. *E.g., Rosemann v. Roto-Die Co.,* 947 S.W.2d 507, 510–11 (Mo. App. 1997).

Following affirmance by the Court of Appeals, this Court granted transfer. Order of Nov. 2, 2016, *First Nat. Bank v. Pointe Royale Property Owners' Ass'n,* No. SC95865 (Mo. banc Nov. 2, 2016). Jurisdiction therefore now lies in this Court.

STATEMENT OF FACTS

Pointe Royale fails to state that it was not the only party at the outset of this case or the only appellant.

The Bank initially sued both the Property Owners' Association, the appellant here, and the Pointe Royale Condominium Owners' Association. L.F. 5, 13–19. In Count I, it sought a declaration that the Associations were obligated to release their liens and a declaration as to what the Bank owed for dues and assessments accruing after the foreclosures, sought a refund of dues and assessments that it had paid pursuant to the Associations' improper demands; sought an injunction to prohibit the Associations from denying the Bank and its successors and assigns the use of amenities, and requested an award of attorneys' fees and costs. L.F. 13–17. In Count II, it asserted a claim for slander of title. L.F. 17–18.

The Associations filed a joint Answer to the Petition, L.F. 58–63, and both filed a Counterclaim against the Bank, L.F. 64–95.

When the trial court ruled in favor of the Bank and against both associations on their counterclaims, both the Property Owners' Association and the Condominium Owners' Association appealed. L.F. 171–73. But only the Property Owners' Association, which appeals here, filed a brief. It noted that "Pointe Royale Condominium Owners' Association, Inc. ('Pointe Royale COA') was also originally a party to this appeal. However, Pointe Royale

COA no longer appeals the trial court's judgment." App. Br. at 1 n.1, *First Nat. Bank v. Pointe Royale Property Owners' Ass'n,* No. SD33797, 2016 WL 3564205 (Mo. App., S.D., June 29, 2016).

ARGUMENT

I

(*Responding to Appellant's Point I*)

It is unfortunate reality that a lender sometimes must foreclose its security lien on the property of a defaulting mortgagor. The economic conditions in Missouri and throughout the country during the Great Recession that followed the 2008 collapse resulted in countless foreclosures. All too often, without another bidder to buy at the sale, the jilted lender becomes the unwilling property owner. That happened here.[3]

As Pointe Royale says, the overarching principle here is to determine and effectuate the *parties'* intent. App. Sub. Br. at 16. No lender forced to buy at its own foreclosure sale would *ever* intend, as the buyer becoming subject to the covenants, to assume the defaulting owner's personal liability for delinquent assessments whose liens it had just foreclosed. To suggest that a priority lender, knowing fully well that it can eradicate the liens, would agree to pay the underlying assessments anyway is truly what, "as a matter of logic, doesn't make sense." *Id.* at 21.

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[3] The deeds of trust on the condominium units in question were recorded between July 9, 2004, and September 14, 2007. L.F. 103–14. The Bank foreclosed them in sales held March 12 and October 21, 2010. L.F. 103 ¶ 9.

The disputed provision is nothing if not a sly[4] attempt to foist personal liability upon an unsuspecting new owner. Even in the context of only

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[4] The original 1986 declaration was executed by Steven S. Redford as president of both the developer and the Property Owners' Association. App. A37. The Missouri Attorney General's office investigated Redford in 1988 in an investigation of timeshare sales at Treasure Lake near Branson. *Webster Contract Contradiction,* ST. LOUIS POST-DISPATCH, Dec. 19, 1991, at 26. In July 1992, Redford "pleaded guilty to fraud in what prosecutors called the biggest forfeiture of hidden bankruptcy assets in U.S. history," admitting that "he concealed nearly $5 million in cash and property from the Bankruptcy Court" but claiming that he had assets of only $41,900 and debts of $12.6 million. ORLANDO SENTINEL, July 19, 1992 (retrieved Dec. 16, 2016, at <articles.orlandosentinel.com/1992-07-19/news/9207190313_1_bankruptcy-redford-assets>). In May 1993, Redford pleaded guilty to federal charges that implicated former Missouri Attorney General William Webster, saying that he had bought a condominium project from Webster in exchange for better treatment from the Attorney General's office in its investigation of a resort that he owned. *Ex-Official Admits Fraud in Missouri,* N.Y. TIMES, June 3, 1993 (retrieved Dec. 16, 2016, at <nytimes.com/1993/06/03/us/ex-official-admits-fraud-in-missouri.html>).

Article X, § 7, itself—leaving aside, for the moment, the greater context of the entire declaration—the disputed provision is ambiguous. It immediately follows a sentence that *limits* the number of owners whose property is bound by liens of the assessments, and its reference to "successors in title" must accordingly be read in that context. Furthermore, as the Court of Appeals said, it is "inherently impossible" both to leave the owner personally liable for assessments but also to "pass" that liability to the owner's "successors in title." *First Nat. Bank v. Pointe Royale Property Owners' Ass'n,* No. SD33797, 2016 WL 3564205, at *5 (Mo. App., S.D., June 29, 2016). *See* Def. Ex. A at Tab B, p. 17, § 7, ¶ 2; App. A60. To "pass" liability requires some sort of transfer.

Consistent with the sentence that precedes it, the disputed provision's reference to passing liability to the owner's "successors in title" means that those who claim under the owner by virtue of inheritance or conveyance assume the owner's personal obligation to pay the assessments. It does not mean that liability alights on one to whom the owner involuntarily loses ownership by virtue of foreclosure. So it does not mean that the Bank, having already been forced to foreclose its deeds of trust because of the owners' default, must also be forced to pay the owners' delinquent assessments, which were subordinate to the deed of trust, simply because it had to buy the property at foreclosure in order to protect its security.

The purposes of foreclosure are "to terminate all interests junior to the mortgage being foreclosed and to provide the sale purchaser with a title identical to that of the mortgagor as of the time that mortgage was executed." RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 8.2 cmt. a (1997). It would subvert those purposes to let Pointe Royale end-run foreclosure by foisting upon a lender the obligation to sink yet more money into property through a covenant burdening the lender personally with the defaulting owner's unpaid assessments if it bids in the debt at the foreclosure sale.

Faithful to these purposes, the language of this declaration does not do that. The trial court reached the right result, and the Southern District ruled correctly. The judgment should be affirmed.

A. *Standard of review.*

The issue here is one of law. "The principles of contract law apply when interpreting an Indenture. . . . Specifically, this Court seeks to give effect to the parties' intent." *The Arbors at Sugar Creek Homeowners Ass'n v. Jefferson Bank & Trust Co.,* 464 S.W.3d 177, 183 (Mo. banc 2015). Contract interpretation is a question of law that this Court reviews *de novo. Schmitz v. Great Am. Assurance Co.,* 337 S.W.3d 700, 705 (Mo. banc 2011).

Review is governed by *Murphy v. Carron,* 536 S.W.2d 30 (Mo. banc 1976). This Court must affirm unless the trial court erroneously declared or applied the law. *Id.* at 32. Thus, this Court reviews "the trial court's

determination independently, without deference to that court's conclusions." *Pearson v. Koster,* 367 S.W.3d 36, 43–44 (Mo. banc 2010). In a judge-tried case such as this one, appellate courts

> are "primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result." . . . To that end, the judgment must be "affirmed if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient." . . . This rule is applicable particularly when the trial court reaches the "correct result in a declaratory judgment action."

Rouner v. Wise, 446 S.W.3d 242, 249 (Mo. banc 2014).

B. *The reference to the owner's "heirs, devisees, personal representatives and assigns" informs the reference to "successors in title."*

The covenants specify who bears responsibility for paying the assessments. For convenience, the operative sentences read:

> 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; App. A60 (emphasis added).

"The intention of the parties comes from the plain language of the covenant, but must also be considered in light of the entire context of the instrument containing the covenant." *Mullin v. Silvercreak Condominium Owner's Ass'n,* 195 S.W.3d 484, 490 (Mo. App. 2006). The Court cannot consider words or phrases in isolation but "must look at the *entire* Declaration and consider the purpose and nature of the contract. . . . Each provision is construed in harmony with the others to give each provision a reasonable meaning and avoid an interpretation that renders some provisions useless or redundant." *Wildflower Community Ass'n v. Rinderknecht*, 25 S.W.3d 530, 534 (Mo. App. 2000) (emphasis added).[5]

"The English language need only be read sequentially[.]" *Goldberg v. State Tax Comm'n,* 639 S.W.2d 796, 802 (Mo. banc 1982). Courts have often said that language must be interpreted in the context of the sentence that precedes it. *See, e.g., Paster v. Tussey,* 512 S.WS.2d 97, 106 (Mo. banc 1974)

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[5] All districts of the Court of Appeals agree that a court must look to the entire contract, not simply to parts of it. *See, e.g.,* Kehrs Mill Trails Assocs. v. Kingspointe Homeowner's Ass'n, 251 S.W.3d 391, 396 (Mo. App. 2008) (E.D.); *Wildflower,* 25 S.W.3d at 534 (W.D.); Stolba v. Vesci, 909 S.W.2d 706, 708 (Mo. App. 1995) (S.D.).

(court opinion); *Saxony Lutheran High School, Inc. v. Missouri Land Reclamation Comm'n,* 392 S.W.3d 52, 59 (Mo. App. 2013) (statute); *Mitchell v. Residential Funding Corp.,* 334 S.W.3d 477, 498 (Mo. App. 2010) (statute); *Boatmen's Bank v. Foster,* 878 S.W.2d 506, 508–09 (Mo. App. 1994) (court's comments); *Wallace v. May,* 822 S.W.2d 471, 473 (Mo. App. 1991) (jury instruction); *Ragsdale v. Tom-boy, Inc.,* 317 S.W.2d 679, 686 (Mo. App. 1958) (correspondence).

Although Pointe Royale focuses on the second of these sentences, the first one gives it context and sets its parameters. The general words "successors in title" in the second sentence draw their meaning in context from the specific words "heirs, devisees, personal representatives and assigns" in the first sentence.

Two principles coalesce here. First, the "expression in a contract of things of a class implies the exclusion of all not expressed, even though all would have been implied had none been expressed." *Lusk v. Lyon Metal Prods.,* 247 S.W.2d 617, 618 (Mo. 1952). This is the time-honored maxim *expressio unius est exclusio alterius*—"the expression of one thing is the exclusion of another." *City of Springfield ex rel. Bd. of Pub. Utils. v. Brechbuhler,* 895 S.W.2d 583, 585 (Mo. banc 1995). "Although more frequently applied to statutory construction, such maxim is also applicable to the construction of contracts." *Gen. Am. Life Ins. Co. v. Barrett,* 847

S.W.2d 125, 133 (Mo. App. 1993). *See also Heartland Presbytery v. Gashland Presbyterian Church,* 364 S.W.dd 575, 586 (Mo. App. 2012); *Ins., Inc. v. Sanders,* 378 S.SW.2d 249, 252 (Mo. App. 1964); *Hoover v. Nat'l Casualty Co.,* 236 Mo. App. 1093, 162 S.W.2d 363, 365 (1942); *Counts v. Medley,* 163 Mo. App. 546, 146 S.W. 465, 469–70 (1912).

Second, "where general words follow particular ones, the general words will be limited in their meaning and restricted in their operation to things of like kind and nature with those particularly specified." *Payne v. Grimes Real Estate Co.,* 660 S.W.2d 755, 757 (Mo. App. 1983). This doctrine, known as *ejusdem generis,* "is based upon the fact in human experience that usually minds of parties are addressed especially to the particularization, and that generalities, though broad enough to comprehend other fields, if they stood alone, are used in contemplation of that upon which the minds of the parties are centered." *Cades v. Mosberger Lumber Co.,* 291 S.W. 178, 180 (Mo. App. 1927). Under the rule of *ejusdem generis,* "[l]imited and specific clauses in contracts operate as a modification and pro tanto nullification of general terms and provisions." *Co-op Ass'n No. 37 v. St. L.-S.F. Ry.,* 591 S.W.2d 404, 410 (Mo. App. 1979).

Thus, for example, as long ago as 1869 this Court held that where the plaintiff's release contained language stating that defendant's payment was in satisfaction of a particular judgment that plaintiff had against him, the

broad language that followed, releasing "all claims and demands" that the plaintiff might have against the defendant, was no bar to a different suit by the plaintiff against him on a different claim. *Grumley v. Webb,* 44 Mo. 444, 450, 455–58 (1869). The Court cautioned that "mischiefs" could arise not only "in the common business of life," but also "in the construction of contracts, and even in judicial proceedings," if general language were not taken in context:

> "Persons often use general language when speaking of the subject on which the mind is then employed. If another subject be presented to the mind in connection with it, the language usually gives some indication of it. And when it does not, if general language were not limited to the subject then under consideration, it would occasion mischiefs not only in the common business of life, but in the construction of contracts, and even in judicial proceedings. It was so clearly perceived that the language used should be considered as applicable to the subject of thought only, that it introduced the maxim, '*sensus verborum ex causa dicentis accipiendus est et secundum subjectum materiam.*'"

Id. at 458 (quoting *Littlefield v. Winslow,* 19 Me. 394, 397–98 (1841)).

In this case, the *general* reference to "successors in title" to whom the owner's obligation to pay supposedly "shall pass" follows immediately the *specific* enumeration of the owner's "heirs, devisees, personal representatives

and assigns." Def. Ex. A at Tab B, p. 17, § 7, ¶ 2; App. A60. This suggests that "successors in title" means those who derive their title directly from the owner, whether through inheritance or conveyance.

Nothing elsewhere in the declaration contradicts this. Although Pointe Royale acknowledges that the Court must consider the disputed sentence of the declaration "in the context of the entire agreement," App. Sub. Br. at 16, Pointe Royale nevertheless looks at *only* the section of the declaration in which disputed sentence appears and ignores the rest. *Id.* at 18–20. The Southern District correctly expanded the inquiry to the entire declaration and noted that the declaration does not define "successors in title." *Pointe Royale,* 2016 WL 3564205, at *6. *See* App. A15–A17. Nor, the court noted, is the term "used anywhere else in the covenants." *Pointe Royale,* 2016 WL 3464205, at *6.[6] Nor are the words "successor" and "successors" defined in

[6] Pointe Royale asserts that "the Southern District's analysis also ignored the plain and ordinary meaning of the words 'successor' and 'title.'" App. Sub. Br. at 23. Indeed it did not. The court specifically said that "[p]iecing together the meaning of 'successors in title' from individual definitions of 'successor' and 'title' only emphasizes the need to consider the phrase in the full context of the covenants"—which Pointe Royale pointedly does not do, resting its argument on the language of Article X, § 7, alone.

the declaration, "but they are used to broaden Pointe Royale's express power to collect payment for the *'Sewer Collection System and Sewage Treatment Plant.'" Id.* *See* App. A53 (Art. XI, § 2). Nor is the phrase "successors and assigns" defined, "but it is used throughout the covenants in connection with the subdivision developer and Pointe Royale, as well as in two parts of the last article of the covenants addressing miscellaneous matters." *Pointe Royale,* 2016 WL 3464205, at *6.

The declaration likewise does not define "heirs," "devisees," "personal representatives," or "assigns." Def. Ex. A at Tab B, pp. 2–4, Art. I; App. A45–A47. Those terms, however, have accepted meanings. "The word 'heir,' unqualified by any adjective, is a technical word denoting the person on whom the law casts the inheritance on the ancestor's decease." *Gardner v. Vanlandingham,* 334 Mo. 1054, 69 S.W.21d 947, 950 (1934). *See also* § 472.010(14), RSMo 2000 ("heir" means "those persons . . . who are entitled under the statutes of intestate succession to the real and personal property of a decedent on his death intestate"). A "devisee" is one who is entitled to real or personal property under a will. *See* § 472.010(7)–(8). A "personal representative" is an "executor or administrator," including "an administrator with the will annexed, an administrator de bonis non, an administrator pending contest, an administrator during minority or absence, and any other type of administrator of the estate of a decedent whose appointment is

permitted." § 472.010(26). An "assign" is an "assignee," who is a person "to whom property rights or powers are transferred by another." BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).

Thus, read in context, the declaration intends that one who directly either voluntarily takes or accepts title to an owner's property—whether by deed from the owner, by inheritance through the owner's will or trust, or by operation of law upon the owner's death—steps into the owner's shoes and accepts both the benefits and the burdens of Pointe Royale property ownership.

The common sense of this is compelling. Pointe Royale argues that it "doesn't make sense" and that if the developer "had intended to bind only the 'then Owner, his heirs, devisees, personal representatives, and assigns'," it "wouldn't have used a broader term—'successors in title'—in the personal obligation clause." App. Sub. Br. at 21. But logic looks at this the other way around: Why would a developer *ever* limit the ability to collect? Yet it did here, because it limited the lien rights—the one sure-fire way to collect, by selling the property out from under the delinquent property owner—to only the property in the hands of the owner or the owner's "heirs, devisees, personal representatives and assigns." Def. Ex. A at Tab B, p. 17, § 7, ¶ 2; App. A60. If "successors in title" means *anybody* who might subsequently hold title, as Pointe Royale argues, and if the developer and the Property Owners' Association had intended to maximize the ability to collect, the

declaration would have made the property lienable in the hands of the owner "and the owner's successors in title." The fact that it does not do so reflects the intent that "successors in title" mean something short of *anybody* who might later hold title.

Thus the Southern District's correct and quite logical conclusion that the scope of "successors in title" is not as broad as Pointe Royale urges here. The court explained:

> The lien limitation makes it clear that not every potential source of recovery for unpaid assessments will be included. The property itself can be bound only when it is "in the hands of the then Owner, his heirs, devisees, personal representatives and assigns." Property removed from an owner and held by someone not included in this list, such as an adverse possessor or purchaser at a foreclosure sale, is not expressly bound. *If the burden against the primary basis for an assessment—the property itself—is limited, it is reasonable to conclude that the reach of personal liability would be more limited, not expanded.* Inasmuch as the lien limitation was restricted to those having some relationship with the original owner as *his* heir, devisee, personal representative or assign—and not based on a mere relationship to *the* property—*we see no indication that the personal liability clause was intended to reach beyond the relationships specified for purposes of liens* so as to extend personal liability to a successor removed from any personal

relationship with the original owner.

Pointe Royale, 2016 WL 3464205, at *7 (footnote omitted) (emphasis added).

The two out-of-state cases on which Pointe Royale relies, a Florida Court of Appeals case and a New York trial court appellate term decision, do not support a different reading. *Publit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass'n,* 169 So. 2d 145 (Fla. Dist. Ct. App. 2015); *Port Village HOA, Inc. v. Summit Ass'n,* 33 Misc. 3d 39 (N.Y. App. Term. 2011). Pointe Royale relies on them for the loose proposition that similar "successors in title" provisions are not ambiguous. *See* App. Sub. Br. at 17. But the cases themselves do not support the proposition that the provision regarding "successors in title" involved in this case includes anybody who might later hold title. *Neither court decided that issue.* In both cases, the declarations expressly provided that the owner's personal obligation to pay delinquent assessments *did not* pass to the subsequent owners—in *Publit 2,* to "a subsequent owner of a property within the association," *Publit 2,* 169 So. 2d at 148, and in *Port Village,* to the owner's "successors in title," *Port Village,* 33 Misc. 3d at 45. Thus, in both cases it was unnecessary for the courts to decide which subsequent owners might or might not be liable for a prior owner's delinquent assessments.

C. *This does not render "successors in title" meaningless.*

Pointe Royale's argument that "the term 'successors in title' is referring to a claim of ownership following another's claim of ownership," App. Sub. Br. at 24, is correct as far as it goes, but it misses the essential point. The question is *what* "successors in title" the provision encompasses.

Pointe Royale's argument in this respect is curious, at best. It claims that by "limiting 'successors in title' to the 'heirs, devisees, personal representatives, and assigns' of the 'then owner,'" the Southern District "rendered the term 'successors in title' meaningless." *Id.* at 21. But if the term encompasses "heirs, devisees, personal representatives and assigns," then it most assuredly is *not* meaningless, for it still describes the classes of persons who assume the former owner's personal liability for payment of the assessments. Neither does it render the term meaningless to say that the term encompasses only those persons. The term is not meaningless merely because Pointe Royale does not *like* reading it more narrowly than the open-ended reading that it urges.

D. *As the buyer at the foreclosure sales, the Bank is not the defaulting owners' "assign."*

There is no question in this case whether the Bank is the defaulting owners' heir, devisee, or personal representative. The issue thus distills to

whether the Bank could possibly be the owners' "assign" so that it is their "successor[ ] in title" within the meaning of Article X, § 7, of the declaration.

Fundamentally, the owner does not convey title at foreclosure. Instead, upon foreclosure, title is *taken from* the owner through the sale of the mortgaged property to satisfy the lien of the owner's obligation to the lender.

Although the owner pledges real estate through the execution and delivery of a deed of trust, a deed of trust is but a lien, and the owner retains title. A deed of trust "is a form of mortgage consisting of an instrument that uses an interest in real property as security for performance of an obligation." *Bob DeGeorge Assocs. v. Hawthorn Bank,* 377 S.W.3d 592, 597 (Mo. banc 2012). It "is merely the right to have the debt, if not otherwise paid, satisfied out of the land." *Central Bank v. Perry,* 427 S.W.3d 285, 288 (Mo. App. 2014). While "the typical deed of trust purports to be a conveyance in fee by the mortgagor to the trustee to secure a debt," it "is well-settled under Missouri law" that a deed of trust "is not considered to vest title in the trustee, and does nothing more than create a lien in favor of the mortgagee." *Libby v. Uptegrove,* 988 S.W.2d 131, 132 (Mo. App. 1999).

Thus, the trustees under the Bank's deeds of trust involved in this case were not the owners' "assigns" upon whom the declaration foisted personal liability as the owner's "successors in title." A trustee under a deed of trust is not an "assign" as the declaration here uses the term. Indeed, Pointe Royale

has not suggested that the trustees had any liability as "successors in title" for the defaulting owners' delinquent assessments.

The buyer at foreclosure—in this case, the Bank—is yet a step further removed. At foreclosure, the *owner* takes no action. Instead, the property is sold under a power of sale vested in the trustee through a contract between the mortgagor and the mortgagee. *Graham v. Oliver,* 659 S.W.2d 601, 603 (Mo. App. 1983). "The grantor of the deed of trust continues as owner of the land until entry for breach of condition, and then foreclosure under power of sale." *Tipton v. Holt,* 610 S.W.2d 659, 661 (Mo. App. 1981). But the *trustee* exercises the right of "entry for breach of the condition of the deed of trust," *R.L. Sweet Lumber Co. v. E.L. Lane, Inc.,* 513 S.W.2d 365, 369 (Mo. banc 1974), and takes all the action at foreclosure—notifies the borrower and the landowner, advertises and conducts the sale, and signs and delivers the trustee's deed. Thus, the buyer at the foreclosure sale is not an "assign" of the owner. The list of "heirs, devisees, personal representatives and assigns" mentioned in Article X, § 7, of the declaration does not include a person who buys the property from a trustee at a foreclosure sale.

Furthermore, in the particular context of this case—when, as here, the lender buys the property at foreclosure—the lender-cum-buyer *cannot* be the owner's "assign." By statute, the grantor in the deed of trust or the grantor's "heirs, devisees, executors, administrators, grantees or assigns" may redeem

the property if the holder of the debt buys the property at foreclosure. § 443.410. If, then, the lender-cum-buyer is the owner's "assign," the owner could have two assigns whose interests are inimical to each other—one who buys the property at foreclosure, and the other who redeems it out of the buyer's hands.

It follows that the Bank is not an "assign" of the defaulting owners and therefore does not constitute their "successor[ ] in title" liable for the owners' delinquent assessments under the declaration. Def. Ex. A at Tab B, p. 17, § 7, ¶ 2; App. A60.

E. *Notice to the Bank is immaterial.*

Pointe Royale's lengthy argument that the Bank acquired title to the property with notice of the declaration is irrelevant. App. Sub. Br. at 26–28. The recorded declaration imparted only notice that the delinquent owners' "heirs, devisees, personal representatives and assigns" arguably would, upon becoming the owners' "successors in title," also become liable for the owners' personal obligations to pay the assessments. Def. Ex. A at Tab B, p. 17, § 7, ¶ 2; App. A60. Since the Bank was not the heir, devisee, personal representative, or assign of any of the defaulting owners, whatever notice the declaration imparted to the Bank in this respect was irrelevant to it.

F. *Whether the declaration creates joint and several liability is irrelevant.*

Pointe Royale's discussion of joint and several liability is also beside the point. *See* App. Sub. Br. at 19–20. Whether the Bank is a "successor in title" within the meaning of Article X, § 7, of the declaration and whether it has joint and several liability with the previous defaulting owners are different questions. The former is the question involved here. The latter can be reserved for a time when it its decision is necessary. It bears noting, however, that the declaration nowhere mentions joint and several liability, and indeed, as the Southern District said, it is "inherently impossible" for the owner's "personal obligation" to pay the assessments *both* to "remain his personal obligation" and "pass to successors in title." *Pointe Royale,* 2016 WL 3464205, at *5. Pointe Royale cited no authority in the Court of Appeals in support of the proposition that this language creates joint and several liability, *id.,* and it has cited none in this Court.

G. *The judgment should be affirmed.*

Lenders are not in the real estate business. They much prefer that borrowers pay their loans. Yet because the owners of the condominiums in question defaulted on their loans, the Bank was forced to foreclose its deeds of trust—and, unfortunately, forced to bid in the debts and become the unwilling

owner of these condos. Still, once it became the owner, the Bank paid the condominium owner and property owner assessments that accrued afterward.

But the Bank did not wipe the slate clean through the foreclosure only to have Pointe Royale try to stick it with personal liability for the assessments that the defaulting owners failed to pay. The sentence in Article X, § 7, of the declaration that makes "successors in title" liable for the owners' delinquent assessments is not nearly as broad as Pointe Royale claims it is. The general reference to "successors in title" to whom the Owner's obligation to pay "shall pass" must be read in context of the immediately preceding sentence's specific enumeration of the owner's "heirs, devisees, personal representatives or assigns." Def. Ex. A at Tab B, p. 17, § 7, ¶ 2; App. A60. Although Pointe Royale argues that the "successors in title" language "is unambiguous," App. Sub. Br. at 17, it wholly ignores the preceding sentence. It is certainly reasonable to read the second sentence in light of the first—to read the English language "sequentially," *Goldberg,* 639 S.W.2d at 802. Of course, as Pointe Royale concedes, "any ambiguity in the covenants should be read narrowly in favor of the free use of property." App. Sub. Br. at 16.

Because the Bank, as the buyer at the foreclosure sale, is not the "successor[ ] in title" of any of the defaulting owners as an heir, devisee, personal representative, or assign, the Bank has no personal liability for those

owners' delinquent assessments. The trial court reached the right result. The judgment should be affirmed.

II

(*Responding to Appellant's Point II*)

For at least three reasons, Pointe Royale's Point II and its argument under the point have no merit. First, Pointe Royale did not raise its claim in Point II below. Second, if there was error, Point Royale invited it. Third, in any event, whether the Uniform Condominium Act applies is irrelevant.

A. *Standard of review.*

The standard of review set forth in the argument responding to Point I above applies in part to Point II and, for brevity, is incorporated here by reference.

B. *Pointe Royale did not present the argument in Point II to the trial court.*

Pointe Royale did not raise below the argument that it presents in Point II—that § 448.3–116[7] does not apply because the Pointe Royale Property Owners' Association is not a *condominium* association subject to the

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[7] Section 448.3–116 was enacted in 1983. It was amended in 1998 and then again in 2014. The version enacted in 1998 is the version in question here because the deeds of trust date from 2004–2007 and the foreclosures occurred in 2010. *See supra* note 3. The court entered judgment January 26, 2015. L.F. 11, 160–70.

provisions of Chapter 448. *See* Supp. L.F. 4–32, 34–48, 50–64, 128–31. Indeed, Pointe Royale suggested instead that § 448.3–116 *does* apply by providing authority for its attempt to recover the unpaid assessments from the Bank. Supp. L.F. 42, 59, 60.[8]

Since Pointe Royale did not present its argument under Point II to the trial court, it cannot assert that argument for the first time on appeal. *Mayes v. St. Luke's Hosp.,* 430 S.W.3d 260, 267 (Mo. banc 2014); *Brown v. Brown,* 423 S.W.3d 784, 787 (Mo. banc 2014). The failure to raise an argument below "precludes a party from obtaining appellate review of error in the trial court's ruling or order." *Id.* "It is well recognized that a party should not be entitled on appeal to claim error on the part of the trial court when the party did not call attention to the error at trial and did not give the court an opportunity to rule on the question." *Mayes,* 430 S.W.3d at 267 (quoting *Niederkorn v. Niederkorn,* 616 S.W.2d 529, 535 (Mo. App. 1981)).

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[8] Pointe Royale argued, twice, that "in Paragraph 6," § 448.3–116 "expressly states that it does not prohibit actions to recover assessments, stating **'This section shall not prohibit actions to recover sums for which subsection 1 of this section creates a lien.'**" Supp. L.F. 42, 59. It mentioned it a third time in a slightly different context. *Id.* at 60.

C. *Pointe Royale invited any error.*

Since Pointe Royale not only did not present the issue to the trial court but instead suggested below that § 448.3–116 *does* apply, Supp. L.F. 42, 59, 60, it cannot now complain of error based on the trial court's application of the statute. It is "the settled law of this state that a party is estopped from complaining of an error of his own creation, and committed at his request." *Sprague v. Sea,* 152 Mo. 327, 53 S.W. 1074, 1078 (1899). Said another way, a party "will not be heard to complain of alleged error in which, by his own conduct at the trial, he joined or acquiesced." *Taylor v. Cleveland, C., C. & St. L. Ry.,* 333 Mo. 650, 63 S.W.2d 69, 75 (1933).

This is all the more critical because of Pointe Royale's late procedural maneuver. The Bank brought this action against the Pointe Royale Property Owners' Association and the Pointe Royale Condominium Owners' Association. L.F. 5, 13. Both associations counterclaimed. L.F. 64–95. Both remained in the case through the judgment, L.F. 160–70, and indeed they jointly submitted proposed Findings of Fact, Conclusions of Law, and Judgment for entry of judgment against both of them, L.F. 10, 147–57. Both appealed. L.F. 11, 171. The Uniform Condominium Act applied to the Pointe Royale *Condominium* Owners' Association, and the Pointe Royale *Property* Owners' Association made no effort below to distinguish one association from the other in terms of which was or was not supposedly subject to the Act.

Now, in order for the *Property* Owners' Association to bolster the claim that the trial court erred by looking to § 448.3–116, the *Condominium* Owners' Association has abandoned its appeal and has filed no brief. The Property Owners' Association acknowledged that forthrightly in the Court of Appeals. *See* App. Br. at 1 n.1, *First Nat. Bank v. Pointe Royale Property Owners' Ass'n,* No. SD33797, 2016 WL 3564205 (Mo. App., S.D., June 29, 2016). But in this Court it has removed from its substitute brief the footnote in the Jurisdictional Statement that told the Court of Appeals about it, and it tells this Court only that "Pointe Royale *POA* appealed the trial court's judgment declaring that the Bank is not liable for past due assessments and attorney's fees, interest, and costs to the Southern District." App. Sub. Br. at 12 (emphasis added).

Of course, the failure to file a brief results in affirmance of the judgment against the Pointe Royale Condominium Owners' Association, since it abandons any claim of error. *E.g., Rosemann v. Roto-Die Co.,* 947 S.W.2d 507, 510–11 (Mo. App. 1997). But Pointe Royale's attempt to play Hide The Pea here by saying nothing about the Condominium Owners' Association's absence skews the presentation of this issue in this Court by suggesting that the trial court erred by applying a statue that, regardless of its application to the *Property* Owners' Association, unquestionably does apply to the Condominium Owners' Association.

D. *Whether § 448.3–116 applies is irrelevant.*

Finally, in any event it makes no difference. As discussed in the argument above responding to Point I, the Bank is not liable for the defaulting owners' delinquent assessments because, as the buyer at the foreclosure sale, it is not the "successor[ ] in title" of any of the defaulting Owners as an heir, devisee, personal representative, or assign. For brevity, that argument is incorporated here. Whether § 448.3–116 does or does not apply therefore is irrelevant.

III

(*Responding to Appellant's Point III*)

Point III needs only a brief response.

A. *Standard of review.*

The standard of review set forth in the argument responding to Point I above applies to Point III and, for brevity, is incorporated here by reference.

B. *Whether the court misapplied § 448.3–116 is irrelevant.*

As with Pointe Royale's argument in Point II that § 448.3–116 does not apply to a *property* owners' association, its argument in Point III that the trial court misapplied the statute is beside the point. Once again, the Bank is not liable for the defaulting owners' delinquent assessments because, as the buyer at the foreclosure sale, it is not the "successor[ ] in title" of any of the defaulting owners as an heir, devisee, personal representative, or assign. Thus, the Bank is not a "debtor" to Pointe Royale, and there is no question with respect to whether the Bank has liability for the personal debts of the defaulting debtors following the Bank's purchase of the properties at foreclosure. *See* App. Sub. Br. at 32–36. For brevity, the Bank's complete argument with respect to that issue under Point I is incorporated here. Whether § 448.3–116 does or does not apply therefore is irrelevant. The trial court reached the right result, even if, as Pointe Royale argues, for the wrong reason, and the judgment should be affirmed.

IV

(*Responding to Appellant's Point IV*)

Pointe Royale misinterprets the trial court's ruling, and thus Point IV asserts error on the basis of a ruling that the trial court did not make.

A. *Standard of review.*

The standard of review set forth in the argument responding to Point I above applies to Point IV and, for brevity, is incorporated here by reference.

B. *Pointe Royale asserts error based upon a ruling that the trial court did not make.*

Pointe Royale rests its entire argument that the court erred by denying it an award of attorney's fees, late fees, and interest on the ground that the award is a matter of a contract that the court should have acknowledged. Point IV states:

> **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 foreclosure on the properties, because under Missouri law, a party may recover attorney's fees when expressly authorized by a contract, in that the *POA Declaration* contains a covenant giving Pointe Royale POA the right to collect reasonable attorney's fees, and late fees in connection with delinquent assessments.**

App. Sub. Br. at 4–5. *See also id.* at 36–37. Thus, the "legal reasons for the appellant's claim of reversible error" that Pointe Royale asserts, Rule 84.04(d)(1)(B), are that "under Missouri law, a party may recover attorney's fees when expressly authorized by a contract." App. Sub. Br. at 5. Pointe Royale's explanation "why, in the context of the case, those legal reasons support the claim of reversible error," Rule 84.04(d)(1)(C), is that "the *POA Declaration* contains a covenant giving Pointe Royale POA the right to collect reasonable attorney's fees, and late fees in connection with delinquent assessments." App. Br. at 5.

The trial court did not, however, rule that Missouri law does not permit a party to "recover attorney's fees when expressly authorized by a contract." L.F. 160–65. Nor did it take issue with the fact that the declaration contains the described covenant. *Id.* What it ruled was that the Property Owners' Association's "claim for assessments accruing prior to foreclosure of the Deeds of Trust were [*sic*] extinguished by foreclosure" and that

> because the Court finds that Pointe Royale POA . . . [was] not entitled to the payment of the 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.

Point IV thus identifies a supposed error based on a ruling that the trial court did not make. The argument does not remedy the defect, for it, too, focuses on the contract issue.[9] Point IV thus preserves nothing for appeal. *E.g., Howard v. City of Kansas City,* 332 S.W.3d 772, 791–92 (Mo. banc 2011) (point asserting error based on insufficiency of the evidence to support the verdict did not preserve claim that the trial court erred by not ordering a remittitur).

Furthermore, Missouri appellate courts address only the issues raised in the points relied on. *Hawley v. Tseona,* 453 S.W.3d 837, 842 n.6 (Mo. App. 2014); *Walton v. City of Seneca,* 420 S.W.3d 640, 648 n.9 (Mo. App. 2013).

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[9] The argument asserts that "Pointe Royale's Declaration expressly entitles the Association to collect reasonable attorney's fees and costs associated with delinquent assessments," and it concludes:

> Because the *POA Declaration* is a contract that expressly authorizes Pointe Royale POA to collect reasonable attorney's fees, it was an error for the trial court to deny Pointe Royale POA attorney's fees, late fees, and interests [*sic*] for costs incurred in connection to the collection of assessments that accrued prior to the foreclosure of the properties by the Bank. Under the terms of the *POA Declaration,* Pointe Royale is entitled to interests [*sic*], reasonable attorney's fees, and costs.

App. Sub. Br. at 38.

Since Point IV challenges rulings that the trial court did not make, the record does not support the claim for reversal.

C. *The existence of a contract is irrelevant.*

As with Pointe Royale's arguments in Points II and III with respect to § 448.3–116, its argument here is also beside the point.[10] Once again, the Bank is not liable for the defaulting owners' delinquent assessments because, as the buyer at the foreclosure sale, it is not the "successor[ ] in title" of any of the defaulting owners as an heir, devisee, personal representative, or assign.

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[10] This leaves aside the question as to just what Pointe Royale complains the trial court failed to award. Point IV asserts error in the failure to award "attorney's fees, late fees, and interest." App. Sub. Br. at 4. But Point IV then asserts only that attorney's fees are recoverable under a contract, and then it says that the declaration authorizes both attorney's fees and late fees. *Id.* at 4–5. In its argument, Pointe Royale says that the declaration "expressly entitles the Association to collect reasonable attorney's fees and costs." *Id.* at 38. It asserts that "it was error for the trial court to deny Pointe Royale POA attorney's fees, late fees, and interests [*sic*] for costs" but argues that the judgment "denying Pointe Royale POA attorney's fees should be reversed." *Id.*

For brevity, the Bank's complete argument with respect to that issue under Point I is incorporated here.

CONCLUSION

Pointe Royale's suggestion that property owners' associations will founder financially if the Court affirms this judgment is not reality. This is the only set of covenants to which Pointe Royale can point in Missouri that contains the disputed language. These covenants give Pointe Royale ample remedies.[11]

If this case has any statewide interest or importance, it lies in the effect that a ruling in favor of Pointe Royale would have on title insurers, lenders, and the real estate market. If the Court should decide that the Bank is a "successor in title" within the sly, ambiguous provision slipped into the second paragraph of Article X, § 7, of the declaration, it will turn the title insurance industry on its proverbial ear. Title companies that have issued policies insuring titles following foreclosure will be on the hook for potentially

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[11] Pointe Royale could have foreclosed its liens, subject to the Bank's superior liens, and thereby forced the defaulting owners either to pay or let their property go at foreclosure for the comparatively small amounts owed. It could also have sued the defaulting owners personally, subjecting their other assets to execution absent payment. Finally, as it did to the Bank, it might have denied the owners the use of common-area amenities at the Pointe Royale development. *See* L.F. 16 ¶ 18.

hundreds of thousands of dollars. Furthermore, no prudent lender will ever again loan money for buyers to purchase properties in developments such as this. That, more than the asserted inability to collect a few delinquent assessments, will destroy property owners' associations by assuring that properties subject to their assessments remain unsold. Even if the associations foreclose their assessment liens and buy the properties at foreclosure, no one else will buy them. Pointe Royale's effort to be penny wise will end up pound foolish.

The purposes of foreclosure are "to terminate all interests junior to the mortgage being foreclosed and to provide the sale purchaser with a title identical to that of the mortgagor as of the time that mortgage was executed." RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 8.2 cmt. a (1997). No lender forced to buy at its own foreclosure sale would ever intend, as the buyer becoming subject to the covenants, to assume the defaulting owner's personal liability for delinquent assessments whose liens it had just foreclosed. It would subvert both the purpose and the spirit of foreclosure to let Pointe Royale end-run the result and foist upon the Bank the obligation to sink yet more money into these properties under a sly, ambiguous covenant that Pointe Royale claims burdens the Bank with the defaulting owners' unpaid assessments.

The specific reference to "heirs, devisees, personal representatives and assigns" in first sentence of the second paragraph of Article X, § 7, of the declaration establishes the parameters for the subsequent general reference to "successors in title" who assume personal liability for a delinquent owner's assessments. The second sentence must be read in context of the first. The Bank is not an heir, devisee, or personal representative of any of the owners whose deeds of trust it foreclosed. As a matter of law, it is not, and cannot be, an "assign." As the buyer at the foreclosure sale, the Bank is not the "successor[ ] in title" of any of the defaulting owners as an heir, devisee, personal representative, or assign, and consequently the Pointe Royale Property Owners' Association has no claim against it for the owners' unpaid assessments or for interest, attorney's fees, or costs. The trial court reached the right result, so the judgment against the Property Owners' Association should be affirmed.

The Condominium Owners' Association has abandoned its appeal. If the Court requires that the Bank move to affirm or to dismiss with respect to the Condominium Owners' Association, the Bank hereby does so. The Court should issue its mandate with respect to the Condominium Owners' Association either affirming the judgment or dismissing the appeal.

Respectfully submitted,

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CERTIFICATE OF SIGNING OF ORIGINAL

I certify that I have signed the original of the foregoing document and that I will maintain it for a period of not less than the maximum allowable time to complete the appellate process.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I certify the following:

1. The foregoing Brief complies with the type and volume limitation of Rule 84.06. The typefaces are Century Schoolbook and Calibri, both 13 point.

2. The signature block of the foregoing Brief contains the information required by Rule 55.03(a). To the extent that Rule 84.06(c)(1) may require inclusion of the representations appearing in Rule 55.03(b), those representations are incorporated herein by reference.

3. The foregoing Brief, excluding the cover, certificate of service, this certificate, and the signature block, contains 9,377 words as counted by Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I certify that I served this Respondent's Substitute Brief on Mr. Karl Finkenbinder and Ms. Jacqueline Bryant, counsel for Appellant, through the Missouri Judiciary e-Filing system, as set forth in Rule 103.08, on December 20, 2016.

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