IN THE SUPREME COURT OF MISSOURI

NO. SC95865

FIRST NATIONAL BANK OF DIETERICH,

Respondent,

v.

POINTE ROYALE PROPERTY OWNERS' ASSOCIATION, INC., *et al.*

Appellant.

Appeal from the Taney County Circuit Court
The Honorable Tony Williams, Circuit Judge

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

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JURISDICTIONAL STATEMENT

Appellant Pointe Royale Property Owner's Association ("Pointe Royale POA") appeals the trial court's judgment (the "Judgment") entered on January 26, 2015, in the Circuit Court of Taney County, Case No. 11AF-CC00812. **(L.F. 160-171; App. A1-A11).** The Judgment became final for purposes of appeal on February 26, 2015. Pointe Royale POA filed its Notice of Appeal on February 27, 2015. **(L.F. 171).** Therefore, Pointe Royale POA's Notice of Appeal was timely filed. *See* MO. R. CIV. P. 81.04(a).

At trial, the trial court was tasked with determining whether First National Bank of Dieterick (formerly known as First State Bank of Redbud) ("the Bank") had an obligation to pay Pointe Royale POA past due assessments that accrued prior to the Bank's foreclosure on eight condominium units located in the Pointe Royale Subdivision and whether Pointe Royale POA was entitled to attorney's fees, late fees, interest and lien filing fees in connection to collecting such assessments. **(L.F. 162).** The trial court entered judgment in favor of the Bank on both issues. **(L.F. 160-170).** Pointe Royale POA appealed the court's judgment on those issues to the Missouri Court of Appeals, Southern District (the "Southern District")

The Southern District had jurisdiction over the appeal. This appeal concerns the construction and interpretation of the *Pointe Royale Property Owner's Association, Inc. Declarations* (the "*POA Declaration*"), as well as the application, construction, and interpretation of the Missouri Uniform Condominium Act, MO. REV. STAT. §§ 448.1-101, *et seq*. These issues are not within the exclusive jurisdiction of this Court because they do not involve the validity of a treaty or statute of the United States, or of a statute or

provision of the Missouri Constitution, the construction of Missouri revenue laws, the title to any state office, or imposition of the death penalty. See MO. CONST. ART. V, § 3 (as amended). Because the issues are not within the exclusive jurisdiction of this Court, jurisdiction vested in the Missouri Court of Appeals. The appeal was appropriately filed in the Southern District as it is an appeal from the Circuit Court in Taney County, Missouri. MO. REV. STAT. § 477.060.

On June 29, 2016, the Southern District issued its opinion (the "Southern District Opinion") affirming the trial court's judgment in favor of the Bank. On July 14, 2016, Pointe Royale POA filed in the Southern District a motion for rehearing and an application for transfer to this Court. The Southern District denied Pointe Royale POA's application for transfer and motion for rehearing on July 21, 2016. On August 3, 2016, Pointe Royale POA filed its application for transfer with this Court pursuant to MO. R. CIV. P. 83.04. On November 1, 2016, this Court granted Pointe Royale POA's application and ordered the Southern District to transfer the case to this Court.

POINTS RELIED ON

I. The trial court erred in holding that the Pointe Royale POA was not entitled to POA Assessments from the Bank that accrued prior to the Bank's foreclosure of the properties, because under Missouri law, covenants creating an obligation to pay assessments are binding on successors in title who obtain title to the property with notice of such covenants, in that the *POA Declaration* contains a covenant obligating successors in title to pay past due assessments and Bank had notice of the covenant prior to acquiring title to the properties.

Case law:

1. *Pudlit 2 Joint Venture, LLP v. Westwood Gardens*, 169 So.3d 145 (Fl. App. 2015).

2. *Port Village HOA, Inc., v. Summit Associates*, 33 Misc.3d 39 (N.Y. Sup. App. Term 2011).

3. Whispering Valley Lakes Improvement Association v. Franklin County Mercantile Bank, 879 S.W.2d 572 (Mo. App. E.D. 1994).

4. *Stolba v. Vesci*, 909 S.W.2d 706 (Mo. App. S.D. 1995).

II. The trial court erred in finding that Section 448.3-116, RSMo. of the Missouri Uniform Condominium Act applied to Pointe Royale POA's collection of assessments, because Section 448.3-116 applies only to "associations" that consist exclusively of condominium unit owners, in that the Pointe Royale POA is an association that consists of both residential lot owners and condominium unit owners.

Case law:

1. *Bd. Of Managers of Parkway Towers Condo. Ass'n. Inc. v. Carcopa*, 403 S.W.3d 590, 592 (Mo. banc. 2013).

Statutes:

1. MO. REV. STAT. § 448.3-116

2. MO. REV. STAT. § 448.3-101

3. Mo. R MO. REV. STAT. § 448.1-103

III. The trial court erred in finding that Pointe Royale POA was not entitled to POA Assessments that accrued prior to the Bank's foreclosure of the properties, because the trial court misapplied the law by interpreting Mo. Rev. Stat. § 448.3-116 to mean that the Bank's foreclosure on the properties extinguished the personal obligation to pay assessments to Pointe Royale POA, in that Section 448.3.116(2) merely lists the circumstances in which an assessment lien is junior to other liens and does not act to extinguish the underlying obligation to pay assessments and the trial court's interpretation of Section 448.3-116 is contrary to the legislative intent.

Case law:

1. *Bd. Of Managers of Parkway Towers Condo. Ass'n. Inc. v. Carcopa*, 403 S.W.3d 590, 592 (Mo. banc. 2013).

Statutes:

1. MO. REV. STAT. § 448.3-116

IV. 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.

Case law:

1. *Dominion Home Owners Ass'n, Inc. v. Martin*, 953 S.W.2d 178, 185 (Mo. App. W.D. 1997).

STATEMENT OF FACTS

I. GENERAL BACKGROUND

The Pointe Royale Subdivision is a common interest community located in Taney County, Missouri. **(L.F. 101; Def. Trial Ex. A; App. A44).** In 1986, Pointe Royale Village and Country Club, Inc., a subdivision developer, recorded the *Declaration of Restrictive Covenants of Pointe Royale Subdivision ("the POA Declaration")* in the Taney County Recorder's Office.[1] **(L.F. 102; Def. Trial Ex. A; App. A44-A72).**

The *POA Declaration* governs the relationship between the developer, Pointe Royale POA, and all residential lot owners and condominium unit owners located in the Pointe Royale Subdivision. **(Def. Trial Ex. A, Subpart B, Art. III, Sec. 1; A44, A48).** According to the *POA Declaration*, Pointe Royale POA is authorized to administer and enforce the covenants in the *POA Declaration*, including the collection of assessments for the benefit of the property owners in the Pointe Royale Subdivision. **(Def. Trial Ex. A, Subpart B,; App. A44).** In order to be a member of the Pointe Royale POA, one must be a record owner of a fee interest in or who is purchasing from the Developer a fee

[1] The *POA Declaration* was originally recorded on February 14, 1986. **(L.F. 102).** On March 27, 1986, it was superseded by the recording of a new *POA Declaration*. **(L.F. 102).** On May 6, 1986, and February 8, 1989, amendments to the *POA Declaration* were recorded in the Recorder of Taney County. **(L. F. 101-102).** There have been no amendments to the *POA Declaration* since February 8, 1989. **(L.F. 102).**

or undivided fee interest in a Lot or Living Unit or Condominium. **(Def. Trial Ex. A, Subpart B, Art. III, Sec.1 ; App. A48-A49).**

The *POA Declaration* includes a provision obligating each owner of a lot, condominium or living unit and successors in title to pay past due assessments and allows Pointe Royale POA to recover attorney's fees, interests, and costs incurred in connection with collecting past due assessments. **(Def. Trial Ex. A, Subpart B, Art. X; A58-A62)**.

The relevant provisions of the *POA Declaration* for this appeal are located in Article X. Section 1, Article X, of the Declaration states:

> **Section 1. Creation of Lien for Annual and Special Assessments.** The Developer, subject to the provisions hereinafter set forth, for each Lot, Condominium and Living Unit owned by it within the Project, hereby covenants and each Owner of a Lot, Condominium or Living Unit, other than Developer, by acceptance of a deed therefore or by entering into a contract of purchase with the Developer therefore, whether or not it shall be so expressed in any deed, contract of purchase or other conveyance, shall be deemed to covenant and agree to pay to the Association: (1) Annual Assessments, and (2) Special Assessments, such assessments to be fixed, established and collected from time to time as hereinafter provided. The Annual and Special Assessments, together with such interest thereon and costs of collection, including a

reasonable attorneys fee, as hereinafter provided, shall be a continuing charge and lien upon the Lot, Condominium, and Living Unit against which each assessment is made. Each such assessment, together with interests, costs and attorneys' fees, shall attach to and remain a lien upon and against the Lot, Condominium or Living Unit against which each such assessment is made until same be paid in full. **(Def. Trial Ex. A, Subpart B; App. A58).**

Article X, Section 7 of the Declaration provides the following:

> **Section 7. Non-Payment of Assessments.** If any Assessments are not paid on the date when due, then such Assessments shall become delinquent. The Association may bring an action at law against the Owner personally obligated to pay the same or foreclose the lien against the property and both actions shall be cumulative and neither shall preclude the other. No Owner may waive or otherwise escape liability for the Assessments by non-use of the Common Elements or abandonment. If Assessments have become delinquent, such Assessments shall bind 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.*** Such delinquent Assessments shall bear interest from the date of delinquency at any lawful rate as determined from time to time by the Board of Directors of the Association or, if not so determined, the rate of 10% per annum. In the event a judgment is obtained, such judgment shall include interest on the Assessments as above provided and a reasonable attorney's fee to be fixed by the Court, together with the costs of the action. (emphasis added) **(Def. Trial Ex. A, Subpart B; App. A60).**

While all properties located within the Pointe Royale Subdivision are subject to the *POA Declaration*, the condominium units are also subject to a second declaration, the *Condominium Declaration for Pointe Royale Condominium Parcels* ("the *COA Declaration*"). **(Def. Trial Ex. B; App. A139-A140).** Like the *POA Declaration*, the *COA Declaration* was recorded in 1986. **(L.F. 102).** The *COA Declaration* governs the relationship between the developer, Pointe Royale Condominium Homeowner's Association ("Pointe Royale COA"), and all condominium unit owners of properties located in the Pointe Royale subdivision. **(Def. Trial Ex. B, App. A139-161).** The *COA Declaration* authorizes Pointe Royale COA to collect assessments. **(Def. Trial Ex. B, Sec. 21; App. A147).** While Pointe Royale POA assessments are collected for the benefit of *all* property owners (both residential lot and condominium unit owners) within the Pointe Royale Subdivision, the COA assessments exclusively benefit the

condominium unit owners within the Pointe Royale Subdivision. **(Def. Trial Ex. B, Section 17 and 21; App. A139-161).**

After the *POA Declaration, COA Declaration,* and all amendments were recorded, the Bank made loans to owners of eight condominium units ("the properties") within the Pointe Royale Subdivision.[2] **(L.F. 102-103).** The Bank's loans for each of the properties were secured by deeds of trust. **(L.F. 102-103).** The eight owners became delinquent in paying their POA assessments and COA assessments. **(L.F. 103).** Pointe Royale POA and Pointe Royale COA levied assessments against the properties pursuant to the *POA Declaration* and *COA Declaration*. **(L.F. 103).** When the assessments were not timely paid, Pointe Royale POA and Pointe Royale COA filed liens against the eight properties for the past due assessments. **(L.F. 103).**

The eight owners of the properties defaulted on the Bank's loans. **(L.F. 103).** On March 12, 2010, and October 21, 2010, the Bank foreclosed on the eight properties and became the record owner of the properties. **(L.F. 103).** At the time of the foreclosures, there were outstanding balances for past due Pointe Royale POA and Pointe Royale COA assessments on all of the properties. **(L.F. 103).** The POA assessments accrued after the Bank's recording of the deeds of trust but before the foreclosures. **(L.F. 103).**

[2] The eight units that the Bank foreclosed on are: 182 Turnberry 14-4; 126 Overlook 11-6; 264 Turnberry 17-3; 320 Turnberry 19-1; 320 Turnberry 19-2; 189 Avondale #6; 168 Grandview 29-2; and 264 Turnberry 17-1. **(L.F. 103-114).**

After the Bank foreclosed on the properties, Pointe Royale POA and Pointe Royale COA demanded payment from the Bank for the past due assessments on the eight condominium units assessed between the dates of the filing of the deeds of trust and the dates of the foreclosures of the deeds of trust. **(L.F. 114).** The Bank demanded that Pointe Royale POA and Pointe Royale COA abandon their claims for assessments that accrued prior to the Bank's foreclosures on the properties. **(L.F. 115).** Pointe Royale POA and Pointe Royale COA refused to abandon the claims for assessments. **(L.F. 116).**

II. THE PROCEDURAL HISTORY OF THE CASE

On September 14, 2011, the Bank filed its lawsuit seeking a declaratory judgment from the court declaring that it was not liable for past due assessments and seeking damages based upon slander of title. **(L.F. 5; L.F. 13).** Pointe Royale POA and Pointe Royale COA counterclaimed for past due assessments and attorney's fees, including the assessments that accrued prior to the Bank's foreclosure. **(L.F. 64).** Sometime after Pointe Royale POA and COA filed their counterclaim, the Bank paid all sums demanded by Pointe Royale POA and Pointe Royale COA except attorney's fees. **(L.F. 116).**

On June 26, 2013, the trial court conducted a trial in Case No. 11AF-CC00812.[3] **(L.F. 160; Tr. 2).** The parties stipulated to most of the facts. **(L.F. 101-117; Tr. 2)**. On January 26, 2015, the trial court entered judgment in favor of the Bank, finding that the Bank was not liable for Pointe Royale POA assessments that accrued prior to the Bank's

[3] The trial court's judgment indicates the trial occurred on June 28, 2013, but the transcript indicates that the actual date was June 26, 2013.

foreclosure on the properties or for attorney's fees, interests, and late fees for said assessments, and that the Bank must be reimbursed by Pointe Royale POA for the POA assessments **(L.F. 160-170)**.

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. **(L.F. 171)**.[4]

ARGUMENT

Introduction

Common interest communities are one of the fastest growing forms of housing in the United States. These types of communities are typically governed by a property owners' association that provides services for the benefit of the owners in that community. In order to provide services to the owners and perform their obligations, property owners' associations require a source of income. This income comes from the collection of assessments. The collection of such assessments is the lifeblood of property owners' associations. Without assessments, property owners' associations cannot fulfill their obligations to their members and provide the upkeep and services that make common interest communities desirable to live in.

Recognizing the importance of an association's ability to collect assessments, the Developer of the Pointe Royale Subdivision included language in the *POA Declaration* that provided Pointe Royale POA with two avenues for collecting assessments: (1) a lien against the property in the hands of "the then Owner, his heirs, devisees, personal

[4] Pointe Royale COA does not appeal the trial court's judgment.

representatives and assigns"; and (2) a personal obligation to pay the assessments. The *POA Declaration* provides that the personal obligation to pay the past due assessments "shall remain his personal obligation and shall pass to successors in title." Thus, the Developer created a mechanism by which Pointe Royale POA could collect past due assessments from a successor in title *and* the delinquent owner.

The trial court and the Southern District have taken positions that frustrate the intention of the parties to allow Pointe Royale POA to collect past due assessments from successors in title. The trial court ignored the language in the *POA Declaration*, and focused its analysis on the Missouri Uniform Condominium Act ("the Act"). In doing so, the trial court erroneously determined that the Act applied to a property owners' association and held that the Bank's foreclosure on the property extinguished the personal obligation to pay the assessments, blurring the distinction between a lien securing an obligation to pay and the actual obligation to pay the assessments. The Southern District, (presumably) recognizing the problems with the trial court's analysis, correctly focused its analysis on the language in the *POA Declaration*, addressing the question of whether a bank that forecloses on a property is a "successor in title" under the *POA Declaration*. Despite asking the right question, the Southern District arrived at the wrong answer. The Southern District, engaging in a result-oriented analysis, ignored the plain and ordinary meaning of the terms "successor" and "title" and rendered the terms meaningless. By engaging in such an analysis, the Southern District ignored the intent of the parties and has threatened Pointe Royale POA's ability to collect past due assessments that accrued prior to the transfer of title from successors in title.

STANDARD OF REVIEW

This is an appeal from the judgment of a court-tried civil case. A judgment from a court-tried civil case will be affirmed "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

Contract interpretation and statutory interpretation are questions of law. *Webbe v. Keel*, 369 S.W.3d 755, 746 (Mo. App. S.D. 2012); *Leaverton v. Lasica*, 101 S.W.3d 908, 911 (Mo. App. S.D. 2003). The Court applies *de novo* review to questions of law in court-tried cases. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 899 (Mo. banc 2006). In deciding such questions, "the appellate court reviews the trial court's determination independently, without deference to that court's conclusions." *Moore v. Bi–State Dev. Agency*, 132 S.W.3d 241, 242 (Mo. banc 2004).

On appeal, Pointe Royale POA does not challenge the trial court's findings of fact. Rather, Pointe Royale POA contends that the trial court erroneously applied the law by finding that Pointe Royale POA was not entitled to POA Assessments that accrued prior to the Bank's foreclosure on the properties and attorney's fees, late fees, and interests for said POA assessments pursuant to the *POA Declaration* and Missouri Uniform Condominium Act. Since the issues to be decided by this Court involve questions of contract interpretation and statutory interpretation, *de novo* review applies.

I. The Trial Court erred in holding that Pointe Royale POA was not entitled to POA Assessments from the Bank that accrued prior to the Bank's foreclosure on the properties, because under Missouri law covenants creating an obligation to pay

assessments are binding on successors in title who obtain title to the property with notice of such covenants, in that the *POA Declaration* contains a covenant obligating successors in title to pay past due assessments and the Bank had notice of the covenant prior to acquiring title to the properties.

In analyzing whether the trial court erred in holding that Bank, a successor in title, was not liable for POA assessments that accrued prior to foreclosure, the Court should engage in the following two-step analysis: (1) determine whether the *POA Declaration* obligates successors in title to pay past due assessments that accrue prior to their ownership; and (2) if so, determine whether the Bank had notice of the covenant creating the obligation to pay assessments.

a. THE POA DECLARATION CLEARLY AND UNAMBIGUOUSLY OBLIGATES SUCCESSORS IN TITLE TO PAY PAST DUE ASSESSMENTS THAT ACCURED PRIOR TO OWNERSHIP.

The *POA Declaration* obligates successors in title to pay past due assessments that accrued prior to the transfer of title. Accordingly, subsequent owners are jointly and severally liable with the previous owner for all unpaid assessments when they purchase property in the Pointe Royale Subdivision with notice of the *POA Declaration*.

In developing a subdivision or common interest community, a developer records declarations to create a covenant that benefits all future landowners of the development by restricting the use of the property. *Hoster v. Green Park Development Co.*, 986 S.W.2d 500, 504 (Mo. App. E.D. 1999). The declarations regulate the relationship between the developer to the subdivision and the purchasers of property within that

subdivision. *Marshall v. Pyramid Dev. Corp.*, 855 S.W.2d 403, 405 (Mo. App. W.D. 1993).

Declarations are essentially contracts and the general rules of contract interpretation apply. *Hellman v. Sparks*, 2015 WL 1021307. The primary rule of contract interpretation under Missouri law is to determine the parties' intent and give effect to that intent. *Mullin v. Silvercreek Condo. Owner's Ass'n., Inc.* 195 S.W.3d 484, 490 (Mo. App. S.D. 2006). To determine the intention of the parties, courts inquire into the purpose and accompanying circumstances at the time of the restrictive covenant. *Stolba v. Vesci*, 909 S.W.2d 706, 708 (Mo. App. S.D. 1995). Terms should be given their plain, ordinary and usual meaning. *Id.* The terms of the contract are to be construed to avoid rendering the terms meaningless. *Kohner Properties, Inc. v. SPCP Group VI, LLC*, 408 S.W.3d 336, 342 (Mo. App. E.D. 2013). Courts presume that people do not intend nullities. *Tuttle v. Muenks*, 21 S.W.3d 6, 12 (Mo. App. W.D. 2000). "To the contrary, the preferred construction is one that provides a 'reasonable meaning to *each* phrase and clause,' not one that 'leaves some of the provisions without function or sense.'" *Id.* at 12 (quoting *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 963 S.W.2d 392, 397 (Mo. App. W.D. 1998). However, any ambiguity in the covenants should be read narrowly in favor of the free use of property. *Mullin*, at 490. A covenant is ambiguous when its wording is reasonably susceptible to multiple interpretations. *Stolba*, 909 S.W.3d at 708. In determining if ambiguity exists, the test is whether the language in the context of the entire agreement is susceptible to more than one construction giving words their plain meaning as understood by a reasonable person. *Id.* If the contract is

unambiguous, the court must enforce the contract as written. *MIF Realty v. Pickett*, 963 S.W.2d 308, 311 (Mo. App. W.D. 1997).

The *POA Declaration* provision at issue must be enforced as written because it is unambiguous. Other jurisdictions that have interpreted declaration provisions containing similar language have held that those declarations are clear and unambiguous. Such was the case in *Pudlit 2 Joint Venture, LLP v. Westwood Gardens*, a case from Florida. 169 So.3d 145 (Fl. App. 2015). In *Pudlit 2*, Florida had a statute making a parcel owner jointly and severally liable with a previous owner for all unpaid assessments that accrued prior to the transfer of title. *Id.* at 146-147. This statute conflicted with a homeowner's association declaration that stated in relevant part: "The personal obligation for delinquent assessments shall not pass to his successors in title unless expressly assumed by them." *Id.* at 146-147, 148.[5] At issue was whether the trial court's reliance on the statute unconstitutionally impaired appellant's right to contract where the homeowner's association declaration was in conflict with the statute. *Id.* at 151. The Florida Court of Appeals answered in the affirmative. *Id.* In reaching its decision, the court held that declaration's plain and unambiguous language absolving a successor in title from liability for assessments controlled over the conflicting statute. *Id.* Accordingly, the trial court erred by not enforcing the declaration provision. *Id.*

[5] Appellant in *Pudlit* had become a successor in title through a foreclosure sale. *Id.* at 147.

A New York court also analyzed a declaration provision that used similar language to the *POA Declaration*. There, a homeowners' association sued successor owners for assessments that had not been paid by prior owners. *Port Village HOA, Inc., v. Summit Associates,* 33 Misc.3d 39 (N.Y. Sup. App. Term 2011). The Declaration stated that delinquent assessments are continuing liens "which shall bind such Lot in the hands of the then Lot Owner's heirs, devisees, personal representatives and assigns" and further stated, "[i]n addition to the lien rights, the personal obligation of the then Lot Owner to pay such assessments shall remain such Lot Owner's personal obligation and shall not pass to such Lot Owner's successors in title unless expressly assumed by them." *Id.* at 45. The subsequent purchasers were determined to be "successors in title" to the Units and since there was no evidence they expressly assumed the personal obligation, they did not have an obligation to pay the assessments. *Id.*

Like *Pudlit 2* and *Port Village HOA, Inc*., the language contained in the *POA Declaration* is unambiguous and the Court can discern the intent of the parties' by looking to the POA Declaration's terms. Article X, Section 7 of the POA Declaration states, in relevant part:

> **Section 7. Non-Payment of Assessments.** If any Assessments are not paid on the date when due, then such Assessments shall become delinquent. The Association may bring an action at law against the Owner personally obligated to pay the same or foreclose the lien against the property and both actions shall be cumulative and neither shall preclude the other. No Owner

> may waive or otherwise escape liability for the Assessments by non-use of the Common Elements or abandonment. If Assessments have become delinquent, such Assessments shall bind 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.*** Such delinquent Assessments shall bear interest from the date of delinquency at any lawful rate as determined from time to time by the Board of Directors of the Association or, if not so determined, the rate of 10% per annum. In the event a judgment is obtained, such judgment shall include interest on the Assessments as above provided and a reasonable attorney's fee to be fixed by the Court, together with the costs of the action. (emphasis added) Def. Ex. A at Tab B, p. 17, §7; App. A60.

The language of Section 7 speaks to what remedies Pointe Royale has when assessments are not paid. It is helpful to look at every sentence in this section in order to determine the parties' intent. Read in context of the entire section, the parties' intent is clear.

The language of the *POA Declaration* demonstrates that the parties intended to give the Association two options to recover delinquent Assessments: (1) to sue the owner

and successors in title for past due assessments; and/or (2) to foreclose the lien against the property when the property is owned by the then owner, his heirs, devisees, personal representatives and assigns. The sentence stating that the delinquent assessments "shall bind the property in the hands of the then Owner, his heirs, devisees, personal representatives and assigns" indicates that the past due assessments create a lien on the property owned by the then Owner, his heirs, devisees, personal representatives, and assigns. This sentence speaks of the Association's remedies affecting the real estate. The next sentence speaks to remedies affecting the persons. This sentence states: "The personal obligation of the Owner to pay such Assessments shall remain his personal obligation and shall pass to successors in title." The language of this sentence indicates that the personal obligation to pay past due assessments is that of the owner and his successors in title. The purpose of using this language was to make all successors in title jointly and severally liable with the prior owner for past due assessments that accrued prior to the transfer of title.

Despite the clear language used in the *POA Declaration*, the Southern District determined that the term "successor in title" was ambiguous. The Southern District's reasoning is wrong for two reasons: (1) it renders the term "successor in title" meaningless; and (2) it ignores the plain and ordinary meaning of the words "successor" and "title."

According to the Southern District, "successors in title" must be limited to the "heirs, devisees, personal representatives and assigns" of the "original Owner."[6] Such a construction, as a matter of logic, doesn't make sense. According to the Southern District's Opinion, the only parties that could possibly be personally obligated to pay past due assessments are the heirs, devisees, personal representatives, and assigns of the "original Owner". If Developer had intended to bind only the "then Owner, his heirs, devisees, personal representatives, and assigns", the Developer wouldn't have used a broader term—"successors in title"—in the personal obligation clause. The Developer would have used the same language—"then Owner, his heirs, devisees, personal representatives, and assigns"—in the personal obligation clause. By limiting "successors in title" to the "heirs, devisees, personal representatives, and assigns" of the "then owner", the Court has rendered the term "successors in title" meaningless.

Tuttle v. Muenks is just one of many cases that the Southern District's Opinion contradicts in its application of the rules of contract interpretation. 21 S.W.3d 6 (Mo. App. W.D. 2000). There, the Western District concluded that the trial court's interpretation of an indemnification paragraph in a contract was in error because it

[6] The Southern District concludes that "the lien limitation was restricted to those having some relationship with the original owner [such] as his heir, devisee, personal representative or assign . . ." Opinion, p. 13. However, the Declaration does not use the word "original owner" in either the personal obligation clause or the lien clause.

"fail[ed] to give a reasonable meaning to each phrase, and instead le[ft] the Reservation Paragraph without meaning, and makes it a nullity…" *Id.* at 12.

Likewise, the Southern District has rendered "successors in title" meaningless by holding that the term was intended to be limited to the "heirs, devisees, personal representatives, and assigns" of the "then Owner." If "successors in title" is limited to mean a subset of "heirs, devisees, personal representatives, and assigns", the term "successors in title" has no meaning beyond "heirs, devisees, personal representatives, and assigns" because the individuals that make up the subset category are nothing more than heirs, devisees, personal representatives or assigns. For example, an administrator or executor is a type of personal representative. By construing "successor in title" to include an administrator or executor, for example, the Southern District has failed to give "successor in title" any meaning beyond a personal representative since administrators and executors are simply types of personal representatives. Accordingly, the Southern District's construction renders "successors in title" meaningless.[7]

[7] This type of construction—where words are rendered meaningless—sets a dangerous precedent because it allows judges to supplant the parties' intent with their own policy agenda and violates the parties' freedom of contract. Words have meaning. Parties choose words based on their meaning. The words they choose, and the meaning behind those words, are often evidence of the parties' intent. When courts ignore the meaning of words, they ignore the intent of the parties.

In addition to rendering "successors in title" meaningless, the Southern District's analysis also ignored the plain and ordinary meaning of the words "successor" and "title." In construing a contract, courts interpret it according to the plain and ordinary meaning of the words used, or the meaning that a person of average intelligence, knowledge, and experience would deem reasonable. *Bailey v. Federated Mut. Ins. Co.*, 152 S.W.3d 355, 357 (Mo. App. W.D. 2004). "The dictionary is a good source for finding the plain and ordinary meaning of contract language." *Id.* "Words are not ambiguous merely because their meaning and application confound the parties." *Id.* at 357. Rather, language is ambiguous only if it is susceptible to more than one reasonable construction. *Id.*

The Southern District's finding that the Bank was not a "successor in title" conflicts with longstanding principles of contract interpretation. *Bailey v. Federated Mut. Ins. Co*. is just one. 152 S.W.3d 355 (Mo. W.D. 2004). In *Bailey*, the trial court determined that a 16-year-old boy who was test driving a vehicle was not a "customer" under an insurance policy because he was not the purchaser. *Id.* The Western District concluded that the trial court's holding was an error. *Id.* In reaching that conclusion, the court looked to the plain and ordinary meaning of the term "customer" by consulting the Webster's Dictionary and Black's Law Dictionary for the definition of the term. *Id.* Based on the plain and ordinary meaning of the term "customer," the Western District rejected the argument that one must be a purchaser to be a customer and determined that the term was unambiguous in the policy. *Id.* at 358.

Likewise, the term "successors in title" is unambiguous. "Successors in title" does not appear in the online version of the Webster dictionary. Thus, it is necessary to look at

the individual words that create the term "successors in title": "successors" and "title." "Successor" is defined as: "one who succeeds or follows; one who takes the place which another has left, and sustains the like part or character." See Webster's 1913 Dictionary, http://www.webster-dictionary.org/definition/Successor. "Title" is defined as "[t]hat which constitutes a just cause of exclusive possession; that which is the foundation of ownership of property, real or personal; a right; as, a good title to an estate, or an imperfect title."[8] See Webster's 1913 Dictionary, http://www.webster-dictionary.org/definition/title.

Read in context of the Article X, Section 7 of the *Declaration*, it is clear that the term "successors in title" is referring to a claim of ownership following another's claim of ownership. The provisions at issue state: "If Assessments have become delinquent, such Assessments shall bind 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."* (emphasis added). In applying the plain and ordinary meaning of the terms "successors" and "title", it is obvious that the parties intended for the personal obligation to pay assessments pass to individuals who follow another in claiming ownership. Accordingly,

[8] There are multiple definitions of "title." Thus, the appropriate definition must be considered in context of the Declaration. The Declaration sets forth the contractual obligations among the parties as it relates to property. Thus, it makes sense to look for the definition of title that refers to an ownership interest in property.

a foreclosing bank, since it claims a right to ownership following another's claim to ownership, is a "successor in title." By ignoring the plain and ordinary meaning of the terms "successors" and "title," the Southern District disregarded the parties' intent and Missouri principles of contract interpretation

The Southern District was uncomfortable with the idea of holding a foreclosing bank responsible for past due assessments that accrued prior to the bank taking title. However, it makes sense that a developer would want to provide an association with the ability to collect past due assessments from a successor in title like a foreclosing bank. Obligating successors in title to pay the past due assessments increases the likelihood that the association will get paid, which is important since associations cannot perform their obligations to the owners without that source of income. Additionally, associations often struggle to successfully collect assessments from delinquent owners and foreclosing on a lien is sometimes impractical. In today's economic environment, condominium units are often financed and subject to a deed of trust. When a unit owner defaults on their personal obligation to pay assessments to an association, they often also default on their obligation to pay on the note to the mortgagee. The association could record a lien on the unit and initiate a foreclosure action. But, such a strategy is often ill advised. In most cases, the mortgagee will have a superior lien on the property. Sometimes, the property will have little to no equity, which leaves the Association with no resources to satisfy the lien. In such a situation, foreclosing on the lien would be a waste of money. And, if the lender is foreclosing on the delinquent owner for nonpayment, the odds of the Association being able to recover any funds by suing them for breaching their personal

obligations are slim. The solution, therefore, is simple: collect the obligation from the successor in title. The *POA Declaration* clearly and unambiguously gives Pointe Royale POA this option.

By using such language, the parties demonstrated their intent to provide Pointe Royale with an avenue for collecting past due assessments from parties who subsequently acquire title to the property, even if that party is a purchaser at a foreclosure sale. Because the language in this covenant is clear and unambiguous, it is enforceable against parties who purchase the property with notice of the covenant.

b. The Bank acquired the title with notice of the covenant that makes the personal obligation to pay the responsibility of successors in title. Accordingly, the covenant is enforceable against the Bank as a successor in title.

Missouri courts have held that a party is bound by the covenants when that covenant is recorded before the party acquires ownership of the property. *Whispering Valley Lakes Improvement Assoc. v. Franklin County Mercantile Bank*, 879 S.W.2d 572 (Mo. App. E.D. 1994). Thus, the next step of the analysis is to determine whether the Bank had notice of the covenant prior to becoming an owner.

A party is presumed to have constructive notice of the existence of a covenant if the document is recorded. *Hall v. American Oil Co.*, 504 S.W.2d 313, 317 (Mo. App. 1973). Thus, properly recorded covenants in real estate records bind the grantees of the developer. *Hamrick v. Herrera,* 744 S.W.2d 458, 461 (Mo. App. 1987).

Whispering Valley Lakes Improvement Assoc. v. Franklin County Mercantile Bank is instructive. 879 S.W.2d 572 (Mo. App. E.D. 1994). There, the Eastern District

reversed and remanded the trial court's grant of summary judgment in favor of a bank on the issue of whether the bank was personally liable for assessments that accrued prior to foreclosure. *Id.* In that case, the developer recorded covenants in 1967. *Id.* at 573. The covenants were designed to run with the land and be binding until 1972, at which time the covenants would automatically extend for a ten-year period unless a majority of owners voted to amend the covenants. *Id.* In 1982, a majority of owners voted to amend the covenants to provide that each assessment would become both a lien on the property and the personal obligation of the owner of the property. *Id.* The amended covenants were recorded in July 1982. *Id.* In 1983, the Bank obtained a deed of trust secured by the lots in the subdivision. *Id.* In 1985, the Bank foreclosed on the deed of trust and acquired an ownership interest in the lots. *Id.* The Association brought an action against the Bank for the unpaid assessments, and the Bank moved for summary judgment on the issue. *Id.*

The trial court found in favor of the Bank on the issue of the Bank's personal liability, reasoning that the original owners did not impose personal liability for assessments. *Id.* at 574. On appeal, the Eastern District disagreed. *Id.* Since the Bank had notice of the amendment to the covenants, it could be bound by amendments made to the covenants. *Id.* Thus, the bank's personal liability for assessments as a successor in title was a "justiciable issue sufficient to preclude summary judgment" and the trial court erred in finding that the Bank was entitled to judgment as a matter of law. *Id.*

Like in *Whispering Valley*, the Bank acquired an ownership interest in the properties with notice of the *POA Declaration*. The *POA Declaration* was recorded in 1986 in the Taney County Recorder's Office. The Bank recorded its deeds of trust and

foreclosed on the properties *after* the Declaration was recorded. Thus, the Bank, a successor in title, had notice of the covenant that obligated it to pay past due assessments. Accordingly, the Bank is bound by the covenant and the trial court erred by holding the Bank was not liable for assessments that accrued prior to foreclosure.

II. The trial court erred in finding that Section 448.3-116, RSMo. of the Missouri Uniform Condominium Act applied to Pointe Royale POA's collection of assessments, because Section 448.3-116 applies only to "associations" that consist exclusively of condominium unit owners, in that the Pointe Royale POA is an association that consists of both residential lot owners and condominium unit owners.

MO. REV. STAT. § 448.3-116 does not prohibit or limit Pointe Royale POA from recovering past due assessments. In fact, MO. REV. STAT. § 448.3-116 is inapplicable to Pointe Royale POA's collection of assessments because Pointe Royale POA is not an "association" subject to the Missouri Uniform Condominium Act. [9]

Judicial construction of a statute is controlled by the intent of the legislature. *Hillyard v. Hutter Oil Co.,* 978 S.W.2d 75 (Mo. App. S.D. 1998). Thus, when interpreting statutes, the court gives effect to legislative intent based on the plain language of the statute. 278 S.W.3d 670, 672 (Mo. banc 2009). If the intent of the legislature is clear, then the court is bound by that intent and cannot resort to any

[9] Section 448.1-102 governs the applicability of the Uniform Condominium Act and indicates it applies to "all condominiums" created in Missouri after September 28, 1983.

statutory construction in interpreting the statute. *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 166 (Mo.App.2006). Courts are not authorized to read a legislative intent into a statute that is contrary to the intent made evident by the plain meaning of the statute's language. *Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126 (Mo. App. E.D. 2007).

The trial court erroneously determined that Section 448.3-116 applied to Pointe Royale Property's Owner's Association's collection of POA assessments. To determine if the trial court's determination is correct, it is necessary for this Court to determine whether the legislature intended for Section 448.3-116 to apply to property owner's associations that include members who own residential lots or whether the legislature intended for Section 448.3-116 of the Missouri Uniform Condominium Act to apply to only condominium associations. In order to determine the legislature's intent in drafting Section 448.3-116, the court must look at the statute's language. *Bd. Of Managers of Parkway Towers Condo. Ass'n. Inc. v. Carcopa*, 403 S.W.3d 590, 592 (Mo. banc. 2013). Section 448.3-116, during the relevant time, provided:

> **448.3-116 Liens for Assessments**
>
> 1. The *association* has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. …If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

> 2. A lien pursuant to this section is prior to all other liens and encumbrances on a unit except:
>
> …
>
> (2) A mortgage and deed of trust for the purchase of a unit recorded before the date on which the assessment sought to be enforced became delinquent;
>
> …
>
> 6. This section shall not prohibit actions to recover sums for which subsection 1 of this section creates a lien, or prohibit an association from taking a deed in lieu of foreclosure. (emphasis added).

The legislative intent of Section 448.3-116 is to give the condominium association the power to enforce the collection of assessments so that the association can maintain the common elements and preserve the value of the community. *Bd. Of Managers of Parkway Towers Condo. Ass'n. Inc. v. Carcopa,* 403 S.W.3d 590, 592 (Mo. banc. 2013). Section 448.3-116 does not apply to property owners' associations that include residential lot owners.

The trial court's decision finding that Section 448.3-116 applied to the Pointe Royale POA is contrary to the legislative intent and ignores the legislature's definition of the term "association." When the legislature defines a term in a statute, that definition should be used in interpreting the statute to which it relates. *Hardt v. Vitae Found., Inc.*, 302 S.W. 3d 133, 138 (Mo. App. W.D. 2009). Section 448.3-116(1) creates a lien in favor of the "association." See MO. REV. STAT. § 448.3-116(1). The legislature has

defined "association" in the Missouri Uniform Condominium Act. Under the Missouri Uniform Condominium Act, an "association" is defined as "the unit owners' association organized under Section 448.3-101." MO. REV. STAT. § 448.1-103(3). Section 448.3-101 provides : "A unit owners' association shall be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist *exclusively* of all the unit owners or, following termination of the condominium, of all former unit owners entitled to distributions of proceeds under section 448.2-118, or their heirs, successors, or assigns." (emphasis added). "Unit owners" are "a declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the condominium . . ." MO. REV. STAT. § 448.1-103(30). A "unit" is "a physical portion of the condominium designated for separate ownership or occupancy. . . ." MO. REV. STAT. § 448.1-103(29). Thus, an "association" under the Missouri Uniform Condominium Act is an organization that consists *exclusively* of persons who own or lease a condominium unit.

Based on the plain language of the statute, the legislature intended to give the condominium association—the association that consists of exclusively of condominium unit owners—the power to enforce the collection of assessments in order maintain the common elements of the condominium. Section 448.3-116 was not intended to apply to property owner's associations that consist of residential lot owners as well as unit owners. The residential lot owners do not have an ownership interest in the condominium units. If the legislature had intended for Section 448.3-116 to apply to associations that include

residential lot owners, the legislature wouldn't have used the word "exclusively" in Section 448.3-101.

Pointe Royale POA collects assessments for the benefit of residential lot owners *and* unit owners within the Pointe Royale Subdivision. The residential lots are not condominium units. Accordingly, Pointe Royale POA is not an "association" under the Missouri Uniform Condominium Act because it does not consist exclusively of unit owners. For that reason, the Section 448.3-116 is inapplicable and it was an error for the trial court to apply Section 448.3-116 to the Pointe Royale POA's claim for past due assessments.

III. The trial court erred in finding that Pointe Royale was not entitled to POA Assessments that accrued prior to the Bank's foreclosure of the properties, because the trial court misapplied the law by interpreting Mo. Rev. Stat. § 448.3-116 to mean that the Bank's foreclosure on the properties extinguished the personal obligation to pay assessments to Pointe Royale POA, in that Section 448.3.116(2) merely lists the circumstances in which an assessment lien is junior to other liens and does not act to extinguish the underlying obligation to pay assessments.

Even if the Uniform Condominium Act applied to Pointe Royale POA, Section 448.3-116(2) does not extinguish an association's right to collect assessments. [10] The are

[10] Counsel for Pointe Royale POA maintains its position that Section 448.3-116 is inapplicable to the Pointe Royale POA. If the Court determines that Section 448.3-116 is

two problems with the trial court's analysis: (1) the court mistakenly assumes that a lien and the obligation it secures are one and the same; and (2) the court's analysis is contrary to the legislative intent behind Section 448.3-116.

MO. REV. STAT. § 448.3-116(1) creates a lien in favor of a condominium association for assessments and gives that lien priority in order to secure collection of the assessments. MO. REV. STAT. § 448.3-116(2) provides a list of circumstances when an assessment lien is junior to other liens. It does not extinguish the underlying obligation to pay assessments. MO. REV. STAT. § 448.3-116(6). In analyzing whether the trial court erred in interpreting MO. REV. STAT. § 448.3-116 to mean that the personal obligation to pay assessments was extinguished by the Bank's foreclosure on the properties, it is necessary to determine the legislative intent behind Section 448.3-116. In order to determine the intent, the court must look to the language of the statute. *Hillyard v. Hutter Oil Co.*, 978 S.W.2d 75, 78 (Mo. App. S.D. 1998).

The language of Section 448.3-116 is clear:

> **448.3-116 Liens for Assessments**
>
> 1. The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. …If an assessment is payable in

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inapplicable, Point III of Pointe Royale's brief may be unnecessary for the Court to address and thus moot.

installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

2. A lien pursuant to this section is prior to all other liens and encumbrances on a unit except:

…

(2) A mortgage and deed of trust for the purchase of a unit recorded before the date on which the assessment sought to be enforced became delinquent;

…

6. This section shall *not* prohibit actions to recover sums for which subsection 1 of this section creates a lien, or prohibit an association from taking a deed in lieu of foreclosure. (emphasis added)

The legislative intent of Section 448.3-116 is to give an association power to enforce the collection of assessments in order to allow the association maintain the common elements and preserve the value of the community. *Bd. of Managers of Parkway Towers Condo. Ass'n. Inc. v. Carcopa,* 403 S.W.3d 590, 592 (Mo. banc. 2013). The language in Section 448.3-116 does not extinguish an association's right to recover assessments. Subsection 1 creates a lien for past due assessments in favor of the Association. Subsection 2 makes that lien superior to other liens on the unit except in certain circumstances. Subsection 2 does not eliminate the underlying obligation to pay assessments.

There is no language contained in subsection 2 that eliminates the underlying obligation to pay assessments. The trial court mistakenly assumes that the extinguishment of a lien extinguishes the underlying obligation to pay. Such a conclusion blurs the distinction between a lien and the obligation to pay a debt. "A personal debt of an owner for unpaid assessments, collected by an action for a money judgment, is not enforcement of a lien but an entirely different legal action and distinct remedy; where a lien attaches to the property, not the owner." *The Ventana Owners Association, Inc. v. Ventana KC, LLC*, 481 S.W.3d 75, 79 (Mo. App. E.D. 2015). A lien is merely a right to have a debt, if not otherwise paid, satisfied out of the property. *Dysart v. State Dept. of Public Health and Welfare*, 361 S.W.2d 347, 353 (Mo. App. 1962). In other words, a lien merely gives the party a security interest in property until the debt is paid. *Id.* at 353. The obligation to pay the underlying debt exists independently from the lien. See *Belote v. McLaughlin*, 673 S.W.2d 27, 30 (Mo. banc. 1984) (holding that a mortgagee may maintain a personal action on a mortgage debt against the debt and may maintain another action to foreclose his mortgage). "[F]oreclosure is but a means of enforcing the lien upon failure to satisfy the debt." *Id.* at 31.

Courts have held that although foreclosure by a senior lienor often wipes out a junior lienor's interests in collateral, it does not discharge the debtor's underlying obligation to junior lien creditors. *Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 124 F.3d 252, 267 (1st Cir. 1997). Once the lien is extinguished, the association's interest in collection of the assessments becomes unsecured. However, there is still an obligation to pay the assessments. The extinguishment of the lien simply means that the Association's

interest in collection of the assessments is no longer secured by an interest in the condominium units. If the legislature intended to eliminate the obligation to pay the assessments in subsection 2, they would not have limited the statute to "liens."

In addition to failing to distinguish between a lien and the underlying obligation to pay assessments, the trial court's interpretation of Section 448.3-116 completely ignores Subsection 6 of the Section. Subsection 6 states that the section "shall not prohibit actions to recover sums . . ." for assessments levied by the association. Nothing in this statute indicates that the legislature intended for a foreclosure to extinguish the Association's claim for assessments. In fact, subsection 6 indicates that the legislature intended the opposite—to protect the association's right to recover assessments. If the legislature had intended to extinguish the personal obligation to pay assessments that accrued prior to a Bank's foreclosure, they would not have included Subsection 6. Thus, the trial court's holding that Section 448.3-116(2) extinguished the Association's claim for assessments accruing prior to the Bank's foreclosure was in error and contrary to the clear legislative intent.

Because the legislative intent of Section 448.3-116 is to give the association the power to enforce the collection of assessments in order to maintain the value of the community, the trial court erred in determining that POA's "claim for assessments accruing prior to foreclosure of the Deeds of Trust were [sic] extinguished by the foreclosure." **(L.F. 164).**

IV. The trial court erred in finding that Pointe Royale was not entitled to attorney's fees, late fees, and interest for the 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 the POA the right to collect reasonable attorney's fees, and late fees in connection with delinquent assessments.

Missouri courts follow the American rule in awarding attorney's fees. *Grewell v. State Farm Mutual Auto. Ins. Co.*, 162 S.W.3d 503, 506-507 (Mo. App. W.D. 2005). Under the American rule, litigants are responsible for their own attorney's fees. *Sheppard v. East*, 192 S.W.3d 518, 523 (Mo. App. E.D. 2006). However, there are exceptions to this rule. *Id.* One exception to the American rule is that attorney's fees are recoverable if authorized by contract. *Id.*

When a contract expressly provides for the recovery of attorney's fees, the trial court must comply with the terms of the contract and award them to the prevailing party. *Harris v. Union Elec. Co.*, 766 S.W.2d 80, 89 (Mo. banc 1989) Such a decision is not a matter of discretion. *Sheppard v. East,* 192 S.W.3d 518, 523 (Mo. App. E.D. 2006).

Dominion Home Owners Ass'n, Inc. v. Martin is on point. 953 S.W.2d 178, 185 (Mo. App. W.D. 1997). There, the Western District determined that the Association was entitled to reasonable attorney's fees and the cost of collection pursuant to the terms of the Declaration. *Id.* at 185. The Declaration at issue stated, in part: " It [sic] the assessment is not paid within thirty (30) days after the due date, the assessment shall bear interest from the date of delinquency at the rate of Ten per cent (10%) per annum. The Association may bring an action at law against the Owner personally obligated to pay, and interest, costs and reasonable attorney's fees of any such action shall be added to the

amount of such assessment." *Id.* Because the Declaration expressly allowed the Association to collect attorney's fees and collection costs, the Western District determined that the Association was entitled to such fees. *Id.* at 185.

Likewise, Pointe Royale's Declaration expressly entitles the Association to collect reasonable attorney's fees and costs associated with delinquent assessments. According to the Article X, Section 7 of the POA Declaration:

> Such delinquent Assessments shall bear interest from the date of delinquency at any lawful rate as determined from time to time by the Board of Directors of the Association or, if not so determined, the rate of 10% per annum. In the event a judgment is obtained, such judgment shall include interest on the Assessments as above provided and a reasonable attorney's fee to be fixed by the Court, together with the costs of the action.

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 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, reasonable attorney's fees, and costs. Accordingly, the judgment of the trial court denying Pointe Royale POA attorney's fees should be reversed.

CONCLUSION

The plain language of the *POA Declaration* creates an obligation to pay assessments that passes to successors in title. Because the Bank, a successor in title, acquired title to the properties after the *POA Declaration* was recorded, the Bank had notice of the covenants and is obligated to pay the past due assessments. Accordingly, it was an error for the trial court to conclude that Pointe Royale POA was not entitled to the past due assessments from the Bank.

The trial court also erred by applying the Missouri Uniform Condominium Act to Pointe Royale POA. Section 448.3-116 applies to "associations" that consist exclusively of condominium unit owners. Pointe Royale POA consists of residential lot owners and condominium unit owners. Because Pointe Royale POA does not consist exclusively of condominium unit owners, it is not an "association" subject to the Missouri Uniform Condominium Act.

Likewise, it was an error for the trial court to determine that Section 448.3-116 extinguished Pointe Royale POA's claim for assessments. There is no language in Section 448.3-116 that indicates it was the legislature's intent to extinguish an association's claim for assessments. In fact, such a conclusion is contrary to the purpose of Section 448.3-116—which is to give an association power to enforce the collection of assessments in order to allow the association maintain the common elements and preserve the value of the community. For that reason, the trial court erred in determining that Pointe Royale POA's claim for assessments were extinguished.

Finally, Pointe Royale POA is entitled to collect reasonable attorney's fees, and late fees in connection with delinquent assessments. In Missouri, attorney's fees are recoverable if there is a contract provision that provides for them. The *POA Declaration* expressly entitles the Association to collect reasonable attorney's fees and costs associated with delinquent assessments. Accordingly, the decision of the trial court denying Pointe Royale POA attorney's fees, costs, and interest was in error and should be reversed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

COME NOW Karl Finkenbinder and Jacqueline Bryant, of Schenewerk & Finkenbinder, Attorneys at Law, L.L.C., and state that this Brief complies with the limitations contained in Supreme Court Rule 84.06 and includes the information required by Rule 55.03.

We further state that the number of words contained in this Brief are 10,409 according to the Microsoft Word program word count. The electronic copy of this document was scanned for viruses and determined to be virus-free.

/s/ Karl Finkenbinder

/s/ Jacqueline Bryant

_____

Karl Finkenbinder
Jacqueline Bryant

CERTIFCIATE OF SERVICE

COMES NOW Jacqueline Bryant, of Schenewerk & Finkenbinder, Attorneys at Law, LLC, and states that the Substitute 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 November 21, 2016.

/s/ Jacqueline Bryant
_____
Jacqueline Bryant, MO BAR #64755