

THE SUPREME COURT OF MISSOURI

Appeal No. SC97349

TRUSTEES OF CLAYTON TERRACE SUBDIVISION,
Plaintiff/Cross-Appellant/Cross Appeal-Respondent,

v.

6 CLAYTON TERRACE, LLC, et al.,
Defendants/Respondents.

Appeal from the Circuit Court of St. Louis County, Missouri
Division No. 34
Cause No. 14SL-CC02852

The Honorable Dale Hood, Associate Circuit Judge

**SUBSTITUTE BRIEF OF APPELLANT/CROSS-RESPONDENT
JEANNETTE R. HUEY, TRUSTEE OF THE JANE R. HUEY
LIFETIME TRUST DATED MAY 21, 1998**

John Hein, #53182
Grant J. Mabie, #61095
HEIN SCHNEIDER & BOND P.C.
147 North Meramec Avenue
St. Louis, Missouri 63105
Telephone: (314) 863-9100
Facsimile: (314) 863-9101
Email: jjh@hsbattorneys.com
gjm@hsbattorneys.com

*Attorneys for Appellant/Cross-
Respondent, Jeannette R. Huey, Trustee
of the Jane R. Huey Lifetime Trust
Agreement dated May 21, 1998*

TABLE OF CONTENTS

Table of Authorities..... 4

Jurisdictional Statement..... 5

Statement of Facts 6

Points Relied On..... 15

Standard of Review 17

Argument..... 19

I. THE TRIAL COURT ERRED IN AWARDING APPELLANT ONLY SIXTY-THOUSAND DOLLARS (\$60,000.00) OF HER ATTORNEY’S FEES AND COSTS BECAUSE THE TRIAL COURT, WHO PRESIDED OVER THE MATTER FROM THE DATE OF FILING UP TO AND THROUGH THE TWO (2) DAYS OF TRIAL, EXPRESSLY FOUND AND REITERATED THAT THE FULL ONE HUNDRED AND NINETEEN THOUSAND TWO HUNDRED AND FORTY-THREE DOLLARS AND 99/00 (\$119,243.99) IN DAMAGES SUFFERED BY APPELLANT, WHICH DAMAGES CONSISTED OF THE ATTORNEY’S FEES AND COSTS ACTUALLY CHARGED-TO AND PAID BY THE APPELLANT, WAS FAIR AND REASONABLE UNDER THE CIRCUMSTANCES, THEREBY REQUIRING THE ENTRY OF JUDGMENT IN SAID AMOUNT 19

II. THE TRIAL COURT ERRED IN MISTAKENLY APPORTIONING FORTY-THOUSAND DOLLARS (\$40,000.00) OF THE APPELLANT’S ATTORNEY’S FEES AND COSTS AGAINST DEFENDANT 6 CLAYTON TERRACE, LLC, A PARTY AGAINST WHO APPELLANT DID NOT ASSERT ANY CLAIMS OR SEEK ANY RELIEF, THEREBY PRECLUDING THE ENTRY OF JUDGMENT AGAINST SAID PARTY IN FAVOR OF APPELLANT 24

Conclusion..... 27

Request for Reversal, Remand, and Entry of Judgment..... 28

Certificate of Service 29

Certificates of Compliance Pursuant to Missouri Supreme Court Rules 84.06(c) and (g) 30

TABLE OF AUTHORITIES

Cases

Agnew v. Johnson, 176 S.W.2d 489 (Mo. 1943)19

Aubuchon v. Hale, 453 S.W.3d 318 (Mo. App. E.D. 2014) 15, 16, 18, 19, 21, 23, 26

Bernheimer v. First National Bank of Kansas City, 225 S.W. 2d 745 (1949) 24

Ellis v. Hehner, 448 S.W.3d 320 (Mo. App. E.D. 2014) 24

First Banc Real Estate, Inc. v. Johnson, 321 S.W.3d 322 (Mo. App. W.D. 2010) 18

Ivie v. Smith, 439 S.W.3d 189 (Mo. banc 2014) 17

Klinkerfuss v. Cronin, 289 S.W.3d 607 (Mo. App. E.D. 2009) 19, 21

Kristen Nicole Properties v. Shafinia, 500 S.W.3d 902 (Mo. App. W.D. 2016) 17

McAllister v. McAllister, 101 S.W.3d 287 (Mo. App. E.D. 2003) 17

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976) 17, 18

Russo v. Bruce, 263 S.W.3d 684 (Mo. App. 2008) 18

Scheck Indus. Corp. v. Tarlton Corp., 435 S.W.3d 705 (Mo. App. E.D. 2014) 17

State ex rel. Chase Resorts, Inc. v. Campbell, 913 S.W.2d 832 (Mo. App. 1995)19

Underwood v. Hash, 67 S.W.3d 770 (Mo. App. 2002) 17

Walker v. Hanke, 992 S.W.2d 925 (Mo. App. 1999) 17

Statutes and Constitutional Authority

Article V, Section 3 of the Missouri Constitution 5

§477.050, RSMo..... 5

JURISDICTIONAL STATEMENT

This is an appeal of the St. Louis County, Missouri, Circuit Court's calculation and assessment of damages, attorney's fees and costs awarded to the Appellant/Cross-Respondent/Defendant/Counterclaim-Plaintiff, Ms. Jeannette R. Huey, in her capacity as Trustee of the Jane R. Huey Lifetime Trust Agreement dated May 21, 1998, by the trial court in its December 21, 2012 final Order and Judgment. The Missouri Court of Appeals, Eastern District, had jurisdiction over this appeal in that it did not involve any of the issue(s) reserved for the exclusive jurisdiction of the Missouri Supreme Court as set forth in Article V, Section 3 of the Missouri Constitution. This appeal therefore fell within the general appellate jurisdiction of the Missouri Court of Appeals and was within the territorial jurisdiction of the Eastern District of the Missouri Court of Appeals. §477.050, RSMo. Jurisdiction was vested in this Court following this Court's Order of December 4, 2018 transferring this matter from the Missouri Court of Appeals, Eastern District.

STATEMENT OF FACTS

A. General Overview and Summary

This matter came before the Trial Court on July 11th and 12th of 2016 for a two-day bench trial on the Plaintiffs' First Amended Petition for Declaratory Judgment and Injunctive Relief, and on Appellant's Counterclaim for Abuse of Process. [L.F. 0040-0078; Tr.]. The genesis of the lawsuit was rooted in a dispute between the Plaintiffs, the Trustees of Clayton Terrace Subdivision (the "**Trustees**") and the defendant, 6 Clayton Terrace, LLC (the "**LLC**") over whether and to what extent the Subdivision's restrictive covenants and indentures (the "**Indentures**") prohibited the LLC from subdividing Lot 6 (the "**Property**") into two, separate buildable Lots (a.k.a. Lot 6A and Lot 6B) for purposes of residential development and sale. [L.F. 0040-0065, 0079-0085, 0094-0097, 00103-00106].

The Trustees likewise sued the Property's former owner, the Jane R. Huey Lifetime Trust dated May 21, 1998 (the "**Trust**"), claiming that the LLC's original acquisition of the Property some two (2) years earlier should now be held null and void because the written Notice of Sale delivered to the Trustees and the other Subdivision homeowners pursuant to the Indentures' Fifteen Day Right-of-First Refusal provision, was allegedly untimely and/or otherwise so fatally deficient in its contents as to warrant setting aside the sale. [L.F. 0040-0065].

Both the LLC and Ms. Jeannette R. Huey ("**Ms. Huey**", or "**Appellant**"), who is the daughter of Jane R. Huey, and at all relevant times served as the Trustee of her

mother's Trust¹, denied the Trustees' claims and asserted a variety of affirmative defenses—including that the Fifteen Day Right-of-First Refusal provision (the "***Sale Restriction***") was invalid because it had been imposed on the Subdivision decades after its founding without first having been approved by the unanimous consent of all the homeowners in the Subdivision. [L.F. 0066-0078, 0091-0093, 0097-00102].

Ms. Huey also filed a Counterclaim against the Trustees for Abuse of Process based on, among other things, a series of emails by and among the Trustees and other testimony and discovery demonstrating that the claim against Ms. Huey was brought in an effort to coerce the LLC into withdrawing or abandoning its request to subdivide the Property by purporting to place its fee title in jeopardy. [L.F. 0066-0078; Defendants' Exhibits 2 (CTS 104-105), 3 (CTS 87), 4 (CTS 162), 5 (CTS 88-90), and 6 (CTS 190)]. Ms. Huey further alleged that the Trustees were fully aware of the sale of the Property from its inception and were likewise aware of any alleged defects in the Notice of Sale about which they now complain well in advance of the Closing. Discovery further revealed that the Trustees were also aware of the LLC's plan to subdivide the Property within days of the sale, yet knowingly chose to take no action or communicate any objection for nearly two (2) years, during which time the Property underwent substantial

¹ It is undisputed that Ms. Huey was named as a party to the action solely in her representative capacity as Trustee of her mother's Trust. And thus, while Paragraph 2 of the Judgment [L.F. 00515; App. 3] makes it seem as though Ms. Huey was also a Trustee of the subdivision, that is not the case, and appears to simply be a typographical error on the part of the Court. Therefore, while Ms. Huey does not believe this error rises to the level of a Point for purposes of this appeal, it is important to bring this matter to this Court's attention for purposes of its review and understanding. See also [L.F. 00608-00609, Subpart A].

renovation and alteration, including the reconfiguration of its layout. It was not until the City of Frontenac (the “*City*”) approved the LLC’s application to subdivide [L.F. 0066-0078, 00335-00343] that the Trustees suddenly raised their claims and filed suit to set aside the sale. [L.F. 00335-00343].

After numerous depositions, substantial written discovery and motion practice, the Parties appeared for trial on July 11th and 12th of 2016 in Division 34 of the Circuit Court of St. Louis County, before the Honorable Dale Hood (“*Judge Hood*”) and presented evidence on all matters and issues. [L.F. 001-0039; Tr.]. Judge Hood presided over the matter from the date of its filing through trial and was thus acquainted with the facts, the claims and issues presented. [L.F. 001-0039; Tr.]. Upon the close of evidence, including the presentation of expert witness testimony from all parties, the matter was taken under submission. [L.F. 001-0039; Tr.] On December 21, 2016 judgment was issued in favor of Ms. Huey and against the Trustees on all counts, including her Counterclaim for Abuse of Process (the “*Judgment*”) [L.F. 00515-00534; App. 3-22]. Judgment was also entered against the LLC and in favor of the Trustees on Count II for injunctive relief, thus halting the LLC’s development plan for the Property. [L.F. 00515-00534 App. 3-22]. Thereafter, the Defendants filed post-trial Motions, which Motions were subsequently denied by the Honorable Joseph Green² on April 13, 2017, and this Appeal followed. [L.F. 00550-00631, 00649-00650, 00657-00745]

² As the Court is aware, Judge Hood was not retained by the St. Louis County voters in the November, 2016 election and vacated his judgeship shortly after entering Judgment in this matter. As such, post-trial motions were present to, and argued before, the Hon. Joseph Green pursuant to Rule 79.01 of the Missouri Rules of Civil Procedure.

B. The Property and its History

By way of further background, the Property at issue is a two (2+) acre Lot located in the Clayton Terrace Subdivision in Frontenac, Missouri formerly known as Lot 6 [L.F. 00335-00343]. Prior to her death, the Property was owned by Ms. Jane R. Huey pursuant to the terms of her Lifetime Trust Agreement dated May 21, 1998. [L.F. 00335-00343; Tr. 301-303]. Ms. Huey is the daughter of Jane R. Huey, and served as the Trustee of her mother's Trust at all times relevant to the litigation and this Appeal. [L.F. 00335-00343].

In her role as Trustee of her mother's Trust, Ms. Huey was tasked with finalizing all matters of the estate, disposing of the Trust's assets—including the Property, and distributing the Trust's proceeds by and among the beneficiaries. [Tr. 301-303, 307-309, 312-313]. As part of that process, Ms. Huey listed the Property for sale with local real estate brokerage firm, Janet McAfee Real Estate. [Tr. 303]. On or about January 17, 2013, and after months on the market and several reductions in the asking price, Ms. Huey received an acceptable contract from Century Renovations, LLC for a sale price of \$415,000.00 (the "***Sale Contract***"). [L.F. 00338; Tr. 303-305].

Prior to closing, the title agent prepared a Notice of Sale for the Property as called for in the Indentures' Sale Restriction. [L.F. 00339]. To accommodate the Sale Restriction's apparent fifteen-day requirement, the closing was postponed until February 15, 2014 (the "***Closing***"). The Notice of Sale was hand delivered to each home in the Clayton Terrace Subdivision on January 31, 2014 by Ms. Huey's real estate agent, Ms.

Judy Miller (“*Ms. Miller*”). [L.F. 00339; L.F. 00354, 00462 (the Deposition of the Realtor, Ms. Judy Miller) at P.41:Ln.16-19 and P.43:Ln.7-22].

Thereafter, the majority of homeowners in the Subdivision executed and delivered their respective Notices of Sale expressly waiving their right of first refusal with regards to the Property. [See Plaintiffs’ Exhibit 3]. Of all the homeowners in the Subdivision, only Mrs. Elizabeth Schwartz (“*Mrs. Schwartz*”) returned her Notice of Sale indicating she might be interested in exercising her right of first refusal and acquiring the Property under the same terms as the LLC. [L.F. 00339-00340]. Ultimately, Mrs. Schwartz elected not to purchase the Property and delivered a written waiver expressly waiving her right of first refusal (the “*Schwartz Waiver*”). [L.F. 00340 (See also Plaintiffs’ Exhibit 3 at p.00345 (the executed Schwartz Waiver waiving the right of first refusal)].

At or before the date of Closing, Century Renovations, LLC assigned the Sale Contract to 6 Clayton Terrace, LLC, a single purpose entity formed and registered by the purchasers for the purpose of taking title to the Property. The sale closed as scheduled [L.F. 341; Tr. 245] and the LLC then spent the better part of the next fourteen (14) months remodeling the home and swimming pool located thereon, which alterations and improvements included:

- a) the demolition and removal of certain walls;
- b) combining the former kitchen and dining room into a single kitchen space which, as of the date of trial remained in an unfinished condition;
- c) reconfiguring the layout of the upstairs so as to increase the number of bedrooms;

- d) raising the floor in the sunroom;
- e) walling off the French doors from the sunroom leading to the greenhouse;
- f) cutting through the brick exterior to add an additional door;
- g) removing several large trees from the Property;
- h) refinishing the swimming pool;
- i) replacing the pool's heating and filtration system;
- j) repairing/replacing the concrete decking around the pool; and
- k) clearing substantial brush and plantings from the Property's grounds. [Tr. 266-267, 270-276, 302-303; Defendants' Exhibits 17, 19-20 (before and after photographs of the interior of the home on the Property)].

During that same time period, and believing the sale of the Property to be final in all respects, Ms. Huey finalized her mother's estate, concluded the remaining tax-related matters and disbursed the assets of the Trust—including the proceeds of the sale of the Property, to the Trust's beneficiaries. [L.F. 00342; Tr. 307-309].

C. The Subdivision of Lot 6 and the Ensuing Lawsuit

On or about April 24, 2014, and more than a year after the Closing, the LLC filed an application with the City of Frontenac to Subdivide Lot 6 into Lot 6A and Lot 6B. [L.F. 00341; Defendants' Exhibit 15]. The Trustees and several of the Subdivision residents strongly opposed the LLC's proposal and appeared at the council meetings to voice their opposition. [Stipulated Exhibit JM-Aff., COF 3-13; Defendants' Exhibit 2]. On or about June 24, 2014, the City of Frontenac approved the LLC's application to subdivide the Property, and the preliminary plat over the Trustees' substantial objection and opposition,

and the instant lawsuit followed. [L.F. 00341-00342].

D. Written Discovery, Depositions and Trial

During the course of the lawsuit, the parties exchanged substantial written discovery and conducted numerous depositions, including each of the parties, the title insurance agent, real estate broker and other residents of the Subdivision. [L.F. 001-0039, 00218-00324, 00351-00357].

Among the numerous documents and materials produced were a series of emails by and among the Head Trustee/President of the Home Owners' Association, John Tackes, Esq. and the other Trustees in which Mr. Tackes outlined the Trustees' two (2) goals in bringing this lawsuit, which were: 1) to prevent the division of Lot 6; and 2) see "*that '6 Clayton Terrace, LLC' moves out of the neighborhood and takes their schemes with them*". [Defendants' Exhibit 2, Defendants' Exhibit 3]. Mr. Tackes further stated that naming Ms. Huey was simply a means to "*achieve the first two goals...*" [Defendants' Exhibit 2] and that the Trustees "*really have no beef with [Ms. Huey] and the Trust she represents...*" [Defendants' Exhibit 4], such that "*[i]f the LLC backs down and does not build on the land [the Plaintiff/Trustees] don't have to enforce the indentures.*" [Defendants' Exhibit 5 at CTS 000089].

Additional emails by and between Mr. Tackes and Mrs. Schwartz likewise revealed that despite having asked the Trial Court to set aside the sale and offer the Property to Mrs. Schwartz, she actually had no intention of acquiring the Property even if the relief had been granted and had in fact informed the Trustees and their counsel of her position prior to the filing of this lawsuit. [L.F. 00351-00357, 00447, 00453, 00457-

00458, 00460 (the Deposition of Elizabeth Schwartz) at P.28:Ln.10-18 and P. 29:Ln. 1-7 (informing the Trustees); P.70:Ln.22-25 (informing counsel); see also, Id. at P.27:Ln.15-20 and P71:Ln.5-6; and (the Deposition of William Schwartz) at P.18:Ln. 3-17); and (the Deposition of Rick Francis at P.29: Ln.9-14)]. In fact, Mrs. Schwartz subsequently inquired whether she would actually have to purchase the Property if the Court were to rule in the Trustees' favor, to which Mr. Tackes replied that “[t]he lawsuit is not about you getting the property.” [Defendants' Exhibit 6].

Trustees Cathy Stahr and Rick Francis also confirmed they were aware of the LLC's plan to subdivide the Property within ten (10) days after the Closing [Defendants' Exhibit 1], but neither she nor Mr. Francis took any action with regard thereto—electing instead to “*just wait and see*” hoping “*its not going to be an issue.*” [Defendants' Exhibit 11]. Mr. Francis likewise confirmed at trial that the decision to file the lawsuit resulted from the City of Frontenac's approval of the subdivision of Lot 6, and not because of Ms. Huey's sale of Lot 6 or the details thereof. See [Tr. 94: Ln.5-7].

On these facts and the others set forth in the Judgment, the Trial Court found in favor of Ms. Huey on her Counterclaim for Abuse of Process and expressly found and concluded that Ms. Huey suffered \$119,243.99 in damages consisting of her attorney's fees and costs as a direct and proximate result of the Plaintiffs' actions [L.F. 00512-00514, 00526, 00532; App. 14, 20]. The Trial Court further found and confirmed that the amount billed to, and paid by, Ms. Huey was “...fair and reasonable under the circumstances.” [L.F. 00532, 00533; App. 20-21]. (emphasis added). The Trial Court, however, only entered an award in favor of Ms. Huey for Sixty-Thousand Dollars (\$60,000.00), rather than the \$119,243.99

called for above [L.F. 00533; App. 21], and purported to assign Forty-Thousand (\$40,000.00) of that amount to the LLC, a party against who Ms. Huey did not assert any claims or seek any relief. [L.F. 0066-0078, 00533; App. 21].

At the same time, the Trial Court awarded the Trustees all of the costs and fees for which they prayed as against the LLC without reduction or set off, despite the Trustees having been expressly found to have acted tortiously and unlawfully in causing Ms. Huey's damages [L.F. 00515-00539; App. 3-23]. Thus, the only party in the matter found to have not engaged in any wrongdoing or unlawful behavior, is also the only party whose award of attorneys' fees and costs was reduced and reapportioned without rationale or explanation [L.F. 00515-00539; App. 3-23].

It is this portion of the Judgment that Ms. Huey appeals for all the reasons set out below. [L.F. 00533, 00716-00745; App. 21].

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN AWARDING APPELLANT ONLY SIXTY-THOUSAND DOLLARS (\$60,000.00) OF HER ATTORNEY’S FEES AND COSTS BECAUSE THE TRIAL COURT, WHO PRESIDED OVER THE MATTER FROM THE DATE OF FILING UP TO AND THROUGH THE TWO (2) DAYS OF TRIAL, EXPRESSLY FOUND AND REITERATED THAT THE FULL ONE HUNDRED AND NINETEEN THOUSAND TWO HUNDRED AND FORTY-THREE DOLLARS AND 99/100 (\$119,243.99) IN DAMAGES SUFFERED BY APPELLANT, WHICH DAMAGES CONSISTED OF THE ATTORNEY’S FEES AND COSTS ACTUALLY CHARGED-TO AND PAID BY THE APPELLANT, WAS FAIR AND REASONABLE UNDER THE CIRCUMSTANCES, THEREBY REQUIRING THE ENTRY OF JUDGMENT IN SAID AMOUNT.

Aubuchon v. Hale, 453 S.W.3d 318 (Mo. App. E.D. 2014).

II. THE TRIAL COURT ERRED IN MISTAKENLY APPORTIONING FORTY-THOUSAND DOLLARS (\$40,000.00) OF THE APPELLANT'S ATTORNEY'S FEES AND COSTS AGAINST DEFENDANT 6 CLAYTON TERRACE, LLC, A PARTY AGAINST WHO APPELLANT DID NOT ASSERT ANY CLAIMS OR SEEK ANY RELIEF, THEREBY PRECLUDING THE ENTRY OF JUDGMENT AGAINST SAID PARTY IN FAVOR OF APPELLANT, AND WHICH AMOUNT SHOULD HAVE BEEN IMPOSED ON THE PLAINTIFFS.

Aubuchon v. Hale, 453 S.W.3d 318, 325 (Mo. App. E.D. 2014).

STANDARD OF REVIEW

On review of a court-tried case such as this, the Appellate Court will affirm the trial court's judgment 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).

In its review, the Court views the evidence and all reasonable inferences therefrom in the light most favorable to the trial court's decision, and disregards all contrary evidence and inferences. Scheck Indus. Corp. v. Tarlton Corp., 435 S.W.3d 705, 717 (Mo. App. E.D. 2014). The Court likewise "*defer[s] to the circuit court's credibility determinations*", recognizing that "*[c]redibility of the witnesses and the weight to be given to their testimony is for the trial court, which is free to believe none, part, or all of the testimony of any witness.*" Ivie v. Smith, 439 S.W.3d 189, 200 (Mo. banc 2014); Underwood v. Hash, 67 S.W.3d 770, 774 (Mo. App. 2002). The circuit court is likewise "*free to believe any, all, or none of the evidence presented at trial*" Ivie, 439 S.W.3d at 200, and defers to the trial court's judgment on contested issues of fact. Kristen Nicole Properties v. Shafinia, 500 S.W.3d 902, 905 (Mo. App. W.D. 2016). If the trial court did not make a finding on a specific issue of fact, the Court will consider it "*as having been found in accordance with the result reached.*" McAllister v. McAllister, 101 S.W.3d 287, 290 (Mo. App. E.D. 2003).

In addition, the Court presumes the trial court's decision is valid and the burden is on the complaining party to demonstrate it is incorrect. Walker v. Hanke, 992 S.W.2d 925, 930 (Mo. App. 1999). Furthermore, because "*appellate courts are primarily*

concerned with the correctness of the result reached by the trial court, [they] are not bound by [the trial court's] rationale and may affirm the judgment on any grounds sufficient to sustain it." Russo v. Bruce, 263 S.W.3d 684, 687 (Mo. App. 2008). Thus, if the correct result was reached, the judgment must be affirmed. First Banc Real Estate, Inc. v. Johnson, 321 S.W.3d 322, 329 (Mo. App. W.D. 2010) (citing Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)).

In regard to an award of attorney's fees, the appellate court will only reverse the trial court's award upon the showing of an abuse of discretion. Aubuchon v. Hale, 453 S.W.3d 318, 325 (Mo. App. E.D. 2014). *"To demonstrate an abuse of discretion, the complaining party must prove that the award is clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice."* Id.

This standard of review is applicable to both of Appellant's Points Relied On set forth hereinbelow.

ARGUMENT

I. The trial court erred in awarding Appellant only Sixty-Thousand Dollars (\$60,000.00) of her attorney’s fees and costs because the trial court, who presided over the matter from the date of filing up to and through the two (2) days of trial, expressly found and reiterated that the full One Hundred and Nineteen Thousand Two Hundred and Forty-Three Dollars and 99/00 (\$119,243.99) in damages suffered by Appellant, which damages consisted of the attorney’s fees and costs actually charged-to and paid by the Appellant, was fair and reasonable under the circumstances, thereby requiring the entry of judgment in said amount.

It is well settled in Missouri that the trial court is considered an expert on attorney fees and may award attorney fees as a matter of law. State ex rel. Chase Resorts, Inc. v. Campbell, 913 S.W.2d 832, 835 (Mo. App. 1995). Likewise, where the trial judge presides over a matter from the date of its filing through the conclusion of the trial, he or she is deemed to be fully acquainted with all the issues involved; aware of the effort expended and the work product submitted; and may fix the amount of attorneys' fees without the aid of evidence. Agnew v. Johnson, 176 S.W.2d 489, 494 (Mo. 1943); Klinkerfuss v. Cronin, 289 S.W.3d 607, 614 (Mo. App. E.D. 2009). As such, the appellate court will only reverse the trial court's award of attorneys’ fees upon the showing of an abuse of discretion. Aubuchon v. Hale, 453 S.W.3d 318, 325 (Mo. App. E.D. 2014).

In this case, it is undisputed that the Honorable Dale Hood presided over this matter from the date of its filing through the conclusion of trial. As such, his award of attorneys’ fees can only be reversed upon the showing of an abuse of discretion. Id. However, a

review of the Judgment and the attorneys' fees awarded to Ms. Huey plainly shows the Trial Court made an error and/or abused its discretion in its calculation in that the Trial Court expressly found and concluded that Ms. Huey suffered \$119,243.99 in attorney's fees and costs as a direct and proximate result of the Plaintiffs' actions [L.F. 00526, 00532; App. 14, 20]. The Trial Court likewise found and confirmed that the amount billed to, and paid by, Ms. Huey was "...**fair and reasonable under the circumstances.**" [L.F. 00533, App. 21] (emphasis added).

Specifically, the Trial Court expressly found and concluded as follows:

As a result of this lawsuit, Ms. Huey has incurred attorney's fees, costs and expenses up through and including the date of this submission in the amount of **\$119,243.99**.

....

It is therefore the conclusion of the Court that the Plaintiffs/Trustees' claims seeking to set aside the sale of the Property were simply an improper attempt to coerce the LLC into stopping or withdrawing its request to subdivide the Property by placing its title to the Property at risk. By pretextually filing suit against Ms. Huey and the Trust, the Plaintiff/Trustees hoped to create sufficient concern on the part of the LLC that it might lose ownership of the Property that it would "*back[] down*" and "... *not build on the land*". The naming of Ms. Huey as a party defendant to this case in furtherance of that tact constitutes an unlawful end, and seeks to compel a collateral act or result that is neither warranted nor authorized under Missouri law. Equally troubling is the Plaintiff/Trustees' prayer for relief asking this Court to exercise its authority and Order the Property be offered to Mrs. Schwartz when it is undisputed that she does not want the Property and informed the Plaintiff/Trustees of that fact prior to the filing of this lawsuit. **Ms. Huey and the Trust have been directly and proximately damaged by the Plaintiff/Trustees' actions in the form of attorneys' fees and costs in the amount of \$119,243.99.**

[L.F. 00526, 00532; App. 14, 20]. (emphasis added).

The Court went on to conclude that:

...having presided over this matter from the date of its filing through the

conclusion of the trial [this court] is aware of the effort expended and the work product submitted in connection with this matter and finds that **the fees and costs charged to, and paid by, Ms. Huey and the Trust are fair and reasonable under the circumstances.** Klinkerfuss v. Cronin, 289 S.W.3d 607, 614 (Mo. App. E.D. 2009) (judges are considered experts on attorney's fees).

[L.F. 00532-00533; App. 20-21]. (emphasis added).

Inexplicably, however, the Trial Court only entered an award of Sixty-Thousand Dollars (\$60,000.00), rather than the \$119,243.99 called for above, and mistakenly assigned Forty-Thousand (\$40,000.00) of that amount to the LLC [L.F. 00533; App. 21], a party against who Ms. Huey did not assert any claims or seek any relief. [L.F. 0066-0078]. Nowhere in the Judgment is there any statement, finding or other indication that the Trial Court intended to reduce the amount of Ms. Huey's costs and fees below that which it expressly found fair and reasonable. See [L.F. 00515-00534; App. 3-22]. Nor is there any rationale set forth articulating or supporting the reduced amount and/or the apportionment thereof. [Id.].

As such, the Trial Court's reduction and reapportionment of Ms. Huey's costs and fees is wholly arbitrary and patently inconsistent with the Trial Court's findings such that it is, and can only be, a calculation error or oversight on the part of the Trial Court. Either way, the resulting award is "...clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice." Aubuchon v. Hale, 453 S.W.3d 318, 325 (Mo. App. E.D. 2014).

In reviewing this result, it is important to recognize that the Trial Court expressly found and determined that Ms. Huey's damages were the direct and proximate result of the

Trustees' unlawful actions and that the full \$119,243.99 of Ms. Huey's costs and attorney's fees were "*fair and reasonable under the circumstances.*" [L.F. 00526, 00532-00533; App. 14, 20-21]. Ms. Huey was also the *only party* to prevail on all claims in all respects and had the lowest total amount in costs and fees of all parties. [L.F. 00515-00534, 00539; App. 3-23]. In short, Ms. Huey secured the best possible result in the most economical fashion vis-à-vis the other parties to the lawsuit, and was the only one who was not found to have engaged in some form of wrongful behavior.

Yet, her award was the only one inexplicably reduced while the Trustees—who were expressly found to have acted unlawfully in causing Ms. Huey's damages—were awarded the full \$209,192.56³ in costs and attorneys' fees they sought from the LLC without reduction or set off. [L.F. 00535-00539; App. 23]. This result is "*clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice*" given that Ms. Huey endured years of litigation [L.F. 001-0039], costing over a hundred thousand dollars in attorney's fees and litigation expenses [L.F. 00512-00514, 00526, 00532; App. 14, 20] even though she was only named as a Defendant to create leverage against the LLC.

In addition, the Declaratory Judgment count against Ms. Huey prayed for the sale to be unwound and the Property offered to Ms. Schwartz [L.F. 0045]⁴ even though she

³ \$89,948.57 more than the costs and fees incurred by Ms. Huey for the same amount of work.

⁴ The evidence has revealed that the filing of this pleading was almost certainly sanctionable.

expressly told the Plaintiffs and their counsel she didn't want it.⁵ In short, rather than simply seeking declaratory or injunctive relief against the LLC concerning the legal effect of the Indentures and whether or to what extent they prohibited the subdividing of lots in the Subdivision, the Plaintiffs purposefully chose to sue Ms. Huey to create negotiating leverage and in so doing, directly and proximately cause her damages. Viewed in that light and against the backdrop of the \$209,192.56 attorney's fees and costs the Trial Court awarded to the tortfeasors/Trustees [L.F. 00539; App. 23], awarding Ms. Huey Sixty-Thousand Dollars (\$60,000.00) rather than the full One Hundred and Nineteen Thousand Two Hundred and Forty-Three Dollars and 99/100 (\$119,243.99) she incurred, and which the trial court expressly found to be "*fair and reasonable under the circumstances*" is and can only be "*clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice.*" Aubuchon, 453 S.W.3d at 325.

⁵ [L.F. 00351-00357, L.F. 00453, 00457-00458, 00460 (the Deposition of Elizabeth Schwartz) at P.28:Ln.10-18 and P. 29:Ln. 1-7 (informing the Trustees); P.70:Ln.22-25 (informing counsel); see also, Id. at P.27:Ln.15-20 and P71:Ln.5-6; and (the Deposition of William Schwartz) at P.18:Ln. 3-17)].

II. The trial court erred in mistakenly apportioning Forty-Thousand Dollars (\$40,000.00) of the Appellant’s attorney’s fees and costs against Defendant 6 Clayton Terrace, LLC, a party against who Appellant did not assert any claims or seek any relief, thereby precluding the entry of judgment against said party in favor of Appellant.

In addition to the above, the Trial Court also erred when it apportioned Forty-Thousand Dollars (\$40,000.00) of Ms. Huey’s damages against her co-Defendant 6 Clayton Terrace, LLC, rather than against the Trustees. As the pleadings plainly show, Ms. Huey did not assert any claims against, or seek any relief from, the LLC as part of her claims or pleadings in this matter.⁶

Reviewing the record before this Court and the applicable Missouri law, the only explanation for such an award/apportionment is and can only be founded upon the law articulated by the Missouri Supreme Court in Bernheimer v. First National Bank of Kansas City, 225 S.W. 2d 745 (1949), in which the Court held that an award of “costs” in a declaratory judgment action may include attorneys’ fees where there are special circumstances and awarding fees is necessary to adjust the equities among the parties. See also, Ellis v. Hehner, 448 S.W.3d 320 at 325-326 (Mo. App. E.D. 2014) (finding “*special circumstances*” sufficient to affirm the trial court’s award of a portion of the

⁶ The Judgment in favor of Ms. Huey was “on her Counterclaim for Abuse of Process” [L.F. 00533; App. 19], which was only asserted against the Plaintiffs, and not her co-Defendant the LLC [L.F. 0040-0065].

Respondent’s attorney’s fees where the “*Appellants acted out of spite on numerous occasions.*”).⁷

In this case, while the Trial Court did not make any express findings regarding special circumstances as would otherwise be expected if the Trial Court was going to apportion Ms. Huey’s costs and fees by and among the Plaintiffs and the LLC based thereon, paragraph 35 of the Judgment does find that the LLC “*acted in bad faith in concealing their intentions and attempts to subdivide the Property...*” [L.F. 00521; App. 9]. As such, it appears the Trial Court believed there were two (2) proverbial “bad actors” in this case—1) the Trustees who tortiously sued Ms. Huey solely for purposes of creating litigation/negotiation leverage; and 2) the LLC, who the trial court found improperly concealed its intentions to subdivide the Property at the time it acquired it.

However, even if we accept that rationale as true, it still does not square with the Trial Court’s express finding that “*Ms. Huey and the Trust have been directly and proximately damaged by the Plaintiff/Trustees’ actions*” rather than those of the LLC.⁸ Nor does it shed any light on why the *only* party to have succeeded on all claims, both for and against her, is also the *only* party whose award of costs and fees in her favor was reduced from the “*fair and reasonable*” sum of One Hundred and Nineteen Thousand

⁷ Here, however, as stated previously, the Declaratory Judgment action only involved the Plaintiffs and Ms. Huey, and the LLC was not a party to that count. See First Amended Petition [L.F. 0040-0065].

⁸ If that was the trial court’s goal, it may have been a more appropriate exercise of its equitable power if it had imposed the full One Hundred and Nineteen Thousand Two Hundred and Forty-Three Dollars and 99/00 (\$119,243.99) against the Plaintiff/Trustees and provided a corresponding judgment against the LLC and in favor of the Plaintiff/Trustees for that amount as a damage.

Two Hundred and Forty-Three Dollars and 99/00 (\$119,243.99), to the sum of Sixty-Thousand Dollars (\$60,000.00)—Forty Thousand (\$40,000.00) of which was then assessed against the LLC even though Ms. Huey did not assert any claims against, or seek any relief from, the LLC as part of her claims or pleadings in the matter a party.

Equally inexplicable is the fact that the Plaintiff/Trustees, who not only lost their Count I claim for Declaratory Judgment against Ms. Huey, but who were also expressly found by the Court to have engaged in the wrongful and tortious conduct that directly and proximately caused her damages [L.F. 00524-00526, 00530-00532; App. 12-14, 18-20], were awarded all of their claimed costs and attorneys' fees against the LLC without reduction or set-off, while the *only* party found not to have engaged in some tortious/wrongful conduct had her damage award cut in half.

Therefore, even if we deem the Trial Court to be an expert on attorney fees as we must under Missouri law, there simply is no logical way to reconcile the Trial Court's Findings of Fact and Conclusions of Law regarding the merits and validity of Ms. Huey's claims and defenses, with the drastic reduction in the amount of costs and attorneys' fees awarded to her and the apportionment thereof between the Plaintiff/Trustees and the LLC such that it can be anything other than "*clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice.*" Aubuchon v. Hale, 453 S.W.3d 318, 325 (Mo. App. E.D. 2014).

CONCLUSION

For all of the foregoing reasons, the Appellant/Cross-Respondent respectfully requests this Court reverse and remand the Trial Court's Judgment regarding Ms. Huey's damages as prayed for in her Request for Reversal, Remand, and Entry of Judgment set forth below.

REQUEST FOR REVERSAL, REMAND AND ENTRY OF JUDGMENT

The Circuit Court erred in entering its Judgment in favor of Defendant/Appellant/Cross-Respondent Ms. Huey on her Counterclaim for Abuse of Process for only \$60,000.00 instead of the \$119,243.99 in damages suffered by Ms. Huey, which damages were found to be fair and reasonable under the circumstances, and the Circuit Court erred in mistakenly apportioning \$40,000.00 of Ms. Huey's \$60,000.00 Judgment against Defendant 6 Clayton Terrace, LLC, a party against who Appellant did not assert any claims or seek any relief, thereby precluding the entry of judgment against said party in favor of Appellant.

Therefore, Appellant requests that said Judgment be reversed and remanded to the Circuit Court with a mandate to enter Judgment in favor of Ms. Huey and against Plaintiffs only on her Counterclaim for Abuse of Process in the amount of \$119,243.99.

Respectfully submitted,

HEIN SCHNEIDER & BOND P.C.

/s/ John Hein

John Hein, #53182

Grant Mabie, #61095

147 North Meramec Avenue

St. Louis, Missouri 63105

Telephone: (314) 863-9100

Facsimile: (314) 863-9101

Email: jjh@hsbattorneys.com

gjm@hsbattorneys.com

***Attorneys for Appellant/Cross-Respondent,
Jeannette R. Huey, Trustee of the Jane R.
Huey Lifetime Trust Agreement dated May 21,
1998***

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via the court's ECF system to all counsel of record this 9th day of January, 2019.

/s/ John Hein

SUPREME COURT OF MISSOURI

TRUSTEES OF CLAYTON TERRACE)	
SUBDIVISION,)	
)	
Plaintiff,)	SC97349
)	
v.)	
)	
6 CLAYTON TERRACE, LLC, et al.,)	
)	
Defendants,)	

CERTIFICATE OF COMPLIANCE PURSUANT TO MISSOURI SUPREME COURT RULE 84.06(c)

COME NOW John Hein and Grant J. Mabie, counsel for Appellant/Cross-Respondent Jeannette R. Huey, Trustee of the Jane R. Huey Lifetime Trust Agreement dated May 21, 1998, and for their Certificate of Compliance Pursuant to Missouri Supreme Court Rule 84.06(c), state as follows:

1. To the best of our knowledge, information and belief, Appellant/Cross-Respondent’s claims, defenses, requests, demands, objections, contentions and arguments, as set forth in Appellant/Cross-Respondent’s Substitute Brief were formed after reasonable inquiry under the circumstances. Moreover:

(a) Appellant/Cross-Respondent’s claims, defenses, requests, demands, objections, contentions and arguments, as set forth in Appellant/Cross-Respondent’s Substitute Brief are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b) Appellant/Cross-Respondent’s claims, defenses, requests, demands, objections, contentions and arguments, as set forth in Appellant/Cross-Respondent’s

Substitute Brief are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of the new law;

(c) The allegations and other factual contentions in Appellant/Cross-Respondent's Substitute Brief have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(d) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

2. Appellant/Cross-Respondent's Substitute Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

3. Appellant/Cross-Respondent's Substitute Brief contains 6,120 words.

Respectfully submitted,

HEIN SCHNEIDER & BOND P.C.

/s/ John Hein

John Hein, #53182

Grant Mabie, #61095

147 North Meramec Avenue

St. Louis, Missouri 63105

Telephone: (314) 863-9100

Facsimile: (314) 863-9101

Email: jjh@hsbattorneys.com

gjm@hsbattorneys.com

***Attorneys for Appellant/Cross-Respondent,
Jeannette R. Huey, Trustee of the Jane R.
Huey Lifetime Trust Agreement dated May 21,
1998***