**THE SUPREME COURT OF MISSOURI**

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**NO. SC97349**

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

**v.**

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

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

**The Honorable Dale Hood, Associate Circuit Judge**

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# SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT TRUSTEES OF CLAYTON TERRACE SUBDIVISION

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## JURISDICTIONAL STATEMENT

This case involves a declaratory judgment action and a claim for injunctive relief concerning the violation of subdivision indentures. The Circuit Court of St. Louis County issued an Order on December 21, 2018. Appellants filed notices of appeal to the Missouri Court of Appeals, Eastern District, which issued an opinion on June 19, 2018. This Court granted Respondent's Application for Transfer on December 4, 2018, and therefore may "finally determine" all issues in this cause. Mo. Const. art. V, § 10.

## STATEMENT OF FACTS[1]

### General Overview and Summary

This legal dispute arose in connection with the 2013 sale of a home in an established St. Louis County subdivision. The trustees of the subdivision had an obligation to uphold the subdivision's indentures and thus took action on issues that arose in connection with the buyer's efforts to subdivide the property in violation of those indentures. The primary question in this appeal, and one with far-reaching implications in Missouri, is whether a property owner may be permitted to circumvent a "One Residence Per Lot" provision set forth in the subdivision indentures by subdividing his lot for the purpose of constructing an additional home on it. The Circuit Court found, among other things, that subdivision of the property for this purpose was improper. This holding preserves the intent of the controlling indentures that had existed at the time of the sale for more than 85 years and allows the homeowners to continue to rely upon their indentures to ensure the integrity and desirability of their community.

### Clayton Terrace Subdivision and Its Indentures

The Clayton Terrace Subdivision ("Clayton Terrace") is a 22-lot residential subdivision off Lindbergh Boulevard in the City of Frontenac, Missouri ("Frontenac"), that was established in 1923. (LF 335). Frontenac was not incorporated as a municipality until after the formation of Clayton Terrace. (LF 337).

[1] Pursuant to MO. R. CIV. P. 84.04(f), the Trustees of Clayton Terrace include this Statement of Facts because they are "dissatisfied with the accuracy or completeness" of the Statement of Facts contained in the Appellants' briefs.

The subdivision plat for Clayton Terrace originally contained 23 lots. (LF 336). While there have been a few changes to the layout of the subdivision over the years,[2] the character of Clayton Terrace has essentially remained the same for nearly a century. From its formation in 1923 through 2014, there had never been a subdivision of any lot in Clayton Terrace for the purpose of constructing an additional residence. (Tr. 22). Furthermore, to date, no one has ever built more than one residence on any lot in the subdivision. (Tr. 22, 124).

Since its inception, Clayton Terrace has been governed by a set of indentures recorded with the St. Louis County Recorder of Deeds, placing restrictions upon certain aspects and uses of the property. Those indentures have been amended, renewed, and/or extended on five different occasions throughout the years (collectively, as amended, the "Indentures"). (LF 336). The Indentures provide that they may be amended upon written agreement of two-thirds of the Clayton Terrace lot owners. (LF 336).

Relevant to the instant dispute are two of the Indenture modifications. In 1928, just five years after the creation of Clayton Terrace, an amendment to the Indentures was approved providing that "only one residence shall be erected on each lot" (the "One Residence Per Lot Provision"). (LF 336-337). In 1973, the subdivision owners approved an amendment mandating certain right of first refusal procedures (the "Right of First

[2] One of the original lots was lost due to the construction of an entrance ramp onto Highway 40 from Lindbergh Boulevard (Tr. 19), and two lots were reconfigured and realigned to face Clayton Terrace rather than Lindbergh Boulevard. (Tr. 19-21, 36).

Refusal Provision") attendant to each residential sale within Clayton Terrace. (LF 336-337). The Right of First Refusal Provision states as follows:

> No sale of any lot in said subdivision shall be consummated without the seller ***giving at least 15 days' written notice*** to the owners of all other lots in said subdivision, ***such notice to contain the selling price and other terms of the proposed sale and to whom it is made***. Any of the lot owners shall have the right to elect in writing to purchase said lot on the ***same terms*** (including the closing date) as offered to the third party buyer within a period of 15 days from the receipt of said notice; provided, that if more than one lot owner elects to purchase said lot, then all lot owners electing to purchase said lot shall do so on a pro rata basis…. ***Any attempted transfer of such property without compliance with this restriction shall be void.***

(LF 337) (emphasis added).

The Fifth Revised Indentures, amending the Original Indentures, were adopted by two-thirds vote of the Clayton Terrace homeowners in 1998 and contain the most current amendments and modifications. (LF 338; Tr. 12). These Fifth Revised Indentures include both the One Residence Per Lot Provision and the Right of First Refusal Provision. (LF 336, 338; *see generally*, SC Exhibit ("Ex.") I).

The Indentures provide for the election of subdivision trustees (the "Trustees"), who have an inherent fiduciary duty to the lot owners and are charged with the responsibility of defending and enforcing the terms of the Indentures, and state that "…the Trustees ***shall have the power to enforce the restrictions*** spread upon the plat of Clayton Terrace subdivision." (SC Ex. I, p. 6, ¶ 3) (emphasis added). Trustees serve voluntarily and without compensation for duties performed on behalf of Clayton Terrace and its owners. (*See generally*, SC Ex. I). At the time of commencement of this

litigation, the Trustees of Clayton Terrace were John Tackes, R.W. Francis, and Cathy Stahr. (LF 335; Tr. 7-8).

**The Sale of the Residence at 6 Clayton Terrace**

Jane Huey resided at 6 Clayton Terrace, a home on a 2.3-acre lot in Clayton Terrace (the "Property"), for close to 40 years. (Tr. 302). Following her death in October 2011, her daughter, Jeannette R. Huey ("Ms. Huey"), serving as trustee of the Jane R. Huey Lifetime Trust Agreement Dated May 21, 1998, listed the Property for sale with Janet McAfee, Inc., a local real estate brokerage firm. (Tr. 302-303).

Kevin McGowan, a career real estate developer with extensive experience renovating properties (Tr. 259), discovered the Property and recognized its investment potential, noting that the residence was located in "the sweet spot of the neighborhood, the very center of it, surrounded by other beautiful homes." (Tr. 284). His first thought with respect to the Property was for its possible subdivision. Disregarding the limitations of the Indentures, Mr. McGowan testified that "[i]mmediately, as soon as I saw it, when I noticed it was almost three acres, my very first thought was that this might be able to be split." (Tr. 263). Before making an offer, he confirmed with the City of Frontenac that its municipal ordinances would permit the subdivision of the Property. (Tr. 263-264).

Mr. McGowan was not in a position to purchase the Property himself and instead secured an investor willing to make an offer. (Tr. 259-261). Both Mr. McGowan and the investor, Century Renovations, LLC ("Century Renovations"), through its manager Richard Birner, reviewed the Indentures as part of their due diligence. (Tr. 220, 262). Thereafter, Century Renovations entered into a written contract with Ms. Huey for the

purchase of the Property for the sum of $415,000.00. (LF 338). Closing of the sale of the Property was initially set for February 6, 2013. (LF 338).

**Multiple Failures to Abide by the Right of First Refusal Provision**

Insight Title Company, LLC ("Insight Title"), on behalf of Ms. Huey, reached out to the Trustees concerning the pending sale, at which time the Trustees advised Insight Title of the existence of the Right of First Refusal Provision contained in the Indentures. (LF 339; Tr. 80-81). A Notice of Sale for the Property (the "Notice") was thereafter prepared by Insight Title, purporting to conform with the requirements of the Right of First Refusal Provision. (LF 339).

Contrary to the Right of First Refusal Provision, the Notice omitted the identity of the proposed purchaser and other relevant terms of sale. (LF 339). Furthermore, and perhaps most importantly, the evidence adduced at trial demonstrated that the Notice was never delivered to a number of the homeowners. (SC Exs. 16, 100; LF 242-243; Tr. 19-21, 119).

Upon receipt of the Notice, one of Ms. Huey's Clayton Terrace neighbors, Elizabeth Schwartz, expressed an interest in the Property as an ideal residence for her son. (LF 339-340). The evidence adduced at trial reflected that she was denied the opportunity to walk through the home by Ms. Huey's real estate agent. Frustrated by her inability to access the Property, Ms. Schwartz elected not to submit a matching offer to purchase the Huey residence and abandoned her interest in it. (LF 245-249, 340).

**Sale Contract was Amended and Assigned to a New Buyer and the Sale was Closed**

Closing was postponed from February 6 to February 15, 2013. (LF 339). On February 14, 2013, Century Renovations assigned the sale contract to an entirely new entity, 6 Clayton Terrace, LLC (also referred to as the "LLC"). (LF 341). 6 Clayton Terrace, LLC is a limited liability company that, at the time, was owned by Century Renovations. (Tr. 245-46).

No new notice was ever provided to any of the homeowners of Clayton Terrace (1) identifying Century Renovations as the original purchaser (LF 339), (2) advising of the assignment from Century Renovations to the LLC (LF 341), (3) identifying the LLC as the ultimate purchaser (LF 241-242), (4) advising of the new and updated closing date of February 15, 2013. (Tr. 81-82). The LLC and Ms. Huey closed on the sale of the Property on February 15, 2013. (LF 341).

**6 Clayton Terrace, LLC Moves Forward with Plans to Subdivide Property**

On April 24, 2014, the LLC filed with the City of Frontenac an Application to Subdivide 6 Clayton Terrace (the "Application") into two separate lots. (LF 341). The Trustees first learned of the Application and the plans to subdivide around this same time (Tr. 16). Frontenac advised the Trustees that it was compelled to grant the subdivision and that the Trustees would need to enforce their own indentures with respect to any restrictions on subdivision of the Property. (Tr. 17, 75; SC Ex. JM-Aff, ¶ 7). Specifically, Frontenac was bound only by its own municipal ordinances regarding the subdivision of property, which simply required that each lot be greater than one acre in size. (SC Ex. JM-Aff, ¶ 8). Frontenac had no authority to enforce private indentures

which might otherwise restrict the subdivision of lots located within its boundaries. (LF 253-254; SC Ex. JM-Aff, ¶¶ 6-8).

Mr. Tackes and Mr. Francis, both Trustees at the time, appeared at two hearings before the Frontenac Zoning Commission to contest the planned subdivision; numerous Clayton Terrace homeowners voiced their strong opposition as well. (SC Ex. JM-Aff, pp. 2-6). Frontenac ultimately approved the subdivision of the Property into two parcels (labelled Lot 6A and Lot 6B by the municipality). (SC Ex. JM-Aff, p. 17; LF 341). This approval marks the first time that Frontenac has ever considered the subdivision of a lot in Clayton Terrace. (LF 341). While allowing for the creation of two lots from one, the Frontenac Building Commissioner acknowledged that "the ruling by the City of Frontenac on subdividing the Property for the purposes of the City of Frontenac has no impact upon the enforceability of the restrictive covenants contained in any indentures applying to the Property." (SC Ex. JM-Aff, ¶ 8).

**The Trustees React and Bring Legal Action on Behalf of Clayton Terrace**

Throughout the summer of 2014, the Trustees met with Clayton Terrace homeowners and unanimously agreed to seek legal counsel. (Tr. 23, 33, 85). On August 21, 2014, immediately after Frontenac gave its final approval to the Application, the Trustees commenced the instant cause of action on behalf of Clayton Terrace. (LF 342). The Trustees' main concern compelling their legal action was to "protect our Indentures of the neighborhood." (LF 437).

The Trustees filed a two-count petition, later amended on December 3, 2014. (LF 40-49). In Count I, Trustees sought a declaratory judgment against Ms. Huey, in her

capacity as trustee of her mother's trust, to establish that the transfer of the Property to the LLC was void, as a result of numerous failures to comply with the Right of First Refusal Provisions. (LF 45-47). In Count II, the Trustees sought injunctive relief against 6 Clayton Terrace, LLC[3] to prohibit it from subdividing and constructing or causing an additional lot to be constructed on the Property. (LF 45-46). Ms. Huey later filed a Counterclaim against the Trustees for abuse of process.[4] (LF 66).

**The Trial and Judgment**

A bench trial was held on July 11-12, 2016 before Judge Dale Hood in the St. Louis County Circuit Court. (Tr. 1-317). On December 21, 2016, the Circuit Court issued its Findings of Fact and Conclusions of Law (the "Judgment"). (LF 515-534).

In the Judgment, the Circuit Court found in favor of Ms. Huey on Count I of the Petition, declining to set aside the sale of the Property. (LF 533). On the Counterclaim for abuse of process, the Circuit Court found against the Trustees, awarding damages to Ms. Huey in the amount of $60,000, to be apportioned between the Trustees ($20,000) and 6 Clayton Terrace, LLC ($40,000). (LF 533).

On Count II of the Petition, the Circuit Court found in favor of the Trustees and determined that the One Residence Per Lot Provision was indeed valid and enforceable

[3] During the course of the instant litigation, Century Renovations sold 6 Clayton Terrace, LLC (the limited liability company that owns the Property) to a new company, Six Clayton Terrace I, LLC. (Tr. 245). Six Clayton Terrace I, LLC is owned by a trust benefitting Mr. McGowan's sister, Mary Grace Melick. (Tr. 267-268).

[4] Ms. Huey also filed a counterclaim for tortious interference with contract, which cause of action was dismissed by Ms. Huey prior to trial. (LF 402-403).

(LF 526, ¶ 64). Further, the Circuit Court enjoined 6 Clayton Terrace, LLC from subdividing the Property and building a new residence on any portion of it. (LF 533). Specifically, the Circuit Court found that "6 Clayton Terrace, LLC acted in bad faith in concealing their intentions and attempts to subdivide the Property and finds that it is not entitled to the benefit of equitable defenses." (LF 521). In conjunction with its decision, the Circuit Court found the Trustees were entitled to recover their costs and attorneys' fees against the LLC. (LF 533).

On December 27, 2016, the Trustees submitted their Affidavit of Fees and Costs. (LF 535). Thereafter, on December 30, 2016, the Circuit Court entered its Order finding the Trustees' requested fees were fair and reasonable and entered judgment in favor of the Trustees and against 6 Clayton Terrace, LLC in the amount of $209,192.56. (LF 539).

**Post-Trial Procedures**

Almost immediately, garnishment actions were commenced by Ms. Huey against the Clayton Terrace homeowners and the bank account held by the Trustees, seeking to collect the $20,000 she had been awarded in fees. (LF 35-38). An Order was entered staying enforcement of the Judgment, and in connection therewith a supersedeas bond was set and deposited by the Trustees with the Court. (LF 651-656). Appeals were taken to the Missouri Court of Appeals, Eastern District. (LF 686-745). After the entry of the Opinion by that court, this Court granted transfer on December 4, 2018.

## PART ONE: RESPONSE TO APPELLANTS' BRIEFS

## I. THE CIRCUIT COURT CORRECTLY FOUND THE ONE RESIDENCE PER LOT PROVISION VALID AND ENFORCEABLE.

***(Responding to 6 Clayton Terrace LLC's Point Relied On I)***

In its Judgment, the Circuit Court found the One Residence Per Lot Provision valid and enforceable. (LF 526). The LLC's first Point Relied On alleges that the Circuit Court erred in finding this provision enforceable because, under *Hazelbaker v. County of St. Charles*, 235 S.W.3d 598 (Mo. App. 2007), any new subdivision restriction creating an additional burden on property must be unanimously approved by the residents. The Trustees dispute the applicability of *Hazelbaker* to this case because the homeowners relied on and ratified the One Residence Per Lot Provision.

But, *Hazelbaker* provides an impractical standard that cannot be enforced without negative consequences for homeowners and subdivisions throughout Missouri. Should this Court determine *Hazelbaker* applies to Clayton Terrace's One Residence Per Lot Provision, it is the perfect opportunity to modify *Hazelbaker* in a way that alleviates the uncertainty it currently causes.

### *A.* *Hazelbaker* Does Not Apply to Clayton Terrace's One Residence Per Lot Provision.

In *Hazelbaker*, the subdivision at issue was formed, and its original indentures recorded, in 1978. *Id.* at 600. The original indentures provided no restrictions concerning subdivision, and, in 2000, two lot owners subdivided their lots without opposition. *Id*. The following year, the subdivision residents sought to prohibit such practices by enacting an amendment providing, "No Lot located within Highland Trails

Plats One and Two shall be split or subdivided, with the exception of Lot 65 which has previously been split by its owner with the approval of the Board of Directors." *Id*. Sixty out of a total of 66 lot owners approved the amendment. *Id.* A mere four years later, Mr. Hazelbaker purchased a lot in the subdivision and "[s]hortly thereafter" initiated the subdivision process, filing a lawsuit seeking to declare the amendment invalid. *Id*. The court of appeals deemed the amendment invalid because it concluded that the indentures did not contemplate the addition of burdens, and therefore "an amendment which adds a burden is not valid in any respect without unanimous consent." *Id*. at 603.

**1. The Residents of Clayton Terrace Have Relied on the One Residence Per Lot Provision Since 1928.**

*Hazelbaker* held that Missouri has implicitly recognized the unanimous consent rule as far back as this Court's holding in *Van Deusen v. Ruth*, 125 S.W.2d 1 (Mo. 1938). This Court did not hand down *Van Deusen* until 1938 – 15 years after Clayton Terrace filed its original Indentures and ten years after it amended the Indentures to include the One Residence Per Lot Provision. For the first ten years of this restriction's existence, it would have been impossible for even the most diligent person to anticipate the One Residence Per Lot Provision could be invalid. Further, the Original Indentures recorded by the covenantor (a subdivision developer) consist of one short paragraph on the surveyor's plat. The Original Indentures provide for amendment to the restrictions upon approval of two-thirds of the lot owners. (LF 336). The covenantor could not have predicted that in order to amend the Original Indentures, that unanimity would be required. But, if *Van Deusen* and *Hazelbaker* are applied retroactively, then unless

unanimous consent is obtained (an unlikely event on most any issue in a subdivision), Clayton Terrace is forever stuck with its minimal and limited Original Indentures. Under such circumstances, the unanimous consent rule should not apply retrospectively.

This Court has the "authority to declare whether [its] decisions are retroactive or prospective 'based on the merits of each individual case.'" *Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. banc 1985) (quoting *Keltner v. Keltner*, 589 S.W.2d 235, 239 (Mo. banc 1979)). This Court has provided that prospective-only application of a decision is particularly proper when "parties have relied on the state of the decisional law as it existed prior to the change" and when applying the law prospectively-only would "avoid injustice and unfairness." *Sumners*, 701 S.W.2d at 723. Likewise, the covenantor and the original purchasers of the Clayton Terrace lots relied on the two-thirds amendment procedure in the Original Indentures. The residents of Clayton Terrace have relied on the existence of the One Residence Per Lot Provision – and the protections it provides to the character of the neighborhood – since 1928. Conversely, the restriction at issue in *Hazelbaker* took effect in 2001, 63 years after *Van Deusen* and only four years prior to Mr. Hazelbaker's attempt to invalidate the provision. Highland Trails could make no argument that its residents had relied upon the amendment or that invalidating it would heavily disrupt the long-established character of the neighborhood. Indeed, two lot owners in Highland Trails had already subdivided their lots just one year prior to the passage of the amendment. *Hazelbaker*, 235 S.W.3d at 600.

Meanwhile, no lot in Clayton Terrace had ever been subdivided prior to the actions at issue in this case. (LF 341). The residents have strictly relied on and abided by

the 85-year-old One Residence Per Lot Provision to protect the character of the neighborhood since its inception. Invalidating the otherwise valid restriction based on a burdensome unanimous consent rule that did not exist at the time the restriction was enacted would be fundamentally unfair to the residents of the Clayton Terrace. This Court should exercise its authority to apply the rule only prospectively.

**2. The Homeowners Ratified the One Residence Per Lot Provision.**

As a contract, the Indentures are subject to ratification by the residents in Clayton Terrace. "Ratification, in contract law, has been defined as an act that conforms an otherwise voidable contract into one that is valid and enforceable." *Murphy v. Jackson Nat. Life Ins. Co.*, 83 S.W.3d 663, 668 (Mo. App. 2002) (citing *Springfield Land and Development Co. v. Bass*, 48 S.W.3d 620, 628 (Mo. App. 2001)). In essence, "ratification is confirmation after conduct." *Id.* (internal citations and quotations omitted). "Ratification need not be intentional." *Id.* (citing *Clear v. Missouri Coordinating Board for Higher Education*, 23 S.W.3d 896, 901 (Mo. App. 2000)). Rather, "It can occur when an individual either expressly or impliedly 'confirms or adopts the agreement with knowledge of its contents.'" *Id*. It is well established that "the most certain evidence of implied ratification is the acceptance and retention of the fruits of the contract with full knowledge of the material facts of the transaction." *Id.* (citing *Wilks v. Stone*, 339 S.W.2d 590, 595-96 (Mo. App. 1960)). "An individual who was not originally bound by an agreement will become bound if he or she ratifies the agreement." *Clear*, 23 S.W.3d at 901 (citing *Cohn v. Dwyer*, 959 S.W.2d 839, 844 (Mo. App. 1997)).

Unlike in *Hazelbaker*, the evidence at trial in this case established that the One Residence Per Lot Provision had been ratified by the residents of Clayton Terrace. The Original Indentures were recorded with the St. Louis County Recorder of Deeds on May 18, 1923. (LF 336). Five years later – on October 18, 1928 – the residents voted to amend the Original Indentures to add the One Residence Per Lot Provision. (LF 336). Not once during the next 85 years did anyone build more than one residence on any lot in Clayton Terrace. (Tr. 22). For nearly a century, the residents have abided by this restriction.

Those who purchase lots in a "subdivision subject to restrictive covenants do so upon the expectation of a benefit as well as the obvious burden or obligation of compliance." *Kauffman v. Roling*, 851 S.W.2d 789, 792 (Mo. App. 1993). Indisputably, the LLC was aware of the existence of the One Residence Per Lot Provision when it purchased the Property. (Tr. 220, 262). Ms. Huey, the LLC, and every other resident who purchased a home in the subdivision since 1928 has received the benefit of this restriction, including but not limited to increased property value from the stable character of the subdivision. "[T]he most certain evidence of implied ratification is the acceptance and retention of the fruits of the contract with full knowledge of the material facts of the transaction." *Murphy v. Jackson Nat'l Life Ins. Co.*, 83 S.W.3d 663, 669 (Mo. App. 2002).

Under either a reliance or ratification theory, this Court may find the One Residence Per Lot Provision valid without resorting to a *Hazelbaker* analysis.

### B. This Court Should Modify the Impractical *Hazelbaker* Standard.

If this Court determines *Hazelbaker* must apply to the One Residence Per Lot Provision despite the facts establishing reliance and ratification, it should take the opportunity to address and modify the problematic standards the case presents.

#### 1. Missouri Courts Have Interpreted Subdivision Indenture Modification Language Too Strictly.

In the instant case, the Indentures provide that two-thirds of the present lot owners may vote to "amend[] or extend[]" the restrictions. (SC Ex. JT-1; LF 336). Under *Hazelbaker* and its progeny, an amendment creating new burdens on property is generally valid only if the "amendment procedure prescribed in the [Indentures] covers amendments which impose an additional burden to ownership." 235 S.W.3d at 602. If the amendment procedure does not contemplate the addition of new burdens, one can only be added with the unanimous consent of all affected property owners. *Id.* at 603.

This standard, on its face, seems reasonable in that it protects an individual's right to freely use his property without fear of having to comply with new unforeseen burdens and restrictions. But Missouri has interpreted the language contained in amendment provisions in an overly strict manner. *See Van Deusen*, 125 S.W.2d at 2 (amendment provision providing restrictions could be "modified, amended, released, or extinguished" by a 75% vote does not contemplate the addition of burdens); *Jones v. Ladriere*, 108 S.W.3d 736, 739 (Mo. App. 2003) (amendment provision providing restrictions could be "altered, amended, changed, or revoked" by a two-thirds vote did not contemplate the addition of burdens); *Webb v. Mullikin*, 142 S.W.3d 822, 823-24 (Mo. App. 2004)

(amendment provision providing restrictions could be "altered or amended all or in part" did not contemplate addition of burdens); *Bumm v. Olde Ivy Development, LLC*, 142 S.W.3d 895, 904 (Mo. App. 2004) (amendment provision providing restrictions could be "amended, repealed or added to ... by the owners of a majority of the lots...." did not contemplate the addition of new burdens).

Each case performed an excessively strict construction of the respective amendment provision to find that the addition of new burdens was not contemplated. It is unclear under these cases what kind of language must be included in an amendment procedure to allow for the addition of new burdens without unanimous consent. But, if language providing that restrictions "may be . . . ***added to*** at any time" is still inadequate, *Olde Ivy*, 142 S.W.3d at 897-98 (emphasis added), then Missouri has effectively held that no language is sufficient to add a burden in the absence of unanimous consent.

As a practical matter, it becomes nearly impossible to amend subdivision indentures in accordance with the law because (1) almost all new amendments add some kind of burden to one's use of the land and, as is discussed in depth below, (2) it is nearly impossible in most circumstances for an amendment to receive unanimous consent.

Evidence presented at trial demonstrated that few, if any, subdivisions in Missouri require 100% approval to amend their indentures. (Tr. 124). Clayton Terrace, which has only 22 lots and has existed for nearly 100 years, has never passed an amendment to its indentures unanimously. (*See generally*, SC Ex. I). Under *Hazelbaker*, any Clayton Terrace homeowner could choose to invalidate any of the "new" burdens enacted in the last century, forcing the residents to comply with the incomplete, vague and outdated

handwritten indentures as they existed in 1923. This concern is not unique to Clayton Terrace. The consequences are particularly problematic considering the builders and developers who typically create the original indentures often have different priorities and intentions than the residents who are ultimately subject to them.

Moreover, compliance with the unanimous consent rule is nearly impossible for larger subdivisions. In a 300-lot subdivision, a logical and necessary new restriction supported by 299 lots can be obstructed for any reason by one lone dissenter. Such a concept impedes general progress and is hard to reconcile with public policy. This problem is not merely theoretical. For example, in *Pinnacle Lake Estates Association, Inc. v. McCorkell*, No. 08BB-CC00021 (Mo. Cir. Oct. 22, 2010)[5] (Appx. 3-16), the subdivision at issue did not include any provisions in its original indentures – adopted in 1964 – that expressly authorized the collection of annual or special assessments from its residents. *Id*. at 2, ¶¶ 8-9. By 2010, the subdivision had grown to consist of 450 total homes and collection of assessments had become necessary for its survival. *Id.* at 5, ¶ 21. The indentures allowed amendments with a majority vote of residents in attendance at the subdivision's annual meeting. *Id.* at 4, ¶ 15. Pursuant to this procedure, the subdivision initially amended the indentures to permit assessments. A resident subsequently filed a lawsuit challenging the new restriction.

The Warren County Circuit Court found that, on average, *only 60 to 70 out of the 450 total owners in the subdivision even attended the annual subdivision meetings* to vote

[5] The judgment was subsequently vacated due to a post-trial settlement.

on amendments. *Id*. at 6, ¶ 23. Nonetheless, citing to *Hazelbaker*, the court held a subdivision "may not amend the [indentures] that govern the use of land and of improvements within the subdivision except with the unanimous approval of the owners of lots therein if the effect is to increase the burdens placed on the owners or to further restrict the owners' use of the property." *Id.* at 9, ¶ 6(1). Because the assessment restriction did not receive unanimous consent of all 450 owners, the amendment was deemed invalid and the subdivision was ordered to disgorge the fees it had already collected. *Id.* at 11, ¶ 11. Thus, due to an oversight in the original indentures, the subdivision forever lacks the power or authority to impose any kind of monetary assessment for any purpose. The *Pinnacle Lake* example demonstrates the harsh and nonsensical results caused by the *Hazelbaker* unanimous consent rule.

**2. Practical Problems with Enforcing the Unanimous Consent Requirement.**

Despite the language of *Hazelbaker* and its progeny, subdivisions across the state, such as Clayton Terrace, have continued to unknowingly pass potentially invalid amendments pursuant to their own established and agreed upon amendment procedures, resulting in a multitude of practical concerns for all of the parties involved.

Inadvertently, *Hazelbaker* and its unanimous consent rule provide a mechanism for developers seeking a quick profit to purchase property in a subdivision and exploit outdated subdivision indentures by filing a declaratory judgment action to invalidate enacted restrictions. They could then redevelop the property in any way imaginable (subject to local ordinances) with no regard for the character of the neighborhood or the

purpose and intent of the indentures. *Hazelbaker* takes the power to define the characteristics of one's own subdivision away from the residents and places it at the mercy of the local zoning ordinances. Such a concept contravenes the whole purpose of subdivision indentures, which is to allow residents to make these determinations on their own.

The unanimous consent rule found in *Hazelbaker* may also have an adverse effect on the housing market. Because of this rule, when purchasing a home, individuals cannot simply rely on the current character of the subdivision or even the language of the indentures. For example, the average prospective buyer would surely expect Clayton Terrace's One Residence Per Lot Provision to prevent the subdivision of lots because it was successfully passed pursuant to the subdivision's own procedures, and it has been a matter of public record for 85 years. If the restriction is found invalid under *Hazelbaker*, the prospective buyer (assuming they are even aware of *Hazelbaker*) could only learn of the defect by (1) determining that the restriction constitutes a burden, (2) reviewing each version of the indentures to see if the provision ever received unanimous consent, (3) reviewing the original, handwritten indentures[6] from 1923, and (4) guessing whether a court would find the restriction was contemplated in the original indentures. Any law that makes it this difficult for buyers to determine just what they are getting themselves into is tough to reconcile with public policy. A strict application of *Hazelbaker* and its unanimous consent rule simply is not practical.

[6] The handwritten indentures themselves are very difficult to read.

### 3. Amendment Provisions Permitting "Amendment" of Indentures Should Contemplate the Addition of New Burdens.

The overly strict construction of the amendment procedures in cases like *Hazelbaker* and *Olde Ivy*, in conjunction with the practical issues with attaining unanimous consent, render a subdivision's original indentures immensely difficult to amend. These cases awkwardly interpret the plain and ordinary meaning of words such as "amend" in order to protect the parties' free use of property. It is undeniably important for homeowners to be able to freely use their property without fear of having to comply with new unforeseen burdens and restrictions. But, *Hazelbaker* and its progeny go beyond protecting free use of property and, instead, directly constrain the homeowners' right to freely contract for the use of their property.

Certainly, it is no easy task to determine how to reconcile the tension between a party's right to contract and their free use of property. In balancing these interests, several courts across the country have interpreted amendment provisions more broadly. *See Zito v. Gerken*, 587 N.E.2d 1048 (Ill. App. 1992) (amendment will be enforced so long as it does not "impose *unreasonable* burdens upon any lot owners within the subdivision") (emphasis added); *Sunday Canyon Property Owners Association v. Annett*, 978 S.W.2d 654 (Tex. App. 1998) (modification clause allowing covenants to be "waived, abandoned, terminated, modified, altered or changed" with majority vote permits the addition of new burdens); *Windemere Homeowners Association, Inc. v. McCue*, 990 P.2d 769 (Mont. 1999) (modification clause permitting restrictions to be

"waived, abandoned, terminated, modified, altered or changed" allowed a majority of property owners to add an additional burden.).

Indeed, "Recognized long ago was the right of persons . . . to contract with relation to their property as they see fit in the absence of contraventions of public policy and positive law." *Sunday Canyon*, 978 S.W.2d at 654. Such a right "is derived from ownership of the property and embraces the ability to impose on the property restrictive covenants and to abrogate or modify them." *Id.* By moving into a subdivision, a homeowner has agreed to abide by subdivision's indentures in order to attain the various benefits of living in an established community. If the subdivision's indentures provide that they may be amended by a non-unanimous vote, the homeowners of the subdivision have accepted that burden in the same fashion.

This Court should reevaluate Missouri's strict interpretation of general amendment procedure language, such as "amend," to permit the imposition of new reasonable burdens on property. From a practical standpoint, the current construction of the language makes indentures nearly impossible to amend. Creating such a difficult threshold for homeowners to add new burdens does not protect property rights – it infringes on them by forcing people to comply with potentially outdated and incomplete original indentures created by a covenantor who may not have had the homeowner's best interest in mind when drafting the instrument. Overruling the strict construction of amendment procedure language would allow parties to contract freely in a way that allows them to create rules that preserve the nature and the character of their surroundings. This is the purpose of creating indentures in the first place.

### 4. Implementation of a Reasonable Time Limitation for Enforcing the Unanimous Consent Rule Would Also Solve these Issues.

The right to freely use property is important, but it is not practical to apply the unanimous consent rule indiscriminately to every single provision adding a new burden. The root cause of most of the negative consequences addressed above is the fact that various interested groups – such as subdivisions and residents – all justifiably rely on the existence of restrictions as they are provided in the indentures. If this Court chooses not to overrule *Hazelbaker's* strict construction of the language contained in amendment provisions, then it should modify *Hazelbaker* to include a reasonableness standard for challenging new restrictions. Clearly, it is unreasonable for a new lot owner to invalidate an amendment that has been recorded and relied upon for close to a century.

Under a reasonableness standard, this Court could hold that once a restriction is passed and made part of the public record for a reasonable period of time,[7] it becomes valid even if it did not initially receive unanimous consent. Such a rule would provide much more stability for both subdivisions and homeowners.

This proposed modification would not run afoul of any of the underlying principles relied on by *Hazelbaker* and its predecessors, in that it would still allow residents to protect the right to freely use their property so long as they attempt to enforce that right within a reasonable time period.

[7] The legislature has codified a brightline rule for condominium properties. Mo. Rev. Stat. § 448.2-117 ("No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.").

## II. THE CIRCUIT COURT CORRECTLY INTERPRETED THE ONE RESIDENCE PER LOT PROVISION TO PROHIBIT SUBDIVISION OF LOT 6 FOR PURPOSES OF CONSTRUCTING A SECOND RESIDENCE.

***(Responding to 6 Clayton Terrace LLC's Point Relied On II)***

6 Clayton Terrace, LLC urges this Court to reject the Circuit Court's interpretation of the One Residence Per Lot Provision and instead permit it to circumvent the Indentures by subdividing the Property for the purpose of constructing a second residence. The LLC suggests that even if the intent behind the provision was to maintain the integrity of the Clayton Terrace neighborhood in a certain consistent manner, in the absence of an indenture specifically stating that "no subdivision of lots may occur," owners can unilaterally subdivide lots to allow for new construction. Such an interpretation ignores longstanding principles of contract law requiring courts to look at the entire instrument, rather than individual provisions alone, when construing contract language. Moreover, this interpretation would allow developers to eye a desirable neighborhood in an attractive, well-established community and seek to maximize profits by dividing lots into smaller parcels and erecting new structures, all without regard for neighbors who have relied on the integrity of their indentures to preserve the character of their neighborhood. The ramifications of ignoring the intent of a subdivision's covenantor to maintain a certain type of community extends well beyond Clayton Terrace.

### C. The Language of the Indentures Unambiguously Reveals an Intent to Prevent Subdivision of a Property for the Purposes of Constructing a Second Residence.

It is well-established that restrictive covenants are "private contractual obligation[s] generally governed by the same rules of construction applicable to any covenant or contract." *Blackburn v. Habitat Dev. Co.*, 57 S.W.3d 378, 390 (Mo. App. 2001) (quoting *Kling v. Taylor-Morley, Inc.*, 929 S.W.2d 816, 819 (Mo. App. 1996)). "The purpose of contract construction is to ascertain the intent of the parties and to give effect to that intent." *Wildflower Cmty. Ass'n, Inc. v. Rinderknecht*, 25 S.W.3d 530, 534 (Mo. App. 2000) (citing *Dwyer v. Unit Power, Inc.*, 965 S.W.2d 301, 307 (Mo. App. 1998)).

"The rules governing construction of contracts imposing restrictions on the use of realty are the same as those applicable to any covenant or contract, including the rule that the clear intention of the covenantor should govern." *Newmark v. L & R Dev. Corp.*, 615 S.W.2d 118, 119 (Mo. App. 1981) (citing *Pellegrini v. Fournie*, 501 S.W.2d 564, 565 (Mo. App. 1973)). Indeed, "[t]he *primary objective* in construing a restrictive covenant is to ascertain the intent of the grantor-covenantor." *Udo Siebel-Spath v. Constr. Enterprises, Inc.*, 633 S.W.2d 86, 88 (Mo. App. 1982) (emphasis added). Further, restrictive covenants "are examined in the context of the *entire instrument* and not just a single clause." *Stolba v. Vesci*, 909 S.W.2d 706, 708 (Mo. App. 1995) (emphasis added). Doubts regarding the restriction's application are "resolved in favor of the free use of land," but should "never be applied in a manner that would defeat the plain and obvious

purpose and intent of the restriction." *Speedie Food Mart, Inc. v. Taylor*, 809 S.W.2d 126, 129-30 (Mo. App. 1991).

Here, there exists no ambiguity in the language of the Indentures with regard to the number of residences allowed on each lot, as they clearly state: "only one residence shall be erected on each lot." (LF 336-337). The obvious intent behind this provision is a restriction upon the number of residences that may be constructed in the community. The character of Clayton Terrace is maintained in part by limiting the number of residences in order to retain as much green space as possible. Missouri courts have recognized this is a valid purpose behind a restrictive covenant. *See Bates v. Webber*, 257 S.W.3d 632, 638 (Mo. App. 2008) ("Restrictive covenants are intended to preserve the aesthetic and residential nature of [a] subdivision.") (internal quotations omitted). To maintain the desired aesthetic and residential nature of Clayton Terrace, the homeowners decided in 1928 to allow no more than one residence on each lot that existed at the time.

As a practical matter, if the Indentures are construed to allow for subdivision, there is no mechanism to prevent a lot owner from endlessly subdividing his property and building additional residences thereon into perpetuity. The only way to maintain the desired aesthetic and residential nature of the subdivision consistent with the covenantor's intent is to interpret the Indentures as preventing residents from subdividing lots. The One Resident Per Lot Provision serves no other possible purpose, and when interpreting the provisions of a contract, a "construction that would render a provision meaningless should be avoided." *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 429 (Mo. banc 2003); *Herion Co. v. Taney Cty, Missouri*, 514 S.W.3d 620,

625 (Mo. App. 2017) ("Each term of a contract is construed to avoid a result which renders other terms meaningless; a construction which attributes a reasonable meaning to all the provisions of the agreement is preferred to one which leaves some of them without function or sense.")

The LLC points out that the City of Frontenac's ordinances presently prohibit the creation of residential lots smaller than one acre. But Frontenac's ordinances – or any local zoning ordinances – are irrelevant to this analysis. This Court is guided by the "intentions of the original grantors." *Olde Ivy*, 142 S.W.3d at 901; *Stolba v. Vesci*, 909 S.W.2d 706, 708 (Mo. App. 1995) (Courts "inquire into the purpose sought to accomplish and the accompanying circumstances *at the time of the restrictive covenant*.") (emphasis added). At the time the One Residence Per Lot Provision was added to the Indentures, Frontenac's minimum lot size restriction did not exist. (Tr. 170). In fact, the City of Frontenac *itself* did not exist for several more decades. (Tr. 170). Thus, the local zoning ordinances should not have had any impact on this Court's inquiry into the intent behind the One Residence Per Lot Provision. *See Marose v. Deves*, S.W.2d 279, 289-90 (Mo. App. 1985) (residents cannot circumvent restrictive covenants merely by attaining city approval). In effect, the LLC's rationale would establish as enforceable a "one residence per acre" restriction for Clayton Terrace, even though such a covenant is not contemplated by the Indentures.

Moreover, Missouri and other jurisdictions have all found similar provisions unambiguously prohibit the subdivision of residential lots. In *Berkley v. Conway Partnership*, 708 S.W.2d 225 (Mo. App. 1986), the Court of Appeals, Eastern District

held that an indenture prohibiting the construction of more than one home on any one lot would not allow for the re-subdivision and construction of another residence on a newly created lot. There, the facts are analogous to those at hand, as subdivision covenants contained a restriction that "[n]o structures shall be erected, altered, placed, or permitted to remain on any residential building lot other than one detached single-family dwelling…" *Id*. at 227. While acknowledging the proposition that restrictions on property use should be strictly construed, the court recognized that "[t]he primary object in construing covenants of restriction is to ascertain the intention of the parties, and this almost necessarily requires inquiry into the purpose which the parties sought to accomplish." *Id.* (citations omitted). The court found that the indentures reflected the developer's purpose that "these be the sole lots established by his original subdivision." *Id*. at 228 (emphasis added). *Berkley* was unwilling to allow a strict rule of construction favoring the free use of property to defeat a restrictive covenant without considering the intent behind the provision, even though re-subdivision may have been permissible under applicable zoning laws.

While *Berkley* implores courts to look to the intent of the restriction, 6 Clayton Terrace, LLC's argument totally ignores it. Rather, it entirely disregards the covenantor's intent, concluding instead that this Court can only look to whether there is language expressly stating something to the effect of "no subdivision of lots." Such a narrow analysis not only contradicts Missouri's longstanding treatment of restrictive covenants, but also contradicts the general principles of contract interpretation provided above.

Numerous other jurisdictions are in accord, concluding that the device of subdividing one lot into two is not appropriate where it effectively abrogates a covenant restriction limiting one residence to a lot.

In *Belle Terre Ass'n v. Brosch*, 216 So.2d 462 (Fla. App. 1968), a property owner attempted to divide an existing lot into two separate lots in order to construct a house on each new parcel. *Id.* at 462. The neighborhood association subsequently filed a declaratory judgment action, claiming the property owner's plans directly violated a restrictive covenant providing that "only one dwelling house ... shall be erected on any single lot or plot and each dwelling house shall be for one family only." *Id*. at 462. The Florida Court of Appeals held in favor of the neighborhood association, finding it significant that the indentures did not separately include restrictions discussing minimum lot sizes. *Id.* at 463. Without the inclusion of such a restriction in the indentures, the court could not "justif[y] [a] finding that resubdivision was contemplated." *Id*. at 463. Rather, the court provided:

> If this transparent device [division of a lot by deed] is approved, there goes the neighborhood. Thousands of Floridians who have in good faith undertaken to comply with restrictions intended for the benefit of themselves and their neighbors could no longer have confidence that some purchaser could not chop his lot up into the smallest lots permitted by ordinance.

*Id*. at 463. Under this rationale, the court ultimately held the one residence per lot provision to "mean precisely what [it] say[s]: There will be only one dwelling house on [the lot], as that lot is shown on the plat . . . ." *Id*. at 463.

In *Kayem v. Stuckey*, 383 S.W.2d 227, 227-28 (Tex. Civ. App. 1964), the Texas Court of Civil Appeals considered whether a property owner could subdivide property despite a restrictive covenant which provided that "only one single family residence and its usual accessories shall be constructed or permitted on each site or separate parcel of land hereafter conveyed out of said subdivision." As in the case at bar, the defendants in *Kayem* attempted to subdivide their property on the grounds there was no express prohibition in the indentures. In considering the provision, the court found it significant that the indentures separately "provide[] for *consolidation* of adjoining tracts or fractions thereof into one homesite, but do[] not in any way allow more than one residence on any one lot." *Id*. at 228 (emphasis in original). The court acknowledged it "must construe the restrictions in the light of the obvious intent of the plan for development of the subdivision" and concluded that "to us it is clear that only one single residence and its usual accessories would be permitted on each lot of the subdivision as shown by the plat." *Id*. at 228.[8]

[8] Many states across the country have found similar language to prohibit subdivision of a lot. *See also Belleview Const. Co. v. Rugby Hall Cmty. Ass'n, Inc.*, 321 Md. 152, 154 (Md. App. 1990) ("The developer who conceived the community, and those who bought from him, had every right to rely upon [the fact that] the carefully conceived plan of development … would not subsequently be divided into such pieces as might satisfy zoning and subdivision regulations which might thereafter be adopted."); *Welshire, Inc. v. Harbison*, 33 Del. Ch. 199, 202 (Del. Ch. 1952) ("The bearing of lot size upon the character of a residential development is obvious. We think the language embodied a restriction against subdividing the lots."); *In Estate of McIntrye v. Lionsridge No. 4 Homeowner's Ass'n*, 124 P.3d 860, 862 (Colo. App. 2005) ("[T]he paragraph permitting construction of not more than one building containing not more than one dwelling unit upon a residential lot refers to a lot as any of the original units of land in the subdivision …."); *Brandon v. Price*, 314 S.W.2d 521, 523 (Ky. 1958) ("[T]he phrase 'all lots shall be used for private single-family residence purposes' means that only one private single-family residence shall occupy each

### D. If This Court Deems the One Residence Per Lot Provision Ambiguous, the Totality of the Facts Before the Circuit Court Clearly Demonstrates the Intent Behind the One Residence Per Lot Provision Was to Prevent Subdivision of Property for the Purposes of Constructing a Second Residence.

In the event that this Court should find the One Residence Per Lot Provision ambiguous and look to outside evidence, then nothing is more probative of intent than the fact that, for over 85 years, not a single resident of Clayton Terrace subdivided his property for the purpose of constructing an additional residence. (Tr. 22). While the LLC claims the Circuit Court ignored evidence showing "various lots in the Subdivision had previously been altered, amended and modified on numerous occasions" (Brief of Appellant 6 Clayton Terrace, LLC ("6CT Br.") at p. 34), this statement mischaracterizes the evidence at trial. For instance, at trial, Trustee John Tackes testified that one of the lots had been reconfigured to accommodate a new on-ramp for Interstate 64 and two lots had been realigned to allow access from Clayton Terrace as opposed to Lindbergh Boulevard. (Tr. 19). The fact that Clayton Terrace permitted such reconfiguration by necessity is a far cry from a lot owner's attempted subdivision and construction in contravention of the Indentures. There are not and have never been more houses than the original number of lots in Clayton Terrace. (Tr. 124).

This, combined with the fact the City of Frontenac's ordinances did not exist at the

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lot. We also think … dividing Lot No. 35 by deed into two lots cannot be effective to avoid the restriction."); *Cadbury v. Bradshaw*, 602 P.2d 289, 290 (Or. App. 1979) ("In a provision providing only one dwelling can be located on any 'parcel,' the term 'parcel' refers to the units of property which are shown on the map and which were originally conveyed by the common grantor.").

time the One Residence Per Lot Provision was enacted, is strong evidence of an intent to prohibit subdivision of lots within Clayton Terrace. In short, to adopt the LLC's interpretation would thwart the clear and obvious intent behind the Indentures and the One Residence Per Lot Provision.

The Trustees had a duty under the Indentures to enforce the One Residence Per Lot Provision in order to ensure that Clayton Terrace remain a consistent and harmonious community, with property lots and structures of attractive size, as contemplated by the covenantor of the Indentures. If the LLC prevails, developers such as itself and Century Renovations, will make more money, while homeowners who relied on the restrictions when purchasing and improving their properties will see their property values decrease. "Even though the law favors untrammeled use of real estate, ***restrictions are not to be disregarded***." *Stolba*, 909 S.W.2d at 708 (emphasis added). Building a second residence on a "subdivided" Lot 6 in Clayton Terrace is a clear violation of the intent of the One Residence Per Lot Provision and should not be allowed. The Judgment on Count II should be affirmed.

## III. THE CIRCUIT COURT WAS CORRECT IN AWARDING THE TRUSTEES THEIR ATTORNEYS' FEES BECAUSE JUSTICE AND EQUITY DEMAND APPLICATION OF THE SPECIAL CIRCUMSTANCES EXCEPTION TO THE AMERICAN RULE.

***(Responding to 6 Clayton Terrace, LLC's Point Relied On III)***

In its third Point Relied On, 6 Clayton Terrace, LLC argues that the Circuit Court erred in ordering it to pay the Trustees' attorneys' fees. While Missouri courts have historically adhered to the "American Rule" requiring that litigants bear the expense of their own attorneys' fees, "[e]xceptions, however, are made … where very unusual circumstances exist so it may be said equity demands a balance of benefits." *Gerken v. Sherman*, 351 S.W.3d 1, 13 (Mo. App. 2011) (internal quotation omitted). In addition, an exception has been recognized in "special circumstances" where a party's conduct is "frivolous, without substantial legal grounds, reckless or punitive." *Goralnik v. United Fire & Cas. Co.*, 240 S.W.3d 203, 211 (Mo. App. 2007) (internal quotation omitted). Contrary to the LLC's claims otherwise, Missouri courts have repeatedly enforced this exception. *Temple Stephens Co. v. Westenhaver*, 776 S.W.2d 438, 443 (Mo. App. 1989); *Law v. City of Maryville*, 933 S.W.2d 873, 878 (Mo. App. 1996); *Volk Constr. Co. v. Wilmescherr Drusch Roofing Co.*, 58 S.W.3d 897, 901 (Mo. App. 2001); *Goellner v. Goellner Printing*, 226 S.W.3d 176, 179 (Mo. App. 2007); *Klinkerfuss v. Cronin*, 289 S.W.3d 607, 618-19 (Mo. App. 2009).

The LLC strives to minimize the special circumstances exception to the American Rule, and in so doing, flatly misrepresents the governing case law. It even goes so far as to argue the Circuit Court's citation to *Klinkerfuss*, 289 S.W.3d at 607, was "wholly

misplaced," merely because *Klinkerfuss* acknowledged that fees were appropriate under the Uniform Trust Code's fees and costs provision, § 456.10-1004 RSMo. (6CT Br. at p. 40). In so arguing, the LLC ignores *Klinkerfuss*' finding that "[a]uthority for awarding attorneys' fees against the beneficiary personally exists, both in section 456.10-1004 and in the cases that apply an exception to the American Rule for a party's intentional misconduct." *Id*. at 619. Indeed, *Klinkerfuss* devoted much attention to the special circumstances exception and concluded "ample authority exists for the proposition that intentional misconduct constitutes 'special circumstances' justifying an award of attorney's fees." *Id.* at 619. Among other cases, the court cited to *Westenhaver*, noting that an award of attorneys' fees was justified under the special circumstances exception where a defendant intentionally omitted plaintiff's name on a list of property owners submitted for a rezoning application. 776 S.W.2d at 443. It likewise cited *Volk Construction Co.*, in which the court upheld an award of attorney's fees under the special circumstances exception where the defendants engaged in intentional misconduct involving transfers with the intent to hinder, delay, and defraud creditors. 58 S.W.3d at 901.

In its Judgment, the Circuit Court found that "6 Clayton Terrace, LLC acted in bad faith in concealing their intentions and attempts to subdivide the Property and . . . is not entitled to benefit of equitable defenses." (LF 521). Indeed, the evidence supports its finding that the LLC engaged in intentional and egregious misconduct justifying the application of the special circumstances exception. The record is replete with evidence of surreptitious behavior by 6 Clayton Terrace, LLC, Mr. McGowan and Mr. Birner to

support the Circuit Court's conclusion that the LLC acted in bad faith. McGowen (a career real estate developer), was drawn to the Property from the outset for its development potential, testifying at trial that "my very first thought was that this might be able to split." (Tr. 263). Prior to making an offer, McGowan and Birner reviewed the Clayton Terrace Indentures with respect to the subdivision issue (Tr. 221, 261, 263), as well as the local zoning laws and even consulted with the City of Frontenac in order to determine whether their municipal ordinances would allow the Property to be subdivided (Tr. 220, 263-264). Century Renovations went so far as to hire a surveyor to survey the Property in order to see whether "it was a viable split option." (Tr. 220). Prior to closing, none of these facts were disclosed to the Trustees or the Clayton Terrace homeowners. The Trustees only learned of the proposed subdivision when they were contacted by the City of Frontenac more than a year later. (Tr. 16).

The LLC claims it did nothing wrong and further alleges that the Trustees were aware of its plans to subdivide within ten days of the closing. (6CT Br. at p. 42). This allegation is simply not true. The only evidence presented to support its claim was that Mr. McGowan's nine-year-old son purportedly told Cathy Stahr – who was not then a trustee (Tr. 30-32) – that his father was planning to construct another house on Lot 6. (Tr. 93, 110). It would be unreasonable to require the Trustees to rely on stray comments of a young child. The Trustees first obtained reliable information regarding plans to subdivide in April 2014 (Tr. 17-18, 84), and shortly thereafter consulted counsel, attended meetings of the Frontenac Zoning Committee to protest, and ultimately

commenced the instant litigation in the Circuit Court. (Tr. 110). Accordingly, the LLC's effort to portray the Trustees as bad actors is just as transparent as its claimed innocence.

The Circuit Court properly relied on such evidence in concluding that 6 Clayton Terrace, LLC intentionally hid its intentions to subdivide the Property, and accordingly, its Judgment on Count II of the Trustee's Petition should be affirmed.

## IV. THE CIRCUIT COURT ACTED WITHIN ITS DISCRETION IN ORDERING THE LLC TO PAY ALL OF THE TRUSTEES' ATTORNEYS' FEES, AS 6 CLAYTON TERRACE, LLC WAS THE CAUSE OF THE LITIGATION.

***(Responding to 6 Clayton Terrace LLC's Point Relied On IV)***

6 Clayton Terrace, LLC additionally argues that the Circuit Court abused its discretion in awarding the Trustees their attorneys' fees in full. At the request of the Circuit Court, after the conclusion of the trial, Trustees submitted their Affidavit of Fees and Costs (the "Affidavit") setting forth the Trustee's incurred attorneys' fees in the amount of $203,915.50 and costs of $5,277.06. (LF 535). The LLC criticizes the Circuit Court's entry of an award based on the Affidavit, in part because the Trustees did not attach copies of billing statements or otherwise detail each and every legal service rendered by counsel and the corresponding time billed.

Tellingly, the LLC provides no controlling Missouri case law requiring a prevailing party to submit such detailed information to support an attorneys' fees award. This omission is likely because Missouri law recognizes that the circuit court, having presided over this matter from the date of its filing through its conclusion, is aware of the effort expended and the work product submitted in connection therewith. *Klinkerfuss*, 289 S.W.3d at 614. The circuit court is considered an expert on the issue of attorneys' fees and "is presumed to know the character of the attorneys' services rendered in duration, zeal, and ability." *Grissom v. First Na'l. Ins. Agency*, 364 S.W.3d 728, 736 (Mo. App. 2012) (quotations omitted) (emphasis added). Because of its expertise, the circuit court "may fix the amount of attorneys' fees without the aid of evidence."

*Western Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 23 (Mo. banc 2012) (quotations omitted) (emphasis added). The circuit court "may fix such fees within its sound discretion and its determination will not be reversed absent a showing the compensation allowed was a manifest and clear abuse of such discretion." *Empire Gas Corp. v. Small's LP Gas Co.*, 637 S.W.2d 239, 248 (Mo. App. 1982). "An abuse of discretion is established only when the award is so 'clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice.'" *Leone v. Leone*, 917 S.W.2d 608, 616 (Mo. App. 1996) (quoting *Meservey v. Meservey*, 841 S.W.2d 240, 248 (Mo. App. 1992)). Here, it was properly within the Circuit Court's province to review the Trustees' Affidavit and award fees based on its knowledge and experience in the case.

Next, the LLC argues, in the absence of legal citations, that the Circuit Court was required to order payment only of those fees incurred in connection with the Trustees' prosecution of Count II against the LLC. However, Missouri courts have discretion to award the full amount of fees where, as here, the claims in the lawsuit have a "common core of facts and are based on related legal theories and much of counsel's time is devoted generally to the litigation as a whole making it difficult to divide the hours expended on a claim-by-claim basis, such [that the] lawsuit cannot be viewed as a series of distinct claims." *Mohamed Alhalabi v. Mo. Dep't of Natural Res.*, 300 S.W.3d 518, 531 (Mo. App. 2009); *see also Williams v. Fin. Plaza, Inc.*, 78 S.W.3d 175, 185 (Mo. App. 2002) (holding that "[b]ecause all of [the plaintiff's] claims were related and intertwined, the trial court was not required to segregate attorney's fees for each claim.").

In the instant case, Counts I and II as well as the Counterclaim all had a common core of facts and law. All relate to the same sale of the same property in the same subdivision involving the same parties and the application of the same Indentures. Accordingly, it was proper for the Circuit Court to order the full amount of the Trustees' attorneys' fees, and the Judgment should therefore be affirmed.

## V. THE CIRCUIT COURT ACTED IN ITS DISCRETION IN AWARDING MS. HUEY $60,000 IN ATTORNEYS' FEES.

***(Responding to Huey's Point Relied On I)***

As set forth in the Trustees' first Point Relied On, *see* Part II, Section I, *infra*, the Circuit Court erred in entering judgment in favor of Ms. Huey on her Counterclaim for abuse of process. Accordingly, no damages should have been assessed in favor of Ms. Huey. But, to the extent the Circuit Court did assess damages, it did not err in reducing the damages to a reasonable amount.

When fixing the amount of attorneys' fees assessed, a circuit court may consider many factors, including:

> 1) the rates customarily charged by the attorneys involved in the case and by other attorneys in the community for similar services; 2) the number of hours reasonably expended on the litigation; 3) the nature and character of the services rendered; 4) the degree of professional ability required; 5) the nature and importance of the subject matter; 6) the amount involved or the result obtained; and 7) the vigor of the opposition.

*Berry v. Volkswagen Group of Am., Inc.*, 397 S.W.3d 425, 431 (Mo. banc 2013); *Hill v. City of St. Louis*, 371 S.W.3d 66, 82 (Mo. App. 2012). In weighing these factors, a circuit court may choose to reduce the requested fees to a reasonable amount and is not obligated to explain its reason for such a reduction. *Winghaven Residential Owners Ass'n., Inc. v. Bridges*, 457 S.W.3d 383, 386 (Mo. App. 2015).

In *Winghaven*, the plaintiff prevailed on a breach of contract claim and sought to recover attorneys' fees from the defendant as damages. *Id.* at 385-86. The plaintiff presented testimony suggesting fees totaling $5,112.62, and the defendants did not

dispute the amount. *Id*. at 386. Nonetheless, the circuit court entered judgment awarding the plaintiff attorneys' fees of $500. *Id*. The court of appeals affirmed the judgment, explaining:

> The [plaintiff] assumes that because the amount of attorney's fees awarded was significantly less than [its] request, the trial court did not properly consider the evidence in light of the factors referenced above. ***We note that a significant difference between the amount of attorneys' fees awarded and the amount requested does not, standing alone, establish an abuse of discretion.*** The trial court is not bound either by the number of hours performed… or the hourly charge…. ***Nor is the trial court required to explain its reasons for the award of the attorneys' fees as the Association suggests.***

*Id.* at 386. (internal quotation omitted) (emphasis added).

Indeed, "In the absence of a contrary showing, the trial court is presumed to know the character of the attorney's services rendered in duration, zeal, and ability." *Id.*; *see also Heilbron v. ARC Energy Corp*., 757 S.W.2d 294, 296–97 (Mo. App. 1988) ("A trial court knows the nature of the work the presentation of the cause entails, the issues, the quality of the professional labor, the expenditure of time, and, thus, its value assessed according to custom, place and circumstances. The trial court, therefore, may set the value of the attorney's fee without evidence."). Moreover, "The trial court is considered to be an expert on the question of attorney fees" and when it "tries a case and is acquainted with all the issues involved[, it] may fix the amount of attorneys' fees without the aid of evidence." *Nelson v. Hotchkiss*, 601 S.W.2d 14, 21 (Mo. banc 1980) (internal quotations omitted).

In light of the significant deference given to a Circuit Court's decision regarding attorneys' fees, Ms. Huey failed to establish that the amount assessed in her favor constitutes an abuse of discretion. This Court should reverse the Circuit Court's Judgment on Ms. Huey's abuse of process claim for the reasons stated below, but if this Court affirms said claim, it should defer to the Circuit Court's determination regarding the attorneys' fees awarded.

## PART TWO: THE TRUSTEES' APPEAL

## POINTS RELIED ON

**I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN MS. HUEY'S FAVOR ON COUNT I OF HER COUNTERCLAIM FOR ABUSE OF PROCESS BECAUSE THE COURT MISAPPLIED THE LAW IN THAT THE TRUSTEES WERE AUTHORIZED TO BRING THEIR CLAIM AGAINST MS. HUEY AND DID NOTHING MORE THAN CARRY OUT THE PROCESS TO ITS AUTHORIZED CONCLUSION AND ANY ALLEGED ULTERIOR MOTIVE BY THE TRUSTEES IS IRRELEVANT UNDER MISSOURI LAW.**

*Ritterbusch v. Holt*, 789 S.W.2d 491 (Mo. banc 1990)

*Duvall v. Lawrence*, 86 S.W.3d 74 (Mo. App. 2002)

*Moffett v. Commerce Trust Co.*, 283 S.W.2d 591 (Mo. 1955)

**II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN MS. HUEY'S FAVOR AND AGAINST THE TRUSTEES ON COUNT I OF THE TRUSTEES' PETITION BECAUSE IT ERRONEOUSLY DECLARED AND APPLIED THE LAW IN THAT THE RIGHT OF FIRST REFUSAL PROVISION WAS PROPERLY APPROVED BY THE REQUISITE SUBDIVISION RESIDENTS AND IS THEREFORE VALID.**

*Hazelbaker v. County of St. Charles*, 235 S.W.3d 598, 600 (Mo. App. 2007)

**III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN MS. HUEY'S FAVOR AND AGAINST THE TRUSTEES ON COUNT I OF THE TRUSTEES' PETITION BECAUSE SUCH HOLDING WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE EVIDENCE WAS UNDISPUTED AT TRIAL THAT MS. HUEY AND HER AGENTS FAILED TO COMPLY WITH THE RIGHT OF FIRST REFUSAL PROVISION.**

*Schler v. Coves N. Homes Ass'n*, 426 S.W.3d 720 (Mo. App. 2014)

## IV. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN MS. HUEY'S FAVOR AND AGAINST THE TRUSTEES ON COUNT I OF THE TRUSTEES' PETITION BECAUSE SUCH HOLDING CONSTITUTED A MISAPPLICATION OF THE LAW IN THAT THE EXPRESS TERMS OF THE INDENTURES PROVIDE A SALE THAT FAILS TO COMPLY THEREWITH SHALL BE VOID, AND EQUITABLE PRINCIPLES DO NOT APPLY TO CHANGE THIS RESULT.

BLACK'S LAW DICTIONARY, 10th ed. 2014

*St. Charles County v. A Joint Bd. Or Com'n*, 184 S.W.3d 161 (Mo. App. 2006)

*Purcell v. Cape Girardeau County Com'n*, 322 S.W.3d 522 (Mo. banc 2010)

## ARGUMENT

**I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN MS. HUEY'S FAVOR ON COUNT I OF HER COUNTERCLAIM FOR ABUSE OF PROCESS BECAUSE THE COURT MISAPPLIED THE LAW IN THAT THE TRUSTEES WERE AUTHORIZED TO BRING THEIR CLAIM AGAINST MS. HUEY AND DID NOTHING MORE THAN CARRY OUT THE PROCESS TO ITS AUTHORIZED CONCLUSION.**

## STANDARD OF REVIEW

This Court may reverse a circuit court's judgment if "there is no substantial evidence to support it, . . . it is against the weight of the evidence, . . . it erroneously declares the law, or . . . it erroneously applies the law." *Murphy*, 536 S.W.2d at 32. "The circuit court's determinations of questions of law are subject to de novo review." *Hill v. Missouri Dep't of Conservation*, 550 S.W.3d 463, 467 (Mo. banc 2018).

## ARGUMENT

In Missouri, to prevail on her claim for abuse of process, Ms. Huey had the burden of establishing that: (1) the Trustees made an illegal, improper, perverted use of process, a use neither warranted nor authorized by the process; (2) the Trustees had an improper purpose in exercising such illegal, perverted or improper use of process; and (3) damage resulted. *Ritterbusch v. Holt*, 789 S.W.2d 491, 493 (Mo. banc 1990).

There must be a "wil[l]ful, definite act not authorized by the process or aimed at an objective not legitimate in the proper employment of such process." *Dillard Dep't Stores, Inc. v. Muegler*, 775 S.W.2d 179, 183 (Mo. App. 1989) (citing *Wells v. Orthwein*, 670 S.W.2d 529, 532-33 (Mo. App. 1984); *Stafford v. Muster*, 582 S.W.2d 670, 678 (Mo. banc 1979); *Guirl v. Guirl*, 708 S.W.2d 239, 245 (Mo. App. 1986)). "Significantly, if the action is confined to its regular and legitimate function in relation to the cause of action at

issue, there is no abuse ***even if the plaintiff had an ulterior motive in bringing the action***, or if he knowingly brought the suit upon an unlawful claim." *Duvall v. Lawrence*, 86 S.W.3d 74, 84-85 (Mo. App. 2002) (emphasis added). The test is whether the process was used to accomplish some unlawful end or to compel the plaintiff to do some collateral thing that the plaintiff could not be compelled to do legally. *Id*. "[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Moffett v. Commerce Trust Co*., 283 S.W.2d 591, 599 (Mo. 1955).

Ms. Huey failed to establish the first element of her claim for abuse of process, as she failed to adduce evidence that the Trustees made a willful, definite act not authorized by the process. The essence of Ms. Huey's abuse of process claim is that the Trustees pursued their cause of action against her solely to compel 6 Clayton Terrace, LLC to leave the neighborhood. In turn, the Circuit Court found that the Trustees brought Count I in an effort to force the LLC out of Clayton Terrace. (LF 526, ¶ 61). Thus, even accepting the Circuit Court's fact finding as true, the Trustees brought Count I for the exact purpose for which it was designed – to set aside the sale of Property as void. The natural consequence of setting aside the sale to the LLC would be for it to lose right and title to the Property, which in effect puts the title back in Ms. Huey's hands. The Trustees' cause of action to void the sale was prescribed by the Indentures as the appropriate action to be taken in the event that the Right of First Refusal Provision was violated.

With respect to the purpose behind the process, the Trustees were fulfilling their fiduciary duty to the current Clayton Terrace homeowners (and in particular, to Ms. Schwartz, who was discouraged from exercising her first refusal rights by Ms. Huey's agent, Judy Miller) by ensuring that the subdivision covenants were upheld. As previously stated, the Indentures expressly charge the Trustees with the responsibility of defending and enforcing the terms thereof. (SC Ex. I, ¶ 3). Consistent with this provision, Trustee Cathy Stahr testified that the Trustees' main concern was to protect the Indentures. (LF 437). Mr. Tackes' testimony underscored this motivation, when he stated at trial that once the Trustees learned of Ms. Huey's violations of the Indentures, "we were bound to enforce" them. (Tr. 46).

In addition to their fiduciary duties, the Trustees felt obligated to act on behalf of their Clayton Terrace neighbors who voiced their strong opposition[9] to the proposed subdivision of the Property. (SC Ex. JM-Aff, pp. 5-6). Thus, the Trustees were not only permitted to bring action, but arguably required to file the instant claim against Ms. Huey in order to enforce compliance with the express terms of the Indentures.

In its Judgment, the Circuit Court inferred improper coercion by the Trustees due to its (unfounded) conclusion that "none of the homeowners or Trustee Plaintiffs ever complained or raised any objection whatsoever to the allegedly defective Notice of Sale

[9] Mr. Tackes (14 Clayton Terrace) and Mr. Francis (8 Clayton Terrace) appeared in person at the City of Frontenac Planning and Zoning Commission meetings in June 2014 to voice their opposition, while William and Barbara Conway (11 Clayton Terrace), Sara and Kurt Hentz (19 Clayton Terrace), Ramesh Agarwal (1 Clayton Terrace), and Linda Tackes (14 Clayton Terrace) all submitted written objections. (SC Ex. JM-Aff, pp. 5-6).

prior to the February 15, 2013 Closing Date." (LF 531). However, the trial testimony adduced by the Trustees supports their position that they had no knowledge of the attempts to thwart Ms. Schwartz's efforts to acquire the Property for her son until the subdivision meetings held during the summer of 2014, close to sixteen months after the sale. [10]

The *Moffett* decision contemplated an abuse of process claim against a fiduciary. 283 S.W.2d at 600. In *Moffett,* this Court considered the claims of a decedent's relative that the administrator of the estate allegedly conspired to misappropriate funds that such relative stood to inherit and instigated frivolous litigation to further such purpose. In its decision, this Court found no cause of action was stated for abuse of process where the administrator had a duty to commence such litigation on behalf of the estate. This Court held that "whatever the motive, the end sought was not unlawful, or beyond the authorized purpose of the process initiated, because it was to establish indebtedness to the estates represented by [the administrator] and obtain judgment therefor. If there was intrinsic fraud in obtaining the judgment, that was not abuse of process." *Id*. at 600.

Ms. Huey has attempted to portray herself an innocent party, used as a pawn by the Trustees, despite the fact that the evidence at trial supported the Trustees' theory that Ms. Huey and her agents sought to hinder the right of first refusal process by refusing Ms. Schwartz access to the property. (LF 245-247). The evidence further supported the

[10] Both Mr. Francis and Mr. Tackes testified at trial that they first became aware of Ms. Schwartz's complaints regarding the sale of the Property during the summer of 2014. (Tr. 17-18, 84).

fact that Ms. Huey's agents failed to deliver adequate notice to all lot owners as expressly mandated by the Indentures. (LF 225-26).

In short, the Trustees had a legitimate right to file the Petition – and indeed were allowed and arguably required to do so under the terms of the Indentures – and have never proceeded in a manner for any end other than that permitted. The Trustees are unpaid volunteers, who do not stand to profit (and conversely, along with the other Clayton Terrace homeowners, have incurred significant personal expense (LF 437)) in the process of enforcing the Clayton Terrace Indentures. An abuse of process claim requires a showing of a "misuse of process for an end other than that which it was designed to accomplish." *Guirl*, 708 S.W.2d at 245. As no such showing was made, the Circuit Court's Judgment on Ms. Huey's Counterclaim relied on a misapplication of the law and should therefore be reversed.

## II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN MS. HUEY'S FAVOR AND AGAINST THE TRUSTEES ON COUNT I OF THE TRUSTEES' PETITION BECAUSE IT ERRONEOUSLY DECLARED AND APPLIED THE LAW IN THAT THE RIGHT OF FIRST REFUSAL PROVISION WAS PROPERLY APPROVED BY THE REQUISITE SUBDIVISION RESIDENTS AND IS THEREFORE VALID.

### STANDARD OF REVIEW

This Court may reverse a circuit court's judgment if "there is no substantial evidence to support it, . . . it is against the weight of the evidence, . . . it erroneously declares the law, or . . . it erroneously applies the law." *Murphy*, 536 S.W.2d at 32. "The circuit court's determinations of questions of law are subject to de novo review." *Hill v. Missouri Dep't of Conservation*, 550 S.W.3d 463, 467 (Mo. banc 2018).

### ARGUMENT

In its Judgment, the Circuit Court found that the Right of First Refusal Provision burdened the land and determined that all lot owners had to unanimously consent to the addition of the provision for the restriction to be valid, citing *Hazelbaker* as authority. (LF 527-528). In holding so, the Circuit Court misapplied the law.

For the same reasons as applicable to the One Residence Per Lot Provision, the Right of First Refusal should also be found valid. The Trustees incorporate the arguments in Part I, Section I, *supra*, as if fully set forth herein.

First, this Court should not retrospectively apply the unanimous consent rule to any of Clayton Terrace's amendments, including the Right of First Refusal Provision. Clayton Terrace's Original Indentures were recorded in 1923, well before the earliest conceivable time in which the unanimous consent rule became law in Missouri. *See Van*

*Deusen*, 125 S.W.2d at 1. For the same reasons previously discussed, in drafting the Original Indentures, the covenantor relied on the ability to amend the restrictions as stated therein. It is irrelevant whether an amendment was enacted before or after the unanimous consent rule came into effect. Rather, what matters is whether a covenantor was put on notice as to a unanimous consent requirement when the document was recorded. If this rule applies to Clayton Terrace, its residents will be forced to live with the sparse terms of the 1923 Indentures forever.

Should this Court overrule the strict construction of amendment provision terms, then it is undisputed that the Right of First Refusal is valid in that it was passed by the requisite two-thirds vote pursuant to the Clayton Terrace Indentures. (LF 337).

Further, for the same reasons as applicable to the One Residence Per Lot Provision, it would be unreasonable to permit a lot owner to invalidate the Right of First Refusal now, nearly 40 years after it was enacted in 1973.

For these reasons, the Judgment on Count I should be reversed.

## III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN MS. HUEY'S FAVOR AND AGAINST THE TRUSTEES ON COUNT I OF THE TRUSTEES' PETITION BECAUSE SUCH HOLDING WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT IT WAS UNDISPUTED AT TRIAL THAT HUEY AND HER AGENTS FAILED TO COMPLY WITH THE RIGHT OF FIRST REFUSAL PROVISION.

### STANDARD OF REVIEW

A claim that the judgment is against the weight of the evidence involves review of the trial court's factual determinations. *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012). "An appellate court 'will overturn a trial court's judgment under [this] fact-based standard[] of review only when the court has a firm belief that the judgment is wrong." *Sauvain v. Acceptance Indem. Ins. Co.*, 437 S.W.3d 296, 302 (Mo. App. 2014). The appellate court defers to the trial court's determinations regarding the credibility of witnesses and views the evidence and the inferences therefrom in the light most favorable to the judgment. *Murphy*, 536 S.W.2d at 32.

### ARGUMENT

The Indentures provide that all Clayton Terrace residents "shall have the right to elect in writing to purchase [a] lot on the same terms (including the closing date) as offered to the third party buyer within a period of 15 days from the receipt of said notice." (LF 337; JB-A(H)). The Indentures also contain a 15-day notice requirement before the sale of any property: "No sale of any lot in said subdivision shall be consummated without the seller giving at least 15 days' written notice to the owners of all other lots in said subdivision." (LF 337). This language makes clear that the restriction on sale without 15 days' written notice is a covenant that must be abided by to

validate a sale within the subdivision. Further, "[a]ny attempted transfer of such property without compliance with this restriction shall be void." (LF 337).

The Right of First Refusal Provision was a covenant in the Indentures affirmatively requiring Ms. Huey to perform certain duties in connection with the sale of the Property. "A covenant is simply an agreement . . . which requires the performance or the nonperformance of some specified duty with regard to real property, including an agreement to do or not to do a particular act." *Schler v. Coves North Homes Ass'n*, 426 S.W.3d 720, 723 (Mo. App. 2014). The evidence before the Circuit Court reflected that, time and again, the subdivision restrictions were either overlooked or evaded by Ms. Huey and her agents.

When Insight Title, on behalf of Ms. Huey, reached out to the Trustees concerning the pending sale, Mr. Francis advised of the existence of the Right of First Refusal Provision contained in the Indentures. (LF 339; Tr. 80-81). Thereafter, the Notice, prepared by Insight Title and allegedly delivered on or about January 31, 2013 (just seven days before the scheduled closing) by Judy Miller, a realtor representing Ms. Huey in the sale of the Property, stated:

> Please be advised Jeannette Huey is selling 6 Clayton Terrace, St. Louis, MO 63131 on or about February 6, 2013 for the sale price of $415,000.00. As an adjoining lot owner and/or grantor, you have the right of option to purchase the same at the above price. Will you kindly sign the bottom of this letter indicating whether or not you are interested in purchasing the above described property.

(LF 243, 339).

The Notice and its delivery were fatally deficient, as the Notice omits the identity of the proposed purchaser, Century Renovations, and other relevant terms of sale. (LF 339). Clearly, Ms. Huey did not want the other homeowners to know that the Property was being purchased by a developer and not a family. And equally important, the evidence adduced at trial demonstrated that the Notice was not delivered to a number of the homeowners. Contrary to the Judgment, no notice was ever prepared for, much less delivered to, the owner of Lot 5. (SC Exs. 16, 100; LF 242-243; Tr. 19-21, 119). Lot 5 (1131 Lindbergh Blvd.) was likely overlooked due to the fact that it fronts Lindbergh Boulevard, and Insight Title apparently prepared Notices only to the owners of properties whose addresses appeared in its search of the St. Louis County Assessor's records for homes with a "Clayton Terrace" mailing address. (SC Exs. 16, 100; LF 242-243; Tr. 119). Further, the deposition testimony of the owners of Lots 16 and 7 (Joan O'Dowd and James O'Dowd, and Michael Lin, respectively), subsequently admitted at trial, confirmed that they also never received the Notice. (LF 227-233).

Apparently, Mr. McGowan was "appalled" when he first learned of the Right of First Refusal Provision and the potential risk it posed with respect to closing the sale. (LF 225). Ms. Huey in turn assured him that "nobody was likely to have any interest in the house." (LF 226). But one of her Clayton Terrace neighbors **did have an interest** – Elizabeth Schwartz. (LF 339-340).

Upon receipt of the Notice and intrigued by the purchase price (which she believed to be well below market value), Ms. Schwartz responded to Insight Title on February 4, 2013, expressing her interest in the Property. (LF 245, 339-340). Believing

that the Property would suit her son and his young family, she contacted Ms. Huey's realtor, Judy Miller, and requested permission to walk through. (LF 244-247). Ms. Schwartz expressed that "we were still very interested. And so [Ms. Miller] proceeded to tell me everything that was wrong with the house." (LF 245). Ultimately, the realtor flatly denied access to the Property to Ms. Schwartz, telling her that "the house has been on the market for a year, you've had plenty of time to go in the house… And she told me that [Ms. Huey] would not allow me to do so." (LF 245). Judy Miller's refusal was notwithstanding the fact that Century Renovations and Mr. McGowan were allowed numerous opportunities to view the Property prior to submitting a contract. (LF 220, Tr. 220, 277). Frustrated by her inability to access the Property, Ms. Schwartz ultimately elected not to submit a matching offer to purchase the Huey residence and abandoned her interest in it. (LF 245-249, 340).

The Sale Contract was ultimately amended to postpone the closing from February 6 to February 15, 2013. (LF 339). On February 14, 2013, just one day prior to closing, Century Renovations assigned the sale contract to an entirely new entity, 6 Clayton Terrace, LLC. (LF 341). No notice was ever provided to any of the homeowners of Clayton Terrace (1) identifying Century Renovations as the original purchaser (LF 339), (2) advising of the assignment from Century Renovations to the LLC (LF 341), (3) identifying the LLC as the ultimate purchaser (LF 241-242), (4) advising of the new and updated closing date of February 15, 2013. (Tr. 81-82). Ms. Huey closed on the sale of the Property to the LLC on February 15, 2013, having clearly disregarded or otherwise

effectively failed to comply with the majority of the Right of First Refusal Provisions. (LF 341).

The Trial Court's finding that Notice was effective, despite its clear nonconformance with the terms of the Indentures, was against the weight of the evidence and should be reversed.

## IV. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN MS. HUEY'S FAVOR AND AGAINST THE TRUSTEES ON COUNT I OF THE TRUSTEES' PETITION BECAUSE SUCH HOLDING CONSTITUTED A MISAPPLICATION OF THE LAW IN THAT THE EXPRESS TERMS OF THE INDENTURES PROVIDE A SALE THAT FAILS TO COMPLY THEREWITH SHALL BE VOID, AND EQUITABLE PRINCIPLES DO NOT APPLY TO CHANGE THIS RESULT.

### STANDARD OF REVIEW

This Court may reverse a circuit court's judgment if "there is no substantial evidence to support it, . . . it is against the weight of the evidence, . . . it erroneously declares the law, or . . . it erroneously applies the law." *Murphy*, 536 S.W.2d at 32. "The circuit court's determinations of questions of law are subject to de novo review." *Hill v. Missouri Dep't of Conservation*, 550 S.W.3d 463, 467 (Mo. banc 2018).

### ARGUMENT

For all of the above-stated reasons, it is clear that the Notice did not comply with the express requirements of the Indentures. As a consequence, the sale to 6 Clayton Terrace, LLC is null and void.

The Indentures explicitly provide that "[a]ny attempted transfer of such property without compliance with this restriction ***shall be void***." (LF 337) (emphasis added). Black's Law Dictionary defines the term "void" as "[o]f no legal effect; to null." BLACK'S LAW DICTIONARY, 10th ed. 2014. Thus, under the express and clear language of this provision, any attempted transfer that did not comply with the notice requirements contained in the Right of First Refusal Provision is void from its inception.

The Circuit Court improperly avoided this result by finding certain "equitable and other legal considerations" weigh against declaring the sale void. (LF 528). Under

Missouri law, however, a void contract is void ***at its inception***, and principles of equity will not be applied to transform a void contract into a valid contract. *St. Charles County v. A Joint Bd. Or Com'n*, 184 S.W.3d 161, 166 (Mo. App. 2006). Indeed, Missouri courts firmly recognize that a void contract is "of no legal effect," and as a result, "the doctrine of estoppel cannot be applied to a null and void contract under Missouri law." *Id*. at 167. *See also* 17 C.J.S. CONTRACTS, § 4 ("[A] void contract means one merely ineffective, of no force and effect; it is no contract whatsoever. No rights of any character in favor of anyone vest under such a contract, and it is binding on neither party; it requires no disaffirmance to avoid it and cannot be validated by ratification."). Accordingly, the doctrines of waiver, estoppel and ratification are all inapplicable and the Circuit Court erroneously applied those theories here.[11] In essence, the Circuit Court ignored the express terms of the Indentures, which state that a sale made without proper notice is "void," and instead found the sale was, at most, voidable. The distinction between a "void" contract and a "voidable" contract is an important one under Missouri law. While a voidable contract may be voided at the option of one of the parties, a void contract is a nullity. *Ellis v. Williams*, 312 S.W.2d 97, 105 (Mo. 1958).

[11] In any event, a party is not entitled to the application of equitable defenses unless he has clean hands. *Purcell v. Cape Girardeau County Com'n*, 322 S.W.3d 522, 524 (Mo. banc 2010). For these same reasons, waiver does not apply, as the lot owners could not have knowingly relinquished a right when they were not given all of the vital facts of the sale. *Brown v. State Farm Mut. Auto. Ins. Co*., 776 S.W.2d 384 (Mo. banc 1989). Ms. Huey's failure to give notice of the prospective buyer, sale terms and date of sale, as well as her refusal to permit Ms. Schwartz access to the Property, bars the applicability of equitable defenses.

Because Ms. Huey did not comply with the Indentures, the sale of the Property is void. The Circuit Court's finding to the contrary relied on a misapplication of the law and should therefore be reversed.

## CONCLUSION

For all of the reasons set forth herein above, Respondent/Cross-Appellants Trustees of Clayton Terrace Subdivision respectfully pray this Court REVERSE the Circuit Court's Judgment on Count I of the Trustees' Petition and on Ms. Huey's Counterclaim for Abuse of Process and AFFIRM the Judgment in all other respects.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Respondent/Cross-Appellant's Substitute Brief was served via the Court's electronic filing system on this 29th day of January, 2019.

/s/ *Gerard T. Carmody*

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

COMES NOW Gerard T. Carmody, counsel for Plaintiff/Respondent/Cross-Appellant Trustees of Clayton Terrace Subdivision, and hereby certifies that this Respondent/Cross-Appellant's Substitute Brief was served pursuant to Supreme Court Rule 103.08, complies with the limitations contained in Rule 84.06(b), and contains 14,913 words.

/s/ *Gerard T. Carmody*