THE SUPREME COURT OF MISSOURI

Appeal No. SC97349

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

v.

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

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

The Honorable Dale Hood, Associate Circuit Judge

SUBSTITUTE BRIEF OF APPELLANT/CROSS-RESPONDENT JEANNETTE R. HUEY, TRUSTEE OF THE JANE R. HUEY LIFETIME TRUST DATED MAY 21, 1998, FILED IN RESPONSE TO THE CROSS APPEAL OF RESPONDENT/CROSS-APPELLANT TRUSTEES OF CLAYTON TERRACE SUBDIVISION AND IN REPLY TO SAID RESPONDENT/CROSS-APPELLANT'S BRIEF IN RESPONSE

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NOTE REGARDING CROSS-APPEALS

Because this consolidated appeal involves Cross-Appeals, the instant brief of Appellant/Cross-Respondent, Jeannette R. Huey, in her capacity as Trustee of the Jane R. Huey Lifetime Trust Agreement dated May 21, 1998 ("***Ms. Huey***") contains her response to the Brief filed by the Respondent/Cross-Appellant, Trustees of Clayton Terrace Subdivision (the "***Plaintiff/Trustees***") in two sections. Part One sets out Ms. Huey's response to the Points on Appeal raised by Plaintiff/Trustees as Cross-Appellant; while Part Two sets out Ms. Huey's reply to the Plaintiff/Trustees' Response to Ms. Huey's Points Relied On in her Appellant's Brief.

PART ONE: MS. HUEY'S RESPONSE TO THE CROSS APPEAL FILED BY THE RESPONDENT/CROSS-APPELLANT TRUSTEES OF CLAYTON TERRACE SUBDIVISION

I. The Trial Court did not err in ruling in favor of Ms. Huey on her Counterclaim for Abuse of Process because the evidence plainly showed that the claim against her was brought solely for the collateral and improper purpose of coercing 6 Clayton Terrace, LLC into abandoning or withdrawing its request to subdivide the Property by purporting to threaten its fee title.

(*Responding to the Plaintiff/Trustees' Point Relied On I*)

Standard of Review

Ms. Huey agrees that Point I of the Plaintiff/Trustees' appeal is governed by the standard set forth in Murphy v. Carron, in that the decree or judgment of the trial court will be sustained unless it erroneously declares or applies the law. 536 S.W.2d 30 (Mo. banc 1976). In applying this standard of review, if an issue has already been decided by prior precedent, the question is one of stare decisis which requires adherence to decided case precedents. Med. Shoppe Int'l, Inc. v. Dir. of Revenue, 156 S.W.3d 333, 334-35 (Mo. banc 2005).

Argument

As this Court knows, a party may recover damages resulting from the initiation of a civil action where such action was prosecuted maliciously and without probable cause or was an abuse of the legal process. Dillard Dept. Stores, Inc., v. Muegler, 775 S.W.2d 179, 183 (Mo. App. E.D. 1989). To prevail on an abuse of process claim, the party asserting it must demonstrate that: (1) the defendant made an illegal, improper, perverted use of process, which was neither warranted nor authorized by the process; (2) the defendant had an improper purpose in exercising such illegal, perverted, or improper use

of process; and (3) the plaintiff sustained damages as a result. Stafford v. Muster, 582 S.W.2d 670, 678 (Mo. 1979). The test is whether the process was used to accomplish some unlawful end or to **compel some collateral action** that a party could not be compelled to do legally. Ritterbusch v. Holt, 789 S.W.2d 491, 493 at n.1 (Mo. 1990) (emphasis added).

In this case, Ms. Huey filed a counterclaim against the Plaintiff/Trustees for Abuse of Process because the facts demonstrated that the claim against her was wholly pretextual and was brought solely for the improper collateral purpose of coercing 6 Clayton Terrace, LLC into abandoning or withdrawing its request to subdivide the Property—a conclusion the Plaintiff/Trustees not only admit in their email communications, but that is also inescapable under the facts and timeline of the case.

In this regard, it is undisputed that prior to her death in October of 2011, the Property was owned by Ms. Huey's mother, Jane R. Huey pursuant to the terms of her Lifetime Trust Agreement. [L.F. 00335-00343; Tr. 301-303]. Following her mother's passing, Ms. Huey was tasked with finalizing all matters of the estate, disposing of the Trust's assets—including the Property, and distributing the Trust's proceeds by and among the beneficiaries. [Tr. 301-303, 307-309, 312-313]. As part of that process, Ms. Huey listed the Property for sale and, after months on the market and several reductions in the asking price, received an acceptable contract for sale on or about January 17, 2013. [L.F. 00338; Tr. 303-305]. The closing date was set on February 15, 2013 to accommodate the fifteen-day notice requirement following notification thereof by Plaintiff/Trustee, Rick Francis.

At no time between January 30, 2013 and February 15, 2013 did any of the homeowners complain, object or otherwise raise any issue regarding the Notice of Sale, its timing or its contents. Nor did they do so for the ensuing eighteen (18) months, until 6 Clayton Terrace, LLC submitted its preliminary plat and application to subdivide the Property, which was thereafter determined by the City to be proper in all respects. [L.F. 341 at ¶¶ 51-53]. As such, and despite the strong objections lodged at the City meetings by the Plaintiff/Trustees and certain other homeowners in the Subdivision, the proposed division of the Property into Lots 6A and 6B was duly approved in compliance with all of the City's requirements. Id. See also [L.F. 44 at ¶ 28].

The City's approval left the Plaintiff/Trustees scrambling for an alternate method to stop 6 Clayton Terrace, LLC from moving forward with its plan to develop the new Lot—fearing that the construction of a home on the newly platted Lot would open the door to the division of other Lots within the Clayton Terrace subdivision.[1] The problem for the Plaintiff/Trustees, however, was that neither the Original Plat nor the Subdivision Indentures or amendments thereto *actually prohibit* 6 Clayton Terrace, LLC from subdividing and developing the Property exactly as it proposed.[2] By the same token, any planned reliance on the "one residence per lot" restriction was questionable at best because "*restrictive covenants…will not be extended by implication to anything not clearly expressed in them.*" Andrews v. Metropolitan Bldg. Co., 163 S.W.2d 1024, 1028

[1] See Defendants' Exhibit 2 (the emails produced by the Plaintiffs) at p. CTS 105. See also L.F. 459 (Deposition of Elizabeth Schwartz) at P.36:Ln.6-21.

[2] See Exhibit JT-1 (the Original Plat); L.F. 50-65 (the Amended Indentures attached to Plaintiff's First Amended Petition as Exhibit A), neither of which contain any prohibition against subdividing Lots in the Subdivision.

(Mo. 1942). Therefore, if the Plaintiff/Trustees were going to stop 6 Clayton Terrace, LLC from proceeding with its plan, they needed some form of additional leverage and attacking the sale by naming Ms. Huey in Count I was their attempt to create it.

Second, discovery confirmed that the newfound complaints about the alleged defects and shortcomings in the Notice of Sale were in fact a ruse designed to achieve the collateral purpose of compelling 6 Clayton Terrace to abandon its attempt to subdivide the Property. In this regard, the email communications by and among the Plaintiff/Trustees openly admit they only had two (2) goals in bringing the instant lawsuit: 1) prevent the division of Lot 6; and 2) see "*that '6 Clayton Terrace, LLC' moves out of the neighborhood and takes their schemes with them*".[3] Mr. Tackes further admitted that the Plaintiff/Trustees "*really have no beef with [Ms. Huey] and the Trust she represents…*" and that naming her as a party was simply a means to "*achieve the first two goals…*".[4]

He went on to concede that despite Count I's prayer asking the trial court to set aside the sale and require the Property be offered to Mrs. Schwartz, "*[t]he lawsuit is not about [Mrs. Schwartz] getting the property*". To the contrary, the litigation was designed to "*stop any attempt to divide our lots for resale*" and "*get the LLC so it never occurs again.*"[5] Thus, "*[i]f the LLC backs down and does not build on the land [the*

[3] See Defendants' Exhibit 2 (the emails produced by the Plaintiffs) at p. CTS 105.
[4] See Defendants' Exhibit 4 (the emails produced by the Plaintiffs) at p. CTS 162.
[5] Defendants' Exhibit 3 (the emails produced by the Plaintiffs) at p. CTS 87.

Plaintiff/Trustees] don't have to enforce the indentures."[6] Trustee/Plaintiff, Rick Francis likewise confirmed at trial that this lawsuit ***would not*** have been brought but for the application to subdivide the Property. [Tr. at P.94:Ln. 5-9]. See also [L.F. 419 (Deposition of John Tackes) at P:18:Ln.13 – P.19:Ln. 3 (admitting the issue was "*the intention to subdivide*", not the identity of the owner)].

In addition to all of the above, Mrs. Schwartz testified in deposition that she too didn't really "*care about what happened with respect to the right of first refusal*" but was "*however, very concerned about whether or not the houses in [her] neighborhood can be subdivided and whether a second residence can be built on what was previously one lot.*"[7] In fact, Mrs. Schwartz openly conceded that the goal was "*to make sure that the lots can't be subdivided*" before one of the other residents (Fred Markus) sold his house, which was also in excess of two (2) acres.[8] Mrs. Schwartz went on to confirm that her position on the topic is consistent with that of the Plaintiff/Trustees and certain other homeowners in the Subdivision.[9] She further testified that she informed the Plaintiff/Trustees and their counsel that she had no intention of acquiring the Property

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[6] See Defendants' Exhibit 5 (the emails produced by the Plaintiffs) p. CTS 89. See also L.F. 419 (Deposition of John Tackes) at P:18:Ln.13 – P.19:Ln. 3 (testifying that the issue was "*the intention to subdivide*", not the identity of the owner) See also Tr. at P.85:Ln.18-24 and P.94:Ln.5-9 (testimony of Trustee Rick Francis expressing concern over subdividing and conceding the suit was brought because of Frontenac's approval of 6 Clayton Terrace's application); and L.F. 459 (Deposition of Elizabeth Schwartz) at P.36:Ln.6-12—all of which demonstrates that the gravamen of the case is the prevention of subdividing.

[7] See L.F. 459 (Deposition of Elizabeth Schwartz) at P.36:Ln.1-12.

[8] Id.

[9] Id. at P.36:Ln.13-21 (admitting that her position is consistent with what the Plaintiff Trustees and other homeowners in the Clayton Terrace Subdivision have expressed).

even if the trial court were to set aside the sale as prayed-for, but was assured that she would not be required to do so. [L.F. 457 (Deposition of Elizabeth Schwartz) at P.27:Ln.15-20 and L.F. 460 at P.70:Ln.3 – P.71:Ln. 6].

Yet disturbingly, this is exactly the relief the Plaintiff/Trustees continued to seek in their First Amended Petition and throughout the pendency of the case.[10] This evidence, which is expressly cited in the Judgment, laid bare the true gravamen of the case and the improper collateral purpose that making Ms. Huey a party defendant was intended to achieve. [L.F. 525 (the Judgment) at ¶ 58 a-d]. It also explained why none of the Plaintiff/Trustees or other homeowners in the Subdivision ever complained about any alleged defect or deficiency in the Notice of Sale, the Closing or any other aspect of sale of the Property until ***after*** the City approved the LLC's preliminary plat and application for subdivision.

Thus, while the Plaintiff/Trustees continue to struggle in their attempt to identify a meritorious rationale for their actions, the simple fact is that the act of filing a lawsuit in which you pray for relief you do not actually want, knowing that it will not be acted upon even if granted by the trial court, is the very definition of an unauthorized use of process for an improper purpose—especially when your goal in bringing the claim is to coerce another party to act, or refrain from acting, in a manner that is otherwise wholly lawful. See Jenkins v. Revolution Helicopter Corp., Inc., 925 S.W.2d 939, 945 (Mo. App. W.D.

[10] L.F. 45 at § (d) of the prayer for relief requesting the trial court to "*…order and declare that the purported sale is null and void and that Lot 6 is to be offered to the Schwartzs as to [sic] purported sale to Buyer…*"

1996) (directing that the "*essence of a claim for abuse of process is the use of process for some [improper] collateral purpose.*").

Therefore, under those facts, the applicable standard of review, and the controlling Missouri precedent, judgment in favor of Ms. Huey on Count I should be affirmed because the trial court did not err in finding that the naming of Ms. Huey as a party defendant was done for the improper collateral purpose of coercing 6 Clayton Terrace, LLC into abandoning or withdrawing its request to subdivide the Property and constituted a "*wil[l]ful, definite act not authorized by the process [that was] aimed at an objective not legitimate in the proper employment of such process*"—the result of which directly and proximately caused Ms. Huey to suffer substantial monetary damage. See Dillard Dep't Stores, Inc. v. Muegler, 775 S.W.2d 179, 183 (Mo. App. E.D. 1989).[11]

[11] Notably, the Plaintiff/Trustees even admit to this Court in Point IV of their Brief on p. 47 that the "*cause of the litigation*" was 6 Clayton Terrace, LLC's act of subdividing and not the allegedly defective Notices of Sale, thereby confirming yet again that the case has nothing to do with the Notice of Sale or the alleged deficiencies therein, but instead has everything to do with 6 Clayton Terrace, LLC's decision to subdivide the Lot.

II. The Plaintiff/Trustees' Point II should be denied because the Trial Court did not err in entering judgment in favor of Ms. Huey and against the Plaintiff/Trustees on their claim to invalidate the sale of the Property in that the fifteen (15) day notice and right of first refusal provision, a.k.a. the "Sale Restriction" on which the Plaintiff/Trustees' claim depends is invalid as a matter of law because the Sale Restriction, which purported to impose a new burden on ownership that was not part of the Subdivision's Original Indentures, was never voted-on and approved by the unanimous consent of all then-current homeowners as required under Missouri law where as here, the Indentures' amendatory language does not permit the adoption of new restrictions by two-thirds vote.

(*Responding to the Plaintiff/Trustees' Point Relied On II*)

Standard of Review

Ms. Huey agrees that Point I of the Plaintiff/Trustees' appeal is governed by the standard set forth in Murphy v. Carron, in that the decree or judgment of the trial court will be sustained unless it erroneously declares or applies the law. 536 S.W.2d 30 (Mo. banc 1976). In applying this standard of review, if an issue has already been decided by prior precedent, the question is one of stare decisis which requires adherence to decided case precedents. Med. Shoppe Int'l, Inc. v. Dir. of Revenue, 156 S.W.3d 333, 334-35 (Mo. banc 2005).

Argument

Throughout their Brief, the Plaintiff/Trustees go to great lengths to portray this case as an assault on the Subdivision and its Indentures by a dastardly real estate developer whose plan to divide Lot 6 into Lots 6A and 6B constitutes such a clear and present danger they were compelled into action in order to preserve the sanctity of the neighborhood. See e.g. Plaintiff/Trustees' Brief at pp. 34, 42. While this proverbial tale of good versus evil makes for good reading, its assertion is a thinly veiled attempt to

camouflage their unlawful abuse of process and distract from the fact that this case is really nothing more than a simple declaratory judgment action regarding whether or not the Indentures prohibit 6 Clayton Terrace, LLC from dividing Lot 6 into Lot 6A and 6B. The Plaintiff/Trustees have also made the shrewd tactical decision to portray the case as a referendum on Hazelbaker v. County of St. Charles, 235 S.W.3d 598 (Mo. App. E.D. 2007), rather than the cases cited therein and on which it relies. This too is understandable since Hazelbaker is an appellate level case and thus its pronouncement regarding "unanimous consent for the imposition of new burdens" is presumptively more vulnerable to review and re-consideration than would a prior decision issued by this Court.

Hazelbaker, however, did **not** establish the law regarding approval of subdivision amendments. Nor did it change the standard necessary for doing so. To the contrary, the law was articulated by this Court almost seventy years earlier in Van Deusen v. Ruth, 125 S.W.2d 1 (Mo. 1938). Notably, a careful review of Van Deusen reveals that even the holding therein did not establish a new principle of law, it merely applied the well-established legal principle that such covenants will not be extended by implication to include anything not clearly expressed in them. See Van Deusen at 3-4.[12] Thus, the Van Deusen Court simply found that the right to "*amend*" a subdivision's Indentures does not

[12] The recognition that restrictions, being in derogation of the fee, will not be extended by implication to include anything not clearly expressed therein, and that doubts regarding its application will be resolved in favor of the free and untrammeled use of the land was the law in Missouri **prior** to Van Deusen. See e.g. Gardner v. Maffitt, 74 S.W.2d 604, 607 (Mo. 1934) and the cases cited therein.

include, and is not synonymous with, the right to *add* entirely new restrictions by majority vote unless the language of the Indenture expressly authorizes it. Id.

This standard has been repeatedly echoed and applied by this Court and each of the appellate districts for more than eighty (80) years and has also been cited and relied-on by the State Supreme Courts of Arkansas, Iowa, Minnesota, Nebraska, Texas and Washington.[13] A review of the Record in this case reveals that there is nothing herein that suggests, let alone compels, the need to revisit, alter or otherwise distinguish more than eight decades of established Missouri precedent in order to cure the alleged ills and parade of horribles posited by the Plaintiff/Trustees—especially since knowledge of the law and thoughtful drafting of subdivision indentures and amendments thereto will more than suffice.[14]

As regards the Sale Restriction, Missouri law dictates that a party seeking to enforce a restrictive covenant bears the burden of demonstrating its validity and enforceability. See e.g. Allison v. AgriBank, FCB, 949 S.W.2d 182, 188 (Mo. App. S.D. 1997). As such, the Plaintiff/Trustees bore the burden of proving the validity and

[13] Windsong Enters. v. Upton, 233 S.W.3d 145 (Ark. 2006); In re Marriage of Carlson, 338 N.W.2d 136 (Iowa Sup.1983); In re Independent Consol. School Dist., 63 N.W.2d 543 (Minn. 1954); Boyles v. Hausmann, 517 N.W.2d 610 (Neb. 1994); Webb v. Finger Contract Supply Co., 447 S.W.2d 906 (Tex. 1969); Rodruck v. Sand Point Maintenance Com., 295 P.2d 714 (Wash. 1956).

[14] The simple fact is that the standard applied in Van Deusen has been in place for the better part of a century and neither the subdivision housing market nor the title insurance industry has crumbled in its wake or otherwise been subjected to the unadulterated havoc against which the Plaintiff/Trustees now warn.

enforceability of the Sale Restriction and the determination thereof was a threshold question in the case. See Lake Arrowhead Property Owners Association v. Bagwell, 100 S.W.3d 840, 844 (Mo. App. W.D. 2003) (The burden of proof attendant to proving the extent and application of a restrictive covenant "*necessarily entails some proof that the process by which the restrictions were adopted was valid*"); Stolba v. Vesci, 909 S.W.2d 706, 708 (Mo. App. S.D. 1995) (The party seeking to enforce a restrictive covenant "*bears the burden of proving the extent and application of its restriction.*"); Perry v. Spavale, 828 S.W.2d 709, 711 (Mo. App. E.D. 1992) ("*[P]roponents of…a restrictive covenant bear the burden of proving the extent and application of the restriction.*").

The Plaintiff/Trustees, however, did not and frankly could not as a matter of law meet that burden because the recorded Indentures and the subsequent amendments thereto conclusively proved that the Sale Restriction,[15] which was adopted more than thirty years after Van Deusen, was not part of the Original Indentures but was instead imposed on the Subdivision by virtue of a 1972 Amendment/revision of the Indentures (a.k.a. the Fourth Revised Indentures) that was only voted on and approved by 2/3 of the homeowners then owning property in the Subdivision. See [L.F. 338 (JSF) at ¶¶ 19-20[16]; Tr. at P.9:Ln 11-25 and P.11:Ln.12-21; Exhibit JT-1 (the Original Plat); Exhibit H (the 1972 Fourth Revised Indentures)].

[15] The term "Sale Restriction" was actually selected by the Plaintiff/Trustees and used in their First Amended Petition prior to realizing the implications of the term under Van Deusen and its progeny. [L.F. 42 at ¶ 13].

[16] It was stipulated that, "The Fourth Revised Indentures was not signed by the lot owners of Lot 5, Part of Lots 3 and 4, Lots 15, 16, and 17, Lot 2, Lot 12, and Lot 18 in the Clayton Terrace Subdivision." L.F. 338 (JSF) at ¶20.

This fact is critical because Missouri law has long dictated that while a subdivision's indentures may be changed at any time with the unanimous consent of all lot owners, when the changes or amendments are adopted by fewer than one hundred percent of the owners, as happened in this case, different considerations apply. Bumm v. Olde Ivy Dev., L.L.C., 142 S.W.3d 895, 903 (Mo. App. S.D. 2004). In those instances, the reviewing court looks to see if the newly added restriction imposes a new or additional burden upon the affected property that did not exist prior to its adoption. Id. If it does, Missouri law requires that it be adopted by the unanimous consent of all of the lot owners in order to be valid and enforceable unless the Indentures expressly provide otherwise. Id.; Van Deusen v. Ruth, 125 S.W.2d 1 at 2-3 (Mo. 1938). Where the Indentures do not expressly permit the addition of new and additional burdens by a designated number or percentage of Lot owners, which the Indentures at issue in this case do not, the failure to secure the unanimous consent of all the owners renders the new restriction unenforceable as a matter of law. Bumm, at 903 (and the cases cited therein). This was the hurdle the Plaintiff/Trustees faced and their inability to clear it is fatal to their claim for Declaratory Judgment in Count I.

Throughout their Brief, the Plaintiff/Trustees go to great lengths to avoid the legal conclusion attendant to having the Sale Restriction imposed on the Subdivision by a 2/3 vote. However, Missouri courts reviewing this topic have repeatedly and consistently applied the law as articulated in Van Deusen and their holdings requiring unanimous consent are dispositive of the issue. See e.g. Steve Vogli & Co. v. Lane, 405 S.W.2d 885 (Mo. 1966); Bumm v. Olde Ivy Dev., L.L.C., 142 S.W.3d 895 (Mo. App. S.D. 2004);

Webb v. Mullikin, 142 S.W.3d 822 (Mo. App. E.D. 2004); Jones v. Ladriere, 108 S.W.3d 736 (Mo. App. E.D. 2003); Sellers v. Woodfield Prop. Owners Ass'n, 457 S.W.3d 357, 360 (Mo. App. S.D. 2015). In applying this standard of review, if an issue has already been decided by prior precedent, the question is one of stare decisis which requires adherence to decided case precedents. See also, Med. Shoppe Int'l, Inc. v. Dir. of Revenue, 156 S.W.3d 333, 334-35 (Mo. banc 2005) (directing that if an issue has already been decided by prior precedent, stare decisis requires adherence to decided case precedents).

i. Hazelbaker v. County of St. Charles, 235 S.W.3d 598 (Mo. App. E.D. 2007) did not establish new law or otherwise constitute an overly restrictive application of existing law, and the cases on which it relies were dispositive of the issues before the trial court.

Although roundly criticized in the Plaintiff/Trustees' Brief, the Hazelbaker Opinion is neither a new pronouncement of the law nor an overly restrictive application thereof. To the contrary, it is simply one decision in a long line of post-Van Deusen Opinions examining the scope and application of a restrictive covenant's amendatory language, and holding that the right to "amend" a restrictive covenant by 2/3 vote is not synonymous nor commensurate with the right to "add" a new restriction by 2/3 vote. Hazelbaker at 602. The Hazelbaker court's conclusion, and the analysis on which it is based, is wholly consistent with, and in fact expressly founded upon, this Court's decision in Van Deusen and the precedent flowing therefrom.

By way of review, the Hazelbaker court was tasked with examining an amendment to a subdivision's Indentures that purported to impose a prohibition against further

subdividing of any Lots located in the subdivision. 235 S.W.3d 598. The trial court ruled in favor of the plaintiff because the amendatory language of the Indenture did not permit the HOA to impose new and additional burdens on the ownership of land by majority vote. Id. at 600. On appeal, the Missouri Court of Appeals for the Eastern District analyzed the amendatory language in the Indenture and the controlling precedent, including Van Deusen, noting:

> Our precedents on this issue all deal with procedures containing slightly different language. In Van Deusen, the restrictions could be "modified, amended, released, or extinguished" by a 75% majority vote. 125 S.W.2d at 2. In Jones, the restrictions provided that they could be "altered, amended, changed, or revoked" by a two-thirds majority. 108 S.W.3d at 739. In Webb, the relevant language was "altered or amended all or in part" by differing majorities depending on who proposed the amendment. 142 S.W.3d at 823-24. Finally, in Olde Ivy, the restrictions stated they could be "amended, repealed or added to . . . by the owners of a majority of the lots . . . ." 142 S.W.3d at 904. In all of these cases, the courts determined that the associations' amendment procedures did not apply to situations in which the associations attempted to impose an additional burden on ownership.

The panel went on to affirm the trial court's judgment and, in so doing, expressly observed that while the amendatory language of the Indenture did in fact permit the HOA to "***change*** *said covenants and restrictions in whole or in part"*, that language "*merely authorize[d]* ***changes*** *to* ***existing burdens*** *by majority vote...*", not the imposition of new "*...amendments which impose an additional burden to ownership.*" Id. at 602 (emphasis added). This conclusion and the amendatory language on which it is based is wholly consistent with the analysis set out in the precedent on which the Hazelbaker court relied. See e.g. Jones v. Ladriere, 108 S.W.3d 736 (Mo. App. E.D. 2003) (holding that an indenture whose terms permit it to be "'*altered, amended, changed, or revoked*' *by a two-*

thirds majority", does ***not*** permit the adoption or imposition of new or different burdens on the lot owners without their ***unanimous*** consent) (emphasis added); Van Deusen, 125 S.W.2d 1 (finding no authority to add new restrictions where indentures could only be "*modified, amended, released, or extinguished*" by a 75% majority vote); Webb v. Mullikin, 142 S.W.3d 822 (Mo. App. E.D. 2004) (no authority to add new restrictions where the indenture could only be "*altered or amended all or in part*"); and Bumm, 142 S.W.3d at 903 (holding that in the absence of specific language, even the term, "*added to*" means only that owners may "*supplement existing covenants*" by majority vote, not add new burdens).

In 2015, the Missouri Court of Appeals for the Southern District revisited the above-cited precedent and distilled them thusly: "*[the] basic fact pattern underlying all of the cases…is: A subdivision is restricted by a set of covenants. Those covenants allow amendment by majority vote. Property owners set out to "amend" the covenants, but, in effect, add entirely new covenants.*" Sellers v. Woodfield Prop. Owners Ass'n, 457 S.W.3d 357, 360 (Mo. App. S.D. 2015). That is ***exactly*** the case now before this Court because as the Record shows, the Sale Restriction was not part of, nor included in, the Subdivision's Original Indentures, but rather was imposed by the 1972 Amendment (a.k.a. the Fourth Revised Indentures) that was only voted on and approved by 2/3 of the homeowners then owning property in the Subdivision. See [L.F. 338 (JSF) at ¶¶ 19-20; Tr. At P.9:Ln 11-25 and P.11:Ln.12-21; Exhibit JT-1 (the Original Plat); Exhibit H (the 1972 Fourth Revised Indentures)].

It is likewise undisputed that the amendatory language of the Subdivision's Indentures is virtually identical to the amendatory language at issue in Jones, Van Deusen and Webb, in that it only grants the Plaintiff/Trustees the ability to "*alter, amend, change or discontinue*" the Indentures by a two-thirds majority vote.[17] As such, just as in Jones, Van Deusen and Webb, the authority to amend the Indentures by two-thirds vote "*merely authorize[d] changes to existing burdens...*", *not* the imposition of "*...an additional burden to ownership*" like the one imposed by the Sale Restriction and the trial court was correct in so finding.

For their part, the Plaintiff/Trustees avoid the Indenture's amendatory language altogether by arguing instead that the passage of time since the Sale Restriction was imposed impacts the analysis under the precedent cited herein. Plaintiff/Trustees' Brief at p. 61 (referencing prior argument on pp. 22-24). In so doing, the Plaintiff/Trustees miss the point in that neither this case nor the precedent relied on by the trial court turn on the question of time or duration. Rather, they turn on the question of "authority" and whether and to what extent the plain language of the Indentures gave the Plaintiff/Trustees the "authority" to impose a new burden on the fee ownership of the Lots by majority or 2/3 vote. The answer is, it did not, and the attempt to impose the Sale Restriction by 2/3 vote was prohibited by the existing precedent.

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[17] C.f. Exhibit JT-1 (the Original Plat) with Jones, 108 S.W.3d at 739 (indentures could only be "*altered, amended, changed, or revoked*' by a two-thirds vote); Van Deusen, 125 S.W.2d 1 (indentures could only be "*modified, amended, released, or extinguished*" by a 75% majority vote); and Webb, 142 S.W.3d 822 (indenture could only be "*altered or amended all or in part*" by majority vote).

Alternatively, the Plaintiff/Trustees posit that the Sale Restriction should be deemed valid because all of the homeowners in the Subdivision have relied on it and the alleged benefit it bestows. Plaintiff/Trustees' Brief at p. 61 (referencing prior argument on pp. 24-25). To be sure, Ms. Huey recognizes the importance and value of restrictive covenants designed to enhance or maintain the beauty and cleanliness of a neighborhood, ensure uniformity in building type and appearance, keep the roads and common grounds in good order and repair or otherwise seek to maintain the specific character of the neighborhood. The Sale Restriction, however, is not such a restriction and its existence bestows no such benefit.

Nor have the Plaintiff/Trustees ever argued, let alone adduced any evidence from any of the other homeowners as to: a) what benefit if any the Sale Restriction bestowed on the Subdivision; b) how or why its existence was material; or c) whether any of the homeowners actually acquired their lot in the Subdivision in reliance thereon. Even as of the date of this submission, the Plaintiff/Trustees have yet to articulate how or why any homebuyer did or would make the decision to purchase a home in the Subdivision in reliance on the fact that they might someday have the opportunity to buy a neighbor's home on the same price and terms as some other third-party buyer.

By this same token, the Plaintiff/Trustees' argument regarding "validity by ratification" also fails for lack of evidence. First, it was the Plaintiff/Trustees' burden to prove the validity and enforceability of the Sale Restriction—a burden that encompassed and included "*ratification*" if that was the methodology by which they sought to do so. Allison, 949 S.W.2d 182; Niehaus v. Mitchell, 417 S.W.2d 509 (Mo. App. 1967) (The

burden of proof of ratification rests with the party claiming ratification). To accomplish that, it would not be enough for the Plaintiff/Trustees to simply present evidence regarding Ms. Huey and her alleged ratification of the Sale Restriction, they also would have had to present evidence showing that each and every one of the other homeowners in the Subdivision did so as well. This is because Missouri law dictates that "*an amendment must either be valid for all or invalid for all [and] lacking such unanimity, the Amendment is wholly invalid*. Hazelbaker, 235 S.W.3d at 602.

Only by adducing testimony demonstrating that each and every one of the Subdivision residents had also independently taken actions sufficient to satisfy the elements of ratification could they establish the "*unanimity*" required to apply the doctrine to the entirety of the Subdivision and thus make the Sale Restriction "*amendment…valid for all.*" Id.[18] The Record, however, plainly shows that no such evidence was ever adduced, and in the absence thereof, and the trial court did not, and frankly could not, err by refusing to validate the otherwise unenforceable Sale Restriction on that basis.

Moreover, ratification is an affirmative defense (Guirl v. Guirl, 708 S.W.2d 239, 243 (Mo. App. E.D. 1986) and must be specifically pled in the party's responsive pleadings. Lamont v. Lamont, 922 S.W.2d 81, 85 n.1 (Mo. App. W.D. 1996). Here, the Plaintiff/Trustees did not assert a ratification defense in response to Ms. Huey's

[18] At no point did the Plaintiff/Trustees ever argued, let alone demonstrate, that all of the residents of the Subdivision support or agree with the alleged Sale Restriction, and certainly no evidence was presented demonstrating that it has ever been invoked by any owner—past or present, to acquire any Lot in the Subdivision.

Counterclaims or her affirmative defenses (amended or otherwise) regarding the invalidity of the Sale Restriction. [L.F. 86-90]. As such, their failure to do so prevents them from asserting them now. Holdener v. Fieser, 971 S.W.2d 946, 950 (Mo. App. E.D. 1998); Lamont, at 85 n.1.

Equally unavailing is the notion that the standard articulated in Van Deusen should be relaxed because of the difficulty in securing full participation at subdivision meetings, or because subdivision trustees are erroneously amending subdivision Indentures. Plaintiff/Trustees' Brief at pp. 27-30. Setting aside the fact that all citizens are presumed to know the law (State ex rel. Phillips v. Green, 100 S.W. 1115, 1117 (Mo. App. E.D. 1907), Missouri courts do not disturb established precedent simply because people are unwilling to participate in the governance of their own subdivision. Nor do they do so for purposes of curing conflicts and problems that can readily be avoided by thoughtful drafting of subdivision Indentures and amendments thereto, which are of course legal documents with legal consequences and should be undertaken by Missouri real estate practitioners, not lay people. If the original developer of the Subdivision had intended to allow for the imposition of new burdens on the ownership of Lots in the Subdivision by a 2/3 vote, he could have readily provided for it. He did not, and the absence of any such right or authority is binding on the Plaintiff/Trustees.

Thus, while issues of subdivision governance and disputes over covenants and restrictions can and will continue to arise as evidenced by the case of Pinnacle Lakes Estates Association v. McCorkell, submitted in the Plaintiff/Trustees' Appendix, the fact that the case settled and resolved without the need for further judicial intervention

demonstrates that every ill—no matter how seemingly important to the litigants, does not require this Court's intervention and certainly does not require revisiting or upending well-established and venerable precedent.

In the end, the law articulated in Van Deusen is clear, unambiguous and easy to follow, and by failing to secure the unanimous consent of all the then current homeowners as required therein, the Sale Restriction is simply unenforceable and the trial court's Judgment in favor of Ms. Huey on Count I should be affirmed accordingly. [19]

III. The Plaintiff/Trustees' Point III should be denied because even if we deem the Sale Restriction to be valid solely for purposes of this analysis, which of course it is not, the trial court did not err in entering judgment for Ms. Huey in that the evidence demonstrated that the Notices of Sale were in fact timely delivered to each home in the Subdivision and the contents and substance thereof was more than sufficient to apprise the residents of all facts necessary to determining whether or not to waive or invoke their alleged right of first refusal as evidenced by the specific testimony and documentary evidence on the topic.

(*Responding to the Plaintiff/Trustees' Point Relied On III*)

Standard of Review

Ms. Huey agrees that the standard of review applicable to Point III is an "*against the weight of the evidence*" standard. Under this standard, the reviewing court "*act(s) with caution*" because "*[a] claim that the judgment is against the weight of the evidence presupposes that there is sufficient evidence to support the judgment…*" Ivie v. Smith, 439 S.W.3d 189, 205 (Mo. banc 2014). As such, the Court "*give[s] the prevailing party*

[19] As the Court will also see in Point III *supra*, this Court does not even need to reach the question of whether to what extent the "*Sale Restriction*" is valid or invalid because the evidence fully supports the trial court's determination that its requirements were not only fully satisfied and complied with prior to the sale, but the Plaintiff/Trustees' year and half delay in asserting any alleged violation thereof prevents them from making any challenge thereto at this late date.

the benefit of all favorable evidence and reasonable inferences to be drawn therefrom, disregarding all evidence to the contrary…" See Stephenson v. First Mo. Corp., 861 S.W.2d 651, 655-656 (Mo. App. W.D. 1993). It for this reason that the "*against-the-weight-of-the-evidence standard serves only as a check on a circuit court's potential abuse of power in weighing the evidence*" and can only be met where "*the circuit court could not have reasonably found, from the record at trial, the existence of a fact that is necessary to sustain the judgment.*" Ivie v. Smith, at 206.

Thus, a party bringing an against-the-weight-of-the-evidence challenge must "*demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition.*" Houston v. Crider, 317 S.W.3d 178, 187 (Mo. App. S.D. 2010). "*This Court rarely has reversed a trial judgment as against the weight of the evidence ....*" (Pearson v. Koster, 367 S.W.3d 36, 52 (Mo. banc 2012)) because even "*[w]hen the evidence poses two reasonable but different inferences*" or "*could support a different conclusion*", the Court still defers to the judgment. See S.S.S. v. C.V.S., 529 S.W.3d 811 at 816 (Mo. 2017) and Stephenson v. First Mo. Corp., 861 S.W.2d 651, 655-656 (Mo. App. W.D. 1993).[20]

[20] Although the Plaintiff/Trustees identify the correct standard of review for Point III, the contents of their Brief focuses almost entirely on matters seemingly favorable to them, while making no mention whatsoever of the vast amount of evidence supporting the judgment. See A.L.R., 2016 Mo. App. LEXIS 722 at n.8. (directing that an against-the-weight-of-the-evidence challenge requires the party to set forth and identify the evidence favorable to the judgment).

Argument

Just as Missouri law dictates that a party seeking to enforce a restrictive covenant bears the burden of demonstrating its validity and enforceability (Perry v. Spavale, 828 S.W.2d 709, 711 (Mo. App. E.D. 1992)) so too does the party alleging non-compliance with the covenant's alleged terms. Speedie Food Mart, Inc. v. Taylor, 809 S.W.2d 126, 130 (Mo. App. E.D. 1991).

In this case, the Plaintiff/Trustees have at various points asserted vastly differing rationales for why the sale of the Property had to be set aside, including: a) the failure to accept Mrs. Schwartz' written offer to purchase the Property; b) the Notices of Sale were either not delivered to all of the Subdivision's residents or were otherwise not timely; and c) the contents of the Notices of Sale rendered them fatally deficient because they did not set forth the entity to who the Property was ultimately conveyed or otherwise contain the alleged "*other terms of the proposed sale.*" Plaintiff/Trustees' Brief at pp. 63-65. Each of these arguments, however, either failed prior to trial or were found by the trial court to be unsupportable based on the evidence and testimony contained in the Record.

i. The Notices of Sale were Hand Delivered to each home in the Subdivision.

First, and as regards the delivery of the Notices of Sale, the evidence showed that they were in fact hand delivered to every home in the Subdivision by Ms. Huey's Realtor, Ms. Judy Miller. See [L.F. 462 (Deposition of the Realtor, Ms. Judy Miller) at P.41:Ln.16-19 and P.43:Ln.7-22]. This was not only testified-to by Ms. Miller, but it was also confirmed by several of the Subdivision's residents, including Mrs. Schwartz who specifically recalled Ms. Miller delivering the Notice of Sale by hand, and by two of the

Plaintiff/Trustees, Cathy Stahr and Rick Francis, who then executed and returned their Notices having expressly waived their alleged rights of first refusal.[21] In fact, the Plaintiff/Trustees' own motion for summary judgment in this matter expressly averred that "*The **Notice was delivered** by Judith Miller sometime on January 30–February 1, 2013 **by hand delivery or taping to the door** of **each** **home in the subdivision***." [L.F. 142 (Plaintiffs' SOF at ¶ 25)] (emphasis added).

While those facts and admissions fully support the Judgment in and of themselves, it was also undisputed that the majority of the homeowners in the Subdivision executed and delivered their written waiver expressly waiving their alleged right of first refusal with regards to the Property (thereby supporting Ms. Miller's testimony that she hand delivered them to each of the houses in the Subdivision).[22] At trial, the Plaintiff/Trustees did not present a single homeowner witness to testify that they did not receive a copy of the Notice of Sale or were otherwise unaware the Property was being sold.

Nor did they ever proffer any alternate theory or explanation as to how each of the homeowners who executed and returned their Notice of Sale received it if it was not delivered by hand as the Realtor (Ms. Miller) explained (and Mrs. Schwartz and Trustees,

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[21] See L.F. 456 (Deposition of Elizabeth Schwartz) at P.17:Ln.21 through P.18:Ln.19; L.F. 176 (Francis Waiver); L.F. 174 (Stahr Waiver); Tr. at P.88:Ln.23-25 (testimony of Trustee, Rick Francis confirming hand delivery).

[22] See Plaintiffs' Exhibit 3 (the Notices of Sale and written waivers); L.F. 479 (the Deposition of Suchin Prapaisilp, owner of Lot 17) at P.11:Ln. 2-15; L.F. 483 (the Deposition of Michael Lin, the owner of Lot 7) at P. 21:Ln.11-13 and P.26:Ln.7-19; L.F. 495 (the Deposition of Joan O'Dowd, the owner of Lot 16) at P.22:Ln.15-18; L.F. at 00346 (Stipulated Exhibits for M.Y. Kwong, owner of Lot 2 and William and Barbara Conway, owners of Lot 11).

Stahr and Francis confirmed).[23] Surely if any such witness existed the Plaintiff/Trustees would have, and in fact were required to, produce that person(s), including the alleged owner of 1131 Lindbergh Avenue, since it was their burden to demonstrate this allegedly egregious non-compliance. Yalem v. Industrial Dev. Authority, 700 S.W.2d 103, 105 (Mo. App. E.D. 1985).

Instead, the best the Plaintiff/Trustees could muster was the deposition testimony of Mr. and Mrs. O'Dowd, the owners of Lot 16, which is directly adjacent to and contiguous with the Property, who testified they never received any notice of the sale whatsoever. However, as the trial court (and this Court) can readily see from the large color-copy of the Plat (Exhibit 100), Lot 16 sits in the middle of the Subdivision and the home constructed thereon is not only situated very close to the road, it is also the largest home in the Subdivision by far. In short, it was impossible for anyone tasked with hand delivering notices to each house in the Subdivision to miss the O'Dowd residence.

Moreover, Ms. O'Dowd conceded in deposition that she can "*barely remember what she did a month ago*" [L.F. 494 at P.19:Ln.13-14] and that she knew the property was for sale, had no interest in purchasing it, and was "delighted" when Mr. McGowan moved in. [L.F. 495-496 at P.22:Ln.15-18; P.24:Ln12-24] and [L.F. 501 at P.35:Ln.5-22].

As such, the trial court was free to discount her testimony or even disregard it completely in the face of the other evidence and testimony provided by the Realtor (Ms.

[23] See L.F. 456 (Deposition of Elizabeth Schwartz) at P.17:Ln.21 through P.18:Ln.19; L.F. 176 (Francis Waiver); L.F. 174 (Stahr Waiver); Tr. at P.88:Ln.23-25 (testimony of Trustee, Rick Francis confirming hand delivery).

Judy Miller), Mrs. Schwartz, Trustees Francis and Stahr, and the stack of written waivers executed and returned by the other homeowners clearly demonstrating that in fact the Notices of Sale had been delivered consistent with Ms. Miller's testimony[24] and Plaintiff/Trustees' own summary judgment submissions. See Ivie, 439 S.W.3d at 200 (the fact-finder is "*free to believe any, all, or none of the evidence presented at trial.*"); Stephenson, 861 S.W.2d at 655-656 (on appeal of a court tried case, the Court "*give[s] the prevailing party the benefit of all favorable evidence and reasonable inferences to be drawn therefrom, disregarding all evidence to the contrary…[and defers to the judgment]… even if the evidence could support a different conclusion*.").

ii. Delivery of the Notices of Sale was timely.

Second, and as regards the timing of the delivery, the Plaintiff/Trustees likewise failed to adduce any testimony in deposition or trial demonstrating that the Notices were untimely. In fact, when specifically asked about the timing of the Notice of Sale, Mrs. Schwartz expressly testified that while she remembered the Notice of Sale being "*delivered by the realtor to my house, which [she] accepted at the front door*", she was "*not sure*" what the exact date of the delivery was, and that "*it could have been the 31st or the 1st*" but could not say for sure. See [L.F. 456 (Deposition of Elizabeth Schwartz) at

[24] The other homeowner to who the Plaintiff/Trustees refer, Michael Lin, likewise admitted that he was not fully sure about the delivery of the Notice but was aware of the sale. See L.F. 483 (Deposition of Michael Lin, the owner of Lot 7) at P. 20:Ln.23 through P.21:Ln.2 and L.F. 485 at P. 26:Ln.7-19 (admitting he cannot conclusively say Ms. Miller did not deliver the Notice to his house and that he may well have thrown it out since he was not interested in purchasing Lot 6); L.F. 488 (deposition of Miaochin Lin) at P.10:Ln.5-18 (testifying that she did not recall getting a notice but knew the house was to be sold because she met Mr. McGowan).

P.17:Ln.21 through P.18:Ln.19]. Mrs. Schwartz further testified she had no issue with the timing of the Notice of Sale and no problem or complaint as to "*whether or not [she] had 15 days or more or less than 15 days…*" [L.F. 457 (Deposition of Elizabeth Schwartz) at P.26:Ln.25 through P.27:Ln.5]. Likewise, the Head Trustee/President, John Tackes, Esq. testified that he too could not recall exactly when the Notice was delivered to his home but admitted he knew about the pending sale and could identify **no** homeowner who did not get 15 days' notice. See [L.F. 427 (Deposition of the Head Trustee/Plaintiff/President) at P.86:Ln.7-13; Tr. at P.12:Ln. 15-24].

Moreover, even under the Plaintiff/Trustees' own assertions, the Notices of Sale were hand delivered between January 30, 2013 and February 1, 2013. January 30, 2013 is sixteen days prior to the February 15th closing and January 31st is fifteen days prior to the closing. Thus, the ***only*** day on which the Plaintiff/Trustees could rely for purposes of even stating a claim based on untimely notice is February 1, 2013. However, the Realtor (Ms. Judy Miller) testified that she hand delivered the Notices of Sale prior to February 1st and no one, not even Mrs. Schwartz or Trustees Stahr and Francis, who admitted receiving their Notices by hand, were able to offer testimony to the contrary. See [L.F. 462 (Deposition of the Realtor, Ms. Judy Miller) at P.41:Ln.16-19 and P.43:Ln.7-22 (testifying she hand delivered the Notice of Sale to each residence on January 31, 2013); L.F. 457 (Deposition of Elizabeth Schwartz) at P.26:Ln.25 through P.27:Ln.5; Tr. at P.88:Ln.23-25].[25]

[25] The alleged issue regarding the timing of the Notice of Sale is also complete red herring because Mrs. Schwartz, and virtually every other homeowner in the subdivision

Given those facts, the trial court did not err in finding that the Plaintiff/Trustees failed to demonstrate the lack of timely notice necessary to support their claim. In fact, taking it one step further and giving the Plaintiff/Trustees' arguments every benefit of the doubt on **both** the fact of delivery **and** the timing—which of course we do not under the applicable standard of review, the best that can be said in support of the Plaintiff/Trustees' challenge to the Judgment is that there was a conflict in the evidence and a question of fact for the trial court to decide on those issues.

Under those circumstances and the applicable standard of review, the Judgment would still be affirmed because Missouri law "*presupposes that there is sufficient evidence to support the judgment*" and the trial court's determination thereon is presumed to be correct even "*[w]hen the evidence poses two reasonable but different inferences*" or "*could support a different conclusion.*" See S.S.S. v. C.V.S., 529 S.W.3d 811 at 816 (Mo. 2017) and Stephenson v. First Mo. Corp., 861 S.W.2d 651, 655-656 (Mo. App. W.D. 1993).

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executed and delivered a written waiver expressly waiving the right of first refusal regarding the sale of the Property. See generally Exhibit 3 (the written waivers). Having done so, it is irrelevant whether Mrs. Schwartz and the other recipients had fifteen days or fifteen minutes because by executing and returning their written waivers to the title agent as directed, they are all bound as a result. See Bartleman v. Humphrey, 441 S.W.2d 335, 343 (Mo. 1969) (waiver can be by express declarations or it can be implied by conduct).

iii. The Contents of the Notice of Sale was sufficient to apprise the residents of all material facts and provided them with a telephone number and email address for their use if they had questions or desired additional information.

Third, and as regards the allegedly defective "contents" of the Notice of Sale, this Court will note that the argument appears nowhere in the Plaintiff/Trustees' Petition or their First Amended Petition. That is because it was nothing more than an after-add by the Plaintiff/Trustees when discovery revealed their other theories, both factual and legal, were unsupportable. See generally [L.F. 45-49]. More importantly, however, this claim is also contrary to the facts and testimony before the trial court because, as noted above, paragraphs 18 through 20 of the First Amended Petition expressly admit that the Notices of Sale effectively provided the Schwartzes (and the other residents) "*with notice of the agreed-upon terms of Buyer's purchase of Lot 6…*" sufficient to enable them to make "*…a written offer to purchase Lot 6 from Seller for the same terms as offered to Buyer.*"

Likewise, the deposition testimony of the Head Trustee/President of the Homeowners' Association, John Tackes, Esq., confirmed that the Notice of Sale contained sufficient information for him to "*know that [he] did not want to buy the property*", and that "*as far as he was concerned the buyer and seller did what they needed to do.*" See [L.F. 420 (Deposition of the Head Trustee/Plaintiff/President of the HOA, John Tackes, Esq.) at P.22:Ln.10 through P.23:Ln.17]. He further testified that while the identity of the proposed purchaser probably should have been included, that

omission was not fatal to the effectiveness of the Notice[26] because it really did not matter who owned the Property. [Tr. at P.16-Ln.24 through P.17:Ln.11]. This conclusion regarding the sufficiency of the Notice of Sale was further supported by the actions and outward manifestations of the other Subdivision residents themselves—none of who raised any objection, and the vast majority of which executed and delivered their written waiver expressly waiving their alleged right of first refusal without inquiring or seeking additional details.[27] Peet v. Randolph, 33 S.W.3d 614 (Mo. App. E.D. 2000) (even the right of first refusal itself is not deemed invalid simply because it is missing certain terms).

Tellingly, at no point during the trial or even in their Brief before this Court do the Plaintiff/Trustees ever articulate any rationale for why the identity of the buyer being either Century Renovations, LLC or its related, single purpose entity 6 Clayton Terrace, LLC is or was in any way material or prejudicial. Nor do they articulate or what, if anything, would have transpired differently had the Notice reflected 6 Clayton Terrace, LLC as the Buyer. Tellingly, no one ever testified in deposition or trial that they would

[26] L.F. 429 (Deposition of the Head Trustee/Plaintiff/President of the HOA, John Tackes, Esq.) at P.96:Ln.5-15.

[27] See Plaintiffs' Exhibit 3 (the Notices of Sale and written waivers); L.F. 479 (the Deposition of Suchin Prapaisilp, owner of Lot 17) at P.11:Ln. 2-15; L.F. 483 (the Deposition of Michael Lin, the owner of Lot 7) at P. 21:Ln.11-13 and P.26:Ln.7-19; L.F. 495 (the Deposition of Joan O'Dowd, the owner of Lot 16) at P.22:Ln.15-18; L.F. at 00346 (Stipulated Exhibits for M.Y. Kwong, owner of Lot 2 and William and Barbara Conway, owners of Lot 11).

have made a different decision regarding the exercise of their alleged right of first refusal had the Notice reflected one entity name versus another.[28]

In fact, Mr. Tackes expressly testified that the name of the buyer was not fatal to the Notice and admitted that had he known the identity of the purchaser, he would not have made any different decision because the issue was not the ownership, it was the desire to subdivide. [L.F. 429 (Deposition of the Head Trustee/Plaintiff/President of the HOA, John Tackes, Esq.) at P.96:Ln.5-15 (regarding effect of failing to name the buyer) and L.F. 419 (Deposition of John Tackes) at P:18:Ln.13 – P.19:Ln. 3 (regarding the subdividing of Lot 6)].[29] This absence of supporting rationale applies equally to the alleged "*other terms of the proposed sale*" the Plaintiff/Trustees now claim constitute "*key pieces*" of information. Try as one might, one will not find any specific identification of these alleged "*other terms of the proposed sale*" in the Plaintiff/Trustees' Brief that were so important that their absence rendered the sale invalid. Nor will one find any rationale for why any homeowner who felt they needed or were entitled to additional information could not simply have utilized the telephone number or email address printed on the Notice of Sale specifically for that purpose.

[28] It is important to note that Century Renovations was in fact the purchaser at the time the Notice of Sale was prepared and delivered to each of the residences in the Subdivision. It was not until the day of the closing that Century renovations assigned the sale contract to 6 Clayton Terrace, LLC and closed the transaction under that entity name.

[29] See also Tr. at P.16:Ln.24 through P.17:Ln.11; Tr. P.41:Ln.22 through P.45:Ln.20.

Instead, the facts showed that no one other than Mrs. Schwartz ***ever*** attempted to get any additional information or expressed any interest whatsoever in the Property.[30] Nor did anyone in the Subdivision—including the Plaintiff/Trustees, ever contact Ms. Huey, her Realtor (Judy Miller) or any other party involved in the transaction to complain, object-to or raise any opposition or concern whatsoever regarding the sale of the Property, the timing or contents of the Notice of Sale, or the alleged violation of their claimed right of first refusal. This is because, as the trial court aptly found, the case has never been about the Notice of Sale, its contents or its timing. [L.F. 526 (Judgment) at ¶¶ 60-61 and L.F. 531-532]. Nor has it ever been about the Sale Restriction or whether and to what extent it was complied with in whole, in part, or even not at all at the time the Property was sold.

To the contrary, this case is and has always been about preventing 6 Clayton Terrace, LLC from subdividing the Property into separate Lots. In fact, Mr. Tackes, summed it up best in his email to the other Plaintiff/Trustees in which he admits: we have two (2) goals in bringing the instant lawsuit: a) prevent the division of Lot 6; and b) see "*that '6 Clayton Terrace, LLC' moves out of the neighborhood and takes their schemes with them.*" [31] Mr. Tackes went on to admit that the Plaintiff/Trustees "*really have no beef with [Ms. Huey] and the Trust she represents…*"; that naming her as a party was

[30] See Plaintiffs' Exhibit 3 (the Notices of Sale and written waivers); L.F. 479 (the Deposition of Suchin Prapaisilp, owner of Lot 17) at P.11:Ln. 2-15; L.F. 483 (the Deposition of Michael Lin, the owner of Lot 7) at P. 21:Ln.11-13 and P.26:Ln.7-19; L.F. 495 (the Deposition of Joan O'Dowd, the owner of Lot 16) at P.22:Ln.15-18; L.F. at 00346 (Stipulated Exhibits for M.Y. Kwong, owner of Lot 2 and William and Barbara Conway, owners of Lot 11).

[31] See Defendants' Exhibit 2 (the emails produced by the Plaintiffs) at p. CTS 105.

simply a means to "*achieve the first two goals…*"[32] and "*[i]f the LLC backs down and does not build on the land [the Plaintiff/Trustees] don't have to enforce the indentures.*" [33] This sentiment was echoed at trial by Trustee, Rick Francis,[34] and in deposition by Mrs. Schwartz who likewise conceded that she too didn't really "*care about what happened with respect to the right of first refusal*" but was "*however, very concerned about whether or not the houses in [her] neighborhood can be subdivided and whether a second residence can be built on what was previously one lot.*" [35]

These admissions lay bare the fact that no one in the Subdivision cared one iota about the Notice of Sale or its timing and contents. That is why it was not until eighteen (18) months later when the City of Frontenac approved 6 Clayton Terrace, LLC's application to subdivide Lot 6 that anyone raised so much as an objection to the sale. Even then, it wasn't until their original theories and attacks on the sale fell short that the Trustee/Plaintiffs suddenly decided that the Notices of Sale they represented in the First Amended Petition as being more than sufficient to apprise the Subdivision residents of the sale and enable them to make their respective decisions regarding the exercise of their right of first refusal, were suddenly deemed so fatally defective and constituted such an

[32] See Defendants' Exhibit 4 (the emails produced by the Plaintiffs) at p. CTS 162.
[33] See Defendants' Exhibit 5 (the emails produced by the Plaintiffs) at p. CTS 89. See also L.F. 419 (Deposition of John Tackes) at P:18:Ln.13 – P.19:Ln. 3 (testifying that the issue was "*the intention to subdivide*", not the identity of the owner).
[34] See Tr. at P.85:Ln.18-24 and P.94:Ln.5-9 (expressing concern over subdividing and conceding the suit was brought because of Frontenac's approval of 6 Clayton Terrace's application).
[35] L.F. 459 (Deposition of Elizabeth Schwartz) at P.36:Ln.6-12.

egregious violation of the Indentures that it warranted voiding the deed to 6 Clayton Terrace, LLC.

These facts—all of which were squarely before the trial court and are fully memorialized in its Judgment [L.F. 503-533], demonstrate exactly what this case is and has always been about. The trial court's refusal to set aside the sale of the Property after weighing of all the evidence was not only correct under the circumstances, it was also wholly consistent with the other Missouri cases denying precisely this type of belated attack on the contents of a Notice of Sale and/or the timing thereof when a subsequent change in circumstances suddenly makes it more attractive for the plaintiff to try and unwind an allegedly offending transaction. See e.g. McNabb v. Barrett, 257 S.W.3d 166 (Mo. App. W.D. 2008).

For example, in McNabb, the Missouri Court of Appeals for the Western District examined a case in which the personal representative of an estate admittedly failed to provide the plaintiff with written notice of the pending sale of the decedent's Lot despite being required to do so by the subdivision's indenture. 257 S.W.3d at 168-169. Following the sale, and despite being aware of its occurrence, the plaintiff made no objection and took no action to challenge or otherwise seek to have the sale set aside until ***after*** the new owner completed a variety of upgrades and improvements to the property. Id. (emphasis added). In its Opinion, the Appellate Court expressly found that the plaintiff had sufficient knowledge at or about the time of the sale to have invoked the right of first refusal had she wished to do so. Id. at 172.

The court went on to conclude that the grossly belated timing of plaintiff's objection and the circumstances under which it was made demonstrated that the lawsuit had "*nothing to do with a failure to receive notice*", but was instead "…*motivated by the increase in property value and the opportunity to acquire property that is worth substantially more today than it was [at the time of the original sale]*." Id. at 174-175.

Here, the case for affirming the Judgment in favor of Ms. Huey is even stronger than in McNabb because the written Notices of Sale were in fact delivered to the homeowners as evidenced by the testimony of Mrs. Schwartz, the Realtor (Judy Miller), Trustees Francis and Stahr, and the numerous written waivers, deposition testimony, affidavits of the homeowners and the Plaintiff/Trustees themselves—each of who acknowledges receiving the Notice and/or otherwise being aware of the pending sale and its terms.[36] Likewise, the Plaintiff/Trustees' admissions regarding the real gravamen of the lawsuit and their goal of stopping the division of Lot 6 and seeing "*that '6 Clayton Terrace, LLC' moves out of the neighborhood and takes their schemes with them*",[37] all reveal *exactly* what this case is and has always been about: the subdividing of Lot 6.

As the Record shows, it wasn't until the City of Frontenac approved the application and request to subdivide the Property a ***year and half after*** the sale that the Plaintiff/Trustees elected to act. Even then, they still did nothing to communicate any

[36] See L.F. 142 (Plaintiffs' Statement of Facts at ¶ 25) (admitting delivery to "each home in the subdivision"); L.F. 462 (Deposition of the Realtor, Ms. Judy Miller) at P.41:Ln.16-19 and P.43:Ln.7-22. (testifying she hand delivered the Notice of Sale to each residence); L.F. 456 (Deposition of Elizabeth Schwartz) at P.17:Ln.21 through P.18:Ln.19 (admitting receipt by hand delivery); L.F. 176 (Francis Waiver); L.F. 174 (Stahr Waiver).

[37] Defendants' Exhibit 2 (the emails produced by the Plaintiffs) at p. CTS 105 and Defendants' Exhibit 4 (the emails produced by the Plaintiffs) at p. CTS 162.

alleged problem to Ms. Huey, who remained wholly unaware of any alleged issues with the sale until she was served with the lawsuit some four (4) months later in August 2014. [L.F. 2-3]. Again, and as noted several times in this submission, if the Plaintiff/Trustees or any other homeowner in the Subdivision truly and legitimately believed the sale was invalid or that the timing and contents of the Notice of Sale were so defective, or constituted such a severe violation of the Indentures that the sale of the Property had to be set aside, they would have, and in fact had a duty to take timely action to stop the sale or at least put Ms. Huey and/or 6 Clayton Terrace, LLC on notice of the problem.

They did not, and their decision to lay silent for a year and half has consequences because Missouri law simply does not countenance that kind of sideline sitting—especially in situations such as this where the complaining party's delay is grossly prejudicial to the other parties.[38] As such, the undisputed facts, testimony and admissions in this case demonstrate that like the plaintiff in McNabb, the Plaintiff/Trustees' "*…desire at this late date to exercise [or enforce the] pre-emptive right of purchase…*" has "*nothing to do with a failure to receive notice*" or its allegedly deficient timing or contents, but instead "*…is motivated by…*" the changed circumstances attendant to the City's approval of the application to subdivide the Property. See McNabb at 174-175 and the cases cited therein.

[38] See e.g. Davis v. Lea, 239 S.W. 823, 826 (Mo. 1922) ("*silence, where there is a duty to speak, amounts to concealment, and justifies the application of the doctrine of estoppel…*"); Speedie Food Mart, Inc., 809 S.W.2d 126, 131 (Mo. App. E.D. 1991) ("*Estoppel arises from the unfairness of permitting a party to assert rights belatedly if he knew of those rights but took no steps to enforce them until the other party has, in good faith, become disadvantaged by changed conditions*").

Viewed against this backdrop and the controlling Missouri precedent, the trial court—who presided over this matter for 28 months from its inception through trial and was well acquainted with the facts and the parties' positions and arguments,[39] did not err in entering judgment in favor of Ms. Huey and its decision to do so on Count I should be affirmed in all respects. Stephenson, 861 S.W.2d at 655-656 (the reviewing Court "*give[s] the prevailing party the benefit of all favorable evidence and reasonable inferences to be drawn therefrom, disregarding all evidence to the contrary…[and defers to the judgment]… even if the evidence could support a different conclusion*."); McCormick v. Cupp, 106 S.W.3d 563, 569 (Mo. App. W.D. 2003) (the fact-finder is "*free to believe all, none, or some of a witness's testimony.*").

III (A). The Trial Court also did not err in ruling in favor of Ms. Huey on the Plaintiff/Trustees' Claim to invalidate the sale of the Property because even if we deem the Sale Restriction to be valid and enforceable solely for purposes of this analysis, which it is not, any right the Plaintiff/Trustees may have had to enforce it or otherwise contest the sale of the Property was waived both in writing and by virtue of their failure to object, complain or otherwise take any action whatsoever for more than a year and a half after the sale of the Property despite having full knowledge thereof, and during which time Ms. Huey disbursed the sale proceeds to the Trust's beneficiaries in reliance thereon and 6 Clayton Terrace, LLC undertook substantial renovations and alterations of and to the Property such that the trial court could not return the Parties to the status quo ante even if was otherwise inclined to do so.

Even if we deem the Sale Restriction to be valid ***and*** accept ***all*** of the Plaintiff/Trustees' arguments in Points II and III, the trial court still did not err in ruling in Ms. Huey's favor on Count I because any right the Plaintiff/Trustees may have had to contest the sale was waived. As the Court is well aware, Missouri law dictates that rights

[39] Tr. at P.5:Ln.6-17.

of first refusal can be waived. McNabb v. Barrett, 257 S.W.3d 166 (Mo. App. W.D. 2008); Greenwood v. Sherfield, 895 S.W.2d 169, 171 (Mo. App. S.D. 1995). That waiver can be by express declarations or it can be implied by conduct. Bartleman v. Humphrey, 441 S.W.2d 335, 343 (Mo. 1969); Spencer Reed Group, Inc. v. Pickett, 163 S.W.3d 570, 574 (Mo. App. W.D. 2005).

In this case it is both. First, the language of the Indentures demonstrates that the Plaintiff/Trustees have no separate or independent right of first refusal. See [Exhibit H (the 1972 amendment to the Indentures); L.F. 50-65 (the Indentures attached to Plaintiffs' First Amended Petition); L.F. 448 (Deposition of Trustee/Plaintiff Rick Francis) at P.33:Ln.5-13 (confirming no independent right exists)]. That right belongs exclusively to the homeowners in their capacity as owners and residents of the Subdivision. As such, the Plaintiff/Trustees must "*stand in the shoes*" of one or more specifically identified and aggrieved homeowners for purposes of enforcing the alleged Sale Restriction on their behalf. See [L.F. 56 (the Indentures attached to Plaintiffs' First Amended Petition) at p.6 (confirming that action need be taken "*in the name and place of the lot owners.*")].

Here, the ***only*** allegedly aggrieved homeowner ever identified or relied-on by the Plaintiff/Trustees was Mrs. Betty Schwartz. See generally [L.F. 40-49 (Plaintiffs' First Amended Petition)]. However, Mrs. Schwartz elected not to purchase the Property and executed and delivered a written waiver in which she expressly waived her right of first refusal.[40] Although the Plaintiff/Trustees now attempt to argue that her waiver should be

[40] See Plaintiffs' Exhibit 3 at p. 00345 (the executed Schwartz Waiver waiving the right of first refusal); L.F. 180-181.

overlooked because she was denied the opportunity to "walkthrough" the Property and/or was wrongfully dissuaded from purchasing (Plaintiff/Trustees' Brief at pp. 64-65) that simply is not correct. To the contrary, 6 Clayton Terrace, LLC acquired the Property "as-is" with no inspections other than a sewer lateral inspection. [Tr. at P.305:Ln.20-23].

Thus, because the Sale Restriction only entitles the other homeowners the right to acquire the property on the same terms, Mrs. Schwartz was bound by the absence of inspections and was therefore unable inspect the Property prior to purchase. It was on that basis, and not any alleged nefarious conduct, that the Schwartzes' decision was founded. See [L.F. 454 (Deposition of William Schwartz) at P26:Ln.15-17 (testifying that the inability to inspect the Property prior to purchase was a "*deal breaker*")]. Mrs. Schwartz also confirmed in deposition that she had no interest whatsoever in acquiring the Property even if the trial court chose to set aside the sale and communicated that to the Plaintiff/Trustees and their counsel prior to the filing of this lawsuit.[41]

As such, even if the trial court had been predisposed to set aside the sale, Mrs. Schwartz had already waived her right of first refusal in writing and expressly testified she had no interest whatsoever in the Property. Likewise, virtually all of the other homeowners in the Subdivision either executed and delivered a written waiver, testified in deposition, or submitted affidavits attesting to the fact that they did not wish to acquire

[41] See L.F. 457 (Deposition of Elizabeth Schwartz) at P.27:Ln.15-20 and L.F. 460 at P71:Ln.5-6 (regarding her unwillingness to purchase); L.F. 457 at P.28:Ln.10-18 and P. 29:Ln. 1-7 (informing the Trustee Plaintiffs) and L.F. 460 at P.70:Ln.22-25 (informing counsel).

the Property.[42] See Bartleman, 441 S.W.2d 335, 343 (Mo. 1969) (waiver can be by express declarations or it can be implied by conduct). As such, the Plaintiffs could not as a matter of law base their Count I claim on any of those homeowners. Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112, 128 (Mo. 2010) (one "*standing in the shoes*" of another for purposes of asserting a claim, such as the Plaintiff/Trustees are attempting to do in this case, has no greater rights than the original claimant). Of the few homeowners who failed to return their written waiver, none were called by the Plaintiff/Trustees to testify at trial, and none has ***ever*** stated or claimed in deposition or otherwise that they were ready, willing and able to purchase the Property at the time it was sold to 6 Clayton Terrace, LLC but were somehow deprived of their right by virtue of the alleged deficiencies in the Notice of Sale.[43]

Given those facts, there simply was no "aggrieved homeowner" in whose shoes the Plaintiff/Trustees could stand and to whom the trial court could order the Property be sold even if it wanted to.[44] As such, its refusal to enter an otherwise empty and

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[42] See Plaintiffs' Exhibit 3 (the Notices of Sale and written waivers); L.F. 479 (the Deposition of Suchin Prapaisilp, owner of Lot 17) at P.11:Ln. 2-15; L.F. 483 (the Deposition of Michael Lin, the owner of Lot 7) at P. 21:Ln.11-13 and P.26:Ln.7-19; L.F. 495 (the Deposition of Joan O'Dowd, the owner of Lot 16) at P.22:Ln.15-18; L.F. at 00346 (Stipulated Exhibits for M.Y. Kwong, owner of Lot 2 and William and Barbara Conway, owners of Lot 11).

[43] These facts, which are dispositive in and of themselves, are even more telling in light of the testimony of the Plaintiff/Trustees' own expert witness, Mr. Nat Walsh, who expressly stated that a party's failure to return a written waiver following the receipt thereof bound that homeowner to the same degree as if he/she had waived their right in writing. Tr. at P.136:Ln. 15 through P.137:Ln.11 (explaining the waiver process); Tr. at P.95:Ln.14-15 and P.88:Ln. 6-12 (confirming Ms. Huey's right to rely on the waivers).

[44] Despite knowing that Mrs. Schwartz had no interest in the Property, the Plaintiff/Trustees and their counsel continued to seek relief from the trial court

ineffective judgment was wholly proper. See State Savings Association v. Kellogg, 52 Mo. 583, 591 (Mo. 1873) (directing that "*the law will not attempt to do an act which would be vain, or to enforce an act which would be frivolous.*"); State v. Barnett, 628 S.W.2d 917 (Mo. App. E.D. 1982) (the law does not compel the undertaking of a useless act).

Second, even if we ignore the above analysis, the Plaintiff/Trustees have waived any right they may have otherwise had to contest or object to the sale by virtue of their admitted conduct in this case. In this regard, Missouri law expressly directs that a party will be held to have waived their right to complain about a condition in a contract where its conduct demonstrates an intention to renounce that condition such that no other reasonable explanation of the conduct is possible. Horne v. Ebert, 108 S.W.3d 142, 147 (Mo. App. W.D. 2003). In this same vein, a party will likewise be estopped from attacking a transaction he might otherwise have been able to reject or contest if he accepts and retains a benefit from that transaction. Rhodus v. Geatley, 147 S.W.2d 631, 637 (Mo. 1941). This is especially true where the complaining party has a duty to speak as the Plaintiff/Trustees claim they do here with regards to alleged violations of the Indentures. Davis v. Lea, 239 S.W. 823, 826 (Mo. 1922) ("*silence, where there is a duty to speak, amounts to concealment, and justifies the application of the doctrine of estoppel…*")

"*declar[ing] that the purported sale is null and void and that Lot 6 be offered to the Schwartzs on the same terms as to purported Buyer.*" See L.F. 45 (the prayer for relief in Count I, §(d) of Plaintiffs' First Amended Petition).

In this case, it is undisputed that each of the Plaintiff/Trustees was fully aware of the sale of the Property and the terms thereof prior to the Closing. Plaintiff/Trustees, Cathy Stahr and Rick Francis admit receiving their respective Notices of Sale and each returned them having expressly waived their alleged rights of first refusal.[45] Likewise, the Head Trustee/Plaintiff/President of the HOA, John Tackes, Esq., admitted that he "*had enough information at that time to know that [he] did not want to buy the property.*"[46] Yet not a single one of the Plaintiff/Trustees or any other homeowner raised any objection nor made any complaint whatsoever about the propriety of the sale, the Notice or its allegedly defective contents.[47] To the contrary, Mr. Tackes expressly testified that "*as far as he was concerned the buyer and seller did what they needed to do.*" [48]

In addition to those facts—all of which fully support the trial court's Judgment refusing to set aside the sale, Plaintiff/Trustees Cathy Stahr and Rick Francis conceded they were aware of the plan to subdivide the Lot within ten (10) days following the

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[45] See Plaintiffs' Exhibit 3 at p. 00339 (the "Stahr Waiver") and at p.00341 (the "Francis Waiver"); Tr. at P.81:Ln.3-4 (acknowledging receipt of the Notice of Sale); Tr. at P.88:Ln6-12 and Tr. at P.95:Ln14-15 (confirming Ms. Huey's right to rely on the waivers); Tr. at P.12:Ln.15-24 (regarding knowledge of sale and receipt of the Notice); Tr. at P.15:Ln.22-23 (confirming decision not to exercise the alleged right of first refusal).

[46] See L.F. 420 (Deposition of the Head Trustee/Plaintiff/President of the HOA, John Tackes, Esq.) at P.22:Ln.10 through P.23:Ln.3; Tr. 16:Ln.24 through P.17:Ln.11.

[47] L.F. 131 at ¶ 49 (admitting that no issue regarding the sale of the Property was ever raised until the Plaintiff/Trustees' counsel wrote a letter to 6 Clayton Terrace, LLC in June of 2014); Tr. at P.89:Ln.17-21 (confirming no issues or complaints raised to the Plaintiff/Trustees); Tr. at P.306:Ln. 19-21 (no issue communicated to Ms. Huey prior to suit).

[48] See L.F. 420 (Deposition of the Head Trustee/Plaintiff/President of the HOA, John Tackes, Esq.) at P.22:Ln.10 through P.23:Ln.17 and L.F. 429 at P.96:Ln.5-15.

Closing Date.[49] However, rather than contact Ms. Huey, her Realtor (Ms. Judy Miller), 6 Clayton Terrace, LLC, or Mr. McGowan, who at all times following the sale resided on the Property with his six (6) children and continues to do so today, they elected instead to do nothing and "*just wait and see*" hoping "*its not going to be an issue.*" [50]

While the Plaintiff/Trustees may now attempt to avoid the clear consequences of their knowledge by casting it as little more than "*stray comments of a young child,*" [51] Missouri law dictates that when one "*has knowledge from **any source** which should reasonably put him on inquiry, he should be charged with such knowledge as he would naturally gain by making such inquiry.*" Woodbury v. Connecticut Mut. Life Ins. Co., 166 S.W.2d 552, 555 (Mo. 1942) (emphasis added). As the facts of the case plainly show, prudence dictates that when the child of a real estate developer tells you his father's plan for a piece of real estate, you would be wise to listen. At a bare minimum, an inquiry of the developer-father should be made if the plan impacts your property or you have an affirmative duty like the Plaintiff/Trustees assert they do here. Either way, Missouri law does not permit you to "*just wait and see*" hoping "*its not going to be an issue.*" Id.

Despite all of the above facts and admitted knowledge of the Plaintiff/Trustees, they sat idle for well over a year and a half following the sale until the City approved the subdivision of Lot 6 and they were left scrambling to find an alternate method to stop the

[49] Defendants' Exhibit 11 at p. CTS 116-117; Tr. at P.93:Ln.2-17.
[50] Tr. at P.258:Ln.23; Defendants' Exhibit 11 at p. CTS 116-117.
[51] Plaintiff/Trustees' Brief at p.45

Property from being subdivided.[52] Only then did they suddenly deemed the sale to be so egregiously defective that it compelled the filing of a lawsuit seeking to nullify the transaction and invalidate the duly recorded deed vesting 6 Clayton Terrace, LLC with title.[53]

This year and a half delay is wholly inexcusable and unreasonable given that Missouri law certainly provided the homeowners and the Plaintiff/Trustees with ample avenues for immediate injunctive relief if any of them truly believed that the manner by which was the sale was conducted, or the contents and the timing of the Notices of Sale, somehow deprived them of their rights under the Indentures. See e.g. Wallace v. Grasso, 119 S.W.3d 567 (Mo. App. E.D. 2003) ("*(E)quity will enjoin the violation of restrictive covenants…*"). Also, and as the Judgment aptly points out, the eighteen (18) months of silence between the Closing Date and the filing of this lawsuit were grossly prejudicial to Ms. Huey and 6 Clayton Terrace, LLC because not only was Mr. McGowan openly making dramatic physical changes and alterations to the Property throughout that time period,[54] but Ms. Huey was also moving forward to finalize all matters concerning her

[52] See L.F. 463-464 (Deposition of the Realtor, Ms. Judy Miller) at P.92:Ln.5-25 and P.93:Ln.16-19; L.F. 437 (Deposition of Trustee/Plaintiff Cathy Stahr) at P.33:Ln.2-6; L.F. 445 (Deposition of Trustee/Plaintiff Rick Francis) at P.21:Ln.22-25 and P.24:Ln.5-9; and L.F. 420 (Deposition of the Head Trustee/Plaintiff/President of the HOA, John Tackes, Esq.) at P.22:Ln.10-18 and P.24:Ln.2-13.

[53] See L.F. 463-464 (Deposition of the Realtor, Ms. Judy Miller) at P.92:Ln.5-25 and P.93:Ln.16-19; L.F. 437 (Deposition of Trustee/Plaintiff Cathy Stahr) at P.33:Ln.2-6; L.F. 445 (Deposition of Trustee/Plaintiff Rick Francis) at P.21:Ln.22-25 and P.24:Ln.5-9; and L.F. 420 (Deposition of the Head Trustee/Plaintiff/President of the HOA, John Tackes, Esq.) at P.22:Ln.10-18 and P.24:Ln.2-13.

[54] The alterations to the home and Property includes: a) the demolition and removal of walls; b) the physical combination of the former kitchen and dining room into a single,

mother's estate and distributing the Trust assets—including the proceeds from the sale of the Property to the Trust's beneficiaries, justifiably believing the sale of the Property to be final in all respects.[55]

These actions were wholly reasonable given that not only had no one ever raised a complaint about the sale to Ms. Huey or any other party facilitating the transaction,[56] but they had also treated 6 Clayton Terrace, LLC and Mr. McGowan as the recognized owner of the Property for all purposes—including all assessments and subdivision fees. See e.g. [L.F. 41, Plaintiffs' First Amended Petition at ¶6]. Had these alleged objections been timely raised and communicated at or near the date of closing, both Ms. Huey and 6 Clayton Terrace, LLC could have, and in fact would have, been able to take steps to preserve the status quo. They did not, and the resulting prejudice to both Ms. Huey and 6 Clayton Terrace, LLC that occurred during the ensuing eighteen (18) months of silence is exactly why equity requires diligence on the part of those who believe their rights in real estate have been violated and punishes those who slumber thereon. See Townsend v.

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open concept kitchen space which, as of the date of trial still remained in an unfinished condition; c) reconfiguration of the layout of the upstairs so as to increase the number of bedrooms; d) raising of the floor in the sunroom; e) walling-off the French doors that lead from the sunroom to the greenhouse; f) cutting through the brick exterior to add an additional door to the rear of the home; g) removing trees; h) refinishing and refurbishing the swimming pool; i) replacing the pool's heating and filtration system; j) repairing/replacing the concrete decking around the pool; and k) clearing substantial brush and plantings from the Property's grounds. See Exhibits 17-20 (the before and after photographs of the Property); L.F. 522 (Judgment) at ¶¶ 39-40 (identifying the material alterations to the Property).

[55] See Tr. at P.307:Ln. 24 through P.308:Ln. 13.

[56] L.F. 438 (the Deposition of Trustee/Plaintiff Cathy Stahr at P.52:Ln.16 through P.53:Ln.9 (testifying that she assumed the sale of her home was done properly because no one ever challenged it).

Maplewood Investment & Loan Co., 173 S.W.2d 911 (Mo. 1943) (directing that equity aids the vigilant and not those who slumber on their rights, and that adherence to such promotes diligence, punishes laches and discourages the assertion of stale claims); Doran, Inc. v. James A. Green, Jr. & Co., 654 S.W.2d 106, 109 (Mo. App. 1983) (silence creates an estoppel when it has the effect of misleading the other party or is otherwise inconsistent with honest dealings).[57]

As such, even if the trial court fully believed each and every one of the arguments and positions posited by Plaintiff/Trustees both then and now, ***and*** would otherwise have been predisposed to granting the relief and unwinding the sale, the Plaintiff/Trustees' decision to "*just wait and see*" resulted in such dramatic and irreversible changes in circumstances—both to the physical condition of the Property and the financial position of the Trust for which Ms. Huey was the trustee, that it was physically and financially impossible to return the parties to the *status quo ante* as required for purposes of unwinding the sale.[58] Speedie Food Mart, Inc., 809 S.W.2d at 131 (refusing to enforce a

[57] These arguments apply with equal force to the Plaintiff/Trustees and the other Subdivision residents.

[58] These same facts support Ms. Huey's Estoppel and Laches-based Affirmative Defenses set out in defenses B, D, E and F of her Amended Affirmative Defenses. L.F. 71-73 (Ms. Huey's Affirmative Defenses) and L.F. 98-101 (Ms. Huey's Amended Affirmative Defenses); Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 386 (Mo. 1989) (estoppel requires: (1) an act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the act); State ex rel. City of Monett v. Lawrence County, 407 S.W.3d 635, 640-41 (Mo. App. S.D. 2013) (directing that laches "borrows from" estoppel and is said to address unreasonable or unexcused delay and the inequity of enforcing a claim due to changed conditions or relations; it applies against claims in which the plaintiff's failure to move has caused vast changes to be made in the betterment of the property and in the rise of values, a case in

restrictive covenant where "*[i]t would work a grave injustice [and]… appellants were slow to assert their rights*"); Halbrook v. Atlas Life Ins. Co., 234 S.W.2d 628, 639 (Mo. App. 1950) (silence operates as an assent where the conduct of the silent party would, if it were not estopped, operate as a fraud on the party who has taken some action to his own prejudice in reliance upon it); Forst v. Bohlman, 870 S.W.2d 442, 446 (Mo. App. E.D. 1994) (Waiver may be based on inactivity on the part of land owners or trustees).

Given those undisputed facts and the clear inequity attendant to the relief so belatedly sought in this matter, the trial court's refusal to grant the relief requested was wholly proper and the Judgment should be affirmed accordingly. See [L.F. 14-16 (Judgment) (discussing the equities and equitable considerations underlying the court's decision)]; Garnhart v. Finney, 40 Mo. 449, 463 (Mo. 1867) (directing that "*[w]hen a man by his words or conduct knowingly causes another to believe in the existence of a certain state of things, and induces him to act upon that belief so as injuriously to alter his previous position, the former will be concluded from averring, as against the latter, a different state of things as existing at that time; or asserts a fact upon the faith of which another acts, and will receive damage if the fact be not true, he shall be estopped from contradicting it.*").[59]

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which it would cause a just man instinctively to cry out against holding that defendants, who in good faith invested great sums to improve the property, should now lose part of it on this newly sprung, newly asserted stale claim).

[59] See also, Hoyt v. Latham, 143 U.S. 553, 566-567 (U.S. 1892) (directing that "*[t]he complainant could have treated the purchase made by the defendant as a nullity. . . .Had he at once denied the validity of the transaction, or by any declaration or proceeding indicated dissatisfaction with it, or even refrained from expressions of approval, he would have stood in a court of equity in a very different position*").

IV. The Plaintiff/Trustees' Point IV should be denied because the Trial Court did not err in entering judgment in favor of Ms. Huey and against the Plaintiff/Trustees' on their claim seeking to invalidate the sale of the Property in that the sale was not "void" under Missouri law and any ability the Plaintiff/Trustees may have had to assert that claim or contest the sale was lost when they demanded and received payment for unpaid HOA fees out of the Closing proceeds for the very transaction they now seek to invalidate, and then sat silent for the ensuing eighteen (18) months while the Property and its grounds underwent substantial alteration.

(*Responding to the Plaintiff/Trustees' Point Relied On IV*)

Standard of Review

Ms. Huey agrees that Point IV of the Plaintiff/Trustees' appeal is governed by the standard set forth in Murphy, in that the decree or judgment of the trial court will be sustained unless it erroneously declares or applies the law. 536 S.W.2d at 32. In applying this standard of review, if an issue has already been decided by prior precedent, the question is one of stare decisis which requires adherence to decided case precedents. Med. Shoppe Int'l, Inc., 156 S.W.3d at 334-35.

Argument

For their final argument, the Plaintiff/Trustees attempt to avoid the judgment on Count I by arguing that the sale of the Property to the LLC is "*void*" and is therefore not subject to waiver or estoppel arguments. Plaintiff/Trustees' Brief at pp. 67-68. This position fails for several reasons. First, it is founded on the faulty premise that the Sale Restriction on which the argument depends is valid—which, as has been shown in response to Point II above, it is not.

Second, this Court has long held that the equitable doctrines of estoppel, election, ratification, affirmance, acquiescence, acceptance of benefits, laches and waiver do in

fact apply in situations such as this where a party claiming to have a right to avoid or reject a real estate transaction not only elects to lay silent while others take action to their detriment in reliance thereon, but who also knowingly chooses to accept and retain a benefit from that transaction. See e.g. Lytle v. Page, 591 S.W.2d 421, 424-425 (Mo. App. S.D. 1979) (and the cases cited therein). In those instances, the Court has consistently directed that "*[i]t makes no difference whether the proceedings under which the sale occurs are voidable or wholly void*…." Hector v. Mann, 124 S.W. 1109, 1116 (Mo. 1910). See also, Rhodus v. Geatley, 147 S.W.2d 631, 637-638 (Mo. 1941) ("*where one received… a part of the purchase price paid at a judicial sale of property in which he is interested, he may not thereafter question the validity of such sale, even though it be in fact absolutely void*"); Austin v. Loring, 63 Mo 19, 22-23 (Mo. 1876) (sale of property conducted under a void judgment sale held valid under the doctrine of ratification).

This Court has also applied the exact same analysis to void judgments—directing that when a party to an allegedly void judgment voluntarily performs it or accept its benefits, he estops himself from questioning the decree and no further inquiry will be made as to its validity. See State ex rel. York v. Daugherty, 969 S.W.2d 223, 225 (Mo. 1998); Matter of Estate of Tapp, 569 S.W.2d 281, 285 (Mo. App. 1978) (one accepting and retaining benefits of a void judgment is estopped to deny the validity of any part thereof, or any burdensome consequences, even where invalidity arises from want of subject matter jurisdiction); Smith v. Smith, 524 S.W.3d 95, 100 (Mo. App. E.D. 2017) *("[T]he parties to a void judgment may be estopped from challenging the validity of a*

judgment…by taking voluntary acts that expressly or impliedly recognize the validity of the judgment.").

Thus, even if we indulge the Plaintiff/Trustees' argument and treat the sale as "void" solely for purposes of the analysis, the question is whether the Plaintiff/Trustees have estopped themselves and/or otherwise lost the right to attack it based on their actions and inactions in this case. The answer to that question is plainly, "yes" because as the Court can see from Point II above, the Record shows that the Plaintiff/Trustees had knowledge of the sale and the allegedly defective timing and contents of the accompanying Notice prior to the closing. At that point, they as Trustees of the Subdivision had a choice: a) object to the sale for all of the reasons they have articulated throughout their Brief; or b) allow it proceed despite the alleged shortcomings. They chose the latter, and in the process demanded and received payment for unpaid HOA fees out of the closing proceeds, which funds were readily accepted, received and deposited into the Subdivision's account.[60] Austin v. Loring, 63 Mo. 19 at 22 (Mo. 1876) ("*no person will be allowed to adopt that part of a transaction which is favorable to him, and reject the rest to the injury of those from whom he derived the benefit [because] [w]hen those who are entitled to avoid a sale adopt and ratify it, equity will estop them from afterwards setting it aside.*")

By allowing the sale to proceed and collecting HOA fees out of the proceeds, the Plaintiff/Trustees not only signaled their acceptance of the sale and all alleged defects

[60] L.F. 450 (Deposition of Trustee Rick Francis) at P.41:Ln.7-24 and P.44:Ln.3-14; Tr. at P.90:Ln 17 through P.92:Ln.18.

and shortcomings thereof, they also barred themselves as a matter of law from attacking it thereafter. Id.; Murphy v. Jackson Nat. Life Ins. Co., 83 S.W.3d 663, 668 (Mo. App. S.D. 2002) ("*estoppel…involves the inducement of someone to act to his detriment*"); Poger v. Mo. DOT, 501 S.W.3d 37, 50 (Mo. App. E.D. 2016) (the use and acceptance of the proceeds from the sale of subdivision common ground held to prevent the unit owners from subsequently attacking the validity of the sale).

This same conduct also serves to ratify the sale because, as the Plaintiff/Trustees aptly assert in their Brief (at p 24.), ratification "…*can occur when an individual either expressly or impliedly 'confirms or adopts the agreement with knowledge of its contents.*'" Murphy v. Jackson Nat. Life Ins. Co., 83 S.W.3d 663, 668 (Mo. App. 2002). In so doing, a party's ratification can be intentional or it can be inferred from the facts because "*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.

In this case, the undisputed facts clearly showed that the Plaintiff/Trustees had knowledge of the sale and the allegedly defective timing and contents of the accompanying Notice. Yet rather than object or otherwise attempt to block or prevent the sale, they instead demanded and received payment for unpaid HOA fees from the closing proceeds.[61] Payment of the fees was tendered, accepted and deposited into the Subdivision's account and no objection was thereafter made to the transaction until a year

[61] L.F. 450 (Deposition of Trustee Rick Francis) at P.41:Ln.7-24 and P.44:Ln.3-14; Tr. at P.90:Ln 17 through P.92:Ln.18.

and half later when the Plaintiff/Trustees became unhappy with the new owner and its plan to subdivide the Property (in a manner that quite frankly is in full accord with the express terms and plain language of the Indentures).[62] Having done so, they cannot now attack the validity of the sale.

Moreover, and as detailed extensively above, the ensuing eighteen (18) months of silence on the part of the homeowners and Plaintiff/Trustees were deeply prejudicial to both Ms. Huey and 6 Clayton Terrace, LLC in that the actions taken by each rendered it impossible to return the parties to their *status quo ante* positions by the time the Plaintiff/Trustees belatedly chose to object and file this lawsuit a year and half post-closing.[63]

Under those circumstances, and contrary to the Plaintiff/Trustees' argument, Missouri Courts do in fact apply equitable principles to situations such as this and the trial court did no err in so concluding.

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[62] Although Ms. Huey agrees with 6 Clayton Terrace, LLC that imposing the One Residence Per Lot Provision constitutes the addition of a new burden on the ownership of land in the Subdivision by majority vote, the battle regarding the provision's validity is somewhat of a tempest in a teapot because there is nothing in the language of the Indenture or the provision itself that even impliedly prohibits the division of Lot 6. Thus, if a new home is in fact constructed on the newly platted Lot, there is only going to be one residence per Lot, with one sited on Lot 6A and one on Lot 6B—thereby being in full compliance with the disputed One Residence Per Lot Provision, regardless of its validity.

[63] See Exhibits 17-20 (the before and after photographs of the Property); L.F. 522 (Judgment) at ¶¶ 39-40 (identifying the material alterations to the Property); Tr. at P.307:Ln. 24 through P.308:Ln. 13.

PART TWO: MS. HUEY'S REPLY TO THE TRUSTEES' BRIEF IN RESPONSE TO HER APPELLANT'S BRIEF

V. The trial court did not act within its discretion, and in fact abused its discretion, in only awarding Ms. Huey Sixty-Thousand Dollars ($60,000.00) of the One Hundred and Nineteen Thousand Two Hundred and Forty-Three Dollars and 99/00 ($119,243.99) in damages in the form of attorney's fees and costs she incurred as a direct and proximate result of the Plaintiff/Trustees' tortious conduct in that she was the only party in this lawsuit to prevail on all claims asserted by and against her, and the amount sought, which was determined by the trial court in its Judgment to be fair and reasonable under the circumstances, was a fraction of that awarded to the Plaintiff/Trustees who not only failed to prevail on all of their counts and claims, but were also found to have engaged in tortious and unlawful conduct for which they were adjudged liable.[64]

(*Replying to the Plaintiff/Trustees' response to Ms. Huey's Point Relied On I*)

Argument

Ms. Huey recognizes and agrees that the trial court is considered the expert on attorney's fees and its determination as to whether and to what extent to award those fees will only be reversed by this Court for abuse of discretion. Aubuchon v. Hale, 453 S.W.3d 318, 325 (Mo. App. E.D. 2014).[65] In this regard the trial court's award of fees will only be found to be an abuse of discretion where "*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. W.D. 1996).

In this case, and against that legal backdrop, it should be remembered that Ms. Huey was the only true prevailing party in this litigation—having succeeded in defending

[64] Points I through IV of the Respondent/Cross-Appellant's Brief were directed solely to 6 Clayton Terrace, LLC and its Points Relied On I-IV.

[65] See also, State ex rel. Chase Resorts, Inc. v. Campbell, 913 S.W.2d 832, 835 (Mo. App. 1995); Agnew v. Johnson, 176 S.W.2d 489, 494 (Mo. 1943); and Klinkerfuss v. Cronin, 289 S.W.3d 607, 614 (Mo. App. E.D. 2009).

against the Plaintiff/Trustees' claims under Count I for Declaratory Judgment and prevailing in her Counterclaim for Abuse of Process. At the close of the case, all parties requested and were granted leave to submit their respective Affidavits of Attorney's fees. Of the three affidavits submitted, Ms. Huey's was the lowest of all. As such, it is not a surprise that the trial court found in its Judgment that her $119,243.99 in total costs and fees was fair and reasonable under the circumstances. [L.F. 00532, 00533].

Likewise, a review of the docket sheet in this matter reveals there was no disparity in the number of court appearances and status/case management conferences attended by counsel and no disparity in the parties' respective motion practice—with all parties having filed Motions for Summary Judgment, among others.[66] Nor was there any disparity in the number of depositions taken or attended or any other procedural or non-procedural matter on which one party undertook the vast majority of the effort without any corresponding effort for the opposition. Thus, and as the Plaintiff/Trustees aptly point out in their Brief, the claims and defenses asserted in this case 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*" and for which "*counsel's time is devoted generally to the litigation as a whole*" rather than to a "*series of distinct claims*." Plaintiff/Trustees' Brief at pp.48 and 49.

Each lead counsel for the parties was the primary billing attorney throughout the entirety of the litigation and each was present for every appearance, conference and

[66] See e.g. L.F. 2-4 (Motions to Dismiss by all parties); L.F. 6-10 and 17-19 (Notices of Deposition and amendments and cancellations thereof); L.F. 7 and 11-14 (Motions for Summary Judgment).

hearing and each took the lead on behalf of his client at trial. Each counsel is, and all relevant times hereto was, a partner in his respective firm, well versed in matters of Missouri real estate law and appeared numerous times before the trial court on the factual and legal underpinnings of the matter. It is for this reason that the trial court expressly observed that it "…*has gone through this case quite extensively with the attorneys over the months prior to today, and this group of attorneys for all parties has done a phenomenal job laying this case out for the Court, and I much appreciate that. The Court—we've discussed a lot of substantive issues in trial – or in chambers and, without exception, the attorneys have done a first-rate, wonderful job laying this out.*" [Tr. at P.5:Ln. 9-14].

The parties then proceeded to shepherd their respective claims and defenses through trial and, at the conclusion, Ms. Huey was the only party to prevail on all counts and claims. Thus, the concept that the tortfeasor Plaintiff/Trustees were awarded every dollar of their costs and fees ($209,192.56)[67] despite not only having lost on Count I of their direct claims, but also being found liable for Abuse of Process, while Ms. Huey was only awarded half of the $119,243.99 she incurred in successfully defending herself "…*is so 'clearly against the logic of the circumstances and so arbitrary and unreasonable...*'" as to exceed the discretion allotted to the trial court on this issue. Leone, at 616.

Moreover, the amount claimed by Ms. Huey is not simply the run-of-the-mill, garden variety request for attorney's like the one the Plaintiff/Trustees made against 6 Clayton Terrace, LLC. To the contrary, the amount claimed by Ms. Huey is in fact a

[67] L.F. 00535-00539

"*damage*" claim[68] that directly and proximately resulted from the tortious conduct for which the Plaintiff/Trustees were found liable.[69] This fact, which is confirmed in the Judgment [L.F. 00535-00539], stands in stark contrast to the (inapplicable) case law relied on by the Plaintiff/Trustees in their opposition—all of which involves the same sort of garden variety claims for attorney's fees they've asserted against 6 Clayton Terrace, LLC, rather than the direct claim for damages proximately resulting from their tortious conduct, the precise measure of which is and has been supported by affidavit and evidence.[70]

Tellingly, the trial court does ***not*** expressly "reduce" Ms. Huey's award as the Plaintiff/Trustees contend, and as we would otherwise expect if that had been the court's intention. Instead, the trial court declares the full $119,243.99 as damages directly and proximately caused by the Plaintiff/Trustees' actions; declares that amount to be fair and reasonable under the circumstances; and then erroneously attempts to apportion the damages by and between the Plaintiff/Trustees and 6 Clayton Terrace, LLC, with each

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[68] See Lamber v. Warner, 379 S.W.3d. 849, 859 (Mo. App. E.D. 2009) (directing that legal fees and costs are a proper component and measure of damages in an abuse of process action).

[69] L.F. 532-533 (finding that Ms. Huey has been "*directly and proximately damaged by the Plaintiff/ Trustees' actions in the form of attorney's fees and costs in the amount of $119,243.99*", which the trial court then found were "*fair and reasonable under the circumstances*" (L.F. 533).

[70] See the Plaintiff/Trustees' Brief at pp.50-51 relying on Winghaven Residential Owners Ass'n., Inc. v. Bridges, 457 S.W.3d 383, 384-385 (Mo. App. E.D. 2015) (a lawsuit between the HOA and husband and wife lot owners over unpaid subdivision assessments and for which the fees sought were for enforcement/collection). Berry v. Volkswagen Group of Am., Inc., 397 S.W.3d 425 (Mo. banc 2013), which is cited on page 50 of the Plaintiff/Trustees' Brief, is also factually inapposite because it was a class action based on the Missouri Merchandising Practices Act that contains its own statutory attorney's fee provision.

specific amount allotted to be paid "***toward*** *[Ms. Huey's] reasonable attorney [sic] fees*", ***not*** in satisfaction thereof. [L.F. 532-533]. As such, the trial court's calculation provides no explanation regarding the $59,243.99 encompassed in the fair and reasonable amount of the damage, but that is otherwise unaccounted for.

Therefore, viewed against the factual and legal background of this case, the trial courts declaration that the full amount of Ms. Huey's damages ($119,243.99) was fair and reasonable under the circumstances, only to inexplicably allocate the judgment in a manner that leaves her, as the only true prevailing party, with half of her award while simultaneously awarding the adjudged tortfeasor and quasi-losing party Plaintiff/Trustees every dollar of their claimed $209,192.56 in costs fees does in fact "'*shock one's sense of justice*'" and the trial court abused its discretion in so doing. Leone, at 616.

The trial court then further abused its discretion by entering $40,000.00 of the judgment against 6 Clayton Terrace, LLC, a party against who Ms. Huey asserted no claims nor sought any relief. [L.F. 532-533]. Nor did the Plaintiff/Trustees ever assert any claim for contribution, indemnification or any other legal theory against 6 Clayton Terrace, LLC that would allow them to pass on the damages they inflicted on Ms. Huey as alleged by her in her Counterclaim. In the absence of a claim requesting apportionment of Ms. Huey's damages, the trial court's imposition of such an award was an abuse of discretion because even the broad equitable powers of the court are limited to the claim for relief and issues made by the pleadings. Murphy v. Timber Trace Assoc., 779 S.W.2d 603, 607 (Mo. App. W.D. 1989).

Accordingly, Ms. Huey prays this Court enter Judgment in her favor and against Plaintiff/Trustees only on her Counterclaim for Abuse of Process in the amount of $119,243.99 or, in the alternative, reverse the Judgment as to the amount of the award only, and remand the matter to the Circuit Court with a mandate to enter Judgment as prayed for above.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via the court's ECF system to all counsel of record this 19th day of February, 2019.

/s/ John Hein

SUPREME COURT OF MISSOURI

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

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

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

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

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

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

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

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

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

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

3. Appellant's Substitute Brief contains 19,340 words.

Respectfully submitted,

HEIN SCHNEIDER & BOND P.C.

/s/ John Hein

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