IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TRUSTEES OF CLAYTON TERRACE SUBDIVISION,	)	
Plaintiff/Respondent,	)	
	)	**Case No. ED105555**
vs.	)	
6 CLAYTON TERRACE, LLC, et al.,	)	
Defendants/Appellants.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 34
Cause No. 14SL-CC02852
HONORABLE DALE HOOD

BRIEF OF APPELLANT 6 CLAYTON TERRACE, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES/STATUTES

JURISDICTIONAL STATEMENT

The Missouri Court of Appeals, Eastern District, has jurisdiction over this appeal in that it does not involve any of the issue(s) reserved for the exclusive jurisdiction of the Missouri Supreme Court as set forth in Article V, Section 3 of the Missouri Constitution. This appeal therefore falls within the general appellate jurisdiction of the Missouri Court of Appeals and is within the territorial jurisdiction of the Eastern District of the Missouri Court of Appeals. §477.050, RSMo.

STATEMENT OF FACTS

General Overview

The disputes in this matter relate back to the purchase in February of 2013 by Appellant/Defendant, 6 Clayton Terrace, LLC ("6 Clayton Terrace, LLC") from Appellant/Defendant Jeannette R. Huey, in her capacity as Trustee of the Jane R. Huey Lifetime Trust Agreement dated May 21, 1998 ("Huey"), of certain residential property located in the Clayton Terrace Subdivision (the "Subdivision"), commonly known as 6 Clayton Terrace, St. Louis County, Missouri (the "Property" or the "Original Lot 6") (the "2013 Transaction"). [L.F. 00335-00343; (Joint Stipulation of Facts ("JSF")) ¶¶25-27, 46-47]. Fourteen months later, following an application by 6 Clayton Terrace, LLC to subdivide the Original Lot 6, the City of Frontenac granted the application and subdivided the Original Lot 6 into two separate lots. [JSF ¶¶50-51; Ex. T-2].

Subsequent to the subdivision of the Original Lot 6 by the City of Frontenac, Respondents/Plaintiffs, the Trustees of Clayton Terrace Subdivision ("Trustees" or "Plaintiffs") filed suit in this matter against Huey, in Count I, seeking a Declaratory Judgment that the 2013 Transaction was void and unenforceable, and against 6 Clayton Terrace, LLC in Count II seeking an injunction prohibiting it from constructing an additional residence on any portion of the Original Lot 6, or selling any interest in any

portion of the Original Lot 6[1]. [JSF ¶¶58; L.F. 0040-0049]. The individual Trustees at the time the First Amended Petition was filed were John Tackes ("Tackes"), Cathy Stahr ("Stahr"), and R.W. Francis ("Francis"). [L.F. 0040]. The Trustees' claims are based on two purported amended provisions of the Subdivision's indentures. [L.F. 0040-0049, ¶¶13, 14]. The provision of the indentures relied upon by the Trustees in Count I of the First Amended Petition provides in general that a fifteen (15) day notice and right of refusal is required to be given to each homeowner in the Subdivision prior to the sale of any lot (the "Notice of Sale and Fifteen Day Notice Provision"). [JSF ¶16; Ex. JB-A(I), ¶2(i)[2]]. The provision of the indentures relied upon by Plaintiffs in Count II provides in general that only one residence may be constructed on each lot (the "One Residence Per Lot Provision"). [JSF ¶¶10, 22; Ex. JB-A(I), ¶2(e)]. Both Defendants filed numerous affirmative defenses, one of which alleged that these two indenture provisions are void and unenforceable, in accordance with a long line of Missouri cases, because they were not unanimously approved by all of the homeowners in the Subdivision. [L.F. 0098-00102, ¶M; L.F. 00103-00106, ¶14]. In addition, Huey filed a counterclaim against The Trustees for abuse of process. [L.F. 0066].

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[1] On December 3, 2014, Plaintiffs filed and subsequently proceeded to trial on a First Amended Petition (the "First Amended Petition") in which the substantive claims were identical to those of the original Petition.

[2] On June 28, 2016, the parties filed a "Stipulated Admissibility of Exhibits" in which they agreed to the admissibility of various exhibits. [L.F. 00344].

This matter was tried before the Honorable Judge Dale Hood as a two day bench trial on July 11th and 12th of 2016, and Judgement was entered on December 21, 2016 ("Judgment") [L.F. 00515], and December 30, 2016 ("Attorney's Fees Judgment"). [L.F. 0040-0078, 00515, 00539].

The 2013 Transaction

On January 17, 2013, Huey and Century Renovations, LLC ("Century"), entered into a written agreement whereby Huey agreed to sell the Property to Century (the "Contract"). [JSF ¶25; Ex. 1]. On February 14, 2013, Century assigned the Contract to 6 Clayton Terrace, LLC. [Ex. 5]. On February 15, 2013, the Contract closed and Huey conveyed title to the Property to 6 Clayton Terrace, LLC [L.F. 0040-0065, 0079-0085, 00335-00342; JSF ¶47].

During the next fourteen (14) months, 6 Clayton Terrace, LLC substantially improved and remodeled the home and swimming pool located on the Property. [Tr. 266-267, 270-276, 302-303; Defendants' Exhibits 17, 19-20 (before and after photographs of the interior of the home on the Property)]. Thereafter, on April 24, 2014, more than a year after the closing, a representative of 6 Clayton Terrace, LLC filed an application with the City of Frontenac to subdivide the Original Lot 6 into two separate lots. [JSF ¶¶50-51; Ex. JM-Aff. (COF 27); Defendants' Exhibit 15].

The Trustees and several of the Subdivision residents strongly opposed the application for the subdivision of the Original Lot 6 and appeared at the Frontenac City Council meetings to voice their opposition. [Ex. JM-Aff. (COF 3-13)]. On August 19, 2014, however, the City of Frontenac approved 6 Clayton Terrace, LLC's application to

subdivide the Original Lot 6 into two separate lots in accordance with the approved plat. [JSF ¶51; Ex. T-2 (the "Approved Plat")]. Accordingly, on August 19, 2014, the Original Lot 6 was subdivided into Lot 6A and Lot 6B of Clayton Terrace Subdivision, each of which were assigned separate tax identification numbers and separate post office numbers. [JSF ¶¶54-55].

The Approved Plat, consisting of the two separate lots, was filed in the St. Louis County Public Records on August 21, 2014 at Book 362, Page 314. [JSF ¶53]. The residence located on the Original Lot 6 falls within the confines of Lot 6B of Clayton Terrace, and there is currently no residence constructed on Lot 6A of Clayton Terrace. [JSF ¶¶56-57]. Lot 6A contains 1.098 acres and Lot 6B consists of 1.218 acres. [Ex. T-2]. The two resulting lots are relatively consistent in size with the remaining lots in the Subdivision, as other lots on the Original Plat consist of 1.03 acres, 1.09 acres, 1.15 acres and 1.24 acres respectively. [Tr. 63, Ex. JT-1]. The Trustees were aware of 6 Clayton Terrace, LLC's application to the City of Frontenac to subdivide the Original Lot 6 at least two months prior to the approval of the Subdivision, but did not file their lawsuit until two days after the subdivision of Original Lot 6 was granted by the City of Frontenac [Ex. JM-Aff. (COF 5[3]); JSF ¶¶51, 58].

[3] John Tackes, one of the named Plaintiffs herein, and President of the Subdivision Trustees, appeared at a June 12, 2014 City of Frontenac public meeting, and voiced his objections to the proposed subdivision of the Original Lot 6. [JM-Aff. (COF 4)].

The Subdivision Indentures

1. The Original Plat and Original Indentures.

The Subdivision was formed in 1923 at which time the original plat ("Original Plat") was recorded with the St. Louis County Recorder of Deeds. [L.F. 0035; Ex. JT-1]. The Original Subdivision indentures ("Original Indentures") are set forth on the Original Plat [JSF ¶6; Ex. JT-1][4]

The Original Plat consists of twenty-three (23) lots in the Subdivision numbered lots 1-23 (the "Original Lots"). [JSF ¶8; Ex. JT-1]. Over the years, the number of lots and boundaries of the Original Lots changed on numerous occasions [Tr. 18-21, 23-25, 64-67; Ex. JT-1, 100]. For example, the legal description for the Original Lot 6, when acquired by 6 Clayton Terrace, LLC, contained two separate parcels consisting of portions of lots 4, and 6 [Tr. 67, Ex. 30]. There are also two houses currently located on the land originally platted as lot 3 [Tr. 48-49; Ex. 100]. Finally, there are currently 22 lots in the Subdivision, as opposed to the 23 that were described on the Original Plat [Tr. 19; Ex. JT-1].

The Original Indentures provide in part that, "[t]he foregoing restrictions shall be in force and binding upon the owners of this Subdivision for a period of twenty five years from the date of this instrument, unless amended or extended by two-thirds of the lot

[4] As more fully discussed hereinbelow, the Original Indentures were purportedly amended on five (5) separate occasions (collectively, the "Amended Indentures"). None of the Amended Indentures were approved by the unanimous consent of the homeowners of the Subdivision.

owners in this subdivision and publicly recorded."[5] [Ex. JT-1].

2. The Amended Indentures.

The five (5) Amended Indentures were recorded with the St. Louis County Recorder of Deeds as follows:

(1) The first set of amended indentures were recorded on October 18, 1928 with the St. Louis County Recorder of Deeds in Book 972, Page 18 (the "First Revised Indentures"). [JSF ¶9; Ex. JB-A]. The First Revised Indentures were not approved by the unanimous consent of the homeowners in the Subdivision as First Revised Indentures are missing the signatures of the owners of Lot 23, Lot 1, Lot2, Lot 3, Lot 4, Lot 5 and Lot 6 [Tr. 58; Ex. JB-A(E)].

(2) The second set of amended indentures were recorded on August 14, 1943 with the St. Louis County Recorder of Deeds in Book 1947, Page 190 (the "Second Revised Indentures"). [JSF ¶9; Ex. JB-A(F)]. The Second Revised Indentures were not approved by the unanimous consent of the homeowners in the Subdivision as the Second Revised Indentures lack the

[5] As will be discussed more fully herein, Missouri law clearly provides that, even if a subdivision's indentures provide that they can be amended by less than unanimous consent of the subdivision, unanimous consent is still required as to any amendment that creates an additional burden on any property or such amendment is void and unenforceable. Hazelbaker v. County of St. Charles, 235 S.W.3d 598 (Mo.App. 2007).

signatures of the owners of Lot 5, Lot 1, Lot 2, Lot 3, Lot 4, Lot 9, and Lot 18 [Tr. 59; JSF ¶¶3-14; Ex. JB-A(F)].

(3) The third set of amended indentures were recorded on May 16, 1957 with the St. Louis County Recorder of Deeds in Book 3770, Page 102 (the "Third Revised Indentures"). [JSF ¶9; Ex. JB-A(G)]. The Third Revised Indentures were not approved by the unanimous consent of the homeowners in the Subdivision as the Third Revised Indentures lack the signatures of the owners of Lot 2, 4, 7, 9, 15,16, 17 or 18 [Tr. 59-61; Ex. JB-A(G)].

(4) The fourth set of amended indentures were recorded on March 15, 1973 with the St. Louis County Recorder of Deeds in Book 6659, Page 1761 (the "Fourth Revised Indentures"). [JSF ¶9; Ex. JB-A(H)]. The Fourth Revised Indentures were not approved by the unanimous consent of the homeowners in the Subdivision as the Fourth Revised Indentures lack the signatures of the owners of Lots 1, 2, 12, 15, 17 or 18 [Tr. 61; Ex. JB-A(H); JSF ¶¶ 19-20].

(5) The fifth and final set of amended indentures were recorded on January 20, 1998 with the St. Louis County Recorder of Deeds in Book 11426 Page 1797 (the "Fifth Revised Indentures"). [JSB ¶9; Ex. JB-A(I)]. The Fifth Revised Indentures were not approved by the unanimous consent of the homeowners in the Subdivision as the Fifth Revised Indentures, at a minimum, omit the signatures of the owners of Lots 5 and 6, of the Subdivision [Tr. 61; Ex. JB-A(I); JSF ¶¶ 23-24]. The Fifth Amended

Indentures contain the signatures of only 17 lot owners in the Subdivision. [Ex. JB-A(I)].

3. The One Residence Per Lot Provision

The Original Indentures did not contain the One Residence Per Lot Provision. [JSF ¶11; Tr. 54; Ex. JT-1]. The First Revised Indentures, and all subsequent Amended Indentures, contain the One Residence Per Lot Provision which specifically provides, "[O]nly one residence shall be erected on each lot." [JSF ¶¶10-22; Ex. JB-A(E-I), ¶2(e)].

4. The Notice of Sale and Right of First Refusal Provision

Neither the Original Indentures, the First Revised Indentures, the Second Revised Indentures or the Third Revised Indentures contain the Notice of Sale and Right of First Refusal Provision. [JSF ¶¶ 16-18]. The Fourth Revised Indentures and Fifth Revised Indentures contain the Notice of Sale and Right of First Refusal Provision which provides: "no sale of any lot in said subdivision shall be consummated without the seller giving at least 15 days written notice to the owners of all other lots …", and further provides that any lot owner(s) shall have the "right to elect in writing to purchase said lot …". [JSF ¶¶ 16-18, 22; Ex. JB-A(E-I), ¶2(i)].[6]

None of the Amended Indentures were approved by the unanimous consent of the lot owners in the Subdivision. [JSF ¶¶ 12, 14, 19, 20, 23, 24; Tr. 10-11, 58-62 (Testimony

[6] The Notice of Sale and Right of First Refusal Provision also contains language which provides, "if more than one lot owner elects to purchase said lot then all lot owners electing to purchase said lot shall do so on a pro rata basis…" [Ex JB-A(E-I), ¶2(i)].

of Plaintiff Tackes); Ex. JB-A(E-I), Judgment, ¶9.]. Thus, neither the One Residence Per Lot Provision nor the Notice of Sale and Right of First Refusal Provision were ever approved by the unanimous consent of the lot owners of the Subdivision.

5. The Delivery of the Fifteen Day Notice and Right of First Refusal

The Trial Court found that prior to closing on the Contract, a notice of sale for the Property was prepared and hand delivered to each home in the Subdivision. [Judgment ¶17]. Most of the homeowners in the Subdivision executed and delivered written waivers expressly waiving their right of first refusal, and no homeowner-witness testified that they were ready, willing and able to purchase the Property at the time it was sold. [Judgment ¶¶22-24.]

6. Language in the Indentures Regarding The Ability to Subdivide a Lot

There is no language in the Original Indentures or the Amended Indentures that purports to prohibit a homeowner from subdividing their lot. [Tr. 55 (Testimony of Plaintiff Tackes); Ex. JB-A(E-I)]. There is no provision included in the Original Indentures or Amended Indentures that expressly prohibits a subdivision lot owner who has subdivided his or her lot from building another residence on a subdivided lot. [Tr. 55-56 (Testimony of Plaintiff Tackes); Ex. JB-A(E-I)]

Procedural Background

1. The Pleadings

On August 21, 2014, following the City of Frontenac's subdivision of the Original Lot 6 into two separate lots, and approximately eighteen (18) months following 6 Clayton Terrace, LLC's purchase of the Property, Plaintiffs filed the underlying lawsuit. [LF 001].

On December 3, 2014, Plaintiffs filed their two count First Amended Verified Petition in which they sought declaratory and injunctive relief as follows:

A. Count I – Declaratory Judgment. Count I is directed solely against Huey. In Count I, Plaintiffs allege that Huey breached the Notice of Sale and Right of First Refusal Provision by failing to give all Subdivision lot owners fifteen (15) days written notice of the terms of the proposed sale of Original Lot 6. Plaintiffs further allege that in response to notice provided by Huey to the Schwartz's (the owners of one of the Subdivision lots), the Schwartz's exercised their right of first refusal under the Amended Indentures and made a written offer to purchase Lot 6, which was not accepted by Huey.[7]

B. Count II - Injunctive Relief. In Count II, citing the One Residence Per Lot Provision, Plaintiffs sought injunctive relief against 6 Clayton Terrace, LLC, to enjoin it from constructing an additional residence on any "subdivision" of Original Lot 6 or from selling any use, possessory, or ownership rights in Original Lot 6 or any "subdivision" thereof.[8]

C. Huey's Counterclaim. Huey filed a Counterclaim against Plaintiffs for Abuse of Process. In her Counterclaim, Huey alleged that Plaintiffs filed Count I of their First Amended Verified Petition, not due to any purported violation of the Notice of Sale

[7] The Court found in favor of Huey and against Plaintiffs on this Count.

[8] Although the Indentures do not in any way prohibit the subdivision of the Original Lot 6, or the construction of a residence on any newly subdivided lot, in the Judgment, the Court found in favor of Plaintiffs and against 6 Clayton Terrace, LLC on this Count.

and Right of First Provision, but rather for the sole and improper purpose of attempting to prevent 6 Clayton Terrace, LLC from constructing another residence on the Property.[9]

D. Affirmative Defenses. Huey and 6 Clayton Terrace, LLC each filed numerous affirmative defenses, including the affirmative defense that the One Residence Per Lot Provision and Notice of Sale and Right of First Refusal Provisions are invalid as a matter of law because neither provision was approved by the unanimous consent of the Subdivision homeowners. [L.F. 00100-00101 ¶M, 105-106 ¶14].

2. Motions for Summary Judgment

Each party filed Motions for Summary Judgment by September of 2015. Each of said Motions for Summary Judgment were extensively briefed, and argued before the Court in November of 2015. The Court, however, failed to rule on any of said Motions. [L.F. 001-0039].

3. Stipulation of Facts

On June 28, 2016, the parties filed their Stipulation of Facts. [L.F. 0035-0043].

4. 6 Clayton Terrace, LLC's Request for Findings of Facts and Conclusions of Law

Prior to the trial in this matter, on July 11, 2016, 6 Clayton Terrace, LLC filed a Request for Findings of Fact and Conclusions of Law in accordance with Supreme Court Rule 73.01 ("Requested Findings"). [L.F. 00398].

[9] The Court found in favor of Huey and against Plaintiffs on Huey's Counterclaim for Abuse of Process.

5. The Trial

This matter was tried before the Court and evidence was taken on July 11, 2016 and July 12, 2016. [Tr. 1-317][10].

6. The Judgment

The Court entered its Order and Judgment on December 21, 2016. [L.F. 00515] The Judgment provides in part as follows:

A. The Court entered Judgment in favor of Huey and against Plaintiffs on Count I of Plaintiffs' First Amended Petition for Declaratory Judgment.

B. The Court entered Judgment in favor of Plaintiff and against 6 Clayton Terrace, LLC, presumably on Count II, prohibiting 6 Clayton Terrace, LLC from directly or indirectly "constructing or causing to be constructed any additional residence, or subdivided in any manner, any portion of Lot 6." (sic).

[10] As will be further discussed herein, the trial transcript in this matter is incomplete, as the questions asked by the attorneys on the second day of trial were deemed "indiscernible" by the Official Transcription Vendor for the Office of the State Courts Administrator. However, it is the position of 6 Clayton Terrace, LLC that the determinative issues in this case are legal, as opposed to factual issues, and that given the Stipulated Facts, the testimony of Plaintiffs on day one of the trial and the exhibits admitted into evidence, this Court should reverse the Trial Court's Judgment as a matter of law.

C. The Court entered Judgment in favor of Plaintiffs and against 6 Clayton Terrace, LLC for Plaintiffs' costs and expenses, including attorney's fees, incurred during the pendency of the lawsuit, and further directed Plaintiffs to submit their fees and expenses to the Court.

D. The Court entered Judgment in favor of Huey and against Plaintiffs and 6 Clayton Terrace, LLC on Huey's Counterclaim for abuse of process in the sum of Sixty Thousand Dollars ($60,000.00) toward her reasonable attorney's fees. The Judgment assessed Twenty Thousand Dollars ($20,000.00) of said fees against Plaintiffs and Forty Thousand Dollars ($40,000.00) of said fees against 6 Clayton Terrace, LLC[11].

E. Plaintiffs' Affidavit for Fees

On December 27, 2016, as directed by the Judgment, Plaintiffs, by and through their counsel, Michael Clithero, submitted to the Court an Affidavit of Fees and Costs ("Plaintiffs' Affidavit"), which provided that Plaintiff had incurred $203,915.50 in attorney's fees and $5,277.06 in costs during the pendency of this lawsuit. [L.F. 00535]. Plaintiffs' Affidavit fails to distinguish between fees and costs incurred in their request for an injunction against Defendant 6 Clayton Terrace, LLC in Count II of the Petition from

[11] As will be discussed in greater detail hereinbelow, Huey asserted no claims in this lawsuit against 6 Clayton Terrace, LLC, and 6 Clayton Terrace, LLC asserted no claims against Huey, and therefore, the Court erred in ordering 6 Clayton Terrace, LLC to pay any portion of Huey's fees.

their prosecution of Count I against Huey, or in the defense of Huey's Counterclaim against Plaintiffs for abuse of process.

F. Judgment for Attorney's Fees and Costs

On December 30, 2016, on Judge Hood's final day in office, the trial Court entered its Attorney's Fees Judgment in which it found that the fees submitted by Plaintiffs were fair and reasonable and entered judgment in favor of Plaintiffs and against 6 Clayton Terrace, LLC in the amount of $209,192.56, the full amount of legal fees and costs incurred by Plaintiffs in this dispute through trial.[12] [L.F. 00535].

7. Motion for New Trial and/or to Correct Judgment

On January 20, 2017, 6 Clayton Terrace, LLC filed its Motion for New Trial and/or to Correct Judgment, which was heard by the Hon. Joseph Green on February 28, 2017. [L.F. 0050]. [13] The trial Court denied the Motion for New Trial. [L.F. 0050].

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[12] The trial Court entered the Attorney's Fees Judgment without any evidence as to which portion of Plaintiffs' fees and costs were incurred in connection with Count I, in which the Court found against Plaintiffs and in favor of Huey, or Huey's Counterclaim, in which the Court found that Plaintiffs abused the process of law by filing Count I. Similarly, Plaintiffs failed to provide any itemization concerning the particular services provided or the fees incurred in connection therewith.

[13] St. Louis County voters voted against retaining Judge Hood in the November, 2016 election, and following the entry of Judgement, this matter was assigned to the Hon. Joseph Green.

POINTS RELIED ON

I. **THE TRIAL COURT ERRED IN HOLDING THAT THE ONE RESIDENCE PER LOT PROVISION CONTAINED IN THE AMENDED INDENTURES IS VALID AND ENFORCEABLE AND IN ENTERING JUDGMENT ON COUNT II OF PLAINTIFFS' FIRST AMENDED PETITION AGAINST DEFENDANT 6 CLAYTON TERRACE, LLC BECAUSE SUCH HOLDING WAS AGAINST THE WEIGHT OF THE EVIDENCE AND CONSTITUTED A MISAPPLICATION OF THE LAW, AS THE ONE RESIDENCE PER LOT PROVISION WAS NEVER UNANIMOUSLY APPROVED BY THE LOT OWNERS IN THE SUBDIVISION.**

Bumm v. Olde Ivy Development, L.L.C., 142 S.W.3d 895 (Mo. App. S.D. 2004)

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

Jones v. Ladriere, 108 S.W.3d 736 (Mo. App. E.D. 2003)

Van Deusen v. Ruth, 125 S.W.2d 1 (Mo. 1938)

II. **THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON COUNT II OF PLAINTIFFS' FIRST AMENDED PETITION AGAINST DEFENDANT 6 CLAYTON TERRACE, LLC BECAUSE SUCH HOLDING MISAPPLIED THE LAW AND WAS AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT THE ONE RESIDENCE PER LOT PROVISION DOES NOT PROHIBIT THE SUBDIVISION OF THE PROPERTY OR THE CONSTRUCTION OF A RESIDENCE ON A SUBDIVIDED LOT.**

Blevins v. Barry-Lawrence County Ass'n For Retarded Citizens, 707 S.W.2d 407 (Mo. banc 1986)

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

Lake St. Louis Cmty. Ass'n v. Leidy, 672 S.W.2d 381 (Mo. App. 1984)

Wildflower Cmty. Ass'n, Inc. v. Rinderknecht, 25 S.W.3d 530 (Mo. App. 2000)

III. THE TRIAL COURT ERRED AND MISAPPLIED THE LAW IN ORDERING 6 CLAYTON TERRACE, LLC TO PAY PLAINTIFFS' ATTORNEY'S FEES, AS THERE EXISTS NO APPLICABLE CONTRACT, STATUTE, OR EXCEPTION UNDER THE AMERICAN RULE THAT WOULD PERMIT PLAINTIFFS TO RECOVER ATTORNEY'S FEES FROM 6 CLAYTON TERRACE, LLC.

David Ranken, Jr. Technical Inst. v. Boykins, 816 S.W.2d 189 (Mo. 1991)

Goines v. Mo. Dept. of Soc. Servs., Family Support & Children's Div., 364 S.W.3d 684 (Mo. App. W.D. 2012)

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

Washington Univ. v. Royal Crown Bottling Co., 801 S.W.2d 458 (Mo.App. E.D. 1990)

IV. THE TRIAL COURT ABUSED ITS DISCRETION AND/OR ERRED IN ORDERING 6 CLAYTON TERRACE, LLC TO PAY ALL OF PLAINTIFFS' ATTORNEY'S FEES AND COSTS INCURRED IN THIS DISPUTE, WITHOUT ANY APPORTIONMENT OF FEES PERTAINING TO COUNT II OF THE

PETITION, BECAUSE ONLY ONE CLAIM OF PLAINTIFFS' FIRST AMENDED PETITION WAS DIRECTED AT 6 CLAYTON TERRACE, LLC, AND BECAUSE THE TRIAL COURT FOUND PLAINTIFFS LIABLE WITH RESPECT TO HUEY'S COUNTERCLAIM FOR ABUSE OF PROCESS IN ASSERTING COUNT I OF THE PETITION.

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

V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF HUEY AND AGAINST 6 CLAYTON TERRACE, LLC ON HUEY'S COUNTERCLAIM FOR ABUSE OF PROCESS IN THAT THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AWARD AND IT ERRONEOUSLY DECLARED OR APPLIED THE LAW BECAUSE HUEY ASSERTED NO CLAIM AGAINST 6 CLAYTON TERRACE, LLC, AND 6 CLAYTON TERRACE LLC ASSERTED NO CLAIM AGAINST ANY PARTY.

Conduff v. Stone, 968 S.W.2d 200 (Mo.App. 1998)

Norman v. Wright, 100 S.W.3d 783 (Mo. 2003)

Schumacher v. Austin, 303 S.W.3d 170 (Mo. App. W.D. 2010)

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT THE ONE RESIDENCE PER LOT PROVISION CONTAINED IN THE AMENDED INDENTURES IS VALID AND ENFORCEABLE AND IN ENTERING JUDGMENT ON COUNT II OF PLAINTIFFS' FIRST AMENDED PETITION AGAINST DEFENDANT 6 CLAYTON TERRACE, LLC BECAUSE SUCH HOLDING WAS AGAINST THE WEIGHT OF THE EVIDENCE AND CONSTITUTED A MISAPPLICATION OF THE LAW, AS THE ONE RESIDENCE PER LOT PROVISION WAS NEVER UNANIMOUSLY APPROVED BY THE LOT OWNERS IN THE SUBDIVISION.

STANDARD OF REVIEW

On review of a court-tried case such as this, the Appellate Court will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). Furthermore, the Court reviews questions of law, including the interpretation and application of contracts, de novo. Meritt vs. Wachter, 428 S.W.3d 738, 742 (Mo.App. W.D. 2014).

The argument raised herein is preserved for appeal because the issues involve the determination as to the validity of a provision in the Amended Indentures, which this Court reviews de novo.

ARGUMENT

In this case the Trustees sought to enforce the One Residence Per Lot Provision and the Fifteen Day Notice and Right of First Refusal Provisions, both of which first appear and are contained in the Amended Indentures. In Paragraph 64 of its Judgment, the Trial Court states, "having determined that the indentures and revisions thereto are valid and enforceable, the court need consider whether the One Residence Per Lot Provision prohibits the subdivision of a lot and construction of a residence on the subdivided lot." [L.F. 00526]. The Trial Court's conclusion that the Amended Indentures are "valid and enforceable," however, is contrary to Missouri law, not supported by any evidence, and directly contradicts other express findings set forth in the Court's own Judgment.

The party seeking to enforce a restrictive covenant bears the burden of proving the extent and application of its restriction. Lake Arrowhead property Owners Association v. Bagwell, 100 S.W.3d 840, 844 (Mo.App. 2003). This burden necessarily entails some proof that the process by which the restrictions were adopted was valid. Id. In Lake Arrowhead Property Owners Association, an unincorporated property owner's association filed an action to enforce a subdivision's restrictive covenants against two alleged non-compliant property owners. The trial court entered judgment for the association ordering the homeowners to comply with the covenants. The Court of Appeals reversed the trial court's judgment, holding that the subdivision association failed to meet its burden of establishing that the restrictions were validly enacted because the association failed to establish that a quorum was present at the meeting at which the restrictions were allegedly

enacted. Id. See also e.g. Allison v. AgriBank, FCB, 949 S.W.2d 182 (Mo. App. S.D. 1997).

Since the Trustees in this case sought to enforce the One Residence Per Lot Provision, they bear the burden of establishing its validity. However, in an abundance of caution, 6 Clayton Terrace, LLC filed an affirmative defense alleging that the One Residence Per Lot Provision was invalid because it was not approved by the unanimous consent of the Subdivision. [L.F. 00105-00106, ¶14].

Missouri law dictates that a restrictive covenant may be amended at any time with the unanimous consent of all lot owners. Pearce v. Scarcello, 920 S.W.2d 643, 645 (Mo. App. W.D. 1996); Kauffman v. Roling, 851 S.W.2d 789, 792 (Mo. App. 1993). However, when a new restriction is adopted by fewer than one hundred percent of the owners, as happened in this case, different considerations apply. Bumm v. Olde Ivy Development, L.L.C., 142 S.W.3d 895, 903 (Mo. App. S.D. 2004). In such instance, the reviewing court must determine if the new restriction imposes a new or additional burden upon the affected property. Hazelbaker v. County of St. Charles, 235 S.W.3d 598, 602 (Mo. App. E.D. 2007). If so, the new restriction is invalid and unenforceable unless approved by a unanimous vote of all lot owners. Id. *See also*, Van Deusen v. Ruth, 125 S.W.2d 1 at 2-3 (Mo. 1938); Bumm v. Olde Ivy Development, supra; Jones v. Ladriere, 108 S.W. 3d 736 (Mo. App. 2003).

The Trial Court's Judgment properly found, and it is undisputed, that none of the Amended Indentures were voted on or approved by the unanimous consent of all of the then current lot owners of the Subdivision. [L.F. 00517 ¶9, Tr. 58 lines 3-8 (Testimony of

Tackes)] The Trial Court also properly found that the Notice of Sale and Right of First Refusal Provision was not part of the Original Indentures, but instead, originated in an amendment that was first imposed by the Subdivision by virtue of the Fourth Revised Indentures. [L.F. 00517-00518, ¶¶9, 13; JSF ¶¶16-18[14]]. The Trial Court further properly found that the adoption of the Notice of Sale and Right of First Refusal Provision constituted the imposition of a new burden on the land and the fee ownership thereof that was not part of the Original Plat or the Original Indentures. [L.F. 00518 ¶13[15]]. Based on this finding, the Court then properly determined that, under Missouri law, the Notice of Sale and Right of First Refusal Provision was invalid and unenforceable, stating, "**Under Missouri law, any amendment to a subdivision's indenture that attempts to impose a new restriction or burden on the ownership of the land not found in the original plat or indentures is void unless it is adopted and approved by the unanimous consent of all of the then current lot owners …**" (emphasis added). [L.F. 00527].

While the Court's Judgment correctly sets forth the proper factual and legal analysis in invalidating the Notice of Sale and Right of First Refusal Provision as lacking

[14] Although not mentioned in the Judgment, it is also undisputed that the One Residence Per Lot Provision was not included in the Original Indentures, but instead, originated in an amendment that originally appeared in the First Revised Indentures. [JSF ¶¶10-11].

[15] Despite a specific requested for a finding by 6 Clayton Terrace, LLC, the Trial Court failed to address in its Judgment whether the One Residence Per Lot Provision constituted an additional burden. [L.F.00398].

unanimous approval of lot owners, the Court inexplicably fails to apply the same analysis with respect to the One Residence Per Lot Provision, an amendment first imposed by the Subdivision in the First Revised Indentures, which also lacked unanimous lot-owner approval. In fact, despite a specific requested finding by 6 Clayton Terrace, LLC on this issue, the Court essentially ignores the lack of unanimous Subdivision approval and resulting invalidity of the One Residence Per Lot Provision, and, with no analysis or findings, simply concludes in Paragraph 64 of the Judgment that the One Residence Per Lot Provision is valid ("[h]aving determined that the Indentures and revisions thereto are valid and enforceable …"). [L.F. 00526]. In so doing, the Trial Court ignores that it invalidated the Notice of Sale and Right of First Refusal Provision as lacking unanimous lot-owner approval, set forth in the explicit finding that, **"[n]one of the Amended Indentures were voted on and approved by the unanimous consent of the then current lot owners of the Subdivision."** [L.F. 00517, ¶9]. The Trial Court likewise ignored the Parties' stipulated fact that, **"[t]he Original Indentures did not contain the One Residence Per Lot Restriction** " (emphasis added). [L.F. 00517, ¶9; JSF ¶11].

That the One Residence Per Lot Provision imposed a new burden on the Property cannot be legitimately disputed. In Hazelbaker, the Missouri Court of Appeals for the Eastern District examined a very similar case in which a homeowner's association attempted to amend its indentures to include a provision that stated, "[n]o Lot located within [the subdivision] … shall be split or subdivided…" (the "No Subdivision of Any Lot Restriction"). Hazelbaker, supra at 600. In Hazelbaker, a lot owner sought a declaratory judgment to invalidate the No Subdivision of Any Lot Restriction on the

grounds that such restriction constituted an unlawful amendment to the original indentures due to a lack of requisite unanimous approval by every lot owner in the subdivision. The trial court ruled in favor of the plaintiff lot owner, and declared invalid the No Subdivision of Any Lot Restriction amendment. The defendant homeowners' association appealed. Id. at 600.

The Court of Appeals affirmed the trial court's decision, holding that the new No Subdivision of Any Lot Restriction **constituted an additional burden to ownership** that did not exist prior to the amendment. (emphasis added) Hazelbaker, 235 S.W.3d at 602. The Court of Appeals held that, because a restriction that prohibited the subdivision of a lot amounted to an additional burden, such restriction required approval by a unanimous vote of all the lot owners rather than the simple majority relied on by the association. Id. at 603. In reaching its decision, the Appellate Court noted that while the indenture did permit the trustees 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).

In formulating its opinion, the Appellate Court analyzed and relied on a long line of Missouri case authorities pertaining to the amendment of restrictions, including Jones v. Ladriere, 108 S.W.3d 736 (Mo. App. E.D. 2003), wherein the Court of Appeals held that an indenture which specified that the indentures may be "altered, amended, changed, or revoked by a two-thirds majority", still required the **unanimous approval** by all lot owners for any amendment that imposed new or different burdens. Hazelbaker at 602; *citing* Jones,

Supra at 739 (emphasis added). (*See also* Van Deusen, Supra at 2, wherein the restrictions provided that restrictions could be "modified, amended, released, or extinguished" by a 75% majority vote; Bumm, Supra at 904, wherein the restrictions stated they could be "amended, repealed or added to . . . by the owners of a majority of the lots . . . "; and Harris v. Smith, 250 S.W.3d 804, 810 (Mo.App. 2008), wherein the restrictions stated that they could be "amended or terminated … by at least sixty percent (60%) of the total lot owners."

In each of these cases, the Court of Appeals held that because the amended restriction at issue placed an additional burden on the property, unanimous consent of the homeowners was required to amend the indentures. In this case, the Original Indentures state only that the Indentures can be, "amended or extended by two-thirds of the lot owners of this Subdivision …". [Ex. JT-1, (see last line of Original Indentures)]. As such, like the trustees in Jones, Hazelbaker and the cases cited therein, neither the Subdivision nor the Trustees of the Subdivision possess power or authority to add or impose a new or different burden on the properties within the Subdivision without securing the unanimous approval of the lot owners of the Subdivision.

The plain language of the Trial Court's Judgement, which declares 6 Clayton Terrace LLC is, "prohibited, directly or indirectly, from constructing or causing to be constructed any additional residence, or subdivided in any manner, any portion of Lot 6", clearly and unequivocally places an additional burden on Defendant 6 Clayton Terrace, LLC's property. Because such burden did not exist in the Original Indentures, its addition required the unanimous consent of each homeowner in the Subdivision, which never occurred. Therefore, the Court erred in failing to apply the identical analysis to the One

Residence Per Lot Provision that the Court correctly applied to the Notice of Sale and Right of First Refusal Provision, and should accordingly have required the Trial Court to declare the One Residence Per Lot Provision void and unenforceable.

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON COUNT II OF PLAINTIFFS' FIRST AMENDED PETITION AGAINST DEFENDANT 6 CLAYTON TERRACE, LLC BECAUSE SUCH HOLDING MISAPPLIED THE LAW AND WAS AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT THE ONE RESIDENCE PER LOT PROVISION DOES NOT PROHIBIT THE SUBDIVISION OF THE PROPERTY OR THE CONSTRUCTION OF A RESIDENCE ON A SUBDIVIDED LOT.

STANDARD OF REVIEW

On review of a court-tried case such as this, the Appellate Court will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). Furthermore, the Court reviews questions of law, including the interpretation and application of contracts, de novo. Meritt vs. Wachter, 428 S.W.3d 738, 742 (Mo.App. W.D. 2014).

The argument raised here is preserved for appeal because the issues involve the interpretation of subdivision indentures, which this Court reviews de novo.

ARGUMENT

Assuming arguendo that the One Residence Per Lot Provision is valid, which it is not, the Trial Court violated well-recognized rules of contractual construction by broadly interpreting the One Residence Per Lot Provision to imply a restriction on use not explicitly set forth in the plain language of such provision. The Court's Judgment provides in part, "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, in favor of Plaintiff and against 6 Clayton Terrace, LLC, as Defendants are prohibited, directly or indirectly, from construction or causing to be constructed any additional residence, or subdivided in any manner, any portion of Lot 6." (sic) [L.F. 19]. As an initial matter, this portion of the Judgment suffers from fatal vagueness and ambiguity, including because "Lot 6" has not existed since the City of Frontenac replatted the Original Lot 6 in August of 2014. More critically, the Court's Judgment improperly expands the meaning and/or interpretation of the One Residence Per Lot Provision in a manner prohibited by Missouri law.

It is well settled that restrictive covenants are read pursuant to the same rules of construction applicable to any covenant or contract. Wildflower Cmty. Ass'n, Inc. v. Rinderknecht, 25 S.W.3d 530, 534 (Mo. App. 2000). As such, the terms in a restriction are given their ordinary and popular meaning, and, if the language is plain, no construction is necessary. Lake St. Louis Cmty. Ass'n v. Leidy, 672 S.W.2d 381, 382 (Mo. App. 1984). Also, because Missouri favors the free and untrammeled use of real property, restrictive covenants are strictly construed and may not "*be extended by implication*" beyond their plain language. Id. (emphasis added). As such, when reviewing restrictive covenants, "*any reasonable doubt will be resolved in favor of the free use of land.*" Id. *see also*, Blevins v.

Barry-Lawrence County Ass'n For Retarded Citizens, 707 S.W.2d 407, 408 (Mo. banc 1986) (any doubt regarding the meaning of the terms of a restrictive covenant is resolved in favor of the free use of property).

The One Residence Per Lot Provision forms the sole basis of Plaintiffs' claim for an injunction in Count II, to prohibit 6 Clayton Terrace, LLC from constructing a residence on the undeveloped subdivided lot. [L.F. 0040-0049, ¶¶14, 35-36]. In its Judgment, the Trial Court accurately acknowledges that, "[n]o version of the subdivision indentures specifically prohibits 'subdivision' of lots." [L.F. 0012 ¶64]. With this acknowledgement, the Court's analysis should have been complete, since the plain language of the Amended Indentures do not, in any manner, prohibit the subdivision of lots. Lake St. Louis Cmty. Ass'n., Supra. Since there is no restriction prohibiting the subdivision of a lot, once the Original Lot 6 was subdivided into two lots, the plain language of the One Residence Per Lot Provision should enable 6 Clayton Terrace, LLC to construct a residence on Lot 6A in addition to the residence which currently exists on Lot 6B. However, the Trial Court bizarrely concludes that property uses may be prohibited if such uses are not expressly permitted in indentures: ("[e]qually compelling, however, is that no provision of the subdivision indentures allow the subdivision of lots. Accordingly, the Court looks to the four corners of the document for guidance."). [L.F. 00526 ¶64.].[16]

[16] Indentures are also commonly referred to as "restrictions". The parties' Joint Stipulation of Facts acknowledge this in paragraph 6. The Fifth Amended Indentures, which is the most recent and current version of the Subdivision Indentures is identified

Based on this flawed analysis, the Trial Court applies its own expansive interpretation to the Fifth Revised Indentures provision that provides, "if more than one lot owner elects to purchase said lot, then all lot owners electing to purchase said lot shall do so on a pro rata basis…" (the "Pro Rata Basis Provision") in order to declare an implied restriction against the subdivision of existing lots. [L.F. 00526 ¶64]. Specifically, the Trial Court concludes that the Pro Rata Basis Provision, "indicates a preference for ownership of undivided lots as opposed to division of the lots to separate owners." [L.F. 00526 ¶64]. In so doing, the Court erred. First, the Pro Rata Basis Provision does not indicate a preference, one way or the other, for ownership of undivided lots, and certainly does not expressly prohibit the subdivision of existing lots. Second, and shockingly, the Pro Rata Basis Provision, upon which the Court relies, is set forth in the Notice of Sale and Right of First Refusal Provision, which the Court, in its Judgment previously declared "invalid and unenforceable" [L.F. 00527, Ex. JB-A(G)].

In Hazelbaker, supra, the Court of Appeals ruled against a subdivision which raised the identical argument as the Trustees in this case as to the division of a single lot. In Hazelbaker, as in this case, the restrictions of the Highland Trails subdivision lacked any express restriction on the division of any lot located within the subdivision, but limited improvements to a single residential structure per lot. Id. at 600. Thus, when a

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as, "Agreement Amending, Extending and Restating **Restrictions**…" [Ex. JB-A(G)]. Restrictions are defined as, "A limitation, often imposed in a deed or lease respecting the use to which the property may be put." Black's Law Dictionary.

lot owner subdivided a lot located within the Highland Trails subdivision, the Court of Appeals held that: "[t]he Restrictions contain no implicit limitation on the subdivision of Lots. The act of subdividing Lots can just as easily be seen as creating two new Lots from one, and the limitation of one residence on each of those Lots may still be followed to the letter." Id. at 601.

The Hazelbaker rationale applies in this case. The Amended Restrictions do not expressly or even implicitly prohibit the subdivision of any lot located in the Subdivision, but instead only restrict the improvement of each lot to "one residence". [Ex. JB-A(G) ¶4]. The Amended Restrictions in this case, moreover, do not define the term "lot" and do not even limit the number of lots that can be contained within the Subdivision. In short, there is simply no basis to support the Trial Court's conclusion that the Restrictions even implicitly restricts the division of lots.

Moreover, the Trial Court also ignores an abundance of undisputed evidence that the various lots in the Subdivision had previously been altered, amended and modified on numerous occasions. [Tr. 18-21. 23-25, 64-67; Ex. JT-1, 30, 100]. Ignoring this evidence of a history of lot alteration, the Trial Court concludes paragraph 64 of the Judgment by stating that, "[t]his Court is unable to locate any provisions in the indentures providing for subdivision of lots under any circumstances." [L.F. 00526 ¶64]. Based on this erroneous analysis and conclusion that the Fifth Amended Restrictions implicitly prohibit the division of lots, the Trial Court entered judgment in favor of Plaintiffs and against Defendant 6 Clayton Terrace, LLC, ordering that 6 Clayton Terrace, LLC is "prohibited, directly or indirectly, from constructing or causing to be constructed any additional residence, or

subdivided in any manner, any portion of lot 6." [L.F. 00533]. Unsurprisingly, the Trial Court cites no authority for its expansive reinterpretation of long established Missouri law requiring the narrow construction and interpretation of indentures.

The rationale for the Court's Judgment is not only unsupported, but is also untenable in the context of real property law. Logically extended, if, for example, if a set of indentures does not specifically permit a property owner to build a fence, to construct a driveway or even to sell the property, then, under the Court's flawed reasoning, such owner would be prohibited from doing so. Any such suggestion would be patently absurd and fatally flawed, thus illustrating the error of the Trial Court's reasoning. In short, in broadly construing the Amended Restrictions to bar the subdivision of lots, and prohibit the construction of homes on newly subdivided lots, the Trial Court intentionally created and enforced a restriction on use not explicitly set forth in the Amended Restrictions. In so doing, the Court erred.

III. THE TRIAL COURT ERRED AND MISAPPLIED THE LAW IN ORDERING 6 CLAYTON TERRACE, LLC TO PAY PLAINTIFFS' ATTORNEY'S FEES, AS THERE EXISTS NO APPLICABLE CONTRACT, STATUTE, OR EXCEPTION UNDER THE AMERICAN RULE THAT WOULD PERMIT PLAINTIFFS TO RECOVER ATTORNEY'S FEES FROM 6 CLAYTON TERRACE, LLC.

STANDARD OF REVIEW

On review of a court-tried case such as this, the Appellate Court will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). Furthermore, the Court reviews questions of law, including the interpretation and application of contracts, de novo. Meritt vs. Wachter, 428 S.W.3d 738, 742 (Mo.App. W.D. 2014). With respect to an attorney's fee award, it is well settled in Missouri that the trial court is considered an expert on attorney fees and may award attorney fees as a matter of law. State ex rel. Chase Resorts, Inc. v. Campbell, 913 S.W.2d 832, 835 (Mo. App. 1995). The appellate court will only reverse the trial court's award of attorneys' fees upon the showing of an abuse of discretion. Aubuchon v. Hale, 453 S.W.3d 318, 325 (Mo. App. E.D. 2014). To demonstrate an abuse of discretion, the complaining party must prove that the award is clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice. Id. However, where a Court

lacks authority to award fees, its decision to do so is not entitled to discretion. Washington Univ. v. Royal Crown Bottling Co., 801 S.W.2d 458, 468-9 (Mo.App. E.D. 1990).

The argument raised herein is preserved for appeal because the issue involves the Trial Court's lack of authority to make an award of fees, which this Court reviews de novo.

ARGUMENT

Missouri adheres to the "American Rule", which provides that, with very few narrow exceptions, absent statutory authorization or contractual agreement, each litigant must bear the expense of his or her own attorney's fees. David Ranken, Jr. Technical Inst. v. Boykins, 816 S.W.2d 189, 193 (Mo. 1991); Washington Univ., 801 S.W.2d at 468 (Mo.App. E.D. 1990). As set forth above, the Trial Court erred in several respects in entering judgment in Plaintiffs' favor and against 6 Clayton Terrace, LLC with respect to Count II of the First Amended Petition. On this basis alone, the Court should set aside the award of attorney's fees against 6 Clayton Terrace, LLC. Even assuming arguendo that Count II was properly decided against 6 Clayton Terrace, LLC and in Plaintiffs' favor, however, the Court's award of attorney's fees in Plaintiffs' favor would still constitute error and/or an abuse of discretion as there exists no basis recognized under Missouri law that could support or authorize such award.

Plaintiffs herein make no allegation that any contract permits the recovery of attorney's fees in their favor against 6 Clayton Terrace, LLC, nor is there any allegation

that any statute would authorize a fee recovery against 6 Clayton Terrace, LLC.[17] As such, for Plaintiffs to recover attorney's fees, Plaintiffs' claims must fall within one of the extremely narrow and limited exceptions to the American Rule recognized under Missouri law. Because, as set forth below, no such exception to the American Rule applies to Plaintiffs' claims in this case, the Court erred and/or abused its discretion in awarding Plaintiffs their attorney's fees and costs.

Missouri courts have, on **rare occasion**, permitted certain extremely narrow exceptions to the American Rule where: (1) very unusual circumstances exist so it may be said equity demands a "balancing of benefits"; (2) the fees result from an individual being involved in collateral litigation; or (3) in special circumstances, a party's conduct is frivolous, without substantial legal grounds, reckless, or punitive. Goines v. Mo. Dept. of Soc. Servs., Family Support & Children's Div., 364 S.W.3d 684, 688 (Mo. App. W.D. 2012). (emphasis added) In this case, Plaintiffs do not allege or claim that Plaintiffs were involved in any collateral litigation, and therefore, the second exception to the American Rule is irrelevant. And, as set forth below, neither of the remaining two exceptions have any applicability to the facts or claims of this case.

[17] While Count I of Plaintiff's Petition sought declaratory relief against Huey, Plaintiffs made no claim against 6 Clayton Terrace, LLC under Section 527.010 RSMo. or Mo. Sup. Ct. R. 87.09, and it is therefore axiomatic that neither such statute nor such rule can form the basis for an award of attorney's fees against 6 Clayton Terrace, LLC.

A. Plaintiffs' Claims against 6 Clayton Terrace, LLC do not relate to a "common fund" such to permit a fee award to 'balance the benefits' on equitable grounds.

Under Missouri law, the equitable 'balancing of benefits' exception to the 'American Rule' is not appropriate simply because a case involves an equitable claim. Instead, the 'balancing of benefits' exception is limited to equitable claims involving a 'common fund'. *See* Goines, 364 S.W.3d at 689. As such, the 'balancing of the benefits' exception is intended to "apportion the costs of the litigation among those benefitting from it". Id. "Under this equitable theory, the attorney's fees are shared between the litigants benefitting from the suit." Id. *quoting* Gerkin v. Sherman, 351 S.W.3d 1, 13 (Mo. App. W.D. 2011). Because Plaintiffs and 6 Clayton Terrace, LLC were adverse parties from the outset of this dispute, and did not share rights to a 'common fund' there exists no basis that would permit the Court to 'balance' the equities by requiring 6 Clayton Terrace, LLC to pay Plaintiffs' fees and costs in accordance with the American Rule. Moreover, this exception apportions the attorney's fees amongst the parties that benefit from the litigation. Clearly, Defendant 6 Clayton Terrace, LLC did not benefit from any portion of the Judgment.

In its Judgment, the Court cites Klinkerfuss v. Cronin, 289 S.W.3d 607, 614 (Mo.App. E.D. 2009) in support of its award of fees to Huey. The Court, likewise cites Klinkerfuss, Id., in its Attorney's Fees Judgment in support of its award of fees to Plaintiffs. Klinkerfuss, would not support the Court's award of fees to Plaintiffs. In Klinkerfuss, a trust dispute, the court ordered an award of attorney's fees against a losing plaintiff/trust beneficiary to "place the trust's innocent beneficiary more nearly in the position that she

would have enjoyed but for this vexatious [litigation]". The Court in Klinkerfuss noted that a statutory provision, Section 456.10-1004 of the Missouri Uniform Trust Code, specifically authorized the award of attorney's fees, thus removing the case from the 'American Rule' with respect to fees.[18] Id. at 617. No such statute authorizing a fee award is present in the immediate case.

Klinkerfuss, unlike the immediate case, moreover, involved a "common fund", in the form of a Trust, which suffered substantial depletion as a result of the plaintiff's vexatious litigation. As such, the Klinkerfuss court made its fee award to equitably apportion the cost of the litigation to the losing party to protect the innocent trust beneficiary, who had rights in the "common fund", i.e., the trust assets. Id. The immediate case involves no such "common fund" jointly owned by Plaintiffs and 6 Clayton Terrace, LLC that could support the application of the "balancing of benefits" exception to the American Rule. In short, even if the Trial Court relied upon Klinkerfuss in this case to support its attorney's fee award in Plaintiffs' favor, such reliance is wholly misplaced.

[18] "In a judicial proceeding **involving the administration of a trust**, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." Section 456.10-100 (emphasis added).

B. There exist no 'special circumstances' that would permit an award of fees in Plaintiffs' favor.

The final remaining rare exception to the American Rule, the existence of 'special circumstances' such to justify a fee award, is likewise inapplicable to this case. Missouri courts have held that this exception is applicable only "on rare occasions" and/or under "very unusual circumstances", typically in the context of a declaratory judgment claim under §527.100. *See*, Ranken, 816 S.W.2d at 193; Washington Univ., 801 S.W.2d at 469. As noted by the Missouri Supreme Court in Ranken, "[s]uch fees have been denied in cases of an improper tax assessment [Aschworth v. Schneider, 667 S.W.2d 16, 17 (Mo. App. 1984), when a defendant tendered a check on insufficient funds with an intent to defraud [Tanner v. Gash, 583 S.W.2d 269, 271 (Mo. App. 1979)], when defendants tortiously conspired and threatened to wrongfully foreclose on notes and deeds of trust [Wilner v. O'Donnell, 637 S.W.2d 757, 762 (Mo. App. 1982)], and when defendants fraudulently concealed the existence of an outstanding deed of trust on a house [Osterberger v. Hites Const. Co., 599 S.W.2d 221, 230 (Mo. App. 1980)]. Id. at 193.

There exists no allegation or record evidence that 6 Clayton Terrace, LLC committed any act or conduct that could be construed as "frivolous, without substantial legal grounds, reckless, or punitive" or that demonstrate that this lawsuit somehow constitutes a "rare occasion" or includes "very unusual circumstances" that could support an attorney's fee award. First, Plaintiffs' First Amended Petition lacks any allegation that 6 Clayton Terrace, LLC acted recklessly, punitively and/or maliciously. Instead, 6 Clayton Terrace, LLC simply purchased the Property, and later subdivided the Property, through

the appropriate legal process and with governmental approval from the City of Frontenac. [Ex. T-2]. At no time did 6 Clayton Terrace, LLC initiate construction of a new residence, and Plaintiffs never sought a temporary restraining order or preliminary injunction to prohibit such construction. Nor was there any evidence presented at trial, or even after trial, that 6 Clayton Terrace, LLC somehow acted frivolously, punitively or recklessly during the course of the litigation.

The Judgment contains only a single paragraph that could possibly relate to 6 Clayton Terrace, LLC's conduct in this matter:

"35. This Court further finds that 6 Clayton Terrace, LLC acted in bad faith in concealing their intentions and attempts to subdivide the Property and finds that it is not entitled to benefit of (sic) equitable defenses." [L.F. 00521, ¶35].

In making the above finding, the Court fails to refer to any record evidence that could lead it to the conclusion that 6 Clayton Terrace, LLC acted in "bad faith", nor is there any basis to support the proposition that 6 Clayton Terrace, LLC even had a duty or obligation to disclose its intent to subdivide the Property, or as to any future development plans. None of the factual findings entered by the Court support this conclusion. Moreover, the record is clear that Plaintiffs were fully aware of 6 Clayton Terrace, LLC's intent to subdivide the Property. First, the Trial Court found in its Judgment that Plaintiff/Trustees Cathy Stahr and Rick Francis, "were made aware of the plan to subdivide within ten (10) days of the closing …", which was approximately fourteen (14) months prior to 6 Clayton Terrace, LLC's application to subdivide the Property. [Judgment, ¶41; Ex. JM-Aff. (COF 27)]. Second, homeowners in the Subdivision, including Plaintiff

Tackes, appeared at a public hearing in June of 2014 to voice their objections to 6 Clayton Terrace, LLC's application. [Ex. JM-Aff. (COF 3-13)]. Indeed, Plaintiffs' Petition lacks any allegation that could even be loosely construed as amounting to bad faith conduct on 6 Clayton Terrace, LLC's part.

To the extent the Court's Judgment implies that 6 Clayton Terrace, LLC had some affirmative duty to disclose its intent to subdivide the Property at the time of Contract, rather than through the public municipal process, the Court erred. Neither Missouri law nor the Subdivision Indentures impose such duty, nor could the Court impose such duty without substantially disrupting existing law pertaining to the ownership of real property in Missouri. In short, there is no basis in law or fact to support the Court's award of attorney's fees in Plaintiffs' favor on the grounds of "special circumstances".

Ironically, the Court expressly found that Plaintiffs, not 6 Clayton Terrace, LLC, acted inappropriately and unjustly in this case, as evidenced by the Court's grant of judgment in Huey's favor, against Plaintiffs, with respect to Huey's Counterclaim for abuse of process. Specifically, the Court found that the Plaintiffs' claims in Count I to set aside the sale of the Property "were simply an improper attempt to coerce [6 Clayton Terrace, LLC] into stopping or withdrawing its request to subdivide the Property by placing its title to the Property at risk". [L.F. 00519, ¶18]. That the Court would then require 6 Clayton Terrace, LLC to pay Plaintiffs' legal fees incurred in connection with Count I of the Petition, as well as fees incurred by Plaintiffs in connection with Huey's successful Counterclaim against Plaintiffs, is a shocking and absurd miscarriage of justice that

requires a remedy. In short, the Court erred and abused its discretion in awarding Plaintiffs' their attorney's fees and costs, and such award should be overturned.

IV. THE TRIAL COURT ABUSED ITS DISCRETION AND/OR ERRED IN ORDERING 6 CLAYTON TERRACE, LLC TO PAY ALL OF PLAINTIFFS' ATTORNEY'S FEES AND COSTS INCURRED IN THIS DISPUTE, WITHOUT ANY APPORTIONMENT OF FEES PERTAINING TO COUNT II OF THE PETITION, BECAUSE ONLY ONE CLAIM OF PLAINTIFFS' FIRST AMENDED PETITION WAS DIRECTED AT 6 CLAYTON TERRACE, LLC, AND BECAUSE THE TRIAL COURT FOUND PLAINTIFFS LIABLE WITH RESPECT TO HUEY'S COUNTERCLAIM FOR ABUSE OF PROCESS IN ASSERTING COUNT I OF THE PETITION.

STANDARD OF REVIEW

On review of a court-tried case such as this, the Appellate Court will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). Furthermore, the Court reviews questions of law, including the interpretation and application of contracts, de novo. Meritt vs. Wachter, 428 S.W.3d 738, 742 (Mo.App. W.D. 2014). With respect to an attorney's fee award, it is well settled in Missouri that the trial court is considered an expert on attorney fees and may award attorney fees as a matter of law. State ex rel. Chase Resorts, Inc. v. Campbell, 913 S.W.2d

832, 835 (Mo. App. 1995). The appellate court will only reverse the trial court's award of attorneys' fees upon the showing of an abuse of discretion. Aubuchon v. Hale, 453 S.W.3d 318, 325 (Mo. App. E.D. 2014). To demonstrate an abuse of discretion, the complaining party must prove that the award is clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice. Id.

ARGUMENT

In support of their request for fees and costs, and pursuant to the Judgment, Plaintiffs submitted an affidavit from their counsel ("Plaintiffs' Affidavit"), which asserted that Plaintiffs had incurred $203,915.50 in attorney's fees and $5,277.06 in costs during the pendency of this lawsuit. [L.F. 00535-00538]. The Trial Court awarded all of such fees and costs to Plaintiffs.

Assuming arguendo that the Trial Court possessed the authority to award Plaintiffs their attorney's fees, which it did not, the Court's order awarding Plaintiffs' all of their fees and costs against 6 Clayton Terrace, LLC would still constitute an abuse of discretion warranting reversal, as a significant portion of such fees, and costs, at the very least, were incurred litigating and defending claims against Huey, not 6 Clayton Terrace, LLC.

Plaintiffs' Affidavit states that Exhibit 1, attached to the Affidavit is, "a summary of each monthly invoice submitted by Lathrop & Gage, LLP to the Trustees of Clayton Terrace Subdivision relating to the claims in the current lawsuit." [L.F. 00536, ¶7]. The Affidavit further provides that all of the services performed and costs incurred were actually and necessarily performed, "related to the claims in the lawsuit." [L.F. 00536, ¶8]. Finally, the Affidavit states that the "total amount of attorney's fees and costs billed to the

Trustees of Clayton Terrace Subdivision by Lathrop & Gage, LLP relating to the claims in the lawsuit [through] the date of this Affidavit is $209,192.56." [L.F. 00536, ¶9].

Plaintiffs' Affidavit fails to distinguish between fees and costs incurred in connection with their prosecution of Count I, or the defense of Huey's Counterclaim against Plaintiffs for abuse of process on Count I, and fees allegedly incurred in connection with Count II of the Petition, directed at 6 Clayton Terrace, LLC. [L.F. 00535-00538]**.** Nor does such affidavit provide any copies of billing statements or descriptions of the precise services rendered by counsel, or even the amount of time billed for individual tasks. [L.F. 00535-00538]**.**

Despite the complete lack of detail, on December 30, 2016, on Judge Hood's final day in office, the Court entered its second Order and Judgment in which it found that the fees submitted by Plaintiffs were fair and reasonable and entered judgment in favor of Plaintiffs and against 6 Clayton Terrace, LLC for fees and costs in the amount of $209,192.56, which is the total amount of fees and costs incurred by Plaintiffs in this lawsuit. [L.F. 00539] The Court's order was entered without any evidence as to which portion of Plaintiffs' fees and costs were incurred in connection with Count I, which the Court found against Plaintiffs and in favor of Huey, or Huey's Counterclaim in which the Court found that Plaintiffs abused the process of law by filing said claim. [L.F. 00533].

The Trial Court's award of Plaintiffs' fees in this case is "clearly against the logic of the circumstances and [is] so arbitrary and unreasonable as to shock one's sense of justice" thereby warranting reversal. In failing to apportion fees between Counts I and II of the Petition, and the Counterclaim, the Trial Court essentially awarded Plaintiffs fees on a claim

the Court found amounted to an abuse of process in entering judgment in Huey's favor on the Counterclaim, thereby rewarding Plaintiffs for tortious conduct. The Court did so, moreover, without taking any evidence as to how such fees were incurred, and without providing any rationale that could support such a seemingly unorthodox and punitive ruling. As Huey points out in her Appellant's Brief, it is important to recognize that the Trial Court expressly found and determined that Ms. Huey's damages were the direct and proximate result of the Trustees' unlawful actions with respect to Plaintiffs' assertion of its declaratory claim in Count I. [L.F. 00526, 00532-00533]. In short, though the Trial Court possessed broad discretion to award attorney's fees, under the facts and circumstances of this case, there can be no legitimate dispute that the Court grossly exceeded its authority and abused its discretion, thereby warranting reversal.

V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF HUEY AND AGAINST 6 CLAYTON TERRACE, LLC ON HUEY'S COUNTERCLAIM FOR ABUSE OF PROCESS IN THAT THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AWARD AND IT ERRONEOUSLY DECLARED OR APPLIED THE LAW BECAUSE HUEY ASSERTED NO CLAIM AGAINST 6 CLAYTON TERRACE, LLC, AND 6 CLATYON TERRACE, LLC ASSERTED NO CLAIM AGAINST ANY PARTY.

STANDARD OF REVIEW

On review of a court-tried case such as this, the Appellate Court will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). Furthermore, the Court reviews questions of law, including the interpretation and application of contracts, de novo. Meritt vs. Wachter, 428 S.W.3d 738, 742 (Mo.App. W.D. 2014).

The arguments raised herein are preserved for appeal because the issues preserved involve questions of law, which this Court reviews de novo.

ARGUMENT

The purpose of a petition "is to limit and define the issues to be tried and to put the adversary on notice thereof." Schumacher v. Austin, 303 S.W.3d 170, 174 (Mo. App. W.D. 2010) *citing* Allen Quarries, Inc. v. Auge, 244 S.W.3d 781, 783 (Mo.App. S.D. 2008). The relief awarded in a judgment is limited to that sought by the pleadings. Brown v. Wilson, 155 S.W.2d 176, 180 (Mo. banc 1941); Sveum v. J. Mess Plumbing, Inc., 965 S.W.2d 924,

927 (Mo. App. 1998); Norman v. Wright, 100 S.W.3d 783, 786 (Mo. 2003). To the extent that a judgment is based upon issues not raised in the pleadings, it is void. Schumacher, Supra.

Rule 55.33(b) provides that unpleaded issues tried by "implied consent" are treated as if they had been pleaded. City of St. Joseph v. St. Joseph Riverboat Partners, 141 S.W.3d 513, 516 (Mo.App. 2004). "To fairly say a party implicitly consented to try a new issue, such evidence should warn that a new issue is being injected. Thus, the evidence in question cannot be relevant to any other issue before the Court; it must bear solely on the new issue." Id. It is the burden of the party contending that an issue is tried by implied consent to demonstrate that was so. Conduff v. Stone, 968 S.W.2d 200, 205 (Mo.App. 1998).

Defendant Huey filed her Counterclaim against Plaintiffs for abuse of process. Huey never asserted any claim against 6 Clayton Terrace, LLC, nor did Huey ever request any relief of any kind against 6 Clayton Terrace, LLC, in the pleadings or otherwise. Huey concedes in her Appellate Brief that at no time during the trial of this matter did Huey ever seek relief against Defendant, 6 Clayton Terrace, LLC (*See* Appellant Huey's Appellate Brief Point Relied On II). Moreover, Plaintiffs never asserted anything in their pleadings alleging that Defendant 6 Clayton Terrace, LLC should in any way be liable on Huey's Counterclaim. However, inexplicably, in its Judgment on Huey's Counterclaim, the Trial Court entered Judgement, "in favor of Huey, in her capacity as Trustee of the Jane R. Huey Lifetime Trust Agreement, and against Plaintiff **and 6 Clayton Terrace, LLC** on her Counterclaim for Abuse of Process in the sum of $60,000 toward her reasonable attorney

fees with Plaintiff due and owing $20,000 toward her reasonable attorney fees and **Defendant 6 Clayton Terrace, LLC due and owing $40,000** toward her reasonable attorney fees." (Emphasis added). [L.F. 00533]. In doing so, the Court entered extensive findings in its Judgment in support of its imposition of liability against Plaintiffs, including the following:

> It is therefore the conclusion of the Court that the Plaintiffs/Trustees' claims seeking to set aside the sale of the Property were simply an improper attempt to coerce [6 Clayton Terrace, LLC] into stopping or withdrawing its request to subdivide the Property by placing its title to the Property at risk. By pretextually filing suit against Ms. Huey and the Trust, the Plaintiff/Trustees hoped to create sufficient concern on the part of [6 Clayton Terrace, LLC] that it might lose ownership of the Property that it would "*back[] down*" and "*… not build on the land*". The naming of Ms. Huey as a party defendant to this case in furtherance of that tact constitutes an unlawful end, and seeks to compel a collateral act or result that is neither warranted nor authorized under Missouri law. Equally troubling is the Plaintiff/Trustees' prayer for relief asking this Court to exercise its authority and Order the Property be offered to Mrs. Schwartz when it is undisputed that she does not want the Property and informed the Plaintiff/Trustees of that fact prior to the filing of this lawsuit. Ms.

> Huey and the Trust have been directly and proximately damaged by the Plaintiff/Trustees' actions in the form of attorneys' fees and costs in the amount of $119,243.99. [Judgment, Findings of Facts Section G, Conclusions of Law Section C].

The Court made no findings such to implicate 6 Clayton Terrace, LLC in relation to Huey's Counterclaim. The Judgment is entirely devoid of any findings or analysis that could in any way support a judgment against Defendant 6 Clayton Terrace, LLC on Huey's Counterclaim. However, without explanation and despite the lack of any pleaded or implied claim, the Court in its Judgement allocates $20,000 of Huey's $60,000 total damages against Plaintiffs, and imposes the remaining $40,000 against 6 Clayton Terrace, LLC. [L.F. 00533].

Even if the pleadings in this case had included claims against 6 Clayton Terrace, LLC for abuse of process, which they did not, no evidence that could support such hypothetical claim was presented at trial. As correctly noted by the Trial Court in its Judgment, in order to prevail on a claim for abuse of process, there must be "an illegal, improper or perverted use of duly issued legal process that is not warranted or authorized." [L.F. 00531]. 6 Clayton Terrace, LLC has not brought any claim in this matter, let alone any claim against Huey, and instituted no legal process against Huey. As such, there exists no basis whatsoever to impose any judgment against 6 Clayton Terrace, LLC for abuse of process. The Court's award against 6 Clayton Terrace is beyond the scope of the pleadings, erroneously declares the law, is clearly against the logic of the circumstances and so

arbitrary and unreasonable as to shock one's sense of justice. Accordingly the Trial Court erred.

CONCLUSION AND REQUEST FOR REVERSAL, REMAND AND ENTRY OF JUDGMENT

While the record in this case contains only a discernable trial transcript from the first day of a two day trial, the Judgment against Appellant, 6 Clayton Terrace, LLC, should be reversed in all aspects as a matter of law based on the existing record before this Court.

As extensively set forth in this Brief, the One Residence Per Lot Provision is void and unenforceable because it purportedly created an additional burden on each property located in the Subdivision, but was not approved by a unanimous vote of all lot owners as required under Missouri law. The fact that the One Residence Per Lot Provision initially appeared in the Amended Indentures, which were never approved by the unanimous consent of all of the Subdivision lot owners, was not only specifically found by the Trial Court, but more importantly, was also stipulated to and/or admitted by the Plaintiffs. The fact that the One Residence Per Lot Provision created an additional burden on the Property is axiomatic and cannot be legitimately disputed, and this Court therefore requires no record evidence to make its own determination as to this issue. The Judgment against 6 Clayton Terrace, LLC on Count II of the Trustees' First Amended Petition should therefore be reversed, and the One Residence Per Lot Provision should be declared void and unenforceable by this Court.

Second, even if this Court does not determine that the One Residence Per Lot Provision is void and unenforceable, or concludes that the existing record is insufficient to

make such a determination, the Judgment against Appellant, 6 Clayton Terrace, LLC, in Count II should still be reversed on a separate and distinct basis. Specifically, because neither the Original Indentures nor the Amended Indentures contain any provision that prohibits a homeowner from subdividing his or her lot, the Trial Court erred in finding the contrary. Once subdivided, moreover, there is no provision in the Original Indentures or Amended Indentures that would prohibit the construction of a residence on each of the subdivided lots, and as such, the Trial Court erred in finding same.

In the event that this Court determines that the One Residence Per Lot Provision is void and unenforceable, or alternatively, finds that the Restrictions do not prohibit the subdivision of a lot and subsequent construction of a residence on such newly subdivided lot, the Judgment with respect to Count II will be reversed. In the event of a reversal on Count II of the Judgment, there will likewise exist no basis for the Trial Court's award of fees and costs in the Trustees' favor and against this Appellant.

Even if this Court declines to reverse the Trial Court's Judgment with respect to Count II, however, the Trial Court's award of attorney's fees in favor of the Trustees and against Appellant, 6 Clayton Terrace, LLC should still be reversed on the grounds that such award is contrary to the American Rule, with no applicable exception to such Rule.

Also as a matter of law, the Trial Court's award of attorney's fees in favor of Huey and against Appellant, 6 Clayton Terrace, LLC, on a claim for abuse of process not directed against 6 Clayton Terrace, LLC, constitutes an abuse of discretion and/or error. Huey candidly admits in her appellant's brief that, not only did she not plead such a claim against 6 Clayton Terrace, LLC, but at no time did she ever seek any form of relief against

Appellant, 6 Clayton Terrace, LLC such to warrant a claim. As such, the Trial Court's award of fees against 6 Clayton Terrace, LLC is unsupported, void and should be reversed.

The only scenario in which the incomplete transcript could require a rehearing by the Trial Court, would be a scenario in which this Court: declines to determine that the One Residence Per Lot Provision is invalid and unenforceable, despite that such Provision was never approved by the unanimous consent of the homeowners in the Subdivision; and determines that the language of the Amended Indentures prohibits the subdivision of lots within the Subdivision, even though no such prohibiting language exists; and determines that, in spite of the "American Rule", Plaintiffs are entitled to their attorney's fees from 6 Clayton Terrace, LLC. In such event, a rehearing by the Trial Court as to the attorney's fees incurred by Plaintiffs in prosecuting Count II of the First Amended Petition, as opposed to those fees incurred in prosecuting Count I, or in defending the Counterclaim for abuse of process would still be required due to the lack of evidence suggesting the Trial Court's original award.

For the foregoing reasons, Appellant, 6 Clayton Terrace, LLC, hereby requests that this Court reverse the Trial Court's Judgment as to Count II of Plaintiffs' First Amended Petition, , reverse that portion of the Trial Court's Judgment awarding fees to Huey and against 6 Clayton Terrace, LLC on Huey's Counterclaim for abuse of process remand this matter to the Trial Court with a mandate to enter judgment in favor of Defendant 6 Clayton Terrace, LLC on Count II, declare the One Residence Per Lot Provision null and void, and assess any attorney's fees awarded against 6 Clayton Terrace, LLC on Huey's Counterclaim against Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Signature above is also certification that the foregoing was filed electronically on January 3, 2018, with the Clerk of Court to be served by operation of the Court's electronic filing system upon counsel of record.

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

COMES NOW Steven M. Cohen, counsel for Appellant 6 Clayton Terrace, LLC, and pursuant to Missouri Supreme Court Rule 84.06(c), hereby states as follows:

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

(a) Appellant's claims, defenses, requests, demands, objections, contentions and arguments, as set forth in Appellant'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's claims, defenses, requests, demands, objections, contentions and arguments, as set forth in Appellant'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'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's Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

3. Appellant's Brief contains 11,805 words.

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