THE SUPREME COURT OF MISSOURI

NO. SC97349

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

v.

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

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

The Honorable Dale Hood, Associate Circuit Judge

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

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I. THERE CAN BE NO ABUSE OF PROCESS BECAUSE, AFTER THE LAWSUIT WAS FILED, THE TRUSTEES PERFORMED NO WILLFUL, DEFINITE ACT AIMED AT AN IMPROPER END

Ms. Huey's second brief continues to conflate the first two elements of an abuse of process claim. To prevail, Ms. Huey must establish that the Trustees (1) "made an illegal, improper, perverted use of process" ***and*** (2) "had an improper purpose in exercising such illegal, improper, perverted use of process." *Lambert v. Warner*, 379 S.W.3d 849, 856 (Mo. App. 2012). "The phrase 'use of process' … refers to some ***wil[l]ful, definite act*** not authorized by the process or aimed at an objective not legitimate in the proper employment of such process." *Stafford v. Muster*, 582 S.W.2d 670, 678 (Mo. banc 1979) (emphasis added). The "purpose for which the process is used, ***once it is issued***, is the only thing of importance." *Moffett v. Commerce Tr. Co.*, 283 S.W.2d 591, 599 (Mo. 1955) (citations and quotations omitted). "Stated another way, the test as to whether there is an abuse of process is whether the process has been used to accomplish some end which is outside the regular purview of the process." *Ritterbusch v. Holt*, 789 S.W.2d 491, 493 n.1 (Mo. banc 1990). This means that "if the action is confined to its regular and legitimate function in relation to the cause of action at issue, there is no abuse ***even if the plaintiff had an ulterior motive in bringing the action, or if he knowingly brought the suit upon an unlawful claim***." *Duvall v. Lawrence*, 86 S.W.3d 74, 85 (Mo. App. 2002) (emphasis added).

The crux of Ms. Huey's claim is that the Trustees' filed a lawsuit to enforce the Right of First Refusal restriction with the hope or intention of getting the LLC to halt its plan to subdivide Lot 6 (the "Property") and leave the neighborhood. (Reply Brief of

Appellant Huey ("Huey Reply") at p. 10). Her claim, at its core, is merely an allegation that the Trustees had an improper ***motive*** in filing an otherwise lawful claim. An "ulterior purpose may be inferred from the wrongful use made of the process, but ***the use itself may not be inferred from the motive***." *Romeo v. Jones*, 86 S.W.3d 428, 433 (Mo. App. 2002) (emphasis added). Even if the Court accepts all of Ms. Huey's allegations regarding the Trustees' motives as true, her claim still fails because there was no evidence and the circuit court did not find that the Trustees carried out some deliberate act to accomplish an end "outside the regular purview of the process" – i.e. that the Trustees made a wrongful ***use of process***. Consequently, Ms. Huey has failed establish the first element of an abuse of process claim.

Rather than basing its decision on some unauthorized willful, definite act in the use of the process, the circuit court improperly based its abuse of process judgment solely on the "filing" of the suit against Ms. Huey. (LF 532) ("This Court finds that ***by filing suit*** against Ms. Huey and the Trust, the Plaintiff/Trustees hoped to create sufficient concern on the part of the LLC that it might lose ownership of the Property….") (emphasis added). Accepting this finding as true, the finding cannot establish the first element of abuse of process because it suggests nothing more than an improper motive in the filing of the claim itself. Indeed, it "is ***not the commencement of an action without justification***, but … the

misuse of process for an end other than that which it was designed to accomplish" that matters. *Guirl v. Guirl*, 708 S.W.2d 239, 245 (Mo. App. 1986) (emphasis added).[1]

The filing of the lawsuit itself is not sufficient to establish the required willful, definite act of making an illegal, improper, or perverted ***use*** of the process. For example, there was no evidence that, after filing the suit, the Trustees contacted Ms. Huey and told her they would dismiss the case against her if she convinced the LLC to stop its plans to subdivide and add another house to Clayton Terrace. This is the type of evidence needed to meet the first element of an abuse of process claim. *Cf. Owen v. Owen*, 642 S.W.2d 410

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[1] Ms. Huey incorrectly informed this Court as to the circuit court's findings. Page 20 of Ms. Huey's first brief provides "***the Trial Court expressly found and concluded*** as follows:

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

(First Brief of Appellant Huey Brief at p. 20) (emphasis added). The bolded language above ***does not appear in the circuit court's judgment***. Rather, Ms. Huey appears to have copied and pasted language from her own ***proposed*** order and represented it as a finding to which this Court must give deference.

(Mo. App. 1982) (after the case was filed, plaintiff offered to drop the case against defendant if defendant settled a different lawsuit against plaintiff's brother for $50,000); *Ritterbusch*, 789 S.W.2d at 491 (after the criminal complaint was filed, defendants attempted to force plaintiff to pay a collateral civil claim for alleged damage to a motor vehicle); *Guirl*, 708 S.W.2d at 245-46 (plaintiff continued pursuing a pending lawsuit after defendant had tendered full payment of the notes at issue).

The various emails sent by Trustee John Tackes to third-parties stating (1) the suit was brought so that the "LLC moves out of the neighborhood and takes their schemes with them" and (2) that "[i]f the LLC backs down and does not build on the land [the Trustees] don't have to enforce the indentures" cannot constitute the requisite act. (SC Exs. 2, 3, 4, 5, 6). First, these emails only restate the Trustees' motives in filing the suit. Second, a majority of these emails were sent ***before*** the lawsuit was filed. Finally, none of the emails were communications with Ms. Huey and, therefore, under no circumstances could they be interpreted as attempts to improperly use the lawsuit as leverage to compel Ms. Huey to act in some way.

There could be no improper "use of process" here because the Trustees brought Count I for the exact purpose for which it was designed to accomplish – to set aside the sale of the Property as void. *Dillard Dep't Stores, Inc. v. Muegler*, 775 S.W.2d 179, 183 (Mo. App. 1989) ("The essence of abuse of process is not the commencement of an action without justification, but it is the misuse of process for an end other than that which it was ***designed to accomplish***.") (emphasis added). The purported objectives Ms. Huey complains of as "improper" – i.e. (1) getting the LLC out of the subdivision and

(2) preventing the LLC from subdividing the Property – would have been nothing more than unavoidable consequences of successfully bringing the lawful suit to its natural conclusion. "[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Moffett*, 283 S.W.2d at 599. The Trustees had a legitimate right to file the claim against Ms. Huey and have never proceeded in a manner for any end other than that permitted.

II. THE RIGHT OF FIRST REFUSAL RESTRICTION WAS PROPERLY APPROVED BY THE SUBDIVISION RESIDENTS PURSUANT TO THE PLAIN LANGUAGE OF THE INDENTURES AND IS THEREFORE VALID.

The Trustees' first brief discusses in depth why this Court should interpret language permitting "amendment" of subdivision restrictions to allow the imposition of new, reasonable restrictions on property. The Trustees agree that, pursuant to normal principles of contract law, courts should interpret subdivision indentures by looking to the plain language. The Trustees further agree that ambiguous language should "be resolved in favor of the free and untrammeled use of the land." *Gardner v. Maffitt*, 74 S.W.2d 604, 607 (Mo. 1934). The Trustees are not asking this Court to liberally construe indenture language. On the contrary, the Trustees merely suggest that a ***reasonably*** strict construction of language permitting "amendment" by a two-thirds vote meets the intent of the covenantor and properly balances the free use of property with the rights of the other purchasers in a subdivision development. *Udo Siebel-Spath v. Constr. Enterprises, Inc.*, 633 S.W.2d 86, 88 (Mo. App. 1982) ("The primary objective in construing a restrictive covenant is to ascertain the intent of the grantor-covenantor."). This Court need not act contrary to any overarching legal principles to find so. Indeed, Missouri has long held that "the right freely to acquire property and liberty to make contracts in respect thereto … is fundamental…." *State v. Missouri Pac. R. Co.*, 147 S.W. 118, 124 (Mo. 1912). The unreasonably strict

construction courts currently give to modification language unnecessarily infringes on this right.[2]

Indeed, allowing homeowners to add new restrictions by an agreed-upon, non-unanimous procedure would not, contrary to Appellants' assertions, "create a grave potential for abuse." (Reply Brief of Appellant 6 Clayton Terrace LLC ("LLC Reply") at p. 27). Even without a unanimous consent requirement, any change to subdivision restrictions must still be (1) "uniformly applied to all affected property owners," *Saladin v. Jennings*, 111 S.W.3d 435, 444 (Mo. App. 2003), and (2) reasonable. *Andrews v. Metro. Bldg. Co.*, 163 S.W.2d 1024, 1028 (Mo. 1942) ("[W]hen covenants in the nature of restrictions on the fee are reasonable and within the policy of the law, they are valid."). This means that any restriction that a supposed "ownership faction" wishes to impress on a dissenting homeowner must equally be impressed upon the ownership faction itself. Thus, the dissenting homeowner still has the ability to challenge the new restriction as unreasonable. Especially in light of the fact such homeowners have agreed to purchase

[2] The Trustees' first brief cited to cases from several different jurisdictions as an illustration of the way other states have construed indenture modification language. *See Zito v. Gerken*, 587 N.E.2d 1048 (Ill. App. 1992) (amendment will be enforced so long as it does not "impose unreasonable burdens upon any lot owners within the subdivision"); *Sunday Canyon Property Owners Association v. Annett*, 978 S.W.2d 654 (Tex. App. 1998) (modification clause allowing covenants to be "waived, abandoned, terminated, modified, altered or changed" with majority vote permits the addition of new burdens); *Windemere Homeowners Association, Inc. v. McCue*, 990 P.2d 769 (Mont. 1999) (modification clause permitting restrictions to be "waived, abandoned, terminated, modified, altered or changed" allowed a majority of property owners to add an additional burden.). Appellants' assertion that these cases are somehow less persuasive because they are *appellate* decisions (LLC Reply at p. 31) is not only unfounded, but contrary to common sense. A nonbinding case is simply as persuasive as the correctness of its reasoning.

property in a subdivision permitting "amendment" of the rules by less than unanimous consent, there are sufficient protections in place to protect the "untrammeled use of property" without requiring unanimous consent.

Further, the unanimous consent rule has not, as Appellants suggest, "produced consistent results promoting clarity in drafting." (LLC Reply at p. 25). The problems caused by the rule cannot be solved by hoping for careful drafting of indentures. The builders and developers who typically draft the original indentures often have different priorities and intentions than the residents who are ultimately subject to them. Moreover, people make mistakes and, under the unanimous consent rule, a negligent omission in a subdivision's original indentures can spell disaster for the subdivision into perpetuity. *See Pinnacle Lake Estates Association, Inc. v. McCorkell*, No. 08BB-CC00021 (Mo. Cir. Oct. 22, 2010) (Appx. 3-16) (leaving a 450-lot subdivision unable to ever collect essential assessments without the consent of all 450 owners). Even if drafters act more carefully going forward, that does not help the subdivisions that already exist. They are and always will be stuck with their original restrictions – no matter how outdated or deficient – unless they can improbably obtain unanimous consent of all the homeowners.

Finally, the Trustees' acknowledged in their first brief that the unanimous consent rule could have been, at the very earliest, ***implicitly*** recognized as early as 1939 in *Van Deusen v. Ruth*, 125 S.W.2d 1 (Mo. 1938) – 15 years after Clayton Terrace was created. Appellants' assertion that the unanimous consent rule existed before 1939 in any capacity is wholly unfounded. The cases Appellants generally cite to merely reaffirm that restrictions on the free use of property should be strictly construed. *Gardner*, 74 S.W.2d

at 607 ("Doubts arising as to the intention of the parties must be resolved in favor of the free and untrammeled use of the land."). Again, the Trustees agree with this concept. But a rule requiring strict construction is not at all the equivalent of a rule requiring unanimous consent, especially when the plain language at issue clearly permits "amending" the restrictions with a two-thirds vote. Cases like *Bumm v. Olde Ivy Development*, LLC, 142 S.W.3d 895, 904 (Mo. App. 2004) (language providing indentures could be "amended, repealed or ***added to*** ... by the owners of a majority of the lots...." did not permit the addition of new restrictions without unanimous consent) (emphasis added), demonstrate just how unreasonably strict Missouri has construed such language.

The Trustees are not asking this Court to rewrite the law on construing indentures. The Trustees are asking this Court to reign in the ***unreasonably*** strict construction of indenture modification language that has developed in the courts over the last 80 years. To the extent *Van Deusen* and its progeny implement an ***unreasonably*** strict interpretation of such language contrary to the plain and ordinary meaning, they should be overruled.

III. APPELLANTS' ASSERTIONS REGARDING RATIFICATION ARE ERRONEOUS

Appellants repeatedly suggest the Trustees' ratification claims are improper because ratification is an affirmative defense. But the Trustees were the plaintiffs in this action and had no duty to raise ratification in their initial pleadings. When the appellants amended their affirmative defenses, they claimed that the Right of First Refusal Provision was invalid, but at no point did either Appellant ever question the validity of the One Residence Per Lot Provision in their pleadings, amended or otherwise. (LF 100-01,105-106). Therefore, the Trustees have not waived their ratification argument as it relates to the One Residence Per Lot Provision. Further, to the extent the Trustees had a duty to assert ratification as an affirmative avoidance in relation to the validity of the Right of First Refusal, any such argument was waived by Appellants when evidence of ratification was presented at trial and not objected to on that basis. (Tr. 124-26); *see* Mo. Sup. Ct. R. 55.33 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

Further, Appellants claim the ratification arguments generally must fail because there is no evidence that each and every homeowner ratified the Indentures. But, as Appellants themselves note, ratification occurs when an individual confirms or adopts the agreement with "full knowledge of all the material facts at the time he is charged with having accepted the transaction as his own." *Murphy v. Jackson Nat. Life Ins. Co.*, 83 S.W.3d 663, 668 (Mo. App. 2002). Each of the homeowners bought their property in Clayton Terrace knowing they would be subject to each and every one of the restrictions.

Each and every resident acted as though these restrictions were valid at all times prior to the commencement of this lawsuit and accepted the benefits of living in a subdivision with such restrictions. "Ratification need not be intentional." *Murphy*, 83 S.W.3d at 668 (citing *Clear v. Missouri Coordinating Board for Higher Education*, 23 S.W.3d 896, 901 (Mo. App. 2000)). Rather, "It can occur when an individual either expressly or impliedly confirms or adopts the agreement with knowledge of its contents." *Id*. (internal citations and quotations omitted).

IV. THE NOTICES OF SALE WERE NEITHER TIMELY NOR ADEQUATE AND THE TRUSTEES HAVE NOT WAIVED THEIR RIGHT TO CHALLENGE THE VALIDITY OF THE SALE

Appellants continue to argue the Trustees cannot challenge the validity of the sale of the Property because the homeowners signed waivers concerning the rights of first refusal. But the record is clear that such waivers are not effective because the Notices of Sale were neither timely nor sufficient.

First, is undisputed that no notice was ever prepared for, much less timely delivered to, the owner of Lot 5. (SC Exs. 16, 100; LF 242-243; Tr. 19-21, 119). Moreover, it is undisputed that Ms. Schwartz expressed an interest in exercising her right of first refusal, and that the real estate agent refused to allow her to walk through the Property. (LF 245-249, 340). The LLC was afforded this right prior to closing the Property, as the sale contract itself provides "Seller grants Buyer and selling broker the right to enter and walk-through the property …." (SC Exhibit ("Ex.") 1). Thus, Ms. Schwartz was not offered the Property on the same terms as the LLC, which violates the Right of First Refusal. Appellants now claim the right to walk through the Property is not material because the property was sold "as is." But the fact that Ms. Schwartz would have been buying the property "as is" only makes her inability to inspect the Property even more material. Without the ability to investigate the condition of the Property, a prospective buyer really does not know what they are getting. And when they purchase "as is," there is no recourse post-sale. Indeed, not being able to conduct a walkthrough was the reason the Schwartzes ultimately chose not to exercise their right of first refusal. (LF 454)

(William Schwartz testifying that Ms. Huey's refusal "to allow [them] to walk into the house … was a deal breaker.").

Appellants further allege that the Trustees waived their ability to challenge the validity of the sale because they failed object to in a timely manner and accepted the benefits of it. But, as is discussed in more depth in the Trustees' first brief, the record is clear that it was Ms. Huey's intentional acts that caused the delay in the other homeowners discovering the truth. Ms. Huey's intentional failure to identify the buyer (as required by the Right of First Refusal provision) prevented the other homeowners from knowing that the buyer was a developer and not a family. If the homeowners had known the identity of the buyer prior to the sale, the homeowners could have contacted the buyer and discovered the plan to subdivide the Property and add another residence to Clayton Terrace at that time. After the City of Frontenac notified the Trustees of the application to subdivide the Property, the true intentions of the buyer were known and the Trustees promptly filed their claims.

CONCLUSION

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

Respectfully submitted,

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By: /s/ *Gerard T. Carmody*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Respondent/Cross-Appellant's Substitute Brief was served via the Court's electronic filing system on this 26th day of February, 2019.

/s/ *Gerard T. Carmody*

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

COMES NOW Gerard T. Carmody, counsel for Plaintiff/Respondent/Cross-Appellant Trustees of Clayton Terrace Subdivision, and hereby certifies that this Respondent/Cross-Appellant's Substitute Brief was served pursuant to Supreme Court Rule 103.08, complies with the limitations contained in Rule 84.06(b), and contains 3,351 words.

/s/ *Gerard T. Carmody*