# In the Missouri Court of Appeals
# Eastern District

DIVISION ONE

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| TRUSTEES OF CLAYTON TERRACE SUBDIVISION, | ) | ED105555 |
| Plaintiff/Respondent/ Cross-Appellant, | ) | Appeal from the Circuit Court of St. Louis County |
| v. | ) | |
| 6 CLAYTON TERRACE, LLC, | ) | Honorable Dale Hood |
| and | ) | |
| JEANNETTE R. HUEY, TRUSTEE OF THE JANE R. HUEY LIFETIME TRUST AGREEMENT DATED MAY 21, 1998, | ) | Filed: June 19, 2018 |
| Defendants/Appellants/ Cross-Respondents. | ) | |

## Introduction

Jeannette R. Huey, Trustee of the Jane R. Huey Lifetime Trust Agreement Dated May 21, 1998 (Seller); 6 Clayton Terrace, LLC (Buyer); and the Trustees of Clayton Terrace Subdivision (Subdivision Trustees) appeal from the trial court's Judgment entered December 21, 2016, and Judgment entered December 30, 2016. We affirm in part, reverse in part, and remand.

## Factual and Procedural Background

Seller's mother, Jane Huey, lived in a home on a 2.3-acre piece of property at 6 Clayton Terrace (hereinafter referred to as Lot 6) in an approximate 22-lot/residence subdivision called Clayton Terrace Subdivision off of Lindbergh Boulevard in Frontenac, Missouri (the

Subdivision). The Subdivision was established by Plat in 1923, at which time it had 23[1] recorded lots, and is subject to Original Indentures recorded with the Plat; Indentures which have been renewed, extended, and amended approximately five times since their origination.[2]

On October 15, 2011, Jane Huey died. Seller, as trustee of her mother's trust, became responsible for, among other things, Lot 6. Seller herself had not lived in the home for decades. Seller prepared to sell Lot 6 and listed it with realtor Judy Miller of Janet McAfee Real Estate, Inc. in September 2012.

On February 15, 2013, Seller sold Lot 6 to Buyer, 15 days after Miller hand-delivered notice to all Subdivision lot owners of the proposed sale 15 days prior to closing as required by the right of first refusal provision, part of the Fourth Amended Indentures on record since 1973.[3] The sale closed on February 15, 2013, with no right of first purchase exercised by any lot owner, and all lot owners waiving their rights either expressly or by expiration of 15 days from notice without any offers to buy being made.[4] Seller sold Lot 6 to Buyer for approximately $415,000, proceeds which went into her mother's trust and were disbursed a year later in April 2014 to the

[1] One lot was eliminated upon the construction of an adjacent highway entrance ramp.

[2] Since their original filing in 1923, the Indentures have been amended five times: a) the 1928 Amendment recorded in Plat Book 972, Page 18 (First Revised Indentures); b) the 1943 Amendment recorded in Plat Book 1947, Pages 190-198 (Second Revised Indentures); c) the 1953 Amendment, recorded in 1957, in Plat Book 3770, Page 102 (Third Revised Indentures); d) the 1972 Amendment, recorded in 1973, in Plat Book 6659, Page 1761 (Fourth Revised Indentures); and e) the 1997 Amendment, recorded in 1998, in Plat Book 11426, Page 1797 (Fifth Revised Indentures).

[3] The Fourth Revised Indentures enacted a Sale Restriction which imposes a right of first refusal requirement on all lots in the Subdivision that runs in favor of each of the other lot owners. The Sale Restriction provides in pertinent part:

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

[4] Subdivision Trustees' expert conceded it was a self-expiring notice.

trust's beneficiaries. Seller had no reason to believe and had no notice of any potential irregularities or concerns about the validity of the sale of Lot 6 to Buyer when winding up and closing the trust over a year later.

Buyer acquired Lot 6 for investment purposes and with the intention of leasing it to Kevin McGowan (McGowan) until such time as McGowan could acquire sufficient funds to purchase it from Buyer. After the sale, McGowan and his six children moved into the existing home on Lot 6 and began making considerable physical changes thereto, including: a) the demolition and removal of certain walls; b) combining the former kitchen and dining room into a single kitchen space which, as of the date of trial, remained in an unfinished condition; c) reconfiguring the layout of the upstairs so as to increase the number of bedrooms; d) raising the floor in the sunroom; e) walling off the French doors from the sunroom leading to the greenhouse; f) cutting through the brick exterior to add an additional door to the exterior; g) removing trees and clearing substantial brush and plantings from the grounds; h) refinishing the swimming pool; i) replacing the pool's heating and filtration system; and j) repairing/replacing the concrete decking around the pool.

The Original Indentures in 1923 state they can be amended by two-thirds of Subdivision lot owners in writing. There is a provision established by the 1928 Amendment passed by two-thirds vote and introduced in the First Revised Indentures which provides as follows:

(e) Only one residence shall be erected on each lot.

Lot 6 is 2.3 acres.[5] As one lot under the Plat and Amended Indentures, it can only support one residence. Buyer intended to seek approval from the Planning and Zoning Commission of the City of Frontenac to split the lot. Subdivision Trustees Cathy Stahr (Stahr)

[5] The City of Frontenac is split into six districts. Two are residential. The Subdivision is in the "R-1" One-Acre Residence District which requires each lot to be at least one acre.

and Rick Francis (Francis) were made aware of Buyer's plan to subdivide Lot 6 within ten days of the closing. Stahr was concerned by the idea of having Lot 6 subdivided, but neither she nor Francis approached McGowan to discuss it or take any action with regard thereto, electing instead to "just wait and see," hoping "it's not going to be an issue."

On April 24, 2014, over a year later, Buyer filed an application with the City of Frontenac to subdivide Lot 6. On June 24, 2014, Frontenac approved Buyer's application to subdivide Lot 6 into two lots, known as Lots 6A and 6B. Less than two months later, on August 21, 2014, Subdivision Trustees filed a two-count petition against Seller and Buyer for Declaratory and Injunctive Relief; first amended on December 3, 2014, asking for a Declaratory Judgment in Count I against Seller declaring that Seller violated the Subdivision's Amended Restrictions in failing to provide 15 days' written notice to all of the Subdivision lot owners of the proposed sale of Lot 6 to Buyer, in failing to accept lot owner Elizabeth Schwartz's offer to purchase Lot 6 on terms equal to those offered to Buyer in connection with the February 15, 2013 sale of Lot 6 to Buyer, and for the court to declare the sale null and void. The petition asked for Injunctive Relief in Count II against Buyer to prevent Buyer from constructing an additional residence on Lot 6 or selling any subdivided portion of Lot 6.

On December 5, 2014, Seller filed a Counterclaim against Subdivision Trustees for Abuse of Process.

On June 28, 2016, the parties submitted a Joint Stipulation of Facts and likewise stipulated to the admissibility of numerous documents identified in their joint Stipulated Admissibility of Exhibits, which has formed the basis for the above recounting of the factual background of this case.

Trial was held on Subdivision Trustees' two-count petition in equity and Seller's counterclaim on July 11-12, 2016. On August 11, 2016, all three parties submitted proposed Findings of Fact, Conclusions of Law, and Judgments.

On December 21, 2016, the trial court entered its Order and Judgment finding in favor of Seller and against Subdivision Trustees on Count I, finding no violation by Seller with regard to the sale; declining to set aside the sale; and additionally finding in favor of Seller on her Abuse of Process Counterclaim against Subdivision Trustees for bringing Count I against Seller. The trial court found Seller's damages in the form of attorney's fees, costs, and expenses in the amount of $119,243.99 to be fair and reasonable yet awarded her only $60,000. The trial court assessed $40,000 of those damages against Buyer, who brought no claim against Seller and against whom Seller claimed no abuse of process. The trial court assessed the remaining $20,000 against Subdivision Trustees.

On Count II, the trial court found in favor of Subdivision Trustees and against Buyer, disallowing the division of Lot 6 and/or the construction of an additional residence on Lot 6.

On December 30, 2016, the trial court entered an Order and Judgment addressing Subdivision Trustees' claim for a total of $203,915.56 in attorney's fees, costs, and expenses in filing this lawsuit, finding the amount fair and reasonable and awarding them same, to be payable in their entirety by Buyer.

On January 23, 2017, Seller filed a Motion to Correct, Amend, or Modify the Judgment with regard to her attorney's fees. The court denied the motion on February 28, 2017. This appeal follows.

## Points on Appeal

### Buyer's Appeal

Buyer presents five points on appeal. In its first point, Buyer claims 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 Subdivision Trustees' first amended petition against Buyer 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.

In its second point, Buyer asserts the trial court erred in entering judgment on Count II of Subdivision Trustees' first amended petition against Buyer 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 Lot 6 or the construction of a residence on a subdivided lot.

In its third point, Buyer maintains the trial court erred and misapplied the law in ordering Buyer to pay Subdivision Trustees' attorney's fees, as there exists no applicable contract, statute, or exception under the American Rule that would permit Subdivision Trustees to recover attorney's fees from Buyer.

In its fourth point, Buyer argues the trial court abused its discretion in ordering Buyer to pay all of Subdivision Trustees' attorney's fees and costs incurred in this dispute because only Count II of their first amended petition was directed at Buyer; Count I was directed only at Seller; and the trial court found Subdivision Trustees liable with respect to Seller's counterclaim for abuse of process in asserting Count I.

In its fifth point, Buyer contends the trial court erred in entering judgment in favor of Seller and against Buyer on Seller's counterclaim for abuse of process in that Seller did not claim

abuse of process against Buyer and Buyer did not assert any claims against any party.

Seller's Appeal

Seller presents two points in her appeal. In her first point, she claims the trial court erred in awarding her only $60,000 of her attorney's fees and costs because the trial court expressly found and reiterated that the full $119,243.99 in damages suffered by Seller, which damages consisted of the attorney's fees and costs actually charged to and paid by her, was fair and reasonable under the circumstances, thereby requiring the entry of judgment in that amount.

In her second point, Seller maintains the trial court erred in apportioning $40,000 of her attorney's fees and costs against Buyer, a party against whom she did not assert any claims or seek any relief, thereby precluding the entry of judgment against Buyer in her favor.

Subdivision Trustees' Cross-Appeal

In their first point, Subdivision Trustees assert the trial court erred in granting judgment in Seller's favor on Count I of their petition because it erroneously declared and applied the law in that the right of first refusal provision was properly approved by the requisite subdivision residents and is therefore valid.

In their second point, Subdivision Trustees claim the trial court erred in granting judgment in Seller's favor on Count I of their petition because such holding relied on a misapplication of the law in that the right of first refusal provision was ratified by subdivision residents, including Seller, and is therefore valid.

In their third point, Subdivision Trustees state the trial court erred in granting judgment in Seller's favor on Count I of their petition because such holding was against the weight of the evidence in that the evidence was undisputed at trial that Seller and her agents failed to comply with the right of first refusal provision.

In their fourth point, Subdivision Trustees posit the trial court erred in granting judgment in Seller's favor on Count I of their petition because such holding constituted a misapplication of the law in that the express terms of the indentures provide a sale that fails to comply therewith shall be void, and equitable principles do not apply to change this result.

In their fifth point, Subdivision Trustees argue the trial court erred in granting judgment in Seller's favor on her Counterclaim against them for abuse of process because the court misapplied the law in that Subdivision Trustees were authorized to bring their claim against Seller and did nothing more than carry out the process to its authorized conclusion and any alleged ulterior motive by Subdivision Trustees is irrelevant under Missouri law.

Standard of Review

The standard of review for a declaratory judgment action is the same as in any other court-tried case. Arbors at Sugar Creek Homeowners Ass'n v. Jefferson Bank & Trust Co., Inc., 464 S.W.3d 177, 183 (Mo.banc 2015). The judgment will be affirmed 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. Id.

However, when the parties agree to submit a case upon a stipulation of facts not involving the resolution by the trial court of conflicting testimony, the only question before the court is whether the trial court drew the proper legal conclusions from the stipulated facts. H.B.I. Const., Inc. v. Graviett, 903 S.W.2d 653, 654 (Mo.App. E.D. 1995). We apply *de novo* review to questions of law decided in court-tried cases. Century Motor Corporation v. FCA US LLC, 477 S.W.3d 89, 94 (Mo.App. E.D. 2015). When the parties at trial stipulate as to a fact in issue and the stipulation becomes part of the record, it is binding upon the parties and the court in a subsequent trial of the same action provided the stipulation is not limited specifically to the

initial proceeding. H.B.I. Const., Inc., 903 S.W.2d at 654.

A trial court's findings as to what damages are recoverable are entitled to great weight on appeal and will not be disturbed unless we find that the damages awarded were clearly wrong, could not have been reasonably determined, or were excessive. Saladin v. Jennings, 111 S.W.3d 435, 444 (Mo.App. E.D. 2003). In general, the issue of damages is left to the sound discretion of the trial court as the trier of fact. Id. A court has wide discretion in its determination of damages. Id.

The trial court is considered an expert on attorney's fees and has discretion in determining the fee award. Klinkerfuss v. Cronin, 289 S.W.3d 607, 613 (Mo.App. E.D. 2009). We shall reverse the trial court's award only where we find an abuse of discretion. Id. A court abuses its discretion when it awards an amount so arbitrarily arrived at, or so unreasonable, as to indicate indifference and a lack of proper consideration. Id.

## Discussion

### Buyer's Points I and II – One Residence Per Lot and Subdivision of a Lot

In its first point, Buyer claims the "one residence per lot" provision contained in the amended indentures is invalid and unenforceable because it was never unanimously approved by the Subdivision lot owners. In its second point, Buyer contends even if the one residence per lot provision is valid, it does not prohibit the subdivision of a lot or the construction of a residence on a subdivided lot.

The Clayton Terrace Subdivision was established by and according to a plat duly filed for record on May 18, 1923, in Plat Book 18, Pages 24-25 of the St. Louis County records. The Original Plat consists of 23 lots in the Subdivision. Upon its creation, the Subdivision was subject to the Original Indentures which restrict certain aspects and uses of the property located

in the Subdivision, which indentures appear in, and are written on, the Original Plat. The Original Indentures state they can be amended by two-thirds of Subdivision lot owners in writing.

On October 18, 1928, the Original Indentures were first amended to add the one residence per lot provision, voted upon and approved by two-thirds of the lot owners in accordance with the Original Indentures, which has remained in all subsequent amendments to the Indentures to this day. Thus, at the time of the sale of Lot 6 to Buyer on February 15, 2013, the one residence per lot provision had been a matter of public record for almost 85 years and was still in force. This provision did not impose a *new* burden upon Buyer's Lot 6 and thus did not violate the rule that "a new restrictive covenant, adopted by majority vote only, is invalid and unenforceable if it imposes new burdens upon the affected property owners." Bumm v. Olde Ivy Dev., LLC, 142 S.W.3d 895, 903 (Mo.App. S.D. 2004); Van Deusen v. Ruth, 125 S.W.2d 1, 2-3 (Mo. 1938); Jones v. Ladriere, 108 S.W.3d 736, 739-40 (Mo.App. E.D. 2003); Webb v. Mullikin, 142 S.W.3d 822, 827 (Mo.App. E.D. 2004); Hazelbaker v. County of St. Charles, 235 S.W.3d 598, 602 (Mo.App. E.D. 2007).

It is well-settled that a subdivision's restrictive covenant is a contract among the property owners. Lake Arrowhead Property Owners Ass'n v. Bagwell, 100 S.W.3d 840, 843 (Mo.App. W.D. 2003). Each property owner agrees to the contractual terms of the restrictive covenants by voluntarily purchasing the property that is subject to those conditions. Maryland Estates Homeowners' Ass'n v. Puckett, 936 S.W.2d 218, 219 (Mo.App. E.D. 1996). Courts apply principles of contract law to a subdivision's covenants. Webb, 142 S.W.3d at 825; Kehrs Mill Trails Associates v. Kingspointe Homeowner's Ass'n, 251 S.W.3d 391, 396 (Mo.App. E.D. 2008).

Buyer agreed to the contractual term of one residence per lot as it applied to Lot 6 by voluntarily purchasing Lot 6. See Maryland Estates Homeowners' Ass'n, 936 S.W.2d at 219. Then, desiring to build two residences on the 2.3-acre property comprising Lot 6, Buyer sought a division of Lot 6 into two lots via the City of Frontenac. The City of Frontenac approved the request; thus, Lots 6A and 6B were established and recorded with St. Louis County Public Records. Each lot as platted is slightly over one acre, was assigned two separate tax parcel numbers by the St. Louis County Assessor's Office, and given the post office addresses 5 Clayton Terrace and 6 Clayton Terrace, respectively. The original residence is on the parcel now known as Lot 6B, and there is no residence on Lot 6A.

We find Buyer's subdivision of Lot 6 into Lots 6A and 6B in the manner described above was not prohibited by any indenture governing the Subdivision. Nor did Buyer violate the one residence per lot restriction by legally transforming his lot into two lots. The one residence per lot restriction does not by its plain and clear language prohibit the subdivision of a lot and this Court cannot read into the Indentures provisions that are not there. No version of the Subdivision Indentures specifically prohibits the subdivision of lots. "Where there is no ambiguity in the contract, the intent of the parties is to be gathered from it alone and the court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language as there is nothing to construe." Marshall v. Pyramid Development Corp., 855 S.W.2d 403, 406 (Mo.App. W.D. 1993). "The words of a contract are to be given their plain, ordinary meaning, and ambiguity arises only where the terms are reasonably open to more than one meaning, or the meaning of the language used is uncertain." Woods of Somerset, LLC v. Developers Surety and Indem. Co., 422 S.W.3d 330, 335 (Mo.App. W.D. 2013). "Ambiguity does not arise merely because the parties disagree over the meaning of a provision,

and courts may not create ambiguity by distorting contractual language that may otherwise be reasonably interpreted." Id.

Further, this Court can neither broaden nor expand the one residence per lot restriction to encompass a prohibition on the subdivision of lots, as "[r]estrictions, being in derogation of the fee conveyed, will not be extended by implication to include anything not clearly expressed." Van Deusen, 125 S.W.2d at 3; Bumm, 142 S.W.3d at 903. Restrictive covenants have not been favored under Missouri law because they operate in derogation of a fee, such that when there is any ambiguity or substantial doubt as to the meaning, restrictive covenants will be read narrowly in favor of the free use of property. Blevins v. Barry–Lawrence Cty. Ass'n for Retarded Citizens, 707 S.W.2d 407, 408 (Mo.banc 1986). The one residence per lot indenture is clearly a restriction on the use of the property and thus must be narrowly, not broadly, construed.

For the foregoing reasons, we find the "one residence per lot" provision contained in Clayton Terrace Subdivision's Amended Indentures is valid and enforceable as plainly written but does not extend to prohibit the subdivision of a lot in Clayton Terrace Subdivision or the construction of a residence on a subdivided lot in Clayton Terrace Subdivision, provided the act of subdivision of a lot and results therefrom conform with the procedural and substantive laws of the City of Frontenac and other valid covenants of the Subdivision. Accordingly, Buyer's Point I is denied and Buyer's Point II is granted.

Attorney's Fees

The trial court is considered an expert as to the necessity, ***reasonableness,*** and value of attorney's fees for both trial and appellate work. Layden v. Layden, 514 S.W.3d 667, 677 (Mo.App. E.D. 2017). The determination of ***reasonable*** attorney's fees is within the trial court's sound discretion. DeWalt v. Davidson Surface Air, 449 S.W.3d 401, 405 (Mo.App.E.D. 2014).

We will not reverse that determination unless we find that the amount was arbitrarily arrived at or is so unreasonable as to indicate indifference and a lack of proper judicial consideration. Id.

A court is deemed to be an expert in awarding attorney's fees and has discretion to award an ***appropriate*** amount. Howard v. City of Kansas City, 332 S.W.3d 772, 792 (Mo.banc 2011). A court may award attorney's fees for one particular claim among many, and it is ***obligated*** to segregate the claims when an award is authorized for some and not others. Western Blue Print Co., LLC v. Roberts, 367 S.W.3d 7, 23 (Mo.banc 2012). In order to demonstrate an abuse of discretion, the complaining party must show the trial court's decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice. Id.

Fees may be awarded in equity actions but only in exceptional circumstances. Barkho v. Ready, 523 S.W.3d 37, 46 (Mo.App. W.D. 2017). Unusual circumstances have been found where a party's conduct is frivolous, without substantial legal grounds, reckless or punitive. Id.

Seller's Points I and II – Seller's Counterclaim Abuse of Process

Seller prevailed on her abuse of process counterclaim against Subdivision Trustees. Seller claims after the trial court twice expressly found her attorney's fees and costs in the amount of $119,243.99 was fair and reasonable under the circumstances, it inexplicably awarded her only $60,000, and then mistakenly apportioned $40,000 of those fees against Buyer, a party against whom she did not assert any claims or seek any relief, thereby precluding the entry of judgment against Buyer in her favor.

It would be helpful to illuminate the circumstances leading up to and culminating in Seller's damages, which arose purely from and are completely circumscribed by the attorney's fees and costs Seller incurred from the lawsuit Subdivision Trustees brought against her.

Seller suffered damages from Subdivision Trustees' instituting the underlying legal

proceedings against her, forcing her to retain counsel to defend herself against unwarranted allegations a year and a half after she sold Lot 6 and distributed its proceeds to her mother's trust beneficiaries. Seller's counsel, in the process of defending her against the allegations Subdivision Trustees were asserting against her, determined Seller had a counterclaim for abuse of process against Subdivision Trustees. Seller's counsel successfully established that Subdivision Trustees, in order to intimidate Buyer into refraining from an action Subdivision Trustees deemed contrary to their interests, filed an unwarranted lawsuit against Seller without legitimate cause.

A pleading alleging abuse of process must set forth facts that establish (1) the present defendant (or as here, counter-defendant) made an illegal, improper, perverted use of process, a use neither warranted nor authorized by the process; (2) the defendant had an improper purpose in exercising such illegal, perverted or improper use of process; and (3) damage resulted. Ritterbusch v. Holt, 789 S.W.2d 491, 493 (Mo.banc 1990); Howard v. Youngman, 81 S.W.3d 101, 118 (Mo.App. E.D. 2002). A claimant must show that process has been used to accomplish an unlawful end or to compel the defendant to do something which he could not be compelled to do legally. Howard, 81 S.W.3d at 118.

Here, Seller prevailed on her Counterclaim for Abuse of Process against Subdivision Trustees, the merits of which we will go into in more detail in our discussion of Subdivision Trustees' Point V on cross-appeal, discussed *infra*. The court found Seller's damages consisted of her attorney's fees, costs, and expenses incurred in defending herself against Subdivision Trustees' lawsuit. The court found the amount claimed and set forth by Seller as her damages in the amount of $119,243.99 was fair and reasonable under the circumstances. These were not just attorney's fees, but were Seller's actual damages from Subdivision Trustees' illegal use of

process against her with an ulterior motive of influencing the Buyer's plan to subdivide Lot 6 and build another residence on it, or better yet, as the evidence revealed, to induce Buyer to leave the Subdivision altogether. The court's twice-stated recognition of Seller's damages and their reasonableness in amount yet ultimately unexplained award to Seller of only $60,000 is completely arbitrary.

Attorney's fees are awarded in equity actions in circumstances where a party's conduct is frivolous, without substantial legal grounds, reckless or punitive. This is an apt characterization of Subdivision Trustees' behavior in bringing suit against Seller in the present circumstances, which amounts to an abuse of process, so Seller is entitled to $119,243.99 as actual damages as a result of Subdivision Trustees' abuse of process against her, including attorney's fees due to Subdivision Trustees' filing suit against her in equity without substantial legal grounds but with the purpose to intimidate Buyer and influence his conduct. The trial court's explicit recognition of the fairness and reasonableness of the amount claimed by Seller as well as its appropriateness in the circumstances is completely contradictory to its $60,000 award. It is completely incongruous with the court's findings and the amount is the very definition of arbitrary, especially when compounded by an inexplicable attribution of $40,000 to be paid by Buyer.

Subdivision Trustees claim this Court has expressly held that a trial court may properly reduce the requested fees to a reasonable amount and is not obligated to explain its reason for such a reduction. Winghaven Residential Owners Ass'n, Inc. v. Bridges, 457 S.W.3d 383, 386 (Mo.App. E.D. 2015). However, here the trial court expressly and specifically indicated twice it found Seller's claimed attorney's fees and costs in the amount of $119,243.99 fair and reasonable considering the circumstances. Seller prevailed on the only claim brought against her in this litigation, Count I by Subdivision Trustees. Further, and more importantly, the trial court

found Subdivision Trustees abused process in bringing Count I against Seller, found in favor of Seller's abuse of process counterclaim against them based on Count I, and found her damages to be the amount of attorney's fees and costs she expended in defending this frivolous claim against her brought without legal grounds. The trial court found:

> The Court having presided over this matter from the date of its filing through the conclusion of the trial is aware of the effort expended and the work product submitted in connection with this matter and finds that the fees and costs charged to, and paid by, [Seller] are fair and reasonable under the circumstances.

Therefore, the trial court's reduction of that amount to $60,000 was not a reduction to what it believed to be a reasonable amount in that it did not so declare, *and* it had already twice stated $119,243.99 was a fair and reasonable amount of damages inflicted upon Seller by Subdivision Trustees bringing her into this suit purely for exploitative purposes.

Seller's Points I and II are granted. This case is reversed and remanded for a redetermination of Seller's damages and to whom their payment shall be attributed in conformance with the judgment's findings of fact and conclusions of law.

Buyer's Points III, IV, and V – Subdivision Trustees' Attorney's Fees, Abuse of Process Claim

In its third and fourth points, Buyer asserts it should not have to pay Subdivision Trustees' attorney's fees, as there exists no applicable contract, statute, or exception under the American Rule that would permit Subdivision Trustees to recover attorney's fees from Buyer and even if there were, it should not have to pay ***all*** of their fees incurred in this dispute because only Count II of their two-count petition was directed at Buyer and, moreover, the trial court found Subdivision Trustees abused process on Count I of their petition against Seller. Correspondingly, Buyer maintains in his fifth point the trial court mistakenly entered judgment against Buyer on Seller's abuse of process counterclaim, which was not even directed at Buyer, and Buyer could not have abused process because it did not assert any claims against any party.

Buyer was not a party to Subdivision Trustees' misuse of process in asserting Count I against Seller, and Seller's abuse of process claim was not asserted against Buyer, who brought no claims against any party in this lawsuit. This lawsuit was wholly instigated by Subdivision Trustees. None of Seller's attorney's fees and costs in defending herself against Subdivision Trustees' claim should have been assessed against Buyer. Buyer is correct in maintaining the trial court mistakenly entered judgment against Buyer on Seller's abuse of process claim because the claim was not directed at Buyer and Buyer could not have abused process because it did not bring any claims against any party.

The trial court abused its discretion in ordering Buyer to pay all of Subdivision Trustees' attorney's fees and costs in their entirety. Such an award indicates a lack of careful consideration when Subdivision Trustees were found at fault for calculated misuse of the legal system. We find the court's order that 100% of their fees and costs be awarded in favor of Subdivision Trustees to be paid by Buyer is clearly wrong, cannot have been reasonably determined in light of the circumstances, and is excessive. Saladin, 111 S.W.3d at 444.

Buyer's Points III, IV, and V are granted. The Order and Judgment entered on December 30, 2016, awarding Subdivision Trustees all of their attorney's fees and costs, and ordering them to be paid in their entirety by Buyer, is reversed and remanded for a redetermination of a reasonable and appropriate award of attorney's fees between these two parties. Buyer's request that this Court reapportion the fees in Count IV is denied as moot because we are remanding this issue to the trial court for its determination.

Subdivision Trustees' Cross-Appeal

In their first and second points, Subdivision Trustees assert the Fourth Amended Indentures' right of first refusal provision was properly approved and ratified by the requisite

subdivision residents. In their third point, Subdivision Trustees claim Seller and her agents failed to comply with the right of first refusal provision. In their fourth point, Subdivision Trustees maintain the express terms of the Indentures provide that a sale that fails to comply with the right of first refusal provision is void, thus Seller's sale of Lot 6 to Buyer is void, and equitable principles do not change this result. In their fifth point, Subdivision Trustees dispute the trial court's finding they abused process in filing suit against Seller because any ulterior motive they had in suing her is irrelevant under Missouri law.[6]

We begin with Points III and IV, the claims that Seller and her agents failed to comply with the right of first refusal provision and consequently, the sale of Lot 6 to Buyer is void, despite any and all equitable principles. Should we find Seller and her agents complied with the right of first refusal provision and the sale is not void, then the issue of whether the right of first refusal is valid and enforceable as presented in Points I and II becomes moot because their resolution would not have any practical effect upon any existing controversy. Miller v. Missouri Dept. of Corrections, 436 S.W.3d 692, 696 (Mo.App. W.D. 2014). A cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy. Id.

Subdivision Trustees' Points III and IV –
Right of First Refusal Provision and Seller's Compliance

The following facts were stipulated to by the parties. The Subdivision was established by and according to an Original Plat duly filed for record on May 18, 1923, in Plat Book 18, Pages 24-25 of the St. Louis County records. The Original Plat consists of 23 lots in the Subdivision. Upon its creation, the Subdivision was subject to Original Indentures which restrict certain

[6]Subdivision Trustees cite Duvall v. Lawrence, 86 S.W.3d 74 (Mo.App. E.D. 2002), to be addressed *infra*.

aspects and uses of the property located in the Subdivision, which indentures appear in, and are written on, the Original Plat.

In conformance with the amendment provision of the Original Indentures, two-thirds of the lot owners approved the Fourth Revised Indentures in 1972, which incorporated for the first time the Right of First Refusal provision, duly recorded in 1973. This right of first refusal provision required the seller of any lot to provide 15 days' notice of the proposed sale of said lot to every other lot owner in the Subdivision, each of which would have 15 days to elect to purchase said lot for the same sale price and upon the same terms as negotiated and accepted by the current proposed buyer. Otherwise, the sale could go forward as planned. Subdivision Trustees maintain in their third point that Seller and her agents failed to comply with the right of first refusal provision. The evidence in the record does not bear this out.

In the instant case, on January 31, 2013, Seller's realtor Judy Miller hand-delivered to each home in the Clayton Terrace Subdivision a Notice of Sale of Lot 6 prepared by Insight Title. Each notice contained the terms agreed upon by Seller and Buyer, as well as notice of a closing day 15 days from the date of the notice, February 15, 2013. Almost all of the lot owners indicated on the notice where specified they had no interest in purchasing Lot 6 and returned the notice so marked. The remaining notices were not returned at all, and self-expired within 15 days. No one expressed an interest to buy Lot 6 within the time allotted and the sale of Lot 6 from Seller to Buyer closed on February 15, 2013. None of the witnesses called by Subdivision Trustees to testify at trial testified they did not receive the Notice of Sale for Lot 6. Seller and her agent Miller complied with the right of first refusal provision as set forth in the 1973 Fourth Amended Indentures. No one was denied an expressed interest and/or offer in buying Lot 6 within the 15-day time period from notice to closing. Therefore, the sale of Lot 6 is not void for

failure to comply with the right of first refusal provision or any lot owner's expressed right within the strictures of the provision to purchase Lot 6. Therefore, Subdivision Trustees' Points III and IV are denied. Accordingly, Subdivision Trustees' Points I and II are denied as moot.

Subdivision Trustees' Point V – Abuse of Process

In their fifth and last point, Subdivision Trustees claim they did not abuse process in filing suit against Seller because any ulterior motive they had in suing her is irrelevant, citing in support Duvall, 86 S.W.3d at 85 ("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").

The elements of a claim of abuse of process, a tort, are: (1) the defendant made an illegal, improper, perverted use of process, a use neither warranted nor authorized by the process; (2) the defendant had an improper purpose in exercising such illegal, perverted or improper use of process; and (3) damage resulted. Ritterbusch, 789 S.W.2d at 493. The phrase "use of process," appearing in element (1), refers to some willful, definite act not authorized by the process or aimed at an objective not legitimate in the proper employment of such process. Id.

(1) Improper Use of Process with (2) Improper Purpose

More than a year after closing, on April 24, 2014, Buyer filed an application with the City of Frontenac to subdivide Lot 6. Four months later, on August 21, 2014, Subdivision Trustees filed suit against Buyer and Seller. Subdivision Trustees claimed in their suit against Seller that her sale of Lot 6 was improperly noticed to the subdivision residents as required by the Amended Indentures and was thus void. Their claims against Seller were she failed to comply with the notice requirements of the right of first refusal provision, thus voiding her sale of Lot 6 a year and a half earlier; and lot owner Schwartz wanted to purchase Lot 6 but was

denied her right of first refusal by Seller.

However, Subdivision Trustees had no witness testify they did not receive the notice. They had no witness testify they wished to purchase Lot 6 but were not given an opportunity of first refusal through the 15-day notice. Seller had witness Miller who testified she hand-delivered a 15-day notice in conformance with the provision to every Subdivision lot owner on January 31, 2013, 15 days prior to the closing date which Seller extended to February 15, 2013, in order to be in conformance with the right of first refusal provision.

Subdivision Trustees knew about the sale, but did not bring suit alleging the sale was void until August 21, 2014, more than 18 months after the February 15, 2013 closing date. During this span of time, Seller deposited the proceeds from the sale into her mother's trust account, where those funds remained for more than a year while her mother's estate was finalized and all tax matters concluded. In early April of 2014, believing the sale of Lot 6 to be final in all respects, Seller disbursed the assets of her mother's trust, including the proceeds of the sale of Lot 6, to the trust's beneficiaries.

The delay in bringing suit against Seller was attributed to Subdivision Trustees' "wait and see" attitude as to whether *Buyer* was going to pursue building an additional residence on Lot 6 by splitting the lot. It had nothing to do with any belief on the part of Subdivision Trustees that there were any irregularities with Seller's compliance with the Subdivision Indentures, and in particular the Right of First Refusal provision, in her sale of Lot 6. Subdivision Trustees Stahr and Francis were made aware of Buyer's plan to subdivide Lot 6 within ten days of the closing. Trustee Stahr was concerned by the idea of having Lot 6 subdivided, but neither she nor Trustee Francis approached Buyer or leaseholder McGowan to discuss it or take any action with regard thereto, electing instead to "just wait and see," hoping "it's not going to be an issue."

Subdivision Trustees maintain if they also had an ulterior motive in bringing their suit against Seller, *i.e.,* to prevent Buyer's actions with regard to Lot 6, it is irrelevant under Missouri law.

However, in the instant case, the *only* motive for bringing Seller into the suit, as stated by Head Subdivision Trustee John Tackes (Tackes) via deposition and email, was not that Seller failed to comply with the right of first refusal provision in any way, but to prevent Buyer's division of Lot 6 and see "that [Buyer] moves out of the neighborhood and takes their schemes with them." In the email, Tackes admits naming Seller as a party to the lawsuit was simply a means to "achieve the first two goals…." Subdivision Trustees' suit against Seller did not merely have an additional ulterior motive. Rather, Seller's inclusion as a defendant was a completely unauthorized, willful, definite act singularly directed at having an effect on Buyer. Ritterbusch, 789 S.W.2d at 493.

Tackes further admitted that Subdivision Trustees "really have no beef with [Seller] and [her mother's trust] she represents" and "[i]f [Buyer] backs down and does not build on the land[, Subdivision Trustees] don't have to enforce the indentures." Inclusion of Seller in the suit fits the very definition of a willful act "aimed at an objective not legitimate in the proper employment of such process." Ritterbusch, 789 S.W.2d at 493. Subdivision Trustees not only abused Seller through a perverted use of process, but Schwartz also was merely a pawn in the scheme to stop Buyer from building or force Buyer out of the subdivision altogether. In fact, when Schwartz inquired of Tackes via email whether she would actually be required to purchase Lot 6 if the trial court were to rule in Subdivision Trustees' favor and declare the sale of Lot 6 void, Tackes answered, "The lawsuit is not about you getting the property." Schwartz herself admitted in a deposition she does not really "care about what happened with respect to the right

of first refusal" but is "however, very concerned about whether or not the houses in [her] neighborhood can be subdivided and whether a second residence can be built on what was previously one lot."

Based on the foregoing, the first two elements of a claim of abuse of process are satisfied in this case.

(3) Damages

Here, Seller's damages are easily established in the form of her attorney's fees and costs in the amount of $119,243.99 that she incurred in defending the suit Subdivision Trustees willfully brought against her as well as in countersuing them in tort for their abuse of process against her, a claim upon which she prevailed. The trial court found Seller had "been directly and proximately damaged by [Subdivision Trustees'] actions in the form of attorney's fees and costs in the amount of $119, 243.99." The trial court twice expressly and specifically indicated it found Seller's claimed attorney's fees and costs in the amount of $119,243.99 fair and reasonable considering the circumstances. Accordingly, the third and last element of abuse of process, damages, is established in this case.

Thus, we find the trial court did not err in ruling in Seller's favor on Count I of Subdivision Trustee's amended petition against her and on her counterclaim for abuse of process. The only issue in this regard that needs rectifying is the actual amount of the monetary award to Seller in the judgment, from $60,000 to $119,243.99, to be assessed in its entirety against Subdivision Trustees. This is in accordance with our resolution of Seller's Points I and II, discussed *supra*. Subdivision Trustees' Point V is denied.

## Conclusion

The trial court's judgments are affirmed in part and reversed in part in accordance with this opinion. This cause is remanded for the following determinations.

The trial court's December 21, 2016 judgment awarding $60,000 to Seller is reversed in its entirety. The trial court upon remand is directed to enter an award of $119,243.99 in favor of Seller to be paid in its entirety by Subdivision Trustees, and none by Buyer.

The trial court's December 30, 2016 judgment awarding Subdivision Trustees all of their incurred and requested attorney's fees and costs in the amount of $203,915.56 to be paid entirely by Buyer is reversed. The trial court upon remand is directed to determine a more reasonable amount of Subdivision Trustees' requested attorney's fees to be awarded to them and payable by Buyer, if any.

Sherri B. Sullivan

SHERRI B. SULLIVAN, J.

Robert G. Dowd, Jr., P.J., and
Kurt S. Odenwald, J., concur.