The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Attorney, Kizer & Black Attorneys, PLLC, Maryville, Tennessee

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1996 BPR No. 017947

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee 1996; BPR No. 017947 - Active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Kizer & Black Attorneys, PLLC 1995 - present; partner since 2007. I have only worked as an attorney at Kizer & Black in my adult life.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I represent the City of Maryville as its City Attorney. I also represent the Maryville City Schools, Tuckaleechee Utility District, South Blount Utility District, the Town of Greenback and the Maryville Housing Authority.

As City Attorney for Maryville, I deal with employment and human resources matters, contracts, personal property and property tax collection, resolutions, ordinances, environmental issues, zoning, condemnations, planning and anything else that comes up, much like a general practice. I advise the Maryville Board of Zoning Appeals and Planning Commission in addition to the City Manager and City Council. I attend all city council meetings. I work on legal issues involving the water, sewer and electric utilities. I litigate on behalf of the City. I prosecute cases before the Administrative Hearing Officer involving codes violations. I file collection actions where, for example, a person has damaged a city telephone pole in a car wreck.

I actively represent over 125 property owners' associations and condominium owners' associations throughout East Tennessee. I draft and revise covenants, master deeds and bylaws, advise boards as to disputes with owners and third parties, collect past due assessments including filing sworn accounts and foreclosure actions, and deal with day to day association issues such as requiring owners to comply with covenants. I litigate owners' association cases which frequently involve disputes with the developer of the community.

I also represent a number of local developers like Tennessee National, LLC and Tennessee Land & Lakes, LLC (Jim Macri). Occasionally, I represent individual property owners in disputes with owners' associations.

I represent and advise many individuals and businesses in my community.

As one example of what work I do, I recently took a case where my client is being threatened by a neighbor with litigation because she owns chickens. The neighbor complains that her keeping of chickens constitutes a violation of the restrictive covenants that limit animals in the neighborhood to "household pets." Is a chicken a household pet? I work on that kind of case one minute and a multi-million dollar bond issue for South Blount Utility District the next minute.

I represent many local realtors, and they refer their clients with real estate issues to me for representation and advice.

I work with Westcor Title Insurance Agency and defend and prosecute actions involving title concerns for their insureds throughout East Tennessee. I have worked with them for about five years and handled around 15 such cases.

I have completed 34 appeals and currently have 3 pending cases in the Court of Appeals, Eastern Section.

I am also the current president of the Tennessee Municipal Attorneys Association, a professional association of over 100 city attorneys from across the state.

The percentages of my practice areas currently break down approximately as follows:

City of Maryville: 25%

Other governmental work for Maryville City Schools, Maryville Housing Authority, utility districts and the Town of Greenback: 10%

Contract litigation: 5%

Property related litigation relating to title to real estate, easements, partitions and condemnations: 7%

Owners' associations (including day to day issues, litigation and collections): 35%

General business advice and business litigation: 5%

Appellate work: 3%

Estate litigation including cases involving will contests and claims of undue influence: 2%

Personal injury such as car wrecks and premises liability cases: 4%

Other general litigation including insurance policy coverage disputes: 4%

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I have been in private civil practice at Kizer & Black throughout my career as an attorney. I was very fortunate to have been mentored by prominent attorney David Black, who was a founder of our firm and who has been a litigator since 1968.

In 1996, my first case with David was a jury trial involving a wrongful death due to electrocution on a job site. We alleged OSHA violations were negligence per se. We won the case, and I found the trial process to be exhilarating. I learned the importance of diligent trial preparation by watching David. For the next several years, I worked beside David on cases filed by our clients against AT&T, Holiday Inn and other similar high-profile defendants. I handled discovery, argued motions and drafted legal memoranda.

We tried another jury case involving a forged holographic will where there were dueling handwriting experts. We brought a microscope into the courtroom to let the jury look at the pen strokes up close on the alleged will. Our expert explained to the jury that the pen strokes on the document were not fluid as you see with a normal signature, but were choppy, like one sees in a forgery where someone is drawing someone else's name. The jury agreed, and the alleged will was not admitted to probate.

In 1996-98, we were involved in very contentious but ultimately successful litigation involving the Laurel Valley community in Townsend, Tennessee where we represented the homeowners' association board against developers who refused to turn-over control of the common areas.

This was my first experience with representing a property owners association, and I found that I really liked the work. I noticed that few local attorneys were practicing in this area of law that to me seemed very intuitive.

I also worked in this same time frame as second chair on personal injury and medical malpractice cases with David and with Jerry Cunningham, another senior lawyer in our firm at the time. I learned about vocational experts, life care planners, economists, medical bill and record compilation and trial techniques necessary to prove and/or defend damages in tort cases.

Over time, I began to develop my own civil practice and my own clients. I love to write briefs and do legal research, so soon I was the go-to person in the firm for appellate work. Over time, I have completed 34 appeals. Additionally, I have 3 cases currently pending in the Court of Appeals.

In 1999, I represented a woman who had fallen at a local movie theater and hurt her head and neck. The seat in the theater was broken and caused her fall. This was the first big case where I was lead counsel. I filed a premises liability lawsuit on my client's behalf against the theater. After learning that the manager on duty at the time of the fall had recently been fired from her job, I quickly took her deposition. The former manager admitted that management at the theater knew about the broken seat, but did not take any action because they knew that the theater was soon to be torn down to make way for a new theater building. She acknowledged that theaters are dark, and it would have been difficult for my client to have seen that the seat was the broken. She also admitted that the theater did not follow its own policies in addressing the broken seat. Sadly, my client suffered brain damage from the injuries sustained in the fall. In preparing her case, I took numerous medical depositions all over the southeast. I deposed multiple expert witnesses on our side and on the defense side. We settled the case in mediation for a confidential amount in 2002. The client was very pleased with the result. I was pleased that I had handled such a complex case with only six years of legal experience, and my confidence grew.

In the early 2000's, I became involved with the Tennessee National community and represented its developers and homeowners' association. It is one of the largest developments in Loudon County. I was introduced to the association's property management company, Morris Properties. They liked my work and referred me work from their other owners' association clients. The practice grew through referrals, and I now represent over 125 homeowners' associations and condominium owners' associations. I draft, review and revise master deeds, declarations and bylaws. I have filed hundreds of actions to collect past due assessments. I have foreclosed on properties when the assessments were not paid and had the property sold on the courthouse steps to satisfy the association's lien. I have conducted extensive post-judgment discovery and executed garnishments of wages and levies on bank accounts to collect on judgments. I have filed numerous suits to enforce restrictions and the requirements of architectural review committees. I staged *coups d'états* to oust board members that my client wanted to vote off. I attended board meetings and annual meetings of the association members. Many of these annual meetings were so contentious that they required a police presence to prevent violence.

I filed lawsuits to enforce insurance contracts, including one notable case involving the roof of the Candy Factory condominium building in downtown Knoxville that was damaged in a hailstorm in 2011. The insurance company initially denied the casualty claim, but we settled the case for a significant amount that the board put toward a new roof. Our expert testified that the

hail damage from the storm at issue shortened life expectancy of the roof, and that caused the insurance company to reconsider its complete denial of the claim.

In 1999, David became City Attorney for the City of Maryville. I helped him by working on city issues. I drafted and reviewed contracts and wrote ordinances and resolutions. I condemned property for public use. I helped adopt model codes with local changes. I took the lead when the city decided for the first time to allow liquor stores. I designed the process for selection of the recipients of the three local licenses that the City initially permitted. With help from a committee, I drafted an ordinance in the late 1990's that was the first of its kind in Tennessee requiring all people to show government issued photo id in order to purchase alcohol, regardless of their apparent age. This ordinance has been later used as a model by other cities. I worked with zoning, planning and codes. I worked to separate the planning regulations from the zoning ordinances in the City Code in the mid 2000's. I attended meetings of the Board of Zoning Appeals, Planning Commission, and City Council where I gave legal advice. I advised the City on personnel issues. I worked with the police department and others on amending parts of our city code.

I litigated a case against a city contractor and engineer when the City's huge water detention pond next to the water treatment plant suddenly drained itself completely. The pond had been built on a sink hole that the engineers should have known was there. The engineers had done subsurface testing, but no one had analyzed the results of the tests. If they had looked, they would have found clear indications that there were sink holes under the property. The pond should not have been built on this location at all. We settled in mediation for the amount the utility paid for the construction of the pond plus the amount it took to restore the property.

When David retired as City Attorney in 2016, I was appointed to the position. I had been heavily involved in City work for 17 years by that time.

In the mid 2000's, I began representing the Maryville City School System. Since that time, I have advised the system on contracts, leases, policies, statutory interpretations, and disciplinary actions involving teachers and students. I handled teacher tenure revocation hearings. I have sued parents who are sending their kids to our schools even though they are not residents of the city (nor are they tuition students) for reimbursement of their child's education expense.

I have prosecuted and defended lawsuits for clients in cases involving easements by implication, easements by necessity, and the scope and overburdening of easements. I have litigated numerous boundary line disputes and partition actions over the years. I have litigated at least 15 quiet title actions. I work with Westcor Title Insurance Company, and represent their insureds in cases covered under their title insurance policies.

My personal injury practice has included premises liability cases and cases involving car, motorcycle, four-wheeler and bicycle wrecks. I have prosecuted dog bite cases and several cases where dogs tripped a person and injured them when they fell.

I have handled corporate disputes and LLC disputes over minority shareholder rights and/or rights on dissolution. I have sued to get corporate documents my clients were entitled to review. I have negotiated sales of businesses. I have negotiated many cell tower leases.

I have been involved in estate litigation including will contests and cases involving alleged breaches of fiduciary duty and undue influence. I have filed and defended contested

conservatorships.

I have represented clients in wrongful detainer actions and lawsuits over leases.

I represented many contractors in defending construction cases in the late 2000's.

I was hired by Blount County and successfully defended a spot zoning case.

I have worked with the Tuckaleechee Utility District and the South Blount Utility District on contracts, litigation and bond issues.

I have taken hundreds of depositions of all kinds. I have argued countless motions including dispositive motions. I have participated in around 50 mediations. I have tried hundreds of cases, including many jury trials.

I worked full time for the last 23 plus years except for the brief periods of maternity leave after each of my three daughters were born. I always worked right up until the time I went into labor. I was on my cell phone inquiring about a mediation within minutes of my third daughter being born, much to my mother's dismay.

I am usually either the top producing lawyer in my 9 lawyer firm or the second highest producer in a slow year. I have enough legal work from clients to work 24 hours a day if I could.

I have never advertised for clients. Clients come by word of mouth and through connections with my firm.

I treat my clients with respect, and I truly care about them and the outcome of their cases. Nothing is more satisfying than a repeat client or a referral of a new client from a former or existing client. I love helping people and working to solve their difficult problems or issues. I try to handle a case for my clients in the same way I would handle the case if a family member were my client.

I have two scrapbooks filled with notes and cards from clients, attorneys and others thanking me for my work over the years. Reading through this "feel good file" cheers me up on bad days. Helping so many people and treating them with respect and kindness are what I am most proud of in my legal career.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I list below the various cases I have argued before the Court of Appeals and Tennessee Supreme Court and what they were about in order to show what work I have done at the appellate level. I have always enjoyed appellate practice. I always look forward to oral arguments. Though I have not won every case, I think that I have consistently made good arguments available based on the facts and the law the cases presented.

These cases are:

Payne v. Savell, 1998 WL 46454 – Dispute involving corporation stock in a travel agency

Peery v. Swafford, 1998 WL 744109 – Will contest

In re Estate of Peery, 2000 WL 222617 – Will contest

Sutton v. Sutton, 2000 WL 337567 – Divorce

Venable v. Venable, 2001 WL 427650 – Divorce

Hopewell Baptist Church v. Southeast Window Mfg. Co., LLC, 2001 WL 708850 – Dispute over windows put in church

Stinnett v. Ferguson, 2002 Tenn. App. WL 445073 – Divorce case involving value of business that was marital property

Foster v. Colonial Development, 2002 WL 185477 – Alleged whistleblower employment case

White v. Jenkins, 2002 WL 31106423 – Landlord tenant

Rodgers v. Rodgers, 2004 WL 129990 – Divorce

Michael v. Michael, 2004 WL 362348 – Divorce

Laurel Valley Property Owners Association, Inc. v. Hollingsworth, 2004 WL 1459404 – Easement case

Danny L. Davis Contractors v. Hobbs, 157 S.W.3d 414 (Tenn. App. 2004) – Construction dispute.

Hinkle v. Estate of Hartman, 2007 WL 700973 – Life insurance policy dispute

Proffitt v. Smoky Mountain Woodcarvers Supply, Inc., 2010 WL 1240975 – Dispute over corporate records

Ward v. Yokley, 338 S.W.3d 912 (Tenn. App. 2010) – Recision of deed

Layne v. Adkins, 2011 Tenn. App. Lexis 475 – Fraud related to conveyance of property

City of Maryville v. Langford, 2012 WL 2309607 – Constitutionality of parade permit ordinance

Proffitt v. Smoky Mountain Woodcarvers Supply, Inc., 2012 Tenn. App. Lexis 308 – Minority shareholder rights and wrongful termination

In Re Estate of Miller, 2013 Tenn. App. Lexis 37 – Estate litigation

Tennessee Farmers Mutual Insurance Company v. Reed, 419 S.W.3d 262 (Tenn. App. 2013) – Insurance policy dispute

Haiser v. Haines, 2014 Tenn. App. Lexis 804 – HOA/developer dispute; class action issues

Laurel Hills Condos Property Association v. Tennessee Regulatory Authority, 2014 Tenn. App. Lexis 205 – Dispute over water system

F&M Marketing Services v. Christenberry Trucking, 2015 Tenn. App. Lexis 846 – Piercing the corporate veil

F&M Marketing Services v. Christenberry Trucking, 523 S.W.3d 663 (Tenn. App. 2017) – Piercing the corporate veil

Floyd v. Akins, 2017 Tenn. App. Lexis 724 – Estate litigation

Blount County Board of Education v. City of Maryville, 2017 WL 6606855 – Dispute over liquor by the drink tax proceeds

Crisp v. Nelms, 2018 Tenn. App. Lexis 160 – Personal injury

Haiser v. McClung, 2018 Tenn. App. Lexis 509 – HOA/developer dispute

Innerimages, Inc. v. Newman, 579 S.W.3d 29 (Tenn. App. 2019) – HOA/developer dispute

Blount Co. Bd of Ed. v. City of Maryville, 574 S.W.3d 912 (Tenn. 2019) – Dispute over liquor by the drink tax proceeds

Dailey v. Dailey, Appeal No. E2019-00928-COA-R3-CV; pending – Divorce

Barton v. Barton, Appeal No. E2019-01136-COA-R3-CV; pending – Divorce

Southeast Jubilee Investment, LLC as successor to Kawal, Inc. d/b/a Gas Express v. Uma Shiv Appeal No. E2019-02141-COA-R3-CV; pending – Landlord tenant

The most notable of these cases are the *Haiser v. McClung* case in 2018 and the *Innerimages v. Newman* case in 2019. Both cases established important new law for owners' associations and developers in Tennessee. The *Haiser* case answered long-asked questions about when the statute of limitations accrues for challenging the adoption or amendment of restrictive covenants. The trial court erred in holding that the statute ran six years from recording the restrictive convents in the register's office. The Court of Appeals overturned the trial court holding on this issue and explained how to compute when such a cause of action accrues. In the *Innerimages* case, the Court of Appeals adopted for the first time in Tennessee several important provisions of the *Restatement of Property* dealing with the timing of developer turn-over of common areas and of owners' associations to the members/owners in a common interest community. Since Tennessee has so few applicable statutes in this area of law, case law guidance was greatly needed.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I was a hearing officer for the Board of Professional Responsibility (BPR or Board) from 2006-

2012. I chaired the three-person hearing panel numerous times. I heard cases involving attorney discipline such as cases involving revocation of an attorney's license to practice law due to professional misconduct. We made recommendations of disciplinary action to the Board, heard witness testimony and created an evidentiary record. In 2012, when I was aged off the Committee after two three year terms, Rita Webb, Executive Director for the BPR told me in an email dated March 30, 2012 in pertinent part: "As I told Board members recently, you have been among those Hearing Committee members who I could always count on to respond promptly and to be actively engaged in the work of the Board. I appreciate that – you will be missed."

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I am trustee for several testamentary trusts for clients.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

I prosecuted in City Court for the City of Maryville for many years. I clerked for United States District Court Judge Leon Jordan as a law student. I also worked at the U.S. Attorney's Office in Knoxville as a clerk when I was in law school. I handled a case in the Tennessee Regulatory Authority regarding a public water system (*In Re: Laurel Hills Condominium Property Owners Association*, 2012 WL 3740831) where we successfully prevented a Certificate of Appropriateness from being granted to a potential public water system operator who my clients thought was unqualified to operate the water system.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Never.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Tennessee, Knoxville 1989-1992: BA in French, graduated Magna Cum Laude,

Phi Beta Kappa; Normandy Scholar; Kappa Kappa Gamma; Vol Corps.; UT in France 1991 "Best in French" Award.

University of Tennessee, Knoxville 1992-1993: Master's Degree program in French Literature; Graduate Teacher's Assistant in French (taught French 102 to undergraduates); I left because I decided to go to law school instead of being a French teacher after I actually taught French and realized that I did not want to do that for a living.

University of Tennessee College of Law, Knoxville 1993-1996: JD, graduated Cum Laude; Woman Graduate of the Year 1996; Am. Jur. in Constitutional Law; Advocate's Prize; Labor Law Moot Court Team; Phi Delta Phi (President).

PERSONAL INFORMATION

15. State your age and date of birth.

48 – DOB: [redacted] 1971

16. How long have you lived continuously in the State of Tennessee?

44 Years

17. How long have you lived continuously in the county where you are now living?

44 Years

18. State the county in which you are registered to vote.

Blount County

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

A complaint was filed with the BPR against me over fifteen years ago by a person who was upset because I, as an Attorney for the City of Maryville, sought to enforce zoning laws and shut down the business he was running out of his house. He stated in his complaint that I was "the devil". The complaint was promptly dismissed at an administrative level with no adverse action taken.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

I was sued in 2006 once by an opponent in a lawsuit with my firm in a case styled *Olivera v. Cunningham, et al.*, Blount County Circuit Court No. L-13056. It was not alleged that I did anything personally wrong. It involved a fall out from a domestic dispute where another attorney

in my firm had represented the plaintiff's ex-wife. The case was promptly dismissed.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Blount County Community Action Agency (active Board member from 2012-present; Board Chair from 2016-2018); Rotary Club of Maryville 2019-present (Programs Committee); Friends of the Smokies; Encore (Maryville City Schools Orchestra Booster Club); Member, First United Methodist Church, Maryville.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Blount County Bar Association 1996 – present; President 2001 and 2011; Program Chair for several years; Local Rules Committee.

Knoxville Bar Association 1996 – present.

Tennessee Municipal Attorneys Association ("TMAA") 2002 – present; Executive Board since 2017; current President of TMAA. This is a professional association for city attorneys across the state of Tennessee with over 100 members. We have multiple meetings each year that include CLE presentations relevant to municipal practice. We also file amicus briefs with Courts of Appeals on issues affecting cities.

Tennessee Council of School Board Attorneys 2005 – present; attended seminars on education

law; participated in email forum for attorneys for school boards across the state where we discuss legal issues of concern involving schools.

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Board Certified in Civil Trial Advocacy by the National Board of Trial Advocacy 2008-present.

Certified by the State as a Civil Trial Specialist in 2009 when Tennessee recognized legal specialties. The State no longer recognizes legal specialties.

Board Certified by the National Board of Civil Pre-Trial Advocacy as a Specialist in Civil Pre-Trial Advocacy 2012-present.

Top 100 lawyers in Tennessee according to the National Trial Lawyers Association 2013-present.

Super Lawyer 2018-present.

AV Rated by Martindale Hubbell 2013-present.

Best Lawyers in America 2019, recognized in the area of Appellate Practice.

Litigation Counsel of America 2010 – present. This is a trial lawyers honorary society.

Million Dollar Advocates Forum, association of trial lawyers who have had settlements or judgments in excess of $1,000,000, 2002-present.

Mid-South Rising Star Super Lawyer; 2011.

National Trial Lawyers Top 40 under 40; 2012.

30. List the citations of any legal articles or books you have published.

None.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

In 2017 and 2018, I taught two seminars on owners' association law for the Knoxville Bar Association ("KBA"). I have also given seminars for the Blount County Bar Association on municipal law and owners' association law, but I do not recall the dates. I am scheduled to present at another CLE for the KBA in July 2020 on owners' association law.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

I am City Attorney for the City of Maryville (2016-present). I have represented the City of Maryville since 1999 through my work with Kizer & Black when David Black was the City Attorney, and I assisted him as an attorney for the City. I am City Attorney for the Town of Greenback. (2019-present). Both city attorney positions are appointed.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

The attached briefs were written entirely by me.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I would like to put my legal experience to use in a way that makes a positive impact in East Tennessee on a wider scale than I can as a private attorney. I have witnessed and appreciate the incredible personal impact that a decision from the Court of Appeals can have on clients, their cases, and their lives. I have been continuously impressed with how often the Court of Appeals gets things right. Errors are rightly corrected on appeal, and decisions that are not in error are permitted to stand. I would like to see that tradition of impartiality and legal scholarship continue and to be part of that continuation. As a judge, I would strive to be practical, to have common sense and to be mindful of the real-world impact of the court's decisions.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I have participated in the Saturday Bar in Blount County sponsored by Legal Aid on numerous occasions as well as special law days for the public held at the Blount County Library. I have participated in the Pro Bono Project and taken numerous civil cases from Legal Aid over the years for clients unable to pay.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

Judge for the Court of Appeals, Eastern Section, Civil Division.

My selection as a judge would impact the court by providing a needed female perspective to the local judiciary. I have and understand East Tennessee values. I also believe that being a mother of three children allows me to view cases with a mother's concern and heart. My impact would also be felt by the court due to my extensive legal experience as described above. I can efficiently manage a substantial case load. I can solve complex problems and assimilate large amounts of written material. I get along well with others and respect and consider differing points of view. I would be diligent in following applicable statutes and case law and would not take it upon myself to make new law unless it was appropriate as an issue of first impression for the court.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I am a very active member of the Board of the Blount County Community Action Agency (Meals on Wheels, SMiles). I was Board chairman from 2017-2019. I am currently on the committee seeking a new Executive Director. My family and I deliver meals to the elderly for Meals on Wheels. I am also active in Rotary and participate in its fund raising as well as in community activities such as the dictionary project, providing a dictionary to each third grader in Blount County. I was on the Maryville City Schools Foundation Board from 2004-2009. I was a member of Leadership Blount Class of 2001. I have been on the Board of the Red Cross, the YWCA of Blount County, Children's International Summer Villages and Vocational Rehab of Blount County.

I would expect to expand my community involvement outside of Blount County if I were to be appointed to be judge.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I think it would be helpful to the Council in evaluating my candidacy to understand that I am a loyal, stable and reliable person. I have been with the same law firm for 25 years, my entire legal career. This application is the first time I have sought other employment in that time. I have represented the City of Maryville for over 20 years. Many of my clients have been with me for at least 20 years. I have been married for 27 years to my college sweetheart. We have lived in the same neighborhood for 24 years. As a child, I attended the same school system for 13 years and then sent my children to those same schools 30 years later. My parents live near me in the same house since 1975. I have a "grow where you are planted" philosophy. I love East Tennessee and respect the people here. I think that my history of consistency is a good indicator of the type of judge I would be: no surprises. I keep my head down, work, and stay the course. I have always had a "customer service" point of view in my law practice. My practice has been very successful as a result, and I have almost more work than I can handle. I would bring that same attitude of

service to the court.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. My job would be to uphold the law whether I agree or disagree with it. It is what it is. Part of my job as the Attorney for Maryville Housing Authority is to evict tenants who are elderly or disabled from public housing. These are poor people, and they frequently come to court in tears of desperation. I feel sorry for them. I take no joy in evicting them. Many of these people are in a dire situation once they are evicted. I would personally like to give them more time, one more chance, etc. However, I cannot allow my personal sympathy to override my duty to zealously represent my client, so I get the job done and seek eviction if legally appropriate. Tenants have to pay rent and abide by the occupancy rules for the system to work. My personal opinions or sympathies would play no part in how I would apply the law as a judge. My job would be to interpret the law in an impartial and predictable way in accordance with legal precedent.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. David T. Black, Attorney
[redacted]
Maryville, TN 37804
[redacted]

B. Greg McClain, City Manager
City of Maryville
[redacted]
Maryville, TN 37801
[redacted]

C. Lt. General R.A. Tiebout (Ret. U.S.M.C.)
[redacted]
Townsend, TN 37882
[redacted]

D. Judge David R. Duggan
Circuit Court of Blount County

Blount County Justice Center
[redacted]
Maryville, TN 37804
[redacted]

E. Tommy Hunt, President, Calloway Oil Company
and City Council member
[redacted]
Maryville, TN 37803
[redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals, Eastern Section of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: 2-3, 2020.

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Melanie E. Davis

Type or Print Name

Signature

2-3-2020

Date

017947

BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

N/A

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Deed recorded on August 2, 2013, from Eldon Shirley to Lisa Akins giving her the entirety of the family farm was obtained as the result of undue influence.
2. Whether the Trial Court permitting each Plaintiff to cross-examine the other Plaintiff and other Plaintiff's witnesses constitutes an abuse of discretion.
3. Whether the Trial Court erred in awarding an Edward Jones investment account belonging to Eldon Shirley to Kim Floyd where Kim Floyd was the named beneficiary of that account upon Eldon Shirley's death and where there is no proof or allegation of undue influence by Ms. Floyd over her father.
4. Whether the Trial Court erred in finding that the parties stipulated that certain property consisting of a single-wide trailer, a modular home and property in Scottsboro, Alabama, were all part of the Estate of Eldon Shirley where counsel for the Appellant conceded that these were all estate assets in open court and on the record.

STATEMENT OF FACTS

Eldon Shirley and his wife, Evelyn Shirley, had three children, girls born within approximately three years of one another. (Trans. Vol. 5, p. 21, ln 1)[1]. The oldest child is Lisa Akins. The middle child is Donna Helms, and the youngest child is Kim Floyd. (Trans. Vol 5, p.20, ln 15-23). All are now adults. (Trans. Vol. 5, p. 21, ln 3-5). Evelyn Shirley died unexpectedly on May 29, 2003. (Trans. Vol. 5, p 25, ln 14).

Prior to her death, Evelyn Shirley had taken extensive care of Eldon Shirley for many years, and he was totally dependent on her. (Trans. Vol. 5, p.22, ln 13). Eldon Shirley had been disabled since 1991. (Trans. Vol 5, p. 10, ln 5-7). Evelyn Shirley handled all of the family's finances and business affairs, plus her husband's personal hygiene and health concerns. (Trans. Vol. 5, p. 22, ln 15-23; Trans Vol. 9, p. 125, ln. 15-19). She also took care of the house where the couple lived in Alabama. (Trans. Vol 5, p. 20, ln 5-11; Trans Vol. 9, p. 125, ln. 20-22). She made sure his prescriptions were filled and took him to doctor visits. (Trans. Vol. 5, p. 22, ln 15-23). She cooked his meals and sat them in front of him. (Trans. Vol. 9, p. 125, ln. 4). Evelyn Shirley retired from her job because taking care of Eldon Shirley was so much responsibility. (Trans. Vol. 5, p 20 ln 12-14). Eldon Shirley was physically handicapped and did not want to be responsible for himself. (Trans. Vol. 5, p. 23, ln 13-16).

Evelyn Shirley and her husband owned a ± 90 acre farm in Monroe County, Tennessee. (Ex. 31). This farm had belonged previously to Evelyn Shirley's parents. It was then owned by Mr. and Mrs. Shirley since October 25, 1993. (Id.)

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[1] "Trans." refers to the transcript of the proceedings.

Eldon Shirley did not make funeral arrangements for his wife. (Trans. Vol. 7, p. 80, Ln. 23-25). Lisa Akins made all the arrangements. (Trans. Vol. 7, p. 78, ln. 12-20). Mr. Shirley "never handled business". (Trans. Vol. 7, p. 117, ln. 1).

At the time of Evelyn Shirley's death, it was immediately and unanimously decided that Eldon Shirley was unable to care for himself and needed to return with his daughters to live in Tennessee. (Trans. Vol. 7, p. 149, ln. 18-23). Donna Helms and Kim Floyd wanted him to live in Knoxville near them, but they were overruled by Lisa Akins. (Trans. Vol. 7, p. 83, ln. 12-19; Trans. Vol. 7, p. 119, ln. 7-8). Lisa Akins decided to take Eldon Shirley to live on the farm in Monroe County, Tennessee, where he would be close to her. (Trans. Vol. 7, p. 118, ln. 11-23). Lisa Akins, as the oldest child, had always taken charge. (Trans. Vol. 7, p. 123, ln. 19 - p. 124, ln. 5; Trans. Vol. 9, p. 126, ln. 21-24).

After Evelyn Shirley's death, Eldon Shirley drank alcohol to deal with the pain and grief. He drank alcohol every day in the May through July 2003 time frame. (Trans. Vol. 9, p. 93, ln. 3-10; Trans. Vol. 9, p. 109, ln. 16-23). He "was in real bad shape". (Trans. Vol. 4, p. 111, ln. 14-18). His drinking was evident to people who saw him in his home after his wife's death. (Trans. Vol. 7, p. 113, n. 12-16). He was numb and "very upset". (Trans. Vol 5, p. 120, l ln 25). He was depressed. (Trans. Vol. 5, p. 21 ln 4-11), even by Lisa Akins' own admission. (Trans. Vol. 5, p. 44, ln. 7). Eldon Shirley was so upset that he could not even attend his wife's burial on June 2, 2003. (Trans. Vol. 7, p. 122, ln. 17 - p. 123, ln. 15).

In this period of time, Eldon Shirley took Xanax to deal with his anxiety. (Trans. Vol. 5, p. 40, ln 13-14). He was prescribed Hydrocodone for pain and Zoloft for depression. (See, Ex. 6). He was morbidly obese and physically infirm with high blood pressure and diabetes. (Trans.

Vol. 5, p. 9, ln 20-24) (Ex. 33). He had emphysema and COPD. (Trans. Vol. 5, p. 9, ln 20-24). He had open, weeping wounds on his legs and feet. (Trans. Vol. 9, p. 59, ln. 7-13). He smoked cigarettes and had smoked his entire life. (Trans. Vol 5, p. 9, ln 13014). He was on oxygen. (Trans. Vol. 5, p. 9, ln 15-16). He had painful back problems. (Trans Vol. 4, p. 111, ln. 14-18). He had knee problems. (Trans. Vol. 5, p. 11, ln 20-22). He was totally blind in one eye. (Trans. Vol 5, p 123, ln 40). He had vision problems in his good eye. (Trans. Vol. 5, p. 14, ln 1).

Immediately after his wife was buried, Eldon Shirley was driven to Tennessee and began living in the farm house on the Monroe County farm. On June 4, 2003, within two days of his wife's funeral (that he could not attend because he was in such bad mental and physical shape), Lisa Akins took Eldon Shirley to People's Bank and had her name put on his bank account as a joint account holder. (Ex. 53, p. 696). (Trans. Vol. 23, p. 171, ln 22-p. 172 ln 5). She was made sole beneficiary of the account upon the death of Eldon Shirley. (Ex. 53, p. 696). Lisa Akins did not tell her sisters about opening this account. (Trans. Vol. 9, p. 64, ln. 11-15).

Lisa Akins further received a Power of Attorney from her father dated July 17, 2003. (Ex. 4). She had various other of her father's accounts and properties placed in her name including a single wide trailer and a double wide trailer, both located on the farm property. (Ex. 5; Ex. 10). She did not tell her sisters about these transactions. (Trans. Vol. 9, p. 64, ln. 5-10). Incredibly, within six months of Evelyn Shirley's death, primarily through the actions of Lisa Akins, nearly all of Eldon Shirley's assets had been placed in Lisa Akins' name. (Trans. Vol. 6, p. 47, ln. 16-21).

In Tennessee, Lisa Akins was in charge of Eldon Shirley's health care. (Trans. Vol. 5, p 51, ln 1-3). She was his primary care giver, by her own admission. (Ex. 32, p. 464.). She took

him to doctor visits. (Ex. 53, p. 701). She was his emergency contact for his doctors. (Trans. Vol. 5, p. 52, ln 12-14). His health was so bad that he was told he had six months to live. (Trans. Vol. 5, o. 52, ln 19-22). Lisa Akins decided at which hospitals her father would be treated. (Trans. Vol. 5, p. 54-55).

Lisa Akins controlled her father's finances. She wrote many checks from his account, including checks written without his permission. (Trans. Vol. 22, p. 168, ln 1-5).

Most importantly, on July 31, 2003, a Deed was executed for the Monroe County farm giving it to Lisa Akins with a life estate reserved for Eldon Shirley. (Ex. 2). Prior to the Deed being executed, Lisa Akins falsely told her father that Kim Floyd had "a real estate man" and was going to sell her part of the farm. (Trans. Vol. 4, p. 82, ln. 6-14; Trans. Vol. 9, p. 141, ln. 1-11). Lisa Akins told her father that the nursing home would get the farm unless he deeded it to her. (Trans. Vol. 7, p. 100, Ln. 8-13). Eldon Shirley said he did not want the nursing home to get his property and that is why, in a fog and under her influence, he put the property in Lisa Akins' name, with her promise to split it evenly with her sisters after his death. (Trans. Vol. 4, Page 110, ln. 12 - p. 111, ln. 2).

The circumstances under which this Deed was obtained are unusual and suspicious. Though prepared using the name and office of then Attorney Sharon Lee, the Deed was apparently drawn and notarized by Ms. Lee's secretary, Angie Williford (now Grimes). (Trans. Vol. 4, p. 32, ln. 3). Ms. Lee has no memory of the Deed or the client and could not find a file in his name. (Ex. 1). The check for the Deed was made out to Angie Williford personally for $90.00 for "deed work". Angie Williford co-endorsed the check. The check was cashed at Angie Williford's bank. (Trans. Vol. 4, p. 33, ln. 23-25). Ms. Lee never received these funds,

and asserted they were converted by Angie Williford. (Ex. 1). Angie Williford was later found to be stealing from Ms. Lee and was fired. (Ex. 1). Angie Williford claimed to not remember the Deed to Lisa Akins or who made the appointment to have it made. (Trans. Vol. 4, p. 36, ln. 4-8). None of this proof shows any "independent advice" given to Eldon Shirley by any attorney.

Eldon Shirley didn't understand the transaction with the Deed and thought he could get the property back when he wanted to. (Trans. Vol. 4, Page 112, ln. 6-7). Lisa Akins recorded the Deed personally on August 2, 2003 telling no one about her actions. (Trans. Vol 5, p 100, ln 8-14; Trans. Vol. 5, p. 103, ln 18-22; Trans. Vol. 7, p. 94, ln. 3-9; Trans. Vol. 7, p. 91, ln. 3-17). Lisa Akins testified as follows:

> Q. My question was: did you not feel that being transferred a ninety acre farm was something that your sisters should have been told about?
>
> A: No.
>
> (Trans. Vol. 5, p 100, ln 22-25).

This same Deed was later determined to have been the result of undue influence by Lisa Akins, and thus it was set aside in this case.

In the fall after the execution of the Deed, Lisa Akins wanted her father to move from the farm house on the farm property to a mobile home on the same property. This mobile home was purchased for Eldon Shirley using his money but titled in Lisa Akins' name. (Ex. 5). (Trans. Vol. 4, p. 65, ln. 1-8). Eldon Shirley titled the mobile home in Lisa Akins' name so that the nursing home would not get it. (Trans. Vol. 4, p. 66, ln. 1-12). He stated expressly that he wanted the mobile home divided equally among his three daughters after his death, despite its title ownership. (Trans. Vol. 4, p. 66, ln. 1-12).

Eldon Shirley did not want to move to the mobile home but instead wanted to stay in the farm house. Lisa Akins turned the water off to the farm house in order to force Eldon Shirley out of the farm house and into the mobile home, where she wanted him to live. (Trans. Vol. 9, p. 199, ln. 3-13; Trans. Vol. 6, p. 43, ln. 20). Unable to turn the water back on himself, having no choice, Eldon Shirley moved to the mobile home as Lisa Akins desired. (Id.) Eldon Shirley lived in this mobile home, held in his daughter's name, on the farm property in her name, for the rest of his life. This act of turning off the water, more than any other, shows who was in charge in this relationship between Eldon Shirley and Lisa Akins in 2003 after Evelyn Shirley's death.

In May 2006, Ms. Akins put her father's F150 pick-up truck in her name using the Power of Attorney he had given her. (Ex. 11).

Eldon Shirley later discovered the transfer of his F150 pick-up truck and wanted the truck back, but Lisa Akins refused to give it to him. (Trans. Vol. 4, p. 72, ln. 17 - p. 73, ln. 11). He became angry with her. (Trans. Vol. 21, p. 59, ln. 24 - p. 60, ln. 2; Trans. Vol. 22, p 155, ln 1-5). Soon after, he named his daughter, Kim Floyd, as beneficiary of an Edward Jones investment account payable upon his death. (Trans. Vol. 21, p. 63, ln. 14-16; Trans. Vol. 4, p. 73, ln. 20 - p. 74, ln. 5; Trans. Vol. 22, p. 152, ln 6-9).

He was also angry because he found out that his money in the bank was nearly gone. (Trans. Vol. 4, p. 74, ln. 8-10; Tans. Vol. 21, p. 167, ln 8-14). He was going to give Kim Floyd $40,000.00 cash, but found out he could not do so because Lisa Akins had run through all of his money, writing checks on the joint account. (Trans. Vol. 4, p. 74, ln. 15-21; Trans. 6, p. 181, ln 6-17). The joint account contained only Eldon Shirley's money. (Id.) Without the cash available, he gave Kim Floyd the Edward Jones investment account instead. (Id.)

Kim Floyd and Donna Helms discovered the Deed giving Lisa Akins the farm in January, 2008. (Trans. Vol. 22, p. 168, ln 7-22; Trans. Vol. 7, p. 91). Kim Floyd asked her father about this Deed in a letter dated May 20, 2008. (Ex.25.) As stated above, Eldon Shirley had been assured Lisa Akins that if he gave her the farm, it would not go into the hands of the nursing home. (Trans. Vol. 4, Page 68, ln. 18-19; Trans. Vol. 7, p. 100, ln. 8-13). Eldon Shirley told Lisa Akins to distribute the farm among the three sisters upon his death. Id.. (See also, Trans. Vol. 4, p. 71, ln. 11-20; Trans. Vol. 4, p. 108, ln. 1 - p. 109, ln. 1). In 2008, Kim Floyd was assured that this would happen, and the farm would be distributed to them one-third, one-third, one-third by Lisa Akins, upon their father's death pursuant to their father's stated wishes. (Trans. Vol. 7, p. 98, ln. 19-22; Trans. Vol. 7, p. 100, ln. 14-21). Lisa Akins had asserted many times that the farm would be divided with her sisters. (Trans. Vol. 4, p. 75, ln. 2 - p. 76, ln. 5-13; Trans. Vol. 4, p. 117, ln. 2-5). Nothing was done to contest the Deed at that time based on these assurances. (Trans. Vol. 7, p. 106, ln. 17 - p. 107, ln. 1).

On February 16, 2010, Eldon Shirley died. (Trans. Vol. 7, p. 110, ln. 6). Within one day of his death, Lisa Akins called Edward Jones to ask about Eldon Shirley's investment account. (Trans. Vol. 21, p. 54, ln. 1-4; Trans. Vol.9, p. 199, ln. 17-25). She had assumed that she was the beneficiary of this account. (Trans. Vol. 21, p. 54, ln. 5-8). She was infuriated when she found out that Kim Floyd had been designated as the beneficiary. She then refused to distribute the farm according to the wishes of her father. (Trans. Vol. 7, p. 97, ln. 9-12).

Eldon Shirley's Last Will and Testament left his estate equally to all three daughters. (Ex. 24). The problem is that Lisa Akins owned almost all of his assets so there was little left in the estate to distribute. (Trans. Vol. 22, p. 156, ln 8-16).

Kim Floyd filed suit claiming undue influence in obtaining the Deed at issue.

Lisa Akins attempted to hide the lawsuit from Donna Helms and told her not to worry about it and that she would take care of it. (Trans. Vol. 9, p. 150, ln. 7-14). However, eventually Donna Helms went to the courthouse and got the papers herself. (Trans. Vol. 9, p. 150, ln. 17-18). She then intervened. (R. at 30)[2]. She too sought to have the Deed at issue set aside on the grounds of undue influence.

There further were disputes between the sisters regarding various payments and transfers that had been made to the sisters when Eldon Shirley was alive. These other disputes, other than the Edward Jones investment account, did not involve Kim Floyd or only involved issues of personalty whose distribution by the Court is not contested on appeal.

[2] "R." will designate the Record.

STATEMENT OF THE CASE

This case began on June 4, 2010, when Kim Floyd filed a Complaint against Lisa Akins alleging that Eldon Shirley had been the subject of undue influence by Lisa Akins and seeking to set aside the Deed of July 31, 2003. (R.Vol. I, p. 1-21) .

The Complaint also sought to recover from Lisa Akins various funds and bank accounts belonging to Eldon Shirley for his estate.

An Answer was filed on August 30, 2010 (R. Vol. I, p. 22-26), denying undue influence and filing a counterclaim for the Edward Jones investment account that belonged to Kim Floyd. On March 31, 2011, Donna Helms filed a Motion to Intervene (R. Vol. I, p. 27-29). On August 9, 2011, an Order was entered allowing the intervention (R. Vol. I, p. 30). On August 9, 2011, Donna Helms filed an Intervening Complaint (R. Vol. I, p. 33-40). It adopted the allegations of the Floyd Complaint but added an allegation that the farm be declared a constructive or resulting trust for the three siblings. On November 2, 2011, Lisa Akins answered the Complaint and again denied undue influence and the other allegations against her. (R. Vol. I, p. 43-49). A Counter-Complaint was stated regarding payments and transfers made during Eldon Shirley's lifetime to Donna Helms. (Id.)

The Personal Representative of Eldon Shirley's estate filed a Motion to Intervene on January 24, 2013. (R. Vol. I, p. 83-84).

On February 20, 2013, an Order allowing the Motion to Intervene of Clifford Wilson, Administrator *Pendente Lite* of the Estate of Eldon Shirley was entered. Mr. Wilson filed an Intervening Petition seeking to recover personal assets, cash and intangible personal property for

the Estate from Lisa Akins due to undue influence and other improper conduct. (R. Vol. I, p. 90-91).

This case was heard in a bifurcated trial. The Order from the first trial, dealing only with setting aside the Deed for the farm to Lisa Akins, was entered on July 12, 2013 (R. Vol. II, p. 175-179) with findings of undue influence by the Court as the reason for the setting aside of the Deed at issue. The Court ruled that the burden of proof was on Lisa Akins to show that the transaction at issue was fair and that the execution of the Power of Attorney in her favor created a confidential relationship. A presumption arose that any transfer to Lisa Akins was procured by undue influence which Lisa Akins had to rebut by clear and convincing evidence. She failed to meet such standard under the proof. The Court found suspicious circumstances related to the transfer and that Lisa Akins had unduly influenced Eldon Shirley to her benefit, including obtaining the Deed at issue. The Court further found that Lisa Akins failed to prove that Eldon Shirley received any independent legal advice prior to making the Deed.

After Lisa Akins filed a Motion to Reconsider and/or to Alter Or Amend Order (R. Vol. II, p. 183-190), the Court entered an Order on March 13, 2014 (R. Vol. II, p. 223-243) denying the Motion to Alter or Amend that Order, but clarifying the Order nonetheless. This Order stated that the execution of the Power of Attorney itself did not create a presumption of undue influence but it created a confidential relationship. The confidential relationship, upon execution of the power of attorney followed by a transaction in which the attorney in fact receives a benefit from the transaction, gives rise to the legal presumption of the invalidity of the transaction. In addition, there were several suspicious circumstances, which also coupled with a confidential relationship, that give rise to the Court finding undue influence. (Id.) This same

Order denied the Motion to Alter or Amend on the issue of the propriety of the cross-examination by a Co-Plaintiff as raised by Lisa Akins' counsel. (Id.)

At the second part of the trial, the Court heard additional proof regarding the various transfers during the life of Eldon Shirley and whether they should be overturned . The Court entered an Order on August 7, 2015, adjudicating that particular items of personal property were part of the Estate or otherwise holding whether the items went to Donna Helms, Lisa Akins or Kim Floyd or to the Estate itself. (R. Vol III, p. 350-378). This Order determined that Kim Floyd could keep the Edward Jones investment account.

Lisa Akins' Motion to Alter or Amend and Amended and Supplemental Motion to Alter or Amend was denied by Order entered on March 14, 2016. (R. Vol. III, p. 411-412).

This appeal followed. (R. Vol I, p. 379).

STANDARD OF REVIEW

On appeal, the Trial Court's factual findings are presumed to be correct and are not to be overturned unless the evidence preponderates against them. (Tenn. R. App. P. 13(d)). For evidence to preponderate against the Trial Court's finding of fact, it must support another finding of fact with greater convincing effect. Watson v. Watson, 196 S.W.3d 695, 701 (Tenn. App. 2005). When resolution of issues depends upon the truthfulness of witnesses, the fact finder who has the opportunity to observe the witnesses and their manner and demeanor while testifying is in a far better position than the Appellate Court to decide those issues. Mach. Sales Co., Inc. v. Diamondcut Forestry Prods., LLC, 102 S.W.3d 638, 643 (Tenn. App. 2002). The weight, faith and credit to be given to a witness' testimony lies in the first instance with the trier of fact and the credibility of accorded by the Trial Judge will be given great weight by the Appellate Court. Id.

The Appellate Court is to review a Trial Court's conclusions of law under a *de novo* standard upon the Record with no presumption of correctness. Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993).

Whether a person exercised undue influence over another and whether a transaction was fair are questions of fact. In Re: Estate of Price, 273 S.W.3d at 125.

ARGUMENT

I. AMPLE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT THE DEED CONVEYING THE FARM PROPERTY TO LISA AKINS DATED JULY 31, 2003, WAS INVALID DUE TO LISA AKINS' UNDUE INFLUENCE ON HER FATHER, ELDON SHIRLEY.

Courts apply the doctrine of undue influence where one party, such as a grantee, is in a position to exercise undue influence over the mind and will of another, such as a grantor, due to the existence of a confidential relationship. In Re: Estate of Price, 273 S.W.3d 113, 125 (Tenn. App. 2008), quoting Brown v. Welk, 725 S.W.2d 938, 945 (Tenn. App. 1983): "A deed to a grantee who is in a confidential relationship with the grantor can be set aside if the grantee has exerted undue influence on the grantor to procure the deed". In Re: Conservatorship of Groves, 109 S.W.3d 317, 351 (Tenn. App. 2003), citing Brown, 725 S.W.2d at 925. The underlying theory of the doctrine of undue influence is that the donor was induced by various means to execute an instrument that in reality was the will of another substituted for that of the donor. DeLapp v. Pratt, 152 S.W.3d 530, 542 (Tenn. App. 2004). In Tennessee, where there is a confidential relationship between the parties followed by a transaction wherein the dominant party received a benefit from the other party, a presumption of undue influence arises that may only be rebutted by clear and convincing evidence of the fairness of the transaction. Childress v. Currie, 74 S.W.3d 324, 328 (Tenn. 2002). In other words, the party trying to rebut the presumption of undue influence must establish by clear and convincing evidence "that the transaction was fair and not procured through undue influence". (Id.)

In undue influence cases, the question is not simply whether the donor knew what he intended to do, but how this intention was produced and whether it was by abuse of a

confidential and fiduciary relationship. Turner v. Leathers, 191 Tenn. 292, 232 S.W.2d 269, 271 (Tenn. 1950). The inquiry is whether the weaker party's decision was a free and independent one, or whether it was induced by the dominant party. Fritts v. Abbott, 938 S.W.2d 420, 421 (Tenn. App. 1996). Because the effect of undue influence is to create a disposition contrary to the independent will of the grantor, courts look as to whether the disposition is unjust or unnatural or whether it differs from the grantor's previously expressed intentions. In Re: Estate of Brindley, 2002 LEXIS 567, WL 1827578 (Tenn. App. 2002) (Exhibit 1 hereto).

1. Existence of a confidential relationship.

In this case, there was undoubtedly a confidential relationship between the grantor, Eldon Shirley, and the beneficiary of the Deed, Lisa Akins. In general, confidential relationship is any relationship which gives one person dominion and control over another. Kelly v. Allen, 558 S.W.2d 845, 848 (Tenn 1977); Turner v. Leathers, 191 Tenn. 292, 298, 232 S.W.2d 269, 271 (1950); Mitchell v. Smith, 779 S.W.2d 384, 389 (Tenn. App. 1989). A confidential relationship is not merely a relationship of mutual trust and confidence, but it rather is one where confidence is placed by one in the other, and the recipient of that confidence is the dominant personalty with ability because of that confidence to influence and to exercise dominion and control over the weaker or dominated party. Mitchell v. Smith, 779 S.W.2d at 389. A normal relationship between a mentally competent parent and an adult child is not *per se* a confidential relationship. However, here in this case, the relationship was not normal between Eldon Shirley and Lisa Akins in the period at issue. There was a power imbalance in favor of Lisa Akins.

Lisa Akins held a Power of Attorney for Eldon Shirley. (Ex. 4). The Appellant tries to make much hay out of the idea that the Power of Attorney had not been exercised at the time the

deed was signed later that same month. However, this Power of Attorney was only one factor in the finding of the confidential relationship. The Power of Attorney certainly created a fiduciary duty by Lisa Akins toward her father, at a minimum.

The Record shows many other factors proving a confidential relationship. The Power of Attorney alone is by no means the sole basis for the finding of the Trial Court of a confidential relationship. The Court's Order of July 12, 2013, expressly finds additional suspicious circumstances supporting the Court's ruling on this issue. (R. Vol. II, p. 175).

Lisa Akins was caring for Eldon Shirley physically by providing him with assistance for doctor visits, medicine and other medical needs. (Ex. 53, p. 701, answer 20). The Court found Eldon Shirley was dependent on Lisa Akins for his care. (R. Vol. II, p. 176). She admits that she was his primary care giver. (Ex. 32, p. 464). He was physically infirm with severe health issues. (Ex. 32, p. 464). He was advanced in age. He was grieving the loss of his wife of forty-five years. He had COPD, emphysema, diabetes and was morbidly obese. (Trans. Vol 5, p 9, ln 20-24). He had weeping wounds on his legs and feet. (Trans. Vol. 9, p. 59, ln. 7-13). Clearly his health put him in a position of relative weakness. He was reliant on whoever could help with his medical conditions, his medicine, and his treatment. That person was Lisa Akins.

He also was mentally weakened due to depression, anxiety and grief. He was on strong medication for pain, depression and anxiety. (Ex. 30, Ex. 31).

Lisa Akins held a joint checking account with right of survivorship with her father. (Ex. 53, p. 696). This too suggests a confidential relationship. Since June 4, 2003, Lisa Akins assisted with Eldon Shirley's bills. (Trans. Vol. 5, p. 54-55).

Lisa Akins moved assets into her name without conferring with her father. She moved

her father into the mobile home on the farm property and out of the farm house against his wishes by turning off the water in the farm house. (Trans. Vol. 9, p. 199, ln. 3-13; Trans Vol. 6, p. 43, ln. 20). She did this because she wanted him in the mobile home. His wishes did not matter.

Lisa Akins was the boss, and Eldon Shirley wanted a boss to take care of everything for him his wife had done before her death. (Trans. Vol. 5, p. 23, ln. 13-16).

Given all of these factors, Lisa Akins was in a position to exercise dominion and control over her father when the Deed was executed in July 2013. She was calling the shots.

It is well settled law in Tennessee that where there is a confidential relationship, **coupled with one or more suspicious circumstances**, followed by a transaction wherein the dominant party receives a benefit from the other party, the presumption of undue influence arises and may only be rebutted by clear and convincing evidence of the **fairness** of the transaction. Matlock v. Simpson, 902 S.W.2d 384, 386 (Tenn. 1995). See also, Childress v. Currie, 74 S.W.3d 324, 329 (Tenn. 2002). Courts have refrained from prescribing the exact type or number of suspicious circumstances that will warrant invalidating a Will or Deed on the grounds of undue influence. DeLapp v. Pratt, 152 S.W.3d at 540-41. When this threshold is met of proving a confidential relationship coupled with one mor more suspicious circumstances, the burden shifts to the person holding the influence to show that the transaction was fair.

Proof of fairness of the transaction requires a showing that the donor received independent advice about the transaction in question, but it also can be shown by a lack of suspicious circumstances surrounding the transaction. Lohmann v. Lohmann, 2009 WL 316314, LEXIS 663 (Tenn. App. 2009) (attached hereto as Exhibit 2).

Certainly, this high burden was not met by Lisa Akins under the proof presented.

2. Lack of proof of independent legal advice to Eldon Shirley regarding the Deed.

Here, there is no proof of Eldon Shirley receiving independent legal advice in preparing and executing the Deed. The circumstances surrounding the Deed's execution are very strange. (Ex. 1, letter from Sharon Lee). Sharon Lee has no recollection of Eldon Shirley or a record of a file opened for him. (Id.) Her assistant, Angie Williford, who signed the Power of Attorney to Lisa Akins and the Deed to Lisa Akins, was later fired for forging checks on Justice Lee's account. (Id.) The check written for the deed in this case is written to this assistant, Angela Williford, personally, which is suspicious. (Id.). Ms. Williford deposited the check into her own account and apparently stole the money from Attorney Lee. (Ex. 1).

Accordingly, the primary inquiry into the fairness of the transaction, whether the donor had independent legal advise, is not met by Lisa Akins.

3. Suspicious circumstances.

Furthermore, in addition to a confidential relationship, there were numerous suspicious circumstances surrounding the execution of the Deed in this case.

a. The grantor's physical and mental deterioration.

Here there is ample proof of Eldon Shirley's physical and mental deterioration at the time of the Deed's execution. He was obese, he smoked and had high blood pressure, COPD and diabetes. (Ex. 33). He was on Hydrocodone, a narcotic pain medication, as well as medications for depression (Zoloft) and anxiety (Xanax).[3] He had back problems and knee pain. (Trans. Vol

[3] There is an argument in the Appellant's brief on p. 85 that the Trial Court erred in considering that Eldon Shirley was on hydrocodone at the time the Deed was executed on July

5, p. 11, ln 20-21). He had open wounds on his legs and feet. (Trans. Vol. 9, p. 59, ln. 7-13). He was by all accounts unable to live on his own independent of help. He was drinking after his wife died. (Trans. Vol. 9, p. 57, ln. 13). Lisa Akins admits that he "just had a lot of health problems" (Trans. Vol. 5, p. 13, ln 25- p 14 ln 1). His mental state was depressed. (Trans. Vol. 5, p. 21, ln. 4-11). He was weakened in every way and susceptible to influence as a result.

b. The grantee's active involvement in procuring the deed.

Lisa Akins recorded the Deed two days after it was executed. (Ex. 53, p. 694). The circumstances were certainly suspicious about how the Deed was obtained. (See, Sharon Lee letter, Ex. 1). This all is very curious in a small town.

c. Secrecy concerning the Deed's existence.

In this case, there is no doubt that the Deed was hidden from others including Kim Floyd and Donna Helms. (Trans. Vol. 5, p. 100, ln. 22-25).

Lisa Akins knew about the Deed, but she failed to tell her sisters. (Trans. Vol. 7, p. 91, ln. 3-17). It may have been recorded at the Register of Deeds Office, but these sisters had no reason to check the title to the farm in order to find it. Lisa Akins hid the Deed from her sisters because she knew what she did was wrong.

d. The grantor's advanced age.

At the time of signing of the Deed, Eldon Shirley was 68 years of age. (Ex. 32, p. 464). (Ex. 14).

e. The grantor's illiteracy or blindness.

31, 2003 because, according to the Appellant, he was not prescribed the drug until August 28, 2003. This is false. Eldon Shirley filled prescriptions for hydrocodone on 6-23-03 and 7-19- 03, both times prior to the execution of the Deed. (Ex. 30, p. 459). (Ex. 31, p. 461).

Eldon Shirley was not illiterate, but his highest level of education was receiving a GED. (Trans. Vol. 5, p. 9. ln 12-13). He was blind in one eye. (Trans. Vol. 5, p 123, ln. 10). His vision was bad. (Trans. Vol. 5, p.14, ln 1). He did not do paperwork ever in his life and relied on first his wife to do paperwork. (Trans. Vol. 7, p. 117, ln. 1). When she died, his daughter, Lisa Akins, handled paperwork for him. (Trans. Vol. 7, p. 78, ln. 12-20). Eldon Shirley could be easily taken advantage of with paperwork that he could barely see and did not like or well understand.

f. The unjust or unnatural nature of the Deed's terms.

The Deed is unjust and unnatural because it basically undoes the intent of the Last Will and Testament of Eldon Shirley which was to give his estate equally to each of his three daughters by instead giving the vast bulk of the estate to Lisa Akins. (Ex. 24). By giving the farm to only one of his daughters and not all three, this represents an unjust and unnatural distribution.

g. The grantor being in an emotionally distraught state.

In the weeks and months after his wife's death, Eldon Shirley was very emotionally distraught to the point that he was drinking alcohol and on Xanax and Zoloft for anxiety and depression. (Trans. Vol. 9, p. 57, ln. 13). He was so upset he could not even attend his wife's funeral only two months prior to the Deed being executed. (Trans. Vol. 9, p. 60, n. 2). He was described as being in "really bad shape" with a "bad state of mind". (Trans. Vol 23, p. 172, ln 4) He was on hydrocodone for back pain. (Ex. 6). He was grieving over losing his wife of forty-five years (Trans. Vol. 9, p. 48, ln. 19-23). He was clearly emotionally unstable and disturbed in July 2003 when this Deed was executed and in the period leading up to its execution. Further, he

was described as "more compliant" when he was drinking and fully medicated after his wife's death, easily making him susceptible to influence. (Trans. Vol. 9, p. 60-13-14). After he came back to Tennessee, Lisa Akins admits he was "on some pretty serious medications". (Trans. Vol. 6, p. 187, ln. 21).

All of these factors point to Eldon Shirley being in an emotionally distraught state when the Deed was executed on July 31, 2003.

h. Discrepancies between the Deed and the grantor's expressed intentions.

In this case, the grantor advised repeatedly that he wanted his estate to be divided equally between his three children. (Ex. 24). He wanted his children to "share and share alike" after his death as far as his estate was concerned. (Trans. Vol. 4, p. 111, ln. 25 - p. 112, ln. 2).

This conveyance in the Deed undoes that intention as a practical matter.

I. Fraud or duress directed towards the grantor.

Eldon Shirley was told by Lisa Akins that by signing the Deed, he would keep the nursing home from getting his farm. (Trans. Vol. 4, p. 68, ln. 18-19; Trans. Vol. 7, p. 100, ln. 8-13). Lisa Akins told him, falsely, that Kim Floyd had real estate people to look at the property, insinuating that Kim Floyd wanted to sell the farm. (Trans. Vol. 4, p. 82, ln. 6-14; Trans. Vol. 9, Page 141, ln. 1-11). Eldon Shirley was told by Lisa Akins repeatedly that she would distribute the farm pursuant to his wishes with one-third going to each child upon his death. (Trans. Vol. 4, p. 74, ln. 22 - p. 75, ln. 4; Trans. Vol. 4, p. 116, ln. 12-16). This ongoing promise was the reason that Kim Floyd and Donna Helms did not challenge the Deed when they found out about it in 2008. (Trans. Vol. 7, p. 106, ln. 17 - p. 107, ln. 1). They relied on their sister, Lisa Akins, to do

what she had promised their father she would do and distribute the property according to his wishes. (Trans. Vol. 4, p. 74, ln. 22 - p. 75, ln. 21). All of this of course was just a ruse to get the farm property in the hands of Lisa Akins through fraud.

Kenneth Harrill testified that Eldon Shirley told him that Lisa Akins got him to put it in her name, that she would divide it up equally after his death. (Trans. Vol. 4, p. 68, n. 16-19). Josephine Harrill testified similarly. (Trans. Vol. 4, p. 108, ln. 24 - p. 109, ln. 1; Trans. Vol. 4, p. 110, ln. 15 - p. 112, ln. 2).

Given all of these factors, there clearly was a confidential relationship between Eldon Shirley and Lisa Akins coupled with multiple suspicious circumstances surrounding the Deed at issue. As such, a presumption of undue influence arose. This presumption had to be rebutted by clear and convincing evidence by Lisa Akins. Lisa Akins did not rebut this presumption whatsoever with her self-serving proof.

4. Laches.

The Appellant argues in her Brief that this claim should be barred due to laches. The defense of laches is based on the doctrine of equitable estoppel and is only applied where the party invoking it has been prejudiced by the delay. The defense of laches presents a mixed question of law and fact. Two essential elements of laches are negligence and inexcusable delay on the part of the complainant in asserting his alleged claim which results in injury to party pleading the laches. Freeman v. Martin Robowash, Inc., 61 Tenn. App. 677, 457 S.W.2d 606, 611 (1970). The application of the doctrine of laches in the first instance lies within the discretion of Trial Court, and it will not be reversed on appeal except upon a showing abuse of discretion. John P. Saad & Sons, Inc. v. Nashville Thermal Trans. Corp., 715 S.W.2d 41, 46

(Tenn. 1986).

As stated above, laches requires the delay to be negligent and inexcusable. Here Kim Floyd has sufficient reason for the delay in prosecuting this action. She was given assurances by both her father and other family members, specifically Kenneth Harrill and Josephine Harrill, that her sister, Lisa Akins, would split up the farm equally among the sisters upon her father's death. (Trans. Vol. 7, p. 96, ln. 17-20; Trans. Vol. 7, p. 98, ln. 19-21; Trans. Vol. 7, p. 100, ln. 17-21). Kim Floyd stated that after talking with her Dad she "felt reassured that the land would be divided. Dad reassured me of that." (Trans. Vol. 7, p. 106, ln. 25 - p. 107, ln. 1). Ms. Floyd believed them and accordingly, and perhaps naively, did not pursue the matter further, trusting that her sister would in the end do the right thing. (See, Trans. Vol. 7, p. 100, ln. 17-21). Under the circumstances, it is not unreasonable that she did not immediately sue her sister upon discovering the Deed in 2008. Instead she held out hope that her sister would follow her father's wishes as she told her father and the Harrills that she would do.

This is not negligent, nor is it inexcusable action on behalf of a sister. There is argument on page 94 of the Appellant's Brief about Kim Floyd threatening to sue Lisa Akins after their father died to get part of the farm. It is claimed that this testimony was not disputed by the Plaintiffs. This is not true. Kim Floyd testified that no such conversation about the farm took place in 2008 and that she and her sister, Lisa Akins, never discussed the Deed until after their father died. (Trans. Vol. 7, p. 95, ln. 22 - p. 96, ln. 1).

The doctrine of laches simply does not apply where, as is the case here, there is a good reason for the delay in bringing suit. This finding was implicitly acknowledged by the Trial Court when it did not find in favor of the Appellant on this defense despite the issue being raised

repeatedly by counsel.

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY PERMITTING EACH PLAINTIFF TO CROSS-EXAMINE THE OTHER CO-PLAINTIFF AND OTHER CO-PLAINTIFF'S WITNESSES.

The Appellant complains on page 114 of her Brief that the Court allowed the Co-Plaintiff to cross-examine the other Plaintiff and each and every Plaintiffs' witnesses with leading questions over the objection of the Defendant. The Appellant argues that examination by all Plaintiffs should be by direct examination and not cross-examination pursuant to the Tennessee Rules of Evidence. (Appellant's Brief, p. 115). None of the cases cited by the Appellant speak to this issue particularly involving Co-Plaintiffs or Co-Defendants. Here the Plaintiffs had separate counsel and separate issues in the case. They had separate complaints. Their testimony was not always favorable to one another.

Tennessee Rule of Evidence 611(c), sub-section (1), states in pertinent part that "leading questions should be permitted on cross-examination". In the present case, the testimony at issue was all on cross-examination. The attorney who called the witness did the direct examination and then the other attorneys in the case cross-examined the witness. Counsel in such instance are permitted to ask leading questions as set forth in T.R.E. 611(c)(1).

In general, the question of whether to allow a party to lead a witness is left within the sound discretion of the Trial Court. See, Wilkerson v. Altizer, 845 S.W.2d 744, 747 (Tenn. App. 1992). The Trial Court expressly determined that Kim Floyd and Donna Helms were separate parties and that their lawyers could cross-examine different parties. (Trans. Vol. 7, p. 126, ln. 15 - p. 129, ln. 18). Here, at a minimum, there was not an abuse of discretion in allowing the use of leading questions on cross-examination of these witnesses.

Even assuming arguendo that the Trial Court was required to have these witnesses questioned by direct examination only, the next inquiry is whether the Trial Court's decision to allow cross-examination is prejudicial reversible error and not harmless error. See, Pitner v. Fayette Co., 2000 Tenn. App. LEXIS 299, 2000 WL 557869 (attached hereto as Exhibit 3). There is no showing by the Appellant that allowing such testimony was prejudicial reversible error. The testimony was elicited in a different way than it would have otherwise come out in direct examination, but the testimony is the same in substance and would lead to the same result.

One of the cases cited by the Defendant in her Brief, Estate v. Hughey, 51 S.W.2d 376 (S.C. 1979) emphasizes: "Great latitude must necessarily be allowed a trial court in the exercise of its sound discretion relative to the examination of witnesses". The Appellant and her counsel may not like some of the testimony that was elicited through cross-examination, but that doesn't mean that the Court allowing the witness to be cross-examined was an abuse of discretion much less reversible error. The Trial Court's discretion on how witnesses should be examined in this case should not be overturned by this Court.

III. THE TRIAL COURT PROPERLY ALLOWED KIM FLOYD TO KEEP THE EDWARD JONES INVESTMENT ACCOUNT THAT SHE RECEIVED UPON ELDON SHIRLEY'S DEATH WHERE SHE WAS THE NAMED BENEFICIARY OF SUCH ACCOUNT AND THERE WAS NO ALLEGATION OF UNDUE INFLUENCE AGAINST KIM FLOYD.

It is undisputed that the Edward Jones investment account owned by Eldon Shirley passed to his daughter, Kim Floyd, by a beneficiary designation. Just as Lisa Akins was allowed to keep a number of accounts where she was the designated beneficiary, Ms. Floyd should be able to keep this account.

When asked the grounds for why she thought the Edward Jones account should be taken

away from Kim Floyd and instead distributed through the estate (a three way split among the sisters), Lisa Akins testified that she was contesting the Edward Jones account going to Kim Floyd because "she received this because of her badgering him over the telephone . . .".

Q. But would you agree that when he made her the beneficiary that that was a free and independent act that he did regardless of whether or not she wanted her inheritance or not?

A. Everything my father did was free and independent.

(Trans. Vol. 21, p. 50, ln. 15-23).

Additionally, Lisa Akins took the position in this case, particularly in Ex. 53 on p. 7, Question 16 in her Answer to Interrogatories, that the transfer of this Edward Jones account to Kimberly Floyd was a gift from her father. (Trans. Vol. 21, p. 51, ln.9 - p. 55, ln. 3). She should be estopped from asserting otherwise now.

Lisa Akins explains her position on the Edward Jones account as follows in Trans. Vol. 21, p. 52, ln. 20-25:

Q. What do you contend Kim Floyd did to influence the transfer of this asset?

A. She stopped visiting my father when she learned about the deed transfer in February of 2008 and she called him frequently and harassed him and he was in a lot of turmoil over her harassment over the telephone.

Trans Vol. 21, p. 53, ln. 1-9:

Q. Do you have personal knowledge of the phone calls between Kim Floyd and your father?

A. By conversations with my father.

Q. But you don't have any first hand observation of these phone calls?

A. I did not eavesdrop.

Q. You weren't a party to these conversations?

A. I was not. . .

Accordingly, all that she claims to know on this subject is hearsay.

As is clear, there is no viable legal theory for overturning the decedent's beneficiary designation for the Edward Jones account. The Appellant's Brief fails to recognize that unlike Lisa Akins, Kim Floyd was in no position to unduly influence her father and had no confidential relationship with him as is required for undue influence to be properly asserted. She did not live nearby. She did not control his body and mind. She did not control his medications or health care. She did not have access to his money. She did not hold his power of attorney or share a bank account with him. There is no allegation that she unduly influenced her father, and the facts are not presented for undue influence. Simply allegedly harassing someone, which Kim Floyd did not do but even if she did, does not constitute undue influence in Tennessee and is not the basis to undo a beneficiary designation on account.

Without this Edward Jones account, Kim Floyd was left with almost nothing from the estate because everything of value had been taken out of Eldon Shirley's name and placed into Lisa Akins' name. (Trans. Vol. 21, p. 70, ln. 10 - p. 75, ln. 19).

IV. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE PARTIES STIPULATED THAT THE SINGLE-WIDE TRAILER, THE MODULAR HOME AND THE SCOTTSBORO PROPERTY ARE PART OF THE ESTATE.

The Brief of the Appellant complains about this property being designated as belonging to the estate. Ex. 52 represents the parties' initial positions on these assets and whether they were part of the estate or not. Ex. 52 does not state that these are estate assets according to Lisa Akins. However, in the course of the testimony, it was agreed by counsel for the Appellant on the

Record that the single-wide trailer was part of the farm real estate and thus, under the prior Court's ruling, part of the estate because the farm real estate came back into Eldon Shirley's estate under the finding of undue influence by Lisa Akins in causing the Deed to be executed. (Trans. Vol. 27, p. 7, ln. 7-20). The modular home is the same circumstance, and it was agreed on the record by counsel that this too was part of the estate as being part of the real property. (Trans. Vol. 27, p. 7, ln. 23-24). The Scottsboro property was further agreed to be part of the estate by stipulation of counsel during the course of the trial (Trans. Vol. 27, p. 8, ln. 13 - p. 9, ln. 6).

Accordingly, there is no error because counsel for Lisa Akins agreed in open court that these properties are all part of the estate. It doesn't matter what Ex. 52 originally said about whether these assets were estate property or not.

In any event, the Appellant cannot explain on appeal about this property being classified as estate property when her counsel agreed to the designation of this property as property of the estate on the Record.

CONCLUSION

For all these reasons, Kim Floyd asks that this Court affirm the judgments of the Trial Court in this case.

RESPECTFULLY SUBMITTED,

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CERTIFICATE

I, MELANIE E. DAVIS, hereby certify that a true copy of the foregoing BRIEF OF THE PLAINTIFF/APPELLEE, KIMBERLY VAN FLOYD was served on:

Joseph John Levitt, Jr., Attorney
825 N. Central Street
Knoxville, Tennessee 37917-7122

Martha Meares, Attorney
Meares & Dillard
315 College Street
Maryville, Tennessee 37804-4907

by delivering the same to office of said counsel or by placing same in the United States Mail, sufficient postage prepaid, addressed to said individuals at the above addresses.

THIS 30th day of January, 2017.

_____
MELANIE E. DAVIS

ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court erred in time barring the Appellants from challenging the purported developer rights of Moy Toy, LLC in Renegade Resort.
2. Whether the Trial Court erred in not allowing for tolling of the statute of limitations for challenging the 2005 First Amended Restrictive Covenants (Ex. 2) in Renegade Resort.
3. Whether, alternatively, under the Trial Court's own reasoning, the Trial Court erred in not recognizing the most recent recorded set of Restrictive Covenants for Renegade Mountain found in Book 1212, Page 1324 in the Register of Deeds Office for Cumberland County, Tennessee, (Ex. 5) and if the court so erred, whether the Trial Court's ruling that Renegade Resort, LLC, a Nevada Limited Liability Company was a prior developer in Renegade Resort based solely on the 2005 First Amended Restrictive Covenants (Ex. 2) was therefore in error.
4. Whether the Trial Court erred in holding that the request for a special called meeting held on September 2, 2011, by members of the Renegade Mountain Community Club ("RMCC"), was void because these members were not in "good standing" having not paid their 2011 RMCC dues where no 2011 dues notices or invoices were sent until after the meeting occurred.
5. Whether the Trial Court erred in holding that the common properties and amenities in Renegade Resort are owned by Moy Toy, LLC as the alleged developer, and that it may transfer title for such common properties and amenities only if it chooses to do so, while not recognizing the ongoing easement of enjoyment of the RMCC members to use these common properties and amenities.
6. Whether the Trial Court erred in giving Moy Toy, LLC the ongoing power to maintain access

and control over unplatted roads within Renegade Resort including the closing of certain roads.

7. Whether the Trial Court erred in approving the Special Master's Report as it pertains to the issue of the legal fund maintained by the Appellants where monies paid voluntarily by interested parties for legal expenses in this case were classified as "dues assessments" by the Special Master, and Appellants were required to disgorge or repay these voluntary donations to the current RMCC Board controlled by Moy Toy, LLC.

8. Whether the current Board of Directors of the RMCC controlled by alleged "developer" Moy Toy, LLC is properly elected.

STATEMENT OF THE CASE

A Complaint (T.R. 11)[1] was initially filed by 1) the Renegade Mountain Community Club ("RMCC") as controlled by the owners ("Owner Board") in Renegade Resort (as opposed to the Board controlled by the purported developer, Moy Toy, LLC) ("Moy Toy Board"); and 2) various individuals who were all property owners in Renegade Resort as well as officers or directors of the RMCC elected at the special called meeting of the RMCC held on September 2, 2011. This case is referred to as the "508 Case" due to its docket number. Defendants in the 508 Case were 1) Michael McClung, Michael Haines, Phillip Guettler, Joseph Wucher as current or past alleged directors and officers of the RMCC and 2) the purported developer in Renegade Resort, Moy Toy, LLC. The Complaint in the 508 Case was generally intended to acknowledge the Owner Board as the proper Board of the RMCC, among other claims.

An Amended Complaint was filed in the 508 Case on May 4, 2012. (T. R. 54). The Amended Complaint fleshed out some more allegations and added documents as Exhibits. Defendants McClung and Guettler answered the First Amended Complaint (T.R. 67) as did Moy Toy, LLC. (T.R. 79). Defendant Wucher further answered. (T.R. 87).

Meanwhile, on April 10, 2012, Moy Toy, LLC. Michael McClung and Phillip Geuttler filed a separate case, claiming Moy Toy, LLC is the developer in Renegade Resort and that the true Board of Directors of the RMCC was the Moy Toy Board elected by Michael McClung and Phillip Geuttler. This Complaint further questioned whether the Owner Board was properly elected at the September 2, 2011 special called meeting. This case is referred to as the "527 Case" due to its docket number.

[1] T.R. will indicate Technical Record.

An Order consolidating the 508 Case and the 527 Case was entered on July 18, 2012. (T.R. 100).

As a result of the consolidation, the Complaint in the 527 Case was filed in the record in this case on April 10, 2012. (T.R. 104). An Answer to that Complaint was filed on May 14, 2012. (T.R. 328).

A Motion for Default Judgment was filed by the Plaintiffs in the 508 Case against Defendant Haines. (T.R.406). An Order of Default was entered against Defendant Haines. (T.R. 410).

The deposition of Joseph Wucher was taken on February 19, 2013.

An Agreed Order dismissing Defendant Joseph Wucher was filed on June 10, 2013. (T.R. 417). Joseph Wucher was dismissed due to concerns that the statute of limitations for breach of fiduciary duty against an officer or director in a not-for-profit corporation had run due to the date of his earlier resignation from the Board and as an officer of the RMCC.

Based on information found in the discovery process, the Plaintiffs in the 508 Case filed a Motion to Amend their Complaint on May 28, 2013. (T.R. 414). The proposed Amended Complaint sought a declaration that Restrictive Covenants for Renegade Resort and bylaws for the RMCC as recorded in the Register's Office for Cumberland County, Tennessee, in October 2005 and 1987 (respectively) were void because they were not properly adopted. It was also alleged that Moy Toy, LLC did not have developer rights in Renegade Resort as it claimed to have.

A Response in Opposition to the Motion to Amend was filed on June 13, 2013. (T.R. 419). At the hearing on that Motion, the Court advised that the Plaintiffs could not proceed to challenge the Restrictive Covenants and By-Laws in Renegade Resort unless all owners (530) purportedly bound by such Governing Documents were brought before the Court as parties, either individually or by class

action. The Motion to Amend was withdrawn by the Plaintiffs in order to address the Court's joinder requirement.[2]

Meanwhile, the Defendants in the 508 Case asked for a temporary injunction and for a Special Master to be appointed in order to hold an election of a new Board for the RMCC in a Motion filed on July 19, 2013. (T.R. 429). A response in opposition to the Motion for Temporary Injunction and for Appointment of a Special Master was filed on August 28, 2013. (T.R. 480). The Court denied the Motion for Temporary Injunction or Appointment of a Special Master, preferring to have the Court and not a Special Master rule on issues such as who is entitled to vote and how many votes each owner had, since legal analysis would be needed to make such determinations. In the Response to the Motion, proof was provided by the Plaintiffs in the 508 Case that the RMCC and Renegade Resort were thriving under the management of the Owner Board and that the status quo should be maintained until trial. (T.R. 480)

A Second Motion to Amend was filed by the Plaintiffs in the 508 Case on July 23, 2013, asking for class action certification in order to have all owners in Renegade Resort before the Court as a class in order to attempt to get a declaratory judgment voiding the 2005 and 1997 Restrictive Covenants. (Ex. 2 and 4, respectively). (T.R. 449; T.R. 520). A Response was filed in opposition to the Second Motion to Amend arguing that a class could not and should not be certified. (T.R. 452).

After a hearing, the Court denied the class action certification sought by Plaintiffs in the 508

[2]Plaintiffs in the 508 Case object to and call into question the Trial Court's conclusion that such joinder was necessary. If it were in fact legally required, it makes challenge of restrictive covenants in large communities in Tennessee virtually impossible as a practical matter. It further puts too much power in the hands of wrongdoers who can file improperly enacted Restrictive Covenants in the Register of Deeds Office and then throw up procedural obstacles sufficient to deter the rightful challenge of such documents.

Case by an Order dated September 27, 2013. (T.R. 550). Plaintiffs in the 508 Case appealed to the Court of Appeals in a case styled Haiser, et al. v. Haines, et al. 2014 Tenn App. LEXIS 804 (attached as Exhibit A). The Court of Appeals for the Eastern Section held that the Trial Court had not abused its discretion in denying class certification, and the case was remanded for trial.

A Motion to Unconsolidate the 508 Case and the 527 Case and Renewed Motion for Issuance of an Injunction and for a Special Master was filed by the Defendants in the 508 Case on April 11, 2014 (T.R. 558) with a Memorandum in support thereof (T.R. 563). A Response in opposition was filed to this Motion. (T.R. 585). The Court denied the Motion by an Order entered on May 16, 2014. (T.R. 610).

Upon remand from the Court of Appeals, Plaintiffs in the 508 Case filed a Motion asking for leave to file a Third Amended Complaint on March 31, 2015. (T.R. 614). Since no class was certified, and it was practically impossible to serve all of the 500+ owners in Renegade Resort, the Plaintiffs in the 508 Case re-framed the lawsuit. The case now focused on the lack of developer rights of Moy Toy, LLC and the legal effect, or lack thereof, of the recorded documents involving Renegade Resort on the points and issues before the Trial Court. A Response to this Motion to Amend was filed (T.R. 617), as was a Reply (T.R. 630). The Court granted the Motion to allow the filing of the Third Amended Complaint by Order of June 4, 2015. (T.R. 642).

Plaintiffs in the 508 Case filed their Third Amended Complaint on June 17, 2015. (T.R. 647). All parties identified as prior developers or alleged prior developers in Renegade Resort were joined as parties as required by the Court. The Defendants in the 508 Case filed an Answer to the Third Amended Complaint on October 6, 2015. (T.R. 665).

A Joint Stipulation was filed on December 15, 2015. (T.R. 817).

The trial took place in December 2015, and February, March and April 2016. After Plaintiffs' proof, Defendants moved for a directed verdict on the developers rights issue by finding that the statute of limitations had run on the issue because Plaintiffs' filed the 508 Case on December 22, 2011, and the 2005 Restrictive Covenants recorded more than six years before Plaintiffs filed suit in October 2005. The Plaintiffs could not "pursue the issue if the time has run out". (Trans. p. 970). Thus, Moy Toy, LLC was held to have Developer Rights in Renegade Resort, but only because of the running of the statute of limitations on challenging the 2005 First Amended Restrictive Covenants naming their predecessor as developer had run.

On July 1, 2016, the Trial Court ruled: (T.R. 876)

1. That neither the Owner Board nor the Moy Toy Board were the proper and correct Board of Directors for the RMCC.
2. That the Owner Board was not validly elected because the September 2, 2011 special called meeting where it was elected was not properly called and so the results of that meeting were therefore not valid. In order to have called a special called meeting, 10% of the members in good standing of the RMCC had to call the meeting. The Court found that the year in question for determining good standing was 2011. There were only eleven owners who paid 2011 dues. None of these eleven people called the meeting. Accordingly, the meeting was not properly called , and the results of the meeting are not valid.
3. That the Plaintiffs in the 508 Case acted in good faith in attempting to call the September 2, 2011 meeting.
4. That residents in Renegade Resort made repeated requests to the Moy Toy Board to

see the books and minutes of the RMCC. These requests were ignored by the Moy Toy Board.

5. That any resident of Renegade Resort would have been upset by services being terminated in 2010-11.

6. In the alternative, that if the Court of Appeals finds that the September 2, 2011 meeting was correctly called, that Moy Toy, LLC should have had 30 votes and not 3 votes in the meeting (if it is the developer then it has 10 votes per lot instead of 1 vote per lot) . The proxy of TIG Holdings LLC, was properly not counted or considered valid at this meeting.

7. That the 2005 Restrictive Covenants of record in Book 1212, Page 1224 in the register of Deeds Office for Cumberland County Tennessee (Ex. 2), and the Bylaws of record in Book 1212, Page 1290 (Ex. 5) are valid, but only because the statute of limitations of six (6) years has run on challenging them.

8. As to the issue of notice of the recordation of the 2005 Restrictive Covenants and Bylaws, the notice the Court relies on is notice to all the world when documents are of record in the Register of Deeds Office. (Emphasis added).

9. In the alternative, if the Court of Appeals determines that the statute of limitations issue does not bar the challenge of the recorded Restrictive Covenants and Bylaws, then the Bylaws and Amendments recorded in 2005 (Ex. 5 and Ex. 2) are invalid because they were not enacted in accordance with their terms. In such event, the Bylaws and Restrictive Covenants from 1987 (Ex 97 and Ex. 4) would be the valid Bylaws and Restrictive Covenants for Renegade Resort.

10. That a $20,000 loan from Moy Toy, LLC to the RMCC to cover attorney's fees was a conflict of interest. It does not have to be repaid.

11. That each side would pay its own attorney's fees.

12. That the Special Master appointed in the Order would determine "the amount of attorney's fees and costs paid from money from RMCC annual assessments paid to either Board and require disgorgement of the same".

13. That a special meeting was to be held and administered by the Special Master of the members of the RMCC to elect a Board of Directors.

14. That each side provide an accounting as to monies paid to and distributed from each Board since January 1, 2010.

15. That Attorney Will Ridley be appointed as special master to run the election and determine the amount to be repaid from each Board to the RMCC.

16. That RMCC funds from both the Owner Board and Moy Toy Board would be paid over to the new Board for the RMCC's use and benefit.

17. That in the accounting, if the parties show funds were spent for maintenance, keeping of roads and expenses of that type of nature for proper function of the Association to perform its duties, there would be credit for that and such money would not be repaid or turned over to the new Board.

18. That the developer is entitled to ten votes per lot and is exempt from the payment of RMCC dues.

19. That, only because of the running of the six year statute of limitations on challenging the 2005 Restrictive Covenants, where Renegade Resort, LLC named itself the

Developer, Plaintiffs cannot now affirmatively challenge Moy Toy, LLC's developer rights.

20. That, alternatively, if the Trial Court is wrong on the statute of limitations issue, Moy Toy, LLC did not validly receive the developer rights it now claims. (Emphasis added).

21. That the legal title to common properties remains with the developer under the 2005 and 1987 Restrictive Covenants. The amenities that are unplatted such as the sports park belong to Moy Toy, LLC to transfer title if it so chooses. However, if the Court is incorrect on the statute of limitations issue, then the developer does not exist.

22. That the RMCC has the power to maintain and control the platted roads in Renegade Resort. Subject to legal, existing easements, Moy Toy, LLC has the power to maintain and control the unplatted roads owned by it with the exception of the entrance road, Renegade Mountain Parkway and the bridge located at the entrance to Renegade Resort which shall be maintained and controlled by the RMCC.

23. That other unplatted roads not required for ingress and egress by owners to their lots may be closed by the Developer.

24. That Michael McClung is guilty of a conflict of interest transaction and/or breach of fiduciary responsibility relating to the $20,000 loan from Moy Toy, LLC to the RMCC.

25. That the Bylaws adopted at the September 2, 2011 meeting and recorded in the Register of Deeds Office are not valid since that meeting was not valid. If the meeting is determined to be valid by the Court of Appeals, the ruling would be amended accordingly.

26. That all claims for damages are denied except for what may be ordered once the accountings are complete.

27. That Moy Toy, LLC, Michael McClung, and Phillip Guettler had unclean hands in actions towards the residents in Renegade Resort, but that the Plaintiffs acted in good faith.

28. That there were credibility concerns with Phillip Geuttler, Michael McClung and Darren Geuttler. There were some credibility concerns as well with John Moore in some of his testimony. The other residents in Renegade Resort who testified were credible, and the Court accepts their testimony as truth.

29. That the Order is not a final judgment.

As required by the Trial Court, the Plaintiffs in the 508 Case filed their accounting on July 5, 2016 of all monies spent and received since 2011 regarding the RMCC. (T.R. 888, 990, 1046). The Defendants in the 508 Case also filed their accounting on July 5, 2016. (T.R. 1051). No specific requirements were stated by the Trial Court or by the Special Master as to the contents or form of the accountings. The Special Master stated that he would take the information in the accountings as true unless proven otherwise at the hearing. (T.R. 23, p. 29:11 and 31:17).

The 508 Case Plaintiffs' accounting included amounts paid voluntarily by certain Renegade Resort owners into a "legal fund" to pay legal bills for the 508 Case. These funds were separately accounted for by line item from dues assessments paid to the Owner Board by members.

An Interim Special Master Report was filed on September 13, 2016, dealing with issues involving the election of the RMCC Board in August of 2016. (T.R. 1060). Because Moy Toy, LLC was able to claim developer rights (giving it 10 votes per lot while not having to pay dues in order to

vote in RMCC affairs like other owners), Moy Toy, LLC determined the outcome of the election with its overwhelming voting power. Its chosen Board of Michael McClung, Phillip Geuttler and Darren Geuttler was elected at this meeting. This Board is the exact same makeup as the previous Moy Toy Board and now controls the RMCC.

Subsequently there was a October 3, 2016 hearing where the Special Master determined that the money in the Plaintiffs' separately accounted for attorney's fees fund were considered dues assessments and had to be repaid as dues assessments to the RMCC. (T.R. 1065). There was no proof offered that these donations were anything other than voluntary payments made to pay for legal fees, over and above required RMCC dues assessments. The Special Master acknowledged a separate line item accounting of the legal fees. (T.R. 8, p. 1067). Only because these funds were in the same bank account as dues assessments did the Special Master classify them as dues assessments, and as a result, the Plaintiffs in the 508 Case had to "disgorge" themselves of these monies donated to the attorney fee (legal) fund and pay them to the RMCC. In effect, the Plaintiffs in the 508 Case paid their attorney's fees twice: once when they paid them to their attorney and again when these same funds had to be "repaid" to the RMCC as dues assessments.

The Defendants filed a limited objection to the Special Master's Report on October 17, 2016. (T.R. 1071). The Clerk & Master filed a Notice of Filing of Interim Special Master's Report and Final Special Master Report on October 20, 2016. (T.R. 1075). A Motion by the Plaintiffs for Consideration of Special Master's Report was filed November 2, 2016. (T.R. 1077). An Objection to the Special Master's Report was filed by the Plaintiffs in the 508 Case that same day. (T.R. 1079). Defendants filed a Motion to Strike in Response to Plaintiffs Objection to Special Master's Report on November 15, 2016. (T.R. 1272).

The Defendants filed an Offer of Proof on January 13, 2017. (T.R. 1281). This dealt with issues involving the developer rights portion of the trial that was not entered into evidence by the Defendants.

The Court approved the Special Master's Report as written on January 23, 2017. (T.R. 1289). The Defendants filed proof of payment of the amounts required to be paid to the RMCC on February 17, 2017. (T.R. 1346). Plaintiffs in the 508 Case did not file such proof of payment, and a judgment in the amount of $143,513.55 entered against them and in favor of the RMCC now controlled by Moy Toy, LLC, consisting mostly of the voluntary attorney's fees payments by owners.

A Motion to Revise the January 23, 2017 Order was filed by the Plaintiffs in the 508 Case on February 22, 2017. (T.R. 1349). The Plaintiffs asked the Court to consider these voluntary donations, now improperly counted as dues assessments, to be considered as over payments of dues assessments and to be returned to the people who paid them. A Response to that Motion was filed on March 8, 2017. (T.R. 1355). An Order denying Plaintiffs Motion to Revise Order was filed on March 30, 2017. (T.R. 1382). A Final Order and Judgment was filed on March 10, 2017. (T.R. 1379).

The Notice of Appeal was timely filed on April 7, 2017, by the Plaintiffs. (T.R. 1384).

Plaintiffs filed a Motion for Stay of Judgment Pending Appeal on April 7, 2017. (T.R. 1388). There was an Agreed Order Approving the Bond for Stay of Judgment filed on April 19, 2017. (T.R. 1390). The Plaintiffs' Bond was filed and approved by the Court on April 19, 2017. (T.R. 1392).

STATEMENT OF FACTS

Renegade Resort is located in eastern Cumberland County, near Crab Orchard, Tennessee and currently includes 1,351 building lots and living units (Tr., p. 525:24)[3]. Renegade Resort has approximately 530 different owners of lots. (Tr. p. 526:22). Of those lots, there are 84 condominiums in the Cumberland Point community, 8 condominiums in the Woodridge Community, 8 timeshares in the Laurel Hills community, with the remaining lots being either improved or unimproved. (2001 Budget, Ex. 44). While approximately 57 owners actually reside full-time in the community, the remaining improved lots are maintained for timeshares, rentals and part time vacationing owners. (Tr. p. 614:11).

Over the years, all 1351 lots were sold to individuals or entities. (T.R. p. 878, para. 5). Moy Toy, LLC, the purported developer, owned only 3 living units at the commencement of the case. (Id.). Lots are owned by individuals and entities throughout the United States.

In the 1960's Renegade Resort had 12,000 mountainous acres (Ex, 32, Tab 2), but over the years, acreage was sold off, and Renegade Resort in 2010 consisted of approximately 900 acres in platted lots and common areas, approximately 87 acres in a closed golf course and approximately 1980 acres held by the purported developer, Moy Toy, LLC. (Ex. 33 and Ex. 75). The Eagle's Nest Community and its approximately 100 acres lies within, but is not a part of, Renegade Resort (Tr. p. 97:01; p. 97:06).

Renegade Resort was once a ski resort with a championship golf course and since 1987, amenities included functioning tennis courts, playground, sports park, swimming pool, 18 hole golf

[3] Tr. will indicate the transcript.

course and gated entrance, all of which by 2011 were closed by Moy Toy, LLC. (Tr. p. 530:09). Renegade Resort is not a typical Tennessee development due to its lengthy mountainous and winding roads (Tr. p. 534:01), its routine propensity for ice and snow accumulations, its slopes of up to 13 degrees (Tr. p. 533:04), its isolation from emergency and County services and abundant wildlife on the roadways (Tr. p 535:01).

Renegade Resort was first developed from 1968 to 1972 by Renegade Inc. and Resort Development Corporation (Ex. 32, Tab 1) . These entities immediately began selling lots (Ex. 32, Tab 2, App A) and in February 1971, Renegade Resort was sold to Chauncey Enterprises, a.k.a American Recreation Services, Inc. (Ex. 32, Tab 2). In July 1972, it established the Renegade Community Club, a Tennessee Nonprofit Corporation, as the Homeowners' Association of record (Ex. 1, Preamble). Simultaneously American Recreation Services established the original RMCC By-Laws ("1972 By-Laws") and an original Declaration of Covenants and Restrictions ("1972 Restrictive Covenants").[4] While the 1972 Restrictive Covenants (Ex. 1) were recorded (Book 124, Page 5), no copy of the 1972 By-Laws appears anywhere in the Record.

Renegade Resort changed ownership and developers several times in the 1970's and early 1980's (Ex. 32, Tabs 3-7) until Renegade Limited Partnership, a Tennessee Limited Partnership purchased Renegade Resort in January 1986. (Ex. 32, Tab 8). While various amendments were made to the 1972 Restrictive Covenants, primarily to add property subject to it, no substantiative changes

[4] Lots sold by the initial developers, Renegade Inc. and Resort Development Corporation, prior to the July 26, 1972 formation date of the RMCC (Ex. 1, Art II, Sect 1), or under contract with them at that time, were exempted from portions of the 1972 Restrictive Covenants, notably the requirement of paying dues to the RMCC (Ex. 1, Art. X, Sec. 1). Approximately 550 of the 1349 lots and living units met those requirements and were identified as "Pre-1972" properties. (Tr. p. 565:22). Confusion exists, even today, about the exact number of "Pre-1972" properties (Tr. p. 528:04).

were made to the 1972 Restrictive Covenants until Renegade Limited Partnership, a Tennessee Limited Partnership (also known as Cumberland Gardens Limited Partnership, a Tennessee Limited Partnership after a name change) amended the 1972 Restrictive Covenants by recording the 1987 Restrictive Covenants. (Ex. 4). They also rewrote the original By-Laws and adopted the 1987 By-Laws. (Ex. 97). Both the 1987 Restrictive Covenants and the 1987 By-Laws were recorded in October 1987. The name of the RMCC was legally changed to Cumberland Gardens Community Club. (Ex. 4 Preamble). All amenities, to include the golf course (9 holes), tennis courts, swimming pool, roads, guard shack and sports park were completed and operational before recordation of the 1987 Restrictive Covenants. (Tr. p. 56:01; Tr. p. 160:09).

In August 1991, following default on a note by Cumberland Gardens Limited Partnership, a Tennessee Limited Partnership, the Substitute Trustee, transferred, by Substitute Trustee's Deed, the listed real property of Cumberland Gardens Limited Partnership, a Tennessee Limited Partnership to the new owner, Cumberland Gardens Acquisition Corporation. (Ex. 32, Tab 9). **Developer rights in Renegade Resort were not conveyed as part of this Substitute Trustee's Deed or otherwise, as is clear from the face of the deed and from testimony at trial of the Substitute Trustee. (Tr. p. 461:03).**

On January 6, 2000, Cumberland Gardens Acquisition Corporation sold its interest in Renegade Resort to Renegade Resort, LLC, a Nevada Corporation (Ex. 32, Tab 10). According to Joe Looney, the attorney for Cumberland Gardens Acquisition Corporation, developer rights were never discussed or transferred in January 2000, as part of the transfer between Cumberland Gardens Acquisition Corporation and Renegade Resort, LLC, a Nevada Corporation. (Tr. p. 443:12).

Defendants Phillip Guettler, Michael Haines, Joseph Wucher and other partners, operating as

Renegade Resort, LLC, without a vote of the membership, appointed themselves as Officers and Directors of the Cumberland Gardens Community Club, (Ex. 20, 22, 88 and 89) (Depo Wucher 8:18) and changed the name of the Association to the Renegade Mountain Community Club. (Ex. 24). Defendants Phillip Guettler, Michael Haines and others began operating the RMCC and scheduled various meetings. (Ex. 24). A notice and minutes for a 2000 RMCC Annual Meeting held on March 17, 2000, were introduced into evidence. Also introduced was a notice of a Special Meeting and proposed agenda for a special meeting scheduled for June 27, 2000, purportedly to vote on new By-Laws and new Restrictive Covenants. No minutes of this meeting are in the record. (Ex. 24). Joseph Wucher, representing Renegade Resort, LLC as the purported developer, and signatory of the "First" (Ex. 2) and "Last" (Ex. 5) set of Amended Restrictive Covenants recorded in 2005, did not attend any meeting or see any minutes from this purported meeting (Depo Wucher 17:4; 19:1) to verify the requirement for approval by the membership, necessary to vote on the adoption of any change to the Restrictive Covenants. (Ex. 1, Art. XV, Sec. 5). No Annual or Special Meetings of the Renegade Mountain Community Club occurred between 2000 and 2011 until the Special Meeting held by the Plaintiffs in the 508 Case occurred on September 2, 2011. (Tr. p. 43:22; 73:24; 166:03).

Defendants Phillip Guettler and Michael Haines, now acting as both owners of Renegade Resort, LLC and as self-appointed directors/officers of the RMCC, raised annual dues assessments for members to $180 per year (Ex. 44)(Tr. p. 165:05) which increase was purportedly approved at the March 17, 2000 Annual Meeting (Ex 24). On October 16, 2001, Defendant Michael Haines published a letter (Ex. 24) (Tr. p. 75:12) announcing in part that the Directors had approved a Dues Assessment increase from $180 to $225 per year (Tr. p. 165:17). In accordance with the By-Laws, then in effect (Ex. 97), the letter acknowledged that this proposed increase to $225 (Tr. p. 76:10;

165:17) would need ratification by the membership at the next meeting of the RMCC. However, no such meeting or ratification ever occurred. (Tr. p. 77:04; 165:25). This unratified/unauthorized dues assessment rate of $225 per year continued through 2016. (T.R. p. 881, para. 15).

In April 2003 (Ex. 32, Part 11) three parcels of land in Renegade Resort, and on other occasions five parcels of land, were conveyed from Renegade Resort, LLC to Joseph Wucher, Managing Member of the J.L. Wucher Co., LLC by Quit Claim Deed. Joseph Wucher, the principal of J.L. Wucher Co., LLC, thought it had developer rights in Renegade Resort. (Depo Wucher 28:6; 110:17; 140:17). It considered itself as a developer. (Depo Wucher 110:5; 116:15). At that time, there were at least two different purported developers for Renegade Resort: Renegade Resort, LLC and J.L. Wucher Co., LLC (Tr. p. 867:08) though neither entity actually had developer rights conveyed to it. (Tr. p. 882:21).

In 2004, Phillip Guettler, Michael Haines and others acting as Renegade Resort, LLC conveyed approximately 100 acres of undeveloped land to Eagle's Nest, LLC, Wendell Harkleroad as Managing Member (Tr. p. 97:01). Eagle's Nest, LLC is a third purported developer in or around Renegade Resort (Depo Wucher 140:23; 141:2) and also owns 3 lots in Renegade Resort.

On September 25, 2005, through a contract, Renegade Resort, LLC assigned control and operation of Renegade Resort to the LKM Group, LLC (Depo Wucher 21:1), and it purported to become yet another developer (Tr. p. 768:12). LKM Group, LLC did not pay dues to the RMCC and acted like the developer (Tr. p. 769:02). LKM Group, LLC took total control (Depo Wucher 30:1) of all aspects of the operation of Renegade Mountain as the developer (Depo Wucher 27:25; 28:6; 21:7; 116:21) to include operation and control of the RMCC. (Tr. p. 520:02) (Depo Wucher 21:7). LKM Group , LLC never subsequently conveyed any developer rights it may have allegedly had to anyone.

(Depo Wucher 138:24).

On October 20, 2005, new Restrictions (Ex. 2) were recorded in the Register of Deeds Office for Cumberland County, Tennessee, in Book 1212, Pages 1224-1289 ("2005 First Amended Restrictive Covenants ") by Renegade Resort, LLC, five years after being discussed at a purported but undocumented June 27, 2000 Special Meeting of the RMCC. The Restrictive Covenants in Renegade Resort, in order to be amended according to their terms, had to be approved by an RMCC membership vote and have "developer" approval. (Ex. 1, Art. XV).

These 2005 First Amended Restrictive Covenants (Ex. 2) were prepared by attorneys Robinson and Cole, reviewed by attorneys Hix and Gray, signed by a purported representative of the RMCC and signed by Renegade Resort, LLC (then the purported developer). In these 2005 First Amended Restrictive Covenants (Ex. 2), Renegade Resort, LLC named and defined itself as the developer in Renegade Resort even though that was not true. (T.R. p. 882, para. 21). Renegade Resort, LLC did not possess developer rights at the time when it executed the 2005 First Amended Restrictive Covenants. (Ex. 2). (Tr. p. 404:20). (T.R. 882, para. 21).

On October 20, 2005, when this document (Ex. 2) was executed by Renegade Resort, LLC's Managing Member (Depo Wucher 129:2), Joseph Wucher, in fact, Renegade Resort, LLC had previously assigned its purported developer rights a month earlier in the contract with LKM Group, LLC. (Wucher depo. 21:01; 27:25). Further, Joseph Wucher had an informal meeting with other owners who voted Edward Curtis out of the RMCC as President (Depo Wucher 43:15) which vote occurred prior to Edward Curtis signing the 2005 First Amended Restrictive Covenants (Ex. 2) as the purported RMCC President. (Depo Wucher 43:21). Therefore, Edwards Curtis was not RMCC President when he signed the 2005 First Amended Restrictive Covenants (Ex. 2) as the RMCC

purported President.

Also on October 20, 2005, a set of By-Laws ("2005 By-Laws") and a second set of new Restrictions ("2005 Last Amended Restrictive Covenants") (Ex. 5) were recorded immediately after the 2005 First Amended Restrictive Covenants (Ex. 2) (Tr. p. 368:19) in the Cumberland County Register of Deeds Office in Book 1212, Pages 1290-1345. Like the 2005 First Amended Restrictive Covenants (Ex.2), the 2005 Last Amended Restrictive Covenants (Ex. 5) were also prepared by attorneys Robinson and Cole, reviewed by attorneys Hix and Gray, signed by a purported representative of the RMCC, and signed by Renegade Resort, LLC, the purported developer, who as stated above had assigned away its developer rights a month earlier. These 2005 Last Amended Restrictive Covenants, however, appoint **Renegade Resort, LLC, a Tennessee Limited Partnership** as the Developer of Renegade Resort (Ex. 5) and not Renegade Resort, LLC, a Nevada Limited Liability Company. The 2005 Last Amended Restrictive Covenants (Ex. 5) have been recorded and of record over 10 years and have not been challenged (Tr. p. 404:20; 410:08). The By-Laws recorded list Renegade Limited Partnership as developer, adding to the confusion.

There was no proof in the record that a RMCC vote by the membership to approve Ex. 2 ever occurred. (T.R. 879, para. 9).

Other than recording these documents at the courthouse, no other form of notification was sent to any member regarding the recording or existence of the 2005 By-Laws, the 2005 First Amended Restrictive Covenants or the 2005 Last Amended Restrictive Covenants. (Tr. p.87:09; 1079:18). (Collectively the "2005 Recorded Documents"). Plaintiffs first knew of these 2005 Recorded Documents during the discovery process in 2012 (Tr. p. 1079:13).

On April 20, 2006, Renegade Resort, LLC conveyed all of its 342 platted lots (less 3 living

units) to LKM Group, LLC, with such lots being secured by a Deed of Trust on behalf of lender Phil McCoy. (Ex. 83). LKM Group, LLC bought these lots as the purported developer. (Depo Wucher 138:13).

In 2006, the Eagle's Nest, LLC sued Renegade Resort, LLC, the RMCC, LKM Group, LLC and Larry McMeans regarding utility easements and access to Eagle's Nest, LLC properties off Renegade Mountain Parkway. (Case No. 9446-03-06) (Ex. 95). The Final Order entered in that case gives Eagle's Nest, LLC, and its successor and assigns, the right to access Renegade Mountain Parkway or any other private or public roadways in Renegade Resort, excluding private driveways. (Ex. 95).

In 2007, Renegade Resort, LLC sued Larry McMeans and LKM Group, LLC for breach of the 2005 contract relating to Renegade Resort. (Depo Wucher 24:11). In 2009, the Chancery Court for Cumberland County, Tennessee, set aside the contract and Renegade Resort, LLC regained control and operation of Renegade Resort. The 342 building lots that LKM Group, LLC previously purchased from Renegade Resort, LLC in 2007 remained a valid transaction and remained secured by a Deed of Trust to Phil McCoy (Ex. 83). LKM Group, LLC bought those lots as the purported developer. (Wucher depo. p. 138:13). LKM Group, LLC may still purport to possess such developer rights, having never assigned them away. (Wucher depo. p. 138:24; 139:5).

From 1987 through September 2010 Cumberland Gardens Limited Partnership, Cumberland Gardens Acquisition Corporation, Renegade Resort, LLC, LKM Group, LLC and Joseph Wucher Co., LLC, all as purported developers, along with the Renegade Mountain Community Club, generally provided continuous services to the residents and members in Renegade Resort consisting of security lighting, road maintenance, road repair, mowing, landscaping, gate security (Tr. p. 158:21) and winter

snow and ice removal (Tr. p. 530:09). Likewise the common properties and amenities in Renegade Resort (completed in 1987) (Tr. p. 56:11; 160:09), including the guard shack, sports park, tennis courts, pool, playground, roads and golf course, were all maintained and continuously operated. from 1987 to 2010. (Tr. p. 530:09; 71:20). The swimming pool was operating as late as 2010. (Depo Wucher 79:13).

Each year's RMCC budget (Ex. 44) from 2000 to 2010 showed planned expenses to maintain each one of these services and amenities (except for the golf course) using RMCC dues assessments collected from members. (Tr. p. 632:01; 79:24) (Ex. 80).

These amenities, as shown on Exhibit 75 (Tr. p. 81:07) are also in Master Plans (Ex. 76), development plans (Ex. 77) and brochures (Ex. 63) which were received (Tr. p. 72:25) and handed out to the public (Tr. p. 72:25). These amenities were constructed and used by prior developers to promote lot sales (Tr. p. 73:19) and benefit members. In addition, previous "developers" promised use of these common areas and amenities both verbally (Tr. p. 534:20), in writing and contracts (Ex. 41), as part of their Interstate Land Sales Registration documentation (Ex. 36) and as part of ownership of a lot in Renegade Resort. (Tr. p. 99:12). Defendant Phillip Guettler, an off and on purported member of the Board and or/officer in the RMCC from 2000-2010, testified that owners in Renegade Resort were permitted to use the amenities during this period (Tr. p. 224:07). Both Defendant Phillip Guettler and Defendant Michael McClung recognized an RMCC member's easement of enjoyment in the sports park. (Tr. p. 297:24; 303:14; 221:09; 795:08).

All versions of the Restrictive Covenants and By-Laws in Renegade Resort (Ex. 1, 2, ,4, 5, 97) identify a right of enjoyment and use (Tr. p. 633:05) of the common properties and amenities for members in good standing of the RMCC. Prior to 2011, RMCC members in good standing have

always had access and use of these common properties and amenities. (Tr. p. 631:16). The picture of the sign outside the sports park identified that use of the sports park was restricted to members and their guests who are in good standing (Ex. 40; Tr. p. 56:19; 72:13; 85:05). Except for the roads and golf course, all common properties and amenities were always closed to the public. (Tr. p. 56:25).

Unknown to members and residents in Renegade Resort (Tr. p. 532:11), on September 28, 2010, Moy Toy, LLC, (controlled by Defendants McClung and Guettler) (Tr. p. 221:09), purchased all of the remaining property in Renegade Resort (Ex. 75), less the golf course property, through two deeds: 1) Warranty Deed from J.L. Wucher Co., LLC to Moy Toy, LLC (Ex. 32, Tab 12), and 2) Warranty Deed from Renegade Resort, LLC to Moy Toy, LLC (Ex. 33). Moy Toy, LLC further claims fee simple ownership of certain common properties and amenities lying within Renegade Resort.

Moy Toy, LLC received its purported developer rights by written assignment from Renegade Resort, LLC and J.L. Wucher Co., LLC (Depo Wucher 110:20) (Ex 30) even though Renegade Resort, LLC and J.L. Wucher Co., LLC did not have such developer rights to assign. (Tr. p. 401:22). Moy Toy, LLC researched the chain of title but was unaware of a break in the chain of developers rights. (Tr. p. 723:13).

Defendant Phillip Guettler, as the purported Vice President of the RMCC from 2006 through 2010, (Ex. 23) admittedly didn't perform any duties as Vice President. (Tr. 224:23). In December 2010, however, Defendant Phillip Guettler, acting as the purported RMCC Vice President, reactivated the RMCC entity with the Tennessee Secretary of State and listed Joseph Wucher as the single remaining Director of the RMCC. (Ex. 23). However, Joseph Wucher had resigned as a Director in the RMCC two months earlier on October 1, 2010 (Depo Wucher 72:12). Defendant Guettler was not

an RMCC Director in December 2010 (Ex. 23) (Tr. p. 221:09; 238:03), but nevertheless appointed himself and Defendant McClung as Directors of the RMCC on June 23, 2011. (Ex. 25). There was no vote of the RMCC membership; he just appointed himself, his friends and later family members as Officers and Directors in the RMCC. (Trial Court's Interim Order T.R. p. 877, Para 1). Defendants, Michael McClung and Phillip Geuttler, thus, took over operation of the RMCC in 2010.

Income from dues assessments, necessary for the RMCC to perform vital functions, was not a priority to the Defendants in the 508 Case in 2010 (Tr. p. 746:24). In 2010 Defendant Michael McClung (not then an RMCC Director or Officer (Ex. 23)), admittedly was making RMCC financial decisions and writing RMCC checks. (Tr. p. 1134:16). On December 31, 2010 (Ex. 80), Defendant Michael McClung signed and authorized (Tr. p. 745:24) a $10,000 RMCC check to Patrick James Engineering (Tr. p. 741:19), a firm which he owned, even though he was not an RMCC Officer or Director at the time. (Ex. 23) (Tr. p. 759:11; 864:19). No Board approval of this transaction ever occurred. (Tr. p. 866:15).

All services in Renegade Resort stopped in 2010 when Moy Toy, LLC took control. (Tr. p. 61:16). By November 2010, and without notice, all gate security guards, whose presence were continuous since 1987 (Tr. p. 58:05; 804:09), were fired by Defendant Michael McClung and removed (Tr. p. 736:24; 531:16; 177:21; 81:16). No 2011 invoices were sent to members for their 2011 RMCC dues assessments (Tr. p. 140:24; 746:08), nor were any 2011 invoices received by members/residents as required. (Tr. p. 82:07; 171:06; 212:01; 186:17; 214:24). In January 2011, all security lighting were turned off by Defendant Guettler (Tr. 533:24; 82:23; 178:25; 267:14). No snow removal services were provided in the winter of 2010/2011 (Tr. p. 532:24; 179:04) resulting in impassable roads, accidents (Tr. p. 533:11; 82:23) and emergencies (Tr. p. 533:14). By

February 2011, no notice of the required RMCC 2011 Annual Meeting was received by any member/resident. (Tr. p. 79:06). By April 2011, no road maintenance or repairs (Tr. p. 534:10; 82:23; 180:17) (Ex. 40) occurred and no mowing (Tr. p. 535:08; 82:23; 180:02) had commenced (Ex. 40). In April 2011 a road previously washed out was still not repaired and was impassable. (Tr. p. 535:08; 181:02). Admittedly the RMCC had no office (Tr. p. 711:06) and its purported officers and directors did not communicate (Tr. p. 764:02) or meet with RMCC members. (Tr. p. 265:10; p. 62:10; 82:23; 176:21). There was no published contact address, phone or email for the new purported developer. (Id..) There was no access to any amenities or use of any amenities by RMCC members (Tr. p. 84:01; 100:14).

Around this same time, the Renegade Resort community was also involved in parallel litigation involving the private water system in Renegade Resort, Laurel Hills Prop. Owners' Ass'n v. Tennessee Regulatory Authority, 2014 Tenn App. LEXIS 205. (Attached as Exhibit B). As shown in the facts of that case, Moy Toy, LLC (controlled by Defendants McClung and Guettler) sold the private water system in Renegade Resort to Laurel Hills Condominium Property Owners' Association ("Laurel Hills"), also controlled by Defendants Michael McClung and Phillip Geuttler, as Directors and Officers. Laurel Hills first tried to dramatically increase water rates, and then physically shut off water to customers in Renegade Resort on February 1, 2012. Customers immediately filed for injunctive relief and received a temporary restraining order from Chancellor Thurman to restore the water. Ultimately, the Tennessee Regulatory Authority became involved and, after a full hearing, denied Laurel Hills a certificate of public convenience and necessity to operate the system and required it to divest itself of the water system. This result was upheld on appeal.

On February 13, 2012, Defendants Michael McClung and Phillip Guettler, as owners of Moy Toy, LLC loaned $20,000.00 (Ex. 27) to the RMCC while they were also purported Directors of the RMCC. (Tr. p. 221:09). (Ex. 23; 25). Defendant Phillip Guettler doesn't know who approved this loan and was on both sides of this loan transaction (Tr. p. 261:10; 262:06). Per the Trial Court's Order dated July 1, 2016, para. 27, this transaction constituted a breach of fiduciary responsibility and/or conflict of interest. (T. R. 876).

On March 29, 2011, the Substitute Trustee foreclosed on the Deed of Trust held by Phil McCoy for the 342 lots previously purchased in 2007 by LKM Group, LLC. (Ex. 83). TIG Holdings, LLC, a company formed by Phil McCoy, purchased all of the 342 lots from the Substitute Trustee on the courthouse steps. (Ex. 84).

Plaintiff John Moore, a Renegade Resort owner since 1997, met with several homeowners in early April 2011 to see what could be done about the current state of disrepair within the community. (Tr. p. 536:02). The group agreed that a meeting with the principals was in order and a listing of issues, complete with possible solutions and voluntary assistance, was drafted. (Ex. 59; Tr. p. 536.25). In surveying the community residents, Darrel McQueen, a frequent representative of past developers, indicated that he could set up a meeting with the purported developers and such meeting was scheduled for April 17, 2011. (Tr. p. 536:16). Plaintiff John Moore and Defendant Michael McClung met to discuss the issues. (Tr. p. 537:13). Michael McClung indicated that rehabilitating the water system in Renegade Resort was the top priority (Tr. p. 756:06) and that resident concerns would need to wait until later. He also indicated that an annual meeting might be scheduled at an unidentified later date. (Tr. p. 538:13). The meeting ended on a contentious note with Michael McClung indicating that he did not live here and did not care. (Tr.

p. 539:03).

Plaintiff John Moore hosted a second homeowners' meeting to discuss the results of the April 17th meeting with Defendant Michael McClung. (Tr. p. 539:06). The group determined that a representative should meet with legal counsel to discuss options. (Tr. p. 539:16). Afterward, the Tennessee Secretary of State records were searched to locate the responsible parties for the RMCC (Ex. 23; Tr. p. 540:14).

On May 18, 2011, Plaintiff Moore, an owner and member of the RMCC (Ex. 71), sent registered written correspondence (Ex. 53) to the RMCC Registered Agent and RMCC Officers and Directors listed (Ex. 23) in the Secretary of State's records requesting to review certain records of the RMCC in accordance with the Tennessee Not For Profit Corporation Act ("TNCPA") and the RMCC By-laws then in effect (Ex. 5, 97) (Tr. p. 541:01). Certified mail was delivered and received (Ex. 57), but there was no response (Tr. p. 541.25). A total of four records requests were sent (Tr. p. 1072:01) with no response to any of them (Tr. p. 1072:04). These records were deemed vital to determining: 1) which members were and were not paid and in good standing in the RMCC (Tr. p. 543:12; 1073:13); 2) what the current organizational documents were (Tr. p. 1073:13); and 3) how to identify and address any potential breach of fiduciary duty claims against officers and directors of the RMCC prior to the limitations period running (such as it did arguably against Defendant Joseph Wucher). (Tr. p. 1077:01). These repeated record requests were ignored by the purported Directors. (Trial Court Interim Order 7-1-2016, para. 3; T.R. 878).

This same group of Renegade Resort residents (Tr. p.185:05) researched the TNCPA on how to call a membership meeting, and began drafting a Request for Special Meeting to the listed Board of Directors. (Tr. p. 544:01). On June 23, 2011, Plaintiff Gerald Nugent, an RMCC

Member in Good Standing through calendar year 2010 (Ex. 10)(Tr. p. 176:18), sent a certified letter (Ex. 7, 54) (Tr. p. 182:13) to the purported Board of Directors requesting that they call a Special Meeting of the RMCC membership, along with 33 signatures (Tr. p. 546:10) of RMCC paid up members through 2010, asking for the meeting. (Tr. p. 184:01). There was no response (Tr. p. 182:25). After waiting the requisite time period identified in the TNPCA, Plaintiff Nugent, with the help of other residents (Tr. p. 185:05), researched the courthouse records (Tr. p. 185:18) and sent notice of a special called meeting of the RMCC (Ex. 8) to all 530 owners of property in Renegade Resort. (Tr. p. 554:03; 187:17). Plaintiff Gerald Nugent gave opportunities for all owners to send proof that they were paid up members in the RMCC through 2010, necessary to qualify them to vote at the special meeting. (Ex. 8; Tr. p. 555:17). Plaintiff Nugent verified good standing to vote (Tr. p. 188:09; 189:18) and set a Record Date of August 15, 2011, for voting purposes as permitted in the TNCPA. (Tr. p. 189:09).

In accordance with all sets of Restrictive Covenants for Renegade Resort (Ex. 1, 2, 4, 5; Art. X, Sec. 8), RMCC Directors were required to send a written dues assessment invoice each year to every owner. Defendant Michael McClung knew that this was a duty he had as a purported Director. (Tr. p. 764:04-09). Nevertheless, no dues assessments were levied by the Moy Toy Board for calendar year 2011, "in" calendar year 2011(Tr. p. 263:14;137:15; 794:02; 788:11), and no invoices were received by RMCC members in 2011. (Tr. p. 186:17). 2011 Annual Dues Assessments were never levied by the Moy Toy Board until later on January 27, 2012. (Ex. 45) (Tr. P. 140:24). All of the eleven 2011 payments received for 2011 dues assessments (Ex.80), prior to the September 2, 2011 Special Meeting, were paid by Defendant McClung in a single check for himself and on behalf of his relatives and acquaintances. (Tr. p. 794:05). Defendant

McClung admitted that no one except himself received an invoice or paid dues for 2011 prior to the September 2, 2011 meeting. (Tr. p. 794:18).

Due to poor record keeping, no one, including accountants, could determine who owed dues to the RMCC prior to 2011 with accuracy. (Tr. p. 147:17). Admittedly Defendants in the 508 Case could not determine who was in good standing prior to 2011. (Tr. p. 877:20). Without access to credible records, Plaintiffs in the 508 Case used calendar year 2010 as the base year for determining eligibility to vote in the special called meeting in 2011, as it was the last year where dues were requested from members and payments could be validated. (Tr. p. 545:03). No RMCC member could independently calculate their own 2011 dues assessment because 1) RMCC members did not know of or approve a dues assessment rate for 2011 (Tr. p. 545:21); 2) the Moy Toy Board did not determine and add any previously owed (back) dues (Tr. p. 545:21); 3) the Moy Toy Board did not adjust 2010 dues rate by the change in the Consumer Price Index (CPI) (Tr. p. 545:21) as per all versions of the By-Laws (Ex. 4, 5, 97) and the Moy Toy Board did not calculate and apply any interest charges (Tr. p. 545:21) to unpaid balances as per all versions of the By-Laws (Ex. 4, 5, 97). There was no RMCC or developer office and members didn't know where to send any payments (Tr. p. 545:21; 711:06). Some dues assessments collected after September 2010 did not appear on accounting records. (Tr. p. 496:22). Income was not properly reported on tax forms. (Tr. p. 486:05). For example, no 2010 Dues Assessment income was reported on the 2010 tax returns. (Tr. p. 487.22; 490:22; 498:20; 494:23; 496:22). Given all of these problems caused by the Moy Toy Board and their predecessors, it was impossible to tell precisely who was paid up for 2010/2011 RMCC dues without independent proof of payments made by members. (Tr. p. 498:02).

A Member's List to vote was prepared by the caller of the meeting, Plaintiff Nugent, in

accordance with the requirements of TNCPA. (Tr. p. 558:25) (Ex. 13). A Certificate of Notice and listing of all owners receiving notice was prepared by Plaintiff Nugent as well. (Ex. 58). (Tr. p. 569:25; 190:09). Moy Toy, LLC did not contact the caller of the meeting (Tr. p. 191:10) prior to the Record Date of August 15, 2011 to establish its right to vote at the meeting. (Tr. p. 571:01). Between August 16, 2011 and August 30, 2011, legal counsel for both parties exchanged correspondence. (Ex. 9, 60, 61). On September 2, 2011, the day of the Special Meeting (Ex. 52), Moy Toy, LLC's legal counsel contacted Plaintiffs counsel via written correspondence to object to the meeting. (Ex.10). Included with Exhibit 10 was a list of paid up members for 2010 and 2011, authorized by Defendant McClung (Tr. p. 789:13) which the Plaintiffs further relied on as proof of good standing and voting. (Tr. p. 571:21). This list was very similar to the 2010 list of paid up members the Plaintiffs had already assimilated.

On September 2, 2011, the Special Meeting of the RMCC, called by Plaintiff Gerald Nugent, was held pursuant to the Meeting Notice and published agenda (Ex. 8, 56). Defendant Michael McClung representing both Moy Toy, LLC, the purported developer, and the Moy Toy Board as an alleged Director and President, presented a proxy from TIG Holdings, LLC purportedly giving him 342 votes. (Ex. 55). All other proxies were qualified prior to the meeting. The meeting was recorded and transcribed and detailed minutes were kept and recorded (Ex. 52, 86).

The following occurred at this RMCC special meeting held on September 2, 2011 (See Ex. 52): a call was made for the President or Chairman of the Board of Directors to come forward and chair the meeting and Defendant Michael McClung, purported President in accordance with the Secretary of State records (Ex. 23), came forward to chair the meeting. (Tr. p. 574:14). After trying to cancel or dismiss the meeting, and offering a motion to adjourn the meeting which received no

"second" to proceed, Defendant Michael McClung was asked to chair the meeting or step aside, which he did (Tr. 574:14). Plaintiff John Moore, by majority vote of those present was elected to preside over the meeting. The meeting was conducted as per the topics listed in the Special Meeting Notice (Ex 8). Proposition 11-001, Removal of current RMCC Officers and Directors, and Proposition 11-002, Amendment by Restatement of the Current By-Laws (Ex 48) were read, discussed and voted on by the members present and authorized to vote. (Ex. 50). (Tr. p. 579:09). Defendant McClung representing Moy Toy, LLC objected that Moy Toy, LLC's votes as a developer (10 votes per lot for 3 lots or 30 votes) were not being properly counted. Likewise, Defendant McClung objected that votes he held from the TIG Holdings, LLC proxy were not being properly counted. Both of these objections were reconciled by taking a provisional vote until the TIG proxy held by Michael McClung could be qualified or not qualified. (Ex. 55). Three new directors were elected by written ballot vote to replace those previously removed (Tr. p. 579:05). The meeting was adjourned.

Immediately following the Special Meeting, the new Board of Directors met to appoint officers (Tr. p. 579:21). The vote on the newly adopted By-Laws was certified by the new RMCC Secretary and were later recorded. (Ex. 51). (Tr. p. 578:24). Likewise the election of Directors vote was tallied, rechecked and certified by the new Secretary. (Ex. 49). (Tr. p. 579:16). After being thoroughly reviewed, the TIG Holdings, LLC proxy was disqualified per the By-Laws (Ex. 97, 5) admittedly for never being accepted as an RMCC member as required. (Tr. p. 772:02). In addition, admittedly TIG Holdings, LLC never paid any dues on these lots. (Tr. p. 770:13).

On October 28, 2011, Defendant Michael McClung called Wendell Harkleroad, Managing Member of the Eagle's Nest, LLC sub-development, (Tr. p. 96:24) and asked him **to assist Moy**

Toy, LLC in shutting down Renegade Resort and forcing everyone to move or sell. (Tr. p. 110:15).

On November 17, 2011, the Moy Toy Board called for a membership meeting of the RMCC. (Tr. p. 590:23). During this meeting Defendant Michael McClung said to Plaintiff Gerald Nugent two statements: 1) Regarding the potential for liens for nonpayment of dues: "Before this is over I will have your house right out from under your feet" (Tr. p. 207:07); and 2) regarding no winter road maintenance "If you don't like the roads in the winter, you should go down off the mountain and rent a place for three months" (Tr. p. 202:23). The meeting was quite contentious. (Tr. p. 591:25).

On December 22, 2011, certain homeowners and officers and directors in the RMCC, Owners Board, filed suit (2011-CH-508) against Michael McClung, Phillip Guettler, Michael Haines, Joseph Wucher and Moy Toy, LLC for, among many issues, the return of the assets, property and records of the Renegade Mountain Community Club. (T.R. p. 11). In March 2012, Moy Toy, LLC, Phillip Guettler and Michael McClung filed a countersuit (2012-CH-527). Defendant Wucher was later dismissed with prejudice from the suit based on a statute of limitations defense. (Tr. 1076:16).

Plaintiffs sought voluntary legal fund donations from residents and members to help defray the costs of legal action. (Tr. p. 1068:19). These funds were maintained in a single RMCC checking account controlled by the Owner Board, but were always separately accounted for. (Tr. p. 1050:24). All accounting records show a corresponding income and expense entry. (Tr. p. 1070:02). Voluntary donations to the legal fund were explained to members numerous times in newsletters and differentiated from dues assessment income. (Tr. p. 1069:23). No other legal issues/matters

were paid with voluntary donations from this account (Tr. p. 1070:19); other bank accounts were used. (Tr. p. 1071:02).

Following the September 2, 2011 Special Meeting, and in the remainder of calendar year 2011, the new Owner Board 1) turned 45 security street lights back on (Tr. p. 592:05; 199:13); 2) repaired 95 percent of the large potholes in the roads (Tr. p. 593:21; 199:21); and 3) acquired a snow plow and provided primitive snow removal operations. (Tr. p. 595:03). In subsequent years the Owner Board reconstructed sections of washed out roads (Tr. p. 594:25), began mowing operations with volunteers, and purchased a mower (Tr. p. 596:17), and by 2012 had put in place a website, email account, Facebook account, published newsletters and made available member contact information. (Tr. p. 597:10). The Owner Board completed some road paving in 2014 (Tr. p. 612:19), held annual open houses to encourage sales (Tr. p. 616:04; 205:24), placed a newer snow plow and salt spreader into service in 2014 (Tr. p. 616:15), delivered daily winter road condition reports (Tr. p. 198:21) and purchased a used tractor and bush hog attachment in 2015. (Tr. p. 616:04). Attempts to reinstate security to members and residents was rejected (Tr. p. 83:20) by the purported developer and could not be accomplished. (Tr. p. 593:07).

Predictably, issues arose. In 2012, the Owner Board placed 100 reflector poles along Renegade Mountain Parkway. (Tr. p. 610:25; 58:12). On May 1, 2013, counsel for Moy Toy, LLC wrote a letter stating that these were not reflector poles at all, were unsafe and needed to immediately be removed. (Ex. 40). On May 3, 2013, Plaintiffs counsel responded that these were indeed reflector poles, were required for owner safety and would not be removed. (Ex. 47). In May 2015, two years later, Defendant Phillip Guettler (Tr. p. 269:25) and Defendant Michael McClung (Tr. p. 811:12) admitted that they removed all reflector poles installed by the Owner Board (Tr. p.

611:20; 85:23), and no reflector poles exist today. (Tr. p. 612:05).

Through August 2014, the Owner Board maintained the sports park area. (Tr. p. 614:25). After announcing a Labor day picnic for members in the sports park, counsel for Moy Toy, LLC sent a letter on August 26, 2014, to Plaintiff's counsel indicating that such a use by the members would constitute trespassing and any use of the sports park would not be allowed. (Ex. 72). (Tr. p. 614:03). Plaintiffs' counsel replied with a letter stating that members had a right of enjoyment to the sports park, but since the Court had not ruled, the picnic would be canceled. (Ex. 73).

In 2014 the Owner Board cleared 2.1 miles of impassable platted roads and made a walking trail system for members use (Tr. p. 612:19). Counsel for Moy Toy, LLC sent a letter in September 2014 indicating use would be considered trespassing and that these roads could not be used as walking trails. (Tr. p. 615:11).

In April 2015 the two large "Renegade Mountain" signs at the developments' entrance disappeared. (Ex. 40). (Tr. p. 617:03; 43:22; 85:16). Moy Toy, LLC admitted to removing the signs (Tr. p. 319:18) even though they were present since 1987 and RMCC member dues assessments were used to construct (Ex 44; 2000) and maintain (Ex 44; 2000-2010) the signs (Tr. p. 617:20) . A letter from Plaintiffs' counsel was sent to the Defendants asking them not to dismantle the signs; no response was received. (Tr. p. 617:03).

In May 2015 Moy Toy, LLC (Tr. p. 311:09) blocked certain roads in Renegade Resort (Tr. p. 620:15; 86:04; 101:02) and denied access (Tr. p. 100-14) to, among other roads, Great Warrior Road and Renegade Mountain Parkway, at two locations. (Ex. 40). These roads had been continuously used for decades (Tr. p. 621:17; 60:02; 86:07; 197:06; 800:13) to connect two separate platted areas (Ex. 75). RMCC Members' dues assessments were used to maintain these roads. (Ex.

44). These roads remained blocked as of trial. (Tr. p. 622.02; 800:10).

In May 2015, Moy Toy, LLC placed weight limit signs on the bridge at the entrance to Renegade Mountain (Tr. p. 86:15) , shut down the bridge (Tr. p. 106:06) and denied access to property owners in Renegade Resort and the Eagle's Nest, LLC sub-development (Tr. p. 106:06), then actively engaged in new home construction. (Tr. p. 98:23). This bridge is the only available access to all 1351 lots. (Tr. P. 66:20). Eagles Nest, LLC sought professional advice about the structural integrity of the bridge. (Tr. p. 115:03). Eagle's Nest, LLC Managing Member, Wendell Harkleroad removed the weight limit signs and Defendant Michael McClung had him arrested for criminal trespass. (Tr. p. 109:08). Moy Toy, LLC claimed to own and control this bridge. (Tr. p. 323:22).

The trial took place on December 15, 16 and 17, 2015; February 2, March 7 and April 14, 2016. The Trial Court's ruling was announced on May 4, 2016, (T.R. 826) with the Order entered on July 1, 2016. (T.R. 876).

Among other interim findings, the Trial Court appointed attorney William Ridley as Special Master to review Court ordered accountings from both the Moy Toy Board and the Owners Board, receive dues assessments and determine who was in good standing and could vote, hold a special meeting of the RMCC membership to elect new directors, and disgorge any inappropriate expenses or legal expenses, paid from RMCC dues assessments, by either Board. (T.R. 876). As required, a complete accounting was prepared by Plaintiff John Moore (Tr. XXIV, p. 30:19), Assistant Treasurer (Tr. XXIV, p. 31:17), detailing each line item of income and expense from September 2011 until July 5, 2016, and submitted same to the appointed Special Master on July 5, 2016. (Tr. XXIV, p. 31:21). The Special Master requested that Plaintiff John Moore, total and document the

dues assessments paid by members to either Board, receive and account for all dues paid by members prior to the Court ordered election, interact with members regarding their dues owed/payments, and prepare a listing of members in good standing to vote. Plaintiff John Moore completed these tasks. (Tr. XXIV, p. 27:10).

The Special Master sent a Meeting Notice, set specific dates for payment of any outstanding dues assessments necessary for members to vote at the Special Election, and set the date for the Special Election as August 25, 2016. (T.R. 1061). Both the Owner Board and the Moy Toy Board were required to continue maintaining Renegade Resort in the interim period (between Court order and election). (T.R. 881, Para. 18). The Owners Board spent $21,570.71 in maintenance and continuing operations of Renegade Resort and the Moy Toy Board spent zero funds in the continued maintenance and operation of Renegade Resort (T.R. 1068, Para. 7, 6). All expenditures were found to be appropriate by the Special Master. (T.R. 1068, Para. 8).

Pursuant to the Trial Court's order an RMCC Special Election was held on August 25, 2016 and supervised by the appointed Special Master. Despite having over 20 member's names in nomination (Tr. XXIII, p. 4-6), Moy Toy, LLC, with its 3363 votes (Tr. XXIII, p. 3:21), elected Darren Guettler, Phillip Guettler and Michael McClung as directors, the same set of directors that formed the previous Moy Toy Board. (Ex. 23).

After the election was completed, the Special Master set the rules for the hearing to disgorge any attorneys fees paid from dues assessments, and any inappropriate expenses not maintenance or operation related, from either Board, as required by the Trial Court's Interim Order. (T.R. 881, Para. 11, 20). The Special Master set the hearing date for September 7, 2016 (Tr. XXIII, p. 33:25), just thirteen days later, and stated: "I am going to take the accountings as truth and that's the numbers

I'm going to use, unless proven otherwise at the hearing". (Tr. XXIII, p. 29:11). Mr. Ridley again repeated this language as the standard for the hearing. (Tr. XXIII, p. 31:17).

The final Special Master hearing was held on October 3, 2016. (Tr. XXIV, p. 1:24). Plaintiff John Moore testified that he was the RMCC Assistant to the Treasurer (Tr. XXIV, p. 29:21), appointed by Plaintiff Gerald Nugent (Tr. XXIV, p. 31:17), personally completed the accounting submitted to the Special Master (Tr. XXIV, p. 30:19), and personally completed every phase of the accounting for the RMCC (Tr. XXIV, p. 30:7), which included separate accounting for voluntary donations to the legal fund. (Tr. XXIV, p. 37:25). The defense objected to Plaintiff John Moore's testimony on the grounds that he was not an expert witness, and he could not authenticate the accounting or supporting documents he prepared, as they were hearsay. (Tr. XXIV, p. 38:19). Plaintiff's counsel argued that Plaintiff John Moore could testify from personal knowledge because he personally completed all the accounting actions. (Tr. XXIV, p. 41:25).

The Special Master's Final Report (T.R. 1065), did not recognize the Plaintiffs separate legal fund since the money was placed in the same bank account as were RMCC dues assessments, even though the Special Master did recognize that these funds were accounted for separately (T.R. 1066, Para. 3). However, he still ordered $143,513.55 to be disgorged from Plaintiffs indicating that these monies paid to the legal fund were dues assessments and not legal donations. The Special Master found that all expenditures for maintenance and operation of the RMCC, by the Owner Board, were "reasonable and necessary", but, without reviewing any receipts, contracts, tax records or other supporting documentation available, found Plaintiff John Moore's testimony to be "self serving and not credible". (T.R. 1065).

Plaintiffs objected to the Special Master's Final Report and submitted Income Statements,

tax records, affidavits, cancelled checks and internal accounting records, all showing that a separate legal fund existed, and was separately accounted for. (T.R. 1079). On November 17, 2016, the Trial Court held a hearing on the Plaintiff's objections, and after lengthy arguments, accepted the Special Master's Final Report as written. (T.R. 1079).

Plaintiffs submitted a motion to revise the Court's January 23, 2017 Order on the basis that, if these legal donations were in fact considered dues assessments, then members paying these sums had overpaid dues to the RMCC amounting to dozens, even hundreds of years, and therefore, members should be due a refund of such overpayments. It also asked the Trial Court for guidance on how to handle voluntary donations made by 1) individuals who were no longer members of the RMCC and owed no dues, 2) individuals who were never members of the RMCC, and 3) individuals who were RMCC members, but were exempt from paying dues to the RMCC ("Pre-1972 members"). The Trial Court denied this motion. (T.R. 1349).

Plaintiffs filed a Stay of Judgment pending appeal (T.R. 1388), and established a Bond for $172,216.26. (T.R. 1390). Both actions were approved by the Trial Court.

Notice of Appeal was filed on April 7, 2017. (T.R. 1384).

ARGUMENT

Burden of Proof

The standard of review in a nonjury case is *de novo* upon the record with a presumption of correctness attributed to the trial court's findings of fact unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d). The Trial Court's conclusions of law, however, are review de novo and are accorded no presumption of correctness. Brunswick Acceptance Co., LLC v. MEJ, LLC, 292 S.W.3d 638, 642 (Tenn. 2008).

Introduction

This complicated case mainly comes down to an essential issue involving the statute of limitations for challenging a recorded document in Tennessee. Though it is unclear, there appears to be perhaps a six year statute of limitations for challenging restrictive covenants or amendments thereto since restrictions and covenants are in the nature of contracts. [T.C.A. §28-3-109(a)(3)(six year statute of limitations for contract from when cause of action accrues)]. See, Grand Valley Lakes Prop. Owners Ass'n v. Burrow, 376 S.W.3d 66 (Tenn. App. 2011) (attached as Exhibit C) (in dicta, where notice of amendments to covenants was not an issue, a suit filed nine years after amendments to restrictive covenants were approved was time barred).[5] The Trial Court in this case

[5] Plaintiffs in the 508 Case do not concede that the application of a six years statute of limitations to challenge the contents of a recorded document is appropriate. In Diehl v. Rarity Bay Cmty. Ass'n 2013 U.S. Dist. LEXIS 82472 (attached as Exhibit D), the U.S. District Court for the Eastern District of Tennessee rejected the very argument that the Trial Court adopted in this case. In Diehl, property owners in Rarity Bay sought to challenge a lien placed on their property for past due assessments alleged to be owed to an Association. The lien was purportedly provided for in a Master Declaration of Covenants ("Master Declaration") recorded in 1998. In 2013, the plaintiffs filed suit and asserted that the Master Declaration did not apply to their property. Defendants argued that the Master Declaration applied because it was approved and filed with the register of deeds approximately fourteen years ago and that plaintiffs did not challenge its application within the six year statute of limitations provided for in the Grand Valley case cited above. The District Court rejected this argument and stated that though

commences the limitations period on the date of recordation in the Register of Deeds Office of the 2005 First Amended Restrictive Covenants (Ex. 2), regardless of when or whether actual notice was given to the owners, who are purportedly bound by the amendment and regardless of when owners knew or should have known about the amendment, on the premise that such recordation is constructive notice to all the world. There is no proof of a vote by the membership of the RMCC to ever approve these amendments. There was no signature on Ex. 2 from a legitimate developer as required for any amendment of the Restrictive Covenants in Renegade Resort to be valid. (Ex. 1, Art XV, Sec 5). This holding, that the six year statute of limitations barred Plaintiffs from challenging Moy Toy, LLC's purported developer rights, disregards the reality that owners of property in Tennessee have no duty to routinely conduct a title search on property they own in order to find a document recorded after they purchased their property. Are property owners in Tennessee supposed to do title searches every few years to see what documents have been recorded affecting their real estate or else be bound by the document's terms after six years has passed? The Trial Court implicitly holds that such duty exists. Does this six year time limit apply even where the document that was recorded was not valid in the first instance? The Trial Court in this case holds that an otherwise invalid instrument is rendered legally unassailable after six years passes, based solely on whether it is recorded in the Register of Deeds Office and not contested. That cannot be and is not the true state of the law in Tennessee.

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application of the Master Declaration to the plaintiffs' property was an issue in the case and the court may be called on to determine whether the Master Declaration applies to the plaintiffs' property in determining the merits of plaintiffs' claims, the case was not time barred because simply plaintiffs did not challenge the application of the Master Declaration to their property within six years after its adoption and recordation. See also Bluegreen Vacation Unlimited, Inc. v. Governor's Crossing Design & Review, 2009 Tenn App. LEXIS 485 (attached as Exhibit E) (recorded declaration challenged in February 2005 where it was recorded in August of 1998; no statute of limitations time barred claims).

This holding is pivotal to all remaining issues in this case because without the statute of limitations running, Moy Toy, LLC has no developer rights in Renegade Resort according to the Trial Court. If Moy Toy, LLC does not have developer rights, all other holdings, findings and outcomes in this case are significantly altered.

I. **The Trial Court incorrectly held that Moy, Toy, LLC has developer rights in Renegade Resort based solely on the fact that its predecessor, without any right to do so, simply named itself the Developer in the recorded 2005 First Amended Restrictive Covenants and then six years passed with no one challenging such designation, thus blocking any challenge to such purported developers rights due to the running of the statute of limitations.**

The Trial Court held in its Order of July 1, 2016, that Renegade Resort, LLC, the entity from which Moy Toy, LLC claims it obtained its developer rights in Renegade Resort by assignment, did not have developer rights when it purported to convey them to Moy Toy, LLC. (Ex. 30). (Order, T.R. 882, para. 21). The Trial Court based its ruling on the testimony of two of Plaintiffs' witnesses, Attorneys Joe Looney and Jack Adkins. These witnesses went into great detail as to how developer rights were transferred between prior Renegade Resort "developers" in a series of transactions since 1972 (Ex. 32, Tab 1-10) and the breaks in this chain. The first break was a substitute trustee's deed whereby Cumberland Gardens Acquisition Corporation obtained its property holdings in Renegade Resort after foreclosure on a deed of trust in 1991. (Ex. 32, Tab 9). This deed clearly, by its terms, conveyed real property only and not developer rights. No other conveyance or assignment was made at that time of developer rights that Cumberland Gardens Limited Partnership may have possessed. (Tr. P. 461:03). There is no proof that Cumberland Gardens Limited Partnership ever conveyed its developer rights. (See testimony of Jack Adkins that this entity still possesses developer rights, Trans. p. 417:24). (See testimony of Joe Looney that no

documents in the transaction transferring land from Renegade Resort, LLC to Cumberland Gardens Acquisition Corporation conveyed developer rights). (Tr. p. 461:03).

A second breach in the chain of developers rights occurred as a result of the sale of Renegade Resort from Cumberland Gardens Acquisition Corporation to Renegade Resort, LLC on January 6, 2000. (Ex. 32, Tab 10). In Trial Court testimony of Attorney Joe Looney, who the Trial Court found credible, Mr. Looney testified that he was counsel for Cumberland Gardens Acquisition Corporation at the time of transfer and that, to the best of his recollection, developer rights were never discussed on mentioned during this transfer of property. (Tr. P. 443:12).

Developer rights are personal property rights that may or may not be conveyed with real property depending on the language of the conveyance documents. See Hughes v. New Life Dev. Corp., 389 S.W.3d 453, 465-67 (Tenn. 2012) (developer rights are personal property rights that may or may not be transferred to a successor developer depending on the language of the conveyance documents). See also, Civis Bank v. Willows at Twin Cove Marina Condo & Home Owners Ass'n. 2016 Tenn. App. LEXIS 991 (attached as Exhibit F) ("The Supreme Court in Hughes strongly suggests that as a general matter, declarant's or developer's rights are personal interests, which, although freely transferable, do not run with the land.").

The Trial Court held, and the proof supports, that even though the 2005 First Amended Restrictive Covenants (Ex. 2) state that developer rights existed for Renegade Resort, LLC, Renegade Resort, LLC did not, in fact, possess such developer rights because of the prior breaches in the chain of title for such rights. See, testimony of expert witness Jack Adkins (Tr. p. 404:20) and testimony of Attorney Joe Looney (Tr. p. 461:03).

I can name myself the Queen of England and record a document to that effect in the Register of Deeds Office that I sign and have notarized, but that does not make it so, even after six years with no one challenging my claim to the throne. I can record a forged contract saying that my neighbor has to sell me his house for $100.00. After six years passes and he has not challenged the document, that does not make it enforceable, and I cannot demand that he sell me the house for that sum. The law cannot logically be that an otherwise improperly executed and void instrument transforms into a valid, binding legal document just because it was recorded in the Register of Deed's Office more that six years ago. Legal legitimization of an otherwise illegitimate document is not the effect of registration of a document. (See, T.C.A. §66-26-101. Effect of instruments with or without registration.) Recording a document in the Register of Deeds Office does not have that sort of transformative legal effect. This should especially be true in Tennessee, where the Register of Deeds cannot practice law and screen legal documents, but must simply record what is presented for recording by the public, if it is legible and in English (T.C.A. §66-24-101). Further, Tennessee law does not require a document that is recorded in the Register of Deeds Office to be mailed to or otherwise provided to a person whose property its purports to affect and bind when recorded.

In the 2005 First Amended Restrictive Covenants (Ex. 2), Renegade Resort, LLC simply defines itself to be the Developer in Renegade Resort. That alone does not make it the developer any more than my proclamation makes me the Queen of England. The proper process was not followed for amending the 2005 Amended Restrictive Covenants (Ex. 2 or Ex. 5) in Renegade Resort in the first instance. Both 1) a vote approved by the membership of the RMCC, and 2) approval of the developer are required to amend Restrictive Covenants in Renegade Resort under their terms (Ex. 1 and 4, Art. XV, Sec. 5). At the time of the signing of the 2005 First Amended

Restrictive Covenants (Ex. 2) on October 20, 2005 by Renegade Resort, LLC as purported "developer", developer rights in Renegade Resort were still held by Cumberland Gardens Limited Partnership[6]. The Trial Court held that no vote of the membership of the RMCC on the approval of amendment occurred or was documented. (T. R. 879, para. 9). The RMCC signed the documents (Ex. 2, Ex. 5) through its alleged president, Edward Curtis, who had been voted out of office before he signed. (Wucher depo. p. 43:15-21). Despite all of these critical defects, the 2005 First Amended Restrictive Covenants (Ex. 2) were recorded and are now given legal effect by the Trial Court.

Due to all of these defects, the 2005 First Amended Restrictive Covenants (Ex. 2, Ex. 5) were void ab initio and should not be applied to the issues in this case. See W.H.I,, Inc. v. Courter, 2017 R.I. Super LEXIS 115 (attached as Exhibit G) (amended restrictive were void ab initio where unanimous consent of owners was required for amendment but was not obtained). See also, Dana Glass Multi-Family v. Kenilworth Court Residents Ass'n., 2015 Pa. Dist 7 Cnty. Dec. LEXIS 19029. (attached as Exhibit H). (statute of limitation did not apply to challenge to amendment of declaration because the amendment required unanimous consent to be valid; it lacked such consent; thus it was void ab initio and the statute of limitation does not apply). In this case, if Ex. 2 and

[6]Even if such rights were not left with Cumberland Gardens Limited Partnership after its real estate in Renegade Resort was foreclosed upon, as of the date of the signing of the 2005 First Amended Restrictive Covenants (Ex. 2), Renegade Resort, LLC did not have the right to assert developer rights by admission of Joseph Wucher, the managing member (Depo Wucher 129:02) and signatory on the document for this entity. (Depo. Wucher 27:25). On September 25, 2005 (one month prior to the signing of the 2005 First Amended Restrictive Covenants (Ex. 2) on October 20, 2005) Renegade Resort, LLC contractually assigned control and operation of Renegade Resort, including rights to act as the developer. to LKM Group, LLC. (Depo Wucher 21:1-7; 27:25; 30:1). Defendant Michael McClung admits that in this time period that LKM Group, LLC was the developer and exercised developer rights under its contract to purchase the resort. (Tr. p 768-769).

Ex. 5 are void ab initio, the statute of limitations would not apply. See, Edwards v. Allen, 216 S.W.3d 278 (Tenn 2007) (statute of limitations did not apply to County resolution that was void ab initio).

The one and only basis on which the Trial Court makes its finding that Moy Toy, LLC's developer rights cannot be challenged is that no one filed suit within six years from the date of the recording of the 2005 First Amended Restrictive Covenants (Ex. 2) where Renegade Resort, LLC simply declared itself to be the Developer. Based on this holding, the Trial Court held that Moy Toy, LLC was the current developer in Renegade Resort. Renegade Resort, LLC purportedly assigned such developer rights to Moy Toy, LLC. (Ex. 30). (Order, T.R. 882, para. 21). **The only source of such developer rights for Renegade Resort, LLC was the 2005 First Amended Restrictive Covenants.**

There is no proof of actual notice to any owner in Renegade Resort of the recording of the 2005 First or Last Amended Restrictive Covenants (Ex. 2, 5). To the contrary, the proof shows that no actual notice was given. (Tr. p. 87:09; 1079:18). In ruling on the statute of limitations, the Trial Court in its July 1, 2016 Order states that the Court relied only on notice to all the world based soled on the date when these documents were recorded in the Register of Deed's Office. (See Order, T.R. 879, para. 8).

Relying only on such "notice to all the world" assumes a legal duty that does not exist for owners of property in Tennessee. Such owners of property do not have a legal duty to routinely search the Register of Deeds' records to see what document might have been recorded or amended regarding their property. See Clay v. Metropolitan Govt of Nashville and Davidson Cty, 1985

Tenn App. LEXIS 2704 (attached as Exhibit I) (property owner filed a notice in the Register of Deeds office that he intended to repair a structure that was later demolished; court found such notice to be insufficient because it was not aware of any duty on the part of the Metropolitan Government to conduct a search that would have turned up the notice).

The seemingly all inclusive phrase "notice to all the world" in T.C.A. 66-26-102, regarding the effect of registration of a document, is misleading. This statute states as follows:

> All of the instruments registered pursuant to T.C.A. 66-24-101 shall be notice to all the world from the time they are noted for registration, as prescribed in T.C.A. 8-13-108; and shall take effect from such time.

However, persons whose recorded interests in the property that predate rather that postdate the recorded instrument in question do not form a part of the "world". See Burch v. McKoon, Billings & Gold, 2005 Tenn App. LEXIS 553 (attached as Exhibit J). The recording of an instrument is constructive notice only to those parties acquiring interests subsequent to the filing and recording of the instrument. Id. The recording of an instrument does not constitute notice to antecedents in the chain of tile, as wrongly assumed by the Trial Court.

The universal rule is that the record of an instrument is constructive notice to subsequent purchasers and encumbrancers only, and does not affect prior parties. 45 Am. Jur., §89, (cited in Burch, supra. at 7). The proposition is frequently announced that under the recording statutes, the proper record of an instrument, authorized to be recorded, is notice to the world. But this means simply that the record is open to all, and is notice to all interested parties. The recordation of an instrument is notice only to those who are bound to search for it. It is not a publication to the world at large. Those who, by the terms of the recording laws, are charged with constructive notice of the

record of an instrument affecting land are, therefore, those who are bound to search the records for that particular instrument. Id., § 89.

The Burch case was followed on this issue by the U.S. District Court for the Eastern District of Tennessee in Suntrust Bank v. Stoner, 2008 U.S. Dist. LEXIS 75247 (attached as Exhibit K) which states as follows:

> ..[T]he court finds that plaintiff did not receive constructive notice of fraud by virtue of the recording of the deed in March 1999. While under Tennessee law "instruments registered pursuant to § 66-24-101 shall be notice to all the world from the time they are noted for registration … and shall take effect from such time," Tenn. Code Ann. § 66-26-102, the court finds persuasive a recent interpretation of this rule as providing constructive notice only to persons whose recorded interest in the property postdate the recording, [*11] Burch v. McKoon, Billings & Gold, P. C., No. M2004-00083-COA-R3-CV, 2005 Tenn. App. LEXIS 553, 2005 WL 2104611, at *6 (Tenn. Ct. App. Aug. 31, 2005). Indeed, this appears to be the well-accepted interpretation of notice statutes which purport to provide "notice to all the world." E.g., W.W. Allen, Annotation, Public Records as Notice of Facts Starting Running of Statute of Limitations Against Action Based on Fraud, 137 A.L.R. 268 (1942) (discussing case in which court stated that "the record of a deed is not constructive notice to all the world but only to those who are bound to search for the record, such as subsequent purchasers and mortgagees"); 66 Am. Jur. 2d Records and Recording Laws § 87 (2008) ("The proposition is frequently announced that under the recording statutes, the proper record of an instrument authorized to be recorded is notice to all the world. However, this means simply that … [t]he record of an instrument is notice only to those who are bound to search for it."). Furthermore, where there are no facts or circumstances of suspicion which would impose on a prior owner a duty to search the recorder's office to check for fraud, the recording of a deed does not serve as constructive notice.

See also, Newton v. Bank of Am. (In re: Greene) 2011 Bankr. East. Dist. Tenn. LEXIS 908 (attached as Exhibit L) (recording of an instrument is notice only to those who are bound to search

for it; it is not publication to the world at large). Moore v. Cole, 200 Tenn 43, 289 S.W.2d 695 (if a tenant in common with another intends to try to take the property away from his co-tenants, out of possession, he must give them actual or constructive notice that he is disavowing their interest in the property; notice by recording a deed to a third party in the register of deed's office is not sufficient notice; a remainderman is not charged with a duty of keeping his estate under constant observation).

Contrary to the implicit holding of the Trial Court, there is no legal duty in Tennessee of owners of property subject to Restrictive Covenants to, after their purchase, search their titles to see if there has been filed amendments of such documents. In the case at bar, constructive notice of the 2005 Amended Restrictive Covenants (Ex. 2, Ex. 5) would only apply to owners who bought their property after October 20, 2005, the date of recordation. None of the Plaintiffs fell into this category. All owners who testified at trial, owned their property prior to October 20, 2005 when the 2005 First and Last Amended Restrictive Covenants (Ex. 2, Ex. 5) were recorded. (Ex. 41, Ex. 71, Tr. p. 42:25; 72:15; 99:03).

In the present case, 1) as stated above, there is no proof whatsoever of actual notice to the Plaintiffs of the First and Last 2005 Amended Restrictive Covenants (Ex. 2, Ex. 5), and 2) there are no facts or circumstances of suspicion, which would impose on or require a prior owner in Renegade Resort, a duty to search the Register of Deeds Office to check for amendments to the Restrictive Covenants until, at the earliest, 2010.

The Trial Court determined the statute of limitations had supposedly run from the time of recording (Oct. 20, 2005) of the Restrictive Covenants at issue where the present action was filed six years and two months after the recording (Dec. 22, 2011). However, where there is no duty by

owners to check the Register of Deeds Office after their purchase, the Trial Court erred in determining that the statute of limitations accrued as of the date of recordation of the documents at issue. This is a critical error of law, and it should be corrected by this Court.

Without the statute of limitations defense, Moy Toy, LLC has no developer rights in Renegade Resort.

II. The Trial Court erred in not allowing for tolling of the statute of limitations for challenging the 2005 First Amended Restrictive Covenants.

T.C.A. §28-3-109(a)(3) by its express terms states that actions alleging breach of contract should be commenced within six years after the cause of action "accrued". Under the discovery rule, a cause of action accrues for statute of limitation purposes when the plaintiff either has actual knowledge of a claim or has actual knowledge of facts sufficient to put a reasonable person on notice that he or she has suffered an injury as a result of wrongful conduct. Red Wing v. Catholic Bishop for Diocese of Memphis, 363 S.W.3d 436, 459 (Tenn. 2012) citing Carvell v. Bottoms, 900 S.W.2d 23, 29 (Tenn. 1995). The latter circumstance is referred to as constructive notice or inquiry notice and charges a plaintiff with knowledge of those facts that a reasonable investigation would have disclosed. Id.

The discovery rule is a limited exception to the statute of limitations. Pero's Steak and Spaghetti House v. Lee, 90 S.W.3d 614, 621 (Tenn. 2002) (characterizing the discovery rule as an equitable exception to the statute of limitations). It tolls the running of the statute of limitations until the plaintiff knows, or in the exercise of reasonable care and diligence, should have known that the plaintiff has a legal cause of action against the defendant. Terry v. Niblack, 979 S.W.2d 583, 586 (Tenn. 1998); Hunter v. Brown, 955 S.W.2d 49, 51 (Tenn. 1997).

The rationale underlying the discovery rule is that the injured parties should not be placed in the anomalous situation of being required to file suit before they know they have been injured. McCroskey v. Bryant Air Cond. Co., 527 S.W.2d 487, 490 (Tenn. 1975). The rule alleviates the intolerable result of barring a cause of action by holding that it "accrued" before the plaintiff discovered the injury or the wrong. Foster v. Harris, 633 S.W.2d 304, 305 (Tenn. 1982).

The discovery rule has been invoked in Tennessee in breach of contract claims. See, Individual Healthcare Specialists v. Blue Cross Blue Shield of Tennessee, 2017 Tenn. App. LEXIS 316 (attached as Exhibit M).

In the case at bar, there is no proof of any irregularities that would put Plaintiffs on notice about any changes in the Restrictive Covenants or alleged developer rights until, at the earliest. 2010. This case was filed on December 22, 2011, well within the six year period after the cause of action accrued. Accordingly, the statute of limitations does not prevent Moy Toy, LLC's developer rights from being contested. The Trial Court held that there was never an RMCC meeting approving the 2005 First Amended Restrictive Covenants (Ex. 2). (T.R. 879, para. 9). Members testified that no RMCC meetings, of any kind, for any purpose, where held from 2000-2011 (Tr. p. 43:22; 73:24; 166:03) and members never received an independent copy of the 2005 First or Last Amended Restrictive Covenants (Ex. 2, 5). (Tr. p. 87:09, Matchak; Tr. p. 1079:18, Moore). There is no proof that these documents were approved at any member purported meeting in 2000. There is no testimony in the record that the 2005 First and Last Amended Restrictive Covenants (Ex. 2, Ex. 5) were distributed to the owners in Renegade Resort or anyone else. Owners, including all Plaintiffs, who purchased lots in Renegade Resort prior to October 20, 2005, would have only

known that the 1987 Amended Restrictive Covenants and By-Laws were in effect for their property. (Ex. 4, Ex. 97).

There should be equitable tolling of the statute of limitations in any event, should such limitation of action apply. Defendants Michael McClung and Phillip Guettler repeatedly ignored Plaintiffs' requests for RMCC books, records and information in 2010 and 2011, (T.R. 878, para. 3), despite having a fiduciary duty, as purported directors and officers of a Tennessee not-for-profit corporation, to provide those documents. (T.C.A. §48-66-102).[7] The first of several requests for RMCC records was sent on May 18, 2011 (Ex. 53). If this and/or other subsequent requests had been timely answered, the lawsuit would have been filed within six years of the date of the recording of Ex. 2 and Ex. 5. However, as the Trial Court held, the repeated requests were ignored by Defendants. Violations of the RMCC By-Laws and Tennessee law by Defendants Michael McClung and Phillip Guettler in failing to provide Plaintiffs in the 508 Case with these vital records should not be allowed to further the Defendants' reliance on the statute of limitations. They should not be rewarded for intentional bad behavior.

In conclusion, this case was filed on December 22, 2011, well within the statute of limitations period for when the cause of action accrued. The running of the statute of limitations should be tolled until notice other than notice by publication was given of the filing of the First and Last 2005 Amended Restrictive Covenants, when Plaintiffs knew or should have known that they

[7] Sec. 11.04(2) of the 1987 RMCC By-Laws (Ex. 97) and the purported 2005 By-Laws (Ex. 5) state: "All books and records of the corporation may be inspected by any member or an agent of any member for any proper purpose at any reasonable time." The Tennessee Not-For-Profit Corporation Act, T.C.A. §48-66-102 provides for inspection of records by members and states the same rights of members to inspect corporate records. The Court's Order dated July 1, 2016 (T. R.878) found that the residents made repeated requests for RMCC books and records and that the Defendants ignored these requests.

may have a cause of action to challenge such documents or the designations therein. The earliest date when anything was amiss was 2010. Alternatively, the statute of limitations should toll because the Defendants in the 508 Case willfully and unlawfully withheld critical documents from the Plaintiffs.

Under no circumstances would this case be time barred if the correct legal standard regarding accrual of the cause of action had been used by the Trial Court.

III. **Alternatively, under the Trial Court's own reasoning, it must follow the most recent set of recorded Amended Restrictive Covenants for Renegade Resort which are recorded in Book 1212 Page 1324 in the Register of Deeds Office for Cumberland County, Tennessee (Ex. 5) where such restrictive covenants were recorded after those found in Book 1212 Page 1224 (Ex. 2) and name Renegade Resort, LLC, a Tennessee Limited Partnership, as Developer, and not Renegade Resort, LLC, a Nevada Limited Liability Company.**

While it is denied that Ex. 2, the 2005 First Amended Restrictive Covenants should govern the decisions in this case, as an alternate theory, if the 2005 First Amended Restrictive Covenants (Ex. 2) are held as valid because the statute of limitations ran on challenging them, then, by this same logic, the proper set of Restrictions in effect would be the most recent and last recorded set of documents, or the 2005 Last Amended Restrictive Covenants and By-Laws (Ex. 5).

The 2005 By-Laws and the 2005 Last Amended Restrictive Covenants both make up Ex. 5. From the first half of this single document, the Trial Court recognized and validated the "2005 By-Laws" as binding. However, the Trial Court wrongfully dismissed the validity of the second half of this document that contained the 2005 Last Amended Restrictive Covenants (Ex. 5). Jack Adkins, the expert witness called by the Plaintiffs, who the Trial Court found credible, identified the 2005 By-Laws (Tr. p. 405:14) and the 2005 Last Amended Restrictive Covenants (Tr. p. 406:13) as one

document. (Ex. 5). This document was recorded after Ex. 2. (See, dialogue at Tr. p. 901:1).[8] Using the Trial Court's own logic, Ex. 5 comprises the last set of Restrictive Covenants filed and recorded in the Cumberland County Courthouse for Renegade Resort that have not been challenged within six years after recording.

Ex. 5 was drafted, recorded and executed as one document. The document has consecutive page numbers. The By-Laws begin at page 1 and end at page 34. The Restrictive Covenants begin at page 35 and end at page 56. Ex. 5 was recorded as one document at Book 1212, Pages 1290-1345 in the Register of Deeds Office. The entire document was prepared by Robinson and Cole and reviewed by Hicks and Gray (Ex. 5, p. 1), identical to the preparation and review that occurred for the 2005 First Amended Restrictive Covenants (Ex. 2). The Defendants contend that this review and endorsement applied only to the By-Laws portion of the document (Pages 1-34), but there is no proof to substantiate this. The review and endorsement on its face applies to the whole document, not just the By-Laws. The same RMCC purported officer, Edward Curtis, signed the Restrictive Covenants that are found at Ex. 5, p. 55, recorded p. 1344 on behalf of the RMCC as signed the restrictions found at Ex. 2. The same individual, Joseph Wucher, Managing Member of Renegade Resort, LLC, who signed Ex. 2 also signed for the purported developer, Renegade Resort, LLC, a Nevada Limited Liability Company. (Ex. 5, p. 56, recorded p. 1345). All of these same entities and representatives signed the 2005 First Amended Restrictive Covenants (Ex. 2) which were recorded before the 2005 Last Amended Restrictive Covenants (Ex. 5).

[8] The defense stipulated (Tr. p. 736:1) that the 2005 By-Laws and the Last 2005 Amended Restrictive Covenants (Ex. 5) were filed and recorded after the 2005 First Restrictive Covenants (Ex. 2).

Ex. 2 and Ex. 5 are distinct, separately prepared, separately recorded, separately identifiable documents that are independent from one another. The 2005 By-Laws identify Renegade Limited Partnership as Developer. (Ex. 5, p. 34). The 2005 Last Amended Restrictive Covenants identify Renegade Resort, LLC, ***a Tennessee Limited Partnership***, as developer in Renegade Resort. (See, Ex. 5, p. 37, Definitions). The prior pages in this same set of Restrictive Covenants list Renegade Limited Partnership, a Tennessee Limited Partnership, as the current developer. (Ex. 5, p. 35). So, on October 20, 2005, two sets of Amended Restrictive Covenants and one set of bylaws were recorded for Renegade Resort with each document defining a different entity as developer and one document listing the different developers within the text of the same document. (Ex. 5, p. 35, p. 37).

Moy Toy, LLC obtained its "developer rights" allegedly by assignment from Renegade Resort, LLC , a Nevada Limited Liability Company. (Ex. 30). Moy Toy, LLC did not obtain developer rights from Renegade Resort, LLC, ***a Tennessee Limited Partnership***. As such, Moy Toy, LLC does not have developer rights in Renegade Resort if the 2005 Last Amended Restrictive Covenants (Ex. 5) are recognized as binding, because these latest set of restrictions do not grant developer rights to Renegade Resort, LLC, a Nevada Limited Liability Company. The last named developer of record was Renegade Resort, LLC, ***a Tennessee Limited Partnership***: an entity that does not exist. (Tr. p. 407:13).

Logic would suggest that the 2005 By-Laws and Last 2005 Amended Restrictive Covenants are either a single document where both the By-Laws and Restrictions are valid and in force, or a single document where both the By-Laws and Restrictive Covenants are invalid. (Ex. 5). The Trial Court in this case held, without explanation, that the By-Laws in Exhibit 5 were to be followed, but

the Restrictive Covenants that follow in the same document (Ex. 5) were not in effect and were to be ignored.

Jack Adkins, an expert witness who again the Trial Court found credible, testified that the By-Laws and Restrictive Covenants (Ex. 5) have been recorded and of record for over ten years. They have not been challenged or corrected. They were drafted by an out-of-state attorney and reviewed by a Tennessee attorney. (Tr. p. 410:4). This testimony should validate that these 2005 Last Amended Restrictive Covenants (Ex. 5) were not a mistake that should simply be papered over as was done by the Trial Court.

Further, over the last twelve years, hundreds of title searches for Renegade Resort properties would have been done in Cumberland County, Tennessee. These title searches would have found the By-Laws and Restrictive Covenants identified in Ex. 5 to be the last recorded By-Laws and Restrictive Covenants in force for Renegade Resort. The 2005 First Amended Restrictive Covenants (Ex. 2) would not have been identified as the most recent recorded Restrictive Covenants of record for Renegade Resort in any of these searches. If the Trial Court's logic is sound, that Restrictive Covenants of record for six years and unchallenged, become the law of the land, then these 2005 Last Amended Restrictive Covenants (Ex. 5), and not the 2005 First Amended Restrictive Covenants (Ex. 2), should be accredited. Property owners have relied on title searches saying that Ex. 5 was in effect, and not Ex. 2.

The Plaintiffs proved that Renegade Resort, LLC, ***a Tennessee Limited Partnership*** is a fictitious entity. The entity appears nowhere in the Secretary of State records. (Tr. p. 407:13). If this were a mistake or typing error, Renegade Resort, LLC, Moy Toy, LLC or the Renegade Mountain Community Club had a duty to correct it, which has not occurred to date. Renegade

Resort, LLC, ***a Tennessee Limited Partnership*** is identified as the last developer of record for Renegade Resort. (Ex. 5).

Given all of the above, as an alternate theory in the event the statute of limitations argument is somehow unsuccessful, the Trial Court should have accredited the 2005 Last Restrictive Covenants for Renegade Resort (Ex. 5), and not Ex. 2 that was previously recorded, to determine who the developer was by using the most recent set of unchallenged Restrictive Covenants (Ex. 5). This would result in a party other than Renegade Resort, LLC, a Nevada Limited Liability Company, having had developer rights under the most recent recorded Restrictive Covenants and therefore Moy Toy, LLC not having developer rights in Renegade Resort because its assignment was ineffective.

IV. **The Trial Court erred in voiding the results of the special called meeting of the RMCC membership held on September 2, 2011 based on the finding that the meeting was not properly called because the members calling the meeting had to be in good standing by having paid RMCC dues through 2011, not 2010.**

After the request to call a special meeting was ignored by Defendants, the requester of the special meeting, Gerald Nugent, called the meeting himself pursuant to T.C.A.§ 48-57-102(c). This meeting notice resulted in the September 2, 2011 membership meeting. The Trial Court held that this meeting was invalid because the members who constituted the 10% of those eligible to vote, necessary to call the meeting, were not in fact qualified to vote and were not members in good standing of the RMCC, having not paid their 2011 dues. However, 2011 was not the proper year to consider when qualifying members to vote at the September 2, 2011 RMCC special meeting for the reasons set forth below.

Defendants Michael McClung and Phillip Guettler as purported directors of the RMCC, failed to create or send invoices to any RMCC member, for 2011 dues assessments, in calendar year 2011. Defendants Michael McClung and Phillip Guettler knew, as purported directors and officers of the RMCC, that they must send written notice of dues assessments to owners each year. (Tr. p. 764:04–09, McClung). These Defendants nevertheless did not send 2011 dues invoices to any member, at any time in calendar year 2011. (Tr. p. 263:14, Guettler; 137:15, Stevens; 794:02, McClung; 788:11). These Defendants in the 508 Case, acting as purported directors, failed to establish a 2011 dues assessment rate as required. (Ex. 2, Art. X, Sec. 8). There were no meeting minutes of the Board indicating that any dues rate was set for 2011. (See, Ex. 15, 16, 25, 67). Further, these Defendants failed to call a meeting of the members to ratify any 2011 assessment rate as there was no membership meeting of the RMCC held from 2000 through September of 2011. (Tr. p. 166:03; 43:22; 73:24). By Defendants' admission there were no RMCC membership meetings from January to November 2011. (Tr. p. 247:12, Guettler). As required by the 2005 By-Laws (Ex. 5, Sec. 3.02) and T.C.A. §48-57-101, no date for a 2011 annual meeting was ever set by these Defendants. (Tr. p. 760:07, McClung). As required by the 2005 By-Laws (Ex. 5) Sec. 3.02, these Defendants failed to calculate the 2011 dues assessments rate using the consumer price index adjustment. (Tr. p. 750:23; 890:08, McClung). These Defendants, by their own admission, failed to apply any interest as required under the 2005 By-Laws Sec. 9.05(2) for unpaid dues assessments. (Tr. p. 749:03, McClung; Tr. p. 270:23, Guettler). As required in (Ex. 2) Art. X, Section 8, these Defendants failed to determine and publish a commencement date for 2011 dues assessments. (See, Board minutes 2011, Ex. 15, 16, 25, 67).

Further, as required by Ex. 5, Art. X, Sec. 8, these Defendants failed to create, maintain or open for inspection, a master listing of properties and assessments due for 2011, even though they were required to do so. This list was requested multiple times by Plaintiffs. (See letters dated May 8, 2011 (Ex. 53); June 23, 2011 (Ex. 54); July 27, 2011 (Ex. 8); and August 22, 2011 (Ex. 60)) (TCA §48-66-102). There was no response to any of these requests by Defendants Michael McClung or Phillip Guettler.

2011 dues were never actually invoiced until January 27, 2012. (Ex. 45). At that time these Defendants set the 2011 dues assessment commencement date at March 1, 2012.

Members were incapable of independently calculating their own 2011 dues assessments. Members would need to know any balance due (back dues) prior to 2011, any interest due on any prior balances, what the current approved rate of interest is and the actual approved 2011 dues assessment rate. Nevertheless, Defendant Michael McClung inexplicably and arrogantly testified "Members should know what they were assessed. Sending invoices is not something I had to do." (Tr. p. 789:1, McClung).

Members did not know when or where to send payment. There had been no meetings or communication with the members from September 2010 (Moy Toy, LLC's purchase) through the September 2, 2011 special meeting. (Tr. p. 267:10, Guettler). There was no office for the RMCC at Renegade Resort. (Tr. p. 711:06, McClung). There was no sort of communication with any members at all in this time period. (Tr. p. 764:02, McClung). Owners didn't know who the purported "developer" was in 2011. (Tr. p. 64:23, Renaud; 82:1). As required, there was no set due date for 2011 dues assessment invoices. (Ex. 2, Art. X, Sec. 8).

The 2005 First Amended Restrictive Covenants (Ex. 2, Art. X, Sec. 7(b)) provides for the date of commencement for dues assessments to be February of each year or such other date as fixed by the Board of Directors. Historically, in 2010, there was a due date of January 15, 2010. (Ex. 80). In 2011-2012, there was a due date of March 1, 2012. (Ex. 45). In 2009 (Ex. 80) and in 2002 (Ex. 24), there was no due date assigned. 2011 dues were never "due" until March 1, 2012, according to invoices sent by the Defendants. (Ex. 45).

The reason this is important is that members who fail to pay their dues, when due, may be suspended from membership, and are determined to not be in good standing to vote on RMCC affairs. However, that good standing determination depends entirely on when the payment for 2011 dues assessments was in fact due. Under the 2005 By-Laws (Ex. 5, Sec. 2.6) a member "who fails to pay . . . after the due date . . . is suspended". Further, the 2005 By-Laws (Ex. 5, Sec. 2.6) state: "Any member who fails to pay the dues and assessments applicable to him or her shall 30 days after the due date thereof **be automatically suspended from membership**". Such a member would no longer be eligible to vote, or therefore qualified to call a special meeting. However, 2011 dues, invoiced in January 2012, were never "due" until March 1, 2012. (Ex. 45).

Accordingly, 2010 was the proper year to qualify members to vote at the September 2, 2011 RMCC special meeting. Invoices for 2010 dues assessments were sent out in 2009. (See, 2010 invoice example of Amy Hood Luxford (Ex. 80)).

Many members paid 2010 dues, and those who paid through 2010 were in good standing to vote in 2011 (Ex. 78; Ex. 10), contrary to the holding of the Trial Court. These members had paid all dues requested of them through the September 2, 2011 special meeting. In accordance with the RMCC By-Laws then in effect (Ex. 5, 97), these members were in good standing in 2010, and

would remain in good standing until a subsequent request for 2011 dues assessment was sent, received and non-payment of the request for dues exceeded the 30 day grace period after the due date. Since the 2011 request for assessments was due on March 1, 2012, members paying all dues through 2010 were in good standing until at least April 1, 2012. (Ex. 45). Nevertheless, the Trial Court held that calendar year 2011, and not calendar year 2010, was the year through which dues had to be paid to qualify an RMCC member to be in good standing and subsequently qualified to call a 2011 special meeting.

It is important to remember that the Plaintiffs' actions from September 2010 to September 2011 in this case were reactive to the actions or inactions of Defendants Michael McClung, Phillip Guettler and Moy Toy, LLC. Plaintiffs in the 508 Case researched the Secretary of State records to obtain the names of RMCC officers and directors. (Ex. 23). They requested records from Defendants multiple times as stated above. These requests should have been granted but were ignored. (See, Court Order, T. R. 878, para. 3). These records, if they had been provided and existed, would have allowed Plaintiffs to inspect the membership roster, a listing of dues assessments and a list of who paid dues assessments for 2010 and 2011. (Tr. p. 543:4, Moore). It would have made calling the meeting and determining who was in good standing to vote much easier. Instead, Defendants, who had "unclean hands" (Trial Court Order, Para 32, T.R.884), made it as difficult as possible on the members desiring to take action to improve their community. In the absence of these vital records and no receipt of 2011 invoice for dues, Plaintiffs did the best they could, acted in "good faith" (Trial Court Order, Para 3, T.R. 878) and took the correct position that in order to be in good standing, a member must have paid all dues assessments requested of them through 2010. (Tr. p. 545:3, Moore). Since no 2011 dues requests were received, members who

paid through 2010 were asked by Plaintiffs to provide proof of payment through cancelled checks or other proof. Plaintiffs could then determine who had paid through 2010 in order to qualify the member as in good standing and eligible to vote. (Tr. p. 545:11, Moore). The June 23, 2011 special meeting request to the purported Board of Directors (Ex. 54) was signed by 33 RMCC members from whom proof was previously obtained of 2010 dues assessment payments. This Special Meeting request was sent certified mail with no response from the Defendants. Plaintiffs searched all 1,351 lots and 531 owners for contact information and on July 27, 2011, a special meeting notice was sent to all 531 owners. (Tr. p. 554:3, Moore). A record date was set of August 15, 2011, to respond. (Ex. 8). Plaintiffs prepared a membership list to vote (Ex. 52, Enc. 6, Ex. (i)) and a certificate of notice and associated roster of members receiving notice. (Ex. 52, Enc. 6, Ex. (g) and (h)).

When the Plaintiffs conducted the September 2, 2011 special meeting of the membership, the vote of the members resulted in removal of the prior RMCC directors and officers, the members' adoption of a new set of By-Laws and the election of three new directors. (Ex. 52). It is important to remember that at the time of the September 2, 2011 Special Meeting, the purported developer, Moy Toy, LLC, owned only three living units in Renegade Resort which, if it were the true developer (which it is not), would have given it only 30 total votes (ten votes per lot for the developer). (Interim Court Order, para. 5, T.R. 878). The official meeting minutes show the total votes cast for removing prior Directors and Officers was 81 Yes, 3 No, and the 2011 By-Laws were approved with 86 Yes, 3 No votes. (Ex. 52). This thirty (30) vote total held by Moy Toy, LLC would have been insufficient to defeat any of the issues addressed at the September 2, 2011 Special Meeting. The outcome would remain the same.

When asked for all of the RMCC records as stated above, the first response including any RMCC records from Defendants Michael McClung and Phillip Guettler was not until September 2, 2011, the day of the Special Meeting. (Ex. 10). At that time, Defendant Michael McClung himself provided a list of owners in good standing for 2010 and 2011 dues. (Ex. 10). Regarding the payment of 2010 dues assessments, this list (Ex. 10) was very similar to the list used by the Plaintiffs. Plaintiffs relied on this list to further document who was in good standing for 2010 and could vote at the meeting. (Tr. p. 571:21). There were only seven members, with a total of eleven votes who paid any dues in 2011, prior to the September 2, 2011 meeting. (Ex. 80). Defendant Michael McClung admitted he paid for all seven of those relatives and friends (Tr. p. 794:15, McClung) with a single check. (Tr. p. 794:05, McClung). Deceptively, all 2011 invoices referenced (Ex. 80) were created after the payments were received. (Tr. p. 137:06, Stephens). No RMCC members, other than Defendant Michael McClung, had an opportunity to receive an invoice in 2011 or pay 2011 dues assessments at that time. (Tr. p. 821:08, McClung).

While it is true 1) that this self-serving transaction by Defendant Michael McClung purportedly qualified those eleven members for good standing and voting, and 2) that none of those eleven members requested the special meeting in June 2011, these facts do not disqualify those members and residents who did pay their dues assessments through 2010 and were in good standing in the RMCC when the June 23, 2011 Special Meeting request was sent. These owners had no notice or opportunity to pay their 2011 dues prior to the September 2, 2011 meeting, and 2011 dues were never due until March 1, 2012, in any event. (Ex. 45). In accordance with the definition of good standing in the 2005 By-Laws (Ex. 5), all owners paying their dues assessments through 2010 had "paid all dues assessments <u>when due</u>" and remained in good standing to vote in 2011. This fact

gave all of these owners the legal right to request a special meeting on June 23, 2011, call a special meeting on July 27, 2011, and to conduct a special meeting of the membership on September 2, 2011.

Accordingly, the September 2, 2011 special meeting of the RMCC was a validly called meeting, and its results should be affirmed by the Court. This would result in the Owner Board being acknowledged as properly elected at the meeting.

V. **The Trial Court erred in holding that common property and amenities in Renegade Resort belong to Moy Toy, LLC, as the purported developer and that Moy Toy, LLC will transfer title and control of such common property and amenities only if it chooses to do so, while not recognizing the easement of enjoyment of Renegade Resort owners to use the common property and amenities.**

The Trial Court failed to recognize the Plaintiffs and other Renegade Resort owners' continuing rights for use and control of the amenities and common property in Renegade Resort. The amenities at issue are a sports park (tennis courts, pool, playground) and guard shack that were built for and always intended as common property for use by RMCC members in good standing. Defendant Phillip Guettler acknowledged that the tennis courts are common property. (Tr. p. 300:07). He further recognized that there is an owners' easement of enjoyment for the sports park. (Tr. p. 302:22; 299:20; 297:24). He testified that he believed the roadways (of which the guard shack was a part) were common property. (Tr. p. 300:55). Defendant Michael McClung expressly recognized an easement of enjoyment and all owners' right of access to the amenities. (Tr. p. 795:08).

Clearly it was the intent of the original developer in the 1972 Restrictive Covenants for these amenities to be common properties. (Ex. 1). Article I, Section 1(d) Definitions states that "pools,

tennis courts and permanent parks are common property". (Ex. 1). Article VIII, Section 1 discusses common property and states that "members in good standing maintain an easement of enjoyment, and it passes with title to their lots". (Ex.1). Streets and roads built by the developer, and not dedicated to the public, "shall be common property". (Ex. 1, Art VI, Sec 2). Article VIII, Section 3(a) discusses how the RMCC may revoke use of such easement of enjoyment. (Ex. 1).

Further, Article VIII, Section 2, Title To Common Properties, (Ex. 1). states that "developer shall turn over amenities to RMCC **upon completion**". (Emphasis added).

The original 1972 Restrictive Covenants were amended in 1987. (Ex. 4). Article I, Section 1(d), Definitions, in this 1987 Amendment still specifically describes the roads, pool, tennis courts and permanent parks as common property. Article VIII describes property rights in the common properties, and specifically in Section 1, that RMCC members have an easement of enjoyment in such common properties that passes with title of their lots. Under Section 3(a) of Article VII, of the 1987 Restrictive Covenants (Ex. 4), the RMCC may still revoke use of the easement of enjoyment. However, under Article VIII, Section 2, Title To Common Properties, there is a change from the 1972 Restrictive Covenants. (Ex. 4). Under the 1987 Amended Restrictive Covenants, the developer now may turn over the amenities to RMCC upon completion. (Ex. 4), not shall turn over as previously drafted.

Attorney Joe Looney, who authored the 1987 Restrictions (Ex. 4, p. 1), was a witness at the trial that the Court found credible. He represented two purported developers in Renegade Resort: Cumberland Gardens Limited Partnership and Cumberland Gardens Acquisition Corporation from 1985 through 1999. He testified that common properties were not limited to platted areas. (Tr. p.

456:01). He also testified that the pool, sports park and roads in Renegade Resort were common property. (Tr. p. 446:01).

The testimony at trial was uncontested that all of the amenities were complete by 1987. (Tr. p. 159:06; 160:04; 193:15, Nugent). (Tr. p. 42:25; 55:22, Renaud).

The 1972 Restrictive Covenants (Ex. 1) were in effect when the amenities were completed and before the Restrictive Covenants were amended in October 1987. Since the 1972 Restrictive Covenants (Ex. 1) required turnover of amenities upon completion, such action should have been taken to turn them over to the RMCC, but that was never done. Equity regards done that which ought to have been done. See Gibson's Suits in Chancery 5th Ed. Section 54. In a court of chancery *ought* becomes *is* and whatever a party ought to do or ought to have done, in reference to the property of another, will, ordinarily be regarded as done and the rights of the parties will be adjudicated as though it had been done. See Hurst v. Hurst. 2001 Tenn. App. LEXIS 310 (attached as Exhibit N). The common properties ought to have been turned over when they were completed in 1987. Instead of honoring the legal obligation to do what was legally required, then developer Cumberland Gardens Limited Partnership, changed the rules, after the fact. It took what was a legal obligation to turn over the title to completed amenities and roads, and made it optional so it could retain title and control for itself. This should not be tolerated in equity where the successor in interest, Moy Toy, LLC , now wants to take its fee interest in the property where the amenities sit and proclaim and enforce absolute power to exclude anyone, including RMCC members, from use and enjoyment of these same common properties, some thirty years later.

Under these facts, the doctrine of equitable estoppel should apply to prevent Moy Toy, LLC from blocking RMCC members from use and control of the common properties in Renegade

Resort. In order to establish equitable estoppel in Tennessee, the party asserting estoppel must prove that the party to be estopped: 1) engaged in a false representation or concealment of material facts; (that amenities would be turned over to the RMCC upon completion; and that RMCC members had an easement of enjoyment to the amenities and common properties); 2) with knowledge, actual or constructive, of the real facts, (apparently at least Moy Toy, LLC thought it could do as it pleases with the amenities and common properties and unilaterally revoke access to the amenities and common properties at will, as it has done); and 3) with the intent or at least the expectation that its representation or concealment would be acted on by the other party (published brochures, language in governing documents promises of use of the amenities and common properties, and 2003-04 Master Plan). The party asserting estoppel must also prove that he 1) relied on the false representation or concealment (see testimony of Moore; Tr. 534, p. 20 and Matchak Tr. 75, p. 12) ; 2) changed his position to his prejudice (purchased lots) and 3) lacked knowledge and means of acquiring knowledge about the truth of the facts in question. (Who would have known about or guessed such malicious actions from an alleged "developer"?). Consumer Credit Union v. Hite. 801 S.W.2d 822, 825 (Tenn App. 1990). Equitable estoppel can apply to actions of a party's predecessor in title in real estate matters. Daugherty v. Toomey, 189 Tenn. 54 (Tenn. 1949) (When parties, if living, would be estopped, their heirs and privies in estate are likewise estopped). See also M.C. Headrick & Son Enterprises, Inc. v. Preston, 1989 Tenn App LEXIS 277 (attached as Exhibit O).

If the Trial Court's ruling is not overturned, RMCC members' rights to use and enjoy the common properties, to include the sports park and guard house, will have been ignored. Property owners in Renegade Resort were promised use of the sports park and guard house and then

apparently tricked into thinking that they had an ongoing right of use and enjoyment if the Trial Court's Order stands. The sports park was in continuous operation for members from 1987 to 2010. (Tr. p. 56:17, Renaud). The guard shack was also in continuous operation from 1987 to 2010. (Tr. p. 804:09; 58:05).

The 2003-2004 master plan for Renegade Resort shows an operational pool and sports park. (Ex. 77). Owners were told that these amenities were to the exclusive use of the members (Tr. p. 56:19) for their enjoyment and not open to the public (Tr. p. 56:25). There was a sign posted at the sports park entrance declaring that these amenities were for the exclusive use of the RMCC members. (Ex. 40). Joe Looney, who authored the 1987 Restrictive Covenants and represented two developers as stated above, testified that the amenities, including the sports park and pool, were common property and were open to the members. (Tr. p. 445:02-07). Norman Renaud also testified that sports park usage was for members (Tr. p. 80:25) and that RMCC membership was required for use of amenities. (Tr. p. 56:19). Plaintiff Gerald Nugent testified that the sports park usage was for RMCC members. (Tr. p. 193:15). Plaintiff Joel Matchak testified that RMCC members could use the amenities. (Tr. p. 72:13; 72:04).

These amenities (to include the sports park, guard shack, tennis court and playground) were promised by various prior "developers" to owners in Renegade Resort. These prior "developers" were Moy Toy, LLC's, predecessor in title to the fee simple interest in the sports park property, guard shack and the roadways in Renegade Resort as stated above. These promises were relied upon by purchasers of lots in Renegade Resort. (Tr. p. 534:20). The amenities and their use by members were promoted to encourage lot sales. (Tr. p. 73:21). Plaintiff Gerald Nugent's real estate contract states in the special provisions paragraph 9 on page 2 as follows: "The seller, Cumberland

Gardens Limited Partnership, developer, is obligated to construct a golf course, pool and tennis courts (sports park)". (Ex. 41). Plaintiff Gerald Nugent was given a schedule in his contract for when these amenities would be completed.[9] (Tr. p. 159:22, Nugent).

These amenities are well documented in the promotional materials used by prior "developers" in Renegade Resort. (See Brochure, Ex. 63). The brochure (Ex. 63) promotes the pool, sports park, golf and walking trails in Renegade Resort. Plaintiff Joel Matchak received this brochure. (Tr. p. 72:25). It was available to the public at the guard shack, lodge and golf pro shop (Tr. p. 73:14) and used to sell lots (Tr. p. 73:19).

The amenities to include the sports park, guard shack, tennis court, playground and pool were maintained by the RMCC using annual dues assessments from members. (Ex. 44). The 2005 First Amended Restrictive Covenants (Ex. 2) , Article VI, Section 3, regarding common property, state that "maintenance and costs of operation shall be the Club's responsibility". Accordingly, monies were taken from RMCC dues and assessments for the upkeep of these amenities. (Ex. 44). RMCC monies were also used for the guard shack. (Tr. p. 1135:17).

There was express testimony that these promises relating to the amenities were relied upon in the purchase of lots in Renegade Resort to make purchasing decisions. (Tr. p. 534:20, Moore). (See also, Harkleroad, Tr. p. 99:12).

Despite all of the above, Moy Toy, LLC maliciously has denied access by members of the RMCC to the amenities to include the sports park, guard shack, tennis court, playground and pool

[9] Further, Plaintiff Gerald Nugent was given an Interstate Land Sales Registration document that also listed the promised recreational facilities and again states that the seller, Cumberland Gardens Limited Partnership, developer, was obligated to construct the golf course, pool and tennis court within the listed completion dates. (Ex. 36, p. 26).

since September 2010. Defendant Phillip Guettler's testimony was that he thought he can shut down the sports park. (Tr. p. 296:19). Further, he stated that the sports park grounds are off limits to everybody (Tr. p. 297:17) and that members of the RMCC were no longer allowed to exercise their easement of enjoyment. (Tr. p. 303:17). Defendant Michael McClung agreed with Defendant Phillip Guettler that RMCC members were not allowed in the sports park any longer (Tr. p. 794:22). He admitted that he posted the "no trespassing" signs at the sports park. (Tr. p. 795:02). Norman Renaud testified that the sports park was now unusable (Tr. p. 49:12) as were the tennis courts (Tr. p. 55:24). Plaintiff Joel Matchak testified that there was no use of amenities by the members after September 2010. (Tr. p. 84:01). Wendell Harkleroad testified that he was denied access to the sports park. (Tr. p. 100:14).

Moy Toy, LLC expressly denied use of the sports park to RMCC members by letter dated August 26, 2014. (Ex. 72). This letter states that RMCC members did not obtain permission to use the sports park and that Moy Toy, LLC will not allow unauthorized access or trespassing in this area.

These amenities, with the fee simple title currently held by Moy Toy, LLC, are not listed on any recorded plat for Renegade Resort. That defect is fatal according to the Trial Court to the member's rights to use these amenities. Clearly, however, they were always meant and intended as common properties as indicated by the continuous use of RMCC members, the clear and specific language of defining common properties in all versions of the Restrictive Covenants and the continuous maintenance of these amenities provided by the RMCC. While testifying to recognizing an easement of enjoyment by members in the RMCC to use these facilities, Moy Toy, LLC nevertheless arbitrarily closed these facilities to members with no intention to allow the RMCC to

control or operate them, or to allow RMCC members to use them in the future. Moy Toy, LLC is ignoring the owners' easement of enjoyment and so did the Trial Court.

The Trial Court ruled that unplatted amenities were not Common Properties using the strictest interpretation of the written definition of the term in the 2005 First Amended Restrictive Covenants. (Ex. 2). This strict reading of the definition ignores all of the above facts and the testimony of Joe Looney, who authored the 1987 Amended Restrictive Covenants and who was legal counsel to multiple developers in Renegade Resort from 1985 to 2000, that these amenities were, in fact, common properties. (Tr. p. 446:1), and that common properties were not limited to platted property. (Tr. p. 456:1).

Tennessee law does not favor restrictive covenants, because they are in derogation of the rights of free use and enjoyment of property. Hughes, supra, 387 S.W.3d at 474. Restrictive covenants are to be interpreted and enforced as contracts with any doubt concerning the applicability of a restrictive covenants construed against the restriction. Id. at 481. Restrictive covenants are to be enforced according to the clearly expressed intention of the parties. Benton v. Bush, 644 S.W.2d 690 (Tenn App. 1982).

The definition of "common property" in the 2005 First Amended Restrictive Covenants (ex. 2) is:

> Article I (G) Definitions:
>
> (G) "Common Properties" shall mean and refer to those areas so designated upon any recorded subdivision plat of the Property which are intended to be devoted to the common use and enjoyment of all of Owners of the Properties. They shall also mean and refer to any improvement or area designated by Renegade as Common Property, in writing on the plat or by recorded instrument delivered to the Club, and they shall specifically include, but not to the exclusive of other improvements which may hereafter be designated as Common Properties by Renegade, the following: Roads

and Streets, tennis courts, swimming pools, permanent parks, and permanent recreational plots.

Notwithstanding any other provision of the Declaration of Amended covenants and restrictions to the contrary, Renegade may, in its sole, exclusive, and unfettered discretion choose:

(i) to retain legal title to the Common Properties; or,

(ii) to convey legal title to some or all of the Common Properties to the Club, or other persons or entities; or,

(iii) to build new or additional facilities without designating those facilities and the land on which they stand as Common Properties; or

(iv) to reserve certain of the above facilities for private Ownership and development or to assign and convey such facilities to private clubs or recreational entities, with Membership limited to designated persons.

(Emphasis added).

The Trial Court determined that because the sports park and guard shack were not on recorded plats that they were not common properties. This ignores the remaining clear language of the definition that specifically lists "Roads and Streets, tennis courts, swimming pools, permanent parks, and permanent recreational plots" as common property. The intent is clearly to include these items as common properties. Anyone reading this definition would think that those items were included as common property. No one would think that they had to research if the amenities were platted or not before relying on this language. It is a well settled rule of contract interpretation that particular and specific provisions of a contract prevail over general provisions. Southern Surety Co., v. Town of Greeneville, 261 F.929 (6th Cir. 1920).

Under the terms of the above definition, Moy Toy, LLC did not have the authority to close the amenities altogether and deny access to members unilaterally to these common areas. Revoking access altogether was not a choice.

Roads and Streets is defined broadly in Article I (U) of the 2005 First Restrictive Covenants (Ex. 2) to "mean and refer to every way for passage by vehicle, whether or not dedicated to the Owners exclusively or to the general public, and whether or not known by the name of road, street, avenue, place, lane, or other name. The designation shall not mean private driveways." This would include the guard shack which is in the center of the road at the entrance to Renegade Resort. (See picture 15 at Exhibit 40).

The amenities and guard shack should be recognized as common properties for the use and enjoyment by members and controlled by the RMCC. Where the Trial Court failed to recognize such right of easement of enjoyment for RMCC members, the Court of Appeals should overrule this finding.

VI. **The Trial Court erred in giving Moy Toy, LLC as developer the ongoing power to maintain control of unplatted roads in Renegade Resort (excepting the entrance road, Renegade Mountain Parkway and the entrance bridge), including the power to close certain roads long relied upon by the residents in Renegade Resort.**

The Trial Court allowed Moy Toy, LLC to block certain roads within Renegade Resort if the roads were not currently located on recorded plats. This right to close certain roads included roads that residents in Renegade Resort had used continuously for many years and were continuously maintained by the RMCC using member dues assessments. These roads are blocked (Tr. p. 86:04; 196:19; 620:15) with garbage. (Tr. p. 101-02 Harkleroad). Members are denied access to these roads. (Tr. p. 100:14 Harkleroad). Photographs further show the blocked roadways. (Ex. 40).

Further, the Trial Court ruling was made despite the fact that all roads (less driveways) are defined as common property in Renegade Resort. The definition of "Common Property" in the 2005 First Amended Restrictive Covenants (Ex. 2) is set forth above and expressly includes Roads in the last sentence of the first paragraph as being included in Common Property. (Article I (G)). Again, as with the previous issue argued above, the Trial Court only relied on the first sentence of this definition and determined that because certain roads and streets were not on recorded plats that they were not common properties. This ignores the remaining clear language of the definition that specifically lists "Roads and Streets" as Common Property.

Roads and Streets are defined broadly in Article I (U) of the 2005 First Amended Restrictive Covenants (Ex. 2) as stated above on page 72. This definition would include the closed and blocked roads in Renegade Resort. Being on a plat is not in this definition.

As with the issue involving the amenities, Moy Toy, LLC did not have the authority to close or block these roadways and deny access to members unilaterally under the terms of the above definition.

Defendant Phillip Guettler recognized that roadways were common property in his testimony. (Tr. p. 300:05; 326:10). He further recognized that there was an easement of enjoyment for common property. (Tr. p. 302:22). All Restrictive Covenants (Ex. 1, 2, 4, 5) state in Article I, Section 1 (varying paragraphs), that roads are common property. Article VI, Section 2, of all versions of the Restrictive Covenants (Ex. 1, 2, 4, 5) provides that streets and roads built by the developer and not dedicated to the public shall be common property. Again, Article VIII, Section 1, of all versions of the Restrictive Covenants (Ex. 1, 2, 4, 5) provides members in good standing with an easement of enjoyment to use the common properties.

Further, Article VIII, Section 2, in these original 1972 Restrictive Covenants (Ex. 1) provides that the developer **shall** turn over roads to the RMCC upon completion, and this transfer never happened. The same arguments as asserted above, regarding amenities and the guard shack (Argument Section V) are also asserted on this issue about considering done what ought to be done and equitable estoppel as were previously cited in the argument.

Joe Looney, the attorney who previously represented Cumberland Gardens Limited Partnership and Cumberland Gardens Acquisition Corporation from 1985 to 1999, also authored the 1987 Amended Restrictive Covenants. He testified that common areas (roads) were not limited to platted areas (Tr. p. 456:01) and that the pool, sports park and roads were common property (Tr. p. 446:01). These blocked roads at issue were completed in 1987 and operated continuously through 2010. Plaintiff Gerald Nugent, who purchased property in 1987 (Tr. p. 159:06) testified that the road (containing blocked sections, Ex. 75) was completed to the top of the mountain and water tower. (Tr. p. 158:23). Resident Norman Renaud, who worked for the developer in 1987 (Tr. p. 43:06) and has owned property since 1987 (Tr. p. 42:25) testified that these blocked roads were always open (Tr. p. 60:02) to RMCC members. (Tr. p. 60:05). Defendant Michael McClung testified that the roads now blocked had been used previously by members for as long as he knew. (Tr. p. 800:13). Plaintiff Joel Matchak further testified as to the blocked roads being in continual use up until their closure by the Defendants in May 2015. (Tr. p. 86:04).

Equitable estoppel should apply here as it did with the issue involving common properties and amenities above with some additional facts supporting the argument involving Roads specifically. Gerald Nugent presented as evidence his Interstate Land Sales Registration document delivered to him by the developer prior to the purchase of his lot. (Ex. 36). This document dated

June 5, 1987, provides information on access within the Renegade Mountain subdivision on page 15. The entrance road, Renegade Mountain Parkway (defined as completed and in use) provides the main access within the subdivision. This road is further defined as one continuous road from U. S. 70 to the Old Lodge (water tower), as confirmed by Plaintiff Nugent's testimony above. There is no qualifier as to whether this access road is platted or non-platted, and, in fact, much of this road, according to Ex. 75, remains unplatted. Renegade Mountain Parkway includes the areas blocked by the Defendants. (Ex. 75).

Roads (including the roads that were blocked) were promised by developers and predecessors in title to the Defendants to be open for use. This promise was relied on by purchasers of lots in Renegade Resort. Specifically, Gerald Nugent's real estate contract provides in the Special Provisions section, paragraph 6, that the seller, Cumberland Gardens Limited Partnership, as purported developer, is obligated to construct a road from the water tower to Nugent's lot. (Ex. 41). These roads were promised prior to the lot purchase. (Tr. p. 195:25, Nugent). This infers that the access (road) was being extended from the road that previously terminated at the water tower. (Ex. 75). Further, the Nugent Interstate Land Sales Registration document lists the roads constructed and promised to include the now blocked roads. (Ex. 16, p. 15).

Prior "developers" promised these roads in order to sell lots and these prior "developers" promoted the roads as part of how a buyer would be able to access their property. Such buyers relied on promised access as part of their purchasing decision. The 2003-2004 Renegade Development Plan, Ex. 77, shows access roads to the old lodge and top of mountain, to include the blocked roads.

Further, as stated above, the RMCC used dues assessments to maintain these roads for many years. The 2005 First Amended Restrictive Covenants provide that road maintenance costs and operation shall be the Club's responsibility. (Ex. 2, Art. VI, Sec. 2). Defendant Phillip Guettler further testified that RMCC monies were used for roads. (Tr. p. 224:23). Defendant Joseph Wucher, as Managing Member of Renegade Resort, LLC and former RMCC director, further testified that common areas (roads) were maintained by the RMCC (Depo Wucher, p. 35:8-22) and that the RMCC paid bills for road repairs (Depo Wucher, p. 33:18-22).

In making its ruling that these roads could be closed and blocked, the Trial Court further ignored the rights of Eagle's Nest, LLC pursuant to a prior Court Order from 2006 to access all roads within Renegade Resort. (Ex. 95; Tr. p. 102:09). Eagle's Nest, LLC is an RMCC member subject to the Restrictive Covenants. (Tr. p. 97:13). It owns three lots in Renegade Resort. (Tr. p. 97:13). Platted, unplatted or ownership is not a criteria for Eagle's Nest to access roads in Renegade Resort in this Order, but nevertheless access is being denied.

The Trial Court further was inconsistent in its reasoning. It found that the Renegade Mountain Parkway entrance and bridge were common property to be controlled and maintained by the RMCC. (See, Order dated July 1, 2016, T.R. 883, para. 24). However, this portion of the Renegade Mountain Parkway is currently unplatted and owned by the purported developer, Moy Toy, LLC. (Ex. 75). These blocked roads are a segment of the contiguous Renegade Mountain Parkway which is a single, continuous road from the U. S. 70 entrance to the water tower. (Ex. 75). Nevertheless, Moy Toy, LLC is blocking portions of the Renegade Mountain Parkway, which as before, are equally unplatted and owned by Moy Toy, LLC. Given all of the facts presented, how can the Trial Court find that some unplatted segments of the Renegade Mountain Parkway can be

controlled and operated by the RMCC while other unplatted segments cannot? There was no consistency in the logic used by the Trial Court, especially in light of the prior Chancery Court ruling that Eagle's Nest, LLC has access to all of Renegade Mountain Parkway, and all other roads within Renegade Resort. (Ex. 95). While these blocked roads are owned by Moy Toy, LLC and are not listed on any recorded plat, the facts clearly support the long standing intent that they are common properties dedicated to use by RMCC members. While the Defendants recognize that these roads have been open to RMCC members for decades, they arbitrarily closed these roads with no intention of allowing the RMCC to control or operate them, now or in the future, or to allow RMCC members to ever use these blocked roads.

Members should have access to these blocked roads that have always been part of the Renegade Resort community. Failure by this purported "developer" and prior purported "developers" to record a plat identifying long-existing roadways within Renegade Resort is a defect that should not be used and leveraged against the members of the RMCC, who have used, maintained and relied on these roads for thirty years. Given all these above facts, roads and streets within Renegade Resort, platted or unplatted, should, like the amenities previously discussed, be designated as common property for the use and benefit by the members of the RMCC. In addition, all roads, platted or unplatted, within Renegade Resort, should be maintained and controlled by the RMCC.

VII. **The Trial Court erred in approving the Special Master's report where the Special Master, contrary to the evidence, categorized voluntary payments made to a separately accounted for legal fee fund containing contributions for attorneys fees as RMCC dues, resulting in the moneys paid into such fund having to be "disgorged" by the Plaintiffs in the 508 Case and a judgment entering against them for an amount including such funds ($143,513.55) to be paid to the new RMCC Board.**

From the beginning of this case individual owners in Renegade Mountain, in support of the Owner Board, contributed voluntary funds (outside of dues assessments) to a fund known as the Legal Fund. (Tr. p. 1069:19 Moore). These donations in the 508 Case were made and marked expressly to pay attorney fees and costs related to this case. (Tr. p. 1069:5). These payments made by many Renegade Mountain owners over time were expressly to go towards attorney's fees that were owed in the prosecution of the 508 Case and defense of the 527 Case. (Tr. p. 1069:15).

In the Trial Court's Interim order of July 1, 2016, Special Master Will Ridley was charged with determining the "**amount of attorney's fees and costs paid from money from RMCC annual assessments paid to either Board and require disgorgement of the same**". (T.R. 880, Para. 11). (Emphasis added).

The second Special Master's Report dated October 6, 2016, failed to recognize money paid voluntarily by individuals living on Renegade Mountain to the "Legal Fund" as being separate and apart from assessments paid to the RMCC. (T.R. p. 1066, Para. 3). The Special Master ruled that the 508 Plaintiffs had to pay and disgorge $143,513.55 to the new RMCC Board elected on August 25, 2016. (T.R. p. 1060). This amount included all monies paid into the Legal Fund for legal expenses. These monies were paid voluntarily, were accounted for by a separate line item, but were contained in the same bank account as dues assessments collected by the Owner Board. These monies were not dues, and no one asserted or argued that they were dues. Nevertheless, the Special Master classified these monies as RMCC annual assessments and required them to be "disgorged".

The addition of these monies, paid voluntarily to the Legal Fund, to the amount of money to be "disgorged" and paid by the Plaintiffs in the 508 Case, as determined by the Special Master, and

then approved by the Trial Court, was improper, unjust and unfair. It results in these Plaintiffs in the 508 Case double paying their attorneys fees.

The accounting provided to the Court from the Plaintiffs in the 508 Case showed each year (2011-2016) the amounts in the Legal Fund and the legal expenses paid. (T.R. p. 1050 (2016); 1105-1108). No form for the accounting was prescribed by the Trial Court or Special Master as provided in T.R.C.P. 53.03(3). Plaintiffs were given no direction as to what to put in the accounting, what level of detail on back-up was required, or what form the accounting should take, other than to show monies paid to and disbursements from the account. (T.R. 880, para. 13).

These exact amounts from the Legal Fund were shown on the accountings for 2011, 2012, 2013, 2014, 2015 and 2016 and provided to the Special Master as line items. The amounts are as follows as shown in T.R. p. 1082:

Year	**Donations**	**Legal Expenses Paid**
2011	$ 4,050.00	$ 1,552.52
2012	$ 12,265.00	$ 11,046.53
2013	$ 12,664.00	$ 26,600.02
2014	$ 6,765.00	$ 14,527.44
2015	$ 20,210.00	$ 24,017.04
2016	$ 68,382.09	$ 68,770.23
TOTALS	$124,336.09	$ 146,513.78

Difference in Legal Fund and Expenses Paid:	$ 22,177.69
Less Special Master - Funds on Account	3,000.00
DIFFERENCE	$ 19,177.69

At the hearing which took place on August 25, 2016, immediately after the vote for Directors, Special Master Ridley stated as follows with respect to legal fees (T.R. XXIII, p. 29:11) : "I am going to take the accountings as truth and that's the numbers I am going to use unless proven otherwise at hearing." Mr. Ridley later on Page 31, Line 16, said: "O.k. As far as maintenance funds, the same thing. I am going to take the accountings as presented as the truth. If the money was spent for a road and it says it was for road, I have no way of knowing that, so I am trusting the accounting unless at this hearing that we have somebody that can prove otherwise that the money was not spent for a road or was spent inappropriately, and I plan to give credit for what is listed in the accounting unless that is proven otherwise at the hearing." (Tr. XXIII, p. 31:16). Based on that information, it was understood by the Plaintiffs in the 508 Case that everything in the accounting would be taken as true, and if there were any issues, those issues would be identified at the hearing and additional evidence could be presented if needed on those issues.

At this August 25, 2016, meeting, the Special Master granted the Defense's request for a hearing and set the hearing date for September 7, 2016, thirteen days away. (T.R. XXIII, p. 33:25). There was no mention of discovery, affidavits, document exchanges, expert witness disclosure, etc. or time allotted for those processes to be completed. The Special Master explained that only transactions objected to by the other party required a defense. (T.R. XXIII, p. 31:23). It was understood that evidence would be provided at the hearing to defend the objections. This is important because thousands of documents, to include, but not limited to contracts, invoices, receipts, checks, deposits, bank statements, spreadsheets and work sheets, would have been necessary to be entered into evidence to cover every possible financial transaction that occurred over a span of six years, from 2010 to 2016.

The Plaintiffs in the 508 Case were placed in the position (based on the Special Master's statements) where they believed that everything entered into their accountings (including entries regarding Legal Fund donations) would be taken as true, and that they only need to offer proof if some objection came up at the hearing. At the hearing on October 3, 2016, Plaintiff John Moore testified that he personally prepared the accountings, did the banking and bookkeeping work for the Owners' Board, and had personal knowledge of the legal fund amounts by receiving checks, depositing checks, conducting a separate accounting, reconciling checks, etc. (Tr. XXIV p. 49:3). The testimony from John Moore was that the legal funds were in one bank account along with the assessment funds, but there was always a separate line item within the accounting for the Legal Fund. (Tr. XX IV p. 38:06-07). There was no contrary evidence provided. John Moore testified that the Legal Fund was treated differently for tax purposes (Tr. XXIV, p. 56:12 - p. 57:1) with the Legal Fund amounts being treated as donations and separately from dues as revenue. Then, when Plaintiffs in the 508 Case attempted to provide additional documentation and proof as to the issues being contested, they were denied the ability to enter it into evidence because the Special Master refused to admit it. (Tr. XXIV, p. 51:2). The rationale stated by the Special Master for excluding the proof was that the evidence had not be provided to the Defense in advance, but there was no discovery obligation to provide such back-up documentation in advance of the hearing.

The Special Master was inconsistent with his rulings on entering evidence. He initially denied the Plaintiffs request to enter documents as evidence into the record after objections were made by the Defendants. (Tr. XXIV, p. 51:2). The Special Master then changed this initial ruling and allowed some evidence to be presented. (Tr. XXIV, p. 58:17; 69:14). Only three documents were allowed into evidence, and they are attached to the Special Master's Report.

The Special Master rejected the testimony of John Moore as to the Legal Fund because he is not qualified as an expert witness. However, Gerald Nugent testified that he was the RMCC Treasurer. (Tr. p. 161:24; 199:17; 1004:16), and that Mr. Moore was the Assistant Treasurer (Tr. XXIV, p. 84:24 Logue) (Tr. XXIV, p. 84:17). Mr. Moore testified that he personally performed duties as Assistant Treasurer for over five years. (Tr. XXIV p. 30:1). On behalf of the Special Master, he personally performed the final accounting of all dues assessments, from the Owner Board and Moy Toy Board, in preparation for who was in good standing to vote at the August 25, 2016 special meeting. (Tr. XXIX, p. 51:2) Mr. Moore further testified that he had personal knowledge and personally prepared all of the financial documents related to the accounting. (Tr. XXIX, p. 30:19). He testified that he personally prepared the Court ordered accounting submitted to the Special Master on July 5, 2016. He testified that he personally prepared and executed all financial documents under the direction of the Treasurer to include receiving checks, internal accounting, preparing deposits, making daily deposits, daily and periodic accounting, writing checks, paying expenses and preparing taxes. (Tr. XXIV, p. 116:2). Nevertheless, he was not allowed to testify from personal knowledge, even regarding the ten checks (totaling $62,000.00) that he personally wrote and donated to the legal fund, or any of the other donations to the legal fund that he had specific and personal knowledge of. People account to the Court every day who are not experts or accountants. You do not have to be an expert to do 3rd grade math. Being an expert witness is not a legal requirement in preparing and testifying to an accounting of funds personally prepared by the witness testifying to an accounting.

Most importantly, no material evidence was presented by Defendants, to contradict the Plaintiffs' accounting as presented to the Special Master, proof about the figures or calculations

used regarding the monies paid into the Legal Fund, or even the existence of the Legal Fund. ***There was no dispute that these payments were not assessments and were always separately accounted for and used exclusively to pay legal fees. (Tr. XXIV p. 46:3-19).***

The Special Master could have, but did not, ask for further clarification of the accounting if we had concerns. This is especially appropriate after his statements that everything in the accounting would be accepted as true, unless an objection was made. In other words, the rules set at the August 25, 2016 meeting were not followed on October 3, 2016. The Special Master stated at the end of the hearing that he had not heard testimony from anyone who paid into the Legal Fund, necessary to satisfy him that the Legal Fund existed. (Tr. XXIV, p. 138:19-25). The Special Master, having not heard all the possible and pertinent testimony in the trial of this case, and without the context of the entire proceedings, found, without basis, Mr. Moore's testimony to be "self-serving" and "lack credibility." (Tr. XXIV, p. 90:25; 92:7). Cross-examination was primarily about other payments made from the account. Then the Special Master stated at the end of the hearing that he had not heard testimony from people who paid into the legal fund regarding the legal fund to satisfy him that it existed. (Tr. XXIV, Tr. p. 1067, 138:19-25). This was never a requirement that was suggested or made known to the parties, particularly in light of the "taken as truth" statements from the Special Master.

Further, in the November 17, 2016 hearing on the Plaintiff's Objection to the Special Master's Report, the Chancellor was provided additional and overwhelming information proving the truth about these legal funds. (T. R. 1079). Exhibits in the record include affidavits and copies of cancelled checks from those who paid into the Legal Fund. (T.R. p. 1132-1243). All of these amounts are further documented in the tax returns for 2012, 2013, 2014, and 2015 . For each year's

tax return, Line 1 of page 1 shows voluntary payments to the Legal Fund as donations, while dues assessments are reported separately on Line 8, page 1 as Other Income. (T.R. p. 1252-1271). These totals match exactly to the corresponding year's Income and Loss Statement. (T.R. p. 1105-1108). Every donation to the Legal Fund, with the exception of a few who could not be located, is documented with Affidavits or copies of cancelled checks, complete with check numbers, dates and the amounts. (T.R. p. 1132-1243). Further, deposit slips of record show a separation of deposited checks between collected dues assessments and voluntary legal fund donations. (Ex. 94). There are internal accounting records from 2011 to 2016 showing each voluntary donation to the legal fund to include donor's name, check number, check date, and amount of each donation. (T.R. IX, p. 1244-1251). All of these entries match cancelled checks and affidavits provided by the donors to the Renegade Mountain CC voluntary legal fund. (T.R. p. 1132-1243). All of these entries match the final accounting provided to the Trial Court on July 5, 2016. (T.R. VI. p. 888-VIII. p. 1050). Given all of the above documentation, the Trial Court nevertheless affirmed the Special Master's Report. (T.R., p. 1341). He accepted that $124,336.09 in legal fund payments were somehow RMCC assessments. This was the scope of the assignment to the Special Master: to determine what funds were assessments.

Unfortunately, this draconian finding by the Special Master results in an unwarranted liability for the Plaintiffs in the 508 Case where they are basically being double charged for attorneys fees in the amount of $124,336.09, where Plaintiffs had already paid these monies the first time to their attorney. The difference between the attorney's fees paid from the account managed by the Plaintiffs in the 508 Case and the amount in the Legal Fund is undisputed. This difference totals $19,177.69. The Plaintiffs in the 508 Case accept that they are responsible for $19,177.69 if

this order stands after appeal. However, Plaintiffs should not be required to repay their attorney's fees a second time. This is the unjust result of the Special Master's unwarranted conclusions when he orders that $143,513.55 has to be disgorged by the Plaintiffs and paid to the newly elected Board. This finding is not equitable and is not based on the proof presented. It is further not supported by material evidence because there is no proof that money paid to the Legal Fund ever constituted annual assessments.

Many of these owners would have paid assessments for many, many years, if donated amounts that they paid into the Legal Fund, were considered the same as dues assessments. Plaintiff John Moore would be paid up for almost **300 years**, for example, based on his contributions to the Legal Fund of $60,982.09. All the proof in this case shows that these payments clearly were separate, voluntary payments outside the scope of assessments due to the RMCC and were properly and separately accounted for as such.

This is particularly true where the Court previously ruled that each side would pay its own attorney's fees and that Moy Toy, LLC, Michael McClung and Phillip Guettler had unclean hands but that Plaintiffs acted in good faith in this case. Equity is described as "justice administered according to fairness and contrasted with the strictly formulated rules of common law. It was based on a system of rules and principles which originated in England as an alternative to the harsh rule of common law and were based on what is fair in a particular situation." 11 Tenn. Jurisprudence Equity §2. Equity requires that the Plaintiffs not have such a harsh penalty simply for placing the Legal Funds in the same bank account as assessments.

The Defendants offered no proof of co-mingling of funds. The leading case in Tennessee regarding the co-mingling of funds is Langschmidt v. Langshmidt, 81 S.W.3d 741 (Tenn. 2002).

This case discusses co-mingling of funds in the context of marital property, but the general concept would still apply to the concept of commingling funds. The Langschmidt Court discussed commingling as follows:

> Separate property become marital property [by co-mingling] if inextricably co-mingled with marital property or with the separate property of the other spouse. ..... If the separate property continues to be segregated or can be traced to its product, co-mingling does not occur . . ..

See also State ex rel. Robertson v. Johnson County Bank, 18 Tenn App. 232, 74 S.W.2d 1084 (1934) (no commingling of funds in a bank case because the items were separate and easily identifiable).

The Plaintiffs in the 508 Case, the Defendants in the 508 Case, Special Master, and Trial Court all recognized the existence of a separate legal fund. There was not a single check written to the Renegade Mountain CC legal fund that was challenged as wrongfully applied or misused. There was no witness testimony or affidavit of wrongdoing related to this fund. The single reason the funds were determined to be commingled with assessments was the Owner's Board's use of a single checking account. (Tr. p. 1050:21; 1058:16; 1059:23) (October 3, 2016 Report, T.R. XXIV, p. 37:22; 46:03). The Special Master found: "Per Mr. Moore's testimony, these legal funds were co-mingled in one bank account with annual assessment funds. Mr. Moore testified to the fact that a separate legal fund was accounted for as a line item within this co-mingled account." (T.R. VIII, p. 1067, Ridley ct. of app. cite). So, even as he called the account co-mingled, the Special Master recognized that there was a separate line item for the legal fund.

The donations for the legal fund were extricable, being separated and distinguishable from Renegade Mountain Community Club dues assessments. They were not co-mingled and could not be easily separated out.

Plaintiffs should not be penalized so severely for merely placing the legal fund money in the same bank account as assessment monies. This finding is not equitable and is not based on the proof presented. It is not supported by the preponderance of the evidence because there is zero proof that the money paid to the legal fund constituted RMCC annual assessments.

VIII. **Where Moy Toy, LLC did not have developer rights in Renegade Resort, the Court ordered election on August 25, 2016, was void because it was held with Moy Toy, LLC getting 10 votes per lot where it had not paid dues.**

The Court ordered election of RMCC directors on August 25, 2016, was void because it was held with Moy Toy, LLC as "developer" getting 10 votes per lot, and where it had not paid its dues, where such votes (3363) were determinative in the outcome of the election. (Tr. XXIII, p. 19:12). This allowed Moy Toy, LLC, as a purported developer, to decide the election and vote in its selected directors. However, Moy Toy, LLC as a simple property owner, was not in good standing to vote at the time of the election, having never paid dues to the RMCC as would have been required by the By-Laws. (Ex. 5, 97). It had zero votes having never paid its dues and enjoying no exemption from paying dues. This new Board should be set aside as it was improperly elected.

If the Court agrees with the Plaintiffs/Appellants that the September 2, 2011 special called meeting was properly called then the results of that meeting should prevail that the Owner Board was appropriately elected and the By-Laws passed and recorded should stand as the current By-Laws of the RMCC. (Ex. 51). The money required to be "disgorged" by the Plaintiffs should not be paid. If the Court upholds the Trial Court's ruling that the September 2, 2011 meeting was

invalid and void, this Court should order a new election to be held with Moy Toy, LLC only voting one vote per lot, as any other property owner.

Further, if the September 2, 2011 called meeting was appropriate and the Owner Board was properly elected, the Trial Court remedy of repaying any amounts to the current RMCC Board was inappropriate and any judgment awarded from the Special Master's findings, relating to such repayment, should be voided.

Finally, Defendants in the 508 Case should be enjoined from dissipating RMCC accounts until a proper Board can be elected. This community should not be controlled by a tyrannical faux developer forty-five years after the community had its initial Restrictive Covenants recorded.

CONCLUSION

For the reasons stated above, Plaintiffs in the 508 Case ask for the Court to overturn the erroneous findings of the Trial Court identified above and to remand this case to the Trial Court for further proceedings as necessary.

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CERTIFICATE

I, MELANIE E. DAVIS, hereby certify that a true copy of the foregoing **BRIEF OF PLAINTIFFS/APPELLANTS** was served on:

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by delivering the same to office of said counsel or by placing same in the United States Mail, sufficient postage prepaid, addressed to said counsel at his office.

THIS 16th day of October, 2017.

_____
MELANIE E. DAVIS