

**IN THE COURT OF APPEALS OF TENNESSEE AT KNOXVILLE
EASTERN DIVISION**

GARY HAISER, ET AL.,

Appellees/Plaintiffs,

v.

No. E2021-00825-COA-R3-CV

MICHAEL McCLUNG, ET AL.

Appellants/Defendants.

**Trial Court Nos.:
2011-CH-508 & 2012 CH-527
Consolidated**

BRIEF OF APPELLEES

ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED:

In addition to responding to the issues raised by the Appellants in their Brief, the Appellees state the following additional issues for review:

1. Whether the trial court erred in the language used to define common properties in Renegade Resort between two orders it issued at the conclusion of the case before the trial court in the second trial.
2. Whether the trial court erred in ordering that the golf course in Renegade Resort was of no interest to the Plaintiffs.

STATEMENT OF THE CASE

A Complaint (T.R. 3)¹ was initially filed by 1) the Renegade Mountain Community Club (“RMCC”) the owners’ association as controlled by the owners (“Owner Board”) in Renegade Resort (as opposed to the Association “Board” controlled by the purported developer, Moy Toy, LLC) (Moy Toy, LLC will be referred to as “Moy Toy”; the Moy Toy controlled Board will be referred to as “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 members held on September 2, 2011. This case is referred to as the “508 Case” due to its docket number, and the plaintiffs in the 508 case are referred to herein as “Plaintiffs” or “Appellees.” 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. These defendants in the 508 case are referred to herein as “Defendants” or “Appellants.” The Complaint in the 508 Case was generally intended to acknowledge the Owner Board as the proper board of the RMCC, among other claims.

Meanwhile, on April 10, 2012, Moy Toy, Michael McClung and Phillip Guettler filed a separate case, claiming Moy Toy 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 Guettler. 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.

An Order consolidating the 508 Case and the 527 Case was entered on July 18, 2012. (T.R. 205).

¹ T.R. will denote the Technical Record.

A Motion for Default Judgment was filed by the Plaintiffs against Defendant Haines. (T.R. 596). An Order of Default was entered against Defendant Haines. (T.R. 603).

Based on information found in the discovery process, the Plaintiffs filed a Motion to Amend their Complaint on May 28, 2013. (T.R. 622). The proposed Second 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 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. 748). At the hearing on that Motion, the Court advised that the Plaintiffs could not proceed to directly 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. (T.R. 828).

Meanwhile, the Defendants 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. 760). 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. 851). 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 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. 851).

Following withdrawal of the first Second Motion to Amend, a subsequent Second Motion to Amend was filed by the Plaintiffs on July 23, 2013, asking for class 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. 5 and 4, respectively). (T.R. 809; T.R. 812). 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. 832).

After a hearing, the Court denied the class action certification sought by Plaintiffs by an Order dated September 27, 2013. (T.R. 1137). Plaintiffs appealed to the Court of Appeals in a case styled Haiser, et al. v. Haines, et al. E2013-02350-COA-R3-CV, 2014 Tenn. App. WL 7010723 (Tenn. Ct. App. Dec. 12, 2014). 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.

Upon remand from the Court of Appeals, Plaintiffs filed a Motion for leave to file a Third Amended Complaint on March 31, 2015. (T.R. 1304). 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 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. 1312), as was a Reply (T.R. 1341). The Court granted the Motion to allow the filing of the Third Amended Complaint by Order of May 15, 2015. (T.R. 1373).

Plaintiffs filed their Third Amended Complaint on June 17, 2015. (T.R. 1389). All parties identified as prior developers or alleged prior developers in Renegade Resort were joined as parties as required by the trial court. The Defendants filed an Answer to the Third Amended Complaint on October 6, 2015. (T.R. 1422).

The trial took place in December 2015, and February, March and April 2016. (T.R. 2020). After Plaintiffs' proof, Defendants moved for a directed verdict on the developer's rights issue arguing that the statute of limitations had run on the issue of developer's rights because Plaintiffs filed the 508 Case on December 22, 2011, and the 2005 Restrictive Covenants were recorded more than six years prior in October 2005. The court granted this motion. Thus, Moy Toy was held to have developer rights in Renegade Resort, but **only** because of the alleged running of the statute of limitations on challenging the 2005 First Amended Restrictive Covenants naming their predecessor as the "developer" in a recorded document.

On July 1, 2016, the Honorable Ronald Thurmond ruled: (T.R. 2020)

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, by statute, 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 special meeting. Accordingly, the meeting was not properly called, and the results of the meeting were not valid.

3. That the Plaintiffs 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 2010-2011.
6. In the alternative, that if the Court of Appeals finds that the September 2, 2011, meeting was correctly called, that Moy Toy 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's Office for Cumberland County Tennessee (Ex. 5), and the Bylaws of record in Book 1212, Page 1290 (Ex. 6) are valid, but **only** because the statute of limitations of six (6) years has run on the Plaintiffs 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's Office.
9. In the alternative, if the Court of Appeals determines that the statute of limitations does not bar the challenge of the recorded 2005 Restrictive Covenants and Bylaws, then the 2005 Restrictive Covenants and Bylaws (Ex. 6 and Ex. 5) are invalid because they were not enacted in accordance with their terms. In such event, the Bylaws and Restrictive

Covenants from 1987 (Ex. 21 and Ex. 4) would be the valid Bylaws and Restrictive Covenants for Renegade Resort.

10. That a \$20,000 loan from Moy Toy 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 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's developer rights.
20. That, alternatively, if the Trial Court is wrong on the statute of limitations issue, Moy Toy did not validly receive the developer rights it now claims.
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 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 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 Moy Toy.
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 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, 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 Guettler, Michael McClung and Darren Guettler. 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 was not a final judgment.

As required by the Trial Court, the Plaintiffs filed their accounting on July 5, 2016, of all monies spent and received since 2011 regarding the RMCC. (T.R. 2033). The Defendants also filed their accounting on July 5, 2016. (T.R. 2201).

The 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. (T.R. 2350).

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. 2333). Because Moy Toy 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 determined the outcome of the election with its overwhelming voting power. Its chosen board of Michael McClung, Phillip Guettler and Darren Guettler was elected at this meeting. This Board is the exact same makeup as the previous Moy Toy Board and then controlled the RMCC.

The Special Master's Final Report (T.R. 2348), did not recognize the Plaintiffs' separate legal fund because the money was placed in the same bank account as were RMCC dues assessments, even though the Special Master recognized that these funds were accounted for separately. (T.R. 2350). However, the Special Master 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.

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. 2366).

The Defendants filed a limited objection to the Special Master's Report on October 17, 2016. (T.R. 2356). The Clerk & Master filed a Notice of Filing of Interim Special Master's Report and Final Special Master's Report on October 20, 2016. (T.R. 2360). A Motion by the Plaintiffs for Consideration of Special Master's Report was filed November 2, 2016. (T.R. 2364). An Objection to the Special Master's Report was filed by the Plaintiffs in the 508 Case that same day. (T.R. 2366). Defendants filed a Motion to Strike in Response to Plaintiffs' Objection to Special Master's Report on November 15, 2016. (T.R. 2378).

The Court approved the Special Master's Report as written on January 23, 2017. (T.R. 2447). The Defendants filed proof of payment of the amounts required to be paid to the RMCC on February 17, 2017. (T.R. 2516). Plaintiffs did not file such proof of payment, and a judgment in the amount of \$143,513.55 was entered against them and in favor of the RMCC (then controlled by Moy Toy) consisting predominantly of a duplication of the prior voluntary attorney's fees paid by owners.

A Final Order and Judgment was filed on March 10, 2017. (T.R. 2559).

The Notice of Appeal was timely filed on April 7, 2017, by the Plaintiffs. (T.R. 2561).

This Honorable Court came to hear Case No. E2017-00741-COA-R3-CV on April 17, 2018, in Knoxville Tennessee. The Court of Appeals issued its decision on August 29, 2018 and held that the trial court's judgment should be reversed with respect to its findings regarding:

1) developer's rights and the statute of limitations; 2) the validity of the September 2, 2011 special election; 3) control over platted and unplatted areas of Renegade Resort; 4) the results of the August 26, 2016 special election; and 5) the repayment of legal fees to the RMCC.

A mandate was issued and received by the trial court on December 12, 2018, remanding these specific issues back to the trial court for adjudication. (T.R. 2629).

Defendants filed a Motion to Recuse the Honorable Ronald Thurman on May 20, 2019 (T.R. 2680), citing the Chancellor's formation of prejudged conclusions possibly resulting in bias, prejudice, or partiality against them. Without a hearing on the Motion, or any response from the Plaintiffs, an Order of Recusal (T.R. 2691) was signed by Chancellor Thurman on May 30, 2019. On August 13, 2019, The Chief Justice of the Tennessee Supreme Court ordered that the Honorable Robert L. Davies be appointed to try the case. (T.R. 2696).

On November 12, 2019, the Plaintiffs filed a Motion to Amend their Complaint, and attached their 4th Amended Complaint for consideration. (T.R. 2707). Defendants' Response to Plaintiffs' Fourth Amended Complaint was filed on December 6, 2019 (T.R. 2755), and their Supplemental Response to the original Motion was filed on January 2, 2020. (T.R. 2762). An Order denying Plaintiff's Motion to Amend was filed on January 15, 2020. (T.R. 2793). The trial court took the position that it was limited to determining the issues set forth in the remand and that the pleadings were closed.

The Defendants filed a Motion to Determine Identity and Status of the Party Plaintiffs, Their Basis of Standing, and Claims Remaining for Retrial. (Supplemental T.R. at 16). The Plaintiffs filed a response to the referenced Motion on December 12, 2019. (T.R. 2742).

On December 31, 2019, Defendants filed a “Supplemental Position Statement” which, among other things, attempted to join all Renegade Mountain property owners into this litigation. (T.R. at 2770).

On January 15, 2020, the trial court issued an Order Regarding Post Remand Issues which, among other things, denied Defendants’ request to join all property owners. (R. at 2793) In that Order, the trial court correctly noted that: “this issue was never raised by Moy Toy on appeal and therefore is not a proper issue to be raised on remand.”

The claims remaining for retrial were identified by the Court in its January 15, 2020, Order (T.R. 2788). The issues were: 1) Moy Toy’s purported developer rights whether by chain of title and/or the validity of the 2005 Amendments; 2) Moy Toy’s voting rights; 3) which governing documents should be in effect; 4) validity of the September 2, 2011 RMCC Election; 5) retention of title and control of the common property by Moy Toy; 6) control of the unplatted roads; 7) disgorgement of legal fees paid from dues, and 8) disposition of the \$20,000 loan to the RMCC from Michael McClung. (T.R. 2788). The January 15, 2020, Order also listed the issues from the previous trial that were not appealed and are therefore settled issues.

The Order denying Defendants’ other Post Remand Issues was also entered on January 15, 2020. (T.R. 2793).

Defendants filed a Motion to Amend, Reconsider or Clarify Order Declaring the Issues Retrial on March 6, 2020. (T.R. 2796). On April 13, 2020, Plaintiffs filed a Response to this

Motion. (T.R. 2915). In the court's Order dated April 27, 2020, this Motion was denied by the Court. (T.R. 2959).

A Motion for Intervention into the Proceedings by twenty-one (21) RMCC Members was filed on June 26, 2020. (T.R. 2969). An answer was filed by the Defendants on July 24, 2020. (T.R. 2981), and a response by the Plaintiffs was filed on July 24, 2020. (T.R. 2987). In addition, Defendants filed a Response to the Motion for Intervention on July 24, 2020 (T.R. 2994). The trial court ruled on the Intervenor's Motion to Intervene on August 10, 2020, by allowing any Intervenor who acquired an interest in Renegade Resort after September 1, 2019, to intervene in the case. All other Interveners were denied as untimely (T.R. 3027). The effect was to allow two (2) individuals of the twenty-one (21), to intervene.

On September 17, 2020, Defendants filed a Notice of Withdrawal of the Affirmative Defense set forth in Paragraph 11 of Defendant's Response to Plaintiff's Third Amended Complaint. (T.R. 3053). This was the affirmative defense that this Honorable Court held switched the burden of proof as to the validity of the 2005 Amended Restrictive Covenants from the Plaintiffs to Moy Toy since Moy Toy relied on such Amendments in their Answer to claim developer rights. Plaintiffs responded in opposition to the Defendants' Notice of Withdrawal and filed a Motion to Strike on September 18, 2020. (T.R. 3473). The trial court's Order of November 6, 2020, denied Moy Toy's Motion to withdraw its Affirmative Defense. (T.R. 3599).

A flurry of pretrial Motions was filed on September 24 and September 25, 2020:

1. Defendants' Motion in Limine regarding Standing of Plaintiffs. (T.R. 3556).
2. Defendants' Motion in Limine regarding the Transfer of Common Properties. (T.R. 3576).

3. Defendants' Motion in Limine Regarding Parole Evidence Application to Covenants. (T.R. 3581).

4. Defendants' Motion in Limine to Preclude Testimony Challenging Deeds Based on Statute of Limitations. (T.R. 3586).

5. Defendants' Motion in Limine regarding Failure to Join Necessary Parties and/or lack of Service. (T.R. 3591).

All the motions were either put off pending trial or denied.

The trial took place on September 28 to October 2, 2020, and continued on December 1 and 2, 2020.

At the request of the Court, the parties drafted and filed written closing arguments in the form of Proposed Findings of Fact and Conclusions of Law. The Plaintiffs filed their Proposed Findings of Fact and Conclusions of Law on February 5, 2021. (T.R. 3603). The Defendants were required to submit a similar document; however, this document is not in the record.

The trial court's Memorandum and Order was announced on March 30, 2021, with the Order entered on April 5, 2021. (T.R. 3718). The Memorandum and Order held:

1. That the 2005 First Restrictive Covenants for Renegade Resort (Ex. 5) are not valid because the 2000 proposed Restrictive Covenants (base document) were not properly approved by the membership of the RMCC as required in 2000, and even if properly approved, contained much different language than the version recorded in October 2005. The 2005 First Amended Restrictive Covenants for Renegade Resort are void and of no effect.

2. That the 2005 Second Amended Restrictive Covenants for Renegade Resort are void and of no effect for the same reasons as the 2005 First Amended Restrictive Covenants.

3. That Moy Toy is not the developer for Renegade Resort and is a simple landowner. It does not possess any developer rights within Renegade Resort.

4. That the September 2, 2011, RMCC Special Meeting was a valid meeting; that the actions approved at that meeting were legal; that the Owner Board, in place on May 4, 2016, is reinstated as the correct and legal Board with all the powers necessary to govern the RMCC.

5. The Owner Board is directed to update records, collect dues and back dues, and conduct a meeting to elect directors prior to September 30, 2021.

6. The entrance area, guard shack, platted roads, certain unplatted roads, sports park, pool and tennis courts are common property in Renegade Resort and that RMCC members have an easement of enjoyment over these common properties.

7. That the Plaintiffs shall be disgorged of \$19,177.69 where dues were collected to pay for legal fees.

8. That the Defendants shall be disgorged of \$54,147.41 where dues assessments were collected to pay for legal fees, where the RMCC will retain \$23,147.41 and disgorge \$31,000 back to the RMCC.

9. The \$20,000 McClung loan to the RMCC plus interest is void, unenforceable, and any security interests related to this loan shall be released within forty-five (45) days.

Plaintiffs (T.R. 3766) and Defendants (T.R. 3755) filed Motions to Alter or Amend the initial order (T.R. 3718), and the Plaintiffs filed a Response to Defendants' Motion to Alter and Amend (T.R. 3773), resulting in a Final Order (Motions to Alter or Amend) being entered on June 28, 2021. (T.R. 3784). The findings were:

1. Both parties agreed and stipulated that the golf course was not common property. The members have no easement of enjoyment to it, and that Plaintiffs have no interest in it.

2. Even though physical boundaries have not been established for the unplatted common properties, the RMCC has a right of enjoyment and use of the common properties.

3. The request of the Defendants to revisit the issue of joinder of all property owners which had been previously denied multiple times.

4. The request of the Defendants to revisit the issue of Statute of Limitations which had been previously denied multiple times.

5. Plaintiffs, as the reinstated RMCC Board, had the right and ability to expend dues assessment monies on legal fees, and so the previous Order to disgorge \$19,177.69 collected by Plaintiffs as dues assessments was so amended.

6. Any property in the possession of the Defendants, necessary to operate the RMCC shall be turned over to the RMCC Board.

7. That, because of delays, the requirement to hold an RMCC membership meeting by September 30, 2021, was extended to November 30, 2021.

A Notice of Appeal filed by Defendants on July 26, 2021 (T.R. 3788)

Plaintiffs filed a Motion to Alter or Amend Final Order of June 28, 2021, citing two issues (T.R. 3792):

1. That the Trial Court identified the common areas of Renegade Resort differently in its Final Order (Motion to Alter or Amend) (T.R. 3784) than in the original Memorandum and Order (T.R. 3718) which may cause confusion and requires clarification.

2. That the language used by the Trial Court, in describing the status of the golf course as not being common property and of no interest to the RMCC, was stipulated by the parties, which after reviewing the respective transcripts, was incorrect and requires clarification.

The Trial Court issued an Order on August 6, 2021, in response to Plaintiffs' Motion to Alter or Amend Final Order of June 28, 2021 (T.R. 3801) where the Trial Court agreed with Plaintiffs' issues, but no longer possessed the jurisdiction to act on the Motion due to the filing of the Notice of Appeal by the Defendants.

On July 28, 2021, the Defendants filed a Motion for Stay Pending Appeal. (T.R.3799)

The Trial Court, on September 28, 2021, issued an Order Granting Motion to Stay Pending Appeal (T.R. 3812) providing as follows:

The RMCC members' easement of enjoyment over the Sports Park, Tennis Courts and Pool are conditional upon the Plaintiffs' ability to obtain proof of insurance as required in the March 31, 2021, Memorandum and Order. The Plaintiffs may repair, maintain or replace existing improvements on the common areas but may not construct any new improvements on the defined properties. Any improvements made to the common areas will be the property of the vested party at the conclusion of the appeal process.

The trial court imposed certain further restrictions on usage of the road and unplatted area in the vicinity of the old lodge.

The judgment for \$31,000 due from Defendants was stayed pending appeal conclusion upon proper bond.

STATEMENT OF FACTS

Renegade Resort is located in eastern Cumberland County, near Crab Orchard, Tennessee and currently includes one thousand three hundred forty-three (1,343) building lots and living units. (Tr. 918:2).² Renegade Resort has approximately five hundred thirty (530) different owners of lots. (Tr. 919:11). Of those lots, there are seventy-six (76) condominiums in the Cumberland Point community, eight (8) condominiums in the Woodridge Community (Tr. 918:7), eight (8) timeshares in the Laurel Hills community, with the remaining lots being either improved or unimproved. (Budget, Ex. 19). While over eighty (80) owners actually reside full-time in the community, the remaining improved lots are maintained for timeshares, rentals and part time vacationing owners. (Tr. 920:03).

Moy Toy, the purported developer as of 2010, owned only 3 living units in Renegade Resort at the commencement of the case. (Tr. 973:7; 995:20, Ex. 7; Tab13).

Other lots are owned by individuals and entities throughout the United States.

In the 1960's Renegade Resort had 12,000 mountainous acres (Ex. 7, Tab 2), but over the years, acreage was sold off (Tr. 920:20), and Renegade Resort in 2010 consisted of approximately 2,970 acres (Tr. 921:5), approximately 750+ acres in platted lots and common areas (Tr. 921:10), approximately 87 acres in a closed golf course and approximately 1980 unplatted acres held by the purported developer, Moy Toy. (Ex. 41 and Ex. 7, Tab 13). The Eagle's Nest Community and its approximately 100 acres lies within, but is not a part of, Renegade Resort. (Tr. 922:3). Since 2010, approximately 1,300 acres of potential Renegade Resort property were placed in a conservation easement, leaving Moy Toy with 150-180 acres of undeveloped land in the community. (Tr. 922:1).

² Tr. will denote the Transcript.

Renegade Resort, from 1987 to 2010, had advertised amenities which included functioning tennis courts, playground, sports park, swimming pool, 18-hole golf course, and guard shack. (Tr. 925:18, 181:22).³

Renegade Resort was first developed from 1968 to 1972 by Renegade Inc. and Resort Development Corporation. (Ex. 7, Tab 1). These entities immediately began selling lots. (Ex. 7, Tab 2, App A). In February 1971, Renegade Resort was sold to Chauncey Enterprises, a.k.a American Recreation Services, Inc. (Ex. 7, Tab 2). In July 1972, it established the Renegade Community Club, a Tennessee Nonprofit Corporation, as the homeowner's association of record (Ex. 3, Preamble) when the original 1972 Declaration of Covenants and Restrictions for Renegade Resort were recorded. ("1972 Restrictive Covenants", Ex. 3).⁴

Renegade Resort changed ownership and developers several times in the 1970's and early 1980's (Ex. 7, Tabs 3-7) until Renegade Limited Partnership, a Tennessee Limited Partnership purchased Renegade Resort in January 1986. (Ex. 7, Tab 8; Ex. 79). While various amendments were made to the 1972 Restrictive Covenants (Ex. 3), primarily to add property subject to such Restrictive Covenants, no substantive amendments were made to the 1972 Restrictive Covenants until Renegade Limited Partnership, a Tennessee Limited Partnership (also later known as Cumberland Gardens Limited Partnership after a name change) amended the 1972 Restrictive Covenants (Ex. 3) by recording the 1987 Restrictive Covenants. (Ex. 4). This same developer also wrote and adopted the 1987 By-Laws. (Ex. 21). Both the 1987 Restrictive Covenants (Ex. 4) and the 1987 By-Laws (Ex. 21) were recorded in the Register's Office for Cumberland County,

³ All of these amenities were closed by Moy Toy in 2010. (Tr. 926:5, 194:11).

⁴ The original 1972 RMCC By-Laws have never been located and do not appear anywhere in the record.

Tennessee in October 1987. The name of the Renegade Community Club was legally changed to Cumberland Gardens Community Club. (Ex. 4 Preamble).

All amenities in Renegade Resort, to include the golf course (then 9 holes), tennis courts, swimming pool, roads, guard shack, and sports park were completed and operational before recordation of the 1987 Restrictive Covenants. (Tr. 185:21).

In August 1991, following default on three notes by Cumberland Gardens Limited Partnership, a foreclosure sale occurred on property in Renegade Resort. In such foreclosure sale, Substitute Trustee Joe Looney 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. (Tr. 512:14) (Ex. 7, 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. 514:18, 518:18).

On January 6, 2000, Cumberland Gardens Acquisition Corporation sold its interest in Renegade Resort to Renegade Resort, LLC, a Nevada Corporation. (Ex. 7, Tab 10). According to Joe Looney, then 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. 526:6, 526:12).

In 2000, defendants Phillip Guettler, Michael Haines, 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. 66, 67, 68) (Ex. 12, 44:11) and changed the name of the association to the Renegade Mountain Community Club. (Ex. 24, 25).

Defendants Phillip Guettler, Michael Haines and others began operating the RMCC and scheduled various meetings. (Ex. 24, 69, 71). A notice and minutes for a 2000 RMCC Annual Meeting of the members held on March 17, 2000 (Ex. 69, 70) were introduced into evidence. Later, a Special Meeting of the members of the RMCC was held on June 27, 2000 (Ex. 24, Ex. 25), purportedly to vote on new Amended By-Laws and new Amended Restrictive Covenants. No minutes of this meeting are in the record. Joel Matchak, as an attendee (Tr. 617:1) of the June 27, 2000, RMCC Special Meeting (Ex. 24, 25) and RMCC member, never received or saw any minutes from this meeting. (Tr. 624:1). A vote by the RMCC membership on the adoption of any change to the Restrictive Covenants is required. (Ex. 3, Art XV, Sec. 5). Joel Matchak testified that no vote on the new Restrictions was ever taken at the June 27, 2000, Special Meeting. (Tr. 618:1, 619:1).

In addition, Joel Matchak testified that he received a copy of the proposed Restrictive Covenants (Ex. 16) at the June 27, 2000, meeting which he kept in his files and later produced at the trial. (Tr. 619:16). Joel Matchak completed a comparison between the proposed new Amended Restrictive Covenants he received (Tr. 619:16) at the 2000 Meeting (Ex. 16) and the Amended Restrictive Covenants recorded 5 years later on October 20, 2005 (Ex. 5). He found substantial changes in language and content even though the recorded document was purported to be the same as the document allegedly voted on and approved at the June 27, 2000, RMCC Membership meeting. (Tr. 621:20).

No Annual or Special Meetings of the members of the Renegade Mountain Community Club occurred between 2000 and 2011 until the special meeting called by the Plaintiffs occurred on September 2, 2011. (Tr. 180:18, 624:2, Ex. 12).

In April 2003 (Ex. 7, Tab 11) three (3) parcels of land in Renegade Resort, and on other occasions five (5) additional parcels of land, were conveyed from Renegade Resort, LLC to Joseph

Wucher, Managing Member of the J.L. Wucher Co., LLC by quitclaim deed. Joseph Wucher, the principal of J.L. Wucher Co., LLC, thought it had developer rights in Renegade Resort (Ex. 12 - 28:6; 110:17; 140:17) and considered itself as a developer. (Ex. 12 - 110:5; 116:15). As of the 2003 timeframe, there were several different purported developers for Renegade Resort: LKM Group, LLC, Eagles Nest, LLC, and J.L. Wucher Co., LLC. (Ex. 12 – 110:5, 116:21, 140:23).

In 2004, Phillip Guettler, Michael Haines, and others acting as Renegade Resort, LLC conveyed approximately ninety-seven (97) acres of undeveloped land and three (3) platted lots to Eagle’s Nest, LLC, Wendell Harkleroad as Managing Member. (Tr. 456:18). Eagle’s Nest, LLC thought it had developer rights (Tr. 478:12, 463:7) and is a third purported developer in or around Renegade Resort during this timeframe. (Ex. 12 - 140:23; 141:2).

On September 25, 2005, through a contract, Renegade Resort, LLC assigned control and operation of Renegade Resort to the LKM Group, LLC. (Ex. 12 - 21:1). Joseph Wucher as managing Member of Renegade Resort, LLC (Ex. 12 – 129:2) testified by deposition (Ex. 12) that LKM Group, LLC was yet another developer in Renegade Resort. (Ex. 12 – 116:21). As “developer,” LKM Group, LLC did not pay dues to the RMCC (Ex. 35) and acted like the developer. (Ex. 12 – 21:7, 22:9, 27:25). LKM Group, LLC took total control (Ex. 12 - 30:1) of all aspects of the operation of Renegade Resort as the “developer” (Ex. 12 -27:25; 28:6; 21:7; 116:21) to include operation and control of the RMCC. (Ex. 12 - 21:7).

On October 20, 2005, two new sets of Amended Restrictive Covenants (Ex. 5, Ex. 4) were recorded in the Register’s Office for Cumberland County, Tennessee. (collectively, “the 2005 Amended Restrictive Covenants”). Both sets of Restrictive Covenants were signed by Renegade Resort, LLC, representing the “developer,” and Edward Curtis, purportedly representing the RMCC. These two (2) sets of Restrictive Covenants were recorded more than five (5) years after

the proposed amendments were allegedly discussed at the June 27, 2000 Special Meeting of the RMCC members. However, in order to be properly amended, the 1972 Restrictive Covenants (as amended in 1987) required approval of both: 1) the RMCC by membership vote; **and** 2) the developer. (Ex. 3, Art. XV, Section 5).

According to Plaintiffs' Expert Witness, Jack Atkins, in the 2005 First Amended Restrictive Covenants (Ex. 5), Renegade Resort, LLC named and defined itself as the developer for Renegade Resort in these documents even though that was not true. (Tr. 332:4). Renegade Resort, LLC never lawfully received developer rights from any prior developer. Thus, Renegade Resort, LLC did not possess developer rights at the time when it executed the 2005 Amended Restrictive Covenants as "developer." (Ex. 5, Tr. 330:24). Joseph Wucher (representing Renegade Resort, LLC as the purported developer) did not attend any RMCC membership meeting or see any minutes from any purported membership meeting to verify the requirement for approval of such amendments by the membership of the RMCC. (Ex. 12 17:4, 19:1). In addition, Joseph Wucher could not confirm that the 2000 proposed Amended Restrictive Covenants (Ex. 16) which were presented to the membership of the RMCC at the June 27, 2000 meeting contained the same language as the 2005 Restrictive Covenants which were actually recorded. (Ex. 5) (Ex. 12 - 87:2).

Adding to the numerous problems with the execution and recording of the 2005 Amendment Restrictive Covenants, Joseph Wucher had an informal meeting with other owners who voted Edward Curtis out of the RMCC as President and voted Larry McMeans (LKM Group, LLC) in as the RMCC President (Ex. 12 - 43:15), which vote occurred prior to Edward Curtis signing the 2005 First Amended Restrictive Covenants (Ex. 5) as the purported RMCC President. (Ex. 12 - 43:21).

Also on October 20, 2005, a set of By-Laws (“2005 By-Laws”) and a second set of new Restrictions (“2005 Second Amended Restrictive Covenants”) (Ex. 6) were recorded immediately after the 2005 First Amended Restrictive Covenants (Ex. 5) (Tr. 336:1) in the Cumberland County Register’s Office. Like the 2005 First Amended Restrictive Covenants (Ex.5), the 2005 Second Amended Restrictive Covenants (Ex. 6) 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, the purported developer, who as stated above, had assigned away its developer rights a month earlier. These 2005 Second Amended Restrictive Covenants, however, identified Renegade Resort, LLC, **a Tennessee Limited Partnership** as the developer of Renegade Resort (Ex. 6) and not Renegade Resort, LLC, **a Nevada Limited Liability Company**. The 2005 Second Amended Restrictive Covenants (Ex. 6) have been recorded and of record for over 15 years and have not been challenged or corrected. (Tr. 342:22). The 2005 By-Laws, recorded as part of Exhibit 6, listed Renegade Limited Partnership as the developer, adding to the confusion. There was no proof in the record that an RMCC vote by the membership to approve Ex. 6 ever occurred. (Tr. 3718:22).

Other than recording these documents at the Register’s Office, no other form of notification was sent to any member regarding the recording or existence of the 2005 First Amended Restrictive Covenants, the 2005 Second Amended Restrictive Covenants, or the 2005 By-laws. (Tr. 622:5; 720:2; 758:1).

On April 20, 2006, Renegade Resort, LLC conveyed all of its three hundred forty-two (342) platted lots (less three (3) living units) to LKM Group, LLC, with such lots being secured by a Deed of Trust on behalf of lender Phil McCoy, TIG Holdings, LLC. (Ex. 48). LKM Group,

LLC bought these lots as the (purported) developer (Ex. 12 - 138:13), and those lots, when transferred to TIG Holdings, LLC, were described as “developer lots.” (Ex. 12 – 135:25).

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. 9). The Final Order entered in that case gave Eagle’s Nest, LLC, 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. 9).

In 2007, Renegade Resort, LLC sued Larry McMeans and LKM Group, LLC for breach of the 2005 contract relating to operation and development of Renegade Resort. (Ex. 12 - 24:11, 122:7). In 2009, the Chancery Court for Cumberland County, Tennessee set aside the contract and Renegade Resort, LLC regained control and operation of Renegade Resort. (Ex. 12 - 122:18). The three hundred forty-two (342) building lots that LKM Group, LLC previously purchased from Renegade Resort, LLC in 2006 remained a valid transaction and remained secured by a Deed of Trust to Phil McCoy. (Ex. 48). LKM Group, LLC bought those lots as the purported developer. (Ex. 12 -138:13). LKM Group, LLC may still purport to possess developer rights in Renegade Resort, having never assigned them away. (Ex. 12 - 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. 927:17; 245:19; 247:17; 627:20), and winter snow and ice removal.

(Tr. 927:7; 627:20). Likewise, the common properties and amenities in Renegade Resort (completed in 1987) (Tr. 188:21), 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. 194:11 to 197:10, Tr. 611:12). The swimming pool was operating as late as 2010. (Ex. 12 -79:13).

Each year's RMCC budget from 2000 to 2010 (Ex. 19) 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. 644:3; 717:4; 718:20; 756:13) (Ex. 19).

These amenities were defined in brochures (Tr. 616:1, Ex. 15) which were received and handed out to the public. (Tr. 614:6). These amenities were constructed and used by prior developers to promote lot sales (Tr. 616:15; 226:16) and benefit RMCC members. Purchasers were promised use of these common areas and amenities (Tr. 534:20; 926:23), and purchasers relied upon these promises as part of their purchase decision. (Tr. 708:1; 749:19; 226:16; 927:25).

All versions of the Restrictive Covenants and By-Laws in Renegade Resort identify a right of enjoyment and use of the common properties and amenities for members in good standing of the RMCC. (Ex. 3, 4, 5, 6, 21). Prior to 2011, RMCC members in good standing had access and use of these common properties and amenities. (Tr. 183:7; 612:1; 479:9). A sign outside the sports park (Ex. 14) identified that use of the sports park was for RMCC members and their guests who are in good standing. (Tr. 182:25; 612:1; 479:9). Except for the roads and golf course, all common properties and amenities were closed to the public. (Tr. 183:2).

Unknown to members and residents in Renegade Resort (Tr. 218:4; 226:13; 708:21), on September 28, 2010, Moy Toy purchased all of the remaining unplatted property in Renegade Resort (Ex. 41), less the golf course property, through two deeds: 1) Warranty Deed from J.L.

Wucher Co., LLC to Moy Toy (Ex. 7, Tab 12), and 2) Warranty Deed from Renegade Resort, LLC to Moy Toy (Ex. 7, Tab 13). Moy Toy further claimed ownership of certain common properties and amenities lying within Renegade Resort. (Tr. 1261;20).

Moy Toy received its purported developer rights by written assignment from Renegade Resort, LLC (Ex. 74) and J.L. Wucher Co., LLC (Ex. 12 - 110:20; 133:18; Ex. 75) even though Renegade Resort, LLC and J.L. Wucher Co., LLC did not have such developer rights to assign. (Tr. 311:1; 332:4; 353:1). Admittedly, Moy Toy did not research the chain of title on developer rights but relied on what counsel told them. (Tr. 1525:13).

In December 2010, Defendant Phillip Guettler, as the purported Vice President of the RMCC from 2006 through 2010 (Ex. 43) reactivated (after administrative dissolution) the RMCC entity with the Tennessee Secretary of State and listed Joseph Wucher as the single remaining director of the RMCC. (Ex. 43). However, Joseph Wucher had officially resigned as a director of the RMCC two months earlier on October 1, 2010. (Ex. 12 - 72:12). Consequently, the first trial court, in its May 4, 2016, Order, para 1 (T.R. 2020) stated that this Moy Toy Board was not legally constituted, but rather self-appointed, a finding that was not appealed by the Defendants and now stands as the law of the case. Nevertheless, Defendants Michael McClung and Phillip Guettler (and later Darren Guettler) as Moy Toy representatives took over operation of the RMCC after 2010. (Ex. 43).

All services and amenities in Renegade Resort were stopped or closed in 2010-2011 after Moy Toy took control. (Tr. 194:11; 197:5; 197:10; 480:3; 491:2; 627:20). No 2011 RMCC dues invoices were sent to members in 2011 (Tr. 787:1; 1546:6), nor were any 2011 invoices received by members/residents as required. (Tr. 483:2; 637:4; 709:14; 748:13). By February 2011, no notice of the required RMCC 2011 Annual Meeting was received by any member/resident. (Tr. 749:9,

709:14, 637:4). By April 2011, no road maintenance, or repairs (Tr. 470:16, 627:20) (Ex. 1) had occurred and no mowing had commenced. (Tr. 470:16). By April 2011, a road that had previously washed out was still not repaired and had become impassable. (Tr. 944:15).

The RMCC had no office (Tr. 1220:24) and its purported officers and directors did not communicate (Tr. 1500:1, 708:21; 748:10) or meet with RMCC members. (Tr. 218:4). There was no published contact address, phone number, or email address for the new purported developer and/or the purported new RMCC Board. (Id.). There was no access allowed to any amenities or use of any amenities by RMCC members. (Tr. 481:3, 641:10, 706:9).

On February 13, 2012, Defendants Michael McClung and Phillip Guettler, as owners of Moy Toy loaned \$20,000.00 (Ex. 60) to the RMCC while they were also purported directors of the RMCC. (Ex. 43). Defendant Michael McClung admitted that he and Phillip Guettler approved this loan and were on both sides of this loan transaction. (Tr. 1617:20). Per the first 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. 2020). This holding was not appealed and is the law of the case.

On March 29, 2011, the Substitute Trustee foreclosed on the Deed of Trust held by Phil McCoy for the three hundred forty-two (342) lots previously purchased in 2007 by LKM Group, LLC. (Ex. 48). TIG Holdings, LLC, a company formed by Phil McCoy, purchased all of the 342 lots from the Substitute Trustee on the courthouse steps. (Ex. 48).

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. 945:2). 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. 42; Tr. 945:20). In surveying the community residents, Darrel McQueen, a frequent representative of

past purported developers, indicated that he could set up a meeting with the purported developers, and such meeting was scheduled for April 17, 2011. (Tr. 947:1). Plaintiff John Moore and Defendant Michael McClung met to discuss the issues. (Tr. 948:3). Michael McClung indicated that rehabilitating the water system in Renegade Resort was the top priority and that resident's concerns would need to wait until later. (Tr. 1498:12, 948:13). The meeting ended on a contentious note. (Tr. 948:20).

Plaintiff John Moore hosted a third homeowners' meeting to discuss the results of the April 17th meeting with Defendant Michael McClung. (Tr. 949:2). The group determined that a representative should meet with legal counsel to discuss options. (Tr. 949:8). Afterward, the Tennessee Secretary of State records were searched to locate the responsible parties for the RMCC. (Ex. 43; Tr. 949:15).

On May 18, 2011, Plaintiff John Moore, an owner and member of the RMCC (Ex. 40), sent registered written correspondence (Ex. 45) to the RMCC Registered Agent and RMCC officers and directors listed (Ex. 43) in the Secretary of State's records requesting to review certain corporate records of the RMCC in accordance with the Tennessee Not For Profit Corporation Act ("TNCPA") and the RMCC By-laws then seemingly in effect. (Ex. 6, 21) (Tr. 951:1). The certified mail was delivered and received (Ex. 45), but there was no response. (Tr. 951:8). Repeated record requests were then ignored by the purported directors (the Moy Toy board). (first trial court Interim Order July 1, 2016, para. 3; T.R. 2020).

Plaintiff John Moore and this same group of Renegade Resort residents researched how to call an RMCC membership meeting and began drafting a Request for Special Meeting to the listed Board of Directors. (Tr. 953:7). On June 23, 2011, Plaintiff Gerald Nugent, an RMCC Member in Good Standing through calendar year 2010 (Ex. 48, 13 – 31:1), sent a certified letter (Ex. 13 –

14:22, Ex. 45) (Tr. 953:15) to the purported board of directors requesting that they call a special meeting of the RMCC membership, along with thirty-three (33) signatures of RMCC paid up members through 2010, asking for the meeting. (Tr. 957:2). Certain proof was required to ascertain that the thirty-three (33) members had paid their 2010 dues assessments. (Ex. 44). Later it was determined that the actual number that could be certified as paying their 2010 dues assessments was twenty-seven (27). (Tr. 961:25). There was no response to the request that an RMCC membership meeting be called. (Ex. 45).

After waiting the requisite time period identified in the TNPCA, Plaintiff Gerald Nugent, with the help of other residents, researched the courthouse records and sent notice of a special called meeting of the RMCC (Ex. 18) to five hundred thirty-one (531) owners of property in Renegade Resort. (Tr. 964:4). 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. 18, Encl). Plaintiffs verified good standing to vote (Tr. 996:16) and set a record date of August 15, 2011, for voting purposes as permitted in the TNCPA. (Ex. 18).

In accordance with all sets of Restrictive Covenants for Renegade Resort (Ex. 3, Ex. 4, Ex. 5, Ex. 6; Art. X, Sec. 8), RMCC Directors are 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. 1545:20). Nevertheless, no RMCC dues assessments were levied by the Moy Toy Board for calendar year 2011, in calendar year 2011 (Tr. 787:1; 1546:6), nor were any 2011 invoices received by members/residents as required. (Tr. 483:2; 637:4; 709:14; 748:13). 2011 Annual Dues Assessments were not levied by the Moy Toy Board until January 27, **2012**. (Ex. 33) (Tr. 787:1, 796:1). All of the eleven (11) 2011 payments received for 2011 dues

assessments (Ex.31), prior to the September 2, 2011 Special Meeting, were paid by Defendant Michael McClung in a single check for himself and his relatives and acquaintances. (Tr. 1591:14). Invoices were created after the fact. (Tr. 1591:3, 788:12). Defendant Michael McClung admitted that no one except himself received an invoice or paid dues for 2011 prior to the September 2, 2011 meeting. (Tr. 1591:19).

Due to poor record keeping, no one, including accountants, could determine who owed dues to the RMCC prior to 2011 with accuracy. (Tr. 784:4, 792:25). Without access to credible records, Plaintiffs 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. 974:15, 979:13). No RMCC member could independently calculate their own 2011 dues assessment (Tr. 978:15) because: 1) RMCC members did not know of or approve a dues assessment rate for 2011 (Tr. 977:3); 2) admittedly, the Moy Toy Board did not determine and add any previously owed (back) dues (Tr. 1564:21); 3) admittedly, the Moy Toy Board did not adjust 2010 dues rate by the change in the Consumer Price Index (“CPI”) (Tr. 1564:1, 977:3) as per all versions of the By-Laws (Ex. 4, 5, 97); and 4) admittedly, the Moy Toy Board did not calculate and apply any interest charges (Tr. 1558:7) to unpaid balances as per all versions of the By-Laws (Ex. 4, 5, 97). There was no RMCC or developer office (Tr. 979:9) and members did not know where to send payments. (Tr. 975:24).

Some dues assessments collected after September 2010 did not appear on accounting records. (Tr. 798:3, 803:6). For example, while 2010 dues assessment income was received (Ex. 34), no 2010 dues assessment income was reported on the 2010 tax returns. (Ex. 36). Given all of these problems, it was impossible to tell precisely who was paid up for 2010 or 2011 RMCC dues without independent proof of payments made by members. (Tr. 792:25, 784:4).

A Member's List to vote was prepared by the caller of the meeting, Plaintiff Gerald Nugent, in accordance with the requirements of TNCPA. (Tr. 963:22) (Ex. 45). A certificate of notice and listing of all owners receiving notice was prepared by Plaintiff Gerald Nugent as well. (Ex. 47). (Tr. 964:4). Moy Toy received the notice (Tr. 987:18, Ex. 47) but did not contact the caller of the meeting prior to the record date of August 15, 2011, to establish its right to vote at the meeting. (Tr. 1011:2). Between August 16, 2011, and August 30, 2011, legal counsel for both parties exchanged correspondence. (Ex. 54, 55, 56). On September 2, 2011, the day of the special meeting, Moy Toy's legal counsel contacted Plaintiffs' counsel via written correspondence to object to the meeting. (Ex.48). Included with Exhibit 48 was a list of paid-up RMCC members for 2010 and 2011 (Tr. 993:11), authorized by Defendant Michael McClung (Tr. 1519:3) which the Plaintiffs further relied on as proof of good standing and voting. (Tr. 996:16). 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 members, called by Plaintiff Gerald Nugent, was held pursuant to the meeting notice (Ex. 18) and published agenda. (Ex. 46). Defendant Michael McClung representing both Moy Toy, the purported developer, and the Moy Toy Board as an alleged director and president, presented a proxy from TIG Holdings, LLC purportedly giving him three hundred forty-two (342) votes. (Ex. 57). All other proxies were qualified prior to the meeting. (Tr. 1143:17). The meeting was recorded (Tr. 1001:7), transcribed (Ex. 58) and detailed minutes were kept and recorded (Ex. 45).

The following occurred at this RMCC special meeting held on September 2, 2011 (See Ex. 45): 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. 43), came forward to chair the meeting. (Tr. 1001:20). After trying

to cancel or dismiss the meeting and offering a motion to adjourn the meeting which received no second to the motion to proceed, Defendant Michael McClung was asked to chair the meeting or step aside, which he did. (Tr. 1002:4). 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. 18). Proposition 11-001, Removal of current RMCC officers and directors, and Proposition 11-002, Amendment by Restatement of the Current By-Laws (Ex 45) were read, discussed, and voted on by the members present and authorized to vote. (Tr. p. 579:09). Defendant McClung representing Moy Toy objected that Moy Toy'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 (Ex. 57) 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. (Tr. 1002:15). Three (3) new directors were elected by written ballot vote to replace those previously removed. (Ex. 45). The meeting was adjourned.

Immediately following the special meeting, the new board of directors met to appoint officers. (Tr. 1003:6). The vote on the newly adopted By-Laws was certified by the new RMCC secretary and were later recorded. (Ex. 45) (Tr. 987:7, 1004:15). Likewise, the election of directors vote was tallied, rechecked and certified by the new secretary. (Ex. 45). After being thoroughly reviewed, the TIG Holdings, LLC proxy was disqualified per the By-Laws (Ex. 21, 6) for never being accepted as an RMCC member as required; (Tr. 1006:1), never ever paying any dues on these lots (Tr. 1005:20, 1574:17); and not being a Member in Good Standing entitled to vote. (Tr. 1007:2).

On October 28, 2011, Defendant Michael McClung called Wendell Harkleroad, Managing Member of the Eagle's Nest, LLC sub-development, (Tr. 456:12) and asked him to assist Moy Toy in shutting down Renegade Resort and forcing everyone to move or sell. (Tr. 468:7).

On November 17, 2011, the Moy Toy Board called for a membership meeting of the RMCC. (Tr. 1020:19). During this meeting, Defendant Michael McClung said to Plaintiff Gerald Nugent: 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"; 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." (Ex. 13 – 34:1). The meeting was quite contentious. (Tr. 1021:3).

On December 22, 2011, certain homeowners and officers and directors of the Owner Board of the RMCC and the RMCC itself filed suit (T.R. 1) against Michael McClung, Phillip Guettler, Michael Haines, Joseph Wucher, and Moy Toy for, among many issues, the return of the assets, property and records of the Renegade Mountain Community Club. (T.R. 1). In March 2012, Phillip Guettler and Michael McClung filed a countersuit (T.R. 2), and the two cases were consolidated (T.R. 2).

Plaintiffs sought voluntary legal fund donations from residents and members who contributed to help defray the costs of legal action. (Tr. 227:3, 483:9, 639:18, 714:5). These funds were maintained in a single RMCC checking account controlled by the Owner Board but were always separately accounted for. (Tr. 714:13, 728:4, 1049:19). Voluntary donations to the legal fund were explained to members numerous times in newsletters and differentiated from dues assessment income. (Tr.1047:10).

Following the September 2, 2011 special meeting electing the new Owner Board: roads were fixed and paved. (Tr. 193:14, 753:3). The Owner Board members were "the only ones doing

anything” in Renegade Resort. (Tr. 203:21). Things started getting done. (Tr. 217:3). Security streetlights were turned back on. (Tr. 217:3, 638:18, 753:3). Mowing started. (Tr. 217:3, 718:20, 753:3). Reflector poles were installed along certain part of the roads. (Tr. 203:21, 642:4, 718:20). Owners were satisfied with the services they were getting. (Tr. 218:16). The Owner Board provided snow removal operations. (Tr. 638:18, 753:3) It created and operated an RMCC website. (Tr. 638.18, 753:3). It sent out newsletters. (Tr. 638:18, 753:3). Annual Meetings and Board Meetings were held. (Tr. 713:10, 755:1). There were community dinners. (Tr. 753:3). The Owner Board leased or purchased a snowplow, truck, and mower. (Tr. 1022:1).

Conversely, the Moy Toy Board, following the September 2, 2011 special meeting: provided no services (Tr. 754:5); took down previously installed reflector poles (Tr. 719:15, 642:4, 204:12); removed entrance signs (Tr. 715:19, 641:10; 186:5); blocked roads (Tr. 757:1, 716:17, 644:16; 477:7; 205:18); closed the entrance bridge (Tr. 720:21, 643:6, 472:2); closed the sports park (Tr. 756:13, 641:2), and denied its use (Tr. 1024:18); and from 2011 through 2014, spent a total of \$1,608 on services to its members (Tr. 791:2, Ex. 38) while spending \$54,157 on attorney’s fees. (Tr. 791:20, Ex. 38).

Through August 2014, the Owner Board maintained the sports park area in Renegade Resort. (Tr. 1024:24). After announcing a Labor Day picnic for members in the sports park, counsel for Moy Toy sent a letter on August 26, 2014, to Plaintiffs’ counsel indicating that such a use by the members would constitute trespassing and any use of the sports park would not be allowed. (Ex. 49). 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. (Tr. 1024:19).

In May 2015, Moy Toy blocked certain roads in Renegade Resort (Tr. 1033:22, 757:1, 716:17, 644:16; 477:7; 205:18) and denied access to (Tr. p. 100-14) among other roads, Great Warrior Road and Renegade Mountain Parkway, at two locations. (Ex. 40). These roads had been continuously used for decades (Tr. 1034:8) to connect two separate platted areas. (Ex. 41). RMCC Members' dues assessments were used to maintain these roads. (Tr. 1034:8, Ex. 19).

The first trial took place on December 15, 16 and 17, 2015; February 2, March 7, and April 14, 2016. The Plaintiffs successfully appealed. This court issued its ruling on August 28, 2018, which resulted in there being, for that time, no then authorized Board of the RMCC. Following the August 26, 2016 special election conducted by the Court appointed Special Master, Moy Toy, LLC, using its 10:1 voting margin, reelected the same officers and directors that the trial court invalidated in its July 1, 2016 order. (T.R. 1). The new Moy Toy board minimally operated the RMCC from the 2016 election date until this Honorable Court invalidated this election on August 28, 2018. From 2016 to 2021, as defined by the court in its Memorandum and Finding dated April 5, 2021 (T.R. 3743), held that Renegade Resort did not have an operating association for years and that maintenance of the common area had been performed with donations and volunteer labor. (Tr. 1013:4).

The second trial took place on September 28 to October 2, 2020, and continued on December 1 and 2, 2020. The Trial Court's Memorandum and Order was signed on March 31, 2021, with the Order entered on April 5, 2021. (T.R. 3718). The Owner Board has been operating since that time as the official RMCC Board in Renegade Resort.

ARGUMENT

I. Review should be limited to the issues on remand from the last time this same case was before this Court in 2018 in *Haiser v. McClung* E-2017-00741-COA-R3-CV, 2018 WL 4150877, (Tenn. Ct. App. August 29, 2018).

The following were the issues on remand to the trial court, and the results of the trial court's holdings on these issues.

1. Validity of 2005 Amendments

This Honorable Court previously reversed the first trial court's holding that any challenge to the 2005 Amended Restrictive Covenants was time barred and this Court remanded for the trial court to determine whether the 2005 Amended Restrictive Covenants were valid. Further, on remand, both parties would be allowed to present evidence regarding the adoption process of the 2005 Amended Restrictive Covenants and whether those requirements for adoption were followed.

Trial court holding: The trial court held that both sets of the 2005 Amendments (Ex.5, Ex. 6) were not valid, and the requirements for adoption were not followed. (T.R. 3734-3740).

2. Moy Toy's Purported Developer Rights in Renegade Resort.

The Court of Appeals also remanded the issue of whether Moy Toy held developer rights in Renegade Resort. Both parties were to present evidence on the chain of title for developer rights in Renegade Resort.

Trial court holding: Both parties presented proof on the chain of title for developer rights, including expert witnesses. The trial court found that there were two breaks in the chain of title regarding transfer of developer rights. As a result, the trial court held that since the 2005 Restrictive Covenants (Ex. 5) were declared void, Moy Toy does not have developer rights in Renegade Resort. (T.R. 3735-3736).

3. Members in Good Standing in 2011.

After determining the validity of the 2005 Amended Restrictive Covenants (Ex. 5, 6) and 2005 By-laws (Ex. 6), the trial court on remand was to determine what RMCC members were in good standing at the time of the September 2, 2011 special election to determine whether this meeting was properly called.

Trial court holding: The trial court determined that the September 2, 2011 special called meeting was a valid meeting of the RMCC members, and the actions taken at this meeting were legal and legitimate. The Owner Board was reinstated with all of the powers necessary to govern and operate the RMCC as of May 4, 2016. (T.R. 3743).

4. Common Areas and Roadways of Renegade Resort

After the trial court on remand determined whether Moy Toy had developer rights and which version of the restrictive covenants and by-laws were to be applied, it was to determine whether Moy Toy could retain title to the common areas or whether it was obligated to convey title of the common areas to the RMCC and whether Moy Toy had the power to control the unplatted roads with the exception of the entrance road and bridge.

Trial court holding: The trial court determined that Moy Toy could retain title to the common areas, but that the RMCC members were entitled to an easement of enjoyment over the same, even if Moy Toy retained the fee title interest in these properties. Certain unplatted roads were also held to be under the control of the RMCC for the use and benefit of the RMCC members despite fee ownership remaining with Moy Toy of these roads. (T.R. 3747-3750).

5. Special Master's Report

The trial court on remand was instructed to review the issue of repayment of attorneys' fees after determination as to the validity of the 2005 Amended Restrictive Covenants.

Trial court holding: The trial court determined that the attorneys’ fees paid by the Plaintiffs into a special fund for litigation were not in fact RMCC assessments and such amounts did not have to be disgorged. (T.R. 3785). This holding was not challenged on appeal.

II. The Appellants raise multiple issues in their brief outside the scope of the remand, and it is asserted by Appellees that these arguments should not be permitted in this appeal, but if they are permitted, the Appellees have provided responses.

1. Joinder of parties and intervention

a. The Appellants’ argument about joinder is outside the scope of the remand.

On August 29, 2018, this Court issued its Haiser v. McClung (“*Haiser II*”) opinion which remanded this case back to the trial court with several issues to be resolved as set forth above. Conspicuously absent from that opinion was any reference, request, remand, mandate, or even a mention that the trial court conduct any inquiry into the joinder of additional parties. Despite not being an issue on remand, on December 31, 2019, Appellants filed a “Supplemental Position Statement” which, among other things, attempted to join all Renegade Resort property owners into this litigation. (T.R. at 2770). On January 15, 2020, the trial court issued an Order Regarding Post Remand Issues which, among other things, denied Appellants’ request to join all property owners as parties to this case. (T.R. at 2793). In that Order, the trial court correctly noted that “this issue was never raised by Moy Toy on appeal and therefore is not a proper issue to be raised on remand.” In addition, the trial court held that “the Homeowners Association for Renegade Resort is an appropriate entity to act as a representative of the entire group on whose rights it is asserting.” In making this finding, the trial court cited River Plantation Homeowner's Ass'n, Inc. v. Capps, 587 S.W.3d 755 (Tenn. App. 2019) which held that, in a suit regarding enforcement of restrictive covenants in a subdivision, a homeowner’s association had standing to enforce the restrictive

covenants and all property owners need not be joined where “a representative group of the interested parties,” namely the homeowners association, was already party to the lawsuit.

In Raleigh Commons, Inc. v. SWH, LLC, 580 S.W.3d 121, 129–30 (Tenn. App. 2018), the Western Section of the Court of Appeals restated Tennessee’s position on the scope of remand:

“The appellate court directs actions and dictates results through its orders, judgments, and mandates” and may limit the scope of a remand. State v. Williams, 52 S.W.3d 109, 123 (Tenn. Crim. App. 2001); State v. Irick, 906 S.W.2d 440, 443 (Tenn. 1995); Cook v. McCullough, 735 S.W.2d 464, 470 (Tenn. App. 1977). Such orders and mandates are controlling, and the lower court does not have “the authority to expand the directive or purpose of [the higher] court imposed upon remand.” State v. Weston, 60 S.W.3d 57, 59 (Tenn. 2001); Cook, 735 S.W.2d at 470. Otherwise, “[t]here would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decision.”

And indeed, Appellants are absolutely seeking to inject chaos into this over decade long litigation by first attempting to require the addition of hundreds of property owners into this litigation as parties, and then when that failed, attempting to add a select group of property owners, claiming that somehow these property owners are now “indispensable.” However, the trial court’s January 15, 2020, order was absolutely correct that this issue was not a proper one to consider on a limited remand. (See also April 27, 2020 Order Regarding Moy Toy’s Motion to Reconsider and Amend Post Remand Issues noting that “the Moy Toy Defendants continue to take the position that every owner must be made a defendant. Nowhere in the Court of Appeals’ opinion is there any suggestion that this needs to be done on remand.”). (T.R. at 2964) (See also June 28, 2021, Final Order Re: Motion to Alter or Amend noting that joinder of all property owners continued to be denied as it had “been previously addressed and denied on more than one occasion by this Court.”). (T.R. at 3785).

b. Joinder is not required of any additional alleged necessary parties, and the court did not abuse its discretion in permissively allowing intervention of only two (2) of the twenty-one (21) proposed intervenors, particularly given the late timing of their Motion to Intervene.

First and foremost, the fact that this case has been ongoing for over a decade and has already made two trips to the Court of Appeals without any instruction to join additional parties should be dispositive. Indeed, this Honorable Court made a substantive ruling on this case in *Haiser II* in 2018 and gave no instruction on remand for any additional necessary parties be joined in order to afford complete adjudication in this matter. Complete relief can absolutely be accorded based on the interests of those already joined as parties, and the interests of all property owners in Renegade Resort are represented by those already joined parties

Should this Court nevertheless entertain Appellants' arguments on the issue of intervention given the limited scope of remand, the Court will find the same lacking. On June 26, 2020, a group of twenty-one (21) property owners (hereinafter "Intervenors") sought to intervene in this litigation. (T.R. at 2969). On August 10, 2020, the trial court determined that none of the Intervenors had proven entitlement to intervention as a right as their position was "in lockstep with the positions of Moy Toy." (T.R. 3031). However, two (2) Intervenors were granted permissive joinder given that they had only recently bought property in Renegade Mountain and were therefore not afforded a reasonable opportunity to intervene at an earlier time.

i. Necessary and indispensable parties.

Appellants' main line of attack is that this is a declaratory relief action and therefore "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." T.C.A. § 29-14-107(a). (See also Tennessee Rule of Civil Procedure 19.01). And indeed, this statute "imposes stricter requirements than those imposed generally by the Tennessee Rules of

Civil Procedure requiring the joinder of indispensable parties in all types of cases.” Timmins v. Lindsey, 310 S.W.3d 834, 839 (Tenn. App. 2009). The question for the trial court then in actions for declaratory relief is which parties are “indispensable” or “necessary.” Id.⁵ To frame this issue, the Supreme Court has long held that the Declaratory Judgment Act should be liberally construed (Tennessee E. Elec. Co. v. Hannah, 157 Tenn. 582, 12 S.W.2d 372, 373 (1928)) and “trial courts have discretion to determine the presence of necessary parties to a declaratory judgment and to require their joinder.” Largen v. City of Harriman, No. E-2017-01501-COA-R3-CV, 2018 WL 3458280, at *6 (Tenn. Ct. App. Jul. 17, 2018). “Absent an abuse of that discretion, a declaration should not be disturbed on appeal.” Timmins Id. “A trial court abuses its discretion when it causes an injustice by applying an incorrect legal standard, reaching an illogical decision, or by resolving the case ‘on a clearly erroneous assessment of the evidence.’” Tennessee Farmers Mut. Ins. Co. v. DeBruce, 586 S.W.3d 901, 905 (Tenn. 2019).

“Parties are determined to be necessary when their absence from the action could cause recurring litigation on the same subject because the declaratory judgment, if rendered, ‘would not terminate the uncertainty or controversy giving rise to the proceedings.’” Id. “This does not mean, however, that all persons who might be remotely affected need be joined.” Timmins, Id.

Here, Appellants now claim that either: 1) all property owners in Renegade Resort were indispensable or, if the Court does not believe that argument, then 2) some undefined subset of twenty-one (21) proposed Intervenor property owners were indispensable and that the failure to include them in this case constituted a fatal jurisdictional error. Why are those parties suddenly

⁵ It should be noted that in the first trial, Chancellor Thurman required all parties or persons who appeared in the chain of title as having at some time held developer rights in Renegade Resort be added as parties to this case, and the Plaintiffs added all of these parties as additional party defendants. So, the identity of the proper parties to be before the court for the adjudications requested by the Plaintiffs was considered and ruled upon by the first trial court.

indispensable? Given that there has been over a decade of litigation, two prior trips to the Court of Appeals, completion of discovery and a continuance due to Covid-19 concerns, the why remains a complete mystery. Indeed, it seems that these property owners are now “indispensable” because Appellants were unsuccessful at trial and now are attempting to sow chaos and raise unwarranted and untimely procedural hurdles because their case is unwinnable on the merits.

This case, as recognized in the 2018 Court of Appeals decision, does not involve a direct attack on Restrictive Covenants in Renegade Resort or a demand that any restrictive covenants be expressly declared null and void. The trial court was asked to determine which governing documents were applicable so that the questions concerning developer rights and the propriety of the September 2, 2011, special called meeting could be determined by the court. Every day, courts determine which documents apply and which documents do not apply to a set of facts in making legal determinations. All parties who may be impacted by the rulings on those documents are not necessary parties in ruling on the issues presented.

Scandlyn v. McDill Columbus Corp., 895 S.W.2d 342 (Tenn. App. 1994) and other cases cited by the Appellants in their brief on the issue of necessary parties are distinguishable. In Scandlyn, lot owners whose existing rights to use a lake were being taken away potentially in the lawsuit were necessary parties to the litigation. The case did not involve an owner’s association that was already a party to the case and was defending the rights of the owners to use the lake at issue. The individuals who were necessary parties in that case otherwise were not having their interests represented by parties already before the court, as is the case here.

Appellants argue that absent joinder of them as necessary parties, the Intervenor would not be bound by the holdings in this case, and therefore allegedly all the issues in this case are subject to being re-litigated. (Brief at 30). This argument carries no weight because the holdings

in this case will be binding on all owners in Renegade Resort. These owners are represented through the RMCC being a party to this case. All property owners in Renegade Resort are mandatory members of the RMCC by virtue of their purpose. All five hundred (500) plus property owners in Renegade Resort cannot be allowed to come in and take different positions in this case as to the issued raised; that would be wholly unmanageable and impractical, and it is not legally required. Owners can vote at each annual meeting as to who the Board of Directors of the RMCC will be. Thus, the interests of the Intervenors are already represented. As noted above, the court in River Plantation held that all property owners need not be joined where “a representative group of the interested parties,” namely the homeowners association, was already party to the lawsuit. Either the September 2, 2011, special meeting of the RMCC members was properly called and the actions taken at the meeting were legitimate and legal, or they were not. Either Moy Toy has developer rights, or it does not. Once those issues are finally resolved in this case, they are resolved as to all comers. A random property owner in Renegade Resort could not drag parties back into court to relitigate these issues. The parties could all point to the final ruling in this case and justifiably claim *res judicata*.

It should also be noted that, as was held in the leading case in Tennessee on developer rights, Hughes v. New Life Dev. Corp., 387 S.W.3d 453 (Tenn. 2012), joinder of additional property owners was simply not required in a challenge of the purported developer rights under amended restrictive covenants. The challenge to the developer rights was made by two families who purchased lots in a new subdivision. (Id. p. 5 para. 1 of the Opinion). There were at least twenty-four (24) lots in that subdivision that would have been bound by the restrictive covenants that were interpreted and applied in the case. (Id. p. 6). However, in its review, the Tennessee Supreme Court declared the rights of the parties as to developer rights but did not require or suggest

that that other owners in the subdivision should have been/were required to be made parties to the case. (See also, Grand Lakes Property Owners Ass'n v. Cary, 897 S.W.2d 262 (Tenn. App. 1994)(in a large, restricted development with a golf course and several lakes, the court held that restrictive covenants were not properly amended to allow a dues increase; there was no mention of any need to add all the other owners as parties to the case); Grand Lakes Prop. Owners Ass'n v. Burrow, 376 S.W.3d 66 (Tenn. App. 2011) (again with only one landowner as a party, the court ruled on the effect and validity of disputed amended restrictive covenants as they related to issues presented in the case including developer rights; there was no mention of adding other owners as parties in order to make the determination).

Many other Tennessee courts have also adjudicated who holds developer or declarant rights in a community bound by restrictive covenants without naming all property owners as parties. For example, in Civis Bank v. The Willows at Twin Cove Marina Condominium and Home Owners Association, Inc. No. E-2016-00140-COA-R3-CV, 2016 WL 7468202, (Tenn. Ct. App. Dec. 28, 2016) this court held that Civis Bank did not hold declarant rights in the community as it claimed. The only parties to the case were the party claiming the declarant rights (Civis Bank) and the owners' association. There was no need to add every owner as a party in order to adjudicate these rights. See also Tennessee Funding, LLC v. Worley, M-2018-01099-COA-R3-CV, 2019 WL 633124 (Tenn. Ct. App. Nov. 26, 2019) (court determined which party holds declarant rights without joinder of all parties owning property in the affected subdivision).

Just as joinder of every single community member was not required in River Plantation, Hughes, both Grand Lakes cases, Civis Bank or Worley, the joinder of every single community member (or some random smattering of community members) is not required in this case in order to resolve what purported governing documents are legally binding and who if anyone has

developer rights in the community. Complete and final relief can absolutely be afforded with the parties presently joined.

The same argument is true relating to the alleged necessary joinder of parties in a case where restrictive covenants were sought by plaintiff property owners to be declared unenforceable. In Schodowski, D.P.M. v. Tellico Village Property Owners Association, Inc. E-2015-01145-COA-R3-CV, 2016 WL 1627895 (Tenn. Ct. App. Apr. 22, 2016), a property owner in Tellico Village sued the Tellico Village Property Owners' Association ("TVPOA") and its board members asking for a declaratory judgment holding that the restrictive covenant in Tellico Village requiring payment of dues to the TVPOA should not be enforced against them because it was invalid for several reasons. The trial court dismissed the complaint, and the lot owners appealed. One of the issues on appeal was necessary joinder and whether the trial court erred in failing to join other Tellico Village property owners as parties to the action. TVPOA had raised the issue in a motion to dismiss by arguing that the trial court lacked subject matter jurisdiction because Plaintiffs in that case had failed to join indispensable parties who might be affected by the declaratory judgment. The trial court denied the motion and did not find that joinder of the other parties was necessary. The holding was upheld on appeal.

The argument that Appellants are making that the court lacks subject matter jurisdiction in this case for failure to join indispensable parties has no merit and lacks direct case law support.

ii. Intervention by right

Going beyond the necessary joinder issues inherent in actions for declaratory relief, Appellants continue to push the narrative that either the entire community of Renegade Mountain or the twenty-one (21) Intervenors have a right to intervene in this case. And if not that, then Appellants claim that the trial court erred by not allowing all property owners to permissively

intervene. However, most Intervenor were excluded due to the timeliness and the Intervenor who were not excluded for timeliness, due to no fault of their own, were permissively allowed to intervene based on a date certain when they acquired their property.

Denial of intervention as a right due to an untimely request to intervene and permissive joinder are both reviewed for abuse of discretion, not *de novo*. “When there is no basis for intervention as of right, the decision to allow intervention is a matter within the discretion of the trial court. This decision should not be reversed by an appellate court absent a showing of abuse of discretion.” Shelby Cty. Deputy Sheriff's Ass'n v. Gilliss, 972 S.W.2d 683 (Tenn. App. 1997).

In the case at bar, there is no evidence of abuse of discretion as to the denial of intervention of right relating to the Intervenor.

Intervention as a matter of right is governed by Tenn. R. Civ. P. Rule 24.01. As interpreted by the Supreme Court and as noted by the trial court:

A party seeking to intervene as of right under Rule 24.01 must establish that (1) the application for intervention was timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the pending litigation; (3) the proposed intervenor's ability to protect that interest is impaired; and (4) the parties to the underlying suit cannot adequately represent the intervenor's interests. The intervenor has the burden of establishing all four of these elements or else the motion to intervene will be denied. State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 190–91 (Tenn. 2000)(citations omitted)

The trial court applied this rubric and concluded that that intervention as a right was not proper for any of the Intervenor, in part because there is no impairment to any of the Intervenor's ability to protect their interest. The relief which all the Intervenor sought and the position which all the Intervenor are taking is identical to that of Moy Toy. While it is true that the Intervenor's interests are opposed to that of Plaintiffs, they are in lockstep with the position of Moy Toy. (T.R. at 3031). If either party in the underlying suit can adequately represent the Intervenor's interest, the intervention serves no purpose, and that was the case here.

Appellants claim in principle that the addition of the Intervenors to this lawsuit is required because the Intervenors were “opposed to one or more positions taken by RMCC and that Plaintiffs do not represent the best interests of all lot owners.” (Appellants’ Brief, p. 27). Therefore, according to Appellants, the Intervenors have a right to intervene in this lawsuit, because without them, complete relief cannot be afforded. According to the Appellants, the Intervenors and apparently all other property owners would have interests so diverse to the parties already in this action that substantial prejudice would occur without their intervention. On any given day, with 500 plus members, there are certain to be some group of members that disagree with any decision or position taken by the owners’ association. However, Appellants’ arguments put the cart before the horse and the trial recognized the same. (T.R. at 3031).

In their proposed Complaint in Intervention, the Intervenors state in conclusory fashion that each of the properties or lots owned by Intervenors is subject to the 2005 First Amended Restrictive Covenants, and each Intervenor is a member of the RMCC. (Ex. 5, T.R. at 2976). The Intervenors then go on to claim that “[t]he validity or invalidity of the 2005 First Amended Restrictive Covenants are issues directly impacting Intervenors” (T.R. 2978, Para. 8) and that deciding that issue would have an impact on them and their property. (T.R. 2977, Para 5). It is that *potential* impact that they argue makes them unique and therefore indispensable: that the decisions made by one board or another would necessarily impact their property values and therefore they claim that they have a right to make legal arguments for one board over another and in favor of Moy Toy as developer. However, this lawsuit is not about deciding the aftermath of what an alleged developer can/cannot/should/should not do with the property or what the RMCC can/cannot/should/should not do after the proper board is determined – this lawsuit is primarily about deciding who the developer is (if any) and the who the proper RMCC board is. Indeed, just

because the Intervenor may have contingent claims that they allege are not represented, the principle and dispositive issues in this case are in fact well and fully represented. Where do the Intervenor differ from the positions taken by Moy Toy? Again, any and every decision made by an owners' association will necessarily affect one (1) or more property owners.

More importantly though, it must not be lost as to how long this litigation has been going on. Indeed, the trial court reviewed the timeliness of the Motion to Intervene under the timeliness standards elucidated in In re Est. of Smith, W-2017-02035-COA-R3-CV, 2018 WL 4859045, (Tenn. Ct. App. Oct. 8, 2018):

(1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervener knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervener's failure after he knew or reasonably should have known of his interest in the case to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention. (See also Am. Materials Techs., LLC v. City of Chattanooga, 42 S.W.3d 914 (Tenn. Ct. App. 2000) "The timeliness of an intervention is governed by equitable principles and is determined by the facts and circumstances of each particular case.")("[T]imeliness of the application [for intervention] is reviewed under an abuse of discretion standard." State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 191 (Tenn. 2000))

The trial court addressed all of these factors and concluded that most Intervenor were simply untimely in their application to be joined in this action. Notably, by the time the trial court had ruled on the Motion to Intervene in August 2020, this case had been pending for almost a decade, discovery had been completed, the May 2020 trial had been continued to September 2020 due to Covid-19 concerns, this Honorable Court had issued substantive rulings and remanded the case on August 29, 2018, and this decision case had been recorded on August 1, 2019 in the Register's Office.

iii. Permissive intervention

The trial court did allow certain property owners to *permissively* intervene based on when they acquired property and therefore notice on this lawsuit. Permissive intervention is governed by Tenn. R. Civ. P. Rule 24.02 which provides as follows: Upon timely motion any person may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when a movant's claim or defense and the main action have a question of law or fact in common.

The trial court recognized that although their interests were already adequately represented, the Intervenors presented common questions of law and fact given that they arguably have a financial interest in who owns the common area. However, the trial court also recognized that this matter has been pending for a decade and that a majority of these property owners had ample opportunity to intervene but failed to do so until right before the retrial.

Given all of these facts, the trial court concluded that only Intervenors who had acquired property after September 1, 2019, had insufficient notice of this litigation so as to make their intervention in this case timely. The cutoff date was not arbitrary but was chosen based on representations at the hearing on the issue as to when intervenors purchased their properties. This date was just after the Court of Appeals decision was recorded in the Register's Office for Cumberland County, Tennessee, in August of 2018 showing that the first trial court's judgment was vacated and that the 2005 Amended Restrictive Covenants could be affected by the outcome of the litigation. (T.R. at 3030). The trial court found that the proposed Intervenors who were property owners at Renegade Resort prior to September 1, 2019, did not timely intervene in that they knew or reasonably should have known of their interests in this case based on the dates of

prior rulings in the case. This is a reasonable decision on the issue of timeliness of an intervention. The trial court needed to select a logical cutoff date, and it did so by using common sense.

Given that this joinder was allowed under Tenn. R. Civ. P. 24.02, “[w]here, as here, a common question of law or fact is established, the decision to allow intervention is a matter entrusted to the trial court's discretion, and the decision should not be reversed by an appellate court absent a showing of abuse of discretion.” Ballard v. Herzke, 924 S.W.2d 652, 658 (Tenn. 1996). There is no evidence of abuse of discretion here. The trial court properly and thoughtfully weighed all factors for and against intervention both as a right and permissively. The trial court should be affirmed.

iv. Scenario with no developer

There is no doom and gloom scenario if the developer rights of Moy Toy are not recognized as suggested in the appellants’ brief. (p. 30-31).⁶ Subdivisions operate just fine without developers, particularly where the subdivision is 50 plus years old, as is the case here. At some point, the umbilical cord is cut, and a homeowners’ association takes over a developer’s former roles and functions, only with representative government as opposed to a dictatorship as Moy Toy desires. The RMCC and its members can very well enforce the restrictive covenants without a developer. Common areas and the rights of enjoyment of the same are dealt with later in this brief, but the idea that no new common areas can be added without a developer is simply not true. The Restrictive Covenants in Renegade Resort can still be amended without a developer in the community by a vote of the RMCC membership. If there is no longer a developer, then no developer sign off is needed on amendments to the Restrictive Covenants. To suggest that a non-

⁶ Please note that Moy Toy was at one time down to holding only three (3) lots in Renegade Resort. It since bought some cheap lots to bring up these numbers, but it does not have a significant investment in developable lots to protect, as is frequently cited as the reason for continuing maintenance of developer rights.

existing developer has to sign off to such amendments is absurd. In any event, if Moy Toy would stop trying to negate the rights of RMCC members to enjoy the existing common area, that would be a sufficient outcome for the community. Finally, the idea that chaos will ensue because owners of property added to Renegade Resort after 1991 do not qualify for club membership and would not be bound by the restrictive covenants for the community is a paper tiger if there ever was one. Both expert witnesses Jack Adkins and Joe Huie testified that no such property exists. (T.R. 323:8; T.R. 2009: 23). No proof exists in the record that such later added property exists that would create the controversies Appellants suggest. Their concerns are imagined, convenient for them, and not based on facts in the record.

v. *Common property as relates to joinder*

The allegation that no “common property” exists in Renegade Resort is obviously disputed. (See Appellant Brief at 36). Except for certain roads, it is agreed that there are no plats for Renegade Resort showing common property. (T.R. 13:11). The issues regarding common property will be addressed further below, but the argument that somehow all property owners in Renegade Resort have to be joined as parties to this case because in the future someone may want to trespass on a third party’s property to relocate a road is highly speculative, bizarre, and also not supported by the record.

2) A preponderance of the evidence supported the trial court’s determination that Moy Toy has no developer rights.

Some of the Appellants arguments seem to come from Wonderland, and this first argument under this heading in their brief falls under that category. The brief on page 40 declares boldly that “the statute of limitations defense of Moy Toy was sustained by this Honorable Court in the 2018 Court of Appeal’s decision in *Haiser II*. Because this six-year limitations period ran before this action was commenced in 2011, the trial court’s earlier ruling was sustained in the 2018 Court

of Appeals decision. The issue of developer rights has been decided in Moy Toy's favor." This statement draws into questions whether the writer of those sentences in fact read the 2018 Court of Appeals Decision. The Court of Appeals stated that on remand the Trial Court "should allow both sides to present evidence concerning the chain of title of developer's rights in Renegade Mountain." (Opinion at 14). Why would the trial court be asked to do that if Moy Toy had already had this issue decided in their favor? It makes no sense. Why would the issue of whether Moy Toy has developer rights been posed by the Court of Appeals on remand if that issue was already decided based on the statute of limitation defense that this court held did not apply? This argument by the Appellants defies logic. The statute of limitations issues are further addressed in response to the Appellants' 4th issue raised below.

a) Testimony of Ed Hill and Joe Looney; intent to convey developer's rights

The trial court did as it was directed on remand and after taking significant proof found that developer rights in Renegade Resort are not currently vested in Moy Toy. Review of findings of fact by the trial court in civil actions should be *de novo* upon the record of the trial court accompanied by a presumption of the correctness of the finding unless the preponderance of the evidence is otherwise. Tenn. R. App. 13(d).

Developer rights are personal property rights. Hughes v. New Life Dev. Corp., 387 S.W.3d 453 (Tenn. 2012). One can look to the intent of a transaction to determine whether or not such developer rights are conveyed. Id. The documents surrounding a transaction are used to show intent to transfer developer rights. Id.

In interpreting a deed, courts are primarily concerned with ascertaining the intention of the **grantor**. Griffis v. Davidson Cnty. Metro. Gov't, 164 S.W.3d at 274; Rutherford Cnty. v. Wilson, 121 S.W.3d 591, 595 (Tenn.2003); Hall v. Hall, 604 S.W.2d 851, 853 (Tenn.1980).

Courts ascertain the grantor's intent from the words of the deed as a whole and from the surrounding circumstances. Griffis v. Davidson Cnty. Metro. Gov't, 164 S.W.3d at 267 (Tenn. 2005); Ottinger v. Stooksbury, 206 S.W.3d 73, 79 (Tenn. App. 2006); Shew v. Bawgus, 227 S.W.3d 569, 576 (Tenn. App. 2007); Cellco P'ship v. Shelby Cnty., 172 S.W.3d 574, 586 (Tenn. App. 2005). The search for the parties' intent should focus on the four corners of the contract. Whitehaven Cmty. Baptist Church v. Holloway, 973 S.W.2d 592, 596 (Tenn.1998); Hall v. Jeffers, 767 S.W.2d 654, 657–58 (Tenn. App. 1988).

Moy Toy does not possess developer rights for Renegade Resort and is a simple landowner with all the rights, privileges, and responsibilities as any other RMCC member. Renegade Resort, LLC, Moy Toy's predecessor in title with purported developer rights, did not obtain developer rights through the chain of title, or by naming itself as the developer in the 2005 First Amended Restrictive Covenants (Ex. 5)⁷, or by any other document in the record. Renegade Resort, LLC could not transfer developer rights in Renegade Resort to its successor in title Moy Toy, without first possessing such rights.

The Appellants' reliance on Cellco Partnership v. Shelby County, 172 S.W.2d 574 (Tenn. App. 2005) to support its position on conveyance of developer rights is misplaced. Cellco, a case decided before Hughes, merely holds that a deed conveys all of a grantor's estate or interest in real property unless it clearly expresses an intent to limit the estate or interest being conveyed. There is no doubt that this is the law as to the real property interests a grantor owns in real property: they are all impliedly conveyed by deed. However, developer rights, according to Hughes, are not real property rights, but instead are personal property rights. A court must examine all the relevant

⁷ It appears that the Appellants have abandoned the argument that they strenuously made previously in this case that Moy Toy received developer rights based on the 2005 Amended Restrictive Covenants. Likely the proof about how such documents were "adopted" was so bad that they knew that the argument was no longer even worth making.

documentation in a land sales transaction to determine whether such developer rights, as personal property rights, were conveyed or not in a transaction, with such documents to be reviewed to include the deed(s). But a deed does not necessarily convey developer rights. That is the essential holding of Hughes.

The trial court held that Cumberland Gardens Limited Partnership (formerly Renegade Limited Partnership) had developer rights in Renegade Resort in 1991 prior to the foreclosure by the German bank, DG Bank. In June 1991, developer rights in Renegade Resort *did not transfer* from Cumberland Gardens Limited Partnership (formerly Renegade Limited Partnership by name change) to Joe Looney, as Substitute Trustee. Thus, such rights could not have been conveyed through him as Substitute Trustee to Cumberland Gardens Acquisition Corporation, the purchaser at the foreclosure sale of the land at issue in Renegade Resort.

The Appellants in their brief complain that this finding was in error due to the testimony of attorney Ed Hill and the testimony of attorney Joe Looney as to whether such rights were discussed and transferred to Renegade Resort, LLC from Cumberland Gardens Acquisition Corporation in 2000. (Brief p. 40-50). The biggest problem with this argument is that it ignores the fact that Cumberland Gardens Acquisition Corporation had no such developer rights to give to anyone in 2000 because it did not obtain those rights and only bought real property in Renegade Resort in the foreclosure sale in 1991. The second biggest problem with this argument is that the proof heavily supported the trial court's characterization of the testimony of Joe Looney and Ed Hill and how the court used such proof in supporting its holding that Moy Toy does not have developer rights and that the chain of title for such rights was broken.

While Hughes v. New Life Dev. Corp. 387 S.W.3d 453 (Tenn. 2012) does not require that developer rights be transferred by deed, it does require a clear intent of the parties to transfer these

personal property rights by some kind of writing, (Id.) (Tr. 311:11). R. Jack Atkins and Joe Huie in their expert testimony both confirmed the need for documented intent to transfer developer rights. (Tr. 311:11 and Tr. 1992:16, respectively).

The backstory of developer's rights in Renegade Resort is important. In August of 1972, after selling approximately five hundred fifty-five (555) building lots, American Recreation Services, Inc. as developer established a set of original Covenants and Restrictions for Renegade Resort. (Ex. 3). The undeveloped land and unsold lots in the 12,000-acre resort were transferred by deed, from one developer to the next, until 1986 when Renegade Limited Partnership purchased the remaining undeveloped land and unsold lots. (Ex. 7, Tab 8; Ex. 79). Renegade Limited Partnership, following a name change to Cumberland Gardens Limited Partnership, took out several loans from a German bank, continued developing the resort and in 1987 set forth an amendment to the Restrictive Covenants. (Ex 4. "1987 Amended Restrictive Covenants").

In June 1991, Joseph Looney⁸, as Substitute Trustee for a German bank foreclosed upon a Master Deed of Trust comprised of three separate Deeds of Trust (Ex. 8) encumbering the property of Cumberland Gardens Limited Partnership in Renegade Resort (formerly Renegade Limited Partnership; name change). (Tr. 512:14). Expert witness R. Jack Atkins testified that this transaction included nothing other than the described real property described in the three Deeds of Trust. (Tr. 304:3). He further testified that he reviewed the Master Deed of Trust and subordinate Deeds of Trust in full and did not find any reference to the transfer of developer rights. (Tr. 304:8).

⁸ Joe Looney: 1) was legal counsel to Renegade Limited Partnership (later Cumberland Gardens Limited Partnership) from 1987-1990; 2) drafted and assisted in the adoption of the 1987 Amendment (Ex. 4) and 1987 By-Laws (Ex. 21); 3) was appointed as Substitute Trustee of the Master Deed of Trust and three subordinate Deeds of Trust by the German Bank (Ex. 8); 4) foreclosed on land owned by Cumberland Gardens Limited Partnership for the German Bank and issued a Trustee's Deed to Cumberland Gardens Acquisition Corporation in 1991 for the real property (Ex. 7, Tab 9); 5) oversaw Cumberland Gardens Acquisition Corporation's operation of the property from 1991 to 2000; 6) represented Cumberland Gardens Acquisition Corporation in the sale of property to Renegade Resort, LLC in January 2000; and 7) saw a draft version of the First 2005 Amendment in June 2000.

Joseph Looney testified that as Substitute Trustee, he only received the real property described in the subordinate three Deeds of Trust (Ex. 8) and that these documents did not mention developer rights. (Tr. 562:15). He further testified that he knew of no other documents that may have transferred developer rights in this transaction. (Tr. 519:9). Joe Looney was familiar with the developer rights concept (Tr. 518:18) and was in this transaction from start to finish. (Tr. 517:25).

Appellants' expert Joseph Huie provided expert witness testimony that confirmed that the Substitute Trustee's Deed (Ex. 7, Tab 9) contained nothing about developer rights and contained no catch-all "all right title and interest" language. (Tr. 2000:18). He also agreed that the deed did not state any intent to convey developer's rights. (Tr. 2012:22).

On January 6, 2000, Cumberland Gardens Acquisition Corporation sold the undeveloped lots and land in Renegade Resort to Renegade Resort, LLC. (Ex. 7 Tab 10). Joe Looney's testimony is clear that nothing but real property was given by Cumberland Gardens Limited Partnership to its successors, and nothing but real property was received through foreclosure. He also testified that all he intended to transfer the Renegade Resorts, LLC was the described real property, "we transferred no personal property." (Tr. 514:18). Joe Looney testified that all he was selling was described real property; that no other documents existed to transfer personal property; and that developer rights were never mentioned or discussed. (Tr. 517:14, 562:15 and 563:1). Joe Looney established that no developer rights were transferred by deed, other instrument, or intent.

An entity (Cumberland Gardens Acquisition Corporation) cannot give to another entity (Renegade Resort, LLC) anything which it did not receive, or have to give (developer rights).

Joe Looney testified that he was involved with Cumberland Gardens Acquisition Corporation from 1990-2000 (Tr. 519:17) and represented CGAC in the sale of property to Renegade Resort, LLC

in January 2000. (Tr. 526:6). Joe Looney made it clear that nothing but real property was given by CGAC in the 2000 sale, and nothing but real property was received by Renegade Resort, LLC.

R. Jack Atkins testified that he reviewed the associated 1999 contract for purchase (Ex. 63) in detail and concluded that nowhere in this document are the words “developer rights” mentioned or written. (Tr. 313:15). Joe Looney as lead counsel for Cumberland Gardens Acquisition Corporation (Tr. 526:12) and Ed Hill as lead counsel for Renegade Resort, LLC (Ex. 78, deposition 155:17) confirmed that the words “developer rights” are never mentioned or written in the deed or any supporting documents for this transaction. Ed Hill further testified that any rights Renegade Resort, LLC obtained would have only come from Cumberland Gardens Acquisition Company (“CGAG”). (Ex. 78) (Hill deposition 152:24). Ed Hill’s deposition references developer rights as a “concept” many times. He testified that developer rights were included in the transfer, and that, as lead counsel for Renegade Resort, LLC, there was intent to purchase developer rights from CGAC. However, he admits that developer rights were never discussed. (ex. 78) (Hill deposition 156:14). Most importantly and tellingly, Ed Hill states that he “**presumed**” that developer rights were included as part of the transfer of property. (Ex. 78) (Hill deposition 156:14).

While Ed Hill and Renegade Resort, LLC may have possessed the intent to purchase developer rights from CGAC, there is no documentation of record to show their intent. Intent being a two-way street, there was no reciprocal intent by Joe Looney and CGAC to sell developer rights to Renegade Resort, LLC. Joe Looney testified that to the best of his knowledge developer rights were never discussed as part of the lengthy negotiations surrounding this 2000 transaction. (Tr. 526:6). Joe Looney testified that he drafted (Tr. 525:14) the 2000 Bill of Sale document (Ex. 65) and that he **intended** to convey only that personal property identified in the document. (Tr.

525:23). Developer rights were not included. (Tr. 526:6). This is much stronger testimony than making all of the assumptions and engaging in all the speculation that the Appellants ask the Court to engage in to find in their favor.

Joe Looney testified that if Ed Hill were concerned about developer rights, he could have easily inserted them into the contract or bill of sale (Tr. 557:5), and that in aggressively representing his client (CGAC), it was not his responsibility to address the subject of developer rights if the buyers never brought it up. (Tr. 528:3). Appellants claim that developer rights were of such importance that they could not have possibly been ignored or overlooked during these important and lengthy discussions. Primarily, these Defendants point to the detailed Table of Contents (Checklist) accompanying the 1999 Sales Agreement. (Ex. 64). This document shows multiple pages regarding issues of concern such as motor vehicles, contracts, insurance, dues payable, etc., but fails to list anything regarding an issue as important as developer rights. The parties had sophisticated counsel, so if developer rights were to be included in the transaction, they would have been mentioned or referenced somewhere in the relevant conveyance documents, and they were not. Again, difference is given in favor of the grantor CGAC and Mr. Looney.

From 1991 until 2000, CGAC did its best to not act like a developer or exercise developer rights in Renegade Resort. Joe Looney testified that CGAG was established to hold and maintain the property in Renegade Resort for bulk resale and did not act as a developer. (Tr. 519:17). Joe Looney testified that he was intimately involved in the daily operations of the resort from 1991 to 2000 and had no intent to sell lots (few exceptions) or plat any new lots. There were no new roads, no new amenities, no marketing, or sales. (Tr. 519:17). Joe Looney testified that CGAC might have tried to use a 10:1 voting power in RMCC affairs if “push came to shove,” but that CGAG never had to, nor ever did use this 10:1 vote. (Tr. 565:3). Joe Huie testified that simply acting like

a developer would not establish developer rights, and that proper documentation is required to establish such rights. (Tr. 1995:10).

The Appellants' brief states that it is "difficult to overstate the essential character of these 'developer's rights' to any buyer of the property and the individual lot owners."⁹ (Brief at 20). If this were true, it would seem that Moy Toy would have performed better and conducted more due diligence in confirming that it would in fact legally hold such rights especially if it wanted to obtain such rights from Renegade Resort, LLC and related entities prior to its 2010 purchase. If there is no documented evidence of the transfer of developer rights in a transaction, the court should not presume that such rights exist, as suggested by Appellants in their brief. Written proof of such rights needs to exist for such important rights to be recognized. It does not exist.

Based on these facts, the trial court did not err in holding by a preponderance of the evidence that Moy Toy holds no developer rights because none were ever transferred to them. The testimony of Joe Looney and Ed Hill clearly support this decision, regardless of what Mr. Hill claims to have remembered about alleged oral discussions about developer rights. At the time those conversations were occurring, there were no developer rights to convey to Ed Hill's client due to the prior failure to convey such rights to CGAC in 1991. What Ed Hill allegedly thought was being conveyed, as far as developer rights are concerned, is irrelevant if such rights were not there to convey in the first instance.

b) LKM Group, LLC

The trial court made an alternate finding in the event there was subsequently found to be no break in the chain of title of developer's rights for Moy Toy as follows:

⁹ Given the documented bad behavior of Moy Toy towards RMCC members and owners of property in Renegade Resort, it is certainly not true that lot owners in Renegade Resort would be better off in any way by having Moy Toy recognized as developer in Renegade Resort. As shown in the record, Moy Toy has done everything it can to harm and destroy this community for reasons still undetermined.

It appears Renegade Resort, LLC, informally and by contract transferred developer rights to the LKM Group as of September 15, 2005, to operate and develop Renegade Mountain. However, these same developer rights were never transferred back to Renegade Resort, LLC and therefore Renegade Resort, LLC had no developer rights to transfer to Moy Toy.” (T.R. 3736)

The proof indeed showed that Joseph Wucher, Managing Member of Renegade Resort, LLC, executed a contract for the sale and operation of Renegade Mountain to Larry McMeans of LKM Group, LLC on September 15, 2005. (Ex. 12; Depo 21:1). Joseph Wucher claims LKM Group, LLC at that time took over the developer role and control of the RMCC. (Ex. 12; Depo 21:7). According to the record and the proof presented at trial, such developer rights were never transferred back to Renegade Resort, LLC. (Tr. 135:25, 138:24).

In their Brief, Appellants want to counter this alternate holding based on: 1) statements of counsel (which of course are not in evidence); and 2) a Judgment and Agreed Order that was not admitted into evidence and is not a part of the appellate record, but instead is just appended to the Brief with a request that this Court take judicial notice of the document. Judicial notice is defined as an acceptance by a court, “for purposes of convenience and without requiring ... proof, of a well-known and indisputable fact.” Black's Law Dictionary 863–64 (8th Ed. 2004). Traditionally, Tennessee courts have taken judicial notice of certain facts “as a substitute for the production of evidence.” Metro. Gov't of Nashville & Davidson County v. Shacklett, 554 S.W.2d 601, 605 (Tenn.1977). Resort to judicial notice is, however, subject to limitations, as indicated by Rule 201 of the Tennessee Rules of Evidence which provides in pertinent part as follows:

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute, in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

This Judgment and Agreed Order is not being offered for simple adjudicative facts, such as when it was entered, or that it was entered by the court. Instead, the Appellants want the court to consider the substance of the document. This is not an adjudicative fact. One cannot tell from the document offered if the Judgment and Agreed Order was later amended, appealed, or vacated. Appellants had no opportunity to cross-examine any witnesses relating to this document at trial. The trial court had no opportunity to consider this evidence.

Courts have approved the taking of judicial notice of filed documents so long as the purpose was “to establish **the fact of such litigation and related filings**,” rather than to establish the truth of the matters asserted in the other litigation. Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1388 (2d Cir.1992).

Here, it is not the existence of the prior court case that this Court is being asked to judicially notice, but rather the substance and holdings of the document itself. This is not proper. Judicial notice should not be used to supplement the appellate record where a party simply failed to introduce evidence at trial for whatever reason, as appears to be the case here. The Joe Wucher deposition mentioning LKM Group, LLC and the assignment of developer rights to it (Ex. 12, Tr. 21:1) was taken on February 19, 2013. (Ex 12). There was plenty of time before either of the two trials in this case for the Appellants to go get a certified copy of this 2010 Judgment and Agreed Order, to disclose it in discovery and then introduce it into evidence at trial. This Court should not allow the Appellants to try to use judicial notice as a “back door” attempt to clean up sloppy trial preparation.

Even if this document is allowed into evidence, the terms of the Judgment and Agreed Order do not address developer rights. The court orders only for LKM Group, LLC to relinquish certain real property and a fixture filing of unknown contents. LKM Group, LLC, even if this

Judgment and Agreed Order is considered, the record still shows that developer rights were never conveyed back to Renegade Resort, LLC.

3. Appellees had standing to question the developer rights of Moy Toy.

Despite being outside the scope of appeal, Appellants argue that Appellees have no standing to even bring this action given that there is conflict as to who the actual RMCC board is.

Appellants begin their argument on this topic by making much of how the trial court never even acknowledged their claim that to the defense of standing. However, Appellees would direct this Court to the trial court's April 27, 2020, Order Regarding Moy Toy's Motion to Reconsider and Amend Post Remand Issues. (T.R. at 2963). As the trial court did indeed succinctly address Appellants' entire argument on the subject, Appellees reproduce the same below:

The first argument made by Moy Toy is that the Renegade Mountain Community Club ("RMCC") is not properly before the Court and therefore, Plaintiffs have no authority to bring their lawsuit on behalf of the RMCC. The Court notes that both parties in each of their respective lawsuits sued on behalf of RMCC (The RMCC is a plaintiff in Case Number 527, and the RMCC is a plaintiff in Case Number 508). The previous Chancellor held in the initial trial that RMCC was controlled by Moy Toy and the other Defendants. However, the Court of Appeals reversed because the Chancellor's ruling was based on his finding that Moy Toy held developer rights in the community.

The Plaintiffs in their lawsuit (508) alleged that they were the properly elected board by virtue of the Special Election which took place on September 2, 2011. The Court of Appeals held that the determination of that issue must be made by the trial court on remand after hearing all of the evidence from both parties regarding the validity of the 2005 amendments.

There is no dispute that the RMCC was established as a homeowners' association for the Renegade Resort many years ago. One of the important issues to be answered on remand is which of the two parties will control the RMCC. Since neither party has been in control of the RMCC as a result of the ruling of the Court of Appeals, neither party could file the annual report that is required with the Secretary of State's Office. However, that issue can be corrected by whichever party that prevails on remand.

T.(R. at 2963-2964).

The trial court's ruling brings to light how galling Appellants' arguments on this subject are. In essence, Appellants claim that the Appellees are *de facto* barred from contesting that the Moy Toy Board is not legitimate because, according to the Moy Toy Board, the Plaintiffs were never truly the RMCC board and therefore never had standing to bring suit on its behalf. Such a circuitous argument should be quickly dismissed.

Appellants even go so far as to cite for their main evidence on this topic that "the HOA ("RMCC") didn't even exist; it was administratively dissolved in late 2019. (T.R. at 2832). Plaintiffs were therefore not 'members' of the corporation, or 'directors,' whether they elected to call themselves that or not." (Appellants' Brief p. 54). However, note the trial court's comment above that no party could file the annual report for 2019 as required by Secretary of State as a result of the ruling from this Court. Thus, according to Appellants, because the case was remanded for a determination as to who the proper board was, Appellees' claims should be dismissed because there was no board for them to represent the owners and the community in the interim.

A corporation can be reestablished after it is administratively dissolved as though it has never been dissolved. Under T.C.A. § 48-64-203(c), when the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution, and the corporation resumes carrying on its activities as if the administrative dissolution had never occurred. In Blaylock & Brown Const. Co., Inc. v. Collierville Bd. of Mayor and Aldermen, 23 S.W.3d 316 (Tenn. 1999), the standing of a homeowners association corporation that had at one time been administratively dissolved to be a party to an appeal was questioned. The court held that reinstatement of the homeowner's association's corporate status validated the association's corporate existence and privileges from revocation date, such that the association possessed the legal capacity to pursue its appeal of permitting decision under the Tennessee Air Quality Act. Id.

Reinstatement of the corporation after administrative dissolution is sufficient to maintaining good standing to file and a maintain lawsuit.

This is not a mere challenge of a corporate action as alleged in the Appellants' Brief. Of course, no owner of Moy Toy is going to contest its illegal assertion of developer rights in Renegade Resort. To suggest that such an internal challenge is required is absurd. It is not an internal corporate act being questioned, but rather the ability to control an outside community and a third-party owners' association. Appellants also argue for reasons unknown that relief through derivative action is inappropriate in this case, despite the fact that this is not a derivative action. (Brief at 54).

Appellees absolutely have standing to bring this lawsuit. They are not "strangers" to the issue of whether Moy Toy has developer rights. These are developer rights that Moy Toy wants to use in perpetuity to harm and undermine the community. Appellees include the RMCC, multiple individual property owners in Renegade Resort and officers and directors of the RMCC.

As noted in the Third Amended Complaint, Moy Toy, LLC purchased property and purported to obtain developer rights in Renegade Resort in 2010. (See Third Amended Complaint T.R. at 1389-1406). Moy Toy then began its reign of incompetence and malice towards the community, the RMCC and the owners in Renegade Resort. Owners and interested parties of Moy Toy purported to hold positions as officers and directors in the RMCC. Under the Moy Toy Board's leadership, no dues were being collected and no annual meeting was called in 2010. By 2011 Renegade Resort had fallen into a state of complete disrepair. On September 2, 2011, a special meeting was called, and new directors were elected, thus comprising the Owner Board. The trial court recognized that the September 2, 2011 meeting was legal and legitimate and that the Owner Board was retrospectively restored to its powers as of May 4, 2016. (T.R. 3743).

The Owner Board and owners in Renegade Resort brought this action after being directly and adversely impacted when Moy Toy tried to use its purported developer rights to starve out the RMCC and owners in Renegade Resort through the failure to provide essential services while claiming complete control of the RMCC board. The first trial court settled this issue and held that the Moy Toy Board had simply appointed itself as the Board with no legal right to do so, and this holding was not appealed. Indeed, the Owner Board sought and properly got from the trial court declaratory relief holding that it is the proper RMCC board and that the Moy Toy Board was not valid. Further, it found that Moy Toy did not have developer rights pursuant to chain of title. Under Moy Toy's version of the law, no one as a practical matter could challenge Moy Toy's developer rights, but many people and entities in Renegade Resort would be nevertheless subject to its rule as it attempted to run the owners out of the community. That is not the way standing works.

“The primary purpose of the Declaratory Judgment Act is ‘to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations....’...For a controversy to be justiciable, a real question rather than a theoretical one must be presented, and a legally protectable interest must be at stake.” Brown & Williamson Tobacco Corp. 18 S.W.3d at 193. Further, as noted above, a homeowner's association absolutely has standing to represent the interests of its members in court actions. River Plantation Homeowner's Ass'n, Inc., 587 S.W.3d at 767.

Here there is very much a real controversy at stake between two adverse parties. Both parties originally claimed entitlement to control of the RMCC and wrapped up in that controversy is whether Moy Toy has developer rights. Put simply, if Moy Toy is correct, then it is entitled to developer rights and using its 10:1 voting power could retake control of the RMCC Board.¹⁰ If the

¹⁰ The law of the case is that the Moy Toy Board was not properly elected previously.

Owner Board is correct, then it is entitled to control of the RMCC and Moy Toy does not have developer rights.

The standing argument by Appellants *presumes* that Moy Toy is correct and that the court will bear them out as the victor and that therefore the Owner Board has no standing. However, such an argument does not work where the court has properly recognized the Owner Board as the legal and controlling board for the RMCC. As the legitimate controlling board for RMCC, Appellees absolutely have standing to contest that Moy Toy is *not* the legitimate board and does not have developer rights.

This argument on standing is a red herring, was outside the scope of remand, and should be dismissed.

4. The Plaintiffs' actions in this case were not barred by any statute of limitations.

Curiously, Appellants wish to continue to insist that the six (6) year statute of limitations contained at T.C.A. § 28-3-109(a)(3) should apply to this case. This argument is curious because this Court has already ruled on this subject in *Haiser II*. Indeed, it was the main holding that caused this case to be remanded. And yet, Appellants did not appeal that decision to the Tennessee Supreme Court despite apparently wanting to contest it. Appellants tactical decision to not appeal the *Haiser II* decision is fatal to their efforts now to continue to argue for a statute of limitations defense.

In *Haiser II*, this Court unequivocally ruled that “§ 28-3-109(a)(3) is inapplicable to the case at bar. We therefore reverse the trial court's ruling that the 2005 Amendments were valid due to expiration of the six-year statute of limitations.” *Haiser II*, at 13.

Appellants' failure to appeal this decision made it binding:

An appellate court's final decision in a case establishes the “law of the case” when a case is remanded for further proceedings. This “law of the case” is

binding on the trial court during the remanded proceedings and is also binding on the appellate courts should a second appeal be taken after the trial court enters a judgment in response to the remand order.

Gray's Disposal Co. v. Metro. Gov't of Nashville, 318 S.W.3d 342, 348 (Tenn. 2010).

Appellants apparently now wish to argue that § 28-3-109(a)(3) can still apply. However, as noted above, this Court's ruling was clear: "§ 28-3-109(a)(3) is inapplicable to the case at bar." If Appellants wished to continue to argue that § 28-3-109(a)(3) had any applicability to this case, it was incumbent upon them to appeal and contest this Court's ruling. Yet they did not.

Indeed, Appellants' arguments completely ignore the holding that this Court already made. Appellants argue that the statute of limitations defense still exists simply because the 2005 Amendments were recorded, and Appellees did not bring a lawsuit challenging the same within the six (6) year window thereafter. (Appellants' Brief pp. 59-60) In making such an argument, Appellants completely disregard the law of the case as established by *Haiser II*:

The pleadings indicate that the Owner Board did not in its third amended complaint bring an action challenging the validity of the 2005 Amendments, which might have been potentially barred by a statute of limitations. Instead, the Owner Board simply challenged whether Moy Toy possessed developer's rights. In response, the Moy Toy Board relied upon the First 2005 Amendments as evidence of Moy Toy's alleged developer's rights in order to prove its affirmative defense that Moy Toy received the developer's rights pursuant to its agreement with Renegade Resort, LLC, which allegedly received such rights as a result of the First 2005 Amendments. As such, the Moy Toy Board bears the burden of proving the validity of the First 2005 Amendments.

Giving the most deference to Appellants, they appear to disagree with this Court that Appellees did not bring an action challenging the 2005 Amended Restrictive Covenants. Appellants argue that Appellees *did in fact* bring such an action and are therefore time barred. This is in direct conflict with the law of the case as established by *Haiser II*. If Appellants wished to make such an argument, the time to do so was on appeal from the decision in *Haiser II*. Because

they declined to make such an appeal, they are now barred from challenging the decision therein. This Honorable Court in addressing the repeated reliance on the statute of limitations defense by the Defendants in the 2018 Case stated... “we discern no language in Tennessee Code Annotated § 28-3-109(3) prohibiting courts from examining the validity of a contract or other document proffered as evidence but not specifically challenged in the action as defined by TCA § 28-3-1010.”

Defendants in the 508 Case strenuously and repeatedly have argued that statutes of limitations prevent Plaintiffs from “attacking valid deeds in the chain of title” relating to developer rights.

Here, Plaintiffs have only asked the Court to interpret the documents at issue to evaluate their legal effect, specifically to determine if developer rights were in fact transferred by deed or other supporting document that would establish the intent of the parties. Just as Moy Toy can look back in the chain of title in an attempt to show that its developer rights currently exist, so can the Plaintiffs look back to say that such developer rights do not exist. You have to look back to the source of the rights initially and then track the rights through various transfers to see if the rights survive to current times. There is no statute of limitation on determining the legal effect of a document and then applying that determination to facts in a lawsuit. The law of the case is that no statute of limitations applies to prevent the analysis that the Court of Appeals directed this Court to make in looking at the chain of title for developer rights in Renegade Resort.

5. The trial court did not err in holding that the members of the RMCC have an easement of enjoyment over certain common areas in Renegade Resort.

Appellants argue that the Trial Court has “improperly invaded Moy Toy’s fundamental right as a property owner to own, use and enjoy its property.” (Brief p. 61). The property at issue is “the entrance area, guard shack, platted roads, certain unplatted roads, sports park, pool and tennis

courts” in Renegade Resort. (T.R. 3747). Renegade Resort, since 1972, was a planned community that always provided various amenities and common areas to include a gated entrance area, guard shack, roads, sports park with tennis courts and a swimming pool, and a golf course. Except for the golf course, Moy Toy has record title to the underlying lands on all amenities and common areas. The trial court properly recognized, however, that such property is subject to the easements of enjoyment of the RMCC members.

a. *Alleged internal inconsistency.*

Appellants argue that there is an alleged fatal “internal inconsistency” with the trial court’s order because Moy Toy lacks developer rights on one hand, and, on the other hand, it is being held to the obligations of the developer because its common property is held in equity subject to rights of enjoyment of RNCC members. These positions are not inconsistent, but even if they were, the remedy would not be to strip RMCC owners of all rights in the common property in Renegade Resort as Appellants suggest. Moy Toy is not a developer, but nevertheless has to recognize RMCC members’ rights on enjoyment in the common properties because these rights of enjoyment of the common property **attached to the property at issue itself**, not to Moy Toy. No matter who owns this property, the rights will still exist. Under Moy Toy’s logic, an actual developer could be the record owner in common property (subject to a right to use the common property for the community recognized in recorded documents), and then the developer could just quitclaim the property to another entity; the rights of the community to use the property would just disappear, and the new owner could proceed as it wished to use the property freely. That is not the law.

Here, Moy Toy, as a successor in interest to the “developers” who previously owned the land where the common properties are located, should in equity, not be allowed to prevent RMCC members from using the common properties in Renegade Resort. To do so would discard the

vested rights of the RMCC members to use this property. Moy Toy knew or should have known that these common properties, referenced in all versions of Restrictive Covenants, were not properties where the owner could do whatever it pleased with the land. An equitable servitude exists with respect to such properties, requiring Moy Toy to allow them to be used and enjoyed in perpetuity by RMCC members.

Appellees rely on the case of Stracener v. Bailey, 737 S.W.2d 536 (Tenn. App. 1987). In that case, by designating an area as a “park” on various plats and selling lots according to the plats, the developer created a restriction on the use of the property for any purpose inconsistent with that designation. The Stracener case holds that if an equity is attached to a property by the owner, no one purchasing with notice of that equity, can stand in a different situation from the party from whom he purchases.

b. *Easements of enjoyment*

In their Brief, Appellants’ argument about easements of enjoyment of the RMCC members to use the common areas in Renegade Resort is that the trial court simply pulled these restrictions “out of thin air,” imposed the same on Appellants, and allegedly unfairly divested them of property rights. Appellants’ argument is primarily premised on their representation to this Court that the subject easements of enjoyment “are not described by covenant or other means; and were not part of the common plan of development.” (Brief p. 61). However, the trial court correctly held regarding such common area that “[a]n easement of enjoyment is identified in *every set of restrictions* and in the 1987 bylaws for members of the RMCC who are in good standing.” (T.R. 3747)(emphasis added). (See picture of sign stating as much at Ex. 14). Appellants spend more than ten (10) pages of their brief explaining all the ways that Appellants believe these restrictions do not exist. However, not only do they incorrectly state that the easements were not described in

the Restrictive Covenants, but they also do not address the legal ramifications of the fact that the easements of enjoyment on this property *were* in the Restrictive Covenants. Nor do they address the fact that members of the RMCC were promised and explicitly relied upon the ability to use and enjoy this common property when they purchased lots in the community and the fact that RMCC funds were used for many years to maintain this common property.

See the invalid 2005 First Amended Restrictive Covenants in pertinent part as follows:

ARTICLE VIII
PROPERTY RIGHTS OF THE COMMON PROPERTIES
Section 1 - Members' Easement of Enjoyment.

Subject to the provisions of Article IV, Article VI, and Section 3 of this Article VIII, every Member, so long as such Membership shall continue, shall have a right and easement of enjoyment in and to the Common Properties.... All other Owners of Lots or Living Units at Renegade Mountain, for so long as they pay all maintenance fees and Assessments due the Club and Social Membership Fees due Renegade, shall have a right and easement of enjoyment in and to the Common Properties. Such easements shall be appurtenant to and pass with the title to each Lot or Living Unit....

See also the applicable 1987 Amended Restrictive Covenants, in pertinent part as follows:

21. ARTICLE VIII - PROPERTY RIGHTS OF THE COMMON PROPERTIES, Section 1 - "Members' Easement of Enjoyment". The existing paragraph under Section 1 is deleted and in its place and stead is substituted the following language:

Subject to the provisions of Article IV, Article VI and Section 3 of this Article VIII, every member, so long as such membership shall continue shall have a right and easement of enjoyment in and to the Common Properties...All other owners of Lots or Living Units at Cumberland Gardens for so long as they pay all maintenance fee assessments due the Club and social membership fees due the Developer shall have a right and easement of enjoyment in and to the Common Properties and such easements shall be appurtenant to and pass with the title to each Lot or Living Unit....

And indeed, the 1972 Restrictive Covenants contain the following language:

ARTICLE-VIII
PROPERTY RIGHTS OF THE COMMON PROPERTIES¹¹

¹¹ The 1972 Restrictive Covenants define “common property” to include “[r]oads and streets, golf course, tennis courts, swimming pools, permanent parks, and permanent recreational plots.” The 1987 amendments do not alter this

Section 1. Members Easement of Enjoyment. Subject to the provisions of Article IV, Article VII and Section 3 of this Article VIII, every member, so long as such membership shall continue, shall have a right and easement of enjoyment in and to the Common Properties and such easement shall be appurtenant to and shall pass with the title to every Lot or Living Unit.

Appellants in their Brief ignore these express rights of enjoyment for RMCC members in the common properties at Renegade Resort as though this language is meaningless. This is not a situation where only the circumstances dictate that an implied easement should be recognized, the express **recorded governing documents** provide for such easements of enjoyment.

c. Implied easements

Appellants argue that there is no exact legal description of the easements of enjoyment in question anywhere in the record. While it is true that currently there is no precise plat or survey showing the location of the common properties, through continuous and prior use, it is widely acknowledged where they are located in the community. If Moy Toy would be reasonable in recognizing the right of RMCC members to use such common areas, agreed upon boundaries could easily be determined based on prior use.

The Appellants argue that the definition of “common property”, as listed in the 1987 and 2005 Restrictions (Ex. 4 and Ex. 5), requires that the common areas be platted, and if not platted, they do not exist. Nowhere in the law is any differentiation between platted and unplatted properties made when dealing with easements of enjoyment.

The language used in defining “common properties” in the 1972 Restrictive Covenants (Ex 3, Art I, Section 1, D) is ambiguous at best. However, the definition specifically states that the “roads and streets, golf course, tennis courts, permanent parks and permanent recreational plots...are common properties.” It also says that common properties refer to areas so designated

definition. All common property described by the trial court fits within these definitions.

on a plat (of which there are none in Renegade Resort). Ambiguities in restrictions are construed against the party who drafted them. Maxwell v. Land Developers, Inc., 485 S.W.2d 869, 874 (Tenn. 1972). Since the definition is ambiguous, one looks to intent. See Allstate Ins. Co. v. Watson, 196 S.W.3d 509 (Tenn. 2006). (If the words in contract are susceptible to more than one reasonable interpretation, the parties' intent cannot be determined by a literal interpretation of the language and the court must look to the intent of the parties to interpret the language at issue). The intent was certainly for these easements of enjoyment to be recognized in the common properties for RMCC members. Numerous RMCC members and Renegade Resort residents have testified that they, or RMCC members used the common properties in question (Tr. 182:25; Tr. 183:7; Tr. 234:21; Tr. 479:9; Tr. 611:19; Tr. 612:1; Tr. 706:9; Tr. 926:18); were promised the common properties in question as a condition of purchasing their property (Tr. 226:16; Tr. 616:15; Tr. 747:19; Tr. 926:23); relied on those promises (Tr. 226:16; Tr. 708:1; Tr. 927:24); that RMCC dues assessments were used to improve and maintain these common properties in question (Tr. 644:3; Tr. 717:4; Tr. 756:13; Tr. 761:23; Tr. 1083:3); and these common properties in question were not open to the public (Tr. 183:2; 532:19). Additional testimony (Tr. 636) was provided by Joel Matchak who authenticated 10 years of budgets he received (Ex. 19) which demonstrate that RMCC funds were programmed and spent on these common areas in question. He also testified (Tr. 613) to a sign that was present (Ex. 14) that stated the "Sports Park is for the exclusive use by RMCC members in Good standing." He also authenticated a sales brochure (Ex. 15) that shows most of the common properties in question being promoted by prior "developers." (Tr. 615). Attorney Joe Looney, who wrote the 1987 Amended Restrictive Covenants, testified that RMCC members were allowed to use common properties in question (Tr. 531:19); that the common properties in question were considered

common properties (Tr.532:21); and that he was unaware that these common properties in question were not platted. (Tr. 532:10).

This overwhelming evidence of intent for the RMCC members to use these common properties should not be negated because prior developers or alleged developers failed to formally plat the common properties. Common sense should be used to determine the exact boundaries for the easements of enjoyment the RMCC members have in the common properties based on prior use.

d. Exhibit 41

The trial court, in this bench trial, allowed Exhibit 41, Boundary Survey Map of Renegade Resort to be placed into evidence. Appellants now claim this was reversible error. The court indicated that Exhibit 41 was for identification and spatial orientation only so that there was a way to visualize the community and approximate where the common areas, roads, entrance, etc. were located. This was not a jury trial where you worry about proof being used for the wrong reasons. There is no indication that the trial court used Exhibit 41 for any purpose other than what it identified as its reasons for allowing the survey map into evidence to begin with. This was not error. If Appellants wanted a more technically accurate depiction of the community, they could have gotten a survey and introduced it into evidence, but they did not do so.

e. Easement by common plan of development

Tennessee courts recognize implied restrictive covenants where property was conveyed with restrictions under a general plan or scheme of development. Moy Toy wants to avoid the RMCC members' use of enjoyment on the common properties in Renegade Resort by arguing that prior developers or alleged developers in Renegade Resort were horrible, and therefore, there was no general plan or scheme of development in Renegade Resort. See Arthur v. Lake Tansi Village, Inc.

590 S.W.2d 923 (Tenn. 1979) (referencing reciprocal covenants in part when grantors pursue a course of conduct indicates a neighborhood scheme). However, the record supports the finding that a general plan existed in Renegade Resort since 1972 for a full service, extensive resort, with private roads and only one way in or out, and that such plan was generally followed until Moy Toy purchased its interests in Renegade Resort in 2010 and stopped all previously provided services to RMCC members. Additionally, budgets (Ex. 19), brochures (Ex. 15), and other documents to include the 1972 Restrictions (Ex. 3) set forth a general development plan. A general plan of development does not have to have been well executed to exist.

Language that Appellants rely on from the 1987 Amended Restrictive Covenants (Ex. 4) provides for the developer in Renegade Resort to be able to “build new or additional facilities, without designating those facilities as common properties.” First of all, Moy Toy is/was not the developer, so this language does not apply to them. Nevertheless, Appellants claim this language negates the fact that Renegade Resort for years was subject to a common plan of development because, according to them, under this language, a developer could just abandon the general plan upon a whim. Unfortunately for the Appellants, the language that they cite in support of this position allows the developer to **ADD TO, BUT NOT TAKE AWAY** facilities in the future for Renegade Resort. The record clearly reflects that all common properties at issue were built and in place before 1987 (Tr. 188:21) when this Amended Restrictive Covenant was recorded. This 1987 language cited did not allow the developer to abandon the existing general plan of development for the community, as suggested by the Appellants, who quote this language for the proposition that no implied easements can exist where “the developer has expressly retained the right to deviate from the plan.” See Brief, p. 67, citing Lutzak v. Phoenix, M-2015-02117-COA-R3-CV, 2017 WL 4685300 (Tenn. Ct App. Oct. 18, 2017).

Lutzak is clearly distinguishable. In Lutzak, the developer expressly “reserved the right to amend the Master Plan at any time...” Complaints were then made about the amending of the Master Plan and a claim of implied negative restrictive covenants by common plan of development was made. Such claims were rightfully rejected by the court. In the case at bar, there is no broad language as is found in Lutzak in any applicable governing documents allowing Moy Toy, even if it were the developer, to “amend the Master Plan at any time.” A “developer” in Renegade Resort could not even amend the Restrictive Covenants without a vote of the RMCC membership. There was no unilateral ability of a developer in Renegade Resort to abandon the common development plan. The argument that there was no common plan of development in Renegade Resort is clearly not supported by the record.

In Land Developers, Inc. v. Maxwell, 537 S.W.2d 904 (Tenn.1976), the Tennessee Supreme Court recognized the equitable principles involved in the division of a large tract into smaller parcels under a common plan of development. Each grantee's deed contained the restrictions imposed on the property. The court said:

Ordinarily when the owner of the tract of land subdivides it and sells different lots to separate grantees and puts in each deed restrictions upon the use of the property conveyed, in accordance with the general building, improvement or development plan, such restrictions may be enforced by any grantee against any other grantee. Likewise, the property remaining in the hands of the vendor may also be held in equity to be subject to a servitude so as not to be used in a manner different from that contained in the restrictions. Land Developers at 912.

For a covenant to bind remote grantees in equity, (1) it must “touch and concern” the land; (2) the original parties to the covenant must intend that it run with the land and bind remote grantees; and (3) the remote grantee must have had notice of the covenant. *Id.* at *1–*2 (quoting 5 Richard R. Powell & Patrick J. Rohan, The Law of Real Property § 673 (1991)). Gambrell v. Nivens, 275 S.W.3d 429, 437 (Tenn. App. 2008) (See Arthur v. Lake Tansi Vill., Inc., 590 S.W.2d

923, 928 (Tenn. 1979) for the proposition that “negative reciprocal easements [are] a form of restrictive covenants.”)

Regarding the “touch and concern” requirement, the court in Schodowski v. Tellico Vill. Prop. Owners Ass'n, Inc., No. E-2015 01145 COA-R3-CV, 2016 WL 1627895, (Tenn. Ct. App. Apr. 22, 2016) adopted the following definition from 20 AM. JUR. 2D Covenants, Etc. § 24 (2016) (citations omitted):

In order to meet the requirement that a covenant “touch and concern” the land, the covenant must be so related to the land as to enhance its value and confer a benefit upon it or, conversely, impose a burden on it. Other authority says that to touch and concern the land, a covenant must bear upon the use and enjoyment of the land and must be of the kind that an owner of an estate or interest in land may make because of his or her ownership right. One court has said that the clearest example of a covenant that “touches and concerns” the land is one which calls for a party to do, or refrain from doing, a physical act on the land.

Whether a particular covenant is sufficiently connected with the use of land to touch and concern it is in many cases a question of degree. Covenants that require grantees to pay assessments for upkeep of a particular parcel of property are real covenants which “touch and concern the land,” and which therefore “run with the land.”

Here, the easements of enjoyment at issue absolutely “touch and concern” the common property at issue. The subject common property was absolutely burdened by the right for the RMCC members to use and benefit from the same. Indeed, by virtue of the easement, RMCC members are entitled to drive upon the roads of the community, enter upon and utilize the sports park, and benefit from the safety provided by the guard shack. These are all things that the RMCC members relied upon when they purchased lots in the Renegade Resort community and these are all things that actually burden the land.

As for whether the original parties to the covenant intended that the covenant run with the land and bind remote grantees, the proof is in the covenants. Indeed, as was found by the court in

Gambrell 275 S.W.3d 429, the “most fundamental [element], is the covenant itself, as the equitable servitude arises out of a promise.” In that case, the court found that although there was no explicit restriction enjoining the defendants from constructing a commercial wedding chapel on their property, the court found that the parties had contemplated the restriction and that the defendant “never believed his property to be unencumbered.”

The prior holders of the land that comprises the common properties in Renegade Resort absolutely believed the entrance area, guard shack, platted roads, certain unplatted roads, sports park, pool, and tennis courts were common property. They used the RMCC dues for upkeep of the same, and the members used the facilities. (Ex. 14). Residents relied upon that promise and previous holders of the land honored the promise. (T.R. 927:17, 245:19, 247:17, 627:20, 534:20, 926:23, 708:1, 749:19, 226:16, 927:25). The subject property was absolutely intended to be bound with a continuing easement of enjoyment for RMCC members.

As to the final element, whether Moy Toy had notice of the covenant, Moy Toy cannot bury its head in the sand and claim no knowledge of the same. Indeed, Appellees would argue that the very existence and character of the common property in question (i.e., the entrance area, guard shack, platted roads, certain unplatted roads, sports park, pool, and tennis courts) is indicative of common property. Moy Toy should be deemed to have been on notice that these areas were common based on their location in the community, usage *by* the community, and, more importantly, the fact that RMCC dues had been used for their upkeep. Moy Toy knew about the common property because it closed all common properties and refused entry to RMCC members in 2010. (Tr. 194:11, 197:5, 197:10, 480:3, 491:2, 627:20). It is completely unreasonable to assume that these properties were held unencumbered for Moy Toy’s benefit only. And indeed, based on the recorded restrictions, community practices, and the fact that RMCC dues were used for upkeep

of the subject properties, Moy Toy should be deemed to have had notice that the subject property was common and that an easement of enjoyment existed for the same. Moy Toy principal Phillip Geuttler was involved with Renegade Resort since 1999. See Exhibits 62-64 which are littered with references to the existing common property.

Appellees submit that the evidence here absolutely establishes that there was an implied (if not explicit) continuing intention to establish an easement of enjoyment on common properties purchased by Moy Toy in Renegade Resort . The fact that the subject common properties are not explicitly listed on a plat does not change the fact that: the restrictions explicitly identified the subject types of property as common property and that there was an easement of enjoyment on the same; RMCC members used and paid dues for the upkeep of the subject common property for decades; and all prior owners of that property believed the same to be common property. (See T.R. 3746-3747).

Recognizing rights in common property held by others is nothing new or radical. In the case Austa La Vista, LLC v. Mariner's Pointe Interval Owners Ass'n, 173 S.W.3d 786 (Tenn. App. 2005), this Honorable Court recognized that in equity, timeshare owners' association members had a right to use a nearby lake that was then owned by another entity. The lake had been advertised as an amenity of the community when the timeshare property and the lake had been under prior common ownership. The trial court in that case found that the lake was clearly intended to be an amenity pursuant to the applicable master deed and related documents, and therefore, the timeshare owner's association members had a right to use the lake as long as they paid the required reasonable fee for doing so as set forth in the governing documents. The fact that the fee interest in the lake property was owned by a different entity did not prevent this relief from being afforded.

The owners of the lake property could not escape the prior easements of use put on their property in favor of association members.

Similarly, in the case at bar, the members of the RMCC were promised use of the common properties, actually used the common area property, and paid dues for such a privilege. Moy Toy cannot now deny the rights of the RMCC members to use and enjoy the common properties in Renegade Resort that were clearly intended in recorded documents to be amenities for the community.

6. The fact that the September 2, 2011 special called meeting of the RMCC members was a valid meeting was supported by a preponderance of the evidence; such evidence was given proper effect by the trial court, and there was nothing illogical about the trial court's decision declaring this meeting to have been legally called and held.

In their Brief, the Appellants half-heartedly argue that the September 2, 2021, special called meeting of the RMCC members was not properly called or conducted and therefore the trial court's decision that this meeting was legal and of effect was in error.

The basis for their first argument is that since there has been no developer in Renegade Resort since 1991 and since no properties can be added to the development without a developer, that the meeting was improperly held because the owners of these new unidentified properties did not qualify for membership, did not have to pay dues to the RMCC, and should not have voted at the special called meeting on September 22, 2011. However, both expert witnesses testified that no new properties had been added since 1991 to Renegade Resort. (Tr. 322:12). (R. 2009:16) The Appellants have failed to reference a single instance of land being added to the community after 1991, or a single owner of such added lands that allegedly voted in the September 2, 2011 special called meeting. No such instance exists. Therefore, the Appellants' argument must fail because its entire premise is contradicted in the record.

It is hard to understand the Appellants' second argument, but it seems to be that allegedly the September 2, 2011 RMCC meeting was held under the 2005 By-laws which were later held to not be valid. A fundamental problem with this argument is that the record clearly shows that the September 2, 2011 meeting was held according to the 1987 By-laws *not* the 2005 By-laws. (*See* T.R. 3792 referring to 1987 By-Laws as being used at the meeting) (Ex. 45, Ex. D).

There is no legal requirement that a not-for-profit corporation meeting declare the specific bylaws that the meeting is operating under. There is no law that if those bylaws end up being void at a later date, that such a meeting is automatically invalidated as suggested by the Appellants. That is not the way the law works. The Appellants so desperately want to escape the results of their bad actions by reliance on a legal technicality, and this is just another example of that effort. However, the record directly contradicts the factual premise of their argument. Additionally, this theory was not advanced during the trial and was waived.

In any event, the trial court did not err in finding that the RMCC Special meeting, held on September 2, 2011, and the resulting actions, were valid and of legal effect.

III. The Appellees raise two issues on appeal: 1) that the trial court erred in the language used to define common properties between two orders it issued; and 2) that the trial court erred in ordering that the golf course was of no interest to the Plaintiffs.

There exists an inconsistency between the Final Order Re: Motion to Alter and Amend, entered by the Court on June 28, 2021 (T.R. 3784), and the original Memorandum and Order, entered by the Court on April 5, 2021 (T.R. 3718), regarding the language used to describe the common properties of Renegade Resort. Specifically, in the Memorandum and Order, the Court recognized that RMCC Members had an easement of enjoyment over multiple common areas, further listed in the Memorandum and Order as platted roads, certain unplatted roads, entrance area, golf course, swimming pool, tennis courts, the sports park and guard shack.

Both the Plaintiffs and Defendants filed Motions to Alter or Amend the Memorandum and Order. (T.R. 3755/3766 respectively). The Defendant's Motion argued that, as unplatted property, there were no boundaries (survey) associated with the sports park which contains the pool, tennis courts, playground and picnic areas. In its Final Order Re Motion to Alter and Amend (T.R. 3784), the Court reiterated its previous ruling that the RMCC Members are entitled in equity to the use and enjoyment of the promised common properties (presumably the same listing as used in the Memorandum and Order), regardless of whether they are platted, and that the Plaintiffs had previously proven the underlying facts affording this conclusion by clear and convincing evidence.

However, the very next sentence in the Order states: "These areas are identified as the pool, tennis courts and sports park. However, the Plaintiffs easement is limited to those specific areas and a reasonable amount of land to allow ingress and egress." This language, by error or omission, leaves out areas previously designated as common property in the original Memorandum and Order (T.R. 3718, p. 30), namely platted roads, certain unplatted roads, entrance area and the guard shack. This latest language could be misconstrued to limit the Plaintiffs easement of use and enjoyment to only those areas discussed (pool, tennis courts, sports park) to the exclusion of other areas previously Ordered as common property (platted roads, certain unplatted roads, entrance area and the guard shack).

Plaintiffs filed a Motion to Alter or Amend Final Order Entered on June 28, 2021 (T.R. 3792) on July 28, 2021, which requested the Court to clarify the language used to identify the common property for Renegade Resort and the RMCC Members easement of use and enjoyment. In an Order, entered on August 6, 2021 (T.R. 3801), the Court stated that it received and reviewed the motion, **was in agreement** with the issues raised by the Movants (emphasis added), but could

not hear the Motion because the Appellants had already filed their notice of appeal. The Appellees now seek clarification and resolution by the Appellate Court in this matter.

The issue about the golf course is where the language of the Court's Orders is inconsistent, confusing, and incorrect. There exists an inaccuracy between the Final Order Re: Motion to Alter and Amend, entered by the Court on June 28, 2021 (T.R. 3784), the original Memorandum and Order, entered by the Court on April 5, 2021 (T.R. 3718), and the Trial Transcripts (Tr. 1165:7, 2115:11), regarding the language used to describe the golf course as being/not being common property in Renegade Resort. Specifically, in the Memorandum and Order, the Court recognized that RMCC Members had an easement of enjoyment over multiple common areas, further listed in the Memorandum and Order as platted roads, certain unplatted roads, entrance area, **golf course** (emphasis added), swimming pool, tennis courts, the sports park and guard shack.

Both the Plaintiffs and Defendants filed Motions to Alter or Amend the Memorandum and Order. (T.R. 3755/3766 respectively). The Defendants' Motion argued a number of issues, the first of which is "Golf Course Property Stipulated to not be an Issue [for trial]." (T.R. 3774). While the transcript of the Motion Hearing is not a part of the Record, the Plaintiffs concurred and previously stipulated that the Golf Course was not an issue for this trial (see trial transcript Tr. 1165:7). Both parties agreed that the Memorandum and Order incorrectly listed the golf course as common property identified in this trial. (T.R. 3718, p. 30). However, in the Court's Final Order Re Motion to Alter and Amend (T.R. 3784), the Court went further in its language by adding that: 1) "both parties agreed that the golf course property was stipulated to not be common in Renegade Resort," and 2) "Plaintiffs have no interest in the former golf course property." Both of these statements are not correct. The Record shows that the Plaintiffs only stipulated that the golf course was not an issue for this trial (Tr. 1165:7) and the Court concurred. (Tr. 1165:17). The Golf Course

is not owned by any of the Defendants (Tr. 1165: 10-13), the golf course was not included in the original Complaint (T.R. 3) or any subsequent amended complaint, and no relief was sought relating to the golf course. Neither the owners of the golf course nor the Plaintiffs had any chance to provide legal arguments as to whether the golf course is, or is not, common property in Renegade Resort, or whether the RMCC and Plaintiffs have an interest in same.

Plaintiffs filed a Motion to Alter or Amend Final Order Entered on June 28, 2021 (T.R. 3792) on July 28, 2021, which requested that 1) the Court clarify the language of the stipulation regarding the golf course property, and 2) strike the language regarding the golf course not being common property and the Plaintiffs having no interest in same.

In an Order, entered on August 6, 2021 (T.R. 3801), the Court stated that it received and reviewed the motion, **was in agreement with the issues raised by the Movants** (emphasis added), but could not hear the Motion because the Appellants had already filed a notice of appeal, removing the trial court's jurisdiction. The Appellees now seek clarification and resolution by the Appellate Court in this matter.

CONCLUSION

Appellees respectfully request that the trial court’s order be affirmed in all respects except for the two issues identified by the Appellees as needing further clarification relating to the identity of the common areas and the statements made in an order relating to the golf course that were not supported by the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing document filed in this case via CM/ECF has been served electronically on the following counsel of record:

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This 25th day of April, 2022.

/s/ Melanie E. Davis

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