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IN THE

Supreme Court of Virginia

RECORD NO. 181037

SANJAY SAINANI, *et al.*,

Appellants,

v.

BELMONT GLEN
HOMEOWNERS ASSOCIATION, INC.,

Appellee.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE

Table of Authorities iii

Statement of the Case.....1

Statement of Facts 2

Authorities and Argument.....5

Conclusion 42

Statement Required 43

TABLE OF AUTHORITIES

CASES **PAGE**

Acura v. Letourneau,
260 Va. 180, 531 S.E.2d 316 (2001) 39
Ames v. Am. Nat'l Bank of Portsmouth,
163 Va. 1, 176 S.E.2d 204 (1934) 21, 22
Brandon v. Cox,
284 Va. 251, 736 S.E.2d 695 (2012) 31
Britt Const. Inc., v. Magazzine Clean, LLC,
271 Va. 58, 623 S.E.2d 886 (2006) 41
Condo. Services, Inc., v. First Owners' Ass'n of Forty Six Hundred Condo., Inc., 281 Va. 561, 709 S.E.2d 163 (2011)..... 31
Ed A. Wilson, Inc. v. Gen. Servs. Admin.,
126 F.3d 1406 (Fed. Cir. 1997)..... 38
Friedberg v. Riverpoint Bldg. Comm.,
218 Va. 659, 239 S.E.2d 106 (1977) 20
Holmes v. LG Marion Corp.,
258 Va. 473, 521 S.E.2d 528 (1999) 35
McDonald v. Commonwealth,
274 Va. 249, 645 S.E.2d 918 (2007) 30
Mut. Reserve Fund Life Ass'n v. Taylor,
99 Va. 208, 37 S.E. 854 (1901) 11
Nielsen Co. (US), LLC v. Cnty. Bd. Of Arlington Cnty,
289 Va. 79, 767 S.E.2d 1 (2015) 22
Norfolk Southern Ry. Co. v. E.A. Breeden, Inc.,
287 Va. 456, 756 S.E.2d 420 (2014) 32
Quadros & Associates, P.C. v. City of Hampton,
268 Va. 50, 597 S.E.2d 90 (2004) 21, 27
Riordan v. Hale,
215 Va. 638, 212 S.E.2d 65 (1975) 19-20
Rodriguez v. Taylor,
569 F.2d 1231 (3d Cir. 1977)..... 38
Schickling v. Aspinall,
235 Va. 472, 369 S.E.2d 172 (1988) 39
Schuiling v. Harris,
286 Va. 187, 747 S.E.2d 833 (2013) 16-17

Shepherd v. Davis,
265 Va. 108, 574 S.E.2d 514 (2003) 34-35
Smith v. Sink,
247 Va. 423, 442 S.E.2d 646 (1994) 6, 29
State Farm Mut. Auto Inc. v. Bowers,
255 Va. 581, 500 S.E.2d 212 (1998) 36
Ted Lansing Supply Co. v. Royal Aluminum and Constr. Corp.,
221 Va. 1139, 277 S.E.2d 228 (1981) 6
Transcontinental Insurance Company v. RBMW, Inc.,
262 Va. 502, 551 S.E.2d 313 (2001) 6
Tvardek v. Powhatan Village Homeowners Ass'n, Inc.,
291 Va. 269, 784 S.E.2d 280 (2016) 8
Unit Owners Ass'n of Buildamerica-1 v. Gillman,
223 Va. 752, 292 S.E.2d 378 (1982) 26
Unit Owners Ass'n v. Gillman,
223 Va. 752, 292 S.E.2d 378 (1982) 20, 22
Ward's Equip., Inc. v. New Holland N. America, Inc.,
254 Va. 379, 493 S.E.2d 516 (1997) 39
Waynesboro Village LLC, v. BMC Properties,
255 Va. 75, 496 S.E.2d 64 (1998) 19
White v. Center Point Homeowners Assoc.,
17 Pa. D & C 5th 67 2010 WL 5860739 (2010) 37

STATUTES AND RULES OF COURT

Va. Code Ann. § 13.1-847(G) 10
Va. Code Ann. § 13.1-894(C)(6) 13
Va. Code Ann. § 55-513.....32
Va. Code Ann. § 55-515.....34, 40, 41, 42
Va. Code Ann. § 55-515(A).....34, 35, 40, 41
Va. Code Ann. § 55-515.1(D).....8
Va. Code Ann. § 55-515.1(E).....8, 9
Va. Code Ann. § 55-515.1(F).....8

Rule 5:25.....5, 31

STATEMENT OF THE CASE

The Appellee, Belmont Glen Homeowners Association, Inc., ("Belmont Glen") disagrees with the Statement of the Case and Material Proceedings Below made by the Appellants SanJay and Sona Sainani ("Sainanis") in so far as it fails to include a complete statement of the claims brought against the Sainanis. Belmont Glen's claims against the Sainanis included claims for unpaid monetary penalties and injunctive relief pursuant to both the July/August 2014 Declaration and, in the alternative, the Original Declaration applicable to the Sainanis' property. (JA 71-82). The trial court found, in ruling on the Sainanis' counterclaim, that Belmont Glen acted within its authority in taking enforcement actions against the Sainanis under either the Original Declaration or the July/August 2014 Declarations. (JA 519: 9-13).

Additionally, the Sainanis failed to include the details regarding Counts I and II of their Counterclaim and the trial court's justification for dismissing such Counts. In Counts I and II of their Counterclaim, the Sainanis sought a declaratory judgment and related injunctive relief based on their contention that the Seasonal Guidelines adopted by Belmont Glen were *ultra vires,* beyond the authority provided for in the Declaration, and should not be enforced further throughout the community. (JA 40-42). The

trial court sustained Belmont Glen's demurrer and dismissed Counts I and II on the basis that the trial court had only derivative jurisdiction in this appeal from the General District Court and could not consider these claims. (JA 61). The Sainanis have not appealed this decision.

STATEMENT OF FACTS

Belmont Glen offers the following statement of facts to correct and/or amplify the statement provided in the Appellant's Opening Brief:

Belmont Glen is a property owners association charged, amongst other responsibilities, with maintaining property values and aesthetic appearances within the Belmont Glen community. (JA 812), (JA 229). The Sainanis are owners in the community and subject to the governing documents regulating the community and their Lot. (JA 633)The governing documents include an Amended and Restated Declaration ("July/August 2014 Declaration")") that authorizes Belmont Glen to adopt such rules and regulations as it considers necessary and appropriate, particularly with regard to the external design, appearance and location of improvements so as to preserve and enhance property values. *See* Article IX, Section 8 (JA 924) and Article VIII, Section 5 (JA 919), (JA 229).

The July/August 2014 Declaration also includes specific limitations on the use of Lots, including a prohibition on any "modification or alteration of

any Lot, Structure, or any portion thereof . . . made, installed, constructed, erected, placed, altered and/or externally improved" without the consent of Belmont Glen. *See id.* at Article IX, Section 4 (JA 922). Article IX, Section 3(C) (JA 921)of the 2014 Amended Declaration provides that exterior lighting which results in an adverse visual impact to adjacent Lots is prohibited. This subsection also gives Belmont Glen the right to determine whether exterior lighting results in an adverse visual impact.

In an effort to keep owners from having to submit applications for every holiday and pursuant to its authority as the arbiter of "adverse visual impact," Belmont Glen adopted certain architectural standards that designated holiday periods during which tasteful seasonal decorations, including seasonal lighting, could be installed temporarily on Lots ("Seasonal Guidelines"). *See* (JA 130), & (JA 131), (JA 238 & JA 244).

Notwithstanding the limitations of the governing documents and the requirements of the Seasonal Guidelines, the Sainanis installed holiday or seasonal lighting on the exterior of their residence on days not authorized in the Seasonal Guidelines and failed to turn these lights of nightly by midnight as required by the Seasonal Guidelines. (JA 246-247). Belmont Glen received complaints from many other owners regarding the Sainanis' lights. *Id*.

Belmont Glen sent notices of violation to the Sainanis on September 2, 2012, October 14, 2014, and October 17, 2014. *See* (JA 1038–1040), (JA 352, 353, 358). Belmont Glen held a hearing, after advance notice to the Sainanis, on November 5, 2014. *See* (JA 1042), (JA 361). The Sainanis failed to appear and Belmont Glen determined to impose covenant violation charges against them at the rate of $10 per day, which result was relayed to the Sainanis by a certified letter. *See id.*

The Sainanis failed to correct their covenant violations and subsequent notices of violation were sent on December 16, 2014, October 16, 2015, December 4, 2015, December 31, 2015, January 15, 2016, and February 4, 2016. *See* (JA 1043, 1044, 1045, 1048, 1049, 1050), (JA 362, 363, 364, 366, 368, 369). Mr. Sainani admitted to having received all this correspondence, but stated that he did not open any of the letters. (JA 430). He also admitted to having his lights up from mid-September through the end of April every year. (JA 425). He also acknowledged that, despite the importance of the lights to his family and the requirements of the restrictive covenants, having never submitted an application for his seasonal lights. (JA 429).

In this case, the Sainanis contend, for the first time since Belmont Glen began contacting them about their lights in 2014, that the July/August

2014 Declaration is ineffective and cannot, therefore, serve as the basis of the rules and restrictive covenants now being enforced against them.

AUTHORITIES AND ARGUMENT

This case began as, and at its core is, about a property owners association attempting to enforce its reasonable restrictions on temporary exterior lighting in a consistent manner across the property by requiring the Sainanis to comply in the same way all other owners are obliged to do. In their pleadings and before the trial court, the defense raised by the Sainanis was limited to challenging when the July/August 2014 Declaration is effective and challenging the reasonableness of rules adopted. On appeal, however, the Sainanis seek to broadly expand the scope of this case and the issues presented in an attempt to force a reversal of the trial court. Rule 5:25 of the Rules of the Virginia Supreme Court prohibits such enlargement of a case on appeal. It is necessary, therefore, to ignore the Sainanis' invitation to make this case something other than what was tried to the trial court and to focus instead on the issues properly pled and litigated. To do otherwise not only violates Rule 5:25 but prejudices Belmont Glen, which did not have the opportunity to fully litigate and defend these added issues.

1. The Sainanis failed to plead and timely raise a challenge to the validity of the July/August 2014 Declaration and, therefore,

Assignment of Error No. 1 is not properly before this Court. (Assignment of Error No. 1).

a. Standard of Review

Interpretation of the provisions of a contract presents a legal question and is subject to *de novo* review by the Court. *Transcontinental Insurance Company v. RBMW, Inc.,* 262 Va. 502, 510, 551 S.E.2d 313, 317 (2001).

b. Law and Argument

The Sainanis' first assignment of error alleges that the trial court erred in determining that the July/August 2014 Declaration was effective and enforceable against the Sainanis. They argue that the trial court erred in making this finding because (a) the Original Declaration was not properly amended and (b) the Plan of Merger adopted in April, 2014, could not be used to approve the amendment of the declaration.

As a preliminary matter, the trial court's determination that the July/August 2014 Declaration could be enforced against the Sainanis was based, in part, upon the fact that the Sainanis did not plead a claim to have the July/August 2014 Declaration declared void or unenforceable or to void the 2014 Plan of Merger. (JA 534-540). A court lacks authority to enter a judgment based on a right which has not been pled or claimed. *Smith v. Sink,* 247 Va. 423, 425, 442 S.E.2d 646, 647 (1994); *Ted Lansing Supply Co. v. Royal Aluminum and Constr. Corp.*, 221 Va. 1139, 1141, 277 S.E.2d

228, 229 (1981). The Amended Counterclaim included no plea for relief related to either the July/August 2014 Declaration or the Plan of Merger. At best, the Answer and Grounds of Defense filed by the Sainanis asserted that the July/August 2014 Declaration is ineffective and that the 2014 Plan of Merger was *ultra vires*. (JA 91-98, ¶¶ 60-61).

As pled, the Sainanis' Answer and Grounds of Defense is insufficient to plead for the relief they now seek. Specifically, they ask this Court to reverse the trial court and to determine that the July/August 2014 Declaration is void because it was improperly adopted by the membership or improperly recorded in the land records. But their trial court pleadings seek only a determination that the July/August 2014 Declaration is not effective. An amendment is "effective" according to the Original Declaration as of the date of recording of an amendment. *See* Section 13.01 of the Original Declaration. (JA 667). The Sainanis' pleadings, therefore, only asked the trial court to determine that the July/August 2014 Declaration is ineffective because it is not recorded.

Despite the very limited scope of their pleadings, the Sainanis now ask this Court to void the July/August 2014 Declaration based on their contention that the Members did not properly approve the amendments, as recorded. Their arguments far exceed their pleadings. Because the

Sainanis failed to plead these claims either in their Counterclaim or in their Answer and Grounds of Defense, they are not entitled to such relief. The trial court, therefore, correctly determined that the Sainanis could not rise above their pleadings and dismissed their arguments related to the adoption of the July/August 2014 Declaration.

Even had the Sainanis properly pled their claims that the July/August 2014 Declaration was not properly voted on by the membership or recorded in the land records, their claims would have been untimely. Va. Code Ann. § 55-515.1(E) provides that "[a]n action to challenge the validity of an amendment adopted by the association may not be brought more than one year after the amendment is effective." An amendment is effective on the date it is recorded in land records. Section 13.01 of the Original Declaration; *cf.* Va. Code Ann. 55-515.1(F); *Tvardek v. Powhatan Village Homeowners Ass'n, Inc.,* 291 Va. 269, 784 S.E.2d 280, 286 (2016)(including an additional requirement when an amendment is adopted pursuant to Va. Code Ann. § 55-515.1(D) requiring recordation of a certificate from an officer specifying that the requisite majority of lot owners signed the amendment). Article XVIII, Section 3 of the July/August 2014 Declaration states

> The party executing this Declaration on behalf of BGHA covenants represents and warrants that this Declaration has

> been authorized and approved in full accordance with Article 13.01 of the BGHOA Declaration and Section 55-515.1 of the Code of Virginia.

Therefore, the July/August 2014 Declaration is effective as of August 5, 2014 and any action to challenge the amendment, must have been brought by August 5, 2015.

The Sainanis did not file their Answer and Grounds of Defense until May 19, 2017. (JA 91-98) Because this is more than two years beyond the time the July/August 2014 Declaration became effective, any claim by the Sainanis that it is invalid is untimely pursuant to § 55-515.1(E). The Sainanis arguments here challenging the validity of the amendment and asserting that the trial court erred in determining that the July/August 2014 Declaration is effective are also untimely and barred by the statute of limitations provided for in § 55-515.1(E).

For these reasons, any challenge made by the Sainanis to the validity of the amendment to the Belmont Glen Declaration is barred by the statute of limitations found in Va. Code Ann. § 55-515.1(E).

2. Even had the Sainanis' timely raised their challenge, Belmont Glen properly adopted the restrictive covenants enforced against the Sainanis.

Even if the Sainanis' challenge to the July/August 2014 Declaration is timely and even if they included a claim to void these amendments in their

pleadings, the Members of Belmont Glen properly approved the provisions of the July/August 2014 Declaration that are now being enforced against the Sainanis.

a. The trial court correctly concluded that the July/August 2014 Declaration is effective against the Sainanis to enjoin their use of exterior holiday lighting in violation of the Seasonal Guidelines.

i. The Members properly approved the amendments to the Original Declaration.

In an effort to disenfranchise their fellow Members, and avoid the restrictive covenants applicable to their Lot, the Sainanis contend that the July/August 2014 Declaration did not receive the requisite votes from Members needed for amendment pursuant to Section 13.01 of the Original Declaration.

The Sainanis contend first that the proxies submitted by the Members in favor of the merger did not constitute a vote in favor of the July/August 2014 Declaration. Pursuant to Va. Code Ann. § 13.1-847(G), a "corporation is entitled to accept a proxy's vote or other action as that of the member making the appointment" subject to "any express limitation on the proxy's authority stated in the appointment." A proxy holder is charged with acting "for the interest of his principal to the best of the agent's judgment

and belief." *Mut. Reserve Fund Life Ass'n v. Taylor*, 99 Va. 208, 37 S.E. 854, 858 (1901).

While Belmont Glen does not dispute that there is a typo in the proxy, which misstates the surviving entity of the merger, it is evident both from the face of the proxy and from the supporting materials sent to the Members with the Notice of Meeting, that the Members marking "Approved" on the proxies intended to approve the amendments to the Original Declaration and that the proxy holder acted properly in exercising the Members' votes in favor of such amendments.

On the face of the proxy, the endorsing Member approves not only the Plan of Merger, but authorizes the Board of Directors to execute the Amended and Restated Declaration for Belmont Glen. (JA 678). The Sainanis contend that authorizing execution of the amendments is not the same as approving the amendments, but this conclusion results in an absurdity. If the Members authorizing the execution of the amendments do not mean to approve the amendments, then there would be no point in granting authority for execution of the amendments. Moreover, this conclusion would require the proxy holder to ignore the interests of the Member, who sought to approve the Plan of Merger and the execution of the amendments in furtherance of that Plan.

The 87% of Members voting in favor of the Plan of Merger and the execution of the Amended and Restated Declaration knew and clearly intended that their proxies be exercised to approve the amendments to the Original Declaration, as the import of their vote was spelled out in the materials provided in the Notice of Meeting. The Notice included the proposed amendments and advised Members that approval of the Plan of Merger would constitute an approval of the termination of the Original Declaration and its replacement with the amendments. (JA 676). Pursuant to the Terms of Merger, approval of the merger included approval of the replacement of the Original Declaration with the Belmont Glen Village Declaration and approval of certain amendments of that document. (JA 682-87). At trial, the Sainanis presented no evidence that the Members were deceived into voting for the Plan of Merger or that they did not intend to approve the amendment to the Original Declaration. Instead, both the face of the proxy and the supporting materials evidence the Members intent for their proxies to be exercised as an approval of the proposed amendments to the Original Declaration.

The Sainanis also assert that the amendments to the Original Declaration are ineffective because Section 13.01 requires approval and recording of an "instrument" amending the Original Declaration, which they

contend cannot be done "vicariously." Without conceding that the Members' proxies constitute a vicarious as opposed to direct approval of the amendments, no support exists for the conclusion that vicarious approval is contrary to the requirements of Section 13.01 or the Virginia Nonstock Corporation Act (the "Nonstock Act"), which governs mergers. Section 13.01 provides in relevant part that the Original Declaration "may be amended by an instrument approved by not less than seventy-five percent of the Members voting at a meeting of the Members." Va. Code Ann. § 13.1-894(C)(6) of the Nonstock Act provides that the plan of merger shall include as part of its terms "any other provisions required by the laws under which any party to the merger is organized or by which it is governed or required by the articles of incorporation or organic document of any such party."

Section 7 of the terms of the Plan of Merger requires, as a condition of the merger, the amendment of the Original Declaration to be prepared and recorded which substitutes the Belmont Glen Village Declaration for the Original Declaration. (JA 686-87). An approval of the Plan of Merger by a Member constitutes approval of the terms of the Plan, including in this case, approval of the instrument that is the amendment of the Original Declaration. The amendments to the Original Declaration are, therefore,

incorporated into the Plan of Merger by reference and being voted on by the Members approving the Plan.

The Sainanis are encouraging this Court to disregard the Members' overwhelming approval of the amendments to the Original Declaration because, in essence, they believe the proxy and Plan of Merger are less artfully phrased than they would prefer. In doing so, however, they encourage a great harm: specifically, to disenfranchise the 87% of Members who were clearly informed about the import of their vote and clearly intended that the Original Declaration be amended and that such amendment be recorded as valid restrictive covenants applying to their lots. These Members approved the amendments to the Original Declaration, both by the terms of the proxy and by the terms of the Plan of Merger.

ii. The Restrictive Covenants Enforced Against the Sainanis Were Approved by the Members in April, 2014.

The Sainanis identify several provisions of the Amended and Restated Declaration circulated to the Members in April, 2014 ("April 2014 Draft Declaration") that differ from the Amended and Restated Declaration recorded in July and August 2014 and rely upon these provisions to argue

that the entirety of the July and August 2014 Declarations must be invalid.[1] The different provisions identified, however, are not the provisions being enforced against the Sainanis in this case and so do not affect the outcome here.

In its Amended Bill of Particulars, Belmont Glen claimed that it was entitled to injunctive relief and to recover covenant violation charges against the Sainanis for their violations of the restrictive covenants contained in Article I § 4, Article VI § 1, Article VII § 11, Article VIII, Article IX §§ 3, 4, and 8, and Article XV §§ 1 and 2 of the August 2014 Declaration.[2] (JA 72-74). The language of these provisions is unchanged

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[1] Belmont Glen disagrees with the Sainanis' contention that the identified provisions are materially different than the amendments approved by the Members, but that question is not relevant to this appeal as Belmont Glen did not seek to enforce these provisions against the Sainanis.

[2] The full text of each such provision of the August 2014 Declaration can be found in the Appendix as follows: Article 1 § 4 (JA 903), Article VI § 1 (JA 910-12), Article VII § 11 (JA 916-17), Article VIII (JA 918-20), Article IX §§ 3-4 (JA 921-22), Article IX § 8 (JA 924), and Article XV §§1-2 (JA 931-33).

from the amendments presented to the Members for approval at the April, 2014 meeting.[3]

Because the provisions that Belmont Glen sought to enforce against the Sainanis are identical to those provisions approved as amendments as part of the April 2014 meeting, they are enforceable against the Sainanis as recorded.

To the extent that the Sainanis contend that the inclusion of changed provisions in the recorded August 2014 Declaration invalidates the entire instrument, this argument would be inconsistent with the severability provision contained in Article XVI § 1 of the August 2014 Declaration, which provides that the invalidity of any provision shall in no way affect any other provision, which shall remain in full force and effect. (JA 933). As this Court has previously stated

> A contract is either entire, meaning all its provisions are integral to the agreement of the parties, or severable. *Eschner v.*

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[3] The full text of each such provision of the April 2014 Declaration can be found in the Appendix as follows: Article 1 § 4 (JA 697), Article VI § 1 (JA 705-07), Article VII § 10 (JA 710-11), Article VIII (JA 712-14), Article IX §§ 3-4 (JA 715-16), Article IX § 8 (JA 718), and Article XV §§1-2 (JA 725-26).

> *Eschner,* 146 Va. 417, 422, 131 S.E. 800, 802 (1926); *accord Budge v. Post,* 544 F. Supp. 370, 381–82 (N.D. Tex.1982). Thus, whether a provision is severable or integral is the same inquiry: a provision integral to the parties' agreement cannot be severed and one the parties intended to make severable is not integral.

Schuiling v. Harris, 286 Va. 187, 193, 747 S.E.2d 833, 836 (2013). The express language of Article XVI § 1 makes all provisions severable and, therefore, the possible invalidity of the changed provisions between the April 2014 Declaration and the August 2014 Declaration have no effect on those provisions Belmont Glen seeks to enforce against the Sainanis.

iii. The Members Approved the "Instrument" Recorded Among the Land Records

The Sainanis argue that the proxy and Notice of Special Meeting provide only for a vote on the corporate merger and, since the Plan of Merger was not recorded in the land records, it fails to qualify as the instrument required by Section 13.01 of the Original Declaration for amendment. This argument also fails because it disregards the language of the proxy and the import of the approval of the Plan of Merger.

As stated above, the proxy provided for more than a vote on the corporate merger – it also authorized the execution of the Amended and Restated Declaration. Acting alone, therefore, it qualifies as an approval of an instrument, which was subsequently recorded in August, 2014. Further,

the Plan of Merger included in its terms for approval the amendment and recordation of the amendments to the Original Declaration. By reference in the Plan of Merger and by inclusion in the Notice of Special Meeting, the Members were provided with the instrument for approval and they voted to approve that instrument by both the proxy and by approval of the Plan of Merger. The "instrument" required by Section 13.01 was, therefore, properly approved by the Members and subsequently recorded in the land records. The provisions identified above, therefore, are enforceable against the Sainanis.

b. Interpretation of Section 13.01 was not at issue in this case such that the trial court was obligated to strictly construe this provision to determine its enforceability.

The Sainanis argue that this Court's jurisprudence disfavoring restrictive covenants imposes an obligation on the trial court to conduct a searching inquiry of the amendment process for the provisions Belmont Glen seeks to enforce against the Sainanis. The Sainanis argue that the trial court failed to "'strictly construt[e]' the requirements of [the] Original Declaration." This argument fails for two reasons. First, here again, the Sainanis attempt to raise an issue not presented to the trial court. Neither party contested the applicability or enforceability of Section 13.01 of the Original Declaration—nor did either party argue that Section 13.01 was

ambiguous in its meaning and needed any interpretation from the trial court The sole question before the trial court relating to the July/August 2014 Declaration was whether such amendment was *effective* such that Belmont Glen could enjoin violations or assess charges against the Sainanis. (JA 98, ¶ 60).

Strict construction is a tool used for judicial interpretation. But no interpretation of Section 13.01 was ever needed nor requested. Section 13.01 is not ambiguous, and thus no degree of interpretation from the court was necessary nor appropriate. *See Waynesboro Village LLC, v. BMC Properties*, 255 Va. 75, 79-80, 496 S.E.2d 64, 67-68 (1998) (discussing strict construction and that "[s]ubstantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of property," but that the Court follows the plain meaning rule where an agreement "is complete on its face, is plain and unambiguous in its terms [and] the court is not at liberty to search for its meaning beyond the instrument itself." (citations omitted)).

This Court has determined that

> Restrictive covenants that do not contain unconstitutionally discriminatory provisions are widely accepted contractual devices designed to maintain property values in residential subdivisions. Such covenants must be strictly construed, and the burden is on one who seeks to enforce them to show that

> they are applicable to the acts of which he complains. Nevertheless, when applicable, the covenants will be enforced.

Riordan v. Hale, 215 Va. 638, 641, 212 S.E.2d 65, 67 (1975); *see, also, Friedberg v. Riverpoint Bldg. Comm.*, 218 Va. 659, 665, 239 S.E.2d 106, 110 (1977). Belmont Glen and the Sainanis did not contest before the trial court the applicability of the restrictive covenant contained in Section 13.01. The question raised by the Sainanis was and is whether the August 2014 Declaration was effective against them such that Belmont Glen could take enforcement action. Analysis of this question did not require the trial court to consider a narrow construction of Section 13.01 of the Original Declaration. As stated above, an amended is effective when recorded in the land records, so it requires only a determination of whether the amendment was recorded. There is no ambiguity in Section 13.01 raised before the trial court and no disagreement about its meaning, only whether its requirements have been met.

Even had there been an argument regarding the strict construction of Section 13.01, Section 13.01 does not create a burden on Members of Belmont Glen seeking an amendment that the Sainanis argue for. The declaration and other governing documents of a community association "collectively represent a contract entered into by all owners." *Unit Owners Ass'n v. Gillman*, 223 Va. 752, 766, 292 S.E.2d 378, 385 (1982). In

assessing the meaning of a contract, no word or provision may be disregarded but all words and provisions must be given effect in order to determine the intention of the parties. *Ames v. Am. Nat'l Bank of Portsmouth*, 163 Va. 1, 38, 176 S.E.2d 204, 216 (1934). The court is not at liberty to add terms to a contract that were not included by the parties. *Quadros & Associates, P.C. v. City of Hampton*, 268 Va. 50, 597 S.E.2d 90 (2004).

The Sainanis seek to add obligations to Section 13.01 beyond the plain language of the section. It is not even entirely clear what those obligations are, but they seem intent to ignore the intentions of the Members as reflected in the proxy and Plan of Merger. The Members received materials detailing the process for merging the communities and amending their Declaration and there is no evidence that the Members' intent to amend the Original Declaration was frustrated. They were presented with an instrument detailing the amendments to the Original Declaration and were asked, not only to authorize its execution, but also to approve the Plan of Merger term calling for the amendment. The requirements of Section 13.01, as written, were met and the restrictive covenants therein were appropriately enforced.

2. **The trial court properly determined that the Seasonal Guidelines were enforceable and reasonable. (Assignment of Error #2)**

a. Standard of Review

The question of whether the Seasonal Guidelines were enforceable and reasonable is a mixed question of law and fact, which requires deference to the trial court's factual findings and a review of the trial court's application of law to the facts *de novo*. *Nielsen Co. (US), LLC v. Cnty. Bd. Of Arlington Cnty*, 289 Va. 79, 87, 767 S.E.2d 1, 4 (2015).

b. Law and Argument

i. The Seasonal Guidelines do not exceed the authority granted in the 2014 Declaration.

The governing documents of Belmont Glen, made up of the Declaration and Bylaws, "collectively represent a contract entered into by all owners." *Unit Owners Ass'n v. Gillman*, 223 Va. 752, 766, 292 S.E.2d 378, 385 (1982). In assessing the meaning of a contract, no word or provision may be disregarded but all words and provisions must be given effect in order to determine the intention of the parties. *Ames v. Am. Nat'l Bank of Portsmouth*, 163 Va. 1, 38, 176 S.E.2d 204, 216 (1934).

Article VI, Section 1(N) of the 2014 Amended Declaration authorizes Belmont Glen to

> Adopt, publish and enforce rules and regulations governing the use of the Common Area and Common Facilities and with respect to such other areas of responsibility assigned to it by this Declaration, except where expressly reserved herein to the Members.

(JA829-830). Article IX, Section 8 of the 2014 Amended Declaration provides Belmont Glen with the authority to adopt such rules and regulations regarding Article IX (governing use and maintenance of the Common Area and Lots) as it deems necessary or appropriate. (JA842). Pursuant to the plain language of these sections, Belmont Glen is authorized to adopt rules and regulations that it deems necessary or appropriate related to its areas of responsibility and supplementing the restrictive covenants found in Article IX.

Article IX, Section 3 of the 2014 Amended Declaration prohibits nuisances anywhere on the Lots and Common Area, and includes in the definition of "nuisance" anything "done or placed thereon which is or may become an annoyance or nuisance to the neighborhood." (JA839). A specific nuisance limited by this section is any exterior lighting "which results in an adverse visual impact to adjacent Lots, whether by location, wattage or other features." Article IX, Section 3(C) (JA839). What constitutes an "adverse visual impact" is within the discretion of the ARB. (JA839).

Article IX, Section 4 states that "[n]o modification or alteration of any Lot, Structure, or any portion thereof, shall be made, installed, constructed, erected, placed, or altered and/or externally improved on any Lot or Structure until an Application has been properly filed with, and approved by the ARB." (JA839). Pursuant to Article VIII, Section 5, the ARB is charged with adoption of standards for and regulation of the external design and appearance of the Lots and Common Area and the external design, appearance and location of improvements thereon so as to preserve and enhance property value and maintain harmonious relationships among structure and the natural vegetation and topography. (JA835).

When these contract provisions are read in harmony, a clear picture is painted of Belmont Glen's authority related to the adoption and enforcement of certain architectural standards, which is broad, particularly with modifications that impact the exterior appearance of a Lot, even if the modifications are simply "placed" on the exterior. Consistent with this authority, Belmont Glen adopted the Seasonal Guidelines "to maintain aesthetic appearance and quality in the Belmont Glen community" and "promote and enhance the visual and aesthetic appearance of the community." (JA977).

The rules related to seasonal holiday decorations were intended to "promote harmony in the community," "avoid discourteous and unsafe conditions affecting property values," and "avoid religious issues in the community." (JA993). The rules establish time periods during which tasteful decorative objects and lighting can be installed without prior approval of the ARB, and provide opportunities for owners to extend such time periods through the exterior modification application process. (JA994).[4]

The ARB's stated reasons for adopting the architectural standards and seasonal decorative guidelines fall within the authority provided to the ARB, both to establish standards regarding the exterior appearance of Lots (Article VIII, Section 5(C) of the 2014 Amended Declaration), and to identify the features of exterior lighting that result in an adverse visual impact (Article IX, Section 3(C) of the 2014 Amended Declaration). (JA835, 839). For these reasons, the trial court correctly determined that Belmont Glen

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[4] Belmont Glen amended these standards in 2015 to provide that the purpose of the seasonal decorative guidelines "is to avoid the prolonged display of lights and decorations outside the respective holiday" and to add Diwali as one of the recognized periods for seasonal decorations. (JA1019-1020).

had authority under its governing documents to adopt and enforce the Seasonal Guidelines restricting the time periods during which seasonal decorations can be installed on Lots in the community.

ii. The Seasonal Guidelines are reasonable.

This Court established the reasonableness standard by which property owners associations' rules and regulations should be reviewed, which is "whether [the association] has abused its discretion by promulgating arbitrary and capricious rules and regulations bearing no relation to the purposes of the [association]." *Unit Owners Ass'n of Buildamerica-1 v. Gillman*, 223 Va. 752, 768-69, 292 S.E.2d 378, 386-87 (1982). If a rule adopted by an HOA is reasonable, it is enforceable. *Id.* at 767 (stating that "[i]f a rule is reasonable the association can adopt it; if not, it cannot.). The Sainanis argue that the Belmont Glen's Seasonal Guidelines are arbitrary and capricious because they restrict homeowners' choices in decorating their properties and include standardless, discriminatory discretion and application. On the contrary, the Seasonal Guidelines are reasonable precisely because they directly relate to the purposes of the association in that they were adopted to "maintain aesthetic appearance and quality" and "promote and enhance the visual and aesthetic appearance of the community." (JA977).

The 2014 Amended Declaration prohibits anything to be placed or installed on the exterior of a Lot, without regard to its permanent or temporary nature, without the approval of the ARB. *See* Article IX, Section 4. (JA840). The Sainanis argue that Article IX, Section 4, "clearly impl[ies] a sense of permanence," and therefore cannot apply to exterior lighting of a temporary nature. Opening Br. at 33-34. But there is nothing in Article IX, Section 4 which justifies such a reading. The application and approval process required by Section 4 applies regardless of the temporary or permanent nature of a modification or alteration to one's Lot, and to read it as only applying to permanent changes requires reading in language that does not exist. *See, e.g., Quadros & Associates, P.C. v. City of Hampton*, 268 Va. 50, 597 S.E.2d 90 (2004)(prohibiting a court from adding words or terms to a contract between parties).

Because Article IX, Section 4 requires such an application and approval process, in order to assist owners and prevent them from submitting applications every time they want to put up a holiday light, Belmont Glen adopted rules that defined specific times when everyone is approved in advance to place or install temporary exterior lights and allowed owners to submit applications for additional periods in which they want to use holiday lights. Belmont Glen's Seasonal Guidelines are

intended to make it easier for owners to use their properties, by creating a system that is less onerous than what is contemplated by the recorded instruments.

Further, the ARB is empowered to make determinations as to what modifications create an "adverse visual impact" on the community, pursuant to Article IX, Section 3(C) of the July/August 2014 Declaration. (JA 839). The Sainanis contend that limitations on times of the day and year during which lights can be displayed has no relation to "adverse visual impact" and must, therefore, be unreasonable. This position disregards not only the fact that the ARB is the arbiter of what constitutes an adverse visual impact, but that temporary lights left up for 300 days per year do adversely visually impact the community, by making it appear that the community has residents that care enough about their lots to timely remove decorations. Additionally, many communities prohibit temporary lights entirely, on the theory that such lights are tacky and negatively impact the appearance of the community. Belmont Glen sought to compromise that position by acknowledging that placement of temporary lights for abbreviated times of the day and year meets the needs of owners that do like lights and those of owners that believe they are always tacky. This

compromise is entirely reasonable and consistent with the ARB's purpose in determining what constitutes an "adverse visual impact."

For these reasons, the trial court properly determined that the Seasonal Guidelines are reasonable in that they relate to the purposes of the association and are neither arbitrary nor capricious.

To the extent that the Sainanis attempt to raise for the first time before this Court the issue of whether the Seasonal Guidelines are discriminatory based on religion, that argument is both inappropriate at this juncture and prejudicial to the Appellee, who had no opportunity to develop a record to defend against such claims; the issue was neither pled nor presented to the trial court and therefore, not preserved for appeal.

The Sainanis did not plead below that the Seasonal Guidelines were discriminatory. Pleadings being as important as proof, the Sainanis did not, therefore, effectively raise these issues before the trial court and they were not considered by the trial court. *See*, *e.g.*, *Smith v. Sink*, 247 Va. 423, 425, 442 S.E.2d 646, 647 (1994)(holding that a court lacks authority to enter a judgment based on a right which has not been pled or claimed). The Sainanis did not argue or introduce evidence to the trial court that the Seasonal Guidelines were discriminatory or prohibited their free exercise of religion. In his closing argument, the Sainanis' trial counsel made no

mention of discrimination and failed to argue any violation of the Sainanis' free exercise rights. (JA 525-547).

Moreover, the trial court's final order made no mention of and did not rule on the issue of whether the Seasonal Guidelines were discriminatory or in violation of the rights of free exercise of religion. (JA 171-179). Nor did the Sainanis Objections or Supplemental Objections to the final order include any contention that the trial court erred because the Seasonal Guidelines were discriminatory or interfere with the free exercise of religion. (JA 146-148, 149-151).

For these reasons, this Court should not consider the Sainanis' newfound argument that the Seasonal Guidelines are discriminatory because, as this Court well knows, "an appellate court may not reverse a judgment of the trial court based upon an alleged error in a decision that was not made or upon an issue that was not presented." *McDonald v. Commonwealth*, 274 Va. 249, 255, 645 S.E.2d 918, 921 (2007).

3. The trial court properly sustained the motion to strike the Sainanis' counterclaims. (Assignment of Error #3)

a. Standard of Review

"In reviewing the granting of a motion to strike, 'this Court will consider the evidence and all reasonable inference arising therefrom in the light most favorable to the appellant, resolving any doubt as to the

sufficiency of the evidence in favor of the appellant." *Condo. Services, Inc., v. First Owners' Ass'n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 571, 709 S.E.2d 163, 169 (2011).

b. Law and Argument

The Sainanis contend that the trial court erred in sustaining Belmont Glen's motion to strike their counterclaims at the conclusion of their case-in-chief. They argue that, in reaching its ruling, the trial court disregarded certain disputed material facts and failed to accept as true evidence favorable to the Sainanis.

The Sainanis arguments are, however, procedurally improper as they failed to raise such arguments with the trial court. Rule 5:25 provides that "[n]o ruling of the trial court . . . before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling." "Because the purpose of Rule 5:25 is to ensure that the trial court has the opportunity to rule upon an argument, the record must affirmatively demonstrate that the trial court was made aware of the argument." *Brandon v. Cox,* 284 Va. 251, 736 S.E.2d 695, 697 (2012).

In response to the motion to strike, the Sainanis argued only that it should be denied because the 2014 Amended Declaration is ineffective

and cannot be enforced against the Sainanis. Counsel for the Sainanis acknowledged that the counterclaims do not raise the issue of whether or not the 2014 Amended Declaration is invalid. (JA 500-506). Nevertheless, they asked the trial court to deny the motion to strike because the 2014 Amended Declaration should not be enforced. Now, the Sainanis ask this Court to reverse the trial court because they contend that the trial court failed to view the evidence in their favor. Because the Sainani failed to give the trial court an opportunity to consider this argument, it is improper on appeal.

Substantively, the Sainanis arguments are also without merit. The Sainanis contend that the trial court incorrectly struck their first count, seeking injunctive relief pursuant to Va. Code Ann. § 55-513, on the basis that they failed to introduce any evidence of irreparable harm. In support of their position, the Sainanis argue that a violation of a real property interest is deemed irreparable harm.

While it is true that "the violation of a real property interest is deemed 'irreparable,'" the party seeking injunctive relief must demonstrate that there has been a violation of a real property interest. *Norfolk Southern Ry. Co. v. E.A. Breeden, Inc.*, 287 Va. 456, 464-65, 756 S.E.2d 420, 424-25 (2014). The Sainanis failed to allege in their first counterclaim or to offer evidence

at trial of a real property interest being violated by Belmont Glen enforcing the Seasonal Guidelines. At worst, the Seasonal Guidelines required owners to submit applications for lights they wanted to install on the exterior of their homes consistent with Article IX, Section 4 of the 2014 Amended Declaration. As all exterior lights required approval by the ARB, the Sainanis' property rights were not violated by the enforcement of a rule that required them to ask the ARB for permission to install exterior lights. The trial court correctly concluded that the Sainanis introduced no evidence that their property rights were violated by Belmont Glen's enforcement of the Seasonal Guidelines, and that they, therefore, failed to demonstrate that they would be irreparably harmed by enforcement of the Seasonal Guidelines.

With regard to the second count, the Sainanis allege the trial court erred because it failed to consider that the 2014 Amended Declaration was invalid and unenforceable in deciding to strike the breach of contract claim. This argument is outside the scope, however, of what the Sainanis pled in their second count, which is that Belmont Glen breached the 2014 Amended Declaration and/or the original Declaration. The validity of the 2014 Amended Declaration is irrelevant to a determination of whether Belmont Glen violated either the 2014 Amended Declaration or the original

Declaration. The trial court correctly, therefore, disregarded the Sainanis' argument as to the 2014 Amended Declaration's validity when deciding that the Sainanis failed to introduce evidence of a breach of contract.

With regard to the third count, the trial court sustained the motion to strike on two bases: one, the Sainanis failed to present evidence of a violation of Va. Code Ann. § 55-515(A), and, two, the Sainanis failed to demonstrate that they were damaged as a result of the alleged violation. In their brief, the Sainanis contend that the trial court erred by finding no evidence that Belmont Glen violated Section 55-515 and by disregarding evidence of their damages when sustaining the motion to strike. The Sainanis do not identify any evidence introduced showing that Belmont Glen violated Section 55-515, and, therefore, it is not understood what they rely upon for their argument that the trial court disregarded material facts in deciding that no evidence was introduced showing a violation of Section 55-515. The Sainanis contend that they did introduce evidence of assessments paid, which they believe is sufficient proof of damages to survive a motion to strike.

A plaintiff is obligated to prove, with reasonable certainty, "the amount of damages and the cause from which they resulted; speculation and conjecture cannot form the basis of the recovery." *Shepherd v. Davis*, 265

Va. 108, 125, 574 S.E.2d 514, 524 (2003). In support of their damages claim, the Sainanis asserted only that they paid assessments during a period in which they claim Belmont Glen suspended their pool privileges. Article VII, Section 11(E) of the 2014 Amended Declaration, however, provides that they must pay assessments regardless of whether Belmont Glen properly performed its duties, so payment of assessments is precluded under the contract as evidence of damages. Moreover, Mr. Sainani testified at trial that they never read correspondence from Belmont Glen, so he had no idea that any attempt was made to suspend his privileges and that his family never attempted to use the pool at any relevant time. The trial court correctly, therefore, sustained the motion to strike the claim under Va. Code Ann. § 55-515(A).

4. **The trial court properly awarded costs and attorney's fees to Belmont Glen.**

a. Standard of Review

"On appeal the trial court's determination of the amount of the attorneys' fees to be awarded will be set aside only upon a finding of abuse of discretion." *Holmes v. LG Marion Corp.*, 258 Va. 473, 479, 521 S.E.2d 528, 533 (1999).

b. Law and Argument

i. The trial court correctly concluded that the 2014 Amended Declaration permits Belmont Glen to recover all costs and reasonable attorney's fees.

Sainanis cite *State Farm Mut. Auto Ins. v. Bowers*, 255 Va. 581 (1998) for the proposition that the Association did not "incur" the attorneys' fees it was awarded because it did not actually pay or become legally obligated to pay all of the fees. Appellant's Br. at 47-48. However, this Court in *Bowers* specifically cabined its decision on the definition of what it meant to "incur" a cost to the narrow facts of that case. Importantly, the Court stated in its opinion, that "[t]he first issue requires us to construe the term 'incurred' <u>as used in the definition of medical expense</u>." *Bowers*, 255 Va. at 585 (emphasis added). The Court's narrow definition of "incurred" in *Bowers*, therefore, is not binding on this Court in the review of an attorney's fees provision in the Declaration of a homeowners association, which is wildly different than that same term when used in the context of medical expenses.

Moreover, in *Bowers*, this Court was dealing with a very bad actor, who accepted an overpayment of $30,000.00 from his health insurance company made pursuant to an "administrative error" and spent it all before the health insurance carrier discovered its error. *Id*. at 583. No such "administrative mistake" took place here. The Association deliberately

carried insurance, and paid the premiums monthly in order to protect against an instance where it found itself in costly litigation. The Association did, in fact, "incur" in any sense of the word, costs related to enforcement through its monthly premium payments to its insurance company to protect it from exactly this costly scenario.

While this Court has not addressed the precise issue of whether a community association carrying insurance which covers its legal expenses "incurs" attorneys' fees even though it does not pay those costs itself while litigation is pending, other courts have considered this issue. In *White v. Center Point Homeowners Assoc.*, 17 Pa. D. & C. 5th 67, 72-73, 2010 WL 5860739 (2010), the court awarded an HOA its attorneys' fees pursuant to its declaration for successfully defending against homeowners' claims, even though the HOA's insurance company paid the HOA's legal expenses in the case. The court reasoned that the HOA incurred legal fees because it "paid for legal services in advance as a component of . . . [its] insurance premiums." *Id.* at 73. Furthermore,

> [i]t is well-settled that an award of attorney fees is not necessarily contingent upon an obligation to pay counsel. Generally, awards of attorneys' fees where otherwise authorized are not obviated by the fact that individual plaintiffs are not obligated to compensate their counsel. The presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards.

Ed A. Wilson, Inc. v. Gen. Servs. Admin., 126 F.3d 1406, 1409 (Fed. Cir. 1997)(citing *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir.1977)) [internal quotations omitted].

Even if this Court believes that to "incur" means to actually pay or become legally obligated to pay, the Association's 2014 Amended Declaration, while binding an Owner to pay to Belmont Glen any costs that are incurred in enforcement of its governing documents, is completely silent and without regard to the party actually paying those costs. See JA851.

According to Article XV, Section 2, Belmont Glen "shall be entitled to recover <u>any</u> costs, including . . . attorneys' fees, incurred in connection with the enforcement" of the Association's governing documents. JA851 (emphasis added). Article XV, Section 3 of the July/August 2014 Declaration states that

> <u>Payment of Enforcement Expenses</u>. The cost of any expenses arising out of any enforcement action as set forth in the Article hereof entitled, *ENFORCEMENT*, including but not limited to legal services and court fees, may be paid out of the Annual General Assessment funds collected by the Association. Such costs shall be subject to recovery from any Owner(s) determined or found to be in violation, in accordance with the provisions of this Declaration, and shall constitute a lien on such Owner's Lot, as herein provided.
> JA851.

Nothing in either Section 2 or 3 requires that the Belmont Glen itself must incur the legal costs in order for the violating owner to be responsible

for such costs. Instead, as Section 3 provides that costs "may" be paid from the Annual General Assessment funds, other sources of payment of the enforcement costs are a possibility.

Under Virginia law, "a contract must be construed as written and as a whole with all parts being harmonized whenever possible." *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 384, 493 S.E.2d 516, 519 (1997). The plain language of Article XV, Section 2 and 3 of the July/August 2014 Declaration, when harmonized, makes clear that an owner is liable for all costs and expenses related to enforcement actions, without regard to the party paying such costs and expenses and that, in certain cases, the source of payment of such enforcement costs may be other than the Belmont Glen's general fund.

This Court has also suggested that the collateral source rule may apply under certain circumstances in contract cases. *Acura v. Letourneau*, 260 Va. 180, 193, 531 S.E.2d 316, 323 (2001)("The wrongdoer cannot reap the benefit of a contract for which the wrongdoer paid no compensation."); *Schickling v. Aspinall*, 235 Va. 472, 475, 369 S.E.2d 172, 174 (1988)(holding that the plaintiff was not entitled to benefit of defendant's employment contract, to which plaintiff was not an intended beneficiary). Like the plaintiff in *Schickling*, the Sainanis are not third party beneficiaries

of the D&O Policy and it would be improper to allow them, as the wrongdoers in this action, to benefit from the D&O Policy. This is particularly true when making a claim against its D&O Policy, without recovering some of the funds expended by the insurer, might negatively impact both the rates charged to the Belmont Glen as well as its on-going insurability.

For these reasons, the trial court did not abuse its discretion in awarding the Belmont Glen a judgment for its reasonable attorney's fees and costs.

ii. The trial court correctly concluded that Va. Code Ann. 55-515 permits Belmont Glen to recover all costs and reasonable attorney's fees.

As with the 2014 Amended Declaration, the Sainanis seek to read language into Va. Code Ann. § 55-515 in order to limit the Belmont Glen's recovery of the attorney's fees and costs incurred in this enforcement action. Va. Code Ann. § 55-515(A) provides, in relevant part, that "the prevailing party shall be entitled to recover reasonable attorney fees, costs expended in the matter, and interest on the judgment." Sainanis argue that "expended in the matter" should be read to mean that the prevailing party must have expended the costs in order to recover them. However, the language "expended in the matter" applies only to "costs," not to

"reasonable attorney fees" as a comma separates these phrases in the statute.

Moreover, Section 55-515(A) provides that the prevailing party is entitled to recover reasonable attorney fees. It does not say that the prevailing party is precluded from such recovery if the reasonable attorney fees are paid by a third party or insurance company. Such a conclusion would require adding language to the statute. As this Court is aware, under the basic rules of statutory construction, the intent of the General Assembly is determined from the plain and natural meaning of the words used in the statute and the trial court is not at liberty to add language. *Britt Const. Inc., v. Magazzine Clean, LLC,* 271 Va. 58, 62, 623 S.E.2d 886, 888 (2006). On occasion, parties' litigation is sponsored by an outside source, be it a family member or an insurance company. A holding that such party is prevented from exercising its contractual or statutory right to a recovery of attorney's fees would negatively impact the availability of third party sources of such funding, which is not an intent expressed by the General Assembly in Section 55-515.

For these reasons, the trial court did not abuse its discretion in awarding the Belmont Glen a judgment for its reasonable attorney fees.

CONCLUSION

For the foregoing reasons, Appellees, Belmont Glen Homeowners Association, Inc., respectfully request that the Virginia Supreme Court dismiss the Appellant's appeal, award it its attorney's fees and costs in defending this action pursuant to Va. Code Ann. § 55-515, Article XV § 2 of the July/August 2014 Declaration and Section 8.02 of the Original Declaration and for such other relief as the Court deems appropriate.

Respectfully submitted,

BELMONT GLEN HOMEOWNERS ASSOCIATION, INC.

By counsel

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CERTIFICATE

I hereby certify that rule 5:26 has been complied with and, pursuant to this Rule, a PDF version of this brief has been filed through VACES and three paper copies delivered to the Clerk's Office. An electronic version has also been delivered to opposing counsel via electronic mail on this 22th day of February, 2019, to:

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