CASE NO. 05-09-00788-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS TEXAS

WILLIAM CHARLES BUNDREN AND KAREN P. BUNDREN, d/b/a C & K RESIDENTIAL PROPERTIES, NEW HOPE FOUNDATION, and HOPE HILL INVESTMENTS, INC.

Defendants and Counter-Plaintiffs, Appellants and Cross-Appellees

V.

HOLLY OAKS TOWNHOMES ASSOCIATION, INC., Plaintiff, and THE WOODS ON PARK LANE HOMEOWNERS ASSOCIATION, ROYAL LANE HIGHLAND OWNERS ASSOCIATION, INC. and DUTCH CREEK OWNERS ASSOCIATION, Intervenors

Plaintiff, Intervenors, and Counter-Defendants, Appellees and Cross-Appellants

Appeal from the 192nd Judicial District Court
of Dallas, Texas

APPELLEES' BRIEF AND CROSS-APPEAL BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Plaintiff, Holly Oaks Townhomes, sued the Defendants for unpaid condominium fees on numerous condominium units. (CR 10) Intervenors joined the suit upon the same complaints based upon alternative legal and equitable theories of recovery, to wit: (1) Debt, (2) *Quantum Meruit*, (3) Unjust Enrichment, and (4) Fraud and Deceit for which they requested damages, exemplary damages, attorney's fees and injunctive relief.

Mr. Bundren, *pro se* defendant and as attorney on behalf of his wife and other alleged entities which he solely controlled, defended upon the contention that the condominiums he owned and/or controlled through various entities, purportedly as a Lender through "owner financing," was not required to pay condo fees. Even after his buyers defaulted and moved out, sometimes for years, and after he rented the units, purportedly upon an assignment of rents provision in the Deeds of Trust, Bundren refused to pay any condo fees. Bundren, personally and on behalf of his wife and alter ego entities, counter-sued Plaintiff and Intervenors on multiple theories. (CR. 28, 42, and 86)

After a bench trial, Judgment was entered in favor of Plaintiff and Intervenors, from which Defendants appealed while motions were still pending before the trial court. (CR.1027 and 1067) Plaintiff and Intervenors cross appealed on the day following the entry of the Second Amended Judgment, in response to the previously filed notice of appeal of Defendants. (CR 1035)

STATEMENT REGARDING ORAL ARGUMENT

Appellees agree that oral argument would be helpful to the court due to the complexity of this case, both factually with its voluminous records and by its tangled history. Therefore, Appellees join the Appellant in requesting an oral argument.

RESTATED ISSUES PRESENTED

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STATEMENT OF FACTS

Appellees strenuously object to the Appellants' statement of facts pertaining to the factual histories of each condo unit at issue and contradicts those asserted statements of fact. The chain of title of each of seventeen properties extends over twenty years and is contained in the Plaintiff's approximately 390 exhibits. (RR 6-23) and six volumes of testimony (Vols 2-7). The Appellants assert their arguments and legal conclusions concerning property titles as facts, ignoring numerous other documents in evidence, not mentioned by Appellants, which mandate a contrary conclusion. The correct analysis of these multitude of documents is what caused this record to be so complex and voluminous, and makes it difficult, if not impossible, to comprehensively present all of the relevant facts in a "statement of facts" and "argument" limited to 50 pages.

The first four unnumbered paragraphs of Appellants' Statement of Facts are acceptable, ***except as to the following corrections***:

"New Hope" and "New Hope Foundation" named in Appellants' brief should actually be identified as "New Hope Foundation, Integrated Auxiliary of Dallas Theological Seminary."("NHF") (CR 1073) It had no relationship to or affiliation with the Dallas Theological Seminary, and the Seminary never received any benefits therefrom. (*See* testimony of Don Bustion CR Vol 5, pp. 142-160, at 152-155) It, along with the other entities of William Charles Bundren, were determined by the trial court to be the alter egos of William Charles Bundren and his wife, operated for their sole benefit. (Conclusions of Law #7 & #8, CR 1077 & 1078, App 6) That conclusion was reached upon the extensive record in this case heavily laden with a multitude of improper acts of Mr. Bundren, including the fact that the Corporation was never organized after the charter was issued. "No Organizational Meeting was held, Bylaws were not adopted, nor was any other action taken to

operate the corporation as a corporation." Furthermore, "although organized as a Texas Non-Profit Corporation, the Application for a Tax Exemption Status was Rejected by the state of Texas and it has never been qualified as a 503(c)(3) organization under the I.R.S. Code and was not registered as a Public or Private Foundation with the I.R.S. prior to November 19, 2008." (Findings of Fact 5, CR 01073, *see also* Corporate Books, P390) Even the charter was forfeited on February 10, 2006 (P 2, D 15A) and remained forfeited until November 20, 2008, when, during a recess in the trial in the week of May 5, 2008, Defendant filed for reinstatement. (D 15)

In an attempt to legitimize the void deeds and void transactions over many years, Bundren reinstated the corporations during the trial which began in May, 2008. Hope Hill, which held title to many properties since before forfeiture of its charter in Feb. 15, 1994, was reinstated at the conclusion of the trial on April 15, 2009, long after the operative facts of this case, including the incurrence of debt for condo fees. (App 13, p. 2) Likewise, "NHF" was reinstated on November 20, 2008, 6 months after the trial began, and during a break in the proceedings. (P 357)

Throughout the trial and post trial proceedings, Bundren/Appellants vigorously fought the issue of alter ego, which Plaintiff and Intervenors plead and proved, resulting in the trial court's Finding of Fact and Conclusion of Law. Now, Bundren admits and embraces the truth of that fact in his statement of facts, (Appellants' Brief pp 17-18) for the purpose of legitimizing a history of void deeds which left legal title in HHI and other alter egos, and placed legal responsibility upon him and his wife to pay condo fees. (*See* Findings of Fact and Conclusions of Law, CR 1072-1080.)

Appellees incorporate herein by reference the Findings of Facts and Conclusions of Law of the trial court found at CR 1072-1080. Additional facts, far to extensive and complex to state here, will be incorporated in the argument with references to the record as is necessary to argue the issues

SUMMARY OF ARGUMENT

After years of unconscionable conduct by William Charles Bundren, his wife and alter ego entities utilizing a scheme in which they refused to pay the common expenses for their residential condo real estate investments, and thereby forcing their neighboring owners to bear those costs, Plaintiff and Intervenors brought this suit for the collection of past due condominium fees and for the costs of collection. The evidence overwhelmingly supported the pleadings which alleged both equitable grounds for recovery (*quantum meruit,* unjust enrichment, fraud and deceit) and a legal cause of action for debt based on the obligations originating in the Declarations and By-Laws of the Associations and under Texas law, namely, the Texas Condominium Act. Personal liability of Bundren and his wife was alleged and proven based upon (1) the principles of Alter Ego pertaining to his corporate entities, (2) liabilities imposed by the Texas Corporation Act and the Texas Tax Code, and (3) the invalid and faulty deeds and chain of titles of the various properties.

All alternative remedies and causes of action were proven, and the amount of damages under each alternative remedy and cause of action was the same. The trial court chose to base its judgment against Defendants on equitable grounds, finding that use of alter egos and deceptive conduct was for the purpose of avoiding the payment of their fair share of the common expenses, and was done in an "unjust and inequitable manner."(CR 1032; APP Vol 1, tab 3) On appeal, if the "reviewing court determines a conclusion of law is erroneous, but the trial court has rendered the proper judgment, the erroneous conclusion of law does not require reversal." *BMC Software Belgium, N.V. v. Michel Marchand*, 83 S.W.3d 789 (2002); *Dickerson v. Debarbieris, et al.*, 964 S.W.2d 680 (Tex. 1989). Also, Appellate Rule 44.1 provides:

> *Standard for Reversible Error.* No judgment may be reversed on appeal on the

> ground that the trial court made an error of law unless the court of appeals concludes that the error complained of:
> (1) probably caused the rendition of an improper judgment . . . .

TEX. R. APP. P. 44.1(1)(a)(1).

Therefore, any alternative legal or equitable theory of recovery supported by the evidence would support affirmation of the judgment.

The trial court undoubtedly based its judgment on one of the recognized equitable remedies plead by the Plaintiff and Intervenors, *i.e*. *quantum meruit*, unjust enrichment, and fraud and deceit. However, the court's findings of facts and conclusions of law equally support the judgment for debt against Bundren and his wife individually and against their alter ego entities. (CR 1072; APP Vol. 1, tab 6)

The trial court awarded damages, attorney's fees and some costs based upon the evidence. Appeal courts consider only that evidence and the inferences therefrom which support the court's findings, considered in the light most favorable to the findings, and disregard contrary evidence and inferences. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d. 497, 499 (Tex. 1995); *Holt Atherton Industries, Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992).

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT DID NOT ERR IN GRANTING JUDGMENT TO PLAINTIFFS

A. BACKGROUND

The Defendants, through the consistent use of alter ego entities, including properties held in the names of relatives, have managed their real estate investment properties through a deceptive scheme to hide the true ownership of the condominiums from state and federal governments, the

HOAs, and the tenants and buyers of various condominiums. (*See* Conclusions of Law Nos. 7 and 8, RR1077 and 1078) In the case of every property, Defendant William Charles Bundren deeded, contracted to sell and leased properties using the names of entities that did not have any right, title or interest in the properties, and/or which title was retained in a dissolved corporation rendering the deeds from the corporation invalid. (*See* Exhibits P359, P360, P361, P362, P363, P364, P 363, P365, P366, P367, P368, P369, P370, P371, P372, P373 and P374 and P Exh. Lists of Title Documents for Each Unit found at Appellee's Appendix I, Tab One, A-L .) As a result, the title to many properties remained in the name of revoked and dissolved corporations, ensnaring both Mr. Bundren and his wife in his own schemes as a result of the statutory mandates dictating that the stockholders, officers, and directors are personally liable for the debts incurred during the period of time the corporations are dissolved.

Tex. Tax Code § 171.251(2): *"each director or officer of the corporation is liable for a debt of the corporation as provided in Section 171.255 of this code."*

Tex. Tax Code §. 171.255. Liability of Directors and Officers:

(a) If the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived....

(b) The liability of a director or officer is in the same manner and to the same extent as if the director or officer were a partner and the corporation were a partnership."... and

***

(d) If a corporation's charter or certificate of authority and its corporate privileges are forfeited and revived under this chapter, the liability under this section of a director or officer of the corporation is not affected by the revival of the charter or certificate and the corporate privileges."
See also, In Re: ABZ Insurance Services, Inc., d/b/a Ace Insurance Agency, Debtor, Case No. 379-39760-RCM-7, In the United States Bankruptcy Court for the Northern District of Texas, Dallas

Division, 245 B.R. 255; 2000 Bankr. LEXIS 168. In the words of Shakespeare, "He is hoist on his own petard." *(Shakespeare, Hamlet*, Act III, scene 4) .

Other properties remained in the names of his mother, Joyce Hudnell (units 6 &32), and his half sister, Deborah Bundren (units 9, 50 & 51), but were admitted by Appellant Charles Bundren to have been owned by him as a result of a transfer to him many years before. Bundren owned and managed the units for his benefit and the benefit of his wife for years while recorded title remained in the name of his mother and half-sister. In the case of all five units Charles Bundren held in the name of his mother and half-sister, he used backdated deeds to attempt to create a chain of title eventually leading into his partnership with his wife, Karen, namely C&K Residential Properties. (P359, P361, P365, P 368, and P369 at Appellee's Appendix I). Most deeds were filed November 17, 2008 (6 months after the trial of this case began), except for Unit 32 which was filed April 25, 2002 and Unit 6 filed May 22, 2002. Those backdated deeds were to be "Effective 1/1/97", except for Units 6 and 32. At RR Vol 3, pp 84-85, Bundren testified that his mother, Joyce Hudnell, had "transferred the property back to me" "shortly after she purchased it." At RR Vol 3, p 110, lines 14-16, Charles Bundren testified that Deborah "transferred title to me in January, 1997," but "actually she transferred a lot earlier than that." So, Charles Bundren admitted that he controlled the properties, but titles were left in the names of his mother and sister. (*See* Findings of Fact and Conclusions of Law, CR 64-66)

In many cases, while the title and ownership remained in the names of his dissolved corporations or his relatives, Mr. Bundren deeded the properties from a <u>non-owner entity</u>, such as his "Foundation" or his C&K Residential Properties partnership with his wife to third parties, retaining "superior title" and a vendor's lien and secured a Deed of Trust Promissory Note with a

Deed of Trust. These transactions were legally void and invalid under law (grantor had no title) and, therefore, transferred no title, and the security interests and liens were also void and invalid. (Holly Oaks Units 3, P358; Unit 8, P360; Unit 11, P362; Unit 21, P363; Unit 22, P364; Unit 32, P365; Unit 33, P366; Unit 36, P367; Unit 51, P369; Unit 60, P370; Dutch Creek Unit 301, P372: Woods on Park Lane Unit 711, P373 and Unit 728, P374; and Royal Lane Unit 218, P371)

Charles Bundren argues that his owner financed condos places him in the position of a financier, (or lender). On facts and theory almost identical to this case, The Austin Court of Appeals held otherwise finding Chitsey, who owner financed condos, was liable under the equitable theory of Unjust Enrichment. *Chitsey v. Lockshin*, 2001 Tex. App. LEXIS 7297, (Tex. App.–Austin, 2001), a case which was originally unpublished but later cited as authority in *Barraza Family Limited Partnership v. Carlos P. Levitas, et al.*, ___ S.W.3d____, 2009 Tex. App. LEXIS 1707 (Tex. Civ. App – Corpus Christi 2009, pet. den'd.). Amazingly, Bundren further argues, because he has converted "his" legal ownership interest into an equitable ownership interest superior to the legal title that he "represented" that he had transferred to other buyers, he does not have to pay the cost of maintenance for the unit, including paying the insurance on the unit required by his loan documents and contracts. Thus, he contends that all other association members, his neighbors and fellow property owners in the association, are required to pay all of the costs of maintaining his real estate investments.

Bundren owner financed the units, sometimes with no money down or by financing the down payment and closing costs in a second note, at a sale price 2 or 3 times the fair market value of the unit (*see* testimony of Herbert Simmons RR Vol 2, p. 64, *et seq*., and *see* the loan amounts, compared to the assessment of fair market value by the Dallas Appraisal District). Then Bundren

retained superior title (with 1st rights to the value of the property in the amount of the Deed of Trust Note that he retained) to the bare legal title conveyed to the "buyer" which, in fact, has no financial equity or any financial value in the property. After default by his "buyer," which frequently occurred, Bundren then refused to foreclose the vendor's lien and deed of trust lien he has "apparently" held upon the property, in some cases for years. (*See* Testimony of Property Manager, Jackson Potter, RR Vol 6, p. 9, *et seq*., and Testimony of William Keffer, RR Vol 2, p. 43, *et seq*.) When the HOA has foreclosed a condo fee lien against a reputed owner (which we now find by the evidence adduced in this trial not to be true), Bundren then demanded that all rents be paid to him under an assignment of rents provision in his invalid Deed of Trust. He also demanded that the HOA pay the taxes on the condos if they foreclose their Condo Fee Lien against the "apparent" legal title holder, (RR Vol 2, p. 45):

> "The total taxes paid for the Association was $6,746.32. The lien holder demands that the association reimburse the lien holder for these taxes. The check should be made payable to William Charles Bundren Trustee and forwarded to the address below. If the payment is not made, additional attorney's fees may be incurred to collect the taxes from the Association. I hope that is not necessary." *(Email from Bundren to Keffer and the Dutch Creek Assoc. Board)*

Bundren, with pious aloofness in his testimony, finds fault with the HOAs for not suing the defaulting "apparent" legal title holders for a money judgment for condo fees, who are judgment proof and who, when the truth has become known, had no valid title anyway. Bundren ignores his own advice by not suing, a single time, any of his buyers on the defaulted Deed of Trust Note, or for unpaid taxes and condo fees. Indeed, in this suit, Bundren could have sued his "buyers" for indemnity for the condo fees, taxes, and other damages. The simple fact is, his "buyers" are judgment proof, did not receive any title to the property, were duped, and did not have the financial

qualifications to buy the property in the first place. Bundren personally closed all of his owner financed sales, prepared all legal documents for the sales, and has not produced even one title policy issued for the buyer's protection.

In his testimony, Bundren faults the HOAs for not foreclosing their condo fee liens and renting the units, thereby "mitigating" their damages. This is the same Bundren that demanded that the rents be paid to him by the HOAs, and chastised the HOAs for not paying ad valorum taxes. This is also the same Bundren, who rented units and collected rents without foreclosing the Deed of Trust and vendor's liens, and who failed to pay the condo fees while collecting the rents until the property manager for the HOA discovered the renter in the unit and confronted Bundren. (CR Vol5, p. 164-167)

The fact is that the association is a non-income producing, non-taxable association whose mission is to manage the common elements and collect the costs pro ratably from the owners for the purpose of paying their common expenses. The association is not in the business of buying and selling property or renting property. As verified by the evidence in this case, when the HOA foreclosed a unit for non-payment of condo fees, any and all rents were applied to the outstanding balance of the arrearage in condo fees and assessments. When Bundren finally foreclosed the units, (several of which were foreclosed in September, 2008 after the trial of this case began in May, 2008) the balance claimed against him for damages in this suit are the balances after application of all rents and foreclosure income, including the payments of several thousand dollars made by Herbert Simmons on two units at a condo fee foreclosure sale; after which Bundren then foreclosed the deed of trust on the unit against Simmons, leaving Simmons with nothing but a financial loss and a bitter experience.

B. STANDARDS OF REVIEW

This appeal requires that several standards of review be applied.

After a trial to the bench, the trial court filed findings of fact and conclusions of law in support of its final judgment. (CR 1072-1080; Appellants' Appendix Tab 6) Appellants do not identify or challenge any of the trial court's Findings of Fact or Conclusions of Law. In fact, on appeal, Appellant has abandoned his defense of the Appellees' allegations of his alter egos, and embraced the courts' Conclusion of Law concerning Alter Ego. (*See* 1st 2 lines on Page 18 of Appellants' Brief.) Appellate courts review fact-findings for sufficiency under the same standards that are applied in reviewing evidence supporting a jury's answer. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). In evaluating legal sufficiency, appeals courts review the evidence in the light most favorable to the prevailing party. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 24 (Tex. 1994). To support any reversal, an appellant must persuade the appeals judges that reasonable minds could not differ on the matter in question. *Id*. at 25 (citing Powers. & Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence*," 69 *TEX. L. REV*. 515, 522-23 (1991)).

If an appeal asks for a review of the factual sufficiency of the evidence, then it must consider, weigh, and examine all of the evidence in the record. *Plas-Tex, Inc. v. U.S. Steel Corp*., 772 S.W.2d 442, 445 (Tex. 1989). Under such a review, appeal courts consider only that evidence and the inferences therefrom which support the court's findings, considered in the light most favorable to the findings, and disregard contrary evidence and inferences. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d. 497, 499 (Tex. 1995); *Holt Atherton Industries, Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992). Appellate courts do not pass on the witnesses' credibility or substitute their judgment for that of the trier of fact. *Cohn v. Comm'n for Lawyer Discipline*, 979 S.W.2d 694, 696 (Tex.

App.-Houston [14th Dist.] 1998, no pet.).

Evidence is legally insufficient if: (1) there is a complete absence of evidence for the findings, (2) there is evidence to support the findings, but rules of law or evidence bar the court from giving any weight to the evidence, (3) there is no more than a mere scintilla of evidence to support the findings, or (4) the evidence conclusively establishes the opposite of the findings. *Juliette Fowler Homes, Inc. v. Welch Assoc., Inc*., 793 S.W.2d 660, 666 n.9 (Tex. 1990); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (citing Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 *TEX. L. REV*. 361, 362-63 (1960)). "More than a scintilla of evidence exists where the evidence supporting the findings, as a whole, 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Burroughs Wellcome*, 907 S.W.2d at 499 (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25, 37 (Tex. 1994)). Only if the evidence is so weak as to do no more than create a mere surmise or suspicion of the finding's existence, then – and only then – is there legally-insufficient evidence. *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995).

In other words, findings will be set aside only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996).

On the other hand, when the appeals court reviews a trial court's decisions involving mixed questions of law and fact then an abuse of discretion standard is applied. *See El Paso Natural Gas Co. v. Minco Oil & Gas Co.*, 964 S.W.2d 54, 61 (Tex. App.-Amarillo 1997), *rev'd on other grounds*, 8 S.W.3d 309 (Tex. 1999). It is an abuse of discretion only when a trial court rules arbitrarily, unreasonably, or without regard to guiding legal principles, *e.g., Goode v. Shoukfeh*, 943 S.W.2d

441, 446 (Tex. 1997), or to rule without supporting evidence, *Beaumont Bank v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). Thus, a trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004).

Conclusions of law are reviewed *de novo* as legal questions, and no deference is applied to the lower court's decision. *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996); *Treadway v. Shanks*, 110 S.W.3d 1, 5 (Tex. App.-Dallas 2000), *aff'd*, 110 S.W.3d 444 (Tex. 2003).

If statutory construction is involved, as there is here, then that is a question of law, which is reviewed *de novo*. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989); *Richardson Indep. Sch. Dist. v. GE Capital Corp*., 58 S.W.3d 290, 293 (Tex. App.--Dallas 2001, no pet.). In construing a statute, the objective is to determine and give effect to the legislature's intent. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001); *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). When possible, the legislature's intent is determined by reading the language used in the particular statute and construing the statute in its entirety. *Helena Chem*., 47 S.W.3d at 493. Even if the statutory language is not ambiguous on its face, then courts may also consider other factors, including the objective sought to be obtained, legislative history, and consequences of a particular construction. *Helena Chem*., 47 S.W.3d at 493 (citing TEX. GOV'T CODE ANN. § 311.023 and *Ken Petroleum Corp. v. Questor Drilling Corp.,* 24 S.W.3d 344, 350 (Tex. 2000)).

Contract interpretation is a legal question unless the contract is unclear or susceptible to two or more reasonable interpretations. *Coker v. Coker*, 650 S.W.2d 391, 393, 26 Tex. Sup. Ct. J. 368 (Tex. 1983). If so, then it becomes a question for the fact-finder, *Id*. at 394, and the fact-finders

conclusions may only be set aside in conformance with the rules governing factual sufficiency.

C. PLEADING ISSUES

Appellant's arguments that the Original Petition of Appellees (Plaintiff and Intervenors) was legally deficient is entirely without merit. Plaintiff and Intervenors filed their Petitions (CR 10 & 19) against Defendants for unpaid condo fees, alleging the various entities were the alter egos of Defendant Bundren and his wife. Para. 4 alleges that the "Defendants are holders of *legal, and /or equitable titles, both in the past and at the present,* of numerous condominium units in Holly Oaks Townhomes, . . .Dutch Creek (Unit 301), Park Lane (Units 728 and 711) and Royal Lane (Units 218)." (Emphasis Added) Section V., para. 7 states a cause of action for (1) debt, (2) *Quantum Meruit, and (3) Unjust enrichment.* The HOAs alleged the Defendants have engaged in a

> "consistent and pervasive scheme and course of conduct calculated to shirk and avoid the cost of the ownership and the operation of their real property over which they maintain control and to require their neighbors and members in the Association unjustly to bear Defendants' expenses of ownership as set forth above (Para. 5)"

Para's 7 through 12 allege four (4) alternative bases for Defendants' obligations to pay the condo fees and assessments, (including "costs incurred in the collection of the monies due, including attorney's fees and court costs"), namely

(1) "fees and assessments that have accrued and are due under the terms of the Master Deed and By-Laws of the Association, for which the HOAs are entitle to judgment as will be shown by the evidence;"

(2) "In the alternative, the non-payment of the condo fees by the Defendants is inequitable and entitle the Intervenors to a judgment in ***Quantum Meruit*** for the value of goods and services received by the Defendants, and provided by the HOAs which the HOAs provided

with the expectation of payment;"

(3) "In the further alternative, the Defendants have been ***Unjustly Enriched*** by the receipt of the benefits of the payment of these costs of ownership and operation of Defendants' real estate ventures, for which the [HOAs] are entitled to judgment in the amounts as will be shown by the evidence;" and

(4) The HOAs went further in Section VI. to allege ***Fraud and Deceit***. The HOAs alleged that as a part of the scheme of the Defendants, they apparently rely upon the priority of liens provision in THE CONDOMINIUM ACT, [SEC. 81.001, *et seq*.] making condo fee liens subordinate to (1) Government taxes and (2) *obligations due under validly recorded mortgages*. However, the HOAs further allege that "priority of liens do not avoid the obligation to pay legitimate debts and obligations for benefits received as plead hereinabove."

The HOAs further allege in Para. 11, that

"**the Defendants, by swapping properties amongst themselves and their alter egos, also hide the true identity of the owners**. The Defendants also rent the units taken back, without foreclosure and without notification to the Association of the transfer, sale, occupancy, or the identity of persons or entities involved, all while condominium fees remain unpaid. ...The Association members–victims of the Defendants–simply have a reasonable expectation, and an enforceable legal right, that all of the owners of the condominium units will pay their fair share of the regime expenses of insurance, water, sewer, site lighting, maintenance on the grounds, trash collection, maintenance on the plumbing, maintenance on the buildings, etc."

Para.12 alleges that the actions and activities described above were meant to deceive and defraud the [HOAs], and all other owners represented thereby, of operating funds justly owed to the Association by the Defendants. By reason of the foregoing, [HOAs] are entitled to judgment for fraud and deceit against the Defendants, jointly and severally, and against any entity which they may have used to pursue this scheme to avoid their legitimate and proper costs of owning real estate as well as the damages caused by their fraudulent conduct, including all costs incurred in enforcing the payment of the condo fees and assessments.

After requesting Punitive Damages and Injunctive Relief, the HOAs pled for all other just and proper relief to which the Plaintiff and Intervenors may show themselves to be entitled, both at law and in equity. (*See* T.R.C.P. 47(c) which provides that claims for relief should include **"a demand for judgment for all the other relief to which the party deems himself to be entitled.**")

Appellants argue that Appellees Trial Brief addressing only equitable issues, filed on the first day of trial for the edification of the court on equitable issues, somehow limits the issues at trial. Appellees submit that the pleadings, not a pre-trial brief on a single theory, defines the issues at trial.

All allegations of the Appellees were proven by overwhelming, and almost undisputed, evidence; and the court so found in granting its judgment (CR 1031) and in the court's Findings of Facts and Conclusions of Law. (CR 1072-1080). Appellees plead several alternative legal and equitable theories of recovery, and proved them all. The court's judgment was based upon the "inequity" of the schemes of the Defendant Bundren and his wife, through their alter ego entities. However, the Findings of Facts and Conclusions of Law found the facts and law sufficient for Plaintiffs to recover on any of several legal and equitable theories.

The Supreme Court has noted that:

> Texas follows a "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. *See Broom v. Brookshire Bros., Inc*., 923 S.W.2d 57, 60 (Tex. App.--Tyler 1995, writ denied).
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> ****
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> "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense." *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982)

Horizon/CMS Healthcare Corporation D/b/a Heritage Western Hills Nursing Home, Petitioner v. Lexa Auld, Administratrix.34 S.W.3d 887, 987 (Tex. 2000).

In other words, Rules 45 and 47 only require that the original pleadings give a short statement of the **claim** involved. TEX. R. CIV. P. 45, 47; *Paramount Pipe & Supply Co., Inc. v. Muhr*, 749 S.W.2d 491, 494 (Tex. 1988); *Castleberry v. Goolsby Bldg. Corp*., 617 S.W.2d 665, 666 (Tex. 1981). Rule 45 does not require that the plaintiff set out in his pleadings the evidence upon which he relies to establish his asserted cause of action. *Muhr*, 749 S.W.2d 491, 494-95. A petition must be construed liberally in favor of the pleader. *Stone v. Lawyers Title Insurance Corp*., 554 S.W.2d 183, 186 (Tex.1977). Also, "(t)he court will look to the pleader's intendment and the pleading will be upheld even if some element of a cause of action has not been specifically alleged. Every fact will be supplied that can reasonably be inferred from what is specifically stated." *Gulf, Colorado & Santa Fe Railway Co. v. Bliss*, 368 S.W.2d 594, 599 (Tex.1963). A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim.

In defining fair notice and in measuring the adequacy of a pleading against that standard, Texas courts consistently indicate that to force a party to plead his entire case, with exactness, is not concordant with the spirit of the Rules governing pleading. *Rodriguez v. Yenawine*, 556 S.W.2d 410, 413 (Tex. Civ. App. – Austin 1977).

The party *excepting* [Bundren did not file Special Exceptions to the Plaintiff's Pleading] to a pleading has the burden to show that fair notice of the facts upon which the pleading is based has not been given the party excepting, and the burden is greater because the Rules of pleading uniformly condemn forcing a plaintiff to plead the evidence upon which plaintiff relies to prove the allegations of the pleadings. *King v. Harris County Flood Control Dist*., 210 S.W.2d 438 (Tex.Civ.App. Galveston 1948, writ ref'd n.r.e.); *Andrews v. Daniel*, 240 S.W.2d 1018, 1021 (Tex.Civ.App. Austin 1951, writ dism'd). Under Rules 45 and 47, certainty in the incident giving rise to the controversy is required in the pleadings more than certainty in the issues, as stated by McDonald, 2 McDonald, *Texas Civil Practice*, sec. 5.07.2, p. 22 (1970). This statement of the rule, together with the language immediately following it, met with approval of the courts in 1954: ". . . the time and place of the transactions involved and the circumstances of the occurrence which forms the basis of the controversy are to be stated with such particularity as will permit the opponent to identify the source and estimate the **genera**l scope of the dispute." *Pacific Finance Corporation v. Moody*, 272 S.W.2d 403, 408 (Tex.Civ.App. Austin 1954, no writ) (emphasis supplied).

In other words, fair notice, as used in the Rules, has been given if the pleadings are sufficiently specific that ". . . *an opposing attorney of reasonable competence*, with the pleadings before him, can ascertain the nature and the basic issues of the controversy and the testimony probably relevant." 2 McDonald, § 5.05, p. 16 (1970) (emphasis supplied). The test, as stated in this language, was applied in *Daniels v. Conrad*, 331 S.W.2d 411, 415 (Tex.Civ.App. Dallas 1959, writ ref'd n.r.e.), and in every Fifth Court of Appeals case on the point since**.**

It has been held that allegations setting out each element of the cause of action – *but not every theory of recovery* – are sufficient to give fair notice. *Union Producing Company v. Allen*, 297

S.W.2d 867, 870 (Tex.Civ.App. Beaumont 1957, no writ); *Gunnells Sand Company v. Wilhite*, 389 S.W.2d 596, 598 (Tex.Civ.App. Waco 1965, writ ref'd n.r.e.). In this case, Plaintiff and Intervenors even identified the legal cause of action and equitable remedies relied upon.

The important distinction between what is necessary to constitute adequate notice and what exceeds that standard unnecessarily was stated clearly by the Supreme Court in *Arkansas Fuel Oil Co. v. State*, 154 Tex. 573, 280 S.W.2d 723, 725 (1955) in this language:

> Under Texas pleading a petition should allege the ultimate facts constituting the elements of the cause of action relied upon, but it need not be evidentiary. In general, counsel can, if he wishes, say nothing in advance about the evidence he intends to offer to prove the allegation of his petition. Usually he lets the court and his opposition learn the nature of his evidence as he develops it during the trial.

The Defendant here did not file Special Exceptions to obtain a more definite statement of the plaintiff's claim, and announced ready for trial on May 5, 2008 when the trial began. That is a fatal and final error. *See generally* T.R.C.P. 91; *see Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982). The Supreme Court has:

> . . . recognized that in the absence of such special exceptions, the petition must be "construed liberally in favor of the pleader" and *that the court "should uphold the petition as to a cause of action that may be reasonably inferred from what is specifically stated . . . .*

Boyles v. Kerr, 855 S.W.2d 593, 601 (Tex. 1993) (emphasis supplied).

Futhermore, after 3 days of trial, the case was recessed for almost a year to allow the Defendants the opportunity to "locate documents" that Bundren argued were missing from the chain of title documents produced by Appellees (during which time Bundren (1) foreclosed several units that had been in default, (2) filed a number of backdated deeds, (3) created a number of corporate documents and (4) reinstated Hope Hill Investments, Inc., and New Hope Foundation, Integrated Auxiliary of Dallas Theological Seminary, Inc.).

In his Issues I., F., and G., Bundren complains that he was not given notice of the ***law*** as it may impact the facts and legal theories upon which he had been sued. Such a responsibility has never been placed upon a party to plead. As demonstrated above, the Plaintiff must plead ***facts*** which give rise to a legal cause of action or remedy in equity. Though severely impacted by the law, Defendants cannot complain that the law resulted in an unfair trial. Try as he might to change the facts in this case in the middle of trial, Bundren simply could not change the law of Texas in preparation for trial.

D. ALTERNATIVE BASES OF LIABILITY OF APPELLANTS

Defendants are liable under **one or more of the following theories of recovery**:

1. Liability for Condo Fees to pay the common expenses of the condominiums they owned under the TEXAS CONDOMINIUM ACT, (TEX. PROP. CODE 81.001, *et seq*.) based on:

a. As the holder of Legal Title at the time the debts were incurred;

b. As the equitable title holder (mortgagee in possession) on the basis of *Quantum Meruit* and/or Unjust Enrichment;

c. As a seller of a condo under Property Code § 81.208;

d. As a buyer of a condo under Property Code § 81.208.

2. Liability under the Declaration and By Laws of all HOAs as the:

a. Owner of Legal Title;

b. Owner of Equitable Title, based on Quantum Meruit and/or Unjust Enrichment.

3. Personal liability of Defendant William Charles Bundren as a Director and Officer of HHI ("Hope Hill Investments, Inc.") and NHF ("New Hope Foundation, Ancillary Auxiliary of Dallas Theological Seminary") during their periods of dissolution and forfeiture pursuant to

Texas Tax Code 171.255. Also, Defendants Charles and Karen Bundren are jointly and severally liable as the stockholders of HHI and NHF during the periods when debts were incurred while they were without the shield of corporate protection from debts.

4. Defendants Charles and Karen Bundren are jointly and severally liable for all debts that were incurred during the entire period of time that they practiced their scheme of fraud and deception. Their fraud and deception was fully described in the pleadings of the HOAs and were demonstrated in the evidence of (1) backdated deeds, (2) deeds filed by the Bundrens and their alter ego entities without legal title in the names of the Grantors, (3) Invalid Vendor's liens and false information transmitted to the HOAs as to the true owners of the units, resulting in years protection from paying condo fees by hiding behind their deceptive practices. The scheme of the Defendants has caused great harm to the HOAs and their individual member/co-owners. It has required this complex and monumental lawsuit to learn the truth and to seek redress only through this very expensive litigation process.

5. **Alter Egos** – Defendants Charles and Karen Bundren have used as part of their scheme, various alter egos, including HHI and NHF. It also included Charles Bundren's mother and ½ sister, in whose names he held title for many years, according to his testimony and the documents on file. The evidence is overwhelmingly in support of the trial court's conclusions of law in which the court declared the entities to be the alter egos of Charles and Karen Bundren and to hold them personally liable, jointly and severally, with the corporations.

E. APPLICABLE STATUTORY LAW

As correctly found by the trial court, the Texas Uniform Condominium Act ("TUCA") (Prop. Code Chap 82) is not applicable to this case (*See* Property Code Sections 81.0011 and 82.002,

(Exhibits P 7 for Chap 81; P 8 for Chap 82)), *except limited sections, (see 82.002 (d))*. (Findings of Facts and Conclusions of Law, RR 1072-1080, App 6) The only exceptions relevant in this case is 82.113 (Association's Liens for Assessments) and Sec. 82.161 (Effect of Violations on Rights of Action and Attorney's Fees). The Texas Condominium Act, Chap. 81. and the these two applicable sections clearly give the HOAs the rights to enforce the payment of Condo Fees and to be awarded reasonable attorney's fees and *all costs of collection and enforcement*, which is also covered under the Condominium Act (*See* 82.113). (*See* Finding of Facts (1.) and Conclusions of Law (1, 2, 3. 4) supported by Exhibits P6 (Holly Oaks Declaration dated 2/1/79); P 279, p.2 (Dutch Creek Declaration dated 5/19/83); P 296 (The Woods on Park Lane Declaration dated 4/14/82) and P 323 (Royal Lane Highlands Declaration dated 8/24/83). Therefore, Appellants' arguments that TUCA (Chap 82 is applicable) and not the Texas Condominium Act (Chap 81) is plainly wrong and the court's Findings and Conclusions are correct.

Bundren's argument, and part of his scheme to avoid paying his fair share of the costs of ownership of his units, is that the definition section of TUCA (Chap. 82) defines "Owner" and excludes "a person having an interest in a unit *solely* as security for an obligation. . . ." He ignores the fact that he does more than hold the unit solely as security for a debt. He holds these units after default by the "buyer" for years without foreclosing, collects rents the units, controls the units and demands from the associations full services including insurance to be maintained on the unit, accepting the benefits without paying his share. He is, as described by the court in *Chitsey v Lockshin, et al., supra*. on similar facts, a Mortgagee in Possession. Thus, he forces his co-owners in the association to pay all of his costs of owning his investment real estate. Therefore, he is not a person solely holding a security for an obligation. He has retained "superior title" to the Grantee

according to the terms in his Warranty Deed with a Vendor's Lien. Secondly, the definitions section of TUCA do not apply if they conflict with the Condominium Act (Chap 81). Chap 81 defines "Owner" as any person who owns a unit, "but shall not include a *trustee* under a deed of trust." The definition of "Owner" does not exclude (1) a vendor who retains superior title to the vendee in a Warranty Deed with reservation of a Vendor's Lien, (2) does not exclude a third party beneficiary under the Deed of Trust, and (3) does not exclude a Mortgagee under a Mortgage. The third party beneficiary under a Deed of Trust is not a Trustee. Even the Declaration of The Woods on Park Lane includes all owners of the "fee simple title", but excludes one who holds title "*merely* as security for the performance of an obligation," such as a Trustee under a Deed of Trust. Clearly, that does not apply to Bundren and his Alter Egos, under the facts of this case.

F. LAW APPLICABLE TO CORPORATE FORFEITURE AND DISSOLUTION

Part 7, Texas Business Corporation Act and The Texas Tax Code, Sec. 171.252, and other related sections are interrelated, and somewhat bewildering, as it pertains to the forfeiture of the corporate charter, the revocation of a corporations' right to do business, dissolution of the corporation, liabilities of the officers, directors and stockholders of the debts of a corporation during the time of its forfeiture of its charter, *etc.* However, an excellent analysis of the interrelationship of the two is contained in *In Re: ABZ Insurance Services, Inc., d/b/a Ace Insurance Agency, Debtor*, Case No. 397-39760-RCM-7, in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, 245 B.R. 255; 2000 Bankr. LEXIS 168, (Jan. 3, 2000), to wit:

"1. **Under Tex. Tax Code § 171.251, the comptroller shall forfeit the corporate privileges of a corporation for failure to file a report within 45 days of notice or failure to pay assessed franchise taxes within 45 days of becoming due. The effect of a forfeiture under § 171.251, is that . . .**
(2) each director or officer of the corporation in liable for a debt of the corporation as

provided be Section 171.255 of this code.[1]

2. **Tex. Tax Code § 171.252 (emphasis added). Upon the comptroller's certification, the Secretary of State may then forfeit the corporate charter. Tex. Tax Code § 171.309.**

3. **Forfeiture of a corporate charter for non-payment of taxes acts as a dissolution of the corporation. *See* V.A.T.S. Bus. Corp. Act, Art. 7.01B(1).**

4. Forfeiture of a corporate charter for failure to pay franchise taxes does not extinguish the corporation as a legal entity as long as there is a statutory right to reinstate the charter. *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595 (Tex. App.-- Houston [14th Dist.] 1994, writ denied). A corporation which has forfeited its charter may be resurrected by paying delinquent taxes. Id.

5. Under the Tex. Bus. Corp. Act, Art. 7.01B(1), a corporation may be dissolved by order of the Secretary of the State when it is established that it is in default in any of the following particulars:
(1) The corporation has failed to file any report within the time required by law, or has failed to pay any fees, franchise taxes or penalties proscribed by law when the same have become due and payable;
To this same effect *see* Tex. Tax Code §§ 171.302 *et seq*., including §§ 171.309-310.

6. Under the Tex. Bus. Corp. Act, Art. 7.12A(1)-(4), a dissolved corporation shall continue its corporate existence for a period of three years from the date of dissolution for the following purposes:
(1) prosecuting or defending in its corporate name any action or proceeding by or against the dissolved corporation;

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[1] **Sec. 171.255. LIABILITY OF DIRECTOR AND OFFICERS**. (a) If the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived. The liability includes liability for any tax or penalty imposed by this chapter on the corporation that becomes due and payable after the date of the forfeiture.

(b) The liability of a director or officer is in the same manner and to the same extent as if the director or officer were a partner and the corporation were a partnership. . . .

(d) If a corporation's charter or certificate of authority and its corporate privileges are forfeited and revived under this chapter, the liability under this section of a director or officer of the corporation is not affected by the revival of the charter or certificate and the corporate privileges. (Emphasis added)

(2) permitting the survival of any existing claim by or against the dissolved corporation;
(3) holding title to and liquidating any properties or assets that remained in the dissolved corporation at the time of, or are collected by the dissolved corporation, after, dissolution, and applying or distributing those properties or assets, or the proceeds thereof, as provided in Subsections (3) and (4) of Section A of Article 6.04 of this Act; and
(4) settling any other affairs not completed before dissolution.

7. **Under Article 7.12F(1), a dissolved corporation means a corporation that was:** (a) voluntarily dissolved by the issuance of a certificate of dissolution by the Secretary of State and was not issued a certificate of revocation of dissolution pursuant to Section C of Article 6.05 of this Act, (b) that was involuntarily dissolved by the Secretary of State and was not reinstated pursuant to Section E of Article 7.01 of this Act) that was dissolved by decree of a court when the court has not liquidated all the assets and business of the corporation [**7] as provided in this Act, (d) that was dissolved by the expiration period of its duration and has not revived its existence as provided in this Act, **or (e) whose charter was forfeited pursuant to the Tax Code, unless forfeiture has been set aside.** (Emphasis added).

8. The primary purpose of this three year survival statute is two fold: first, to allow claimants to sue a dissolved corporation for pre-dissolution activity for three years after its dissolution and, second, to protect shareholders, officers, and directors of dissolved corporations from prolonged and uncertain liability. *See Martin v. Texas Woman's Hosp., Inc*. 930 S.W.2d 717, 720(Tex. App.-- Houston [1 Dist.] 1996, n.w.h.); *Hunter v. Fort Worth Capital Corp*. 620 S.W.2d 547, 550 (1981); *See* also Tex. Bus. Corp. Act, Art. 7.12C.

9. [A]s indicated by the current language of Tex. Bus. Corp. Act. Art. 7.12, an amendment has been made to include within the reach of the limited survival statute those corporations whose dissolution comes about by action of the Secretary of State as a result of a corporation's failure to pay its franchise taxes. *See* Tex. Bus. Corp. Act, Art. 7.12F(1)(e). The "Comments of Bar Committee- 1996" on 7.12 states in part:

> Article 7.12 was further amended in 1993 to add corporate termination effected under the Tax Code as dissolutions under Article 7.12. As a result, **a corporation whose charter is forfeited under the Tax Code is considered to be involuntarily dissolved pursuant to Article 7.12 and the directors will have the duties and obligations provided for under Article 7.12 and the corporation may engage in the activities provided under that section.** (Emphasis Added)

10. **A dissolved corporation may not continue its corporate existence for the purposes of continuing the business or affairs for which the dissolved corporation was organized. V.A.T.S. Bus. Corp. Act, 7.12[2] (West Supp. 93).**

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[2]Art. 7.12. LIMITED SURVIVAL AFTER DISSOLUTION. A. A dissolved corporation shall continue its corporate existence for a period of **three years** from the date of dissolution, for

[Excerpts from ABZ case continued on page 34]

Note: The Texas Corporation Act, Art. 7.12, (*see* footnote 2) was amended and effective September 1, 1997, to provide a 3 year period to reinstate a forfeited corporation, during which time the corporation could continue to do business, but did not have access to the courts of the Texas. ***Prior to Sept. 1, 1997***, at the time of the forfeiture of Hope Hill Investments, Inc. on February 15, 1994, the period during which the corporation could do business under Article 7.01 E. was 12 months, or until February 15, 1995. Under the Texas Tax Code, § 171.251 and § 171.252 the corporation was dissolved and could not conduct its regular course of business, but could only do those things permitted in winding up its affairs, until it was reinstated by the payment of taxes, etc.

This change in the law is important to note when evaluating the backdated deeds filed by Bundren from Hope Hill Investments, Inc. The deeds were backdated to a date one month within the three- year period provided in the current statute (*i.e.* 1/01/97), but was outside the 12 month period in effect when the charter of HHI was forfeited on Feb. 15, 1994. HOAs submit that Bundren, reading the current statute, was attempting to backdate the deeds to a time one month within the 3 year period during which the corporation had the power under the Texas Corporation Act to continue to do business in the ordinary course, *but was prohibited from doing business in the ordinary course*

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the following purposes:
(1) prosecuting or defending in its corporate name any action or proceeding by or against the dissolved corporation;
(2) permitting the survival of any existing claim by or against the dissolved corporation;
(3) holding title to and liquidating any properties or assets that remained in the dissolved corporation at the time of, or are collected by the dissolved corporation after, dissolution, and applying or distributing those properties or assets, or the proceeds thereof, as provided in Subsections (3) and (4) of Section A of Article 6.04 of this Act; and
(4) settling any other affairs not completed before dissolution.
However, a dissolved corporation may not continue its corporate existence for the purpose of continuing the business or affairs for which the dissolved corporation was organized.

under the Texas Tax Code, § 171.251 as a dissolved corporation under the tax code. Apparently, Bundren did not recognize the legislative change from a 12 month period to a 36 month period, effective September 1, 1997, and did not take into account the disability under the Texas Tax Code of HHI to conduct the ordinary business affairs for which the corporation was created.

CONTINUING QUOTATIONS FROM *ABZ INSURANCE, SUPRA*:

11. The Tex. Tax Code provisions and the Tex. Bus. Corp. Act dissolution provisions are consistent with one another. The 1993 amendment of Tex. Bus. Corp. Act, Art. 7.12F(1)(e) and Tex. Tax Code § 171.251 and 252 can be harmoniously interpreted. Section 171.251 provides that the state Comptroller **shall** forfeit a corporation's privileges upon which the franchise tax is imposed if a franchise tax report is not filed or fee paid. In such event, per § 171.252, those privileges forfeited are (1) the corporation's right to sue or defend in a court in this state and **(2) each corporate officer or director is liable for the corporate debts.** This occurred to ABZ on October 15, 1997. (Emphasis Added)

G. SUMMARY OF CORPORATE DISSOLUTION CONSEQUENCES:

1. Hope Hill Investments, Inc. (HHI) had its corporate charter forfeited 2/15/94. Under Art. 7.01 E of the Texas Corp. Act, HHI could continue to do business for 12 months, after which it could not. However, pursuant to Tex. Tax Code § 171.251, the non-filing of the franchise tax report or non-payment of the corporations fee requires that the Comptroller ("shall") forfeit the charter and it shall be dissolved, except for the powers of the corporation under § 171.252.

2. **The officers and directors of HHI became personally liable for all debts and obligations of the corporation during the period of forfeiture and dissolution**, both under the Corporation Act and the Tax Code, and this would include condo fees and assessments while title to the condominiums were vested in the name of HHI.

3. **The backdated deeds were not effective prior to execution and filing, which included**

the deeds executed and filed 11/17/2008 and backdated to be "effective 01/01/97" (Def. Exh. 70,) including: (**Holly Oaks 3, 8, 11**(Executed 11/17/08, filed of record 11/18/08, "effective 0**1/01/99**), **21** (2 deeds, 1 executed 6/12/03, recorded 6/23/03, "effective 01/01/97" (Plaint. Exh. 127); and a second deed executed and recorded 11/17/08, "effective 01/01/97 (Def. Exh. 70) and both from HHI to Defendants Bundren as C&K Residential Properties,) **33, 36 (Again two deeds,** one executed 02/16/02 and recorded 03/29/02, "effective 01/02/97 (Plaint. Exh. 214); and a second deed executed and recorded 11/17/08**, "**effective 01/01/97), **60**; **Royal Lane Highlands # 218**, (two backdated deeds, one executed 6/12/03**,** recorded 6/23/03, "effective 01/01/97" (Plaint. Exh. 327); and a second dated 11/17/08, "effective 01/01/97) (Def. Exh. 70); **Dutch Creek 301**, (two backdated deeds, one dated 11/17/97, "effective 01/01/97 from HHI to Bundrens d/b/a C&K, and One dated 3/19/09 from C&K to HHI, "effective 1/18/02" (Def. Exh. 70 A); and **Woods on Park Lane, Unit 711,** one deed signed on August 12, 2005, and filed of record on 9/13/05 from HHI to C & K (Plaint. Exh. 300) and a second dated 11/17/08, "effective 01/01/97 from HHI to Bundrens, d/b/a C&K (Def Exh. 70); and **Unit 728** deed signed June 16, 2003, and filed of record 6/23/03, "effective Jan. 1, 1997) from HHI to Bundrens, d/b/a C&K (Plain. Exh. 310).

4. **In addition, all deeds listed in "3. above" are void and without effect. HHI had its charter reinstated on April 16, 2009. All deeds and contracts dated after February 14, 1994 (under the Tax Code, § 171.251) and after February 14, 1995 under the Texas Corporation Act, Art. 7.01 E., were void and without effect**. (*See Lighthouse Church of Cloverleaf, et al. v. Texas Bank*, 889 S.W.2d 595; 1994 Tex.App. LEXIS 2812, ". . . in Texas a deed is void if the grantee is not in existence at the time the deed is executed." *Fisher v. Southland Royalty Co.*, 270 S.W.2d 677, 680; ". . . a deed to a corporation which has no legal existence at the time the deed is

executed is void." *Klorfine v. Cole*, 121 Ore. 76, 252 P. 708, 710 (Ore. 1927) "When a corporation is dissolved, it is dead, and, in the absence of a statute to the contrary, it no longer exists for any purpose." *Klorfine, id.* "A deed which is void, however, cannot pass title even to an innocent purchaser from the grantee." *See Daniel v. Mason*, 90 Tex. 240, 38 S.W. 161, 162 (1896).

Therefore, legal title for all condominium units listed in para.3. above remained vested in HHI and continues to remain in HHI. Pursuant to § 171.255, each corporate officer or director is personally liable for all corporate debts incurred during the period of dissolution. Defendant William Charles Bundren admits to being the President, Sole Director, and Sole Stockholder of the community common stock belonging to him and his wife. The Contracts of Sale, Deeds, and other recorded documents reflect that he signed the documents as the President of HHI. Also, the "Resolution" of a meeting with himself on the day before the trial was concluded, April 21, 2009, (Def. Exh. 203) represents that he is currently the President, Sole Director and Sole Stockholder. It in unclear when his wife was relieved of her stock interest, because none of the HHI corporate documents were produced prior to the final days of the trial, and what documents were produced were highly suspect, and HOAs submit a reasonable person would conclude they were manufactured for the purposes of this trial.

5. Question from the Court to Expert James V. Smith, essentially asked:

> **How do you know that the backdated corporate deeds were not done in the winding up of the affairs of the corporation, as permitted under the Texas Corporation Act, Art. 7.12 A (1) - (4)?**

Mr. Smith answered, in summary, "Because the deeds were a continuation of the ordinary course of business carried on by Mr. Bundren in the management of these properties." (RR Vol 5, pp.60)

Now with the record, the correctness of Mr. Smith's answer is evident and supported by the

documentary evidence.

First, the deeds were invalid because all of them (*see* 3. above) were after dissolution by the comptroller pursuant to § 171.251 and after the 12 month period provided by Article 7.12 of the Texas Business Corporation Act in 1994 when the charter of HHI was forfeited. (Prior to the Statutory Amendment effective September 1, 1997).

Second, the void, backdated deeds, (all executed and filed before HHI was reinstated on April 6, 2009) were for the obvious purpose of transferring title from HHI to Defendants Bundren, d/b/a C&K Residential Properties, and to attempt to cure a fatal break in the chain of title continuing thereafter from C&K to third parties, and back to C&K through foreclosures of vendors liens and deeds of trust, all of which were void and without effect. In particular, *see* Dutch Creek #301, listed above, from C&K to Sealey, and back to C&K, all without a deed originally into C&K.

Third, Bundren entered several contracts of sale, or Contracts for Deeds, and Leases in the ordinary course of business while title was vested in the name of HHI, including the following: **(Note: The numerous backdated, but void, deeds were filed in a failed effort to cure the non-existent chain of title for the following events, undertaken by Bundren in his alter ego entities as well as other non-existent entities.)**

(1) While title was in HHI, but after dissolution, both under the Tax Code on Feb. 15, 1994, and under the Texas Business Corporation Act on February 15, 1995 (12 months after forfeiture of charter), Defendants Charles and Karen Bundren entered into a "Residential Condominium Contract dated May 6, 2006 to sell Holly Oaks #3 using their partnership name, C&K Residential Properties, with Richard A. Haskell (Bates 25-26) and Letter Receipt for Down payment (Bates 25-26) (P. Exh. 14).

(2) While Title was in HHI, but after dissolution, both under the Tax Code on Feb. 15, 1994, and under the Texas Business Corporation Act on February 15, 1995 (12 months after forfeiture of charter), Defendants Charles and Karen Bundren entered into a Lease from "C&K Management, Inc." **a non-existent corporation**, as "Landlord" on June 21, 2006 to lease Holly Oaks Unit # 3 to Richard A. Haskell, agreeing to allow the Tenant to "close a sale" during the term of the lease, the security deposit and any rent paid "shall apply to down payment." (Bates 22; P. Exh. 15).

(3) Defendants Charles and Karen Bundren paid condo fees in 2002 for units 3, 8, 21, 32, 33, 36, 50, 51, and 11 with checks drawn on an account in the name of a Non-existent LLC, namely, "C&K Residential Property Management, LLC." (P. Exh. 17, as an example)

(4) While title was in HHI, but after dissolution, both under the Tax Code on Feb. 15, 1994, and under the Texas Business Corporation Act on February 15, 1995 (12 months after forfeiture of charter), Defendants Charles and Karen Bundren entered into a Lease dated June 24, 2006 of Holly Oaks #6 utilizing the name of "C&K Properties Management, Inc.," a non-existent corporation, with Richard Olivarez, Tenant. (P. Exh. 37) This is the lessee that was discovered by Jackson Potter of Envision Realty, who investigated and received from Olivarez a copy of his lease with Defendant Bundren. (*See* P. Exh. 38**)** and after foreclosure of assessment lien and a void deed into the name of the HOA (P. Exh. 39) Tenant gave notice that he would vacate at the expiration of his lease. (P. Exh. 40)

(5) While title was in HHI, but after dissolution, both under the Tax Code on Feb. 15, 1994, and under the Texas Business Corporation Act on February 15, 1995 (12 months after forfeiture of charter), Defendants Charles and Karen Bundren entered into a Contract of Sale on March 18, 2003, in the name of "New Hope Foundation" (not "New Hope Foundation, Ancillary Auxiliary of the

Dallas Theological Seminary") to sell Holly Oaks Unit 21 to for $60,000. (P. Exh. 121) The $2,080.00 down payment was, however, paid to Charles Bundren, individually. (P. Exh. 122). However, on March 21, 2003, Bundren entered into a "Contract for Deed" with Mr. Alexander, and did so, again, in the name of "New Hope Foundation." (P. Exh. 123) However, on April 9, 2003 (P. Exh. 124) and on April 30, 2003 (P. Exh. 126), Defendant Bundren issued written Work Order Requests for Unit 21 in the name of C&K Residential Properties Management.

(6) While title was in HHI, but after dissolution, both under the Tax Code on Feb. 15, 1994, and under the Texas Business Corporation Act on February 15, 1995 (12 months after forfeiture of charter), Defendants Charles and Karen Bundren entered into a Residential Condominium Contract to sell Holly Oaks #22 on 1/08/02 between HHI as Seller to J. Dulemba, Buyer for $52,000. This was obviously done in the ordinary course of business. (P. Exh. 151) Shortly thereafter, on January 22, 2002, HHI executed and filed a deed for Holly Oaks # 22 from HHI to Jancyne Dulemba, with a vendor's lien, while reserving superior title. Charles Bundren signed as President of Hope Hill Investments, Inc. (P. Exh. 152) A Deed of Trust on Holly Oaks #22 with HHI as beneficiary, and Charles Bundren as Trustee, was filed on Jan. 29, 2002. (P. Exh. 153) All void transactions by the dissolved corporation.)

(7) While after dissolution oh HHI, both under the Tax Code on Feb. 15, 1994, and under the Texas Business Corporation Act on February 15, 1995 (12 months after forfeiture of charter), (while legal title was in the name of Joyce Hudnell), on Feb. 27, 2002, Charles Bundren, as President, executed a Contract of Sale from Hope Hill Investments, Inc. to Wasserlebens, for a sale price of $82,500, with a down payment of $4,500. (P. Exh. 186) Thereafter, without title, on 3/15/02, C&K Residential Properties filed a Warranty Deed with reservation of vendors lien, reserving superior

title, to Wasserleben, deed filed 4/26/02. (P. Exh. 188) Subsequently, on April 26, 2002, Bundren filed a backdated deed, "Effective January 1, 1997" from Joyce Hudnell to C&K Residential Properties. (P. Exh. 187)

(8) While title was in HHI, but after dissolution, both under the Tax Code on Feb. 15, 1994, and under the Texas Business Corporation Act on February 15, 1995 (12 months after forfeiture of charter), on March 14, 2003, without legal title, Defendant Charles Bundren entered into a Contract of Sale to sell Holly Oaks # 33 in the name of "New Hope Foundation"(not the full corporate name, and not designated as "Inc.") with Curtis Lee Nelson and Roger O. Elia for $76.500. and with $3,500 downpayment. This contract was unrecorded. (P. Exh. 199) Further without legal title, in another unrecorded "Gift Deed" Charles and Karen Bundren, d/b/a C&K Residential Properties attempted to convey title to Holly Oaks # 33 to "New Hope Foundation." (P. Exh. 200) On the same date, Bundren entered executed an unrecorded "Contract for Deed" to Holly Oaks #33 with Nelson and Elia. (P. Exh. 201) Thereafter, again without legal title, Bundren switches back to C&K Properties Managment, Inc. (a non-existent corporation) to enter a lease as Landlord of Holly Oaks #33 to Jaime Hardeman. (P. Exh. 208)

(9) While title was in HHI, but after dissolution, both under the Tax Code on Feb. 15, 1994, and under the Texas Business Corporation Act on February 15, 1995 (12 months after forfeiture of charter), on March 29, 2002, Defendants Charles and Karen Bundren, d/b/a C&K Residential Properties, executed and filed a Warranty Deed with Vendor's Lien to Belinda A. Joyce, (P. Exh. 215), a Deed of Trust for the benefit of C&K. (P. Exh. 216) and a Deed of Trust for the down payment of $3000 for the benefit of C&K (P. Exh. 217) Six (6) months after this trial began, Bundren executed and filed on 11/17/08 a void deed from HHI to himself and his wife, Karen, d/b/a

C&K Residential Properties in a failed attempt to cure the defective chain of title (D. Exh. 70) and, likewise a failed effort, with a void, backdated deed dated March 16, 2002 and filed March 29, 2002. (P Exh. 214)

(10) While title was in HHI, but after dissolution, both under the Tax Code on Feb. 15, 1994, and under the Texas Business Corporation Act on February 15, 1995 (12 months after forfeiture of charter), on Feb. 10, 2001, Defendant Charles Bundren entered into an "Residential Earnest Money Contract of Sale" without title, in the name of D Properties Management to sell Holly Oaks # 60 to Christine and Philip Boyd. (P. Exh. 257) Subsequently, without power and authority to act during the period of dissolution, Bundren as President of HHI executed a void Special Warranty Deed with Vendor's Lien to Philip Boyd and wife, Christine Boyd. (P. Exh. 258) and a Deed of Trust for the benefit of the dissolved corp., Hope Hill Investments, Inc. (P. Exh. 259) All transactions were taken during dissolution during February, 2001 and in the name of HHI.

Bundren also executed a false Corporate Resolution for Specific Transaction certifying that Hope Hill Investments, Inc. "is a duly organized and existing" corporation, although it had been dissolved since Feb. 15, 1994. (P Exh. 260)

(11) Dutch Creek #301 remained in the corporate name of HHI from 1/13/92 and was so on June 23, 2003 when Defendants Bundren, d/b/a C&K, executed a Warranty Deed with Vendor's Lien for the benefit of HHI to Jack Douglas Seeley, (P Exh. 285) along with a Deed of Trust for the benefit of HHI, (P Exh. 286) The title so remains in HHI today, due to the void, backdated deed filed Nov. 17, 2008 executed and filed during the period of dissolution of HHI.

(12) Royal Lane Highlands # 218 remained in the corporate name of HHI from Jan. 13, 1992 and remains so today, notwithstanding Bundren's attempts on 6/23/2003 (P Exh. 327) and

11/17/2008 (D. Exh 70) to file void, backdated deeds from HHI to himself and his wife, d/b/a C&K, during the period of dissolution of HHI. Without legal title, in June, 2003, Defendants Bundren, as C&K, filed a void deed to "New Hope Foundation," (not as a corporation, and not in the corporate name of New Hope Foundation, Ancillary Auxiliary of the Dallas Theological Seminary).(P Exh. 328)

(13) Woods on Park Lane # 711, remained in the corporate name of HHI from Jan. 13, 1992 and remains so today, notwithstanding Bundren's attempt on 11/17/08 (D. Exh 70) to file a void, backdated deed from HHI to himself and his wife, d/b/a C&K, during the period of dissolution of HHI and during this trial. Without legal title, on 9/13/05, HHI filed a void deed to themselves as C&K. (P. Exh. 300) On the same date, Defendants Bundren, as C&K, filed a void Warranty Deed with reservation of a Vendor's Lien to Helen Davila, (P. Exh. 301) and simultaneously filed a void Deed of Trust from H. Davila for the benefit of themselves as C&K. (Plaint. Exh. 302)

(14) Woods on Park Lane # 728, remained in the corporate name of HHI from Jan. 13, 1992 and remains so today, notwithstanding Bundren's attempts on 6/23/03 (P. Exh. 310) and 11/17/08 (D. Exh 70) to file void, backdated deeds from HHI to himself and his wife, d/b/a C&K, during the period of dissolution of HHI and even during this trial. All subsequent deeds to third parties, Emory Howell (P. Exh. 312) , and HOA foreclosure of condo fee lien of such title as Emory Howell had (P. Exh. 320), as well as the foreclosure of the Deed of Trust lien by C&K filed 9/05/08 (D. Exh. 149), are all void and without effect. Title is and has always remained in the name of HHI.

H. NEW HOPE FOUNDATION, ANCILLARY AUXILIARY OF DALLAS THEOLOGICAL FOUNDATION, INC.

The law as it pertains to the two corporations are the same. However, although the

Defendant's failed to produce any corporate documents for Hope Hill Investments, Inc., until the last three days of trial, the Defendant's did produce the original corporate books of New Hope Foundation, Ancillary Auxiliary of Dallas Theological Foundation, which showed absolutely no effort to set up the corporate books or to conduct the corporation as an independent corporation. There were no minutes of meetings, no resolutions and no records at all other than the rejection of a tax free status by the Comptroller of Public Accounts, and the notice that the corporation was not in good standing in Feb., 2006. It will be noticed that the Charter was forfeited on February 10, 2006 and remained forfeited until long after this trial began on May 5, 2008. In fact, the corporation was reinstated on November 20, 2008, while the trial was in recess to allow Mr. Bundren to find missing documents that he contended were of record, but were missing. (*See* P. Exh. 357, consisting of "Application for Reinstatement and Request to Set Aside Tax Forfeiture" signed by Charles Bundren bearing file marks of the Sect. Of State on Nov. 20, 2008, a Tax Clearance Letter for Reinstatement from the Texas Comptroller of Public Accounts dated November 20, 2008, and an Entity Review from the Texas Sect. Of State reflecting Tax Forfeiture on February 10. 2006 and Reinstatement on November 20, 2008)

HOAs will not exhaust the court further with a detailed analysis of the corporate deficiencies except to state that any acts by New Hope Foundation, Ancillary Auxiliary of Dallas Theological Foundation from February 10, 2006 until November 20, 2008, are void as actions of a dissolved corporation. HOAs further point out that the evidence is that the transactions of the "corporation" were often deficient because there was no corporate authorization for actions taken, transactions were done in the name of a non-existent entity, namely "New Hope Foundation" and the transactions were without consideration. For example, the Foundation, represented by Bundren to be charitable

and without stockholders, owners, etc. made gifts of its property to C & K, entirely without consideration, and even the recent foreclosures was a ruse to launder the titles from the Foundation's name as a beneficiary under the Deeds of Trust to C & K through the formality of a foreclosure sale. The foreclosure sales reflected sale prices to C&K of:

$57,000	(Emory Howell, Woods on Park Lane # 728), (D. Exh. 149),
$45,500	(Lawrence Werts, Sr., Holly Oaks #6), (D. Exh. 25),
$50,000	(Charles Jamison, Holly Oaks # 8) (D. Exh. 32),
$57,082.59	(Barry Alexander, Holly Oaks #21)(D. Exh. 33), and
$42,000	(Sherrell Denise Rast, Royal Lane Highlands #218)(D. Exh. 36).
$251,582.59	Total Foreclosure Sale Prices that should have been paid to the Foundation as Deed of Trust Beneficiary.

There is no evidence that the sales generated any revenue. There are no cancelled checks, no ledgers, no bank records to reflect the payment or receipt of any money, much less $251,582.59, which was to have been paid to a charitable foundation. The simple reality, evidenced by the entire trial, is that the manipulation of these investment properties by the Defendant William Charles Bundren was, and always has been, for the personal benefit of himself and his wife. The use of many and varied names, both corporate and otherwise, was a game of deception to confuse the identity of the true owners of the properties, and likely the Federal Income Tax Collectors. It has certainly been effective as to the HOAs who have no defense against the unscrupulous filing of legal documents that masks the identity of the true owner, and the persons whose duty it is to pay their fair share of the common expenses and assessments for these real estate investment properties. Any activity by New Hope Foundation, if done during a time when the charter was active should be simply considered as the acts of Defendants Charles Bundren and wife, Karen, based upon Alter Ego principles, as the trial court did.

I. LEGAL OR EQUITABLE BASES FOR JUDGMENT

In the trial court's Second Amended Final Judgment (CR 1031, at 1032) the court made findings of facts and conclusions of law incorporated in the judgment. As demonstrated above, the Appellants Bundren are personally liable under both legal and equitable theories based on the facts and the statutory law. In the Judgment, after finding the various entities, including the names of relatives, involved in the chain of titles of numerous properties were the alter egos of Bundren and his wife, the trial court concluded:

"The court finds that the activities of William Charles Bundren and his wife, Karen P. Bundren, in dealing with these properties and utilizing these corporate entities with regard to the properties involved in this suit were done in an unjust and inequitable manner and for the purpose, among others, of evading the payment of the fair share of their pro rata common expenses for these units. This is also true with regard to the units which William Charles Bundren testified had been transferred to him by his mother, Joyce Hudnell, and his step-sister, Deborah Bundren, many years previously in 1997 or before."

The trial court did not pronounce on any one equitable theory, except to say that the activities of Bundren were done in an "unjust and inequitable manner." However, the court found that Bundren "on his behalf and on behalf of his wife, and their community estate, have managed the condominiums at issue in this case for their own benefit, for the purpose, among other things, of deception as to the true ownership, and have done so without regard to which party or entity possessed the actual title to the Properties." The court then went on to find the entities and relatives to be the alter egos of Bundren and his wife.

On appeal, "[I]f the reviewing court determines a conclusion of law is erroneous, but the trial court rendered a proper judgment, the erroneous conclusion of law does not require reversal. *BMC Software Belgium, N.V. v. Michel Marchand,* 83S.W.3d 789 (Tex. 2002). In this case, the Appellees has shown that they are entitled to recover under both legal and equitable theories, including three

(3) equitable theories pled in their Original Petitions, *i.e*. unjust enrichment, quantum meruit, and fraud and deceit. In addition, the Appellees have shown that the Defendants/Appellants are also liable under legal theories for debt, based on the obligations which arise under the HOA Declarations and the Texas Condominium Act, Chap. 81 of the Texas Property Code. Through the rigors of trial, the true ownership of the various units under the recorded instruments, and in light of the law regarding Alter Egos, Corporate Laws of Texas, and the Texas Tax Code, places personal liability for the unpaid condo fees squarely upon the Appellants, William Charles Bundren and his wife.

Contrary to the arguments asserted by Appellants, there are no express contracts governing the relationship between the Plaintiffs and the Defendants. Instead, the provisions in the homeowners agreements, when read in conjunction with the statutes, creates an implied contract, which may be enforced in equity.

The leading Supreme Court case of *Vortt Exploration Company, Inc., v. Chevron U.S.A., Inc*.,787 S.W.2d 942, 944 (Tex. 1990) controls here. The court in *Vortt* recognized that:

> "*Quantum meruit* is an equitable remedy which does not arise out of a contract, but is independent of it. *Colbert v. Dallas Joint Stock Land Bank*, 129 Tex. 235, 102 S.W.2d 1031, 1034 (1937). Generally, a party may recover under *quantum meruit* only when there is no express contract covering the services or materials furnished. *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988). This remedy 'is based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted.' *Id*. *See Campbell v. Northwestern National Life Insurance Co.*, 573 S.W.2d 496, 498 (Tex. 1978). Recovery in quantum meruit will be had when non-payment for the services rendered could 'result in an unjust enrichment to the party benefitted by the work.' *City of Ingleside v. Stewart* [**4] , 554 S.W.2d 939, 943 (Tex. Civ. App.--Corpus Christi 1977, writ ref'd n.r.e.). Recognizing that *quantum meruit* is founded on unjust enrichment, the supreme court set out the elements of a *quantum meruit* claim in *Bashara v. Baptist Memorial Hospital Systems*, 685 S.W.2d 307, 310 (Tex. 1985):
>
> > To recover under *quantum meruit* a claimant must prove that:
> > (1) valuable services were rendered or materials furnished;
> > (2) for the person sought to be charged;
> > (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him;

> (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged."

Vortt, *supra* at 944.

The evidence in this case against Bundren and his wife meet all of these criteria: they accepted and enjoyed valuable services under an implied contract and in such circumstance where they knew that they were expected to pay for the services.

Also, contrary to Bundren's arguments in defense of the cause of action for fraud and deceit, the evidence is overwhelming that he actively engaged in a complex scheme to deceive the HOA's and others relying upon the public registry for real estate records when he filed deeds and other legal documents (1) from non-existent entities, (2) entities which did not hold title, (3) back-dated deeds and corporate documents, (4) executed sworn statements that the dissolved corporations were existing and valid corporations, (5) misrepresented New Hope Foundation, Ancillary Auxiliary of the Dallas Theological Seminary to be a benevolent, charitable foundation associated with the Dallas Theological Seminary when it was nothing of the sort, and otherwise deceived the HOA's, the trial court, the tax authorities, and the public at large.

All elements of fraud which Appellants cited from *Ernst & Young, LLP v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001) were proven to exist in this case. Indeed those elements of fraud are the crux of the trial court's finding that Bundren used Alter Egos to avoid paying his fair share of the common expenses of the Condo Associations. In this appeal, Bundren has embraced the Court's findings and conclusions concerning Alter Egos and admitted it to be a fact. (*See* p. 29 of Appellant's Brief) "For purposes of this action, Defendants are alter egos of each other and the district court correctly found that the actions of one Defendant are the actions of all Defendants . .

. ."

In a very recent case concerning Alter Egos, the Texas Supreme Court has held "that the limitation on liability afforded by the corporate structure can be ignored "when the corporate form has been used as part of a basically unfair device to achieve an inequitable result." *SSP Partners and Metro Novelties, Inc. v. Gladstrong Investments (USA) Corporation*, 275 S.W.3d 444, 451 (Tex. 2008) (rehearing denied) (quoting *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986)):

> We disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately [certainly not the case here], when the corporate form has been used as part of a basically unfair device to achieve an inequitable result. Specifically, we disregard the corporate fiction:
>
> > (1) when the fiction is used as a means of perpetrating fraud;
> > (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation; [or Appellants submit, "another person"]
> > (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation;
> > (4) where the corporate fiction is employed to achieve or perpetrate monopoly;
> > (5) where the corporate fiction is used to circumvent a statute; and
> > (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong.

The recodified provisions in the Business Organizations Code say the same thing. Under both statutory analogues, "actual fraud" is conduct that "involves dishonesty of purpose or intent to deceive." *Dick's Last Resort of the West End, Inc., et al. v. Market/Ross, Ltd.*, 273 S.W.3d 905 (Tex. Civ. App. – Dallas 2008) (no writ). Again, this definition is included in the comments to the pattern jury charges for piercing the corporate veil, Texas Pattern Jury Charges § 108.2; *Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd.*, 237 S.W.3d 379, 387 (Tex. App.-Houston [14th Dist.] 2007, no pet.) (sufficient evidence of alter ego where evidence of direct personal benefit to owner resulting from fraud).

J. DAMAGE AWARDS

The damage awards set forth in the Second Amended Final Judgment (CR 1031) was supported by the testimony of the property managers of the Plaintiff and each Intervenor, who each submitted into evidence the "Owner Ledgers" for each property at issue. (For Holly Oaks *see* P Exhs. 18 007, 43 (Unit 3), 18 (6), 68 (Unit 8), 118 (Unit 11), 139 (Unit 21), 154 (Unit 22) 194 (Unit 32), 221 (Unit 36), 251 (Unit 51), 277 (Unit 60); Woods on Park Lane P Exh. 381 (Unit 728); Dutch Creek P Exh 294 (Unit 301); and testimony of Angela Nethercutt that the ledger she maintains in the ordinary course of business shows the correct balance of condo fees owed on Royal Lane Highlands Unit 218 was $11,408.30. (RR Vol 5, p 10).

The Owner Ledger is an activity list of all charges to the owner of each unit, and lists all payments made for the unit. From the testimonies of each property manager, (Jackson Potter (RR Vol 6), Bill Keffer (RR Vol 6) and Angela Nethercutt (CC Vol 7) and the Owner Ledgers, as well as all other testimony during direct and cross examination of all witnesses, the court made findings of damages for condo fees owed. The court gave Appellants an award for damages for lost rent due to delays in effecting sewer repairs to a main sewer line requiring access though Unit 3 of Holly Oaks, deducting therefrom the condo fees the court found that Bundren had not paid. Bundren's claim was one which sounded in negligence, not an enforceable right under the Texas Condominium Act. In the case of each unit, the court carefully evaluated the evidence and made a careful and reasoned award.

Clearly, the judgment of damages by the court is supported by substantial evidence. Appeal courts consider only that evidence and the inferences therefrom which support the court's findings, considered in the light most favorable to the findings, and disregard contrary evidence and

inferences. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d. 497, 499 (Tex. 1995); *Holt Atherton Industries, Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992).

II. THE DISTRICT COURT DID NOT ERR IN REFUSING JUDGMENT TO DEFENDANTS FOR RENTS COLLECTED AND PROPERTY TAXES PAID BY DEFENDANTS

The testimony of the property managers who introduced the Owner Ledgers testified that they had applied all rental income to the Owner Ledger for the unit rented. It was applied to the arrearage. Therefore, Bundren got full credit for any and all rent income received by the HOAs. The taxes Bundren paid to avoid a tax foreclosure was paid by him to protect his investment, including the "Superior Title" reserved in his Warranty Deed with reservation of a Vendor's Lien, and his Deed of Trust Lien. Also, as it was finally determined, he actually held the legal title as the survivor of the dissolved Corporations, HHI and NHF. This appeal point is clearly without merit and is moot based upon the factual findings and conclusions of law of the court.

III. THE DISTRICT COURT DID NOT ERR IN GRANTING ATTORNEY'S FEES

One of the sections of TUCA (Prop. Code Chap 82) which is, and was found by the trial court to be applicable to the Texas Condominium Act (Prop. Code Chap 81) is Sec. 82.161(b). The prevailing party in an action to enforce the declaration, bylaws, or rules is entitle to reasonable attorney's fees and costs of litigation from the non-prevailing party." Plaintiff Holly Oaks incurred attorney's fees of $138,303.84, and each Intervenor incurred a fixed attorney's fee of $3,550.00, plus the costs of Title Research from Lone Star Title in the amount of $3800.

As a result of this suit, and after the first 3 days of trial and during an 11 month break, the

Defendants (Bundren) foreclosed a number of units he had previously steadfastly refused to foreclose, and began paying the condo fees from the date of foreclosure, June 1, 2008. That was a favorable outcome for the Plaintiff and Intervenors and accomplished what the HOAs had tried to get Bundren to do for years, without success, until trial began. After foreclosure, this suit was all about the arrearage on these units.

Bundren operated some units on which Plaintiff and one Intervenor did not make any claims for a deficiency. The chain of title on those units were introduced solely to show the *modus operandi* on Bundren and his alter ego entities. Bundren argues that since no judgment was awarded for these units, that he "prevailed." To the contrary, Plaintiff and Intervenors prevailed on the issue of alter ego, and they never made a claim for damages on those units.

In the Judgment, the Court said, " After balancing the rights and efforts of all sides, the Court finds attorney's fees for the Plaintiff/Intervenors in the amount of $68,000 for trial and $5,000 if appealed to the Court of Appeals." Under the applicable Standards of Appellate Review, (see the discussion in Section B above), it is an abuse of discretion only when a trial court rules arbitrarily, unreasonably, or without regard to guiding legal principles, *e.g., Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997), or to rule without supporting evidence, *Beaumont Bank v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991).

IV. THE DISTRICT COURT DID NOT ERR IN REFUSING FINDINGS SUGGESTED BY DEFENDANTS

Bundren disagrees with the trial court's findings of fact and conclusions of law. The court, likewise, disagreed with Bundren's *proposed* findings of fact and conclusions of law. Therefore, Bundren argues, the court committed an error in disagreeing with him. Appellees refer to Section

I. B above, Standards of Review, pertaining to Findings of Facts and Conclusions of Law.

CROSS-APPEAL

ISSUE PRESENTED

THE COURT ERRED IN FAILING TO AWARD ALL LITIGATION COSTS INCURRED IN COLLECTION OF "ASSESSMENTS" INCLUDING TITLE COMPANY EXPENSES, EXPERT WITNESS FEES AND ATTORNEY'S FEES AND COSTS

STATEMENT OF FACTS

For years, the Plaintiff and Intervenors have done everything possible, short of litigation, to prevail upon Defendants to pay their share of the common condominium expenses and assessments. Finally, driven almost to financial ruin, (*see* Testimony of Dr. Wilson Weatherford, RR Vol 6, William Keffer, RR Vol 6) and recognizing the harsh financial realities of litigating against Bundren, a *pro se* lawyer-defendant, Plaintiff and Intervenors instituted this suit.

A request for production of all documents in the possession of the Defendants yielded virtually nothing reflecting a chain of title documents. Bundren's response was that those documents were recorded and in the public domain and, therefore, Plaintiff and Intervenors could obtain the documents at the courthouse. (RR Vol. 2, p. 10. line17, *et seq*.) (Therefore, Plaintiff and Intervenors were required to retain Lone Star Title Company to produce all documents in the chain of title of all units owned by Bundren or his associated entities. The production cost incurred with Lone Star was $3800 (RR Vol 2, p. 13). Bundren paid nothing but Plaintiff's were required to provide him with a copy of all documents which he likely had as a lawyer and a party to all of the transactions with each property.

Plaintiff introduced over 390 exhibits, most of which were multiple pages. Defendant introduced 210 exhibits, most of which were multiple pages. The trial began on May 5, 2008 and

continued for 3 days before the court recessed the proceedings, which lasted for about 11 months. Trial resumed April 20, 2009 and lasted for another 3 days. On the 3rd day of trial, May 8, 2008, the court was rightfully in despair about the complexity and intensity of the legal documents that must be examined to reach a legal conclusion about the state of title, and the legal effect of various events pertaining to the legal documents.

The court said, "I don't want to look at records. I want to hear somebody explain it to me. I'm not going to read every one of these items. I'm not upset with you, I'll just tell you, nobody does. I mean, I want someone to say, well, this is a title filed and here's how it all traces through. I'm going to allow Mr. Bundren to cross-examine him. Then I'll figure from the truth, I'll go through and see parts of it, but I don't want to read the whole file." (RR Vol 4, p. 9, line 8)

The court went on to say, "I bet you never had such a document intense case. I have never had a – when I was a trial lawyer, and I was a civil trial lawyer for 30 years, I never had such a document intense case. And it's nobody's fault but [it's] the nature of the beast"

At the end of the same day, May 8, 2008, the court recessed the trial. During the recess in the trial, recognizing that the trial court was overwhelmed with the magnitude and factual complexity of the chains of titles of numerous properties, Plaintiff and Intervenors file a Motion for the Appointment of a Master to act on behalf of the court to study the complex facts, corporate records, chain of title records, and the laws applicable to them, and recommend findings of facts and legal conclusions to the court.

The Defendant, during the recess in the trial, gave notice of the his intent to utilize an expert witness, David Baxter, an attorney, to testify about his legal conclusions from the documents in evidence. Plaintiff and Intervenors took Mr. Baxter's deposition and filed a *Daubert-Robinson*

Motion (CR Vol. 1, p.67) to exclude his testimony for two reasons, (1) his testimony revealed that he was not an expert on real estate law and business organizations law and tax law and (2) the TRCP 702 permits experts to express opinions on "scientific, technical, or other specialized knowledge" that will "assist the trier of fact to understand the evidence or to determine a fact in issue." The rule, Plaintiff objected, does not permit a witness to testify about conclusions of law, which is the exclusive responsibility of the court. The attorney's normally submit their recommendations and proposed conclusions of law for the court's consideration, but not a witness under Rule 702.

A hearing was held on March 9, 2009 (CR Vol4, p 1270) to consider the Motion for Appointment of a Master, and the Plaintiffs' *Daubert-Robinson* Motion to exclude the testimony of David Baxter. At the hearing, the court denied the motion to exclude the testimony of Mr. Baxter, and denied the Motion to appoint a Master. (Suppl. Reporter's Record, Vol. 1, p. 16, line4-7) The court went further to invite Plaintiff and Intervenors to bring his own expert to help educate the court. "I invited him to do that." (Suppl. Reporter's Record, Vol. 1, p. 16, line 18-20)

The Court was reaching out for help and he would be happy if Plaintiff and Intervenors' attorney wanted to get an expert, he would be happy to get the help." (Suppl. Reporter's Record, Vol. 1, p. 23, line 18-24)

As a result of the rulings of the court and the requests of the court for an expert to assist the court in processing all of the documents, law and information in this case, Plaintiff hired the Hon. Larry V. Smith, a real estate specialist with the Law Firm of McGlinchey Stafford, PLLC, with 36 years of experience in real estate and business law. Mr. Smith carefully reviewed and evaluated all of the evidence that had been introduced into evidence and requested additional documentation. He gave his deposition to Mr. Bundren, and testified at trial (RR Vol 5, p. 45-141 and Vol 7, p 81 *et seq*.

Mr. Smith gave the court a wealth of insight and information. A reading of the transcript will reveal the questions by the court and the need for a true expert to explain the interplay between the facts in the records and the several areas of the law that must be considered in evaluating the state of the title and the liability of the several Defendants for Condominium Fees. Mr. Smith created the color charts introduced into evidence and which are set forth in Appellees' Appendix. Reading his testimony, and reading the court's Findings of Facts and Conclusions of Law–the substance of which is reflected in this brief, will reflect the degree to which the trial court needed, utilized and relied upon the testimony of Plaintiff's expert witness.

Mr. Smith's charges to Plaintiff, and which Plaintiff has paid, was $76,637.50, plus out of pocket expenses of $1,080.64.(CR Vol. 2, p. 564)

Bundren's testimony during the first 3 days of trial raised serious issues about the New Hope Foundation, Integrated Auxiliary of the Dallas Theological Seminary. It was necessary that Plaintiff and Intervenors retain an expert in Charitable Entities, including Foundations and Integrated Auxiliaries. Plaintiff hired Donald R. Bustion, a qualified expert accepted by the Court, who testified that (1) the New Hope Foundation had forfeited its charter (which Plaintiff knew), (2) had been dissolved, (3) had never been registered with the United States Internal Revenue Service until Bustion had disclosed that fact, (4) that Bundren had lately, during the last part of the trial, registered New Hope Foundation with the IRS, (5) that registering was a simple matter of filing out a form on line, and (6) that the expert had reviewed every IRS tax return of the Dallas Theological Seminary since the year 2000 and found 2 Integrated Auxiliaries reported, neither of which was New Hope Foundation. Bustion brought to court every tax return of the Dallas Theological Seminary from the year 2000 to the present, all of which are public information and readily available if you know where

to look. The corporate status of New Hope was forfeited until it was reinstated in November, 2008, just before trial was scheduled to resume. That enabled Bundren to register with the IRS sometime after January, 2009. A private foundation, such as New Hope Foundation would be classified, versus a Public Foundation, cannot be an auxiliary of the Dallas Theological Institute. The conclusion therefore that New Hope has not been a valid Texas Corporation, is not a non-profit corporation, as never been registered with the IRS and has never had any relationship to the Dallas Theological Seminary. In short, it was a totally false representation–a fraud.

Bustion charged a very reasonable, if not meager, fee of $900 for all of his research, travel from Arkansas where he is a charitable foundation specialist for the Southern Arkansas University Foundation at Magnolia, and testimony at trial. He remained in court available to testify all day. Mr. Bustion is a director of an International Charity in Chicago, and taught courses in not-for-profit organizations at two major law schools. (CR Vol 5, pp 142-165)

Plaintiff's attorney, David J. Potter, testified that he had been retained to represent Holly Oaks from late summer of 2006. He has practiced law for almost 40 years since March, 1970. He is licensed to practice law in Texas, Arkansas, the U. S. Supreme Court, several U. S. Federal District courts, in Arkansas and Texas. He has practiced law in Dallas County for the past 12 or 13 years, being actively engaged in litigation in various courts in Dallas, Texas, both Federal and State. He is knowledgeable about attorney fees being charged in Dallas, as a result of hearing testimony and interviewing numerous lawyers.

This case is an hourly rate case with Holly Oaks Townhomes. He normally charges $350 per hour, but in 2006 he agreed to charge $225 per hour. He testified that he had billed periodically and Plaintiff's Exhibit 387 are actual billings for costs and for services rendered. The total billings to

Holly Oaks Townhomes, all of which have been paid except the last one which had been delivered shortly before trial, was $105,835.52. The last bill was $12,476.85. Subsequently, a great deal of post trial work was done writing a Post Trial Brief of over 100 pages with exhibits attached and a Reply Brief to Defendants' Post Trial Brief. In addition, work was done on Proposed Judgments, Requests for Findings of Fact and Conclusions of Law, and a Motion to reopen the case to submit evidence of attorney's fees. To the Motion was attached an Affidavit of David J. Potter itemizing an additional $33,303.84 for a grand total of $138,303.84. An additional award of $15,000 was requested for this appeal, and additional sums for possible post trial appeals to the Texas Supreme Court. (CR Vol 2, pp541-583) The three Intervenors paid a flat fee of $3,500 attorney's fee and $50 each for required mediation expenses.

The trial court awarded nothing for the cost of producing the deed records by Lone Star Title Company ($3,800 requested); nothing for the fees of the two experts, Larry V. Smith and Donald R. Bustion, II, (vs. actual expenses incurred and paid of $76,637.50 in fees and expenses of $1,080.64 (CR 564) and $900.00 fees, respectively), $68,000 for attorney's fees and expenses for Plaintiff and all 3 Intervenors, plus $5,000 for this appeal, (vs. actual attorney's fees expended by Holly Oaks of $138,303.84 through judgment, and $3,550 each for three Intervenors and a requested fee of $15,000 for this appeal).

SUMMARY OF ARGUMENT

The trial court misapprehended and failed to apply the law set forth in Property Code § 52.113. Said Statute mandates that all costs of collection and enforcement of the condominium assessments as defined in the statute be recoverable from the condominium owner. All attorney's fees, expert witness fees and costs incurred and paid by the association in litigation to enforce the

payment of the condo assessments are required to be paid by the owner who is in breach of his duty to pay his assessments.

The trial court misunderstood, or failed to recognize, the legislatively imposed duty to pay all such costs by the breaching property owner. As a result, the failure to follow the requirements of the statute forces innocent property owners in the association to be burdened with costs forced upon them by a property owner who has refused to pay his fair share of the common expenses of owning a condominium in their association. This is entirely unfair and unjust, and is exactly the problem addressed by the legislature when it required all such costs to be paid by the offending property owner.

ARGUMENT AND AUTHORITIES

I. THE COURT ERRED IN FAILING TO AWARD ALL LITIGATION COSTS INCURRED IN COLLECTION OF "ASSESSMENTS" INCLUDING TITLE COMPANY EXPENSES, EXPERT WITNESS FEES AND ATTORNEY'S FEES AND COSTS

Prior to this appeal, Plaintiff expended $138,303.84 in attorneys fees and costs, 3 Intervenors expended $3,550.00 each for attorney's fees and mediation costs, Holly Oaks expended $3,800 for title search and document production with Lone Star Title Company, Expert witness fees and costs to Larry V. Smith of $77,718.14, and to Donald R. Bustion II in the amount of $900.00. These costs of collection and enforcement were brought about by the actions of the Defendants which the court has found to be inequitable and unfair, at the least, and fraudulent and in bad faith in reality. No litigation would have been brought by these HOAs if the Defendants had acted in good faith and in a fair manner, such as by timely foreclosing on defaulting parties and promptly paying their fair share of the common expenses for their investment properties. Bundren finally did foreclose six (6) units after the first 3 days of trial in May, 2008 and during the recess in the trial.

SUMMARY OF RECENT FORECLOSURES

UNITS FORECLOSED:

Holly Oaks #8, 21, 32

Holly Oaks #8

#8 Beneficiary and Note Holder	"New Hope Foundation, a non-profit Corp, an integrated auxiliary of Dallas Theological Seminary"
Buyer at Foreclosure	C & K Residential Properties (Wm. Chas. Bundren and Karen)
Sale Price	$50,000.00

Holly Oaks #21

#21 Beneficiary and Note Holder	"New Hope Foundation, etc."
Buyer at Foreclosure	C & K Residential Properties (Wm. Chas. Bundren and Karen)
Sale Price	$56,000.00

Holly Oaks # 32

#32 Beneficiary and Note Holder	"C & K Residential Properties" Wm. Chas Bundren and Karen d/b/a
Buyer at Foreclosure	"C & K Residential Properties"
Sale Price	$78,000

Dutch Creek #301

#301 Beneficiary and Note Holder	Hope Hill Investments, Inc.
Buyer at Foreclosure	"C & K Residential Properties"
Sale Price	$45,000.00

Royal Lane Highlands #218

#218 Beneficiary and Note Holder	"New Hope Foundation, etc."
Buyer at Foreclosure	"C & K Residential Properties" Wm. Chas Bundren and Karen Bundren
Sale Price	$42,000.00

The Woods on Park Lane #728

#728 Beneficiary and Note Holder ..... "New Hope Foundation, etc."
Buyer at Foreclosure ..... "C & K Residential Properties"
Wm. Chas. Bundren and Karen Bundren
Sale Price $57,000.00

All Foreclosure Deeds:
Date of Sale ..... June 3, 2008
Date of Deeds ..... June 4, 2008
Date Deed Signed .... September 5, 2008
Date Deed Notarized.... ..... September 5, 2008
Date Deed Filed of record..... September 5, 2008
Date of Condo fee Cks from Wm Chas. Bundren Operating Acct....September 8, 2008
(Checks designated by Bundren for June, July, August, and September and thereafter, none to arrearage)

Holly Oaks $5,000
#8 ..... $1,500
#21 ..... $1,500
#32 ..... $2,000
Dutch Creek #301 ..... $1,000
Royal Lane Highlands #218 ..... $1,000
The Woods on Park Lane #728 ..... $1,500

Plaintiff and Intervenors suggest that the litigation and the admonition from the court in May, 2008 was what finally caused William Charles Bundren to go through the motions of a foreclosure in June, 2008, although the deeds weren't filed until September, 2008 when the trial was scheduled to resume. Solely because of his actions, *every other innocent property owner* will have to pay a special assessment to pay the expenses of this litigation, including $3,800 title expenses, expert witness fees, and attorney's fees.

It must also be remembered that these residences likely are modest "starter homes," and that most of the members of the HOAs likely are first-time homeowners.

These innocent, neighboring property owner have been damaged by a practicing member of this bar, who has the power to make it so prohibitively expensive to enforce assessments against him

that he can abuse them with impunity with his bad faith actions. Plaintiff respectfully would show the court that the failure to award all costs of collection incurred by the association pursuant to the Texas Condominium Act and TUCA, (Property Code Secs. 82.113 and 82.161).

TUCA Sec. 82.113, to wit:

> "(a) An assessment levied by the association against a unit or unit owner is a personal obligation of the unit owner and is secured by a continuing lien on the unit and on rents and insurance proceeds received by the unit owner and relating to the owner's unit. In this section, "Assessments" means regular and special assessments, dues, fees, charges, ***interest, late fees, fines, collection costs, attorney's fees, and any other amount due to the association by the unit owner or levied against the unit by the association, all of which are enforceable as assessments under this section unless the declaration provides otherwise***." (Emphasis added)

TUCA Sec. 82.161, to wit:

> § 82.161. EFFECT OF VIOLATIONS ON RIGHTS OF ACTION AND ATTORNEY'S FEES. (a) If a declarant or any other person subject to this chapter violates this chapter, the declaration, or the bylaws, any person or class of persons adversely affected by the violation has a claim for appropriate relief. (b) The prevailing party in an action to enforce the declaration, bylaws, or rules is entitled to reasonable attorney's fees and costs of litigation from the nonprevailing party.

(Emphasis added)

Failure to award all collection costs actually incurred and expended by the association is a violation of the Texas law applicable to condominiums. Appellees submit that it is not a matter of discretion for the trial court, but a mandate by the legislature when TUCA, Secs. 82.113 and 82.161 were enacted.

This case demonstrates the wisdom of the legislature in passing this provision of the ACT. If a condo owner, such as Bundren, who enjoys an advantageous position as a practicing attorney who can litigate on *infinitum* and until he bankrupts the association, then there is truly no justice, and no adequate means for the association to fulfill its responsibilities. The neighboring property owners did not cause this litigation, and should not bear the costs of enforcing the assessments that should

be paid by the Defendants. To impose the cost upon the innocent members of the association is a rank injustice.

The trial court expressed his belief that expert witness fees were not recoverable: "How do you get expert fees as costs anyway? I was a plaintiff lawyer for 30 years and if I could have figured out how to do it, I would have put more money in my client' pocket, I'll tell you." (RR Supp. Vol., p.8, lines 2-7) "I'm still not going to assess it [expert witness fees] as court costs. It's got to be discretionary, right?" (RR Supp. Vol., p 9, lines 19-20) "I think experts – you can't convince me, unless you get an order down here, that an expert fee is a cost of court as a matter of law." (RR Supp Vol., p. 15, lines 21-23.) At the hearing, I denied the motion to exclude Mr. Baxter, and I denied the motion to appoint a Master. I did do that. I did invite him [Potter], if he wished to bring in his own expert to help educate me, I invited him to do that. At the hearing, I did do that. (RR Supp Vol., p 16) "But I didn't appoint a master and you did request that, Mr. Potter, a person to be an independent , and advise the Court as an ad litem of some kind." (RR Supp Vol., p.17, lines 6-9)

Therefore, the court did not believe he had the authority to award expenses incurred by the HOAs in enforcing the payment of assessments. Under the definition of "Assessments," all costs incurred in the collection of condominium fees are recoverable as a part of the Assessment. The trial court did not take recognize that statutory requirement and, based upon his experience as a personal injury trial attorney, did not believe that expert witness fees were recoverable, as he clearly stated.

Therefore, the trial court clearly erred in failing to award all attorney's fees actually incurred and paid, expert witness fees actually incurred and paid, and the out of pocket costs of litigation such as the title research and production of Lone Star Title in the amount of $3,800.

Separate and apart from the statutory requirement to award the costs of collection of the condo fees, the law provides, in some cases, for the award of expert witness fees, attorney's fees and other special costs incurred in litigation. Texas Rule of Civil Procedure 131 provides that "[t]he successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided." *See Roberts v. Williamson*, 111 S.W.3d 113, 124 (Tex. 2003). While it is generally the practice of Texas Courts not to tax expert witness fees as costs, no hard-and-fast rules absolutely forbids the practice. *See AVCO Corp. v. Interstate Sw., Ltd.*, 251 S.W.3d 632, 662 (Tex. App.--Houston [14th Dist.] 2007, pet. denied) (citing *King v. Acker*, 725 S.W.2d 750, 755 (Tex. App.--Houston [1st Dist.] 1987, no writ) and *City of Houston v. Biggers*, 380 S.W.2d 700, 705 (Tex. Civ. App.--Houston 1964, writ ref'd n.r.e.)).

A trial court may always tax expert witness fees as costs, when there is good cause stated on the record. *See* Tex. R. Civ. P. 141; *Roberts*, *supra*, 111 S.W.3d at 124. "Good cause" is determined on a case-by-case basis. *Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 376-77 (Tex. 2001); *Rogers v. Walmart Stores, Inc.*, 686 S.W.2d 599, 601 (Tex. 1985). In Rule 131 cases, if the record supports a decision to tax, then expert witness fees may be taxed as costs. *Rogers*, 686 S.W.2d at 601 (citing *Bruni v. Vidaurri*, 140 Tex. 138, 166 S.W.2d 81, 96 (Tex. 942)).

"Good cause" usually means that a party unnecessarily prolonged the proceedings, unreasonably increased costs, or committed some other offensive, recalcitrant conduct which increased the burdens on the Court or the prevailing party. Such certainly is the case here, and in spades. *Bethune*, 53 S.W.3d at 377. Unless the record demonstrates an abuse of discretion, appellate courts do not disturb trial judge's assessment of costs for good cause. *Rogers*, 686 S.W.2d at 601.

PRAYER

In conclusion, the judgment of the trial court in favor of the Plaintiff and Intervenors is justified on any one of three equitable remedies and on the legal basis for debt. The findings of facts and conclusions of law are overwhelmingly supported by the evidence, and certainly meets the sufficiency of evidence standard of review and should not be disturbed on appeal. Plaintiff and Intervenors requested damages for arrearage significantly greater than those awarded, but recognize that the determinations of fact by the trier of fact will not be disturbed on appeal unless there is no evidence to support the factual determination. Therefore, the Plaintiff and Intervenors respectfully accept the judgment in their favor and the award of damages that the judge rendered after weighing all of the evidence. The judge was certainly fair to the Defendants, notwithstanding the findings of inequitable misconduct by the Defendants Bundren and wife in avoiding paying their fair share of the common expenses of the association.

However, the trial court misapprehended the law as it applied to the award of the costs of enforcement and collection of condominium assessments. The legislative intend and the specific dictates of Property Code § 82.113, as well as the provisions of the Declarations of each of these condominium associations, dictate that the association should be made whole. All costs of collection and enforcement of the assessments are allocatable to the owners of the individual units. To do otherwise not only violates the law wisely and intentionally established by the Texas legislature, but it improperly places a financial burden upon innocent property owners who had nothing to do with causing the expenditure of these litigation costs.

THEREFORE, PREMISES CONSIDERED, Plaintiff and Intervenors pray that the judgment in their favor be AFFIRMED, and that this Appellate Court MODIFY AND RENDER an additional

judgment for all costs incurred by the Plaintiff and Intervenors in the enforcement of the assessments in the amounts of $3,800 for Title Research and production of chain of title documentation by Lone Star Title Company; Expert Fees incurred and paid by Plaintiff Holly Oaks Townhomes in the amounts of $77,718.14 for Larry V. Smith and $900 for Don Bustion; and $138,303.84 attorney's fees paid to David J. Potter, their attorney, and $3,550 to each of the Intervenors for a flat fee and mediation fee paid to David J. Potter/Mediator to also present their claims. In addition, Appellants should be awarded an additional fee of the requested $15,000 for this appeal (See CR 551, verified affidavit of David J. Potter) in view of the extensive record and complexity of the issues requiring an extraordinary length of time in preparation. Further, in the event Appellants Bundren files additional appeals, Appellees pray for an additional award of $1,500 if a Petition for Review is filed, and in the event a full brief is required in the Texas Supreme Court, Appellees request an additional $8,000 be awarded to them.

In the alternative, in the event that this court chooses not to Render Judgment on the record, Appellees pray that the Judgment be Affirmed in Part as to the judgment awarded to Appellees, and REVERSED and REMANDED with instructions to award all actual costs incurred in the enforcement and collection of assessments against the Appellants/Defendants, for the reasons stated above.

Respectfully Submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that I have served counsel of record a copy of the above and foregoing Appellees Brief and Cross-Appeal Brief on this 6th day of August, 2010 in accordance with the procedures set forth in the Texas Rules of Appellate Procedure and the Local Rules of the Fifth District Court of Appeal in Dallas, Texas by serving said counsel through the United States Post Office, 1st Class, Postage Paid addressed as follows:

Hon. William Charles Bundren
Attorney at Law
2591 Dallas Parkway, Suite 300
Frisco, Texas 75034

_____

David J. Potter, Attorney for Appellees