CASE NO. 2019-TS-01407

IN THE SUPREME COURT OF MISSISSIPPI

Bob Marthouse, Stewart Nutting, Gary Becker and Diamondhead Country Club and Property Owners Association, Inc.
APPELLANTS

V.

Committee for Contractual Covenants Compliance, Inc., Joseph Floyd and Patrick McCrossen and City of Diamondhead, Mississippi
APPELLEES

On Appeal from the Chancery Court of Hancock County, Mississippi
Cause Number 23CH1:18-cv-00654-CB

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1.	Bob Marthouse, Stewart Nutting, Gary Becker	Appellants
2.	Diamondhead Country Club Property Owners Association, Inc.	Appellant
3.	Committee for Contractual Covenants Compliance, Inc., Patrick McCrossen, Joseph Floyd and City of Diamondhead, Mississippi	Appellees
4.	Michael D. Haas	Attorney for Intervenors/Appellants, Committee for Contractual Covenants Compliance, Inc,, Patrick McCrossen and Joseph Floyd
5.	Derek R. Cusick	Attorney for Appellant/Intervenor, City of Diamondhead, MS
6.	Mario Feola	Intervenor
7.	Paul Newton, Jr.	Attorney for Intervenor, Mario Feola
8.	Honorable Carter Bise	Chancery Court Judge

/s/ *David C. Goff*
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STATEMENT REGARDING ORAL ARGUMENT

Appellants do not request oral argument.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS _____ i

STATEMENT REGARDING ORAL ARGUMENT _____ ii

TABLE OF CONTENTS _____ iii

TABLE OF AUTHORITIES _____ iv

STATEMENT OF THE ISSUES _____ 1

STATEMENT OF ASSIGNMENT _____ 2

STATEMENT OF THE CASE _____ 3

SUMMARY OF THE ARGUMENT _____ 7

ARGUMENT _____ 8

STANDARD OF REVIEW _____ 8

I. Whether the Chancery Court was in error in finding the amendment provision in the Diamondhead Covenants is not unreasonable. _____ 8

II. Whether the Chancery Court committed reversable error by failing to amend the amendment provision of the covenants as requested. _____ 8

III. Whether the Chancery Court committed reversable error in finding that, based on the fact that the Diamondhead POA has previously acted upon and enforced its Covenants, the Diamondhead POA is estopped from claiming the Covenants, or any part thereof, are unreasonable. _____ 10

IV. Whether the Chancery Court committed reversable error in making a finding on estoppel which issue was not before the Court. _____ 10

V. Whether the Chancery Court committed reversable error in finding that the Diamondhead POA was required to give due process notice to and join all of the Diamondhead lot owners in the action. _____ 14

CONCLUSION _____ 16

TABLE OF AUTHORITIES

Cases

City of Gulfport and Bayou View HOA v. Wilson, 603 So.2d 295 (Mis. 1992)..... 16

Cossitt v. Federated Guaranty Mutual Insurance Company, 541 So.2d 436 (Miss. 1989) 11

Eastover Lake Assoc. v. Estate of Carraway, 118 So.3d 571, 582 (Miss. 2013) 13

Flaherty v. Bridgetown Community Assoc., 486 So.2d 1235 (Miss. 1986)..... 16

Gibson v. Williams and Montgomery, P.A., 186 So.3d 836 (Miss. 2016)..... 11

Griffin v. Tall Timbers Development, Inc., 681 So.2d 546, 554 (Miss. 1996) 8, 9, 15

Journey v. Berry, 953 So.2d 1145 (Miss. Ct.App. 2007) 15

Kephart v. North Bay Property Owners Associaiton, 134 So.3d 784, 786 (Miss. Ct.App. 2014). 9, 16

Lee v. Stewart, 724 So.2d 1093, 1096 (Miss. Ct.App. 1998) 11

Longanecker v. Diamondhead Country Club and Property Owners Association, 760 So.2d 764 (Miss. 2000)..... 16

Mendrops v. Harrell, 103 So.2d 418, 422 (Miss. 1958)..... 9

Perry v. Bridgetown Community Association, Inc., 486 So.2d 1235 (Miss. 1986)..... 16

Strong v. Strong, 981 So.2d 1052 (Miss. Ct.App. 2008)..... 11

Tellus Operating Group, LLC v. Texas Petroleum Investment Co., 105 So.3d 274, 278 (Miss. 2013)..... 8

Statutes

Mississippi Code Ann. §79-11-237(2) (1988)..... 15

Rules

Mississippi Rules Civil Procedure 19..... 16

STATEMENT OF THE ISSUES

The following issues are presented for appellate review:

1. Whether the Chancery Court was in error in finding the amendment provision in the Diamondhead Covenants is not unreasonable;

2. Whether the Chancery Court committed reversable error by failing to amend the amendment provision of the covenants as requested;

3. Whether the Chancery Court committed reversable error in finding that, based on the fact that the Diamondhead POA has previously acted upon and enforced its Covenants, the Diamondhead POA is estopped from claiming the Covenants, or any part thereof, are unreasonable;

4. Whether the Chancery Court committed reversable error in making a finding on estoppel which issue was not before the Court;

5. Whether the Chancery Court committed reversable error in finding that the Diamondhead POA was required to give due process notice to and join all of the Diamondhead lot owners in the action.

STATEMENT OF ASSIGNMENT

Appellants do not believe that the Supreme Court must or should retain this case and has no objection to assignment to the Court of Appeals.

STATEMENT OF THE CASE

1. Diamondhead is a common interest community dating back to the early 1970s. The Diamondhead Country Club and Property Owner's Association ("DPOA") was issued its original Charter by the state of Mississippi on June 8, 1970. (R. 146-150). The original developer was known as Diamondhead Properties. The first Declaration of Covenants for Diamondhead Phase I was dated June 17, 1970. (R. 21-47). The members of the DPOA own approximately 6,949 properties. Currently, there are approximately 4,759 housing units in Diamondhead. These consists of detached, single family homes, townhomes, condominiums and other dwellings. Common area amenities include two golf courses, pools, tennis courts, parks, bikes/walking paths and a country club. As with most common area communities, these amenities are funded, in part, by assessments to owners. The DPOA is a Mississippi non-profit corporation. The DPOA sets the assessments, collects same, maintains the common elements and the amenities. Diamondhead became an incorporated city in 2012. Since that time, the city has taken over the maintenance of the streets, formed a police department and enacted various ordinances, including zoning, for the City of Diamondhead.

2. Diamondhead is broken up into three phases (with numerous units, subdivisions and condominium/townhomes). For some unknown reason, as each phase or unit came into existence, a new Declaration of Covenants specific to that phase or unit was adopted. In some cases, covenants from previously developed areas were adopted with additions. As stated, the first covenants were adopted in 1970. (R. 21-47). All of the early covenants from 1970 to 1983 contain a term of 50 years. Most of the later covenants contain no term at all (as is customary in today's common interest communities). The first Declaration with regard to Phase 1 is sometimes referred

to as the "Master Covenants". This is believed to be because many of the separate units under Phases 1, 2 and 3 adopted covenants that were similar (but not identical) to Phase 1.

3. On October 15, 2012, the City of Diamondhead's zoning ordinance became effective. All of the early covenants from 1970 and 1983 contain zoning provisions and many are now in conflict with the City of Diamondhead. Additionally, all of the covenants are dated and need to be revised. Most importantly, the amendment clause in the master covenants which has been adopted by many subsequent phases or units, provides as follows:

XXI. AMENDMENTS

> **Any and all the provisions of these restrictions, conditions, easements, covenants, liens and charges may be annulled, amended or modified at any time by the consent of the owner or owners of record of 85% of the lots in Diamondhead, Phase 1**.

(R.45)

R. 48-50 is a chart showing the phases or units, the status of the amendment clause and the term and/or expiration. The 85% rule applies to many of the phases. Some of the phases or units have no date or term referenced at all in the various covenants.

4. As alleged in the Complaint, the participation in annual meetings, elections and other actions to be taken by DPOA falls far below the 85% requirement. The average over the last few years is approximately 27%. (R.18).

5. The Charter of Incorporation, paragraph 5 provides as follows:

> 5. **Period of existence shall be perpetual**. (R.148).

Paragraph 6 provides as follows:

> **The purpose for which it is created not contrary to law including a statement of the rights and powers that are to be exercised by said corporation which said rights and power shall be limited to those reasonably necessary to**

accomplish the stated purpose of the association being incorporated:

The corporation shall be a civic improvement organization devoted to the improvement of the Diamondhead development and to the operation, maintenance, management, ownership, buying and handling of its common facilities, areas, roads, streets, country club, the yacht club, recreational facilities and guard and security services.

The corporation shall have the right and power to establish, develop, build, construct, design, maintain, manage, operate, own, buy, sell, acquire, lease, trade and deal in cafes, bars, restaurants, clubs, marinas, yacht club, golf clubs, private street and roads and the appurtenances thereto, common areas, recreation areas, private police cars and security services and similar enterprises in Hancock County, Mississippi and elsewhere and to engage in any other business or activity which may be useful and helpful in the operation and maintenance of any of the above.

The corporation shall have all the rights and powers to the extent reasonably necessary to accomplish the stated purposes of the corporation given to corporations under the Mississippi Business Corporation Act, any amendments thereto and any successor, act or acts.

(R. 150)

The Bylaws of DPOA contain a similar statement of purpose:

Article I. Purpose

Diamondhead Country Club and Property Owners Association, Inc. is a Mississippi non-profit corporation, herein referred to as "the Corporation", shall conduct its affairs for the mutual benefit of the membership hereof an for the civil improvement, operation, maintenance, management, ownership, buying, selling and handling of the common facilities, areas, country club, recreational facilities of Diamondhead.

(R.181)

Therefore, the Charter and Bylaws distinctly state that the purpose of Diamondhead is to develop and maintain what is commonly known as a common interest community. Most importantly, its existence was meant to be perpetual. As stated, the various covenants begin to expire beginning June 17, 2020. If the covenants are allowed to expire, the consequences could be devastating and purely contrary to the intended purpose of Diamondhead being a traditional common interest community. If the covenants are allowed to expire, the DPOA does not cease to exist. However, the DPOA may suffer a loss of effective enforcement.

Plaintiffs requested that the Chancery Court enter a declaratory judgment finding that the amendment provision of the covenants as it exists was unreasonable. (R. 138-145). The DPOA had no opposition to the requested relief. Both Plaintiffs and the DPOA were on notice that Intervenors would oppose the requested relief. Quite frankly, the DPOA and/or the different units will never be able to amend its covenants because of the 85% requirements. Thus, Plaintiffs' argued without the help of the Court, the covenants will expire and the entire Diamondhead community will be in jeopardy.

The Complaint and Motion for Declaratory Judgment asked that the Court find that the amendment provision in the various Covenants was unreasonable and change same to allow amendments by a majority of 60% of votes cast in person, by absentee ballot or other means permitted by the Bylaws of the DPOA, or by proxy. The relief requested was limited to the way to amend the covenants. Any actual amendment would then be put to a vote of the members.

Chancery Court Judge Carter Bise read his ruling denying the requested relief into the record. (R. 300-302). The Court's written judgment was entered on August 7, 2019. (R. 217-221).

SUMMARY OF THE ARGUMENT

The procedure for amending the DPOA covenants was unattainable and unreasonable. The lower court should have found so and changed the amendment procedure to something reasonable.

The Court found that the DPOA was estopped from claiming the amendment provision was unreasonable when the issue of estoppel was not before the Court. In the alternative, the issues of judicial estoppel were not met. Section V of the Judgment regarding estoppel is ambiguous and is due to be stricken.

The Court incorrectly found that the DPOA was required to serve and join all property owners in the action when notice of the suit was mailed to each owner, the information was posted on the DPOA website, an informational meeting was held and all owners had an opportunity to intervene and approve if desired.

ARGUMENT

STANDARD OF REVIEW

Prior to the hearing on July 23, 2019, the parties agreed on a number of stipulations. These were read into the record. As the court recognized in Section II of the Judgment, "the sole issues before the Court were questions of law." "Questions of law . . .are subject to a *de novo* standard of review." *Tellus Operating Group, LLC v. Texas Petroleum Investment Co.*, 105 So.3d 274, 278 (Miss. 2013).

I. Whether the Chancery Court was in error in finding the amendment provision in the Diamondhead Covenants is not unreasonable.

II. Whether the Chancery Court committed reversable error by failing to amend the amendment provision of the covenants as requested.

Diamondhead is a common interest community that is a little different than many others in that the common areas are owned by the DPOA. There are common areas consisting of golf courses, parks, pools, tennis courts and other similar amenities. By Deed dated December 21, 1984, Purcell Company, Inc. (the subsequent and current developer) conveyed the common areas to Diamondhead Country Club and Property Owner's Association, Inc. If the DPOA were to ever attempt to sell or otherwise convey its interest in the common areas, Purcell would have the first right of refusal to reacquire that property. The DPOA, funded by member assessments, maintains the common areas.

The lawsuit filed on October 19, 2018 asked the Court to find that the amendment provision of the restrictive covenants is unreasonable. (R. 16-20). A Chancery Court Judge can make a judicial inquiry into the reasonableness of covenants. The court does not have the power "to rewrite entire provisions the court may deem unreasonable, but rather allows the court to examine the reasonableness of the bylaw (or covenant) in light of the declaration of purpose." *Griffin v. Tall Timbers Development, Inc.*, 681 So.2d 546, 554 (Mis. 1986). "Review by the court must be

guided by the intent stated in the declaration of purpose and judged by a test of reasonableness." *Id.* If the covenant is unreasonable, the court should strike it and allow the HOA to adopt one that is reasonable. *Id.* The purpose is stated in the Charter. In construing covenants, imposing restrictions and burdens on the land, "the language used will be read in its ordinary sense, and the restriction and burden will be construed in light of the circumstances surrounding its formation, with the idea of carrying out its object, purpose and intent. They are to be fairly and reasonably interpreted according to their apparent purpose". *Mendrops v. Harrell*, 103 So.2d 418, 422 (Miss. 1958). "Restrictive Covenants are to be fairly and reasonably construed according to their apparent purpose." *Kephart v. North Bay POA*, 134 So.3d 784, 786 (MS. Ct.App. 2014).

Most importantly, Section 5 of the Charter provides that the "Period of existence shall be perpetual." (R.148). If the Covenants are allowed to expire, Diamondhead may lose its ability to effectively fulfill its purpose as stated in Section 6 of the Charter, the Bylaws and in the existing covenants.

The goal was two-fold: (1) to give the DPOA the ability to make amendments as needed in the future, and (2) to immediately address the covenant expiration issue. If the Court would have found that the 85% requirement was unreasonable, Diamondhead would have been able to make amendments. The Complaint further asked the Court to amend all the amendment clauses in the various sets of covenants to allow amendment by a majority of 60% of votes cast in person or by proxy. Historically, the different phases in Diamondhead have had participation in elections and other actions taken by the POA at less than 30%. Therefore, the DPOA was hamstrung in moving forward and amending and/or updating its Covenants. The lawsuit did not ask the court to make any substantive amendment at all as it pertains to the POA setting assessments, liens, restrictions on use, etc. Any such amendment could have been proposed sometime in the future

and put to a vote of the members. The lawsuit simply explained to the Court that the procedure for amendment is unreasonable, the Covenants will soon be expiring and unless the Covenants are extended, it will be extremely detrimental (even disastrous) to the Diamondhead community.

The Court erred when it denied the requested relief for the following reasons:

(1) Diamondhead's charter and purpose contemplate a perpetual existence;

(2) If the Covenants are allowed to expire, it will be contrary to the intent and stated purposes of the DPOA;

(3) The amendment provision in the various sets of Covenants is so restrictive it is practically impossible and therefore not a reasonable restriction on the POA members;

(4) By having an amendment provision in the Covenants, the intent was to be able to amend;

(5) The court should have found the amendment provision to be unreasonable and changed it to something attainable.

III. Whether the Chancery Court committed reversable error in finding that, based on the fact that the Diamondhead POA has previously acted upon and enforced its Covenants, the Diamondhead POA is estopped from claiming the Covenants, or any part thereof, are unreasonable.

IV. Whether the Chancery Court committed reversable error in making a finding on estoppel which issue was not before the Court.

Prior to the submission of the proposed judgment, counsel for the Appellants objected to the ruling on the estoppel issue and suggested removal of Section V. Counsel for Appellees disagreed, submitted the judgment and it was entered by the Court.

The Judgment entered by the Court dated August 7, 2019 in Section V was as follows:

> **If the Court is wrong in this respect, the Court further finds that the DPOA has acted upon and enforced these**

> **provisions up until June 2016 when the DPOA filed its petition for declaratory relief before this Court. The Court finds that the DPOA is now estopped from claiming that its own requirements are unreasonable. For that reason, the Plaintiffs' request for declaratory relief is DENIED**.

First of all, the Complaint in this cause of action was filed on October 19, 2018. It is assumed that Section V of the Judgment is referring to a separate action that was filed by other counsel and was subsequently dismissed. (Supp. Record, Doc. 71). Regardless, in the case before this Court as well as in the other case referred to in the Judgment, the issue of estoppel is not pled.

No mention of estoppel was made by any party. Likewise, the Intervenors did not plead estoppel. It is the law in the state of Mississippi that evidence pertaining to issues not contained in the pleadings may not be presented at trial nor may a trial court award relief on a point not pleaded. *Lee v. Stewart*, 724 So.2d 1093, 1096 (Miss. Ct.App. 1998). *See also, Strong v. Strong*, 981 So.2d 1052 (Miss. Ct.App. 2008); *Cossitt v. Federated Guaranty Mutual Insurance Company*, 541 So.2d 436 (Miss. 1989). Therefore, because the issue of estoppel was not properly before the Chancery Court, that Court erred in making the ruling indicated above.

In the alternative, Appellants assume that the Court, in ruling on the estoppel issue is referring to judicial estoppel. Those elements have been defined as follows:

> This Court demands that three elements be met for judicial estoppel to apply:
>
> 1. The position must be clearly inconsistent with one taken during previous litigation;
>
> 2. The Court must have accepted and relied on the previous position;
>
> 3. The party must not have inadvertently taken the inconsistent position.

Gibson v. Williams and Montgomery, P.A., 186 So.3d 836 (Miss. 2016).

The Court further committed error in finding that the DPOA is judicially estopped. Even if the issue of estoppel had been pled, the elements were not met. First, the positions taken by the DPOA in the 2016 matter and in the underlying case were not inconsistent.

The Motion for Declaratory Judgment referenced by the Court filed by the DPOA on June 17, 2016, recognizes many of the same things pled in the instant Complaint, namely that Diamondhead is a common interest community, has various covenants and how they are integral to the operation of Diamondhead. (Supp. Record, Doc. 71). Both Complaints recite a concern that the Diamondhead Covenants would begin to expire in 2020 if no further action was to be taken. In an attempt to rectify the issue of the Covenants' expiration, the method selected in the 2016 matter was to incorporate the Covenants into the Bylaws without expiration dates. The language of the original Covenants would not be changed except for omitting the expiration language. The DPOA filed a Declaratory Judgment action asking the Court to find that the terms of the Diamondhead Covenants, except any terms purporting to set forth an expiration date, shall continue to be binding on the lot owners. (Supp. Record, Doc. 71). That Petition was never heard and no ruling issued. That Complaint was dismissed. The Complaint in the instant case, took another tact. (R.16-20). Basically, the Complaint illustrated that on average, member participation at the yearly annual meeting was about 27% and thus the DPOA could never get 85% requirement to amend the covenants. The Complaint then requested the Court find the amendment provision of the Restrictive Covenants to be unreasonable and to amend the amendment clauses to allow amendment by a majority of 60% votes cast in person or by proxy. The Motion for Declaratory Judgment essentially asked for the same relief. (R. 138-145). The positions taken in the two pleadings filed with the lower court were not inconsistent. Each were seeking a remedy to keep the Covenants from expiring.

The second element of judicial estoppel is that "the court must have accepted and relied on the previous position" is also not met here. The Court erred in its ruling on estoppel because (1) the issue was not properly before the Court, and (2) in the alternative, the elements of judicial estoppel were not met.

Finally, Section V of the Judgment is ambiguous and is due to be stricken. Section V starts with, "if the court is wrong in this respect, the Court further finds. . ." This language creates confusion and ambiguity as to the meaning. It contemplates that the findings in Section IV are incorrect. It is unclear if the finding in Section V is conditioned upon the Court being wrong with respect to the finding in Section IV or is in addition to the finding in Section IV. Basically, the ambiguity makes the Judgment unclear with respect to the findings. "When faced with an ambiguous judgment, we turn to the rules of construction. . . (citations omitted) . . . Our focus is on determining the intent of the Chancellor." *Eastover Lake Assoc. v. Estate of Carraway*, 118 So.3d 571, 582 (Miss. 2013). In this case, due to the ambiguity we are not able to determine the intent of Section V of the Judgment.

Section V of the Judgment has other problems. The phrase "the Court further finds that the DPOA has acted upon and enforced **these** provisions up until June 2016 when the DPOA filed its petition for declaratory relief before this Court" is ambiguous as well. We are forced to interpret what "these" means. Does it refer to the entirety of the covenants or the amendment provision only. If this finding is interpreted to apply to all of the covenants, then the finding is far beyond the scope of the matter that was before the Court. If the finding is interpreted to apply to all the covenants, then one could argue that because the DPOA has acted on and enforced covenants up until June 2016, it now cannot ask a Court to review any of the covenants. The original (Master) covenants in XVIII provide as follows:

> **No delay or omission on the part of the Declarant, or its successors or assigns in interest or the owner or owners of any lot or lots in said property, in exercising any right, power or remedy herein provided for in the event of any breach of any of the provisions, restrictions, conditions, easement, covenants, agreements, liens and charges herein contained shall be construed as a waiver thereof or acquiescence therein, and no right of action shall accrue, nor shall any action be brought or maintained by anyone whomsoever against Declarant, its successors or assigns, for or on account of its failure or neglect to exercise any right, power or remedy herein provided for in the event of any such breach, or for imposing herein provisions, restrictions, conditions, easements, covenants, agreements, liens and charges which may be unenforceable.**

(R.45)

In sum, that section stands for the fact that no delay or omission of enforcement of any covenant shall constitute a waiver thereof.

Section V of the Judgment is due to be stricken because the relief awarded was not before the court, the elements of judicial estoppel were not met, and the Judgment is ambiguous.

V. Whether the Chancery Court committed reversable error in finding that the Diamondhead POA was required to give due process notice to and join all of the Diamondhead lot owners in the action.

In Section 6 of the Judgment entered by the Court, the Court found that amending the Covenants as requested would affect the substantive due process rights of Diamondhead lot owners and "to modify the Covenants without due process notice to these owners, such as the arbitrary decision to change the 85% super majority to a 60% majority of those who appear, would be to unconstitutionally deprive them of their substantive and procedural due process rights . . ." Finally, the Court found that the Plaintiffs were required to join all of the affected property owners in the action. The Bylaws of the DPOA, Section 3.4, provide for notice to the members. For

example, for meetings of the members, whether annual or special, notice shall be given not less than thirty nor more than sixty days prior to the meetings. The written notice shall be delivered personally or by U.S. mail. (R.182). As stated, written notice of the action was given to all members. (R.266-267; R.E. 3)

The DPOA is comprised of members who are owners of properties in Diamondhead. By virtue of owning property in Diamondhead, all owners are members of the POA. *See, Griffin,* 681 So.2d at 550. The DPOA owns all the common areas. The DPOA acts by and through its Board of Directors who are elected by the members. DPOA is a Mississippi non-profit corporation. The Mississippi non-profit corporation Act provides that "all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of the board." Mississippi Code Ann. §79-11-237(2) (1988). Section 5.4 of the Bylaws provide that, "The Board of Directors shall have control and management of the affairs and business of the Corporation." The DPOA was a named party in the case so essentially, all the Members' interests were represented by and through the DPOA. Sufficient notice of the DPOA's actions was given to the members. At or near the time that this cause of action was filed, the DPOA notified each member by U.S. Mail of the action and their opportunity to join or intervene if desired. (R. 266-267, R.E. 3). The DPOA also posted the Complaint on its website.

A review of various cases involving POAs and POA members does not appear to require that due process notice is mandatory for each and every member of a homeowners' association. *See, Griffin v. Tall Timbers Development, Inc.*, 681 So.2d 546 (Miss. 1996) (Husband and wife owners brought action against a Developer on whether it had a right to form a POA), *Journey v. Berry*, 953 So.2d 1145 (Miss. Ct.App. 2007) (Owners sued other owners on issue of whether covenants were valid and enforceable); *Perry v. Bridgetown Community Association, Inc.*, 486

So.2d 1235 (Miss. 1986), (members of HOA filed suit to enjoin HOA from enforcing covenants); *Kephart v. Northbay Property Owners Association*, 134 So.3d 784 (Miss. Ct.App. 2014) (HOA sued individual owners on whether owners could lease property); *City of Gulfport and Bayou View HOA v. Wilson*, 603 So.2d 295 (Mis. 1992) (Owners filed suit against the City and HOA on issue of whether commercial activity was allowed); *Flaherty v. Bridgetown Community Assoc.*, 486 So.2d 1235 (Miss. 1986) (owners sued HOA over assessments). In a case involving the DPOA, individual members challenged the assessment of security fees and were not required to join all members. *See*, *Longanecker v. Diamondhead Country Club and Property Owners Association*, 760 So.2d 764 (Miss. 2000). Not one of these cases required that each and every member of the respective POAs had to be joined in the action. Finally, Section VI of the Judgment is ambiguous and is not in accordance with M.R.C.P. 19. The Judgement states, "The Court finds that the Plaintiffs have not properly joined all of the affected property owners and for "these" reasons, the request for declaratory relief is denied." Once again, we are forced to interpret what "these" means. Is it referring to the rulings in Sections IV, V and VI or just Section VI? Additionally, if a court finds that compulsory joinder exists, "the Court shall order that he be made a party." *See*, M.R.C.P. 19(a)(2). The Court was in error when it denied the requested relief.

CONCLUSION

The lower Court committed reversable error in failing to find the amendment provision in the covenants was unreasonable. Likewise, the Court erred in making a ruling on estoppel which was not properly before the Court, the elements of estoppel were not met and the Judgment as it pertains to estoppel is ambiguous. Finally, the Court was in error in finding that each member had to be joined and served in the action when members were sufficiently notified of the proceedings, given the opportunity to object and were essentially represented by the DPOA.

Submitted this 20th day of January, 2020.

By: s/*David C. Goff*
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By: s/*August N. Rechtien*
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CERTIFICATE OF SERVICE

I, David C. Goff, certify that on this day, the Brief of Appellants was filed electronically with the clerk and a copy of same has been forwarded to the following via electronic mail and/or U.S. Regular Mail:

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Honorable Carter Bise
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This, the 20th day of January, 2020.

/s/ *David C. Goff*
DAVID C. GOFF