

2007

Lebr Associates, LLC, a Utah limited liability company, and Centennial Pointe Property Owners Association (Registered on November 29, 2004), a Utah Nonprofit Corporation v. Myriam Onyeabor :
Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

LEBR ASSOCIATES, LLC, a Utah
limited liability company, and
CENTENNIAL POINTE PROPERTY
OWNERS ASSOCIATION (Registered
on November 29, 2004), a Utah Nonprofit
Corporation,

Appellee/Cross-Appellant,

vs.

MYRIAM ONYEABOR,

Appellant/Cross-Appellee.

BRIEF OF APPELLEE/CROSS-
APPELLANT

LEBR ASSOCIATES, LLC, and
CENTENNIAL POINTE PROPERTY
OWNERS ASSOCIATION (Registered
on November 29, 2004), a Utah Nonprofit
Corporation

Appellate Case No. 20070851

District Court No. 040918762

Appeal from Order of
Third District Court
Judge Robert P. Faust

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has original jurisdiction over Defendant Myriam Onyeabor's ("Ms. Onyeabor") appeal and Plaintiffs' LEBR Associates, LLC ("LEBR") and Centennial Pointe Property Owners Association's (Registered on November 29, 2004) (the "Association") (both parties collectively referred to as "Plaintiffs") cross-appeal, pursuant to Utah Code Annotated § 78A-3-102(3)(j). On October 25, 2007, the Utah Supreme Court transferred this appeal to the Utah Court of Appeals, pursuant to Utah Code Annotated § 78A-3-102(4), and Rule 42 of the Utah Rules of Appellate Procedure. This Court has jurisdiction over this appeal and cross-appeal pursuant to Utah Code § 78A-4-103(2)(j) (granting jurisdiction over "cases transferred to the Court of Appeals from the Supreme Court").

STATEMENT OF THE ISSUES

Ms. Onyeabor appeals the Order of Judge Robert P. Faust granting Plaintiffs' Motion for Partial Summary Judgment and striking, *inter alia*, the affidavits Ms. Onyeabor proffered in opposition to Plaintiffs' Motion. *See* Onyeabor Brief at 13, 14. Ms. Onyeabor has set forth sixteen single-spaced issues for review, all of which fail to provide citation to the record to indicate where Ms. Onyeabor purportedly preserved these issues below. *See* Ms. Onyeabor's Brief at 11-13. Ms. Onyeabor provides no standard of review for these issues. Many of these issues are raised for the first time on appeal and are inadequately briefed. Ms. Onyeabor's Brief does not satisfy the requirements of Rule 24 of the Rules of Appellate Procedure. Ms. Onyeabor's Brief does not comport with

Utah law. *See James v. Preston*, 746 P.2d 798, 801 (Utah Ct. App. 1987) (matters raised for the first time on appeal will not be considered); *Phillips v. Hatfield*, 904 P.2d 1108, 1109 (Utah Ct. App. 1995) (matters inadequately briefed shall not be considered). For these reasons, Plaintiffs request that this Court strike and not consider the issues raised by Ms. Onyeabor in her Brief.

Pursuant to Rule 24 of the Utah Rules of Appellate Procedure, Plaintiffs provide this Court with their Statement of Issues for Review:

ISSUE NO. 1.

Did the trial court correctly grant partial summary judgment in favor of Plaintiffs determining, as a matter of law, that the Restated Covenants, Conditions and Restrictions of Centennial Pointe, a planned unit development, recorded in August 2002 (the “Restated Amended CC&Rs”) are valid and encumber all Lots in the Centennial Pointe development, including Lots 1 and 2 owned by Ms. Onyeabor?

STANDARD OF REVIEW: Correctness. This Court reviews a trial court’s ruling granting summary judgment for correctness. *See Traco Steel Erectors, Inc. v. Control, Inc.*, 2007 UT App 407, ¶ 31, 175 P.3d 572.

ISSUE NO. 2.

Did the trial court abuse its discretion when it granted Plaintiffs’ Motions to Strike the affidavits of Onyeabor, Robert Mills, Travis Healey and Chinedum Alexander Udeh proffered in opposition to Plaintiffs’ Motion for Partial Summary Judgment?

STANDARD OF REVIEW: Abuse of discretion. When this Court reviews a trial court’s decision to strike affidavits, that decision “is reviewed under a broad grant of

discretion.” *Murdock v. Springville Mun. Corp.*, 1999 UT 39, ¶25, 982 P.2d 65 (citations omitted).

ISSUES ON CROSS APPEAL

ISSUE NO. 1.

Did the trial court abuse its discretion when it reduced the Association’s attorney fees’ award by an arbitrary 50% without consideration of the factors set forth in *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988)?

This issue was preserved by Plaintiffs’ request for attorney fees in their Motion for Partial Summary Judgment (R. 865-70), and Plaintiffs’ counsel’s affidavit of attorney fees filed with the trial court. (R. 2017-64)

STANDARD OF REVIEW: Abuse of discretion. This Court reviews a trial court’s determination of reasonable attorney fees for an abuse of discretion. *See Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988).

ISSUE NO. 2.

Did the trial court err when it denied Plaintiffs’ claim for late fees and fines imposed against Ms. Onyeabor under the express terms of Centennial Pointe’s CC&Rs for violating the CC&Rs, on the basis that the late fees and fines were not damages resulting from Ms. Onyeabor’s breach of contract?

This issue was preserved below in Plaintiffs’ Motion for Partial Summary Judgment. (R. 865-70)

STANDARD OF REVIEW: Correctness. The trial court’s interpretation of restrictive covenants is a question of law. *See Holladay Duplex Mgmt., Co., LLC. v.*

Howells, 2002 UT App 125, ¶ 2, 47 P.3d 104. Appellate courts review a trial court's ruling on questions of law for correctness. *See id.*

STATEMENT OF THE CASE

Nature of the Case/Course of Proceedings.

Ms. Onyeabor appeals from an Order, certified as final under Rule 54(b) of the Utah Rules of Civil Procedure, granting Plaintiffs' Motion for Partial Summary Judgment declaring the Restated Amended CC&Rs for Centennial Pointe valid and encumbering Ms. Onyeabor's Lots 1 and 2 in the development, and striking, *inter alia*, the affidavits Ms. Onyeabor proffered in opposition to Plaintiffs' Motion.¹ *See* Onyeabor Brief at 14. Plaintiffs have cross-appealed the trial court's ruling reducing the attorney fees award by an arbitrary 50%, and its denial of Plaintiffs' claim for late fees and fines imposed against

¹The trial court's determination that the Restated Amended CC&Rs were valid and encumbered Ms. Onyeabor's property was based upon the proper exercise of the amendment power reserved unto the original owner/developer and upon Ms. Onyeabor having notice of the Restated Amended CC&Rs, as well as Ms. Onyeabor's ratification of the Restated Amended CC&Rs. (R. 2521-90) Ms. Onyeabor has variously stated that she did not, and that she did, sign the Restated Amended CC&Rs. For example, she argues in her Brief that she never denied signing the original CC&Rs, Onyeabor Brief at 27, however, the only CC&Rs bearing her signature are the Restated Amended CC&Rs. (R. 1136) Ms. Onyeabor did not sign the original CC&Rs recorded in April, 2000. (R. 919) Ms. Onyeabor has claimed that she has no recollection of signing the Restated Amended CC&Rs. (R. 1308) That said, Plaintiffs Motion for Partial Summary Judgment was not premised upon whether or not she signed the Restated Amended CC&Rs. That was conceded to be a disputed fact. However, the trial court correctly determined that the Restated Amended CC&Rs were valid and encumbered Ms. Onyeabor's property without reaching any decision as to whether Ms. Onyeabor signed the Restated Amended CC&Rs. (R. 2591-2602) Accordingly, Ms. Onyeabor's argument regarding the same should not be considered.

Ms. Onyeabor under the express terms of Centennial Pointe's CC&Rs. *See* Plaintiffs' Docketing Statement.

Centennial Pointe is a light industrial planned unit development, which its owner/developer intended to be managed by an owners association and the lots therein to be burdened by restrictive covenants. Exhibit 2; (R. 840-41, 885) Ms. Onyeabor owns two lots in Centennial Pointe. (R. 841-43) Ms. Onyeabor has challenged the validity of Centennial Pointe's restrictive covenants and ceased paying her assessments, resulting in the present matter. (R. 1-13)

On and off through this litigation, Ms. Onyeabor has proceeded with counsel and acted *pro se*. (R. 2017-64). In prosecuting this case to and including the dispositive *N prosecuting* Leading up to Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs have filed a motion for preliminary injunction and an evidentiary hearing was conducted thereon, motions to dismiss were filed, opposed and hearings were conducted thereon, Plaintiffs have filed a motion to compel discovery because Onyeabor refused to sit for her deposition, Plaintiffs have conducted depositions, and Plaintiffs' have conducted written discovery. (R. 2017-64)

On October 30, 2006, Plaintiffs filed their Motion for Partial Summary Judgment seeking an Order declaring, *inter alia*, that Centennial Pointe's Restated Amended CC&Rs are valid and encumber Ms. Onyeabor's Lots 1 and 2 in the development. (R. 831-1277) Plaintiffs requested an award of attorney fees under the provisions of the Restated Amended CC&Rs, and that Ms. Onyeabor be ordered to pay the late fees and

finer imposed against Ms. Onyeabor under the express terms of the CC&Rs. (R. 865-68)

On December 13, 2006, Ms. Onyeabor filed her Opposition to Plaintiffs' Motion, a Cross-Motion, and appended thereto were several affidavits. (R. 1306-1474) Ms. Onyeabor did not dispute or controvert the facts and evidence set forth in Plaintiffs' Motion. On January 17, 2007, Plaintiffs filed their Reply Memorandum and Opposition to Ms. Onyeabor's Cross-Motion, and several Motions to Strike evidence proffered by Ms. Onyeabor in opposition to Plaintiffs' Motion. (R. 1584-1786)

Ms. Onyeabor did not file any specific opposition to Plaintiffs' Motions to Strike, but on January 23, 2007, she did file a pleading entitled Motion and Memorandum in Support of Ms. Onyeabor's Request to File Answer to Plaintiffs' and Third-Party Defendants Bruce Raile's and Jennifer Clark's Answer Memorandum of January 17, 2007 ("January 23, 2007 Onyeabor Memorandum"). (R. 1787, 1790) In that Memorandum, Ms. Onyeabor argued that the affidavits of Robert Mills, Travis Healey, and Chinedum Alexander Udeh should not be stricken because they "have every right to state in plain English what conversations they had with whom. They also have a right to recount events as they witnessed them. It is not hearsay if they were part of the conversation." (R.1790) On February 2, 2007, Plaintiffs filed their Reply Memorandum in support of their Motions to Strike. (R. 1805-12)

On May 2, 2007, the trial court heard oral argument on Plaintiffs' Motion for Partial Summary Judgment and Plaintiffs' Motions to Strike. (R. 1972, 1975-77) The trial court took the matters under advisement. On May 3, 2007, the Court issued a Minute

Entry granting Plaintiffs' Motion for Partial Summary Judgment and awarding them their attorney fees, and granting their Motions to Strike. (R. 1975-77) The trial court denied Plaintiffs' claim for late fees and fines imposed against Ms. Onyeabor. (R. 1975-77)

On June 20, 2007, Plaintiffs filed an affidavit of attorney fees, which included redacted billing statements. Exhibit 4 (R. 2017-64) On August 7, 2007, the trial court issued a Minute Entry stating that Plaintiffs' attorney fees were exorbitant and reduced the fee by 50%. (R. 2396-98). On October 1, 2007, the trial court executed and entered the Order granting Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike. Exhibit 1 (R. 2521-90) The Order reflected the 50% reduction of the attorney fees award. (R. 2529) The trial court certified the Order as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. (R. 2528-29, 2531)

On October 16, 2007, Ms. Onyeabor filed her Notice of Intent to Appeal. (R. 2605-07) On October 25, 2007, Plaintiffs filed their Notice of Cross-Appeal. (R. 2789-91).

STATEMENT OF FACTS

The following facts were not disputed by Ms. Onyeabor. (R. 1306-1474)

1. Centennial Pointe Industrial Park ("Centennial Pointe") is a commercial, light industrial planned unit development located at or about 1755 South 4490 West, Salt Lake City, Utah. Addendum 1, Exhibit 2 (R. 840)

2. Centennial Pointe is comprised of two integrated commercial buildings, sharing common areas which include, *inter alia*, utilities, grass areas and landscaping, walkways, interior roads, as well as parking spaces around the two various buildings. (R. 840)

3. On or about April 18, 2000, Centennial Pointe's owner and developer, Centennial Pointe, LLC, executed Centennial Pointe's Declaration of Covenants, Conditions and Restrictions ("April 2000 CC&Rs"), which were recorded by the Salt Lake County Recorder's office on April 19, 2000 as Entry No. 7631217. (R. 840); *See* Declaration of Covenants, Conditions and Restrictions. (R. 885)

4. The April 2000 CC&Rs expressly granted Centennial Pointe, LLC, the declarant, the right to unilaterally amend the April 2000 CC&Rs and the Plat, so long as Centennial Pointe, LLC had not sold all of the Lots in Centennial Pointe. Specifically,

Until the Declarant [Centennial Pointe, LLC] has sold all Lots, Declarant shall have the right unilaterally to amend and supplement this Declaration and the Plat to correct any technical errors or to clarify any provision to more fully express the intent of the Declarant for development and management of the Project.

April 2000 CC&Rs, Section XIV(b). Addendum 1, Exhibit 2 (R. 907-08)

5. The April 2000 CC&Rs provided for the establishment of an owners association (the "Association") to manage and maintain Centennial Pointe's common areas. (R. 893-97)

6. The Association was also vested with the authority to "fix, levy, collect and enforce payment" of all charges and assessments for, *inter alia*, the maintenance and repair of Centennial Pointe's common areas and for capital improvements, as well as to

impose fines and late fees for an owner's failure to pay his or her assessments. (R. 897-900, 917-18)

7. The April 2000 CC&Rs provided for the award of attorney fees and costs for the enforcement of the CC&Rs. (R. 896, 917-18)

8. The April 2000 CC&Rs define the common areas to include all parking stalls, roads, walkways and landscaping. (R. 885-86, 905)

9. However, the April 2000 CC&Rs contained some conflicting or overlapping definitions. For example, common areas were defined to exclude Lots, but the description of Lots in the CC&Rs and the Plat showed all of the property encompassed in Lots. Also, "Buildings" were defined to include landscaping as well as other improvements existing on a Lot. (R. 885-86)

10. On or about April 24, 2000, Myriam Onyeabor purchased Lot 1 in the Centennial Pointe development. (R. 1039)

11. To clarify the ambiguities and conflicting definitions contained in the April 2000 CC&Rs, Centennial Pointe, LLC caused to be prepared Centennial Pointe's Restated Declaration of Covenants, Conditions and Restrictions ("Restated Amended CC&Rs"), which Centennial Pointe, LLC intended to supercede and amend the April 2000 CC&Rs. *See* Affidavit of Donald Sanborn. Addendum 1, Exhibit 2; (R. 100-04)

12. The Restated Amended CC&Rs did not alter the fee simple ownership interest that Centennial Pointe owners possessed over their Lots. (R. 1109)

13. The Restated Amended CC&Rs defined Centennial Pointe's Common Elements (or common areas) as "Utility Lines, lighting not attached to Buildings, fences, landscaping, Accessways, parking spaces, loading/receiving areas, and all other portions of [Centennial Pointe] other than the Buildings." (R. 1106)

14. The Restated Amended CC&Rs continued to vest the Association with the authority to maintain and manage Centennial Pointe's common areas. (R. 1114)

15. The Restated Amended CC&Rs continued to vest the Association with the authority to "fix, levy, collect and enforce payment" of all charges and assessments for, *inter alia*, the maintenance and repair of Centennial Pointe's common areas and for capital improvements. (R. 1115)

16. The Restated Amended CC&Rs provide for the award of attorney fees and costs for the enforcement of the CC&Rs. (R. 1115, 1135-36)

17. The Restated Amended CC&Rs continued to vest in the Association the authority to impose and collect fines and late fees for, *inter alia*, an owner's failure to pay his or her assessments. (R. 1135-36)

18. The Restated Amended CC&Rs continued to grant Centennial Pointe's owners and the Association the right to use the common areas, as well as ingress and egress easements over those areas. (R. 1109-10)

19. Donald Sanborn, the manager of Centennial Pointe, LLC, executed the Restated Amended CC&Rs on behalf of Centennial Pointe, LLC. (R. 1100-04)

20. On August 24, 2000, the Restated Amended CC&Rs were recorded by the Salt Lake County Recorder's Office as Entry No. 7704757. (R. 1106)

21. On or about September 28, 2000, after the Restated Amended CC&Rs had been recorded, Ms. Onyeabor purchased Lot 2 in Centennial Pointe from Centennial Pointe, LLC. (R. 1040)

22. Prior to closing, Ms. Onyeabor received title work, followed by a policy of title insurance for Lot 2 that expressly disclosed that Lot 2 was encumbered by the Restated Amended CC&Rs. Addendum 1, Exhibit 2; (R. 1058-59, 1192-93)

23. The Special Warranty Deed from Centennial Pointe, LLC to Ms. Onyeabor for Lot 2 expressly states that Centennial Pointe, LLC's conveyance was subject to any restrictions of record. (R. 1039, 1203)

24. In November, 2000, LEBR Associates, LLC ("LEBR") purchased Lots 3, 4, and 5 in the Centennial Pointe Development. (R. 1206)

25. LEBR is a limited liability company. (R. 1206)

26. LEBR's managing partner is Bruce Raile. (R. 1206)

27. From April 2000 through December 2000, the Association maintained Centennial Pointe's common areas, including, but not limited to, the landscaping and snow removal in the Centennial Pointe development. Addendum 1, Exhibit 2 (R. 1017-21, 1103, 1217-18)

28. The Association also paid the water, sewer, power and insurance for the Centennial Pointe development. (R. 1217-18)

29. In December 2000, the Association assessed the Centennial Pointe owners, including Ms. Onyeabor, for their *pro rata* share of Centennial Pointe's common expenses for the period of April 2000 through December 2000. (R. 1016-18)

30. Specifically, the Association assessed Ms. Onyeabor \$1,028.42 for her *pro rata* share of the common expenses. Addendum 1, Exhibit 2 (R. 1017)

31. The assessment included costs for landscaping, snow removal, water, sewer and power. (R. 1217-18)

32. Ms. Onyeabor paid the \$1,028.42 Association assessment. (R. 1017-18)

33. Ms. Onyeabor did not contest the existence of the Association, nor its authority to assess Centennial Pointe owners for the maintenance and repair of Centennial Pointe's common areas and utilities in the Centennial Pointe development. (R. 1017-21)

34. In December 2000, Bruce Raile was elected president of the Association and Ms. Onyeabor was elected secretary of the Association. (R. 1206, 1220-21)

35. On October 2001, the Association conducted a meeting with all members of the Association, including Ms. Onyeabor, in attendance. (R. 1024, 1223)

36. During that meeting, the Association members discussed the 2001 assessments for the maintenance of Centennial Pointe's common areas, including power, water, sewer, landscaping and insurance. (R. 1024, 1223)

37. Ms. Onyeabor agreed to obtain bids for the Association maintaining the landscaping and snow removal for Centennial Pointe's common areas. (R. 1024-25, 1223)

38. On or about November 26, 2001, Ms. Onyeabor paid the Association's 2001 assessment in the amount of \$2,745.00. (R. 1026-27)

39. The assessment included expenses for water and sewer, power, insurance, and landscaping and snow removal. (R. 1225)

40. Ms. Onyeabor paid the Association's assessments through October 2002. Addendum 1, Exhibit 2 (R. 1027-28, 1207)

41. Ms. Onyeabor has testified that she received written notice of the amount of her ratable share of the common expenses in December 2000, November 2001, January 2002, March 2002, and May 2002. (R. 1017, 1025, 1027-29)

42. Ms. Onyeabor willingly paid those assessments. (R. 1017, 1026, 1027-29)

43. On or about May 22, 2002, Ms. Onyeabor notified the members of the Association that beginning June 1, 2002 she would no longer participate as a member of the Association or pay her *pro rata* share of Centennial Pointe's common expenses. (R. 1011-12, 1227)

44. Ms. Onyeabor also informed the members of the Association that she, and not the Association, would maintain the landscaping and common area on or around her two Lots, and that she would have vehicles towed that were parked in the Centennial Pointe parking stalls within her purported "legal boundary." (R. 1011-12, 1227)

45. In or about June 2002, after receipt of Ms. Onyeabor's letter, the Association's president Bruce Raile forwarded to Ms. Onyeabor a copy of a memorandum from Dave

Castleton, the Association's attorney, explaining that Ms. Onyeabor could not unilaterally opt out of her obligations as a Centennial Pointe owner. (R. 1206-07, 1229-32)

46. After October 2002, Ms. Onyeabor ceased paying the Association's assessments, forcing the other Centennial Pointe owners to pay more than their ratable share of Centennial Pointe's expenses for joint utilities and maintenance of the common areas. (R. 1207)

47. Ms. Onyeabor continued to receive assessment statements from the Association, but ignored those statements. (R. 1029, 1240-41)

48. Ms. Onyeabor was provided an assessment statement in November 2004, February 2005, April 2005, May 2005, August 2005, September 2005, October 2005, November 2005, January 2006, March 2006, June 2006, and September 2006. (R. 1239, 1241)

49. Ms. Onyeabor ignored those statements. (R. 1240-41)

50. Jennifer Clark is the secretary of the Association and either sent or caused to be sent statements and assessment information from the Association to Ms. Onyeabor. (R. 1240-41)

51. Ms. Clark is an employee of Sun Optics, which is located in Centennial Pointe. (R. 1240)

52. Ms. Clark is not and has never been an employee of LEBR. (R. 1240, 1206)

53. Ms. Onyeabor has asserted counterclaims against Plaintiffs and Third-Party Defendants. (R. 217-88, 715-40, 796-97)

54. On March 23, 2006, in her deposition, Ms. Onyeabor testified as follows:

a. Ms. Onyeabor met Mr. Raile for the first time after she purchased Lot 2 and LEBR had purchased Lots 3, 4, and 5 in Centennial Pointe. See Exhibit 2 (R. 958)

b. Ms. Onyeabor testified that she had never met Mr. Raile or had any discussions with him prior to LEBR's purchase of the Lots in Centennial Pointe. (R. 958)

d. Ms. Onyeabor testified that nothing Mr. Raile said or did affected her decision to purchase Lots 1 and 2 in Centennial Pointe. (R. 959)

e. Ms. Onyeabor testified that her complaint against Mr. Raile stems from Mr. Raile (1) "talk[ing] down to [her]," (2) telling Ms. Onyeabor that Centennial Pointe's parking area is a common area as defined by the CC&Rs, (3) telling Ms. Onyeabor that Mr. Raile's employees could park in any of Centennial Pointe's parking stalls, even those in front of Ms. Onyeabor's business, and (4) telling Ms. Onyeabor that the landscaped areas in Centennial Pointe, even those in and around Ms. Onyeabor's Lots, are common areas to be maintained by the Association. (R. 997-98)

f. Ms. Onyeabor testified that Mr. Raile never came into her building during any of his conversations with Ms. Onyeabor. (R. 925)

g. Ms. Onyeabor testified that Mr. Raile has never called her a derogatory name. (R. 926-27)

h. Ms. Onyeabor testified that Mr. Raile has never threatened her. (R. 927)

i. Ms. Onyeabor testified that Mr. Raile has never touched her. (R. 927)

j. Ms. Onyeabor testified that her conversations with Mr. Raile occurred in the Centennial Pointe parking lot or on the sidewalk area outside of Ms. Onyeabor's building. (R. 925)

55. Ms. Onyeabor has not sought medical attention as a result of any of the conduct that she relies upon to establish her intentional infliction of emotional distress claim. (R. 953, 976)

56. Ms. Onyeabor has not sought treatment from a psychiatrist or a psychologist as a result of the alleged conduct of Plaintiffs or Third-Party Defendants. (R. 951)

57. Ms. Onyeabor was not prescribed any medications, nor did she take any prescribed medications as a result of the alleged conduct of Plaintiffs or Third-Party Defendants. (R. 976) Ms. Onyeabor has testified that she "didn't need to." (R. 976)

58. Regarding any distress that she may have experienced, Ms. Onyeabor testified that she just "deal[t] with it." (R. 953)

STATEMENT OF FACTS REGARDING CROSS-APPEAL

59. On May 3, 2007, the trial court issued a Minute Entry granting Plaintiffs' Motion for Partial Summary Judgment, awarding them their attorney fees, and granting their Motions to Strike. See Exhibit 5 (R. 1975-77)

60. The trial court denied Plaintiffs' claim for late fees and fines imposed against Ms. Onyeabor. *Id.*

61. On June 20, 2007, Plaintiffs filed an affidavit of attorney fees, which included redacted billing statements. Exhibit 3 (R. 2017-64)

62. On August 7, 2007, the trial court issued a Minute Entry stating that Plaintiffs' attorney fees were exorbitant and reduced the fee by 50%. *See* Exhibit 6 (R. 2396-98)

63. On October 1, 2007 the trial court executed and entered the Order granting Plaintiffs' Motion for Partial Summary Judgment and Motions to Strike. (R. 2521-90)

64. The Order reflected the 50% reduction of Plaintiffs' attorney fee award. (R. 2529)

65. On October 25, 2007, Plaintiffs filed their Notice of Cross-Appeal. (R. 2789-91)

SUMMARY OF ARGUMENT

I. **MS. ONYEABOR'S BRIEF DOES NOT SATISFY THE REQUIREMENTS OF THE RULES OF APPELLATE PROCEDURE AND SHOULD BE STRICKEN IN ITS ENTIRETY.**

Ms. Onyeabor's Brief does not satisfy the requirements of Rule 24 of the Utah Rules of Appellate Procedure, is inadequately briefed, and improperly raises issues for the first time on appeal. Accordingly, Ms. Onyeabor's brief should be stricken in its entirety.

II. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT STRUCK THE AFFIDAVITS OF MYRIAM ONYEABOR, ROBERT MILLS, TRAVIS HEALY, OR ALEXANDER UDEH.**

Ms. Onyeabor has failed to proffer any facts, admissible evidence, or supporting legal authority to support her claim that the trial court abused its discretion by striking her affidavits. Rule 56(e) of the Utah Rules of Civil Procedure and case law show that inadmissible evidence cannot be considered on summary judgment, and that the rules of

civil procedure and evidence apply to *pro se* litigants. Further, Ms. Onyeabor raises this issue for the first time on appeal. Ms. Onyeabor's argument should be denied.

III. THE TRIAL COURT CORRECTLY GRANTED PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

The trial court correctly granted Plaintiffs' Motion for Partial Summary Judgment. The record shows that Ms. Onyeabor purchased her first lot, Lot 1, subject to the April 2000 CC&Rs, which reserved unilateral amendment authority in Centennial Pointe's owner/developer, the owner/developer properly amended the April 2000 CC&Rs when it adopted the Restated Amended CC&Rs to clarify the April 2000 CC&Rs; and Ms. Onyeabor had notice of the Restated Amended CC&Rs before she purchased her second lot, Lot 2. The reservation of amendment authority in CC&Rs is enforceable, and Centennial Pointe's owner/developer satisfied the requirements necessary to exercise that authority. Accordingly, the trial court correctly determined that the Restated Amended CC&Rs are valid and encumber Ms. Onyeabor's Lots 1 and 2. Ms. Onyeabor has failed to proffer any facts, admissible evidence, or legal authority to show otherwise.

IV. THE TRIAL COURT CORRECTLY DISMISSED MS. ONYEABOR'S COUNTERCLAIMS FOR QUIET TITLE AND DECLARATORY JUDGMENT.

Ms. Onyeabor's counterclaims for quiet title and declaratory judgment were premised on her claim that the Restated Amended CC&Rs were invalid. Plaintiffs' Motion for Partial Summary Judgment put those claims at issue. When the trial court determined that the Restated Amended CC&Rs were valid, Ms. Onyeabor's claims necessarily failed as a matter of law. The trial court correctly dismissed these claims with prejudice.

V. - VI. THE TRIAL COURT CORRECTLY DISMISSED MS. ONYEABOR'S CLAIMS FOR TRESPASS, ASSAULT, AND INFLICTION OF EMOTIONAL DISTRESS.

Ms. Onyeabor has failed to proffer any facts or admissible evidence to overcome the undisputed facts and evidence proffered to the trial court that show Ms. Onyeabor failed to establish the required elements to sustain these claims as a matter of law. The trial court correctly dismissed these claims with prejudice.

VII. MS. ONYEABOR'S CLAIM THAT PLAINTIFFS ARE NOT ENTITLED TO AN AWARD OF ATTORNEY FEES FAILS.

Ms. Onyeabor's argument is incomplete and inadequately briefed and should not be considered. The Restated Amended CC&Rs expressly provide an award of attorney fees for enforcing Centennial Pointe's CC&Rs. Ms. Onyeabor's argument fails.

CROSS-APPEAL

I. THE TRIAL COURT ABUSED ITS DISCRETION BY REDUCING PLAINTIFFS' AWARD OF ATTORNEY FEES BY AN ARBITRARY 50%.

The trial court abused its discretion when it reduced Plaintiffs' award of attorney fees without analysis of the evidence supporting Plaintiffs' attorney fees, or addressing the factors set forth in *Dixie State Bank*. Accordingly, this Court should reverse the trial court's ruling and award Plaintiffs the attorney fees set forth in Plaintiffs' counsels' fee affidavit, or, alternatively, remand back to the trial court to analyze the evidence proffered under the factors set forth in *Dixie State Bank*.

II. THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFFS' CLAIM FOR LATE FEES AND PENALTIES IMPOSED AGAINST MS. ONYEABOR PURSUANT TO THE RESTATED AMENDED CC&RS.

The trial court erred when it denied Plaintiffs' claim for late fees and fines imposed against Ms. Onyeabor under Centennial Pointe's CC&Rs, because the trial court concluded they were not damages as a result of Ms. Onyeabor's breach of the CC&Rs. Restrictive covenants are interpreted in the same manner as contracts and should be enforced as written. The Restated Amended CC&Rs expressly provide for late fees and fines for failure to pay assessments and for violating the CC&Rs. The late fees and fines are a contractual remedy. The undisputed facts and evidence show that Ms. Onyeabor has failed and refused to pay her assessments and violated the Restated Amended CC&Rs. Plaintiffs have been damaged by Ms. Onyeabor's conduct. Accordingly, the trial court erred when it refused to award Plaintiffs the late fees and fines as provided for under the Restated Amended CC&Rs.

ARGUMENT

I. MS. ONYEABOR'S BRIEF DOES NOT SATISFY THE REQUIREMENTS OF THE RULES OF APPELLATE PROCEDURE AND SHOULD BE STRICKEN IN ITS ENTIRETY.

Ms. Onyeabor's brief is difficult to comprehend, confusingly organized, difficult to respond to, and does not conform to the rules of appellate procedure. Ms. Onyeabor's statement of issues lacks citation to the record or standards of review. *See* Utah R. App. P. 24(a)(5). This failure to cite to the record is pervasive throughout Ms. Onyeabor's Brief. Ms. Onyeabor's Statement of Facts contains unsupported allegations, inadmissible evidence, as well as inadmissible evidence not before the trial court on summary judgment, and improper argument. *See e.g.*, Onyeabor Brief at 15 ¶¶ 2, 4; 17 ¶¶ 10, 11,

12; 18 ¶ 18; 19 ¶ 20; 20 ¶ 23; 21 ¶ 26. Ms. Onyeabor's arguments are incomplete, not coherently organized, conclusory, rely on inadmissible evidence and lack supporting legal authority. *See e.g.*, Onyeabor Brief at 27-28 (affidavits), 47-48 (affidavits and referenced exhibits), 50 (incomplete argument), 56 (incomplete argument). Ms. Onyeabor has inadequately briefed the issues and arguments contained in her Brief, and her Brief should be stricken. *See Phillips v. Hatfield*, 904 P.2d 1108, 1109 (Utah Ct. App. 1995); *see also* Utah R. App. P. 24(k). "[N]either an opposing party, nor the appellate courts, are obliged to address deficiencies in an appellant's briefing." *Department of Human Serv. v. Schwarz*, 2003 UT App 406, *2, – P.3d– (Memorandum Decision) (*citing Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14)).

Ms. Onyeabor asserts several new issues for the first time on appeal with no citation to the record. *See e.g.* Onyeabor Brief, Section II due process, constructive fraud (Ms. Onyeabor has no claim for constructive fraud); page 31 (the Plat violates criminal law); page 37 ("stranger to the deed" arguments); pages 42 and 50 (notice and standing); and page 52 (restated Amended CC&Rs are ambiguous). These issues and arguments should not be considered. *James v. Preston*, 746 P.2d 798, 801 (Utah Ct. App 1987). Ms. Onyeabor's Brief is fatally deficient and should be stricken in its entirety. Alternatively, this Court should not consider the issues, arguments, facts, or evidence not properly before this Court. Finally, Plaintiffs' request that this Court award them their attorney fees and costs on appeal. *See* Utah R. App. P. 24(k), *see also* Plaintiffs' Opposition to Ms. Onyeabor's Motion for Summary Disposition, dated February 2, 2008.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT STRUCK THE AFFIDAVITS OF MYRIAM ONYEABOR, ROBERT MILLS, TRAVIS HEALY, OR ALEXANDER UDEH.

The trial court properly struck the affidavits of Myriam Onyeabor, Robert Mills, Travis Healy, and Alexander Udeh proffered in opposition to Plaintiffs' Motion for Partial Summary Judgment. As set forth in Plaintiffs' Motions to Strike, which specifically addressed the deficient paragraphs in each affidavit, those affidavits did not satisfy Rule 56(e) of the Utah Rules of Civil Procedure or the Utah Rules of Evidence, as this lacked foundation, contained inadmissible hearsay, and were conclusory and argumentative. *See* Plaintiffs' Motion to Strike; *see e.g.*, Exhibit 3 (R. 1587-1616, 1620-48, 1649-1709) Ms. Onyeabor did not and has not addressed these legal deficiencies, nor has she pointed out in her Brief a single paragraph in any of the affidavits that was purportedly improperly stricken. Ms. Onyeabor has not shown that the trial court abused its discretion by striking the affidavits.

For the first time on appeal Ms. Onyeabor argues that the trial court abused its discretion by striking the affidavits because she is a *pro se* litigant. This Court should refuse to consider this argument. *See James*, 746 P.2d at 801. That said, the trial court did not abuse its discretion. This Court reviews a trial court's decision to strike affidavits "under a broad grant of discretion." *Murdock v. Springfield Mun. Corp.*, 1999 UT 39, ¶ 25, 982 P.2d 65 (citation omitted). It is well-settled that inadmissible evidence may not be considered on summary judgment. *See Panos v. Olsen & Assocs. Const., Inc.*, 2005 UT App 446, ¶ 6, 123 P.3d 816. A *pro se* litigant must set forth admissible evidence

pursuant to Rule 56(e) of the Utah Rules of Civil Procedure. *See Winter v. Northwest Pipeline Corp.*, 820 P.2d 916, 919 (Utah 1991). These well-settled legal standards make it clear that Ms. Onyeabor's argument fails. Moreover, Ms. Onyeabor has cited no authority to show that a trial court abuses its discretion by refusing to accept inadmissible evidence from a *pro se* litigant. Ms. Onyeabor's argument fails.

III. THE TRIAL COURT CORRECTLY GRANTED PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

The trial court correctly granted Plaintiffs' Motion for Partial Summary Judgment. The undisputed facts and evidence proffered by Plaintiffs, as well as an abundance of legal authority cited by Plaintiffs, show that the trial court correctly determined that, *inter alia*, Ms. Onyeabor purchased Lot 1 subject to the April 2000 CC&Rs; Centennial Pointe's owner and developer, Centennial Pointe LLC, had the reserved unilateral authority, under the April 2000 CC&Rs, to amend the April 2000 CC&Rs; the Restated Amended CC&Rs were validly adopted and amended and superceded the April 2000 CC&Rs; Ms. Onyeabor had notice of the Restated Amended CC&Rs before she purchased Lot 2; and that the Restated Amended CC&Rs encumber Ms. Onyeabor's Lots 1 and 2 in Centennial Pointe. (R. 2521-90) The trial court's determination that the Restated Amended CC&Rs were valid and encumbered Ms. Onyeabor's property properly disposed of Ms. Onyeabor's counterclaims for quiet title and declaratory judgment, which were based upon Ms. Onyeabor's claim that Restated Amended CC&Rs were invalid. (R. 730-32)

This Court reviews a trial court's decision to grant summary judgment for correctness. *See Traco*, 2007 UT App 407 at ¶ 31. Summary judgment is appropriate "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Mountain West Surgical Ctr., LLC v. Hospital Corp. of Utah*, 2007 UT 92, ¶ 10, 173 P.3d 1276; Utah R. Civ. P. 56. Conclusory allegations and denials are insufficient to raise an issue of material fact in opposition to summary judgment, as statements that are not admissible in evidence may not be considered on summary judgment. *Panos v. Olsen and Assocs. Const. Inc.*, 2005 UT App 446, ¶ 6, 123 P.3d 816, *rehearing denied*. A party opposing summary judgment has a duty to set forth specific facts showing there is a genuine issue for trial. *DCB Collection Trust by Helgesen & Waterfall v. Harris*, 893 P.2d 593, 597 (Utah Ct. App. 1995), *cert. denied*, 910 P.2d 425.

Rule 7 of the Utah Rules of Civil Procedure mandates that a "memorandum opposing a motion for summary judgment *shall* contain a verbatim restatement of each of the moving party's facts that is controverted, and that for each fact controverted, the opposing party *shall* provide an explanation of the grounds for any dispute, *supported by citation to relevant materials, such as affidavits or discovery materials*. *See* Utah R. Civ. P. 7(c)(3)(B) (emphasis added). Each fact set forth in the moving party's memorandum is *deemed admitted* for the purpose of summary judgment unless controverted by the responding party." *Id.* Rule 7(c)(3)(A).

A. The Trial Court Correctly Determined That There Were No Disputed Issues of Fact.

The record shows that Ms. Onyeabor did not controvert, or dispute any of the facts set forth in Plaintiffs' Motion for Partial Summary Judgment. (R. 1306-44) The affidavits Ms. Onyeabor proffered in opposition to Plaintiffs' Motion were not admissible evidence and were properly stricken. *See* Section II, *supra*. Ms. Onyeabor's Opposition Memorandum contained a section entitled "Statements (Motion in Opposition to Motion for Summary Judgment)." (R. 1316). In that section, Ms. Onyeabor made a number of conclusory statements. Those statements were not admissible evidence, were conclusory, and were largely improper argument, e.g., "That the August CC&r [sic] has failed all legal tests." (R. 1317) Ms. Onyeabor's "Statements" did not address or proffer admissible evidence in opposition to the facts set forth in Plaintiffs' Motion that show, *inter alia*, that the Restated Amended CC&Rs are valid and encumber Ms. Onyeabor's property as a matter of law. As such, the facts in Plaintiffs' Motion are undisputed and the trial court correctly determined that there were no genuine or disputed issues of material fact. *See* Utah R. Civ. P. 7(c)(3)(A), (B); *Panos*, 2005 UT App 446 at ¶ 6; *DCB Collection*, 893 P.2d at 597.

B. The Trial Court Correctly Determined That the Restated Amended CC&Rs Were Validly Adopted Under the Provisions of the April 2000 CC&Rs.

The Restated Amended CC&Rs were validly adopted and those CC&Rs amended and superceded the April 2000 CC&Rs. Ms. Onyeabor has failed to proffer any facts, evidence or legal authority to show otherwise. Centennial Pointe's owner and developer,

Centennial Pointe LLC, had the reserved right to unilaterally amend the April 2000 CC&Rs. (R. 840, 908) Specifically,

Until the Declarant [Centennial Pointe] has sold all Lots, Declarant shall have the right unilaterally to amend and supplement this Declaration and the Plat to correct any technical error or to clarify any provision more fully to express the intent of the Declarant for development and management of [Centennial Pointe].

April 2000 CC&Rs, Section XIV(b). Exhibit 2; (R. 908) Ms. Onyeabor purchased Lot 1 in Centennial Pointe after the April 2000 CC&Rs were recorded. (R. 840-41) As such, Ms. Onyeabor purchased Lot 1 subject to the April 2000 CC&Rs, “which clearly included an express right of alteration or amendment.” *Baldwin v. Barbon Corp.*, 773 S.W.2d 681, 686 (Tex. Ct. App. 1989); *see also* (R. 854)

Provisions reserving a developer’s right to unilaterally amend restrictive covenants are enforceable. *See e.g. The View Condo Owner’s Assoc., v. MSICO, LLC.*, 2005 UT 91, ¶ 26, 127 P.3d 697 (acknowledging that CC&Rs provided developer the unilateral right to amend CC&Rs, but developer failed to follow the procedures set forth in CC&Rs to implement unilateral amendment); *see also Baldwin v. Barbon Corp.*, 773 S.W.2d 681, 686 (Tex. Ct. App. 1989); *Rossman v. The Seasons at Tiara Rado Assocs.*, 943 P.2d 34 (Colo. Ct. App. 1997) (*upholding* developer’s right to unilaterally amend CC&Rs where amendment did not did not destroy the general scheme or plan of development for the neighborhood); *Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc.*, 303 So.2d 665, 666 (Fla. Dist. Ct. App. 1974) (same). The factors to be considered when analyzing such provisions are (1) the “instrument creating the original restrictions must

establish both the right to amend such restrictions and the method of amendment”; (2) the “right to amend such restrictions implies only those changes contemplating a correction, improvement, or reformation of the agreement rather than a complete destruction of it”; and (3) “the amendment to the restrictions may not be illegal or against public policy.” *Baldwin*, 773 S.W.2d at 685; *see also* (R. 854-59) Ms. Onyeabor has not proffered any legal authority to show that such provisions were unenforceable.

The April 2000 CC&Rs provided a right to, and a method for, Centennial Pointe LLC to unilaterally amend the April 2000 CC&Rs. *See* Plaintiffs’ Memorandum at 4-5. (R. 856-57) At the time Centennial Pointe LLC executed and recorded the Restated Amended CC&Rs, Centennial Pointe LLC had not sold all of the Lots in the Centennial Pointe development. (R. 843-44) As such, the first requirement was satisfied. *See Baldwin*, 773 S.W.2d at 685. Further, Centennial Pointe LLC executed and recorded the Restated Amended CC&Rs thus satisfying the “method” for amendment. *Id.*

The Restated Amended CC&Rs clarified ambiguities and overlap in the April 2000 CC&Rs regarding the common areas. Specifically, Centennial Pointe is a PUD. (R. 888) The April 2000 CC&Rs defined common areas to include landscaping, walkways, parking spaces and roads. Exhibit 2; (R. 885-86) The April 2000 CC&Rs provided that all Centennial Pointe property owners had the right to use the common areas and had reciprocal easements over the common areas. (R. 889) The April 2000 CC&Rs also provided that the Association was responsible for maintaining and managing the common areas. (R. 895) However, plainly contrary to those definitions and terms, as well as

Centennial Pointe, LLC's intent that Centennial Pointe be a PUD, the April 2000 CC&Rs defined common areas to exclude "Lots." (R. 885) The April 2000 CC&Rs defined "Buildings" to include "landscaping" "and other improvements of any kind existing on a Lot at anytime." (R. 885) These definitions created ambiguities because the definitions of Lots, Buildings and common areas overlapped in some respects.

Undisputed evidence proffered to the trial court showed that Centennial Pointe LLC adopted the Restated Amended CC&Rs to more clearly define Centennial Pointe's common areas to include, *inter alia*, "landscaping, Accessways, parking spaces, loading/receiving areas and all other portions of [Centennial Pointe] other than "Buildings." (R. 858); Affidavit of Donald Sanborn. (R. 1102) These were the same common areas identified in the April 2000 CC&Rs. The undisputed facts and evidence presented to the trial court showed that the Restated Amended CC&Rs did not alter Centennial Pointe's owners' ownership interest in their Lots, they continued to have fee simple ownership. *Compare* April 2000 CC&Rs Section IV, 4.1 (R. 889); Restated Amended CC&Rs Section IV, 4.1. Exhibit 2 (R. 1109) The Restated Amended CC&Rs did not change Centennial Pointe's owners right to access and use the common areas. *Compare* April 2000 CC&Rs, Section IV, 4.6, 4.7 (R. 889), Restated Amended CC&Rs, Section IV, 4.5, 4.6. (R. 1109-10). The Restated Amended CC&Rs did not destroy the general scheme or development plan of Centennial Pointe; it was and continues to be a PUD. *See Baldwin*, 773 S.W.2d at 685; *see also Rossman v. The Seasons at Tiara Rado Assocs.*, 943 P.2d 34 (Colo. Ct. App. 1997) (*upholding* developer's right to unilaterally

amend CC&Rs where amendment did not did not destroy the general scheme or plan of development for the neighborhood); *Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc.*, 303 So.2d 665, 666 (Fla. Dist. Ct. App. 1974 (same)). The Restated Amended CC&Rs improved the Centennial Pointe development, clarified the ambiguities in the April 2000 CC&Rs, and the amendment was neither illegal nor against public policy. *See Baldwin*, 773 S.W.2d at 685. The record shows the trial court correctly determined that the Restated Amended CC&Rs were validly adopted.

On appeal, Ms. Onyeabor argues otherwise. *See Onyeabor Brief* at 39. Ms. Onyeabor argues that the April 2000 CC&Rs required the written approval of 67% of the first mortgagees before Centennial Pointe LLC could amend the April 2000 CC&Rs. *See id.* at 40. Ms. Onyeabor's argument fails. The provision Ms. Onyeabor relies upon in the April 2000 CC&Rs affects only the *Association's* authority to act. Specifically, "Unless at least 67% (based upon one vote for each mortgage) of the individual Lots subject to first mortgage consent in writing, *the Association* shall not be entitled, by act, omission, or otherwise. . . ." April 2000 CC&Rs Section XIII, 13.5 (emphasis added). (R.906) The provision relied upon by Ms. Onyeabor places no limitation on Centennial Pointe LLC, the owner/developer, which had a reserved express right to unilaterally amend the April 2000 CC&Rs. Ms. Onyeabor took Lot 1, her first purchase in the development, subject to Centennial Pointe LLC's reserved amendment right. *Baldwin*, 773 S.W.2d at 685. The provision Ms. Onyeabor relies upon is inapplicable and her argument fails.

Next, Ms. Onyeabor argues that a vote of Owners holding at least 67% of the “Percentage Interests” was required for Centennial Pointe LLC to amend the Declaration. *See* Onyeabor Brief at 41. Ms. Onyeabor relies upon Section XIV of the April 2000 CC&Rs. *See id.* However, Section XIV expressly provides exceptions to requiring such a vote. (R. 907) One key exception is where the Declarant, Centennial Pointe LLC, exercises its unilateral right to amend the April 2000 CC&Rs, which is what occurred. (R. 908) The express language of the April 2000 CC&Rs shows that no vote of the Owners was required for Centennial Pointe, LLC to exercise its reserved unilateral amendment authority. Accordingly, Ms. Onyeabor’s argument fails.

Finally, Ms. Onyeabor argues that a new plat needed to be filed for the Restated Amended CC&Rs to be valid. *See* Onyeabor Brief at 40. Ms. Onyeabor provides no legal authority to support her conclusory argument, but merely relies upon her reading of the Restated Amended CC&Rs. *See id.* Conclusory allegations or denials are insufficient to oppose summary judgment. *See Panos*, 2005 UT App 446 at ¶ 6. The undisputed facts and evidence in this matter show that Centennial Pointe L.C.’s amendment of the April 2000 CC&Rs did not alter the Plat. Ms. Onyeabor has failed to proffer any facts, admissible evidence or legal authority to show that the Plat has changed. The Restated Amended CC&Rs merely clarify the ambiguities in the April 2000 CC&Rs regarding the definition of “buildings” and “Lots,” and furthered the intent of Centennial Pointe, LLC and the original CC&Rs that the parking lot, parking stalls, roads, landscaped areas and

sidewalks located in Centennial Pointe be common areas, and that all Centennial Pointe owners, tenants and invitees have a reciprocal easement over these common areas.

Neither the size of the Lots nor the building sizes were altered, and Ms. Onyeabor did not and has not presented any facts or admissible evidence to show they were. (R. 920, 1137)

Ms. Onyeabor's conclusory and unsupported argument fails. The record shows that the trial court correctly ruled that the Restated Amended CC&Rs were validly adopted.

C. The Trial Court Correctly Concluded That Ms. Onyeabor Had Notice of the Restated Amended CC&Rs.

The record shows that Ms. Onyeabor had notice of the Restated Amended CC&Rs before she purchased Lot 2. Before she purchased Lot 2, Ms. Onyeabor received a title insurance commitment that disclosed the Restated Amended CC&Rs. Exhibit 2 (R. 843-44, 864, 1062-63, 1192, 1196) Accordingly, the trial court correctly determined that Ms. Onyeabor had notice of the Restated Amended CC&Rs before she purchased Lot 2.

On appeal, Ms. Onyeabor argues that the "content of the Restated Amended CC&Rs were not disclosed" to her. *See* Onyeabor Brief at 26. She relies upon inadmissible evidence to support her argument, specifically, the affidavits of two realtors.² *See id.* at 27. Ms. Onyeabor argues that these two realtors had a duty to inform her of the Restated Amended CC&Rs, but failed to do so. *See id.* This conclusory argument does not

²The affidavits cited in her Brief at 27 are not the affidavits she proffered in opposition to Plaintiffs' Motion for Partial Summary Judgment. Those affidavits are located in the record at 1346-56.

overcome the undisputed facts or evidence that Ms. Onyeabor had notice of the Restated Amended CC&Rs before she purchased Lot 2. Ms. Onyeabor 's argument fails.

Ms. Onyeabor attempts to bootstrap revival of her fraud claim against LEBR and the Association with her notice argument. *See id.* at 26, 30-31. Ms. Onyeabor asserted a fraud claim against Plaintiff LEBR and the Association based entirely on a purported misrepresentation by these parties. (R. 732-33) Plaintiffs responded to Ms. Onyeabor's fraud claim, proffering undisputed facts and evidence to the trial court showing that no misrepresentation had been made, e.g., no representative of LEBR or Bruce Raile, the Association's president, had any communication with Ms. Onyeabor until after she purchased Lot 2 (R. 958-59), and neither influenced her decision in any way to purchase her property in Centennial Pointe. (R. 958-59) The trial court correctly determined that Ms. Onyeabor had not satisfied the nine elements required to show fraud and correctly dismissed her fraud claim with prejudice.

Now, Ms. Onyeabor argues for the first time on appeal that the trial court erred because it did not consider constructive fraud or fraudulent nondisclosure. *See* Onyeabor Brief at 26. Ms. Onyeabor does not have a claim for constructive fraud or fraudulent nondisclosure. (R. 732-33) Ms. Onyeabor's fraud claim was predicated on a misrepresentation. (R. 732-33) This Court should refuse to consider this argument. *See James*, 746 P.2d at 801. That said, Ms. Onyeabor has failed to proffer any facts, evidence or legal authority to show that either LEBR, which was not a property owner at the time Ms. Onyeabor purchased Lot 2, or the Association had a legal duty to communicate to

Ms. Onyeabor regarding the existence of the Restated Amended CC&Rs. *See* Onyeabor Brief at 26, 30-31. Neither LEBR nor the Association sold Ms. Onyeabor Lot 2. (R. 843) Further, Ms. Onyeabor had notice of the Restated Amended CC&Rs before she purchased Lot 2. (R. 1058-59, 1192-93) Ms. Onyeabor's argument fails.

D. The Trial Court Correctly Determined That the Restated Amended CC&Rs Are Valid and Encumber Ms. Onyeabor's Property.

The trial court correctly determined that the Restated Amended CC&Rs are valid, including the assessment authority, and that they encumber Ms. Onyeabor's property. Ms. Onyeabor argues that the Restated Amended CC&Rs are invalid because the Plat purportedly does not show the easements, parking stalls, or common areas. *See* Onyeabor Brief at 33. Ms. Onyeabor did not provide the trial court with an affidavit or expert testimony regarding what easements, etc. are reflected thereon. In fact, a layman's review of the Plat reveals that there must be easements, otherwise the interior lots are landlocked with no access to a public street or their loading docks along the interior driveway separating the two buildings. *See* Onyeabor Brief, Exhibit 1. The Restated Amended CC&Rs did not change the size of the Lots or buildings. (R. 920, 1137) Moreover, Ms. Onyeabor did not proffer any evidence or any legal authority to the trial court to show that an amended plat needed to be recorded for the Restated Amended CC&Rs to be valid, or that the Plat somehow controlled over the Restated Amended CC&Rs and the easements and common areas identified therein.

To support her argument, Ms. Onyeabor has cited and cites to both state statutes and municipal ordinances. *See id.* at 32-34. Ms. Onyeabor relies upon Utah Code Ann. § 57-8-1, et. seq., the Condominium Act. *See id.* at 29. The Centennial Pointe development is not a condominium, but rather a PUD. (R. 840) That said, the Condominium Act regarding this issue is highly informative. The Condominium Act does not require a plat to show “the location and dimensions of all easements appurtenant to the land included within the project.” *Id.* § 57-8-13(vi). The Act states that easements be identified when “feasible.” *Id.* Further, the Act provides that *the recorded declaration* include a description of the common areas and facilities, and a description of any limited common areas and facilities and the units that have use of these limited areas. *Id.* § 57-8-10(2)(a)(iv)-(v) (emphasis added). The plat is not required to show the easements or common areas to be valid. This makes sense due to the substantial number of reciprocal easements that such a development would have. The result is no different with Centennial Pointe.

Ms. Onyeabor also relies on Title 10 of the Utah Code, as well as provisions of the Salt Lake City Ordinances. *See* Onyeabor Brief at 29, 33. Neither of these support her argument. Title 10 of the Utah Code Annotated, includes subdivisions and plat requirements. *See* Utah Code Ann. §§ 10-9a-601, -603. The Salt Lake City ordinance concerning subdivisions was enacted pursuant to Title 10 of the Utah Code. *See* Salt

Lake City Code § 20.04.020. Neither section requires that common areas be included on a plat for it to be valid.

Further, the City ordinance provides that whenever any words are not defined in the subdivision title, but are defined in the Utah Code or City zoning ordinances, those definitions are incorporated into the subdivision title and shall apply, unless the definition “clearly” indicates a contrary contention. *See* Salt Lake City Code § 20.08.010. The City’s subdivision ordinance does not define “easement.” *See id.* Subdivisions, Title 20. The Utah Code Annotated expressly provides that “whenever any land is laid out and platted, the owner of the land shall provide an accurate plat that describes or specifies: . . . (d) every existing right-of-way and **easement** grant of record **for underground facilities**, as defined in Section 54-8a-2, **and for other utility facilities.**” Utah Code Ann. § 10-9a-603 (emphasis added). The Restatement of Property (Servitudes) further evidences that easements and common areas are not required to be shown on a plat. Comment *c* states that “[t]ypically, the servitudes are set out in a separate document, often labeled a declaration,” which is recorded. Restatement (Third) of Prop. Servitudes, § 2.1 Comment *c*. Ms. Onyeabor has failed to proffer any facts, admissible evidence or legal authority to show that the Plat is invalid or that the Restated Amended CC&Rs are invalid. Ms. Onyeabor’s arguments should be denied.

E. Ms. Onyeabor's Arguments Regarding the Validity of the Easements Provided by the Restated Amended CC&Rs Should Not Be Considered by This Court and Nevertheless Fail.

The easements provided for in the Restated Amended CC&Rs are valid. On appeal, Ms. Onyeabor argues that the deeds she received conveying to her Lots 1 and 2 did not convey to the Association the easements provided for in the April 2000 CC&Rs, or the Restated Amended CC&Rs. *See* Onyeabor Brief at 34. Ms. Onyeabor's conclusory argument is difficult to decipher and should be denied. Ms. Onyeabor has inadequately briefed this argument, it is confusingly organized, and incomplete. *See Phillips*, 904 P.2d at 1109 (inadequate briefing). Further, this argument is raised for the first time on appeal. *See James*, 746 P.2d at 801. Ms. Onyeabor does not cite where she preserved this argument below. *See* Utah R. App. P. 24. Accordingly, for those reasons, this Court should refuse to consider this argument.

That said, Ms. Onyeabor's argument fails. Ms. Onyeabor relies on the "stranger to the deed" doctrine to support her argument. *See id.* at 37. Ms. Onyeabor misapplies the doctrine. The stranger to the deed doctrine prevents reservation of an easement in favor of a third party (stranger) who was not a party to the transaction in a deed between a grantor and a grantee. *See Potter v. Chadaz*, 1999 UT App 95, ¶¶ 12-13, 977 P.2d 533. The stranger to the deed doctrine does not prevent the creation of an easement in favor of a person granting rights over the grantor's property, and it does not prevent the conveyance of any subsequent conveyance of the grantor's property to a grantee made subject to a previously granted easement. *See id.* That is what happened in this case.

Centennial Pointe, LLC, owner and developer of Centennial Pointe, granted an easement to the Association when it recorded the April, 2000 CC&Rs. When Centennial Pointe LLC subsequently conveyed Lot 1 to Ms. Onyeabor, it did so *subject to* the April 2000 CC&Rs which granted that easement. *See* Onyeabor Brief, Exhibit 4. Thus, the deed from Centennial Pointe, LLC to Ms. Onyeabor did not reserve an easement in favor of a third party when it conveyed Lot 1 to Ms. Onyeabor. The stranger to the deed argument presented by Ms. Onyeabor is inapposite to the facts of this matter.

Ms. Onyeabor appears to make a similar “stranger to the deed” argument concerning the April 2000 CC&Rs. *See* Onyeabor Brief at 38. Centennial Pointe LLC validly encumbered Lot 1 by executing or recording the April 2000 CC&Rs. Ms. Onyeabor purchased Lot 1 subject to the April 2000 CC&Rs and the easements and restrictions provided therein, including Centennial Pointe LLC’s reserved amendment authority. Ms. Onyeabor’s argument makes little sense. Her argument should not be considered, but nevertheless fails.

F. Ms. Onyeabor’s Arguments That She Did Not Receive Notice of the Assessments and No Properly Filed Lien Was Subject to Judicial Foreclosure Should Not Be Considered and Stricken.

Ms. Onyeabor’s arguments on pages 42-45 were not raised to the trial court in her Opposition to Plaintiffs’ Motion for Partial Summary Judgment and should not be considered on appeal. *See James*, 446 P.2d at 801. Ms. Onyeabor fails to proffer any admissible evidence to support her arguments, or any citations to the record. *See e.g.*

Onyeabor Brief at 44-45. As such, this Court should refuse to consider them. *See Phillips*, 904 P.2d at 1109; Utah R. App. P. 24.

Ms. Onyeabor claims she did not receive notice of the assessments. *See* Onyeabor Brief at 42. The undisputed facts of this matter show that Ms. Onyeabor received notice regarding assessments for her ratable share of the common expenses. The Restated Amended CC&Rs expressly state that “Assessments shall be due and payable within 30 days after written notice of the amount thereof shall have been given to the Owners.” (R. 1117) Ms. Onyeabor has testified that she received written notice of the amount of her ratable share of the common expenses in December 2000, November 2001, January 2002, March 2002, and May 2002. (R. 1017, 1025, 1027-29) Ms. Onyeabor willingly paid those assessments. (R. 1017, 1026, 1027-29) At a minimum, Ms. Onyeabor’s conduct shows that she has ratified the assessment procedure adopted by the Association, its predecessor, and the owners. *See Swan Creek Vill. Homeowners Assoc. v. Warne*, 2006 UT 22, ¶ 32, 134 P.3d 1122 (owners ratified owners association’s authority to act).

Ms. Onyeabor also testified that she received written notice of the amount of her ratable share of the common expenses in January 2003 and thereafter. (R. 1028-29) Ms. Onyeabor testified that she ignored those written notices. (R. 1029) The facts and undisputed evidence show that Ms. Onyeabor was provided an assessment statement in November 2004, February 2005, April 2005, May 2005, August 2005, September 2005, October 2005, November 2005, January 2006, March 2006, June 2006, and September 2006. (R. 1239, 1241) Ms. Onyeabor’s notice argument fails.

Next, Ms. Onyeabor argues that the lien against Lots 1 and 2 is invalid. This Court should strike this argument as it raised for the first time on appeal and lacks citation to the record. *See James*, 746 P.2d at 801; Utah R. App. P. 24. Ms. Onyeabor bases her argument in part on lack of notice of the assessments. Ms. Onyeabor's notice argument fails. *See supra*. Ms. Onyeabor's challenge to the validity of the Association's lien against her property is a red herring. Plaintiffs asserted a breach of contract claim against Ms. Onyeabor for failure to pay her assessments. This Court has granted summary judgment on that claim and the Court has certified its Order granting summary judgment as a final judgment. The Association has been awarded damages in the amount of past due assessments and interest, and attorney fees and costs. Plaintiffs have executed on the judgment not by foreclosing the lien recorded against Ms. Onyeabor's property, but rather by executing on Ms. Onyeabor's property via writs of execution to collect the judgment. *See e.g.*, (R. 2654-57) As such, Plaintiffs have executed upon their judgment lien. The Restated Amended CC&Rs expressly provide that foreclosing a lien for failure to pay common assessment is not required to pursue a suit to recover a money judgment against an owner for failing to pay his or her assessments. (R. 1118) Accordingly, Ms. Onyeabor's challenge to the lien for assessments is immaterial to this Court's jurisdiction and Ms. Onyeabor's argument fails.

G. The Undisputed Facts and Evidence in This Matter Show That Ms. Onyeabor Ratified the Restated Amended CC&Rs.

Ms. Onyeabor has ratified the Restated Amended CC&Rs, including assessment authority, through her conduct. Specifically, Ms. Onyeabor paid her Centennial Pointe

assessments for a number of years after the recording of the Restated Amended CC&Rs. (R. 845, 1018) Ms. Onyeabor paid her assessments to the Association in 2000, 2001, and 2002, which assessments included water, power, sewer, landscaping and snow removal expenses. (R. 845, 1020, 1025-27) Ms. Onyeabor paid her assessments until such time as she unilaterally decided to “ignore[]” the assessment statements from the Association. (R. 845, 1028) Ms. Onyeabor attended Association meetings, was elected as an officer of the Association, and agreed to assist the Association in obtaining a bid for the maintenance of the landscaped common areas. (R. 845-46, 1023-25) This conduct, pursuant to the Utah Supreme Court’s holding in *Swan Creek*, wherein the court used its equitable powers to hold that a property owner’s and other owners conduct ratified an owners association’s assessment and managerial authority³, shows that Ms. Onyeabor ratified the Restated Amended CC&Rs and that the trial court correctly ruled the same.

On appeal, Ms. Onyeabor argues that she did not ratify the Restated Amended CC&Rs. *See* Onyeabor Brief at 45-50. Ms. Onyeabor’s arguments are based upon her incorrect assertion that the Restated Amended CC&Rs are invalid, which Plaintiffs’ have previously addressed. Ms. Onyeabor relies upon inadmissible evidence and pleadings outside the scope of her appeal to support her argument. *See* Onyeabor Brief at 46, 48. The affidavits relied upon by Ms. Onyeabor were not proffered in opposition to Plaintiffs’ Motion for Partial Summary Judgment. These affidavits should not be considered, nor should the exhibits referenced on page 48. (R. 2151-58).

³*See Swan Creek*, 2006 UT 22 at ¶¶ 32, 38-39.

Ms. Onyeabor's mention of a "February 2002 agreement" was not raised in her Opposition to Plaintiffs' Motion for Partial Summary Judgment. Ms. Onyeabor has not produced any such agreement. To amend the Restated Amended CC&Rs such document needed to be recorded, and since all Lots in Centennial Pointe had been sold, the Association needed to execute the amending instrument, and the written consent of 67% of the first mortgagees for the Lots must have been obtained. (R. 1125-26). Ms. Onyeabor has not proffered any such evidence. Ms. Onyeabor's argument should be stricken and not considered. Finally, Ms. Onyeabor attempts to distinguish *Swan Creek* from this matter. *See Swan Creek Vill. Homeowners Assoc. v. Warne*, 2006 UT 22, 134 P.3d 1122; *see* Onyeabor Brief at 49-50. Ms. Onyeabor's argument is inadequately briefed and incomplete. This argument should be stricken and not considered. *See Phillips*, 904 P.2d at 1109. In sum, the trial court correctly determined that Ms. Onyeabor ratified the Restated Amended CC&Rs, including the assessment authority provided therein.

H. Plaintiffs Have Standing to Bring Claims Against Ms. Onyeabor to Enforce the Restated Amended CC&Rs, Including Collection of Assessments.

Ms. Onyeabor argues that Plaintiffs do not have standing to bring their claims against her. Ms. Onyeabor raises this argument for the first time on appeal and without any citation to the record. The Court should refuse to consider it. *See James*, 746 P.2d at 801. Further, Ms. Onyeabor attempts to support her argument by merely reasserting her prior arguments, specifically, that the Restated Amended CC&Rs are invalid, the "stranger to the deed" doctrine, and invalid Plat. Plaintiffs have addressed these prior

arguments and have shown that they fail and should be denied. Ms. Onyeabor's standing argument fails.

Plaintiffs plainly have standing to bring claims against Ms. Onyeabor to enforce the Restated Amended CC&Rs. Plaintiff LEBR is an owner in Centennial Pointe. (R. 844) The Restated Amended CC&Rs provide that an "aggrieved Owner" may bring suit to, *inter alia*, enforce the Restated Amended CC&Rs and to collect sums due. (R. 1134) The Association also has the right to enforce the Restated Amended CC&Rs. (R. 1134-36)

Moreover, the Association has standing to sue to enforce the Restated Amended CC&Rs under well-established principles of Utah law. In *Architectural Comm. of the Mt. Olympus Cove Subdivision No. 3 v. Kabatznick*, 949 P.2d 776, 779 (Utah Ct. App. 1997), this Court held that an association has standing to sue when "(1) the individual members of the association have standing to sue; and (2) the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause.'" *Id.* (quoting *Utah Rest. Ass'n v. Davis County Bd. of Health*, 709 P.2d 1159, 1163 (Utah 1985) (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211 (1975))). In reaching its decision, this Court, quoting the Utah Supreme Court, explained

[A]ssociational standing has the advantage of permitting the prosecution of legitimate claims by an entity with the capacity to spread the costs of litigation among its members and to assume the burden incident to it, rather than requiring a single litigant to carry the entire load. To deny an association standing under such circumstances just might deter the assertion of valid claims without serving any countervailing public purpose. We

decline to take such a sterile approach to standing and adopt the test above [*Warth v. Seldin*] stated for determining an association's standing to sue.

Id. (quoting *Utah Restaurant Ass'n*, 709 P.2d at 1163).

The requirements set forth in *Kabatznick* have been satisfied. Specifically, the Restated Amended CC&Rs provide that an aggrieved owner may sue to enforce the CC&Rs, and the nature of the claims, i.e., enforcement of the Restated Amended CC&Rs and collection of assessments, does not require the participation of all Centennial Pointe owners.

Moreover, the Restated Amended CC&Rs provide for the creation of an association to levy and collect assessments and to enforce the CC&Rs on behalf of the owners. (R. 1113-19, 1135) Further, Ms. Onyeabor's refusal to pay her assessment not only harms LEBR, but also Centennial Pointe's other owners who have also been forced to contribute to pay Ms. Onyeabor's unpaid share of the common expenses in order to keep the water and the lights on for the whole Centennial Pointe development. Finally, the rationale set forth in *Kabatznick* is particularly applicable in this matter as evidenced by the duration of this litigation and the voluminous pleadings. Accordingly, Ms. Onyeabor's standing argument fails.

I. Ms. Onyeabor's Claim That the Restated Amended CC&Rs are Ambiguous Has Been Raised for the First Time on Appeal and Should Be Stricken.

This Court should refuse to consider Ms. Onyeabor's argument that the Restated Amended CC&Rs are ambiguous. Ms. Onyeabor has raised this issue for the first time on appeal and without citation to the record. *See James*, 746 P.2d at 801; Utah R. App. P.

24. Ms. Onyeabor's argument is inadequately briefed. *See Phillips*, 904 P.2d at 1109.

Ms. Onyeabor also continues to reassert her prior arguments, e.g., the Plat is invalid, the Restated Amended CC&Rs create of future easements, to support her present argument. Those arguments have been addressed and they fail. For these reasons, the Court should strike and not consider Ms. Onyeabor's arguments contained on pages 52-56.

Assuming *arguendo* that the Court considers her argument, Ms. Onyeabor has not shown that the Restated Amended CC&Rs are ambiguous as a matter of law. Ms. Onyeabor's argument is incomplete and provides no analysis. *See Onyeabor Brief* at 52-53. The provisions cited merely show that the Association is charged with maintaining the common areas, e.g., the parking lot. This task is accomplished through a nonexclusive easement over the common areas shared by all Centennial Pointe owners. Restated Amended CC&Rs (R. 1109-1110) Centennial Pointe owners are charged with maintaining their buildings and lots, e.g., keeping their buildings in a good and safe state of repair, as well as keeping the buildings and lots in a clean, sanitary and orderly condition. (R. 1111-12) Ms. Onyeabor does not explain or provide any analysis to show that these provisions are ambiguous, or how these provisions somehow render the Restated Amended CC&Rs invalid. Ms. Onyeabor's ambiguity argument fails.

IV. THE TRIAL COURT CORRECTLY DISMISSED MS. ONYEABOR'S COUNTERCLAIMS FOR QUIET TITLE AND DECLARATORY JUDGMENT.

The trial court correctly determined that the Restated Amended CC&Rs are valid and encumber Ms. Onyeabor's Lots 1 and 2. Ms. Onyeabor's quiet title and declaratory

judgment were claims predicated upon the invalidity of the Restated Amended CC&Rs, i.e., the common areas identified and easements granted therein being terminated or invalid. (R. 730-32) Plaintiffs' Motion for Partial Summary Judgment, seeking an Order from the trial court declaring that the Restated Amended CC&Rs are valid and encumber Ms. Onyeabor's property, placed Ms. Onyeabor's counterclaims directly at issue. Ms. Onyeabor had notice of Plaintiffs' Motion and the arguments therein, and an opportunity to argue that the Restated Amended CC&Rs were invalid and did not encumber her property, which she did. By declaring the Restated Amended CC&Rs valid, the trial court properly disposed of Ms. Onyeabor's inherently inconsistent counterclaims for quiet title and declaratory judgment. Accordingly, Ms. Onyeabor's due process argument fails.

V. THE TRIAL COURT CORRECTLY DENIED MS. ONYEABOR'S TRESPASS AND ASSAULT CLAIMS.

Ms. Onyeabor has failed to proffer any facts or admissible evidence to show the trial court erred in denying her claims for trespass and assault. Ms. Onyeabor merely cites to the arguments in her Brief as support for her argument regarding these claims. Ms. Onyeabor has failed to adequately brief her argument, and her argument is conclusory at best. Ms. Onyeabor does not even address the elements of trespass or assault. This Court should refuse to consider Ms. Onyeabor's argument. *See Phillips*, 904 P.2d at 1109. That said, the undisputed facts and evidence proffered to the trial court show that neither LEBR nor third-party plaintiff Bruce Raile trespassed on Ms. Onyeabor's property. *See* Statement of Facts at 13-14, *supra*. They were privileged to enter onto the common areas

of Centennial Pointe pursuant to the reciprocal easement provided by both sets of CC&Rs. Ms. Onyeabor has proffered no facts or evidence to controvert the same.

The undisputed facts and evidence proffered to the trial court show that Ms. Onyeabor's assault claims against LEBR and Mr. Raile failed as a matter of law. *See id.* at 12-14, *supra*. Ms. Onyeabor's conclusory argument does not address the elements of assault, nor has she proffered any facts or admissible evidence to controvert those proffered to the trial court. Accordingly, Ms. Onyeabor's arguments should be denied.

VI. THE TRIAL COURT CORRECTLY DENIED MS. ONYEABOR'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Ms. Onyeabor has failed to proffer any facts or admissible evidence to show that the trial court erred by denying her claim for intentional infliction of emotional distress. Ms. Onyeabor relies upon inadmissible evidence to support her argument, specifically, inadmissible affidavits and her resume, and therefore her argument should not be considered. *See* Onyeabor Brief at 57. The undisputed facts show that Ms. Onyeabor's claim was premised upon "Mr. Raile talk[ing] down to [her]" and telling her that the parking area and landscaping areas in Centennial Pointe were common areas pursuant to the Restated Amended CC&Rs. *See* Statement of Facts at 12-14, *supra*. Ms. Onyeabor has not shown actual emotional distress. *See id.* Further, Ms. Onyeabor has failed to show that the conduct she complains of is outrageous or revulsive as a matter of law. *See Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 38, 56 P.3d 524. Ms. Onyeabor failed

to show that she satisfied the requirements necessary to sustain her claim. Accordingly, the trial court correctly determined that Ms. Onyeabor's claim failed as a matter of law.

VII. MS. ONYEABOR'S CLAIM THAT PLAINTIFFS ARE NOT ENTITLED TO AN AWARD OF ATTORNEY FEES FAILS.

Ms. Onyeabor's argument on this point is incomplete and inadequately briefed. As such, the Court should refuse to consider it. *See Phillips*, 904 P.2d at 1109. Further, Ms. Onyeabor's argument fails because the Restated Amended CC&Rs provide for collection of attorney fees expended to enforce the Restated Amended CC&Rs. (R. 1115, 1135-36) The trial court ruled that the Restated Amended CC&Rs are valid and encumber Ms. Onyeabor's property. Accordingly, an award of attorney fees is appropriate and Ms. Onyeabor's argument fails.

CROSS-APPEAL

I. THE TRIAL COURT ABUSED ITS DISCRETION BY REDUCING THE ASSOCIATION'S AWARD OF ATTORNEY FEES BY AN ARBITRARY 50%.

The record in this matter shows that in prosecuting this case to and including Plaintiffs' dispositive Motion for Partial Summary Judgment, the Association's counsel performed the following work in this matter: (1) filed a Motion for a preliminary injunction against Ms. Onyeabor, which was granted; (2) conducted an evidentiary hearing that included proffering evidence and witness testimony, (3) defended against Ms. Onyeabor's counterclaims and third-party claims; (4) defended against two motions to dismiss; (5) drafted written discovery; (5) opposed a motion for protective order and filed a Motion to Compel when Ms. Onyeabor refused to sit for her deposition; (6)

conducted 3 depositions; (7) filed a Motion for Partial Summary Judgment, with 17 exhibits, including affidavits and deposition testimony; (8) opposed a cross-motion for summary judgment; and (9) filed several Motions to Strike pleadings and exhibits. Supplemental Affidavit of Edward T. Vasquez (R. 2017, 2019-25) Ms. Onyeabor has at times acted *pro se* in this matter as well as been represented by counsel. *See id.* (R. 2019)

On May 3, 2007, the trial court, via Minute Entry (R. 1975), granted Plaintiffs' Motion for Partial Summary Judgment and awarded the Association their attorney's fees pursuant to the Restated Amended CC&Rs. *See id.* the Association's counsel filed with the trial court an affidavit of attorney fees that included redacted billing statements, showing that the attorney fees incurred were \$136,589.00. (R. 2017, 2029, 2180-2205) In a Minute Entry dated August 7, 2007, the trial court determined that the attorney fees requested were "exorbitant" and reduced the award by an arbitrary 50%. (R. 2425)

This Court reviews a trial court's determination of a reasonable attorneys fee for an abuse of discretion. *See Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). A trial court evaluating evidence to determine reasonable attorney fees must consider (1) what legal work was actually performed; (2) how much work performed was reasonably necessary to adequately prosecute the matter; (3) whether the attorney's billing rate was consistent with rates customarily charged in the locality for similar services; and (4) whether circumstances, e.g., tactics such as filing multiple pleadings, and asserting inconsistent and unmeritorious positions, require the trial court to consider additional factors. *See Dixie State Bank*, 764 P.2d 985, 990-92 (Utah 1988).

Plaintiffs' counsel provided the trial court with a detailed affidavit setting forth the basis for the attorney fees claimed. (R. 2017-25) The affidavit provided billing rates, the work performed, the challenges Plaintiffs' counsel experienced in addressing Ms. Onyeabor's pleadings, and the fact that she has employed different counsel and has at times acted *pro se*. (R. 2017-25) The trial court's ruling did not address the scope of the work performed, e.g., preliminary injunction, evidentiary hearing, motions to dismiss, discovery, motion to compel, prepare motion for summary judgment, reply memorandum, and motions to strike. (R. 2425-26) Further, the trial court provided no discussion or analysis to suggest that the work Plaintiffs' counsel performed was not reasonably necessary to adequately prosecute the matter. (R. 2425); *See Dixie State Bank*, 764 P.2d at 990-92. The trial court did not address counsels' billing rates. The trial court provided no discussion or analysis of how it reached its decision that an exact 50% reduction would bring the fees "in line with what the Court consider[ed] to be reasonable and justified." (R.2425-26) The record in this matter shows that the trial court did not analyze the claim for attorney fees under the factors set forth in *Dixie State Bank*, and that it abused its discretion by reducing the attorney fee award by an arbitrary 50%.

Similar to the decision in *American Vending Services, Inc. v. Morse*, 881 P.2d 917 (Utah Ct. App. 1994), the trial court's determination that Plaintiffs' fees were "exorbitant" is not sufficient to show that it conducted the *Dixie State Bank* analysis. *See id.* at 988. Accordingly, the trial court's ruling reducing the attorney fees award should be reversed and the Association awarded the attorney fees set forth in and supported by

Plaintiffs' counsel's attorney fee affidavit, specifically, \$136,589.00, plus post judgment interest. Alternatively, this Court should reverse the trial court's ruling and remand back to the trial court for determination of the award, in an amount not less than the attorney fees awarded, under the factors set forth in *Dixie State Bank*.

II. THE TRIAL COURT ERRED BY DENYING PLAINTIFFS' CLAIM FOR LATE FEES AND FINES AUTHORIZED TO BE IMPOSED BY THE RESTATED AMENDED CC&RS.

The trial court erred by denying Plaintiffs' claim for late fees and fines imposed against Ms. Onyeabor under the express provisions of the Restated Amended CC&Rs. The trial court denied Plaintiffs' on the basis that the late fees and fines "are not damages which have been sustained and suffered by the Plaintiffs due to Defendant's breach." (R. 1976) The trial court's interpretation of restrictive covenants is a question of law. *See Holladay*, 2002 UT App 125 at ¶ 2. Appellate courts review a trial court's ruling on questions of law for correctness. *See id.*

It is well-settled that restrictive covenants are interpreted in the same manner as contracts. *See Id.* Unambiguous restrictive covenants should be enforced as written. *See id.* (citing *Swenson v. Erickson*, 2000 UT 16, ¶ 11, 998 P.2d 807). Further, recorded restrictive covenants are enforceable against property owners who purchased land 'subject to' those covenants." *Workman v. Brighton Props., Inc.*, 1999 UT 30, ¶ 10, 976 P.2d 1209.

The trial court correctly determined that the Restated Amended CC&Rs are valid and encumber Ms. Onyeabor's property. The Restated Amended CC&Rs expressly provide

for late fees and fines for failure to timely pay assessments and violations of the CC&Rs. (R. 1117, 1136) These provisions are unambiguous contractual remedies for breach of contract, i.e., the CC&Rs, which should be enforced. Further, these provisions should be enforced because they deter property owners from imposing upon others in a PUD from being forced to subsidize them in order to keep the water and power on for all. In some circumstances, recovery of principal and interest may not be sufficient to compensate and protect from the harm of having to make an untimely “loan” by the paying of the assessments of a recalcitrant owner in addition to their own in order to keep the utilities on or the snow plowed from the parking lot. An owner’s failure to pay their *pro rata* share of the common area expenses harms other owners and the owners association. These types of provisions seek to avoid this harm.

The undisputed facts of this matter show that Ms. Onyeabor has violated the Restated Amended CC&Rs and refused to pay her assessment. Ms. Onyeabor has received the benefits of, *inter alia*, the common areas, water and sewer services, and snow removal, all the while she refusing to pay her assessments. Plaintiffs have been harmed by Ms. Onyeabor’s conduct. The late fees and fines provide a remedy for this harm. The trial court erred when it denied Plaintiffs’ claim for late fees and fines imposed under the Restated Amended CC&Rs. Accordingly, this Court should reverse the trial court’s decision and remand back to the trial court to determine the amount of late fees and fines owing to Plaintiffs by Ms. Onyeabor.

CONCLUSION

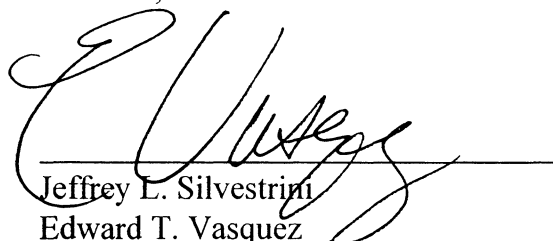
For the foregoing reasons, Plaintiffs request that Ms. Onyeabor's appeal be denied in its entirety. Plaintiffs request that they be awarded their attorney fees on appeal, pursuant to the attorney fees provision in the Restated Amended CC&Rs, Rule 24(k) of the Utah Rules of Appellate Procedure, and their request for attorney fees in their Opposition to Ms. Onyeabor's Motions for Summary Dispositions, which Motions this Court denied. *See* Plaintiffs' Opposition Motion dated February 2, 2008; *see* Order dated February 29, 2008.

Plaintiffs request that their Cross-Appeal be granted and that they be awarded the attorney fees requested in their counsel's attorney fee affidavit filed with the trial court. Alternatively, Plaintiffs request that this Court reverse the trial court's ruling reducing their attorney fee award and remand back to the trial court to determine a fee award pursuant to the factors set forth in *Dixie State Bank*.

Plaintiffs request that the trial court's ruling denying Plaintiffs' claim for late fees and fines imposed against Ms. Onyeabor under the Restated Amended CC&Rs be reversed, and that Ms. Onyeabor be required to pay those late fees and fines owing to Plaintiffs as determined by the trial court on remand.

DATED this 23rd day of December, 2008.

COHNE, RAPPAPORT & SEGAL P.C.



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Attorneys for Appellees

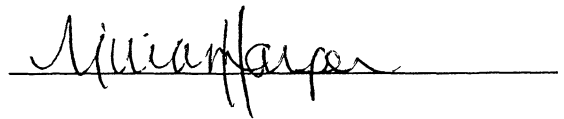
CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be mailed, by first class U.S. postage prepaid, this 23rd day of December, 2008, to:

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A handwritten signature in cursive script, appearing to read "Myriam Onyeabor", is written over a horizontal line.