[Cite as *Jubliee Ltd. Partnership v. Hosp. Properties, Inc.*, 2010-Ohio-5550.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jubilee Limited Partnership et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 09AP-1145 (C.P.C. No. 08CVH-08-12489)
Hospital Properties, Inc.,	:	(REGULAR CALENDAR)
Defendant/Third-Party Plaintiff-Appellant,	:	
v.	:	
Life Time Fitness, Inc.,	:	
Third-Party Defendant-Appellee/Cross-Appellant.	:	

D E C I S I O N

Rendered on November 16, 2010

Bricker & Eckler LLP, Doug Shevelow, Vladimir P. Belo, and *Jack Rosati, Jr.; Keith P. Hartzell,* for appellant Hospital Properties, Inc.

Thompson Hine, LLP, Scott A. Campbell and *Julie Dreher,* for appellee/cross-appellant Life Time Fitness, Inc.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant and third-party plaintiff-appellant, Hospital Properties, Inc., appeals from a judgment of the Franklin County Court of Common Pleas, pursuant to trial, in favor of third-party defendant-appellee and cross-appellant, Life Time Fitness, Inc.

on Hospital Properties, Inc.'s claim that Life Time Fitness, Inc. breached a covenant running with land and owed Hospital Properties, Inc. the cost of constructing a roadway adjacent to the property at issue. Because (1) the trial court did not err in determining Hospital Properties, Inc. failed to prove the promise to pay for the roadway construction was a covenant running with the land; (2) the trial court did not err in awarding Life Time Fitness, Inc. its attorney fees; and (3) the trial court erred in failing to adequately explain its basis for the amount of attorney fees awarded, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶2} Pursuant to an agreement dated October 16, 1997 ("1997 Agreement"), Sawmill Partners Investment Company and Jubilee Limited Partnership (collectively, "Jubilee") sold to Hospital Properties, Inc. ("HPI") a piece of real estate located in Dublin, Ohio (the "Property"). Paragraph 12(a) of the 1997 Agreement recited certain obligations between HPI and Jubilee concerning the construction of Emerald Parkway, a roadway adjacent to the Property.

{¶3} According to the 1997 Agreement, Jubilee and HPI acknowledged "the necessity of improving and dedicating Emerald Parkway as a public street serving the Real Estate and area property owned by [Jubilee]." 1997 Agreement, paragraph 12(a). HPI therefore agreed "to keep [Jubilee] informed of its intentions with respect to the commencement of improvements upon the Real Estate." 1997 Agreement, paragraph 12(a). HPI was obligated to pay Jubilee a specified amount for improvements either at the closing or, if the improvements were not yet completed at the time of closing, at the dedication of the roadway.

{¶4} On January 17, 2005 HPI entered into an agreement ("2005 Agreement") with Life Time Fitness, Inc. ("Life Time"), in which Life Time agreed to purchase the Property; the 2005 Agreement subsequently was amended in terms not pertinent to the parties' litigation. Life Time viewed Paragraph 12(a) of the 1997 Agreement as "an option to have Emerald Parkway built by Sawmill and Jubilee for $175,000." (Tr. 230.) Life Time chose to forego that option and instead executed a tax increment financing agreement ("TIF Agreement") with the City of Dublin. (Tr. 231.) Pursuant to the TIF Agreement, the city would use the increased property taxes from the Property to fund off-site improvements, including Emerald Parkway. Life Time recorded a "Declaration of Covenants" concerning the TIF Agreement, Section 5 of which specifically stated the covenants contained in it run with the land.

{¶5} On March 1, 2006 HPI conveyed the Property by way of a Limited Warranty Deed to LTF Real Estate Company, Inc., a wholly owned subsidiary of Life Time created to hold real estate acquisitions. The deed conveying the Property from HPI to LTF Real Estate Company, Inc. did not mention the obligations under Paragraph 12(a) of the 1997 Agreement; nor did it mention any covenant to pay money to Jubilee upon completion of the roadway.

{¶6} On November 28, 2006 Jubilee entered into an agreement with the city of Dublin in which Jubilee agreed to transfer certain property worth approximately $1.3 million to the city in exchange for the city's agreement to release Jubilee from its $698,918 reimbursement obligation to the city regarding construction of the roadway, all premised on certain rezoning conditions Jubilee worked out with the city. From August through October of 2006, Jubilee communicated to HPI and Life Time that it would be

transferring land to the city, that the transfer would fulfill Jubilee's obligation to cause construction of Emerald Parkway, and that Jubilee expected payment of $175,000 called for under Paragraph 12(a) of the 1997 Agreement.

{¶7} Jubilee filed a complaint against HPI on August 29, 2008 alleging breach of contract and unjust enrichment arising out of HPI's failure to pay the $175,000 contemplated under the 1997 Agreement. On October 21, 2008 HPI filed a third-party complaint against Life Time alleging Life Time assumed HPI's obligation to pay Jubilee upon the completion of Emerald Parkway. HPI based its claim on a March 30, 2005 letter allegedly sent from Life Time's counsel to HPI's counsel in which Life Time's counsel allegedly stated "[t]he Purchase Agreement between LTF and HPI expressly provides that LTF will assume the obligations of Paragraph 12 of the Contract, for the purpose of dealing with costs and other terms associated with construction drive [sic] Emerald Drive under ¶12(a)." (Third-Party Complaint of Defendant Hospital Properties Inc. against Life Time Fitness, Inc., ¶4.) Life Time timely answered, denying it assumed the Paragraph 12(a) obligations of the 1997 Agreement.

{¶8} On February 25, 2009 Life Time filed a motion for summary judgment stating that it neither assumed HPI's obligation to pay Jubilee upon completion of the roadway nor received an assignment of HPI's rights under Paragraph 12(a) of the 1997 Agreement. In HPI's memorandum in opposition to Life Time's motion for summary judgment, HPI for the first time introduced its theory that Paragraph 12(a) of the 1997 Agreement was actually a real covenant running with the land or an equitable servitude. HPI contended HPI and Jubilee intended for Paragraph 12(a) of the 1997 Agreement to run with the land because (1) paragraph 24 stated that the terms of the contract would

"inure to the benefit of and be binding upon the respective successors and assigns of the parties hereto," and (2) paragraph 12(a) expressly stated that its provisions were to survive closing and not merge with the deed. Id. at 6.

{¶9} The trial court denied Life Time's motion for summary judgment. The trial court agreed with Life Time "that there [was] no provision within the 2005 Agreement requiring it to assume Hospital Properties' obligations under ¶12 of the 1997 Agreement." The trial court, however, denied summary judgment because it found that "issues exist concerning whether the provision at issue constitutes a real covenant running with the land and whether the doctrine of equitable servitude applies to these facts." Id. at 7. Accordingly, the issue for trial no longer was assignment or assumption but whether HPI could prove a covenant running with the land.

{¶10} On October 5, 2009, Life Time filed an amended answer and counterclaim under Paragraphs 11 and 12 of the 2005 Agreement. Life Time's counterclaim asserted HPI's memorandum in opposition to Life Time's summary judgment motion, which argued the Property was subject to a covenant running with the land or an equitable servitude, breached Paragraph 11(i)'s representation that no restrictive covenants affected the Property. Life Time argued that, as a result, it was entitled to damages and attorney fees pursuant to paragraph 12. On the same day Life Time filed its answer and counterclaim, Jubilee filed a Rule 41(A)(1)(a) notice of dismissal with prejudice as Jubilee and HPI settled their claims through an agreement dated September 30, 2009. (Life Time Trial Exhibit V; HPI Trial Exhibit 85.) Under the settlement agreement, HPI paid $130,000 to Jubilee, and Jubilee assigned to HPI any claim Jubilee had against Life Time. Id.

{¶11} On October 19, 2009, the morning of trial, HPI filed a Rule 15(E) Supplemental Third-Party Complaint against Life Time that added a third claim against Life Time. It asserted that HPI, as assignee of Jubilee's claims against Life Time, was entitled to all damages and costs under the terms of the covenant running with the land, the equitable servitude, or both, as contained in the 1997 Agreement. HPI's supplemental pleading also added a fourth count alleging the 1997 Agreement contained a covenant running with the land, an equitable servitude, or both, that bound Life Time as HPI's successor in interest to the Property. Id. at ¶9-16.

{¶12} Following a bench trial, the trial court issued a written decision on November 30, 2009. (Decision and Entry Finding in Favor of Third-Party Plaintiff Life Time Fitness, Inc.) The trial court initially noted that Paragraph 12(a) of the 1997 Agreement contained no language indicating its provisions were intended to run with the land. By contrast, Paragraph 12(b), concerning an access drive easement, specifically stated "[s]uch obligation shall encumber the Real Estate * * * and the Deed to be given by [HPI] * * * shall contain provisions acceptable to counsel for [HPI] and [Life Time] to that effect, which shall be deemed a Permitted Encumbrance." Id. at 8. The trial court further pointed out that the "successors and assigns" paragraph of the 1997 Agreement required Jubilee's consent to HPI's assignment under the 1997 Agreement unless the assignment was to an HPI affiliate and did not release HPI. The trial court observed that "[i]f the promise ran with the land there would be no need for Jubilee's consent." Id. Accordingly, the trial court concluded HPI and Jubilee never intended the provisions of Paragraph 12(a) to be a covenant running with the land. On Life Time's counterclaim for attorney fees, the trial court awarded Life Time $89,427.72. Id. at 9.

II. Assignments of Error

{¶13} HPI appeals, assigning as error:

> **Assignment of Error No. 1:**
>
> The trial court committed reversible error by finding in favor of Third-Party Defendant/Appellee Life Time Fitness, Inc.
>
> **Assignment of Error No. 2:**
>
> The trial court committed reversible error by awarding attorneys' fees to Life Time.

{¶14} Life Time cross-appeals assigning a single error:

> The trial court erred by awarding Third-Party Defendant Life Time Fitness, Inc. its defensive legal expense only through the fourth day before trial, and failing to award Life Time Fitness, Inc. its defensive legal expense for the three days leading up to trial and the trial itself, after (a) correctly concluding that Life Time Fitness, Inc. was entitled to reimbursement of its legal expense, and (b) awarding Life Time Fitness, Inc. its legal expense, without any adjustment, and down to the penny, from the day when the claim for legal expense arose, through the fourth day before trial.

III. First Assignment of Error – Real Covenant Running with the Land

{¶15} HPI's first assignment of error contends that Paragraph 12(a) of the 1997 Agreement is either a covenant running with the land or an equitable servitude that Life Time breached. Whether a covenant runs with the land depends on whether it is real or personal. *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Quaranta*, 7th Dist. No. 01CA60, 2002-Ohio-1540, ¶15. Real covenants relate to the realty, pass automatically to the assignee of the land, and run with the land; personal covenants, established solely for the original parties' personal use and enjoyment of the land, do not run with the land. Id. at ¶15-17. A covenant running with the land includes three elements: (1) the original grantor and grantee must have intended the covenant run with the land; (2) the covenant

must either "affect" or "touch and concern" the land in question; and (3) the party claiming the benefit of the covenant must be in privity with the party who is called upon to fulfill it. *Candlewood Lake Assn. v. Scott*, 10th Dist. No. 01AP-631, 2001-Ohio-8873.

{¶16} An equitable servitude, which is also a restriction on land use but enforceable in equity, requires that: (1) the parties' agreement must demonstrate an intent to bind the successors to the land; (2) the agreement must be within the statute of frauds; (3) the party who agreed to burden the land and his or her successors must be in vertical privity; (4) the promise must touch and concern the land; and (5) successors in interest must take with actual or constructive notice of the burden. *Perrysburg v. Koenig* (Dec. 8, 1995), 6th Dist. No. WD-95-011. Because both real covenants running with the land and equitable servitudes require evidence of an intention between the original grantor and grantee to bind future landowners to their promise, the parties' intent drives our analysis.

{¶17} The "intention of the parties and any proper construction of a covenant is to be based on a reading of the entire deed as a whole." *Slife v. Kundtz Props., Inc.* (1974) 40 Ohio App.2d 179, 184; *Siferd v. Stambor* (1966), 5 Ohio App.2d 79, 86 (stating "[d]eeds are to be construed as a whole in arriving at the intention of the parties"); *Masury v. Southworth* (1859), 9 Ohio St. 340, 351 (noting that to determine whether a covenant runs with the land, the issue is "whether such was the intention of the parties as expressed in the deed"), overruled on other grounds by *Kratz v. Risch* (1912), 30 Ohio Dec. 589, 595-96. The covenant need not contain the words "heirs," "assigns" or "successors" to run with the land, but use of such words in a covenant can provide strong evidence of the parties' intent that the covenant do so. *Easter v. Little Miami R. Co.* (1862), 14 Ohio St. 48, 51 (concluding a deed granting a railroad company a right of way

over the grantor's land, which included a covenant that the grantor build and maintain a fence, made clear the intention "that the covenant should run with the land, and bind heirs and assigns," as "*assigns* [were] expressly named") (emphasis sic); *Hickey v. Lake Shore & M.S. Ry. Co.* (1894), 51 Ohio St. 40, 49 (deciding deed stating "Hickey, his heirs and assigns, shall make and maintain good and sufficient fences on each side of the right of way * * * which condition and obligation shall be perpetually binding on the owners of the land," indicated an intention for the obligation to run with the land); *Hughes v. Cincinnati* (1964), 175 Ohio St. 381, 385 (noting "heirs and assigns" language in the deed, which concerned the grant of an easement and an obligation to pay for roadway improvements to the easement, precluded "the idea that the agreement to pay on account of the street was to be a mere personal contract of the grantee").

{¶18} Unlike the noted cases, the deed conveying the Property from Jubilee to HPI mentions neither Paragraph 12(a) of the 1997 Agreement nor the obligation to pay $175,000 or 50 percent of the construction costs to Jubilee upon the construction and dedication of Emerald Parkway. Accordingly, when the deed of the original grantor and grantee, Jubilee and HPI respectively, is construed as a whole, the terms fail to disclose any intent that the promise to pay money upon the completion of the roadway runs with the land.

{¶19} HPI nonetheless points to the "successors and assigns" clause in the 1997 Agreement, contending it evidences the intent of Jubilee and HPI to have Paragraph 12(a) run with the land. Ohio courts, however, have reached such a conclusion when the language and the covenant were contained in the deed transferring the property. Although the Paragraph 12(a) promise and the "successors and assigns" language of that

paragraph are part of the 1997 Agreement, their absence in the deed transferring the property suggests Jubilee and HPI did not intend the promise to run with the land. Cf. *Peto v. Korach* (1969), 17 Ohio App.2d 20, 23 (concluding a deed evidenced intent of original parties to have covenant run with the land because, in part, it reserved to the "grantor, his heirs and assigns" the right to use the water and sewer lines and the obligation to share in one-third of the costs of upkeep and maintenance); *LuMac Dev. Corp. v. Buck Point Ltd. Partnership* (1988), 61 Ohio App.3d 558, 564 (deciding "the use of the terms 'assigns' and 'successors' in the subject conveyance [in the deed] * * * clearly reflects that the grantors intended that this provision run with the land").

{¶20} Acknowledging the strong preference for covenants running with the land to be included in the deed of conveyance, HPI notes Ohio courts nevertheless have found covenants to run with the land even where the covenant was not contained in the deed. Unlike the facts before us, the parties in those cases either recorded the covenant through some other document or incorporated by reference the purchase agreement containing the covenant into the deed.

{¶21} For example, in *Perrysburg,* the developers of a subdivision persuaded the city of Perrysburg to provide their subdivision with water and sewer services, even though the subdivision was not contiguous with the city. The interested parties executed an agreement to that effect, recorded in the deeds records of the county recorder's office, which obligated the city to provide the subdivision with water and sewer services. It further obligated the developers to seek annexation of the subdivision to the city as soon as legally possible and to include in the deeds for the lots in the subdivision a covenant

"requiring that the purchaser and any subsequent purchasers seek annexation." Id. None of the deeds for the subdivision lots contained the covenant requiring annexation. Id.

{¶22} The court found the intent necessary to create an equitable servitude because the language of the recorded agreement between the city and the developers stated both that the owners of the lots would make an application for annexation as soon as legally possible and that the applicants would not sell any portion of their property without including in the deed a similar covenant that required annexation. Id. With that premise, the court concluded the "service agreements unambiguously exhibit an intention to bind the developers' successors in interest to seek annexation." Id.

{¶23} Unlike *Perrysburg*, where the covenant to seek annexation was placed on record in the county recorder's office, Paragraph 12(a)'s promise to pay money upon completion of the roadway was not recorded anywhere. Neither of the deeds transferring the Property, nor any recorded document, contains any reference to Paragraph 12(a) of the 1997 Agreement or the obligation to pay Jubilee money upon completion of the roadway. (Life Time Trial Exhibits D & E.) The parties' failure to refer to the Paragraph 12(a) promise in the deed, or in any other recorded document, is evidence Jubilee and HPI did not intend to bind future landowners to their Paragraph 12(a) promise.

{¶24} Moreover, the court in *Perrysburg* found significant that the service agreement required all future landowners, should they transfer their property, to place a covenant in their deed restating the covenant to seek annexation. By contrast, Paragraph 12(a) does not require HPI to record the promise to pay money in a deed should HPI transfer the Property. Under the analysis in *Perrysburg,* Jubilee's and HPI's failure to require the Paragraph 12(a) promise be stated in the deed's 40 future landowners also

indicates they did not intend for the promise at issue to run with the land. Rather, it was a personal covenant between the two parties to the 1997 Agreement. See also *Capital City Community Urban Redevelopment Corp. v. Columbus*, 10th Dist. No. 08AP-769, 2009-Ohio-6835 (concluding certain provisions in a real estate purchase agreement conveying a movie theater from Capital City to CUG were real covenants running with the land where the deed transferring the property from Capital City to CUG "contained language that it was subject to, among other things, paragraph 9 of the real estate purchase agreement between the parties, which was incorporated by reference" into the deeds transferring the property). Id. at ¶3.

{¶25} Moreover, the nature of the promise in Paragraph 12(a) indicates it is a personal covenant. Paragraph 12(a) requires HPI to advise Jubilee when HPI started to make improvements to the property. According to Paragraph 12(a), Jubilee then would commence constructing the roadway. If the roadway were finished by the date the agreement was closed, HPI would pay Jubilee the agreed roadway contribution at closing; if the roadway were incomplete, HPI would pay Jubilee once the roadway was completed. Paragraph 12(a) thus contemplated a one-time payment of money to occur at closing or shortly after closing. In contrast, the provisions of the purchase agreement in *Capital City* envisioned an ongoing and continuous obligation for whoever owned the property. The language of Paragraph 12(a) itself, coupled with the fact the deeds transferring the Property never contained any reference to the Paragraph 12(a) promise, again indicates Jubilee and HPI did not intend for the promise to run with the land.

{¶26} Comparing Paragraph 12(a) with other portions of the 1997 Agreement further supports the conclusion that HPI and Jubilee did not intend to bind future

landowners to their Paragraph 12(a) promise. Paragraph 13 of the 1997 Agreement required the restrictive covenants listed in that paragraph be recorded in a declaration of covenants or otherwise encumber the title to the Property; those covenants ultimately were placed in the deed conveying the property from Jubilee to HPI. HPI and Jubilee did not use similar language in the Paragraph 12(a) promise, indicating they intended the Paragraph 12(a) promise to be a personal covenant.

{¶27} Other comparisons within the 1997 Agreement lead to the same conclusion. The language of Paragraph 12(a) starkly contrasts with Paragraph 12(b) of the 1997 Agreement concerning the South Access Drive. Paragraph 12(b) states that "[i]f the South Access Drive is to remain a private way," the parties must "execute and deliver to the other a reciprocal easement" that not only assures "the existence and joint use of the constructed portion of the South Access Drive in perpetuity" but also provides "for the obligation of reimbursement and cost of future maintenance * * *." According to the language of that paragraph, "such obligation shall encumber the Real Estate * * * and the Deed to be given by the Seller in accordance with section 9 hereof shall contain provisions acceptable to counsel for [Jubilee] and [HPI] to that effect, which shall be deemed a Permitted Encumbrance." (Life Time Trial Exhibit A; HPI Trial Exhibit 5.)

{¶28} Paragraph 12(b) thus envisions encumbering the Property with an easement that not only creates an obligation to reimburse for maintaining the easement but places the obligation in the deed of conveyance. Such language strongly suggests the intent to bind future landowners to the easement maintenance obligation. Conversely, the lack of similar language in Paragraph 12(a) demonstrates Jubilee and HPI did not intend the Paragraph 12(a) promise to run with the land. Indeed, were the general "successors

and assigns" clause in Paragraph 24 of the 1997 Agreement sufficient to cause the covenants contained in the 1997 Agreement to run with the land, HPI and Jubilee would not have needed to use the language found in Paragraphs 13 and 12(b) that requires those covenants to be placed in the deed and bind the land in perpetuity.

{¶29} Were any doubt remaining about the nature of the promise in Paragraph 12(a), both the "successors and assigns" language of Paragraph 24 in the 1997 Agreement and the conduct of HPI and Life Time towards the covenant in Paragraph 12(a) of the 1997 Agreement confirm the Paragraph 12(a) promise never was intended to run with the land. See *Perrysburg* (noting the Restatement definition of intent for a covenant to run with the land "questions whether the promisor, from the writing and the surrounding circumstances, has manifested an intention that his or her successors are to be bound as the promisor is bound"); *Lone Star Steakhouse* (noting the parties' attempt to release the covenant provided evidence the restriction was indeed a real covenant running with the land).

{¶30} HPI alleges that Paragraph 24 of the 1997 Agreement evidences HPI and Jubilee's intention to have the Paragraph 12(a) promise run with the land. Paragraph 24 states that the terms of the 1997 Agreement "shall inure to the benefit of and be binding upon the respective successors and assigns of the parties hereto." The paragraph, however, qualifies that sentence, providing that while "[HPI] shall have the right to assign its interest in this Contract to a [HPI] Affiliate without the consent of [Jubilee], * * * [a]ny other assignment by [HPI] shall require the consent of [Jubilee], which shall not be unreasonably withheld or delayed." (Life Time Trial Exhibit A; HPI Trial Exhibit 5.) As a result, under the specific language of the 1997 Agreement, Paragraph 12(a) could be

binding on HPI's successors and assigns only if Jubilee consented to the assignment, unless the assignment were to an HPI affiliate. Because, however, a real covenant runs with the land and "passes to the assignee of the land," no assignment of the promise, or consent to such assignment, is required: the promise passes automatically to the one who takes the land. *Capital City* at ¶12. Paragraph 24 of the 1997 Agreement thus indicates the covenants in the 1997 Agreement are personal covenants between HPI and Jubilee unless, as Paragraphs 13 and 12(b) do, the 1997 Agreement specifically states a covenant shall encumber the real estate and be included in the deed of conveyance.

{¶31} In the final analysis, not only did HPI and Jubilee not record the Paragraph 12(a) promise in the deed or in any other instrument, but they used language in other portions of the 1997 Agreement, not used in Paragraph 12(a), that evidenced an intent to bind future landowners to certain obligations and use restrictions encumbering the Property. Because the language of Paragraph 12(a) does not indicate an intent to bind future landowners to the promise it provides, and because the Paragraph 24 "successors and assigns" clause requires Jubilee's consent to an assignment which would not be necessary for a covenant running with the land, the evidence supports the trial court's conclusion that HPI and Jubilee did not intend for the promise in Paragraph 12(a) to run with the land. HPI thus cannot satisfy the first element of either a covenant running with the land or an equitable servitude. Accordingly, we overrule HPI's first assignment of error.

IV. Second Assignment of Error and Assignment of Error on Cross-Appeal - Attorney Fees

{¶32} HPI's second assignment of error and Life Time's assignment of error on cross-appeal concern the attorney fees the trial court awarded to Life Time. HPI contends

the trial court erred in awarding Life Time any attorney fees; Life Time asserts the trial court should have awarded Life Time the additional $15,093.75 in attorney fees it requested. While the trial court properly awarded Life Time attorney fees, we remand to the trial court for an explanation of the basis for the amount of its award.

A. The award of attorney fees

{¶33} Ohio adheres to the "American Rule," which "requires that each party involved in litigation pay his or her own attorney fees in most circumstances." *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 699; *Sorin v. Warrensville Hts. School Dist. Bd. of Edn.* (1976), 46 Ohio St.2d 177, 179. A trial court, however, may award attorney fees where a statutory provision permits the recovery of attorney fees, the court finds the opposing party acted in bad faith, or a contractual provision between the parties allows for one party to recover its attorney fees. *McConnell* at 699; *Pegan v. Crawmer* (1997), 79 Ohio St.3d 155, 156; *Krasny-Kaplan Corp. v. Flo-Tork, Inc.* (1993), 66 Ohio St.3d 75, 77; *Vance v. Roedersheimer* (1992), 64 Ohio St.3d 552, 556.

{¶34} In awarding fees to Life Time, the trial court stated that "[e]vidence was presented establishing that fees in the amount of $89,427.72 were incurred. The Court finds said amount to be reasonable and awards the same." (Decision and Entry Finding in Favor of Third-Party Plaintiff Life Time Fitness, Inc., 9.) Because neither party suggests a statute that supports an award of attorney fees, nor bad faith, the agreement between HPI and Life Time determines whether attorney fees may be awarded in this case. Accordingly, we engage in plenary review of the contract language in deciding whether it supports an award of attorney fees to Life Time.

{¶35} The construction of a written contract is a matter of law for the court. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. The purpose of contract construction is to effectuate the intent of the parties, which is presumed to reside in the language they chose to employ in the agreement. *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, paragraph one of the syllabus; *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus (approving and following *Blosser v. Enderlin* (1925), 113 Ohio St. 121, paragraph one of the syllabus); *Resolution Trust Corp. v. GSW Assoc.* (Mar. 24, 1992), 10th Dist. No. 91AP-1084. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander* at paragraph two of the syllabus.

{¶36} The 2005 Agreement allows for the recovery of costs and attorney fees under Paragraphs 11, with sections (a) and (i) being most relevant, and under Paragraph 12. According to Paragraph 11(a), HPI represented and warranted to Life Time that, as of the date of closing, "no action, litigation, investigation, condemnation or proceeding of any kind" was "pending or, to the best of [HPI's] knowledge, threatened against [HPI] or the Property which could adversely affect the Property." (Life Time Trial Exhibit B; HPI Trial Exhibit 15.) The 2005 Agreement specified the representations and warranties in Paragraph 11 survived closing and, if any representation or warranty were incorrect or breached when made, then HPI would be liable to Life Time for any actual damages arising from the breach. Id.

{¶37} Life Time claims HPI breached Paragraph 11(a) because HPI "always knew the day would come when Jubilee would demand money for the Roadway Segment." (Brief of Appellee Life Time Fitness, Inc., 24.) Life Time points to the trial testimony of Keith Hartzell, in-house counsel for OhioHealth Corporation and the parent company of HPI. Hartzell testified HPI expected the demand for $175,000 in exchange for building the road from the time it signed the 1997 Agreement. (Tr. 210.)

{¶38} HPI's awareness that Jubilee, at some point, would demand payment under Paragraph 12(a) of the 1997 Agreement does not equate with HPI's having knowledge an "action, litigation, condemnation, or proceeding of any kind" was "pending or threatened" against HPI. Paragraph 12(a) of the 1997 Agreement stated that HPI was to pay Jubilee the money for completing the roadway either at closing or, if Jubilee did not complete the roadway until after closing, HPI then was to pay Jubilee "upon the subsequent dedication of the Required Portion." Because the roadway was not complete at closing, HPI did not have an obligation to pay Jubilee until Jubilee dedicated the roadway and, presumably, demanded payment from HPI.

{¶39} The first communication from Jubilee to HPI concerning the demand for payment under Paragraph 12(a) of the 1997 Agreement did not occur until August 8, 2006, four months after HPI and Life Time closed on the sale of the Property on March 1, 2006. Under those circumstances, no action was pending or even threatened against HPI or the Property at the closing on March 1, 2006. HPI thus did not breach its Paragraph 11(a) representation to Life Time. Cf. *Royal Appliance Mfg. Co., Inc. v. Fernengel* (Aug. 27, 1987), 8th Dist. No. 51268 (concluding a similar provision in a purchase agreement was breached where an individual sent a memorandum to the defendants

before the closing informing them that he was contemplating taking legal action against the defendants); *Abruzzi's Inc. v. Abruzzi's Pizza, Inc.* (July 2, 1998), 8th Dist. No. 73002 (determining a similar provision in a purchase agreement was breached where a former employee of the business had filed for unemployment compensation and collected over $7,000 before the sale closed).

{¶40} Under Paragraph 11(i), HPI represented and warranted to Life Time that, as of the date of closing, "[t]here are no restrictive covenants affecting the Property." The elements for a restrictive covenant are the same as the elements for a covenant running with the land. *LuMac* at paragraph one of the syllabus. By alleging in Count IV of its third-party complaint that Paragraph 12(a) contained a covenant running with the land, or a restrictive covenant, HPI in effect asserted a restrictive covenant had been on the Property from the time the 1997 Agreement was signed. Although Paragraph 11(i) more than likely was designed to address claims against Life Time from those not party to the 2005 Agreement, we see no basis in the language of Paragraph 11(i) to so limit its meaning. Indeed, HPI's representation in Paragraph 11(i) that no restrictive covenants affected the Property as of the March 1, 2006 date of closing, though ultimately true, was not a true representation in that HPI's contrary belief resulted in Life Time's incurring the very litigation costs HPI's assurances in Paragraph 11(i) were designed to avoid.

{¶41} Paragraph 12 of the 2005 Agreement states that "[i]n any action brought with respect to a breach of any of the foregoing representations and warranties, * * * the prevailing party shall be entitled to recover its reasonable attorneys' fees." (Life Time Trial Exhibit B, HPI; Trial Exhibit 15.) On the morning of trial, HPI confirmed the change in its claim, filed a revised complaint to include a claim that Life Time breached a covenant

running with the land or an equitable servitude, and thus brought an action for breach of a restrictive covenant affecting the Property. Life Time is the prevailing party in the action and is entitled to its reasonable attorney fees under Paragraph 12 of the 2005 Agreement.

B. The amount of attorney fees awarded

{¶42} Life Time's cross-appeal alleges the trial court erred in failing to award Life Time its attorney fees for the three days leading up to trial and the first day of trial. HPI, on the other hand, contends the trial court erred in allowing Life Time's lead trial attorney to testify concerning his attorney fees.

{¶43} The decision concerning the amount of attorney fees awarded rests in the sound discretion of the trial court and will not be overturned on appeal absent an abuse of that discretion. *Moore v. Moore*, 175 Ohio App.3d 1, 2008-Ohio-255, ¶81, citing *Layne v. Layne* (1992), 83 Ohio App.3d 559, 568; *Birath v. Birath* (1988), 53 Ohio App.3d 31, 39. *Miami Univ. v. Ohio Civ. Rights Comm.* (1999), 133 Ohio App.3d 28, 37 (noting an "[a]buse of discretion" entails "more than an error in law or judgment" and "implies that the trial court acted in an unreasonable, arbitrary or unconscionable manner"). A reviewing court will not substitute its judgment for that of the trial court and may affirm a trial court's judgment under an abuse of discretion standard "so long as there is a reasonable basis for it." *Becker Equip., Inc. v. Flynn*, 12th Dist. No. CA2002-12-313, 2004-Ohio-1190, ¶11; *Smith v. Ohio Dept. of Human Servs.* (1996), 115 Ohio App.3d 755, 759.

{¶44} The trial court awarded Life Time $89,427.72 in legal fees, the exact amount of legal fees Life Time incurred from August 1, 2009 to October 15, 2009, as

documented in its counsel's billing invoices. At trial, Life Time's lead trial counsel testified, authenticated the billing invoices and the time sheets for October 16, 17, and 18 that were not yet invoiced, and stated he billed a dozen hours on October 19, the first day of trial. The total amount for the three time sheets that were not invoiced and the hours devoted to the first day of trial represent the $15,093.75 in attorney fees Life Time asserts the trial court should have awarded.

1. Counsel testifying

{¶45} HPI alleges the trial court should not have allowed Life Time's lead trial counsel to testify concerning Life Time's fees because Life Time did not disclose counsel as a trial witness on either the initial or supplemental witness disclosure lists. See Franklin County Court of Common Pleas Loc.R. 43.01, 43.02 (requiring each party to serve on all other parties, no later than the date set for disclosure by the Case Schedule, a written disclosure of all persons the party reserves the option to call as a witness at trial). An appellate court reviews a trial court's decision to allow the testimony of an undisclosed witness under an abuse of discretion standard. *Kallergis v. Quality Mold, Inc.*, 9th Dist. No. 23651, 2007-Ohio-6047, ¶14; citing *State v. Havens* (Nov. 1, 2000), 9th Dist. No. 20020.

{¶46} In *Basil v. Wagoner* (Sept. 12, 1995), 10th Dist. No. 94APE12-1716, we concluded the trial court did not abuse its discretion when it allowed two experts to testify even though the experts did not prepare written reports setting forth their expert opinions as Franklin County Court of Common Pleas Loc.R. 43.03(c) required. In so concluding, we noted the general rule that a party may not call a witness to testify at trial if the party did not disclose the witness in compliance with Loc.R. 43, but we further observed Loc.R.

43 permits the trial judge to allow the testimony "for good cause and subject to such conditions as justice requires." Id. *Basil* determined not only the trial court had "good cause" to admit the experts' testimonies, but also the trial court's decision to admit the testimony did not prejudice the defendants, as "defense counsel was on notice of the substance of the testimony of the experts." Id.

{¶47} Here, even though Life Time did not disclose lead trial counsel as a witness, the trial court did not abuse its discretion because HPI was not prejudiced. HPI asserts to the contrary, contending counsel's testimony surprised it, as it would have expected a records custodian to verify the bills. HPI further asserts prejudice in that it had no time to prepare for cross-examination. Life Time, however, asserted its claim for legal fees in its October 5 counterclaim; HPI thus was on notice that Life Time's legal fees would be at issue. Moreover, HPI does not dispute Life Time's assertion that HPI received most of Life Time's billing records prior to trial. Nor do we perceive prejudice to HPI in Life Time's decision to provide testimony through counsel rather than a records custodian. Under those circumstances, we cannot say the trial court abused its discretion in allowing lead counsel's testimony. HPI's second assignment of error is overruled.

2. Trial court's explanation

{¶48} Generally, the trial judge, who participated in the trial and the preliminary proceedings, "has an infinitely better opportunity to determine the value of services rendered by lawyers who have tried the case * * * than does an appellate court." *Bittner v. Tri-Cty. Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146. Therefore, a reviewing court should not interfere with a fee award "[u]nless the amount of fees determined is so high or so low

as to shock the conscience." Id., quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.* (1985), 23 Ohio App.3d 85, 91.

{¶49} When deciding a fee award, the "trial court should first calculate the number of hours reasonably expended on the case times an hourly fee, and then may modify that calculation by application of the factors listed in DR 2-106(B)." *Bittner* at 146; see Ohio Rule of Professional Conduct 1.5 (replacing DR 2-106 and now governing a trial court's discretion relating to attorney fees); *In re Estate of Keytack*, 11th Dist. No. 2008-T-0039, 2008-Ohio-6563, ¶6 (applying Prof.Con.R. 1.5 in place of DR 2-106(B)). The Rule 1.5(a) factors a trial court should consider in making a fee award determination are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time either the client or the circumstances imposed; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) the nature of the fee, either fixed or contingent. Id. at ¶30-38.

{¶50} In *Hikmet v. Turkoglu*, 10th Dist. No. 08AP-1021, 2009-Ohio-6477, the "trial court conducted its own analysis under Prof.Con.R. 1.5 by applying those factors to the relevant facts and circumstances and determining whether each individual factor should be subject to an upward or downward adjustment or whether it was a neutral factor." Id. at ¶88. On appellate review, we determined the trial court did not abuse its discretion in refusing to award the full amount of fees requested because the "trial court considered

and discussed the proper factors in making its determination" and "provided detailed reasoning as to how it arrived at the amount awarded and its reasons for a reduction in the amount of the award." Id. at ¶105.

{¶51} By contrast, in *Bittner,* the trial court did not award the full amount of attorney fees requested even though the attorneys submitted "well documented time reports" and "presented testimony regarding the number of hours worked and their hourly rates of recompense." Id. at 145. The Supreme Court of Ohio noted the trial court's decision made it impossible "to determine what factors the court considered or the weight, if any, it placed on those factors." Id. at 146. Addressing an award under the Consumer Sales Practices Act, the Supreme Court stated that "[w]hen making a fee award * * *, the trial court must state the basis for the fee determination. Absent such a statement, it is not possible for an appellate court to conduct a meaningful review." Id. The Supreme Court remanded the case to the trial court so it could state the basis for its fee determination and dispose of the case. Id.

{¶52} Although the appeal here does not involve the Consumer Sales Practices Act, the *Bittner* principles are instructive. Life Time presented the billing invoices, the time sheets of Life Time's lead trial counsel from the not yet invoiced days of October 16, 17, and 18, and counsel's testimony he billed 12 hours on October 19. The trial court also had before it testimony from Life Time's in-house counsel that the amount of time and the hourly rate trial counsel charged were reasonable. The trial court, however, did not provide any insight into the basis for its decision to award all of Life Time's attorney fees incurred before October 16, but none after that date. Because the trial court did not, we cannot meaningfully review its decision. Accordingly, we must return the matter to the trial

court to consider the award and the testimony lead counsel presented, to determine the amount of the award, and to set forth its reasons for its determination. Life Time's assignment of error on cross-appeal is sustained to the extent indicated.

{¶53} Having overruled HPI's two assignments of error, but having sustained Life Time's assignment of error on cross-appeal to the extent indicated, we affirm in part and reverse in part the judgment of the trial court, and remand this matter to the trial court to consider its attorney fee award in the context of the concerns noted in this decision.

Judgment affirmed in part and reversed in part; case remanded.

TYACK, P.J., and CONNOR, J., concur.

_____