No. 16-1005

IN THE SUPREME COURT OF TEXAS

KENNETH H. TARR,

Petitioner,

v.

TIMBERWOOD PARK OWNERS ASSOCIATION, INC.,

Respondent.

On Petition for Review From the Fourth Court of Appeals
San Antonio, Texas, No. 04-16-00022-CV

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The HOA's brief on the merits bobs and weaves around the central issue by focusing on claims the HOA never asserted: the familial relationship amongst renters and maximum lease occupancy. In any event, such issues are conceptually distinct from whether the deed restriction "residential purposes" restricts leasing or occupancy by duration.

The HOA fails to offer responsive argument on critical issues, in essence conceding that it has no arguments. It does not, for example, mention the Third Court *Zgabay* case with which the Fourth Court below expressly disagreed, nor the new Second Court *Garrett* case that amplifies upon *Zgabay* and rejects the Fourth Court approach. The HOA does manage to discuss the Ninth Court's *Benard* decision that barred short-term rentals, but then the HOA does not address how *Benard's* imposition of a 90-day minimum lease term squares with the Fourth Court's imposition of an ill-defined, open-ended "permanent residency" requirement. This Court is thus none the wiser how the HOA proposes to harmonize Texas law or resolve the thorny question presented.

This Reply supplements Tarr's petition and brief on the merits concerning the irrelevancy of the unasserted "single family" and maximum occupancy issues. This Reply then addresses selected other misstatements and arguments in the HOA's brief.

STATEMENT OF FACTS IN REPLY

I. Only Tarr's Declaratory Judgment Claim Concerning Duration of Use Was Tried Below, *Cont.*

A. The HOA Asserted No Claims for Breach of Restrictive Covenant

The HOA asserts here, as it did in the court of appeals, that the "single family" deed restriction wording was tried at summary judgment. Brief of Respondent at 3-6. And the trial court's summary judgment order did, it is true, include a finding that Tarr breached the restrictive covenant by renting to "multi-families." **Tab A**. Tarr's opening brief addresses the various improprieties of that finding in his opening brief. Brief of Petitioner at 6-7.

B. Tarr Preserved Objections to the HOA's Purported "Claims"

The HOA also asserts that Tarr did not object to the HOA's raising of the single-family issue. Brief of Respondent at 6. That is false: Tarr objected timely and vehemently at trial and on appeal.

After the close of summary judgment, Tarr asked the trial court to reopen summary judgment to consider the new *Zgabay* decision of the Third Court, which had recently gone Tarr's way. CR658; *Zgabay v. NBRC Property Owners Association,* No. 03-14-00660-CV, 2015 WL 5097116, at *3 (Tex. App.—Austin Aug. 28, 2015, pet. denied) (mem. op.). The HOA filed an opposition to the request, insisting that the only issue left for the court to decide was the form of the judgment, not substantive matters. CR845.

The trial court agreed with the HOA and informed Tarr that it had already ruled on the cross-MSJ's. 3RR5-6.

The HOA then submitted a proposed order, whereupon the trial judge set a hearing on the entry of judgment. CR841, 843-844. At the hearing, Tarr objected to the HOA's proposed order's grant of unpled injunctive relief. 3RR10-13, 39-41. The HOA conceded as much and agreed to take out the unpled injunction. 3RR43. But then, *at the hearing on entry of judgment*, the HOA began contending for the first time that Tarr had violated the restrictive covenants by renting his home for "multi-family" use. 3RR17-20, 22-23, 26-27, 42-44. Tarr objected to this as unpled. 3RR31-32.

The trial judge took under advisement the form of the judgment. The HOA submitted a revised proposed order which:

- declared that a home is not a residence unless occupied permanently;
- again included an unpled injunction;
- made findings of fact that Tarr had violated the deed restrictions by renting for short terms and for "multi-family" use; and
- awarded attorney's fees to the HOA subject to later hearing on the issue.

The trial judge signed and entered this order. **Tab A**.[1]

On appeal to the Fourth Court, Tarr continued arguing the

[1] At a subsequent hearing, the trial court determined the amount of the fees and entered an order that recited finality. **Tab B**.

HOA's waiver of the single-family issue in every conceivable way, including the HOA's additional waiver of the issue on appeal by failing to address the issue in its appeal brief. Brief of Appellant at 8, 10-11, 35-36; Reply Brief of Appellant at 2-6, 7-8, 12-13.

II. Other Factual Rebuttals

The HOA's brief asserts that Tarr's leases "drastically increase the number of people entering the community on any given weekend." Brief of Respondent at 18. This statement is false, unsubstantiated, and inflammatory. The cited lease spreadsheet (CR590-93) does show the number of occupants during a given lease term, but there is no evidence in the record as to the number of people who enter the community on "any given weekend" or how Tarr's leases affect or relate to the total numbers. Nor is there any evidence that Tarr's leases exceed any maximum occupancy laws or restrictions. Any lease, for any duration, can include the maximum permissible occupancy under state law. *See* Tex. Prop. Code § 92.010 (max. three adults per bedroom). If the HOA had complaints about the number of Tarr's lease occupants, the HOA should have asserted a statutory claim under § 92.010. It did not.

The HOA's brief also states that Tarr rents "to multiple families at once," which insinuates that Tarr has multiple leases in occupancy at the same time. Brief of Respondent at 10. That is false and unsubstantiated. The evidence shows Tarr's leases to be serial and, as already noted, to individual lessees at a given time. CR434-35 (declaration of Tarr); 590 lease spreadsheet.

ARGUMENT

I. The HOA Waived Most Relief Ordered by the Trial Court, *Cont.*

The HOA's brief repeatedly contends that Tarr violated the deed restrictions. Brief of Respondent at 6, 12, 18. However, as the facts recited above and in Tarr's opening brief demonstrate, the HOA never pled for breach of restrictive covenant nor asserted such claims at summary judgment. There cannot be any finding or judgment for breach of restrictive covenant in this case.

Rule 166a(c) "unequivocally restrict[s] a trial court's summary judgment ruling to issues raised in the motion, response, and any subsequent replies." *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993). Issues that a non-movant contends defeat summary judgment must be expressly presented by written response. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). Granting a summary judgment on a claim not addressed in the summary judgment motion is reversible error. *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011).

The trial court improperly granted relief that the HOA never pled, waived, or sought untimely. The summary judgment order (**Tab A**) on its face grants relief beyond Tarr's declaratory judgment claim, which was the sole claim in the case. Specifically, the trial court found violations of the deed restrictions (and granted injunctive relief) even though the HOA never pled for breach of restrictive covenant nor pursued it at summary

judgment.[2] The only substantive relief that the trial court could have granted in the order on the cross-motions for summary judgment was declaratory relief concerning whether "residential purposes" restricts lease or occupancy by duration.

The court of appeals modified the trial court's judgment by vacating the injunction, but the court of appeals left unclear the resolution of the "single family" (or "multi-family") issue. Its modified affirmance also recites a take-nothing judgment, presumably meaning that Tarr's claims were dismissed, leaving nothing else pending.

In any event, on the merits of the issue, as Tarr's brief points out, the "single family" wording is conspicuously a construction requirement, not a limitation on use or occupancy. Brief of Petitioner at 1-2, 3 n. 2. Tarr has steadfastly preserved that merits argument. Brief of Appellant at 6, 10; Reply Brief of Appellant at 5.

At bottom, the HOA's "multi-family" argument is a sideshow intended to thwart the granting of review through distraction. Whether or not "residential purposes" bars lease or occupancy according to duration is separate and distinct from who may permissibly reside at a property or how many persons may do so. The only issue properly before this Court is narrow and unrelated

[2] A party is not entitled to findings of fact at summary judgment because for summary judgment to be rendered, there cannot be a "genuine issue as to any material fact." Tex. R. Civ. P. 166a(c); *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997).

to the "multi-family" and maximum occupancy issues the HOA raises in its brief.

II. Requiring A Homeowner to Seek Amendment of Deed Restrictions to Counter Silence Is Unfair

The HOA argues that it was Tarr who should have sought an amendment to the deed restrictions expressly allowing short-term rentals. Brief of Respondent at 2.

Interpreting silence as a prohibition on an activity – and a prohibition without a clear safe-harbor – puts all property owners at grave risk. The Court should not go down the road of declaring that what is not expressly allowed is forbidden, and for two reasons:

First, doing so would create a situation analogous to an *ex post facto* law. Property owners all over the state with bare-bones "residential purposes only" deed restriction wording have no reason to expect that silence imposes duration restrictions leasing or occupancy, much less a vague restriction like the one imposed by the Court of Appeals. If the HOA's interpretation prevails, millions of property owners stand to be sued for their past rentals falling within the limitations period. *See* Tex. Civ. Prac. & Rem. Code § 16.051 (residual four-year period). They can be sued for both ordinary damages and even punitive damages of $200 per day for the prior four years' worth of rentals, amounting to hundreds of thousands of dollars. *See* Tex. Prop. Code § 202.004(c); *Wal-Mart Stores, Inc. v. Forte,* No. 15-0146, 2016 WL 2985018, at *5 (Tex.

2016) (statutory civil damages are punitive); *KBG Investments, LLC v. Greenspoint Prop. Owners' Ass'n, Inc.*, 478 S.W.3d 111, 122 (Tex. App. - Houston [14th Dist.] 2015, no pet.) (damages under § 202.004 are punitive). Worse, owners of Texas property who live or spend time out of state may face even higher damages claims, since the limitations period can be tolled while statutory damages are piling up. *See* Tex. Civ. Prac. & Rem. Code § 16.063.

Second, putting the onus on landowners to get amendments passed to fill in every silence in deed restrictions is unworkable and unreasonable. Owners and buyers of land would suddenly be placed in the position of not knowing what property uses they are buying and what uses may later be asserted as barred by an angry neighbor or activist HOA board. That flies in the face of any common-sense notion of how deed "restrictions" (or "restrictive" covenants) ought to work, which is to give owners and prospective owners fair notice of the "restrictions" on their property rights. That is why Texas law has long allowed property uses not plainly forbidden: the common-law rule of construction respected by the *Zgabay* and *Garrett* decisions interprets any doubt or uncertainty to favor property rights and prevent unfair enforcement. *See Zgabay*, 2015 WL 5097116 (Tex. App.—Austin Aug. 28, 2015, pet. denied) (mem. op.); *See Garrett v. Sympson*, 02-16-00437-CV, 2017 WL 2471098 (Tex. App.—Fort Worth June 8, 2017, reh'g denied, no pet. h.) (**Tab F**).

III. The Lease Spreadsheet Is No Evidence Of The Relationships Amongst The Tenants

There is no evidentiary basis for the HOA's assertion that Tarr leased to "multiple families," or to multiple families "at once." Brief of Respondent at 10. Tarr's lease spreadsheet does ostensibly show the number of occupants per lease, CR590, but the HOA has not submitted any evidence concerning what the various entries denote or any relationships amongst the ostensible occupants.[3] The HOA sought and obtained a continuance -- over Tarr's vehement opposition -- precisely to seek such discovery. CR245, 248. The most that can be said about whether Tarr rented to "multiple families" is that there is no evidence. Tarr bears no fault for that: the reason he never submitted any evidence on that issue is that the HOA never raised it at or before summary judgment.

IV. The Texas Hotel Tax and private deed restrictions are two ships passing in the night

The HOA argues that the Legislature's 2015 amendment to the Texas Hotel Tax to add home rentals means that the Legislature intended to bar short-term rentals. Brief of Respondent at 18.

The argument is a non-starter. The purpose of the Hotel Tax is to capture revenue, not thwart it, which is why "hotel" is defined broadly:

[3] Tarr urged these objections below, at the hearing on the entry of judgment after the summary judgment record had closed. 3RR31-32.

> **Sec. 156.001. Definitions.** (a) In this chapter, "hotel" means a building in which members of the public obtain sleeping accommodations for consideration. The term includes a hotel, motel, tourist home, tourist house, tourist court, lodging house, inn, rooming house, or bed and breakfast . . . .
>
> (b) For purposes of the imposition of a hotel occupancy tax under this chapter, Chapter 351 or 352, or other law, "hotel" includes a short-term rental. In this subsection, "short-term rental" means the rental of all or part of a residential property to a person who is not a permanent resident under Section 156.101. . . .
>
> * * *
>
> **Sec. 156.101. Exception--Permanent Resident.** This chapter does not impose a tax on a person who has the right to use or possess a room in a hotel for at least 30 consecutive days, so long as there is no interruption of payment for the period.

Tex. Tax Code Ch. 156 (2015) (amended to add STR's). Had the Legislature wished to ban short-term rentals, it would not have tried to raise revenue by taxing them. Tax laws whose purpose is to generate revenue would be undermined if their broad definitions aimed at lassoing taxable events were transferred by judicial fiat into unrelated private deed restrictions as a basis to prohibit the taxed activity.

Relatedly, there is no basis for concluding that the mere existence of state or local taxes on short-term rentals informs the meaning of private deed restrictions. One document would have to

refer to or incorporate the other in order for their respective definitions of terms to be the same.

In the same vein, if a given set of deed restrictions expressly allows short-term rentals by defining them as "not a hotel," that would not provide an exemption from the tax. Conversely, if the tax expressly did not apply to subdivision homes rented for short terms, that would not allow an owner to flout a prohibition against short-term rentals in the deed restrictions. The Hotel Tax and private deed restrictions have distinct meanings and purposes and have nothing to do with one another.

Further toward that same point, this Court employs a broad legal principle that where separate laws or rules have opposing aims, identical terms are not interpreted the same. *See, e.g., Fin. Comm'n of Texas v. Norwood*, 418 S.W.3d 566, 587 (Tex. 2013) ("interest" under the usury statute, where the law aims to bar extra charges, means the opposite of what it means under Tex. Const. art. XVI, § 50(a)(6)(E), where the law aims to include extra charges, because the laws have different purposes). Thus, a short-term rental of a home is a "hotel" under the tax code because the tax is inclusive to capture revenue, whereas it is not a "hotel" under the common law absent clear contrary wording in the deed restrictions.

V. The Court of Appeals' Findings Are *Dicta*

The Court of Appeals fell into the same trap as the trial court in deciding more than required by Tarr's claim for declaratory

relief. Tarr sought a declaration that the deed restrictions do not impose a duration restriction on leasing or occupancy. The Court of Appeals, however, in saying that they do, went further to make what amounts to a finding of breach of restrictive covenant, concluding that Tarr "leased his home to be used for transient purposes." **Tab C** at 6. At the risk of repetition, the HOA asserted no claim for breach that would support such a finding.

The Court of Appeals' ensuing discussion of Tarr's specific lease language, such as the lease's "check-in" time and the lease's designation of renters as "guests," is thus pure dicta. If all that is required for an owner to comply with the deed restrictions is the use of particular lease language, such as "move-in" instead of "check-in," and "tenant" instead of "guest," any owner can easily accomplish that and come into compliance. But that is not is what is at issue in this litigation. What is at issue is a pure issue of law whether "residential purposes" imposes a minimum duration on occupancy or leasing, no matter what formalities are used in a given lease agreement.

If this Court does believe that specific lease terminology would safe-harbor an owner's short-term rentals, then it should state as much in its opinion so that property owners avoid breaches of restrictive covenant that are readily avoidable if only the formalities are observed.

CONCLUSION

The Court should decline the HOA's invitation to detour into waived and irrelevant side-issues and muddy the issue for which review is sought. The issue before the Court, as correctly framed by Tarr given the state of the record, is narrow and vital to Texas statutory and common-law property rights jurisprudence. It needs to be taken up and resolved given its importance and the plain conflict amongst the several courts of appeals, with many more such cases in the pipeline in both trial and appellate courts. Property owners all over Texas are awaiting the outcome in this case on an important property rights issue that is spawning new disputes daily all over the state.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on August 14, 2017, per T.R.A.P. 6.3(b), a true and correct copy of this brief was served by efiling on:

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in Century Schoolbook 14-point for text and 12-point for footnotes. Spacing is expanded by .5 point for clarity. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i)(2)(D) because it contains 2970 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

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