

# IN THE SUPREME COURT OF TEXAS

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No. 96-1092  
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FRANK AND DEBORAH PILARCIK, PETITIONERS

v.

JAMES R. EMMONS AND SUSIE EMMONS, PRESTON AND FERN HASTY, DOUG  
JOHNSON, JIM KERN, MIKE AND KATHY KOBOS, KELLY AND SUSAN JONES, AND  
TROY AND NELL RADFORD, RESPONDENTS

=====  
ON APPLICATION FOR WRIT OF ERROR TO THE  
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS  
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**Argued on February 25, 1997**

JUSTICE GONZALEZ, dissenting.

I believe it is inappropriate to resolve this dispute by summary judgment. In order to prevail, it is the Pilarciks' burden to show that there is no genuine issue of material fact. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). It is my view that they have failed to satisfy that burden because there is a fact issue as to whether the Architectural Control Committee ("ACC") has the authority to waive the restriction on composition shingles when those shingles are to be used to repair or replace the roof of an existing house. For this reason, I disagree with the Court's judgment and opinion. I would reverse the judgment of the court of appeals and remand the case for trial on the merits.

The homes in Waterwood Estates are subject to various deed restrictions, including the following provisions related to roofing:

Article I. ¶ 9. Roofs of composition type shingles will not be permitted. All roofs and dwellings or accessory buildings shall be constructed with wood shingles, unless an alternate roofing material is approved by the Architectural Control

Committee.

Article II. ¶ 1. Architectural Control. No building shall be erected, placed, or altered on any lot until construction plans, specifications and a plan showing the location of the structure shall have been approved by the Architectural Control Committee as to quality or workmanship or materials, harmony or exterior design with existing structures, and as to the location with respect to topography and finished grade elevation. . . . The Architectural Control Committee shall have the right to waive any Restrictions herein provided insofar as the same pertains to type of roof or quality of masonry to be used provided that the appraised value of the proposed house is not less than \$50,000.00.

Article I, paragraph 9 expressly prohibits composition shingles. But as the Court recognizes, the restrictions also provide that the ACC may “waive any Restrictions herein provided insofar as the same pertains to type of roof or quality of masonry to be used provided that the appraised value of the proposed house is not less than \$50,000.00.” I agree that this express language allows the ACC to waive “any” restriction in the covenants, including the restriction on composition shingles. However, this language is in the context of, and thus limited by, the phrase, “provided that the appraised value of the proposed house is not less than \$50,000.00.” If “the appraised value of the proposed house is not less than \$50,000.00,” the ACC has the authority to waive the restriction on composition shingles. The relevant inquiry then becomes whether this phrase, “the appraised value of the proposed house,” limits ACC authority to only new construction, as urged by the Emmonses, or whether the language is mere surplusage, as the Pilarciks maintain.

In my view, the term “proposed house” is capable of several interpretations. For instance, the term could mean the house “proposed” to be built, which would limit the ACC’s authority to waive the restrictions to new construction. But the term “proposed house” could also mean the house *proposed for repair*, which would be consistent with the Pilarciks’ position. Moreover, “house” could mean any discrete *component part* thereof, including the roof, the foundation, and walls, such that the proposed replacement of any one of these components could fall within the term “proposed house.”

The other language in Article II, paragraph 1 provides very little guidance to assist us in

determining whether one of these interpretations of “proposed house” is the only reasonable interpretation. The first sentence provides, in relevant part:

No building shall be erected, placed, or altered on any lot until construction plans, specifications and a plan showing the location of the structure shall have been approved by the Architectural Control Committee as to quality . . . , harmony . . . with existing structures . . . and location with respect to topography and finished grade elevation.

As the Emmons point out, most of this terminology is inconsistent with repairs or alterations to an existing house, especially the requirement that the ACC approve the “location [of the structure] with respect to topography and finished grade elevation.” Of course, if the house is just being repaired or portions replaced, a requirement that the ACC approve its “location” is meaningless. But on the other hand, the sentence does refer to a building being “altered,” which might contemplate the repair or replacement of part of a house.

I disagree with the Court that, under these circumstances, the covenants can be given a definite or certain meaning as a matter of law. Instead, because the covenants are subject to at least two reasonable interpretations regarding the ACC’s authority to waive the prohibition on composition shingles, I would hold that the covenants are ambiguous and a fact issue exists on the intent of the parties. Because the restrictions are ambiguous as to the scope of the ACC’s authority to waive the prohibition, I would not reach the issue of whether the Pilarciks properly received a waiver.

Accordingly, I would reverse the judgment of the court of appeals and remand the case to the trial court to resolve the factual issue on the parties’ intent and to determine, if necessary, whether the Pilarciks actually received a waiver from the ACC.

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Raul A. Gonzalez  
Justice

OPINION DELIVERED: April 14, 1998