CAUSE NO. 23-25[1]92-442

POINT NOBLE HOMEOWNERS' ASSOCIATION, INC., *Plaintiff*,	§	IN THE DISTRICT COURT
v.	§	
LINA RAMEY, *Defendant/Third Party Plaintiff,*	§	442ND JUDICIAL DISTRICT
v.	§	
GREG SMITH, BRENDA BARR MECKLEY, LISA LOSHELDER, and DALE SMITH, *Third Party Defendants.*	§	DENTON COUNTY, TEXAS

RAMEY'S RESPONSE TO THIRD-PARTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Lina Ramey (*Ramey*) files this Response to Third-Party Defendants' Traditional and No-Evidence Motion of Summary Judgment to the (the *Motion*) filed Greg Smith (*Greg*), Lisa Loshelder (*Loshelder*), and Brenda Barr Meckley (*Meckley*) (collectively *Movants*).[2]

I.
BACKGROUND

A catastrophic mudslide put in motion the events that gave rise to the conflicts between Point Noble Homeowners' Association, Inc. (the *HOA*), its Board, and its Architectural Control Committee (the *ACC*) and the homeowner, Ramey, which now come before this Court.

[1]

[2] Greg, Loshehler, Meckley, and Dale are each sometimes referred to as a *Third-Party Defendant* and sometimes, collectively, as *Third-Party Defendants*, whether acting in their respective individual ***or*** in their representative capacities on behalf of Point Noble Homeowners' Association, Inc. (the *HOA* or *Association*).

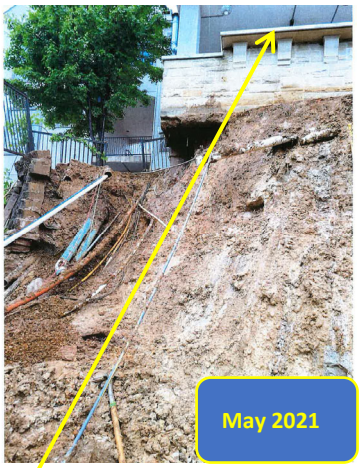
A. MAY 2021 MUDSLIDE

Ramey's home sits atop a cliff roughly **30** feet above the shore of Lake Grapevine. IIn May of 2021, the retaining wall at rear of Ramey's back yard failed suddenly and catastrophically. The retaining wall itself, improvements in the back yard, such as the back fence, patios, concrete steps, and tons of earth slid from Ramey's back yard into the floodway easement below the cliff onto the shore, which is managed by the United States Army Corps of Engineers (the *USACE*) .

The Town of Flower Mound (the *Town*) and USACE required Ramey to clear the rock, mud, and debris that had slid into floodway easement. Ramey was instructed to replace the failed retaining wall with a roughly 30-foot-high retaining wall and to install piers and other structural supports to prevent another catastrophic mudslide.

Due to the exigent circumstances created by the failure of the retaining wall, the ensuing mudslide, and the increased risk of injury and death to persons and to the house itself, however, USACE and the Town dispensed with the usual permitting process and related red tape. Instead of putting people and property in jeopardy, both USACE and the Town facilitated and encouraged the prompt repair and restoration of the failed retaining wall and related improvements at the rear of Ramey's house. A picture, as the saying goes, is worth a thousand words. The few photographs on the following page speak volumes.

Depo. Ex. 1



Depo. Ex. 1

Outdoor Bar

Depo. Ex 1

Depo. Ex. 2

The severity of the mudslide and the extent of the resulting damage depicted in the two photographs on the left and the one at the top right are obvious.[3] The photograph at the bottom right shows above ground portions of the reconstructed retaining wall at the rear of the home.[4]

[3] Appx 1: Depo. Ex. 1.

[4] Appx 1: Depo. Ex. 2.

B. REPAIRING THE DAMAGE TO SAVE RAMEY'S HOME

The wall and piers extend a roughly equal distance below the surface of the ground. Together these photographs point to the unstable soil conditions that created the compelling need to implement the robust combination of drainage control measures at the rear ***and*** in the front of the Ramey home.

C. THE HOA, ACC, AND BOARD'S ARBITRARY, CAPRICIOUS, DISCRIMINATORY RESPONSE TO RAMEY'S SITUATION

The Original Declaration and the First Amendment, as well as Texas law, required the HOA, its AAC, and its Board to take the risks and circumstances surrounding the May 2021 failure of the retaining wall into account. Instead, the HOA, acting through its ACC and Board, repeatedly made arbitrary, capricious, discriminatory, arbitrary, and unreasonable decisions about nearly every aspect of Ramey's efforts restore the stability of the ground under her home. Idiosyncratic aesthetic preferences and personal pique overwhelmed reasonable considerations of the safety of lives or property.

The pattern of conscious indifference repeated itself again in early 2023. Veneer stones on the arcade between the pillars on to portico over the entrance to her home suddenly fell more than 20 feet to the ground, scattering stone shards over the porch and its environs. Had anyone been under the portico, one of these larges stone could have hit and killed or seriously injured the person.

Ramey moved promptly to remove loose stones to eliminate the continuing risk of serious harm to persons and property. Even after Ramey informed the HOA of the emergency, the HOA complained that she should have asked the HOA for permission to make the emergency repairs before doings so.

On matters great and small, the HOA, acting through its Board, acted consistently in an arbitrary, capricious, discriminatory, and unreasonable manner. Conscious indifference, lack of ordinary care, mixed with petty vindictiveness, and willful negligence impeded Ramey's efforts to repair her home.

II.
SUMMARY JUDGMENT EVIDENCE

A. TEX. R. CIV. P. 166a(c). RAMEY'S SUMMARY JUDGMENT EVIDENCE

Ramey's Response relies on the deposition transcripts, evidentiary hearing transcripts, interrogatory answers, and other discovery responses referenced or set forth in her response; the pleadings, admissions, affidavits, stipulations of the parties; and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court.[5]

Ramey's summary judgment evidence includes discovery products and instruments not otherwise on file with the clerk either (i) contained in the appendices ***or***

[5] TEX. R. CIV P. 166a(c)-(d).

(ii) specifically referred to in the written notice set forth herein, which states Ramey's intention to use the discovery, instruments, and other evidence in support of her Response,[6] including excerpts from the deposition transcripts of Greg, Dale, Loshelder, and Meckley.

B. **APPENDIX A CONTAINS THE FOLLOWING SUMMARY JUDGMENT EVIDENCE:**

Exhibit 1: Designated Excerpts from Transcript of Temporary Injunction Hearing dated March 8, 2024

Exhibit 2: Designated Excerpts from Transcript of Hearing on Plaintiff's Second Motion for Sanctions and to Show Cause dated July 25, 2024.

Exhibit 3: Designated Excerpts from Transcript of Deposition of Greg Smith (*Greg Depo*).

Exhibit 4: Designated Excerpts from the Deposition of Dale Smith (*Dale Depo*).

Exhibit 5: Designated Excerpts from the Lisa Loshelder (*Loshelder Depo*).

Exhibit 6: Designated Excerpts from the Deposition of Brenda Barr Meckley (*Meckley Depo*).

Exhibit 7: Deposition exhibits first marked in depositions of Loshelder (Exhibits: 1-39), Dale (Exhibits: 40—56, 38a), Greg (Exhibits: 57-59), and Meckley (Exhibits: 60-67).

Exhibit 8: Declaration of Lina Ramey (*Ramey Dec*.).

Exhibit 9: Declaration of Kenneth Ramey (*Kenneth Dec*.).

Exhibit 10: Declaration of Shanna Mizell (*Mizell Dec*.).

Exhibit 11: Geotechnical Report

Exhibit 12: Summary of Major Construction Expenses

[6] TEX. R. CIV P. 166a(d).

Exhibit 13: Foundation Drainage System Proposal.

C. **TEX. R. CIV. P. 166a(d).** Ramey gives notice of her intent to use discovery not otherwise on file and deposition transcripts not available at least seven (7) Days Before the June 6, 2025, Hearing Set on Third-Party Defendants' Traditional and No-Evidence Motions for Summary Judgment (*Movants' Motion*) and the June 11, 2025, Hearing Set on Plaintiff's Traditional Motion for Summary Judgment (the *HOA's Motion*).

III.
GROUNDS OF RAMEY'S RESPONSE TO MOVANTS' MOTION

A. MOVANTS' TRADITIONAL MOTION

1. Section 84.004 of CILA: Movants are not entitled to traditional summary judgment on their immunity defense under section 84.004 of CILA.

   a. Section 84.004 only applies to civil liability. Civil liability means money damages. As a matter of law, section 84.004 does not immunize Movants from Ramey's claims for declaratory relief under the UDJA.

   b. Ramey does not dispute, for purposes of Movants Motion, that Movants are volunteers or that the HOA is a charitable organization.

   c. But Movants failed conclusively establish that each Movant acted in the course and scope of their duties or functions as either an officer or director.

   d. In particular, Movants published the Defamatory Letter (Depo. Ex. 34) in their individual capacities and, therefore, outside the course and scope of their duties and functions as directors or officers of the HOA.

   e. Movants also breached independent duties to refrain from making negligent or intentional false statements or false entries into the records of the HOA. These acts and omissions are outside the scope of any duty they owed as officers and directors to the HOA.

2. Section 84.007 of CILA: Under Section 84.007, Section 84.004 *does not apply* to an act or omission that is intentional, willfully negligent, or done with conscious indifference or reckless disregard for the safety of others.

a. Section 84.004, therefore, is inapplicable to Movants' acts and omissions that were intentional, willfully negligent, or done with conscious indifference or reckless disregard for the safety of others.

b. Movants did so in regard to their arbitrary, capricious, and discriminatory decisions about the use of the conservation grass

c. Movants omissions in regard to their decisions about repairs to the stone veneer also were intentional, willfully negligent, or done with conscious indifference or reckless disregard for the safety of others.

d. Movants are not immune, but Ramey is entitled to declaratory relief under the UDJA.

e. Movants are not entitled to traditional summary judgment on their immunity defense under section 84.004 of CILA. Ramey's summary judgment evidence raises genuine issues of material fact on each element of section 84.007 of CILA.[7]

3. Movants are not entitled to either traditional or no evidence summary judgment on Ramey's claims under the UDJA for declaratory relief.

a. Movants are not entitled to summary judgment on Ramey's claims for declaratory relief regarding Movants breach of their fiduciary duties to the HOA that constitute, caused, or contributed to the HOA's breaches of its contractual and legal obligations to Ramey.

b. Ramey *does not* seek money damages from Movants for breach of any formal or informal fiduciary duty owed directly to Ramey

4. Ramey raised genuine issues of material fact on movants' claims that they are not liable for acts and omissions in the discharge of their duties as directors to the HOA under section 22.221(b) of the Texas Business and Commerce Code.

a. Section 22.221(a) requires a director to discharge his or her duties or functions *as a director* in good faith, with ordinary care, and in a

[7] Ramey Dec.; Indexed excerpts from Greg Depo., Dale Depo., Loshelder Depo., & Meckley Depo.

manner that he or she reasonably believes to be in the best interests of the HOA.[8]

b. To be entitled to immunity from civil liability *as directors* under Section 22.221(b), each movant has the initial burden under section 22.221(b) to show that he or she *discharged* his or her ***duties as a director*** and ***not*** in the discharge of his or her ***duties as an officer*** and certainly ***not*** in his or her individual capacities.

c. Movants not only failed to point to the alleged acts and omissions for which they seek immunity, but they failed to satisfy their initial summary judgment burden to establish that all of the acts and omissions in question occurred in the discharge of their duties as directors but not as officers and not outside the scope of their duties as either officers or directors.

d. These procedural and evidentiary failures are fatal to Movant's no-evidence summary judgment seeking to establish immunity from liability under Sections 22.221(b) for three reasons.

e. First, Movants acted outside the course and scope of their duties to the HOA as directors when Movants published the Defamatory Letter in their individual capacities.[9] Section 22.221(b) has no application to these acts and omissions in Movants' individual capacities.

f. Second, Section 22.221(b) has no application to Movants' acts and omissions in the discharge of their duties as officers.[10]

- Section 22.221(b) applies only to acts and omissions of directors in the discharge of their duties as directors.
- The safe harbor established by Section 22.221(b) places the initial burden on the person seeking to impose liability on a director for acts and omissions in the discharge of a directors' duties as a director to show lack of good faith, lack of ordinary care, and lack of a reasonable belief that his or her acts and omissions were in the best interests of the corporation.

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- There is no safe harbor in Sections 22.231 and 22.235 placing the initial burden on the person seeking to impose liability on an officer. Instead, Section 22.235 places the initial evidentiary burden on an officer who seeks to avoid liability to show that he or she discharged his or her duties as an officer in good faith, with ordinary care, and in the reasonable belief that his or her acts and omissions as an officer were in the best interests of the corporation.

g. Third, each Movant, at different times, and with respect to different events, acted or failed to act as a director, as an officer, or in his or her individual capacity.

- In some instances, Greg arguably acted in the discharge of the duties of a director; in others, he acted or failed to act in the discharge of the duties of a president; and, in still others, he acted in his individual capacity and not in the discharge of the duties of either a director or a president of the HOA.

- In some instances, Loshelder arguably acted in the discharge of the duties of a director;[11] in others, she acted of failed to act in the discharge of the duties of a secretary;[12] and, in still others, she acted in her individual capacity and not in the discharge of the duties of either a director or a secretary of the HOA.

- In some instances, Meckley arguably acted in the discharge of the duties of a director; in others, she acted in the discharge of the duties of vice-president; and, in still others, she acted in her individual capacity and not in the discharge of the duties of either a director or vice-president of the HOA.

h. Because each Movant failed to point to specific acts and omissions that he or she performed in the discharge of his or her duties to the HOA *as a director*, Movants' Motion did not establish the predicate facts necessary under Section 22.221(b) to shift the initial evidentiary burden to Ramey to raise genuine issues of material fact that he or she ***did***

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not discharge his or her duties or functions *as a director* in good faith, with ordinary care, and in a manner that he or she reasonably believes to be in the best interests of the HOA.[13].

i. In the alternative, Ramey met her burden to raise genuine issues of material fact on the following issues pertinent to Movants' claims for immunity Section 22.221(b):

j. Movants ***did not*** discharge his or her duties or functions *as a director* in good faith, with ordinary care, and in a manner that he or she reasonably believes to be in the best interests of the HOA. Acts and omissions that do not comply with this standard include, without limitation:

- Movants did not know what their duties were, acts with ordinary care to investigate facts or to understand the applicable contractual or statutory standards.
- Movants did not act in a reasonable belief that their acts were in the best interest of the HOA
- The HOA and Board's decisions in April 17, 2023, letter, April 24, 2023, and other violation notices
- Movants acted outside the course and scope of their duties to the HOA when:
  - Movants published the Defamatory Letter in breach of individual duties to Ramey
  - The HOA and Movants made, caused to be made, or acted or failed to act with conscious indifference toward the knowing use of such misrepresentations and false entries in the records of the HOA.
  - The HOA and Movants knowingly used the false entries to deny Ramey's rights as a Member and as one of more than 10% of the Members to call and notice an annual and special meeting after the HOA failed to achieve a quorum.

[13] *See* TEX. R. CIV. P.166a(i)

- ◊ The HOA and Movants' knowingly failed to comply in a "precise manner" with Section 10.2 of the Original Declaration's conditions precedent to the effectiveness of the Second Amendment and attempted to conceal the failure.

- ◊ The HOA, the Board, and the ACC acted in conscious disregard of the health and safety of Ramey and her family by denying, delaying, and obstructing work necessary to mitigate the substantial risks of another mudslide.

B. **THIRD-PARTY DEFENDANTS OWED AND BREACHED AN INDEPENDENT LEGAL DUTY TO REFRAIN FROM PUBLISHING NEGLIGENT OR INTENTIONAL FALSE STATEMENTS ABOUT RAMEY.**[14]

1. A person has an independent legal duty of care to avoid making false statements negligently or intentionally about another person, whether the person is acting in his or her individual capacity or acting in the course and scope of his or her duties as an officer or director of a corporation.

2. In either circumstance, negligence is the minimum standard for fault in libel cases, and a person who publishes the false statement—in his or her individual capacity or in his capacity as an officer or director—can be held personally liable.

3. Third-Party Defendant owed this duty of care to Ramey as a matter of law. Third-Party Defendants admitted in their depositions that they made statements in the Defendants without investigating or knowing whether the statements therein were true or false and that they made statements without knowing whether the statements were true or false. Third-Party Defendants owed and breached their independent legal duties to refrain from negligently or intentionally false statements about Ramey.

C. **THIRD-PARTY DEFENDANTS MADE EITHER NEGLIGENT OR INTENTIONAL MISREPRESENTATIONS OF FACT AND KNOWINGLY OR INTENTIONALLY FALSE ENTRIES IN THE RECORDS OF THE HOA IN BREACH OF THEIR FIDUCIARY DUTIES TO THE HOA.**

[14] *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369 the Texas Supreme Court held that an employee who made libelous statements while acting within the scope of their employment was personally liable for the defamation; *see also Keyes v. Weller*, 692 S.W.3d 274, *Remenchik v. Whittington*, 757 S.W.2d 836.

THIRD PARTY DEFENDANT ALSO BREACH AND INDIVIDUAL DUTY NOT TO KNOWINGLY ASSIST ANOTHER IN THE BREACH OF THOSE DUTIES

1. Third-Party Defendants owe Ramey an independent legal duty to refrain from making negligent or intentional misrepresentations, as well as to refrain from making false entries into the records of the HOA.

2. The recording of the December 11, 2022, meeting, the minutes of the December 11, 2023, the absence of records establishing a quorum, excerpts from the depositions Greg and Dale, records of the July 19, 2022, annual meeting, and the records of the August 8, 2022 Board Meeting, and the false recitals in the Second Amendment, and the Ramey's Declaration show Third-Party Defendants' made, or caused to be made negligent or intentionally false statements or that they made, or caused to be made, false entries in the records of the HOA.

3. Third Party Defendants also owe a legal duty to refrain from making negligent or intentional misrepresentations.

IV.
INSUFFICIENCY OF, AND RAMEY'S OBJECTIONS TO, MOVANTS' TRADITIONAL SUMMARY JUDGMENT EVIDENCE

A. MOVANTS' INITIAL TRADITIONAL SUMMARY JUDGMENT BURDEN.

The Affidavit of Greg Smith (***Greg's Affidavit***) and the four exhibits to it are the only evidence offered in support of grounds expressly presented in Movants' Traditional Motion. This evidence, however, does not satisfy Movants' initial summary judgment burden. Movants' evidence fails to conclusively establish ***every*** element of any claim or defense on which Movants' bear the burden of proof ***or*** to conclusively negate ***any*** essential element of any claim or defense on which she bears the burden of proof.

B. INSUFFICIENCY OF GREG'S AFFIDAVIT TO MEET MOVANTS' INITIAL BURDEN.

Greg's Affidavit recites the legal elements of Movants' defense under section 84.004 of Charitable Immunity and Liability Act of 1987 (*CILA*) in conclusory fashion, without reference to specific facts supporting his conclusory statements. As the cases which Ramey cites in support of her objections below to the specific statements in Greg's Affidavit, show, the conclusory statements are insufficient as a matter of law.

Under Rule 166a(c), "[s]ummary judgment may be based on uncontroverted testimonial evidence of an interested witness . . . ***if*** the evidence is clear, positive and

direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."[15] Moreover, the phrase "could have been readily controverted" means that the testimony must be of a nature that opposing evidence could effectively counter it, not merely that it could be easily rebutted. If the credibility of the affiant is likely to be a dispositive factor with respect to some issues in the case, summary judgment is ***inappropriate.***[16]

1. Greg is an interested witness. Greg is a third-party defendant, is, or claims to be, the duly elected president of the HOA, and is, or claims to be, a duly elected director on its Board. Thes facts make Greg an interested witness.

2. Greg's Aff. is merely a sworn denial of Ramey's claims.[17] The self-serving conclusory statements in Greg's Affidavit do not refer to any specific facts or admissible corroborating evidence. These statements are not clear,

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[15] TEX. R. CIV. P. 166a(c) (emphasis added). *See generally* Nationsbank, N.A. v. Akin, Gump, Hauer & Feld, L.L.P., 979 S.W.2d 385, 393 (Tex. App.—Corpus Christi 1998, pet denied) (citing *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991 and finding that trial court erred by overruling NationsBank's objections to Akin Gump's summary judgment evidence and holding that the affidavit submitted by Akin Gump constituted legal conclusions and failed to establish the law firm's entitlement to judgment as a matter of law); *see also Mercer v. Daoran Corp*., 676 S.W.2d 580, 583 (Tex. 1984); *Hidalgo v. Surety Savs. & Loan Ass'n*, 487 S.W.2d 702, 703 (Tex. 1972) (per curiam). The affiant's statements in *Akin Gump* mirror many of Greg's: "I did not make any false representations to Plaintiff[;] I did not make any false representations to the Plaintiff that I knew to be false when made nor did I make any false representations recklessly without any knowledge of the truth and as a positive assertion when made[;] I did not breach any express warranties that I may have made to the Plaintiffs[;] my] relationship with the Plaintiff did not concern the provision of goods[;] I did not pass off goods or services as those of another[;] I did not cause the confusion or misunderstanding as to affiliation, connection or association, with, or certification, by another[;] I did not represent that goods or services had sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they did not have or that a person had sponsorship, approval, status affiliation or connection which he did not[,] I did not represent that goods or services were of a particular standard, quality, or grade, or that goods were of a particular style or model, when they were of another[;] I did not disparage the goods, services, or business of another by false or misleading representations of facts[;] I did not represent that an agreement conferred or involved rights, remedies, or obligations which it did not involve, or which were prohibited by the law[; I did not represent that work or services had been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced[; . . . the relationship between myself and Plaintiff did not involve goods[;] I did not fail to disclose information concerning people or services which was known at the time of the transaction in order to induce the Plaintiff into a transaction into which the consumer would not have entered had the information been disclosed[;] I did not knowingly commit any violations of the DTPA[;] and after stating he had personal knowledge of the work performed by himself and other employees of Akin Gump, [the affiant] Nelson made the same statements with respect to Akin Gump. *Id*. at 383. This testimony, the court of appeals concluded, "comprised only of legal conclusions is insufficient to support summary judgment as a matter of law." *Id*.

[16] Klein Indep. Sch. Dist. v. Wardlaw, 693 S.W.3d 610, Casso v. Brand, 776 S.W.2d 551.

[17]

positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.[18] Because of these shortcomings, Greg's Affidavit fail to conclusively establish any fact necessary establish Movants' entitlement to immunity from civil liability for death, injury, or damage under section 84.004 of CILA.

a. Texas appellate courts routinely and consistently hold that statements in affidavits virtually identical to statements in the Greg's Third Aff., which merely recite statutory or common law legal standards without reference to specific supporting facts, are wholly insufficient to conclusively establish a material fact necessary to entitle the movant to judgment as a matter of law.[19]

b. Even in the absence of objections, specific objections, or controverting evidence, the conclusory statements in Greg's Third Aff., which do not refer to specific facts, to not satisfy Rule 166a(c). As a result, Greg's statements in his affidavit do not satisfy Movants' initial summary burden to conclusively establish any material fact necessary to entitle Movants to judgment as a matter of law.[20]

C. THE SECOND AMENDMENT, ATTACHMENT C TO GREG'S THIRD AFF., IS NOT ADMISSIBLE AS, AND IT IS NOT PART OF, ANY ENFORCEABLE CONTRACT BETWEEN THE HOA AND RAMEY.

1. Movants failed their initial summary judgment to establish the conditions precedent to effectiveness of the Second Amendment as a contract between the HOA and Ramey.

a. **The Second Amendment fails the "*precise manner*" of adoption test**. To establish that the Second Amendment is a valid and enforceable part of the contract between the HOA and Ramey, the HOA has the burden of proof to show "all necessary legal requisites were established to yield an effective binding and mutually enforceable restriction."[21] As the Fort Worth Court of Appeals explained:

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21 *Bijan Youssefzadeh, Mussa, Inc. v. Brown*, 131 S.W.3d 641, 644-45 (Tex. App.—Fort Worth 2004, no pet) (citing *McCart v. Cane*, 416 S.W.2d 463, 465 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.)); *see also Dyegard Land Partnership v. Hoover*, 39 S.W.3d 300, 308 (Tex. App.--Fort Worth 2001, no pet.) (stating that "[w]ords used in a restrictive covenant may not be enlarged, extended, stretched, or changed by

> When the power to amend the land use restriction is reserved in the developer, the amendment of a restrictive covenant must be in the precise manner authorized by the dedicating agreement. The same 'precise manner' requirement should logically be required when the amendment mechanism lies other than with the developer.[22]

b. **Section 10.2 of the Original Declaration**. Section 10.2. of the Original Declaration, entitled, Term and Amendments, establishes the "precise manner" required to amend the Original Declaration:

> This Declaration may be amended by an instrument signed by Owners constituting not less than seventy-five percent (75%) of the votes of the Association and counter-signed by a duly authorized representative of the Town [of Flower Mound (the *Town*)] . . . . Any amendment must be recorded in the Denton County Land records.[23].

c. The Second Amendment, which Greg signed on August 8, 2022, and then filed of record on November 10, 2022, does not satisfy these two conditions precedent to the effectiveness of the Second Amendment.[24]

d. Fewer than seventy-five percent (75%) of the Owners eligible to vote signed the Second Amendment.[25]

e. No authorized representative of the Town countersigned the purported Second Amendment.[26] Greg admitted that the Town did approve it.[27]

f. Because the HOA failed to satisfy these express conditions precedent in the precise manner required by the Original Declaration, "all

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construction. Rather, words and phrases used in the covenant must be given their commonly accepted meaning.").

[22] *Bijan*, 131 S.W.3d at 644-45.

[23] Original Declaration § 10.2

[24] *See Syx v. LTG Vegan Ltd.*, No. 05-05-00854-CV, 2006 WL 2077567, at *2 (Tex. App.—Dallas July 27, 2006, pet. denied) (stating that "[f]or a subsequent instrument to amend original restrictive covenants, the instrument creating the original restrictions must establish both the right to amend such restrictions and the method of amendment.")

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[26] Smith Aff.¶ Appendix, Ex. C (Second Amendment)

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necessary legal requisites to yield an effective binding and mutually enforceable restriction that includes the terms of the Second Amendment did not occur.[28] The HOA has no right or power to enforce the Second Amendment against her.

g. Movants acts and omissions in breach of their fiduciary duties of care and loyalty to the HOA constituted, caused, and contributed to the HOA's breach of its contractual obligations to Ramey under the Original Declaration, as amended by the First Amendment. The Movants did not perform their fiduciary duties to the HOA in good faith, with reasonable care, and in a manner they reasonably believed to be in the best interest of the HOA.

h. These acts and omissions of the HOA, acting by and through Movants, breached the HOA's contractual and other duties to Ramey under the Original Declaration, as amended by the First Amendment.

i. Moreover, to the extent the HOA exercised any discretionary authority, the HOA, acting by and through Movants, they did so in an arbitrary, capricious, discriminatory, and unreasonable manner.

j. As a result of Movants breach of their duty of care and loyalty to the HOA, Movants' acts and omissions constitute, caused, and contributed to the HOA's breach of its contractual obligations to Ramey under the Original Declaration, as amended by the First Amendment. In the alternative, even if the Second Amendment were enforceable, and it is not, the acts and omissions remain unreasonable and the result the same.

k. Neither the HOA nor Movants are entitled to any presumption of reasonableness with regard to their acts and omissions in connection with their exercise of any discretionary authority in determining whether the HOA breach its contractual obligations to Ramey.

l. Moreover, even though section 209.0041(h) of the Texas Property Code may have lowered the approval threshold from 75% in the

[28] *Bijan Youssefzadeh, Mussa, Inc. v. Brown*, 131 S.W.3d 641, 644-45 (Tex. App.—Fort Worth 2004, no pet) (citing *McCart v. Cane*, 416 S.W.2d 463, 465 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.)); *see also Dyegard Land P'ship v. Hoover*, 39 S.W.3d 300, 308 (Tex. App.--Fort Worth 2001, no pet.) (stating that "[w]ords used in a restrictive covenant may not be enlarged, extended, stretched, or changed by construction. Rather, words and phrases used in the covenant must be given their commonly accepted meaning.").

Original Declaration to 67% under the statute, this statute did not eliminate the condition in the Original Declaration that Owners constituting not less than the requisite percentage of Owners—either **75%** or **67%**—must ***sign*** the amending instrument for it to become effective. The HOA failed to satisfy the Owner signature requirement.[29] Greg is the only person who signed the Second Amendment, and he did so almost four months after the July 19, 2022, annual meeting under suspicious circumstances.[30.]

m. The Original Declaration also mandates that an authorized representative of the Town of Flower Mound (the *Town*) countersign any amendment to the Original Declaration. The Second Amendment, which Greg signed on August 8, 2022, and filed of record on November 10, 2022, does not satisfy this requirement.[31] No representative of the Town signed the Second Amendment.[32]

2. The Second Amendment was not approved by a favorable vote of 67% of the Members at the July 19, 2022, Annual Meeting. The Board was scrambling for 5 ballots after the Meeting adjourned.

3. The Agenda for the August 9, 2022, Board Meeting reflects that, at the time of the Board Meeting, the Second Amendment still needed 5 votes to pass.

4. Ramey became a party to the Original Declaration, as amended by the First Amendment, when she took title to the Ramey Lot in January 2007. The Original Declaration, the contract between the HOA and Ramey, established the contractual prerequisites for amending this contract. To be effective as an amendment to the Original Declaration, as previously amended by the Second Amendment, the HOA must comply with the amendment procedures in the Original Declaration in a "precise manner" and rigidly perform "all necessary legal requisites" set forth in the Original Declaration and applicable law to amend the contract between the HOA and Ramey. Because the HOA failed to perform the prerequisites in the

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[29]

[30] Original Declaration § 10.2.

[31] *See Syx v. LTG Vegan Ltd.*, No. 05-05-00854-CV, 2006 WL 2077567, at *2 (Tex. App.—Dallas July 27, 2006, pet. denied) (stating that "[f]or a subsequent instrument to amend original restrictive covenants, the instrument creating the original restrictions must establish both the right to amend such restrictions and the method of amendment.")

[32] Smith Aff.¶ Appendix, Ex. C (Second Amendment)

"precise manner" set forth in the Original Declaration, the Second Amendment is not enforceable as a contract between the HOA and Ramey. The HOA cannot enforce the Second Amendment against Ramey, and Ramey cannot be in breach of its terms. The Second Amendment simply is not part of the enforceable contract between the HOA and Ramey or any other Member of the HOA.

5. On November 8, 2022, one day *after* the HOA's management company asked Ramey to stop demolition of the existing driveway, which was necessary to correct improper drainage of surface water toward the foundation at the front of Ramey's house to protect the foundation from water damage, Greg construction Greg signed and recorded the

D. **THE CORRESPONDENCE, WHICH IS INCLUDED IN ATTACHMENT D TO GREG'S AFFIDAVIT, IS NOT ADMISSIBLE FOR TRUTH OF THE MATTERS ASSERTED CONCERNING THE EXISTENCE OF VIOLATIONS OR RAMEY'S FAILURE TO CURE THEM.**

1. *Objections to Attachment D in its entirety*. Ramey objects to all of the letters in Attachment D to the Third Smith Aff. .

a. **TEX. R. EVID 803(6)**: Ramey objects to the letters in Attachment D because they are hearsay and, therefore, are not admissible for the truth of any matter stated therein. Greg's Affidavit does not lay the foundation for admissibility as business record under Tex. R. Evid. 803(6).

b. **Anticipation of Litigation and Post-Lawsuit Filing Letters**. Ramey objects to the letters in Attachment D because they are hearsay independent of Movant's failure to satisfy business records exception to the hearsay rule.

c. The HOA sent its first cease and desist letter to Ramey on December 16, 2022,[33] after disputes arose between the HOA and Ramey. The HOA then filed this suit in March 27, 2023.

d. Even if Movants had attempted to offer the post-December 16, 2022, letters as business records, the HOA did not create these letters in the ordinary course of business but to advance positions in regard to existing disputes in anticipation of litigation or after the commencement

[33] A copy of the December 16, 2022, letter (the *Cease-and-Desist Letter*) from the HOA's counsel to Ramey is included in Exhibit D to Greg's Third Aff.

of litigation. The circumstances surrounding their creation exhibit fatal indicia of unreliability.[34]

e. **Photographs**. Likewise, the photographs contained in the letters are not admissible against Ramey to show the existence of any violation.

2. Greg's Third Aff. does not the foundation for admissibility of each photograph as fair and accurate depiction its subject.

a. Even if Greg had laid the proper foundation for admission of the photographs as fair and accurate depictions of its subject, which he did not, abundant evidence exists of his lack of credibility with respect to such matters.[35]

3. The statements in Greg's Affidavit do not satisfy the requirements of Rule 166a(c)

a. "Summary judgment may be based on uncontroverted testimonial evidence of an interested witness . . . *if* the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."[36] The specific statements in Greg's Affidavit

b. Greg's statements do not the present evidence that is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.[37] not satisfy this standard. Moreover, Ramey objects to the following statements and attachments to the Smith Affidavit and proffers competent summary judgment evidence that controverts Movants' summary judgment evidence offered in support of their traditional motion for summary judgment and raises a genuine issue of material fact on each properly challenged element of Ramey's claims on which Movants' seek no-evidence summary judgment.

[34] Greg Depo.

[35] See Appx., Exhibit 2

[36] Tex. R. Civ. P. 166a(c).

[37] Tex. R. Civ. P. 166a(c).

4. In paragraph 2 of Smith Affidavit, Smith states: "I am the President of the Association and currently serve as on the Board with Lisa Loshelder and Brenda Barr Meckley."

a. ***Objection***: To the extent this statement is offered to establish Movants' legal status as duly and properly elected directors, Ramey objects to this statement in Greg's Third Aff. because it constitutes (a) an opinion, a conclusory statement rather than specific statement of fact or (b) a legal conclusion.[38]

5. In paragraph 2 of Smith Affidavit, Smith states: "We do not serve on the Architectural Control Committee of the Association."

a. ***Objection***: Ramey objects to this statement in Greg's Third Aff. because it constitutes an opinion, a legal conclusion, or both.[39] Conclusory statements or affidavits without supporting facts are not competent summary judgment evidence.

b. The Declaration expressly prohibits Directors from serving on, or being appointed to, the ACC. Greg intervened in Ramey's application before Ramey appealed and before the ACC had acted on Ramey's application for the ornamental fence. When the ACC did respond on January 20, 2023, it was more than 30 days after Ramey's December 14, 2022, request for approval.

[38] *Storck v. Tres Lagos Prop. Owners Ass'n*, 442 S.W.3d 730, 741 (Tex. App.—Texarkana 2014,pet. denied) (stating that, on evidence before court of appeals, "we are unable to conclude when the terms of the appointed officers expired, even though, party "testified both officers' terms expired," finding that this "testimony is simply Storck's opinion or legal conclusion that those terms expired because a members' meeting was held on that date."); *see also Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999) (concluding that a fiduciary's affidavit, "which gave no basis for its conclusions, *was nothing more than a sworn denial* of plaintiff's claims and could not support summary judgment") (emphasis added); *Seale v. Nichols*, 505 S.W.2d 251, 255 (Tex. 1974) (holding that statement by corporation's president in affidavit that he acted in his representative capacity failed to raise a material issue of fact on the issue of whether he signed promissory note in his representative capacity or in his personal capacity).

[39]

E. **IN PARAGRAPH 2 OF SMITH AFFIDAVIT, SMITH STATES: LISA LOSHELDER, BRENDA BARR MECKLEY, AND I ARE THIRD-PARTY DEFENDANTS IN THIS LAWSUIT FOR CLAIMS RELATED TO THE ACTIONS WE TOOK IN OUR CAPACITY AS BOARD MEMBERS OF THE ASSOCIATION.**

1. *Objection*. Ramey objects to this italicized portion of the statement in the Smith Affidavit because it is conclusory, a legal conclusion, or both.

2. *Controverting Evidence*. More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions."[40]

F. **IN PARAGRAPH 3 OF SMITH AFFIDAVIT, SMITH STATES: "AS BOARD MEMBERS, OUR POWERS AND DUTIES ARE ENUMERATED IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR POINT NOBLE.**

1. *Objection*: Ramey objects to this statement because it violates the best evidence rule, constitutes a legal conclusion, or both. The terms of the Original Declaration speak for themselves.

2. The Original Declaration is not the exclusive source of Movants' duties as officers and directors of the Association. Certain terms of Original Declaration itself are subject to statutory exceptions that override or supplement the interpretation of specific provisions of the Association's governing documents at issue in this lawsuit.

3. This statutory provision imposes a reasonableness standard on the exercise of discretionary authority, even if the HOA's governing documents purport to grant sole and absolute discretion.

4. Controverting Evidence. Ramey's Declaration and her other summary judgment evidence raise disputed issues of material fact that overcome the presumption that decisions of the HOA were reasonable and present an issue for trial. See TEX. PROP. CODE § 202.004(a); Li v, 652 S.W.3d at 897.

G. **IN PARAGRAPH 3 OF SMITH AFFIDAVIT, SMITH STATES: "AT ALL TIMES RELEVANT, I AND MY FELLOW BOARD MEMBERS WERE ACTING IN OUR CAPACITY AS BOARD MEMBERS OF THE ASSOCIATION AND DID NOT ENGAGE IN ANY ACTIONS OR DECISIONS THAT WERE NOT FOR THE BENEFIT OF THE ASSOCIATION. . . . MY ACTIONS AND DECISIONS WERE MADE IN GOOD FAITH, WITH ORDINARY CARE, AND IN A**

[40] *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Merrell Dow Pharms*., 953 S.W.2d at 711.

MANNER THEY REASONABLY BELIEVED TO BE IN THE BEST INTEREST OF THE ASSOCIATION.

1. ***Objection***: Ramey objects to this statement in the Smith Affidavit because it constitutes one or more of the following: (a) a conclusory statement unsupported by specific facts[41], or (b) an opinion or naked statement of intent unsupported by corroborating evidence.

a. None of the affidavits provide any underlying facts to support the assertions in this paragraph, and therefore the statements [**11] are merely conclusory. Because conclusory statements in an affidavit are not competent summary-judgment evidence, the officers failed to establish that they were entitled to judgment as a matter of law. See Burrow v. Arce, 997 S.W.2d 229, 235 (Tex. 1999) (concluding that a fiduciary's affidavit, "which gave no basis for its conclusions, was nothing more than a sworn denial of plaintiff's claims and could not support summary judgment"). Accordingly, summary judgment was not proper on the basis of section 22.235. or (c) a legal conclusion. Accord Storck, 442 S.W.3d at 741 (reasoning that statements about the expiration of the terms of board members and validity of elections are considered opinions or legal conclusions rather than evidence establishing the expiration of terms or validity of election). Each affidavit contains the following language relevant to this inquiry:

H. **IN PARAGRAPH 3 OF SMITH AFFIDAVIT, SMITH STATES: "I DID NOT ACT ALONE WITHOUT THE SUPPORT, APPROVAL, OR CONSENT OF THE OTHER BOARD MEMBERS."**

1. ***Objection***: Ramey objects to this statement in the Smith Affidavit because it constitutes one or more of the following: (a) a conclusory statement unsupported by specific facts[42], or (b) an opinion or naked statement of intent unsupported by corroborating evidence.

I. **IN PARAGRAPH 4 OF SMITH AFFIDAVIT, SMITH STATES: "ON NOVEMBER 8, 2022, THE SECOND AMENDMENT TO THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR POINT NOBLE ("SECOND AMENDMENT") WAS ADOPTED.**

[41] *See Seale v. Nichols*, 505 S.W.2d 251, 255 (Tex. 1974) (holding that statement by corporation's president in affidavit that he acted in his representative capacity failed to raise a material issue of fact on the issue of whether he signed promissory note in his representative capacity or in his personal capacity),

[42] *See Seale v. Nichols*, 505 S.W.2d 251, 255 (Tex. 1974) (holding that statement by corporation's president in affidavit that he acted in his representative capacity failed to raise a material issue of fact on the issue of whether he signed promissory note in his representative capacity or in his personal capacity),

ATTACHMENT C TO THIS AFFIDAVIT IS A TRUE AND CORRECT COPY OF THE SECOND AMENDMENT."

1. ***Objection***: Ramey objects to this statement in the Smith Affidavit because it constitutes one or more of the following: (a) a conclusory statement unsupported by specific facts[43], or (b) an opinion or naked statement of intent unsupported by corroborating evidence.

J. **IN PARAGRAPH 5 OF SMITH AFFIDAVIT, SMITH STATES: "OVER THE YEARS, ON A PROPERTY LOT OWNED BY LINA RAMEY ("RAMEY"), THERE HAVE BEEN NUMEROUS VIOLATIONS OF THE RESTRICTIVE COVENANTS OUTLINED IN THE ASSOCIATION'S DECLARATION AND SUBSEQUENT AMENDMENTS."**

1. ***Objection***: Ramey objects to this statement in the Smith Affidavit because it constitutes one or more of the following: (a) a conclusory statement unsupported by specific facts[44], or (b) an opinion or naked statement of intent unsupported by corroborating evidence.

K. **IN PARAGRAPH 5 OF SMITH AFFIDAVIT, SMITH STATES: SPECIFICALLY, RAMEY HAS BEEN IN VIOLATION IN THAT SHE HAS FAILED TO MAINTAIN HER PROPERTY AS REQUIRED BY THE PLAIN LANGUAGE OF THE ASSOCIATION'S RESTRICTIVE COVENANTS, INCLUDING, BUT NOT LIMITED TO THE FOLLOWING:**

1. ***Objection***: Ramey objects to this statement in the Smith Affidavit because it constitutes one or more of the following: (a) a conclusory statement unsupported by specific facts, see Seale v. Nichols, 505 S.W.2d 251, 255 (Tex. 1974) (holding that statement by corporation's president in affidavit that he acted in his representative capacity failed to raise a material issue of fact on the issue of whether he signed promissory note in his representative capacity or in his personal capacity); (b) an opinion or naked statement of intent unsupported by corroborating evidence; or (c) a legal conclusion. Accord Storck, 442 S.W.3d at 741 (reasoning that statements about the expiration of the terms of board members and validity of elections are considered opinions or legal conclusions rather than evidence establishing the expiration of terms or validity of election).

[43] *See Seale v. Nichols*, 505 S.W.2d 251, 255 (Tex. 1974) (holding that statement by corporation's president in affidavit that he acted in his representative capacity failed to raise a material issue of fact on the issue of whether he signed promissory note in his representative capacity or in his personal capacity),

[44] *See Seale v. Nichols*, 505 S.W.2d 251, 255 (Tex. 1974) (holding that statement by corporation's president in affidavit that he acted in his representative capacity failed to raise a material issue of fact on the issue of whether he signed promissory note in his representative capacity or in his personal capacity),

IX. Prayer

WHEREFORE, Lina Ramey respectfully requests that the Court deny Third Party Defendants' Motions

Respectfully submitted,

/s/ Thomas M. Whelan [2025-06-02]
Thomas M. Whelan
Texas Bar Number 21263800
Thalheimer, Cipione, Whelan & Morgan, PLLC
8350 N. Central Expy., Suite 1420
Dallas, Texas 75206
T: (214) 954-6815
TWhelan@tcwmlaw.com
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I, Thomas M. Whelan, certify that on June 2, 2025, my office served the foregoing document via electronic service to all parties on the service list.

/s/ Thomas M. Whelan [2025-06-02]
THOMAS M. WHELAN

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Shanna Mizell on behalf of Thomas Whelan
Bar No. 21263800
smizell@tcwmlaw.com
Envelope ID: 101530710
Filing Code Description: Response(s)
Filing Description: (Ramey's) to Third-Party Defendants' Motion for Summary Judgment
Status as of 6/3/2025 9:03 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Thomas MWhelan		twhelan@mcslaw.com	6/3/2025 12:00:43 AM	SENT
Casey Meyers	24053362	casey@hoalegal.com	6/3/2025 12:00:43 AM	SENT
Lance Erickson		Lance@HOALegal.com	6/3/2025 12:00:43 AM	SENT
William Scazzero		wscazzero@hbwvlaw.com	6/3/2025 12:00:43 AM	SENT
Lance Erickson		filings@hoalegal.com	6/3/2025 12:00:43 AM	SENT
J. WillConine		will.conine@tbjbs.com	6/3/2025 12:00:43 AM	SENT
Ryan Bennett		rbennett@hbwvlaw.com	6/3/2025 12:00:43 AM	SENT
Nina Martin		nina.martin@tbjbs.com	6/3/2025 12:00:43 AM	SENT
Shanna Mizell		smizell@tcwmlaw.com	6/3/2025 12:00:43 AM	SENT
Jeff Libersat		kjones@rmwbh.com	6/3/2025 12:00:43 AM	ERROR
Philip Traynor		Philip@hoalegal.com	6/3/2025 12:00:43 AM	SENT
Tishunna Gaines		Tishunna.Gaines@tbjbs.com	6/3/2025 12:00:43 AM	SENT
Vrutti Patel		vrutti@hoalegal.com	6/3/2025 12:00:43 AM	SENT
Shanna Mizell		smizell@mcslaw.com	6/3/2025 12:00:43 AM	SENT
Luke Doane		ldoane@hbwvlaw.com	6/3/2025 12:00:43 AM	SENT