No. 03-17-00846-CV

IN THE COURT OF APPEALS FOR THE THIRD
DISTRICT OF TEXAS AT AUSTIN

RICHARD W. JACKSON AND LISA C. JACKSON,
Appellants,
v.
JANICE COX AND HELEN RAMSEY,
Appellees.

From the County Court at Law No. 1, Travis County, Texas
Trial Court Cause No. C-1-CV-17-001833

SURREPLY BRIEF OF APPELLEES

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ATTORNEYS FOR APPELLEES

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ARGUMENT AND AUTHORITIES

I. Appellees Failed To Preserve Their Arguments And Waived Any Alleged Error.

In their Reply Brief, Appellants invoke Rule 33.1(a) of the Texas Rules of Appellate Procedure.[1] Pursuant to Rule 33.1(a), a party waives an alleged error if the party fails to preserve the error in the trial court:

> "As a prerequisite to presenting a complaint for appellate review, the record must show that: (1) the complaint was made to the trial court by a timely request, objection, or motion . . . "

Tex. R. App. P. Rule 33.1(a). Here, Appellants did not file a response or objection to Defendants' Motion to Dissolve the Temporary Injunction. Nor did Appellees urge the arguments that they now make to this Court.

In fact, in the trial court, Appellants actually ***agreed*** with the trial court's dissolution of the temporary injunction:[2]

> "If the – **I agree with counsel that if the Court has reversed the findings from the temporary injunction**, that notice is not required and prior ACA recommendation before an amendment can be filed, **then I agree that the temporary injunction should be dissolved. I wish I could come up with an argument that it doesn't, but I can't so I'm not going to."**

Pursuant to Texas law, "[c]omplaints and arguments on appeal must correspond with the complaint made at the trial court level." *Smith v. East*, 411 S.W.3d 519, 530

[1] Reply Brief at 6.

[2] RR at 33:16:23 (emphasis added).

(Tex.App.—Austin 2013, pet. denied); *Gutierrez v. Hiatt*, 2006 Tex.App. LEXIS 1747, *4 (Tex.App.—San Antonio, 2006, rehearing denied) (When Appellant's arguments on appeal as to denial of her motion for summary judgment did not comport with those arguments made at trial, the Court of Appeals found that the complaints were not properly preserved for review under Tex. R. App. P. 33.1(a)).

Therefore, after agreeing with the trial court's dissolution of the injunction, Appellants are foreclosed from raising new arguments – that were not presented to the trial court – on appeal. The Court should affirm the trial court's dissolution of the temporary injunction, a ruling that Appellants (1) agreed with and (2) admitted that they could not "come up with an argument" against dissolution "so I'm not going to."[3]

II. The Amendment Has Been Filed And, As They Have Offered To Do So On Several Occasions, Ms. Cox And Ms. Ramsey Will Not Record Any Additional Amendments.

There is no dispute that Ms. Cox and Ms. Ramsey recorded the amendment prior to Appellants filing their Notice of Appeal. There is also no dispute that this filed amendment is the sole amendment in dispute. Contrary to Appellants' unsupported suggestion, there is no evidence that Ms. Cox or Ms. Ramsey need to, want to, or will file another amendment. Simply put, there will be no other amendments.

[3] *Id.*

To confirm this fact, Appellees sent a letter to counsel for Appellants confirming that that Ms. Cox and Ms. Ramsey will not file any other amendment. In their Reply Brief, Appellants argue that there is nothing that would bar Ms. Cox and Ms. Ramsey from filing another amendment. However, Appellants are not being candid with the Court. On several occasions, Ms. Cox and Ms. Ramsey have offered to enter into a Rule 11 Agreement barring them from filing any additional amendments.[4] However, Appellants have refused to enter into the agreement.

Appellants' refusal to enter into such a Rule 11 Agreement fatally undermines their argument. If Appellants were truly concerned about Ms. Cox and Ms. Ramsey filing another amendment, they would have entered into the Rule 11 Agreement. As it is, their refusal indicates that they are more interested in maintaining an unsupported litigation position than being candid with the Court.[5]

III. Given The Changed Circumstances, The Trial Court Did Not Abuse Its Discretion In Dissolving The Injunction.

As Ms. Cox and Ms. Ramsey explained, the changed circumstances supporting the trial court's decision include the following: (1) newly revealed facts; (2) Ms. Woodall's non-suit of her claims together with Appellants' dropping of their

[4] Tab A – Email Concerning Rule 11 Agreement.

[5] Appellants' attempt to distinguish *Uresti* also fail. Appellants claim that *Uresti* can be distinguished because "the curtain necessarily falls on a candidacy on election day." Appellants' Reply Brief at 3. However, *Uresti* is on point because "the curtain necessarily falls" when the amendment was recorded and mooted the requested injunction prohibiting the recording of an amendment. *In re Uresti*, 377 S.W.3d 696, 697 (Tex. 2012).

breach and attempted breach of restrictive covenant claims; and (3) a change in the law concerning the interpretation of the restrictive covenant.

Importantly, Appellants do not dispute that newly revealed facts showed that Appellants had misled the trial court at the injunction hearing by claiming that there was a lack of due process and notice to the property owners. For example, at the temporary injunction hearing, Appellants told the trial court that "defendants actually blocked us from having a voice in that vote, and it's quite apparent why."[6] As detailed in Appellees' Response Brief, subsequent discovery revealed the truth: Plaintiff Ms. Woodall had sent a letter and flyer to all of the property owners, except possibly for Ms. Cox and Ms. Ramsey, opposing the amendment more than a month prior to the hearing.[7]

Instead of responding to this changed circumstance, Appellants ignored the trial court's acknowledgement that the newly revealed facts proved Appellants' prior due process "facts" to be false:

> **"Probably because there were things that were said in that [temporary injunction] hearing that may not necessarily [] be true today."[8]**

[6] Supp. RR Vol. 2 at 60:11-13.

[7] Appellees' Response Brief at 2-3 and 6-7

[8] RR at 7:3-5 (emphasis added).

The trial court made this statement at the *same* hearing in which the trial court granted the Motion to Dissolve the Injunction.[9] This changed circumstance – that the trial court referenced in explaining its changed ruling – is sufficient to support the dissolution of the temporary injunction.

Similarly, Appellants do not dispute that Ms. Woodall's non-suit of her claims and Appellants' dropping of their breach or attempted breach of restrictive covenant claims constitutes a changed circumstance. Plaintiffs' prior dropping of their claims was one of the stated reasons for the dissolution of the temporary injunction.[10] Furthermore, at the hearing, Appellees informed the trial court that Appellants had dropped their breach of contract claims.[11] Appellants have never responded to this change in circumstance.

Finally, the last change in circumstance is the trial court's ruling on the motions for summary judgment. Appellants claim that the trial court's ruling cannot constitute a change in circumstance. However, Appellants made no such argument in the trial court. Instead, as detailed above, Appellants agreed that the trial court should dissolve the temporary injunction based on its summary judgment ruling and

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[9] *Id.*

[10] CR at 44.

[11] RR at 14:4-10.

could not "come up with an argument" against the trial court's ruling.[12] Therefore, the trial court did not abuse its discretion in dissolving the temporary injunction.

IV. Conclusion and Prayer

WHEREFORE, PREMISES CONSIDERED, Appellees respectfully request that the Court dismiss the appeal as moot or affirm the decision of the trial court, and grant them such other relief as the Court deems proper.

Respectfully submitted,

/s/ Michael L. Navarre
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[12] RR at 33:16:23 (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was electronically served on counsel of record by electronic transmission on this the 10th day of April, 2018:

James Patrick Sutton – via jpatricksutton@jpatricksuttonlaw.com
The Law Office of J. Patrick Sutton
1706 W. 10th St.
Austin, Texas 78701

Mr. David M. Gottfried – via david.gottfried@thegottfriedfirm.com
The Gottfried Firm
West Sixth Place
1505 West Sixth Street
Austin, Texas 78703

/s/ Michael L. Navarre
Michael L. Navarre

CERTIFICATE OF COMPLIANCE

The Surreply Brief of Appellees' complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B) because it contains 1,195 words, excluding the parts of the response exempted by Tex. R. App. P. 9.4(i)(1). The undersigned relied on the word count of MS Word, the computer program used to prepare the brief.

/s/ Michael L. Navarre
Michael L. Navarre

TAB A

Affidavit of Michael L. Navarre with Exhibit 1—3/30/18 email between counsel

AFFIDAVIT OF MICHAEL L. NAVARRE

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, personally appeared Michael L. Navarre, who, being by me duly sworn, deposed as follows:

1. My name is Michael L. Navarre. I am over the age of twenty-one (21) years, am of sound mind, have never been convicted of a felony, and am fully competent and able to testify to the matters set forth herein. The information contained herein is based upon my personal knowledge and is true and correct.

2. I am an attorney with Beatty Bangle Strama, PC in Austin, Texas. I am the attorney of record for Appellees Janice Cox and Helen Ramsey in this case.

Attached to the Surreply Brief of Appellees is a true and correct copy of the following document:

Exhibit 1: March 30, 2018 email between J. Patrick Sutton and myself.

FURTHER AFFIANT SAYETH NOT.

Michael L. Navarre

SUBSCRIBED AND SWORN to before me on this the 10th day of April, 2018, to certify which witness my hand and seal of office.

AMY WEAPPA
NOTARY PUBLIC
ID# 8043011
State of Texas
Comm. Exp. 11-20-2018

Amy Weappa
Notary Public in and for the State of Texas
ID # 8043011
My Commission Expires: 11/20/2018

Michael Navarre

From: Michael Navarre
Sent: Friday, March 30, 2018 7:46 PM
To: 'j. patrick sutton law'
Subject: RE: Jackson v. Cox

Patrick, that does not answer the question. Are your clients willing to enter into an enforceable Rule 11 Agreement as described in the below email.

Thanks.

Michael L. Navarre

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From: j. patrick sutton law <jpatricksutton@jpatricksuttonlaw.com>
Sent: Friday, March 30, 2018 7:40 PM
To: Michael Navarre <mnavarre@bbsfirm.com>
Subject: Re: Jackson v. Cox

Mr. Navarre:
There is a stay in place barring your clients from recording any amendments.
Patrick Sutton

NOTE: this e-mail may have been dictated. Please forgive any misspellings or grammatical errors.

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On Mar 28, 2018, at 2:16 PM, Michael Navarre <mnavarre@bbsfirm.com> wrote:

Patrick,

I hope you are doing well. In the Reply Brief, your clients make several arguments concerning the letter in which my clients confirmed their agreement not to record any amendments to the Restrictive covenants during the pendency of the case in the trial court. As I previously offered, my clients remain willing to enter into an enforceable Rule 11 Agreement with these same terms.

Please let me know if your clients are willing to do so. I would appreciate a response this week so I can inform the Court.

Thank you.

Michael L. Navarre

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