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

REPLY BRIEF OF APPELLANTS

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STATEMENT OF FACTS IN REPLY

Most of Appellees' fact contentions and evidence were not submitted below with their motion to dissolve the injunction or at the hearing. This Court should disregard Appellees' citations to and reliance upon pages 61-190 of the supplemental clerk's record and their appendix. In any event, the Jacksons have consistently in the trial court contested the allegations in Cox's and Ramsey's brief and will continue doing so at appropriate times.

ARGUMENT IN REPLY

I. The Appeal to Reinstate the Temporary Injunction Is Not Moot

A live dispute is ongoing in the underlying litigation as to whether the restrictive covenants require (1) prior notice to all owners of any proposed amendment and (2) a recommendation from the subdivision's architectural committee (hereinafter, "the two preconditions"). Brief of Appellants at 2. Statements by Cox's and Ramsey's counsel at the hearing on dissolution of the injunction establish that Cox and Ramsey oppose the Jacksons' case in this regard, so there is a live, unresolved controversy. RR14, 23-24.

The temporary injunction granted as part of that controversy itself has continuing vitality because the dispute relates to "any"

amendments which Cox and Ramsey (and those acting in concert with them) might seek to record while this lawsuit is pending. Appellants' Tab C (TI Order). The Jacksons obtained the temporary injunction by proving that the two preconditions apply and that Cox and Ramsey would, if not restrained, amend the restrictive covenants without satisfying those two preconditions. By the trial court's findings and the temporary injunction's terms, any and all amendments – not merely the specific one in evidence as of the time of the temporary injunction hearing – needed to satisfy the two preconditions before being recorded. Appellants' Tab C (TI Order ¶ 4). The evident purpose of the temporary injunction was to enforce, in the face of a politically active adversary in the subdivision community, the trial court's legal and factual determinations from the hotly-contested evidentiary hearing.

Cox and Ramsey have not, on appeal, pointed to anything in the record demonstrating that they cannot or will not record other amendments to the restrictive covenants if the temporary injunction is not reinstated. They submitted no such evidence at the hearing below. The self-serving letter attached as Tab B to their brief, which was sent to undersigned counsel after the hearing and, indeed, after this appeal was noticed, is not part of the record and therefore

cannot be considered. *Till v. Thomas*, 10 S.W.3d 730, 734 (Tex. App.—Houston [1st Dist.] 1999, no pet.) ("The attachment of documents as exhibits or appendices to briefs is not a formal inclusion in the record on appeal and, thus, the documents cannot be considered."[1] (Neither can their Tab A, for the same reason.)

Cox's and Ramsey's reliance on *In re Uresti*, 377 S.W.3d 696 (Tex. 2012), is misplaced because *Uresti* is peculiarly an elections case where the curtain necessarily falls on a candidacy on election day, guaranteeing mootness. In the present case, by contrast, Cox and Ramsey themselves control whether and when they might seek to record amendments to the restrictive covenants; according to their theory of the case, they can do so at any time without satisfying the two preconditions.

In addition, the "capable of repetition but evading review" issue in *Uresti* is inapplicable here. In *Uresti*, a party seeking an injunction failed to carry his burden of showing that a challenged action of short duration might recur. *Id*. at 696. This case, however, involves an appeal of an order dissolving an injunction, not an order

[1] In any event, such an offer or statement, for which there is no consideration or mutuality, has no binding effect on anyone; at best, it could possibly be offered as evidence at another injunction hearing if the Jacksons go through that process again owing to the recording of yet another amendment. *See Domingo v. Mitchell*, 257 S.W.3d 34, 40 (Tex. App.—Amarillo 2008, pet. denied) (fundamentals of binding agreements discussed).

deciding the merits of an injunction. For purposes of this appeal, it was Cox and Ramsey who bore the burden of proof to dissolve the injunction. Furthermore, Cox and Ramsey failed to appeal the temporary injunction timely so as to preserve arguments concerning the merits of the grant of the injunction. The "capable of repetition but evading review" exception to mootness was not litigated at the temporary injunction stage and cannot under any circumstances be litigated here.

Finally, Cox and Ramsey are asking the Court adopt in law the adage that it's easier to beg to forgiveness than ask for permission. Cox and Ramsey failed to appeal the injunction timely, inexplicably waited many months and until the very eve of trial to seek its dissolution, then offered no proof at all of changed circumstances justifying as much. That afforded them a chance to rush out and record an amendment and generate a self-serving letter attempting to moot the controversy and block any appeal. If the dissolution of the injunction was an abuse of discretion, yet Cox and Ramsey remain free to participate in the recording of other amendments, they will be rewarded for such unfair gamesmanship.

Worse, Cox's and Ramsey's recordation of an amendment on the eve of trial would all but guarantee a delay of trial indefinitely,

starting up the machinery of litigation all over again with a new set of claims and another round of injunction proceedings. The Jacksons would have to amend their lawsuit to declare the new amendment invalid on various grounds; Ramsey and Cox create a new basis to assert breach of restrictive covenant (that is, the new restrictions in the amendment) for short-term rentals. If the Court allows actions like Cox's and Ramsey's to go unchecked on mootness grounds, litigants will be encouraged to file unsupported motions to dissolve injunctions indiscriminately, in defiance of the orderly process for timely interlocutory appeals. Sanctioning such procedural games will just prolong grudge matches and scorched-earth litigation.

II. This Court Cannot Consider the Propriety of Summary Judgment

This Court's jurisdiction in an appeal of an order dissolving an injunction is "extremely narrow" and precludes consideration of the summary judgment evidence or the propriety of summary judgment. *Murphy v. McDaniel*, 20 S.W.3d 873, 877 (Tex. App.—Dallas 2000, no pet.). Yet Cox's and Ramsey's brief relies extensively upon the summary judgment evidence below. Brief of Appellees at 1-2, 5-8. Cox and Ramsey are attempting to introduce at the appellate stage evidence they failed to introduce at the hearing on their motion to

dissolve the injunction. While the Jacksons do, for the record, contest Cox's and Ramsey's contentions,[2] this appeal is not the appropriate vehicle to do so. This Court must disregard all the argument and evidence that Cox and Ramsey rely upon in their brief and failed to submit below.

III. Cox and Ramsey Waived Argument Concerning the Woodall Nonsuit

Cox and Ramsey argue that a nonsuit filed by a party below, Ms. Woodall, constitutes a changed circumstance justifying dissolution of the injunction. Brief of Appellees at 8. A review of the reporter's record reveals that Cox and Ramsey did not raise this below, so the argument has been waived. Tex. R. App. P. 33.1(a).

In any event, as demonstrated above, the Jacksons' declaratory judgment claim that the two preconditions apply to all amendments has remained live throughout the case, so the injunction has vitality.

[2] For example, regardless of who got notice of Cox and Ramsey's proposed amendment, the summary judgment evidence was undisputed that there was no recommendation by the architectural committee. That failure alone, the Jacksons contended below, was enough to doom recordation of an amendment. They attempted to get clarification on the trial court's interlocutory summary judgment order on that point – the order is notably silent on it – but were rebuffed by the trial judge. RR29-30.

IV. There Was No Change in the Law

Cox and Ramsey argue that a change in the law justified dissolving the injunction, pointing to the trial court's ruling at summary judgment. Brief of Appellees at 9. However, an interlocutory ruling, not being final, is not controlling law. *See*, *e.g.*, *Murphy*, 20 S.W.3d at 878 (interlocutory summary judgment ruling was not a change in the law supporting dissolution of an injunction). Furthermore, *stare decisis* only comes into play with appellate decisions, not trial court decisions. *See Strong v. Sunray DX Oil Co.*, 448 S.W.2d 728, 793 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).

And at the risk of repeating the central argument of the Jacksons' opening brief, the purpose of a motion to dissolve "is not to give an unsuccessful party an opportunity to relitigate the propriety of the original grant." *Tober v. Turner of Texas, Inc.*, 668 S.W.2d 831, 836 (Tex. App.—Austin 1984, no writ). That is exactly what Cox and Ramsey are trying to do, however.

Cox and Ramsey have not demonstrated a change in the law justifying the dissolution of the injunction.

CONCLUSION

This Court should reject the contentions and arguments in Appellees' response brief, vacate the trial court's order dissolving the temporary injunction, reinstate the injunction, and remand the case for further proceedings.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on March 26, 2018, a true and correct copy of this reply 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 .6 point for clarity. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains **1500** words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

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