NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 09/15/09
PHILIP G. URRY,CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CRAIG EARLY and JILL EARLY, husband and wife,

Plaintiffs/Appellees,

v.

TATUM RANCH COMMUNITY ASSOCIATION, an Arizona corporation,

Defendant/Appellant.

No. 1 CA-CV 08-0622

DEPARTMENT A

MEMORANDUM DECISION

(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2005-013188

The Honorable John A. Buttrick, Judge

AFFIRMED

Gordon & Rees, L.L.P. — Phoenix
By Stephen W. Tully
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Attorneys for Appellant

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Attorneys for Appellees

J O H N S E N, Judge

¶1 Tatum Ranch Community Association (the "Association") appeals from a jury verdict in favor of Craig and Jill Early (the "Earlys") and the superior court's denial of its motions for judgment as a matter of law. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Tatum Ranch is a planned community governed by Covenants, Conditions and Restrictions ("CC&Rs"). Pursuant to the CC&Rs, "no improvements (whether temporary or permanent), alterations, repairs, excavation, grading, lighting, landscaping or other work which in any way alters the exterior appearance of any property within Tatum Ranch . . . shall be made or done . . . without the prior written approval of the governing Architectural Committee." The CC&Rs establish a Residential Architectural Committee (the "Committee") and empower it to adopt rules, regulations and guidelines for the performance of its duties, including procedures for the preparation, submission and determination of applications for any work requiring approval under the CC&Rs. Pursuant to the CC&Rs, the Committee has "sole and exclusive authority with respect to all approvals." The CC&Rs additionally state that the approval or disapproval of plans "shall be in the sole and complete discretion of [the Committee]," but that any approval requested

from the Committee "shall not be withheld unreasonably." The Committee's decisions may be appealed to Tatum Ranch's board of directors (the "Board").

¶3 The Earlys moved to Tatum Ranch in February 1999. In 2004, having decided to "revamp" their front yard and put in a front patio, the Earlys drove around Tatum Ranch to get ideas from other homes in the area. In June 2004, the Earlys submitted an "Application for Design Review" of their plan for "removal [of] trees [and] some shrubs" and "addition of 1 tree, other shrubs, [and] small bistro seats." The Committee determined the application contained insufficient information for review and stated it needed a "specific landscape plan."

¶4 In August, the Earlys submitted a handwritten document stating, "Our plans are as follows: Remove 2 trees (to eliminate excessive leaves, reduce bud population), [r]emove 5 shrubs, [p]ut in brick seating area (size does not exceed regulations), [p]ut in red yucca, [p]ut in fountain grass, [and p]ut in sisso[o] tree. We intend to complete this immediately or asap." A sketch was included showing the general location of the seating area, tree and shrubs. The Committee disapproved the plan, finding it "lack[ed] sufficient detail" and noting that

"fountain grass and sisso[o] tree [are] not on [the] approved plant list."[1]

¶5 The Earlys went ahead with the landscaping. At trial, Craig Early explained the work was already scheduled, they wanted to get it done and they thought they had no reason to believe their changes would not be approved. They then received a letter from Tatum Ranch stating, "Modifications that were expressly disapproved by the Architectural Committee were made to your property. Please either have these approved by the Architectural Committee at the October 25, 2004 meeting or permanently removed by October 28, 2004."

¶6 Craig Early consulted the community manager, Sean Bodkin, who suggested the Earlys reapply for approval and that if there was something specific they wanted to do it would "probably help [their] case" if they had examples of other residents doing the same thing. At Bodkin's suggestion, the Earlys filed two separate requests for approval, one for the landscaping and the patio and another for the sissoo tree. The request for approval of the patio included a significantly more detailed diagram of the landscaping changes showing the location

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[1] Pursuant to the "Guidelines for Community Living," "[p]lants used to landscape any visible area within Tatum Ranch must be from the Approved Plant List," which is available online.

of the patio and identifying the surface as "new sand set brick."

¶7 The Committee approved the landscaping but disapproved the sissoo tree and the patio. The Earlys were not informed why the patio was disapproved. The Committee did not tell the Earlys what sort of patio might be approved, nor did it tell them how they could modify the existing patio to receive approval.

¶8 Craig Early again met with Bodkin to find out if there "was something that [they] weren't doing or were doing that was wrong." The Earlys decided to appeal the Committee's decision to the Board. Bodkin assisted them, suggesting they submit photographs of houses in the neighborhood that had front-yard patios and benches. The Earlys photographed several such houses and sent the photos to Bodkin, who printed them and made packages for the Board to consider as part of the Earlys' appeal.[2]

¶9 In December, the Board upheld the Committee's disapproval of the patio seating area. Craig Early attended the board meeting and, as he was leaving, a Committee member approached him and said he would be available to sit down with

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[2] Bodkin testified at trial that the Board looked at the photos included in the Earlys' appeal. The photos were not admitted into evidence at trial.

the Earlys and discuss the situation. A couple of months later, Craig Early invited the board member to come to the Earlys' home and discuss whether there was "another avenue of how [they] can move forward." At that meeting, the two talked for approximately half an hour before the Committee member told Craig he would never approve a seating area for the Earlys.

¶10 After the Board rejected their appeal, the Earlys covered their patio with rocks so that the ground in their front yard was returned to its original condition. They left the bench in the front yard, however. In February and March 2005, the Earlys received notices that they were in violation of Tatum Ranch's rules and regulations because the bench remained in the front yard. After consulting Bodkin and the community's compliance coordinator, the Earlys moved the bench to a concrete area on the side of the house.

¶11 The Earlys then sued the Association, alleging breach of contract and breach of fiduciary duty and seeking injunctive relief. At trial, the Earlys and Bodkin testified to the facts recounted above. Rick Nowell, a former Committee and Board member, also testified.

¶12 Nowell testified that, in considering the Earlys' application, he and another member of the Committee went to their home to determine whether the patio would be aesthetically

appropriate. Nowell stated he did not recall seeing photos of the other yards and he voted to disapprove the patio because "aesthetically, based on the drawing that [he] saw, [he] did not feel that it was appropriate for the particular size of the [lot] or for that particular neighborhood. It was unique. There was nothing similar to that." Finally, he testified he participated in the Board's decision of the Earlys' appeal even though, as a former member of the Committee, he had participated in the decision the Earlys were appealing.

¶13 At the close of evidence, the Association moved for judgment as a matter of law ("JMOL"). The superior court denied the motion and, after the close of evidence, the jury found in favor of the Earlys on their claim that the Association breached the CC&Rs by acting unreasonably or unfairly. The court then denied the Association's renewed motion for JMOL and entered judgment ordering that the Earlys shall be permitted to "have and use [their] front yard patio" and awarding them their attorney's fees and costs.

¶14 The Association filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

A. Standard for Determining Whether an HOA Has Breached Its Duty to a Homeowner.

¶15 In *Tierra Ranchos Homeowners Assoc. v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007), this court adopted the Restatement (Third) of Property: Servitudes § 6.13 (2000) ("Restatement") as the standard by which discretionary decisions of a community association should be reviewed. 216 Ariz. at 201-02, ¶¶ 25, 27, 165 P.3d 179-80. Pursuant to the Restatement approach, a homeowners association has "the duty to 'treat members fairly' and the duty to 'act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers.'" *Id.* at 201, ¶ 25, 165 P.3d at 179 (quoting Restatement § 6.13(1)(b), (c)). A member challenging an action of the association bears the burden of proving the association breached its duty and, if the action by the association was within its discretion, that the breach has caused or threatens to cause injury. *Tierra Ranchos*, 216 Ariz. at 201, ¶ 25, 165 P.3d at 179.

¶16 The Association correctly notes that in *Tierra Ranchos* we did not decide whether a more deferential standard of review may apply if CC&Rs grant an association the power to act in its "sole discretion." *Id.* at 199 n.1, ¶ 16, 165 P.3d at 177 n.1. The Association argues we should hold that the CC&Rs in this case created a "deferential standard of review" under which the

Committee's decisions should not be reversed unless they are "clearly erroneous or unsupported by any credible evidence."

¶17 We decline to reach the issue of whether the CC&Rs in this case required a deferential standard of review because the Association did not make this argument to the superior court. *See Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 109-10, ¶ 17, 158 P.3d 232, 238-39 (App. 2007) (party waives argument raised for first time on appeal when the superior court had no opportunity to address the issue on its merits). Indeed, the Association itself proposed the instruction the court gave with respect to the Restatement's requirement of fair and reasonable treatment.[3] Because the Association requested the instruction the superior court gave, the Association may not argue on appeal that the court incorrectly instructed the jury as to how it should determine whether the Association breached its duty to the Earlys. *See Schlecht v. Schiel*, 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953) ("By the rule of invited error, one who deliberately leads the

[3] The instruction the court gave at the request of the Association provided that the Earlys had the burden to prove both that the Association acted unreasonably in refusing to approve the patio and that the failure to approve the patio caused or threatened to cause injury to the Earlys. In addition, the instruction cautioned the jury that it "should not second-guess the decisions of the Association," but that instead, it "should look at the process" the Committee and the Board "utilized in coming to their decisions."

court to take certain action may not upon appeal assign that action as error.”), *abrogated in part on other grounds as recognized in A Tumbling-T Ranches v. Paloma Inv. Ltd. P’ship*, 197 Ariz. 545, 552, ¶ 23, 5 P.3d 259, 266 (App. 2000).

B. Sufficient Evidence Supported the Jury’s Verdict.

¶18 The Association argues that, even if the Restatement standard applies, the Earlys produced no evidence of unfairness or unreasonableness and, therefore, the verdict was not supported by the evidence. “In reviewing a jury verdict, we view the evidence in a light most favorable to sustaining the verdict, and if any substantial evidence could lead reasonable persons to find the ultimate facts sufficient to support the verdict, we will affirm the judgment.” *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). Furthermore,

> [w]e must not “take the case away from the jury” by combing the record for evidence supporting a conclusion or inference different from that reached here. . . . “Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.”

Flanders v. Maricopa County, 203 Ariz. 368, 371, ¶ 5, 54 P.3d 837, 840 (App. 2002) (quoting *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 56, ¶ 27, 961 P.2d 449, 454 (1998)).

¶19 In order to prevail, the Earlys were required to prove the Association, in the exercise of its discretion, treated them

unfairly or unreasonably, thus causing or threatening to cause them injury. *See Tierra Ranchos*, 216 Ariz. at 201, ¶ 25, 165 P.3d at 179. As recounted above, the jury was presented with evidence that the Earlys made several efforts to receive approval for their patio application and received no reason for its disapproval and no information to guide them in trying to design an acceptable patio. The jury heard that the community contained other homes with similar patios and that the Earlys had provided the Board with evidence of this fact. It also heard that as a Committee member, Nowell had voted to disapprove the patio and yet did not recuse himself from deciding the Earlys' appeal of that decision to the Board.

¶20 Although the superior court commented in denying the Association's motion for JMOL that this was "clearly a close case," we cannot say the jury's determination that the Association treated the Earlys unreasonably or unfairly was unsupported by "any substantial evidence." *Styles*, 185 Ariz. at 450, 916 P.2d at 1166.[4]

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[4] The Association also argues that the superior court erred in denying its motions for JMOL. Because we have determined the jury's verdict was supported by sufficient evidence, the superior court did not err in denying the Association's motions for JMOL. *See Acuna v. Kroack*, 212 Ariz. 104, 111, ¶ 24, 128 P.3d 221, 228 (App. 2006) ("we review the evidence in a light most favorable to upholding the jury verdict and will affirm if any substantial evidence exists permitting reasonable persons to reach such a result.") (quotation and citation omitted).

C. The Doctrine of Unclean Hands Did Not Preclude the Earlys from Receiving Equitable Relief.

¶21 Finally, the Association argues the Earlys were precluded by the doctrine of unclean hands from receiving equitable relief. More specifically, it argues the Earlys should not be permitted to keep their patio because it was built "in direct contravention of the CC&Rs and after receiving not one, but two, disapprovals for their landscaping changes."

¶22 The Association's argument refers to the principle that "[a plaintiff] who comes into equity must come with clean hands," such that courts "will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy" if he has "violated conscience, or good faith, or other equitable principle, in his prior conduct." *Sines v. Holden*, 89 Ariz. 207, 209-10, 360 P.2d 218, 220 (1961). "The application of the 'clean hands' doctrine rests in the sound discretion of the trial court." *Manning v. Reilly*, 2 Ariz. App. 310, 314, 408 P.2d 414, 418 (1965).

¶23 During a hearing after the trial, the Association argued "the evidence at trial was that the party who breached, willfully breached this contract, and a party with unclean hands can't get equitable relief." This brief reference was the only mention of the doctrine of unclean hands before the superior court. Even if this was sufficient to preserve the issue for

appeal, *see* *Airfreight Exp.*, 215 Ariz. at 109-10, ¶ 17, 158 P.3d at 238-39 (party waives argument raised for first time on appeal when the superior court had no opportunity to address the issue on its merits), we nevertheless see nothing in the record to suggest the superior court abused its discretion in impliedly rejecting the Association's argument by entering judgment in favor of the Earlys. Although the Earlys admittedly altered their landscaping in violation of the CC&Rs, that was not necessarily a violation of conscience, good faith or equitable principles, and the superior court did not abuse its discretion in granting the Earlys equitable relief.

CONCLUSION

¶24 For the reasons stated above, we affirm the superior court's judgment. We grant the Earlys' request for costs and reasonable attorney's fees on appeal, contingent on their compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
DANIEL A. BARKER, Judge