

Opinion issued February 3, 2011



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-09-00654-CV

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**YIGAL BOSCH, Appellant**

**V.**

**CEDAR VILLAGE TOWNHOMES HOMEOWNERS ASSOCIATION,  
INC., Appellee**

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**On Appeal from the County Civil Court at Law No. 3  
Harris County, Texas  
Trial Court Case No. 884,135**

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**MEMORANDUM OPINION**

Yigal Bosch appeals a judgment in favor of Cedar Village Townhomes Homeowners Association, Inc. ("Cedar Village") for \$21,002.60 in assessments,

late fees, and prejudgment interest and \$26,689.55 in attorney's fees. Cedar Village sued Bosch for unpaid assessments under the Condominium Declaration, and Bosch counterclaimed. After the trial court granted two motions for partial summary judgment, the remaining issues of damages and attorney's fees were tried to a jury. In ten issues, Bosch asserts that the trial court erred by (1) granting summary judgment in favor of Cedar Village on his claims for negligence, mismanagement, fraud, and theft; (2) finding that Cedar Village did not breach a fiduciary duty or abuse association funds by failing to request that its insurer defend his counterclaims; (3) awarding attorney's fees to Cedar Village; and (4) denying Bosch a fair trial in its exclusion and admission of evidence. We affirm the judgment of the trial court.

### **Background**

Cedar Village is a homeowners association for a 38-unit condominium complex in Houston, Texas. Bosch owns five units in the complex. A fire destroyed one of Bosch's units and damaged some of the nearby units. As required by its Declaration, Cedar Village carried insurance that covered the common elements of the complex. Cedar Village used insurance proceeds to rebuild common elements of the condominium complex damaged by the fire. Cedar Village did not rebuild the portions of Bosch's unit that it determined were not part of the common elements of the complex as defined in the Declaration.

Under Section 22 of the Declaration, each unit owner is obligated to pay monthly assessments. The monthly assessments include the estimated expenses to maintain the general common elements. Bosch failed to pay all the assessments that were due. Cedar Village sent Bosch a written demand for payment and then filed this suit.

Bosch filed an answer and counterclaim. Cedar Village filed a motion for partial summary judgment. The trial court rendered summary judgment that Bosch take nothing on all of his affirmative claims and that Bosch was liable to Cedar Village for non-payment of assessments and attorney's fees. The only issues remaining after the trial court granted Cedar Village's first motion for partial summary judgment were the amount of unpaid assessments and Cedar Village's reasonable and necessary attorney's fees.

Bosch filed an amended answer and amended counterclaim re-asserting that he had paid the assessments to Cedar Village and asserting counterclaims for negligence, mismanagement, and civil theft. Cedar Village filed its second motion for partial summary judgment addressing the claims raised in Bosch's amended original answer and second amended counterclaim. The trial court granted that summary judgment.

The case proceeded to a jury trial on the two remaining issues: the amount of Cedar Village's damages and attorney's fees. The jury found \$21,002.60 for

Bosch's failure to pay assessments and \$26,689.55 for reasonable and necessary attorney's fees. The trial court rendered final judgment, stating it was rendering judgment "[i]n accordance with this Court's partial summary judgments and the jury's findings." Bosch filed a motion for new trial, which was overruled by the trial court.

### **Summary Judgment**

Bosch's first, second, fourth, and seventh issues address matters raised in Cedar Village's motions for partial summary judgment. Specifically, he contends that the trial court erred by granting Cedar Village's motions for partial summary judgment and in finding Cedar Village was not negligent, did not mismanage the repairs of a condominium unit, did not commit fraud, and did not commit civil theft.

#### **A. Standard of Review**

We review summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When a party seeks summary judgment on both traditional and no-evidence grounds, we first review the trial court's summary judgment under the no-evidence standard of Rule 166a(i). *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the nonmovant failed to produce more than a scintilla of evidence raising a genuine fact issue on the challenged elements of his claims, then there is no need to analyze whether the movant's

summary judgment proof satisfied the traditional summary judgment burden of proof under Rule 166a(c). *Id.*

A traditional summary judgment under Rule of Civil Procedure 166a(c) is properly granted only when the movant establishes that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Provident Life & Accid. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In deciding whether there is a disputed material fact precluding summary judgment, evidence favorable to the nonmovant will be taken as true, every reasonable inference must be indulged in favor of the nonmovant, and any doubts must be resolved in favor of the nonmovant. *Knott*, 128 S.W.3d at 215.

## **B. Negligence**

In his first issue, Bosch contends that the trial court erred by granting Cedar Village's motion for summary judgment on his negligence claim for failure to insure his condominium unit. Cedar Village moved for summary judgment on both no-evidence and traditional grounds. To prove an action for negligence, the plaintiff must establish that: (1) the defendant owed a legal duty to the plaintiff; (2) the defendant breached that duty; and (3) the breach proximately caused the plaintiff's injury. *W. Invs. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). Bosch claims that a duty was created by contract and by statute.

## **1. No Duty under the Declaration**

First, Bosch asserts that Cedar Village had a duty under the Declaration to insure and rebuild his condominium unit, and that Cedar Village breached that duty by not doing so. Specifically, Bosch contends that the last two sentences of section 21 of the Declaration create such a duty. Those sentences provide, “Each owner may obtain additional insurance at his own expenses for his own benefit. Insurance coverage on the furnishings and other items of personal property belonging to the owner, and casualty and public liability insurance coverage within each individual unit, are specifically made the responsibility of the owner thereof.” Bosch asserts that these sentences indicate that everything except furnishings had to be insured by Cedar Village and that the word furnishings includes interior items such as paint, wallpaper, and other finishing elements.

These sentences do not create any duty on the association; they advise the owner of his or her responsibility to insure certain furnishings and personal property. The word “furnishings” does not reach as far as Bosch contends. “Furnishings” generally refers to “furniture, fittings, and other decorative accessories, such as curtains and carpets, for a house or home.” NEW OXFORD AMERICAN DICTIONARY 689 (2001). Other portions of section 21 make clear that any insurance obligation is limited to insurance of the common elements, and Bosch did not present any competent summary judgment evidence that Cedar

Village did not pay for damage to the common elements. The first sentence of section 21 provides,

The assessments made shall be based upon the cash requirements deemed to be such aggregate sum as the Managing Agent or Board of Managers of the Association shall from time to time determine is to be paid by all of the owners, including Declarant, to provide for the payment of all estimated expenses growing out of or connected with the maintenance and operation of the *general common elements* . . . .

(Emphasis added). The Declaration defines the common elements of the complex to exclude the interior of the units from the unfinished sheetrock walls inward and the utilities serving individual units. Specifically, the Declaration defines “general common elements,” in pertinent part, as “[t]he land on which the buildings are located” and “[t]he foundations, columns, girders, beams, supports, main walls and roofs.” The Declaration also provides that a “condominium unit” is an interest in the general common elements and the space contained “within the perimeter walls, floors and ceilings of a building.” Section 16 clarifies that an owner “shall not be deemed to own the undecorated and/or unfinished surfaces of the perimeter walls, floors and ceilings surrounding” the unit, but does own the inner decorated or furnished surfaces of the perimeter and finished surfaces of the perimeter and interior walls, floors and ceilings, doors, windows and other such elements consisting of paint, wallpaper, and other finishing elements. Section 21, by specifying that Cedar Village was responsible for the general common elements, only extends to the unfinished walls, floors, ceilings, and similar items.

Finally, the plain language of section 21 states that Cedar Village “may” provide fire insurance<sup>1</sup> without imposing a requirement to do so. *See Ramsay v. Tex. Trading Co., Inc.*, 254 S.W.3d 620, 631 (Tex. App.—Texarkana 2008, pet. denied) (use of “may” in contract suggests “conditional or possible result rather than a mandatory one”); *cf. Mabon Ltd. v. Afri-Carib Enters., Inc.*, 29 S.W.3d 291, 297 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (use of “shall” in contract is mandatory term).

We conclude that the Declaration does not create a duty for Cedar Village to insure Bosch’s unit.<sup>2</sup>

## **2. No Duty under the Property Code**

Second, Bosch asserts that section 82.111(b) of the Texas Uniform Condominium Act (“the Act”) creates a duty by Cedar Village to insure Bosch’s property. *See* TEX. PROP. CODE § 82.111(b) (Vernon 2007). Section 82.111(b) requires a condominium association to maintain certain casualty insurance on condominium units, in addition to insuring the common elements, if such insurance

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<sup>1</sup> Section 21 states that the assessments determined by Cedar village “*may* include, among other things, . . . fire insurance . . . , issued in the amount of the maximum replacement value of all of the condominium units . . . .” (emphasis added).

<sup>2</sup> We do not address whether the Declaration could serve as the basis for the creation of a duty recognized in tort. *Cf. Sw. Bell Tel. Co. v. Delanney*, 809 S.W.2d 493, 495 (Tex. 1991) (holding that claims for negligent failure to include customer’s directory advertisement sounded solely in contract). This argument was not raised by the parties.



is readily available to the association. *Id.* Section 82.002(c), which governs the applicability of Section 82.111(b), provides as follows:

This section and the following sections apply to a condominium in this state for which the declaration was recorded before January 1, 1994; Sections 82.005, 82.006, 82.007, 82.053, 82.054, 82.102(a)(1)–(7) and (12)–(22), 82.108, 82.111, 82.113, 82.114, 82.116, 82.157, and 82.161. The definitions prescribed by Section 82.003 apply to a condominium in this state for which the declaration was recorded before January 1, 1994, to the extent the definitions do not conflict with the declaration. *The sections listed in this subsection apply only with respect to events and circumstances occurring on or after January 1, 1994, and do not invalidate existing provisions of the declaration, bylaws, or plats or plans of a condominium for which the declaration was recorded before January 1, 1994.*

*Id.* § 82.002(c) (Vernon Supp. 2010) (emphasis added).

The Declaration was recorded on August 8, 1977. Therefore, under the plain language of section 82.002(c), section 82.111(b) does not apply and does not invalidate existing provisions of the Declaration because the Declaration was recorded before January 1, 1994. *See id.* We conclude that Cedar Village had no duty under the Act to insure Bosch’s unit.

We overrule Bosch’s first issue.

### **C. Mismanagement**

In his second issue, Bosch contends that the trial court erred in dismissing his claim of negligence for “mismanagement” of the repairs and the funds associated with the repairs. Bosch presented no admissible evidence in support of this claim. In his affidavit, Bosch stated that the repair took twenty months and

Cedar Village did not use the insurance proceeds to repair fully his unit or to reimburse him. The trial court, however, sustained Cedar Village's objections to his affidavit and Bosch does not challenge that ruling. With no evidence to raise a fact issue on his mismanagement claim, the trial court properly granted summary judgment. *See Knott*, 128 S.W.3d at 215.

We overrule Bosch's second issue.

#### **D. Fraud**

In his fourth issue, Bosch contends that the trial court erred in granting summary judgment on his fraud claim.

The elements of fraud are: (1) a material misrepresentation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made the statement recklessly without any knowledge of the truth; (4) the speaker made the representation with the intent that the other party should act on it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). As part of its motion for summary judgment, Cedar Village specifically stated that Bosch had no evidence that it made a material misrepresentation or that any misrepresentation was false. In his response to the motion for summary judgment, Bosch presented no evidence

of a misrepresentation. Thus, the trial court properly granted the no-evidence motion for summary judgment. *See Ford Motor Co.*, 135 S.W.3d at 600.

Bosch also asserts that Cedar Village received insurance proceed covering some of the disputed items, such as air conditioning vents, but “concealed the payments” from Bosch. Bosch did not, however, plead fraud by nondisclosure. In his response to Cedar Village’s motion for summary judgment on his fraud claim, Bosch included no evidence to support the assertions of “concealed payments.” In his affidavit submitted with his response, Bosch does not mention the concealment. Accordingly, no-evidence summary judgment was proper on Bosch’s fraud claim. *See id.*

We overrule Bosch’s fourth issue.

#### **E. Civil Theft**

In his seventh issue, Bosch argues that the trial court erred by finding Cedar Village did not commit civil theft. Texas Rule of Appellate Procedure 38.1(i) requires that an appellant’s brief “contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.” TEX. R. APP. P. 38.1(i). “Rule 38 requires [a party] to provide us with such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue.” *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). “This is not done by

merely uttering brief conclusory statements, unsupported by legal citations.” *Id.* “Issues on appeal are waived if an appellant fails to support his contention by citations to appropriate authority . . . .” *Abdelnour v. Mid Nat’l Holdings, Inc.*, 190 S.W.3d 237, 241 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Similarly, appellate issues are waived when the brief fails to contain a clear argument for the contentions made. *Izen v. Comm’n for Lawyer Discipline*, 322 S.W.3d 308, 322 (Tex. App.—Houston [1st Dist.] 2010, pet. filed).

Bosch’s argument within this issue contains no citation to authority concerning theft. Accordingly, we hold that this issue is waived due to inadequate briefing. *See Abdelnour*, 190 S.W.3d at 241.

We overrule Bosch’s seventh issue.

### **Breach of Fiduciary Duty and “Proper Legal Defender”**

In his third issue, Bosch asserts that the trial court “erred in finding that Cedar Village did not breach its fiduciary duty to Bosch.” In his fifth issue, Bosch contends that the trial court “erred in finding that Cedar Village did not abuse association’s funds by not using the proper legal defender.”

Bosch’s live pleading from the trial court does not contain any allegations of breach of fiduciary duty or of “not using the proper legal defender.” These claims are not mentioned in Cedar Village’s motions for summary judgments or Bosch’s responses. There is no record that Bosch submitted a jury question on these issues.

The first time these claims appear in the record is in Bosch’s motion for new trial. A motion for new trial is too late to raise a claim. *See Hollingsworth v. Hollingsworth*, 274 S.W.3d 811, 815 (Tex. App.—Dallas 2008, no pet.) (affirmative defense waived when first raised in motion for new trial).

We overrule Bosch’s third and fifth issues.

### **Issues Concerning Conduct of the Jury Trial**

In his eighth issue, Bosch complains of the admission of evidence. In his ninth issue, he asserts the trial court erred in the exclusion of evidence. In his tenth issue, Bosch contends generally that “in all aspects of the judicial process, Bosch was denied a fair trial.”

#### **A. Admission and Exclusion of Evidence**

##### **1. Standard of Review**

We apply an abuse of discretion standard to the question of whether a trial court erred in an evidentiary ruling. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). The admission or exclusion of evidence is a matter within the trial court’s discretion. *Id.* (citing *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995)). A trial court abuses its discretion when it rules without regard to any guiding rules or principles. *Id.* We must uphold the trial court’s ruling if there is any legitimate basis for its ruling. *Id.*

## **2. Admission of Documents at Trial**

In his eighth issue, Bosch complains of the admission of evidence. Specifically, Bosch contends the trial court erred in not allowing Bosch time to study documents that were submitted on the day of trial. As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion that complied with the Texas Rules of Evidence and that the trial court ruled on the request, objection, or motion, either expressly or impliedly, or refused to rule, and the complaining party objected to the refusal. TEX. R. APP. P. 33.1(a)(1), (2). The record in this appeal does not show that Bosch objected to the documents or obtained a ruling on the admissibility of the documents. Therefore, he has not preserved this issue for appeal. *See id.*; *Mieth v. Ranchquest, Inc.*, 177 S.W.3d 296, 307 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding failure to object to evidence at trial waives complaint on appeal).

We overrule Bosch’s eighth issue.

## **3. Exclusion of Evidence at Trial**

In his ninth issue, Bosch asserts that “[t]he [t]rial [c]ourt erred in not allowing Bosch to testify about the fire and theft before the jury.” As stated above, to preserve a complaint for appellate review, the record must show that the complaint was made to trial court by timely request, objection, or motion that

complied with the Texas Rules of Evidence. TEX. R. APP. P. 33.1(a)(1). When a trial court improperly excludes evidence, a party must show that the error affects a substantial right of the party and the substance of the error was made known to the court by offer or was apparent from the context in which questions were asked. TEX. R. EVID. 103(a)(2). A party must present the nature of the evidence with enough specificity that an appellate court can determine its admissibility and whether any exclusion was harmful. *See In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). The record before us does not contain an offer of the evidence that Bosch contends was erroneously excluded. Accordingly Bosch has not preserved this issue for appeal. *See* TEX. R. APP. P. 33.1(a)(1).

We overrule Bosch’s ninth issue.

## **B. Fair Trial**

In issue ten, Bosch complains generally that, “in all respect [sic] of the judicial process, Bosch was denied a fair trial.” Within this issue, Bosch asserts that he was not able to address matters that were disposed of by summary judgment, such as Cedar Village’s failure to turn over the fire insurance proceeds to him (i.e., the civil theft claim). We have already upheld the trial court’s granting of summary judgment on these issues. Thus, the jury trial concerned only two issues: (1) the dollar amount of Cedar Village’s damages and (2) the dollar amount

of Cedar Village's reasonable and necessary attorney's fees. Testimony concerning the fire and the alleged theft was irrelevant. *See* TEX. R. EVID. 401 (stating relevant evidence has tendency to make existence of fact that is of consequence to determination of action more probable or less probable). The trial court, therefore, properly excluded Bosch's testimony on the fire and alleged theft. *See* TEX. R. EVID. 402 ("Evidence which is not relevant is inadmissible.").

We overrule Bosch's tenth issue.

### **Attorney's Fees**

In his sixth issue, Bosch challenges the trial court's award of attorney's fees to Cedar Village. Bosch contends that Cedar Village was not the prevailing party and thus not entitled to fees and also that the attorney's fees were not reasonable and necessary.

#### **A. Prevailing Party**

Bosch contends that the trial court erred in awarding attorney's fees because "the question of who prevail[ed] was never established." In determining who is a prevailing party for the purposes of an attorney's fees award, we look to the judgment. *See Intercont'l Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 656 (Tex. 2009). Cedar Village sued for unpaid assessments. The final judgment awards Cedar Village \$21,002.60 in damages for those unpaid assessments. We conclude that Cedar Village is the prevailing party in this case.



*See id.* at 655 (stating party prevails when trial court awards monetary, declaratory, or injunctive relief on its claims).

Bosch contends that the trial court could not determine who prevailed because Bosch was not allowed to present his defense of payment. Bosch further contends that there was no proof of presentment of the claim. However, Bosch has provided this court with only a partial reporter's record, consisting of a three-and-a-half page excerpt of his testimony from the jury trial. A party may prosecute an appeal with a partial reporter's record. *See* TEX. R. APP. 34.6(c). Rule 34.6(c)(1) provides that when an appellant requests only a partial reporter's record, "the appellant must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points or issues." TEX. R. APP. 34.6(c)(1). An appellant's failure to file a statement of points or issues "require[s] the appellate court to affirm the trial court's judgment." *Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002); *see also Mason v. Our Lady Star of the Sea Catholic Church*, 154 S.W.3d 816, 821 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (stating failure to file statement of points results in presumption that omitted portions of record are relevant and support trial court's judgment).

The record before us contains no statement of points or issues from Bosch. Accordingly, we presume that the record supports the trial court's judgment, including that Cedar Village presented evidence of presentment of the claim and

that Bosch was allowed to present any relevant evidence. *See Bennett*, 96 S.W.3d at 229.

**B. Reasonableness and Necessity of Attorney's Fees.**

Bosch also contends that the attorney's fees awarded to Cedar Village were not reasonable and necessary. As we note above, Bosch presented us with a partial reporter's record, but the record before us contains no statement of points or issues. We therefore affirm the trial court's award of attorney's fees. *See id.*

We overrule Bosch's sixth issue.

**Conclusion**

We affirm the judgment of the trial court.

Harvey Brown  
Justice

Panel consists of Justices Jennings, Higley, and Brown.