

Opinion issued August 11, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-01086-CV

GABRIEL DUNCAN AND EDWARD DUNCAN, Appellants

V.

**DOMINION ESTATES HOMEOWNERS ASSOCIATION, CHARLES
AMOS, THELMA BOWIE, NATALIE POWELL, AND MARQUES
COLLINS, Appellees**

**On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause Nos. 2007-67563**

MEMORANDUM OPINION

Appellants, Gabriele and Edward Duncan, challenge the trial court's entry, after a jury trial, of a take-nothing judgment in favor of appellee, Dominion Estates Homeowners Association ("DEHA"), and the trial court's rendition of summary judgment in favor of appellees, Charles Amos, Thelma Bowie, Natalie Powell, and Marques Collins (the "DEHA board members"), in the Duncans' suit against DEHA and the DEHA board members for breach of restrictive covenants and declaratory judgment. In their first issue, the Duncans contend that the summary-judgment motion of the DEHA board members did not challenge the elements of the Duncans' claims or conclusively establish an affirmative defense. In their second and third issues, the Duncans contend that the evidence at trial conclusively established that DEHA "failed to comply" with the Dominion Estates Declaration of Covenants, Conditions and Restrictions (the "Declaration") when it assessed a \$250 special assessment and the Duncans incurred damages in the amount of \$250. In their fourth and fifth issues, the Duncans contend that the evidence at trial conclusively established that the DEHA Architectural Review Committee's "Design Guidelines," which included "monetary fines in specific dollar amounts" and "imposed weekly late fees for delinquent assessments," were not authorized by the Declaration. In their sixth, seventh, and eighth issues, the Duncans contend that, after the jury trial, the trial court erred in not rendering judgment in their favor on their claim for breach of restrictive covenants, awarding them attorney's fees,

and ordering the release of funds that they had deposited with the registry of the trial court.

We reverse the trial court's take-nothing judgment entered against the Duncans on their breach of restrictive covenant claim against DEHA, render judgment in the Duncans' favor in the amount of \$250 on this claim, and remand the Duncans' claim for attorney's fees to the trial court. We also reverse the trial court's order granting summary judgment in favor of the DEHA board members and remand those claims to the trial court for further proceedings.

Background

The Duncans owned a home located in the Dominion Estates subdivision subject to restrictive covenants set forth in the Declaration, which provided for, among other things, the creation of an Architectural Review Committee (the "ARC"). The ARC separately created the Design Guidelines, which provided that each homeowner had the duty "to keep and maintain the[ir] Lot, its yard and landscaping, and all improvements therein and thereon, in a well maintain[ed], safe, clean and attractive condition." Citing this provision, DEHA, on May 10, 2007, sent the Duncans, by certified mail, a letter stating that they were in violation of the ARC Design Guidelines and instructing them to, among other things, remove foil that had been wrapped around some exterior pipes on their home. In its letter, DEHA noted that failure to comply with its instructions to remove the foil

could result in a “fine” as well as “corrective action at the owner’s expense.” This first certified letter was returned to DEHA as unclaimed.

DEHA sent the Duncans a second letter, which was dated June 5, 2007 but postmarked June 11, 2007, stating that the Duncans remained in violation of the Design Guidelines. In this letter, which the Duncans received on June 15, 2007, DEHA, citing the same Design Guideline provision that it had referenced in its prior letter, instructed the Duncans to remove the foil. DEHA noted that the Duncans’ failure to comply “with the regulations by removing the foil from the pipes by June 1, 2007” resulted in the imposition of a \$50 fine and the failure to remove the foil by June 20, 2007 would result “in an additional fine of \$50 per week until the foil is removed.”

On July 28, 2007, DEHA sent the Duncans a third letter, instructing them to remove “gray tape”¹ from their pipes by August 17, 2007 and to pay the \$50 fine immediately. The Duncans did not pay the fine, and DEHA began to assess weekly fines of \$50 against the Duncans for their failure to pay the original \$50 fine.

In November 2007, the Duncans filed their original petition, alleging that the initial \$50 fine, as well as the subsequent \$50 fines or late fees imposed by DEHA, were not authorized by the Declaration. The Duncans asserted a claim against

¹ The Duncans presented evidence that they replaced the foil with tape.

DEHA for breach of restrictive covenants and sought declarations² that DEHA was not authorized “to impose both a late fee and interest” on a delinquent assessment or “more than one delinquent assessment,” the Design Guidelines could not be used as the sole basis to impose an assessment without a concurrent violation of the Declaration, the “rules and regulations regarding fines and penalties” used by DEHA to impose the fine were not set forth in the Declaration and were thus “void and unenforceable,” and the Declaration did not authorize DEHA to impose a liquidated fine or other penalty that was not “fixed and established” or without advanced notice of the violation and possible “specific penalties.” The Duncans further sought to “quiet title and remove alleged liens” against their home as well as orders compelling DEHA to “timely comply” with their request to inspect DEHA records.

The Duncans further alleged that in June 2008, the DEHA board members,³ at a DEHA meeting, made defamatory statements about them and imposed a \$250 special assessment in violation of the Declaration against all homeowners for legal fees without allowing the homeowners to vote on it. The Duncans asserted claims against the DEHA board members for tortious interference with contract,

² See TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 2008).

³ The Duncans originally filed their claims against the DEHA board members in a separate lawsuit, which was consolidated into the instant case.

defamation, breach of restrictive covenants, constructive fraud, and breach of fiduciary duties.

DEHA filed an answer and counterclaims against the Duncans, alleging that they had breached the restrictive covenants and requesting an order enjoining the Duncans from violating the restrictions. The DEHA board members filed an answer and, subsequently, a summary-judgment motion, in which they argued that the Duncans' claims against them were barred under "statutory law." The trial court granted the DEHA board members' summary-judgment motion.

On August 4, 2008, DEHA, stating that it was seeking "past due fines and assessments," filed a Notice of Lis Pendens on the Duncans' home. On April 16, 2009, the Duncans, seeking to sell their home to a third party, filed a motion to cancel the lis pendens, to which they attached a copy of a letter from DEHA's attorney. DEHA's attorney, in the letter, stated that, as of April 8, 2009, DEHA held a lien against the Duncans' home in the amount of \$4,800 and the lien amount increased "\$50 each week." The Duncans, based upon this letter, requested that the trial court require them to deposit \$5,000 in the registry of the court in exchange for the cancellation of the lis pendens. On April 27, 2009, the trial court granted the Duncans' motion, but ordered them to deposit \$10,000, rather than \$5,000, into the court's registry. The trial court further ordered that DEHA, upon the deposit being made, file a notice releasing the lis pendens. The Duncans then

deposited the money into the trial court's registry.

The Duncans and DEHA tried their claims to a jury in October 2009. After the trial, the jury, in response to fourteen questions, made findings, some of which conflicted, in favor of both the Duncans and DEHA. The jury found, in favor of DEHA, that (1) the Declaration authorized the creation of the Design Guidelines that provided "monetary fines in specific amounts" and "weekly late fees for a delinquent assessment," (2) "the tape on the pipes located on the exterior pipes of the Duncans' home" constituted a violation of the Declaration, (3) the Duncans' violation was not excused, (4) DEHA complied with the Declaration "when it assessed the \$250 special assessment," (5) the Duncans were entitled to no damages for the "special assessments," and (6) the Duncans failed to comply with the Design Guidelines.

However, the jury also found, in favor of the Duncans, that (1) the Declaration did not "prohibit the placement of tape on pipes located on the exterior" of homes⁴ in the subdivision, (2) DEHA did not give the Duncans adequate notice of the Design Guidelines before enforcing those guidelines against them, (3) DEHA did not give the Duncans adequate notice of the alleged violation before imposing fines against them, (4) DEHA did not give the Duncans a

⁴ In response to a question from the jury during deliberations, the trial court instructed the jurors that the word "foil" should replace the word "tape."

reasonable amount of time in which to correct the alleged violation before imposing fines against them, (5) DEHA did not comply with the Declaration when it imposed a fine and late fees against the Duncans, and (6) DEHA was not entitled to any damages for the Duncans' "unpaid fines and late charges." The jury did not reach the Duncans' attorney's fees question because the instructions provided that the jury would make an attorney's fees award only if the jury had awarded the Duncans damages for the "special assessments" that they had paid.

The Duncans filed a motion to disregard certain findings, asserting that they had established, as a matter of law, that the Declaration did not authorize the Design Guidelines that provided for specific monetary fines or weekly late fees and DEHA did not comply with the Declaration when it imposed the \$250 special assessment. The Duncans further argued that they, as a matter of law, were entitled to recover \$250 for the unauthorized special assessment. Finally, they argued that because the jury had found that DEHA had failed to comply with the Declaration when it imposed a fine and late fees, the trial court should award them attorney's fees.⁵ The Duncans also filed a motion to release the funds that they had deposited with the trial court on the ground that the jury verdict was generally in their favor.

The trial court denied the Duncans' motion to disregard the jury findings and

⁵ See TEX. PROP. CODE ANN. § 5.006 (Vernon 2010).

motion to release the funds. It then entered a final judgment, ordering that the Duncans take nothing on their claims against DEHA and that DEHA take nothing on its claim against the Duncans. The trial court did not provide any declaratory or injunctive relief.

The Duncans then filed a motion to modify the trial court's judgment and a motion for new trial, arguing that the evidence is legally and factually insufficient to support the jury's findings in favor of DEHA, the zero damages finding against them, and the trial court's failure to award them attorney's fees. The Duncans further argued that the jury's findings that the tape on their pipes constituted a violation of the Declaration and the Duncans had failed to comply with the Design Guidelines were "immaterial" because the jury further found that DEHA had failed to comply with the Declaration and Design Guidelines. The Duncans asserted that, when "construed as a whole," the jury's verdict afforded them recovery and denied DEHA recovery. The Duncans also requested attorney's fees and the return of their deposited funds. The trial court denied the Duncans' new-trial motion.

Special Assessment

In their second issue, the Duncans argue that the evidence at trial conclusively established that DEHA "failed to comply" with the Declaration when it assessed a \$250 special assessment against all homeowners for legal fees because "it is undisputed" that DEHA "did not obtain a vote from its members

before imposing” the assessment in June 2008. In their third issue, the Duncans argue that the evidence conclusively established that they incurred damages in the amount of \$250 when they paid the unauthorized special assessment under protest.

Article 6 of the Declaration, entitled “Assessments,” provides that each homeowner agrees to pay a variety of assessments. Section 6.1 identifies the following types of assessments: “regular assessments” for maintenance, taxes, and insurance on the individual lots and common areas; “special assessments” for reserve funds, capital improvements, or “unusual or emergency matters . . . to be fixed, established and collected from time to time as hereinafter provided”; “special individual assessments” against individual owners for water and sewage charges or for maintenance and repairs caused by a homeowner’s willful or negligent acts; “individual assessments” against individual lot owners for violations of the rules or regulations “pertaining to” DEHA “to be fixed, established and collected from time to time as hereinafter provided”; and “other sums.”

Section 6.2, entitled “Purpose of Assessments,” provides that the assessments levied by DEHA shall be used exclusively for a number of delineated purposes, including the “payment of legal and all other expenses incurred in connection with the collection, enforcement, and administration of all assessments and charges and in connection with the enforcement of this Declaration.” Article

6.2 states that the board’s judgment “in establishing annual, special and individual assessments and other charges . . . shall be final and conclusive so long as such judgment is exercised in good faith.”

Section 6.4, entitled “Special Assessments,” provides,

In addition to the regular assessments authorized by Section 6.3 hereof, the Association may levy a special assessment, applicable to that year or a specified number of years, for the purpose of defraying, in whole or in part, the cost of any future, current or past construction or reconstruction unexpected repair or replacement of capital improvements upon the Common areas, including any necessary fixture and personal property related thereto, or for unusual or emergency purposes’ *provided that any such assessment shall have the affirmative approval of a majority of votes of each class of Members present (in person or by proxy) and entitled to vote at any regular or special meeting of Members called for such purpose.*

(Emphasis added.)

The restrictions contained in the Declaration are restrictive covenants concerning real property. *See* TEX. PROP. CODE ANN. § 202.001(4) (Vernon 2007). Restrictive covenants are subject to the general rules of contract construction. *Uptegraph v. Sandalwood Civic Club*, 312 S.W.3d 918, 925 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (citing *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998)). As when interpreting any contract, our primary duty in construing a restrictive covenant is to ascertain the parties’ intent. *Bank United v. Greenway Improvement Ass’n*, 6 S.W.3d 705, 708 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). We focus on the parties’ objective, rather than subjective, intent, as that

intent is reflected in the written contract. *See Lopez v. Munoz, Hockema & Reed*, 22 S.W.3d 857, 861 (Tex. 2000). We must examine the covenant as a whole in light of the circumstances present when the covenant was made, and give a restrictive covenant's words and phrases their commonly accepted meaning. *See Pilarcik*, 966 S.W.2d at 478; *Truong v. City of Houston*, 99 S.W.3d 204, 214 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *see also Owens v. Ousey*, 241 S.W.3d 124, 129–30 (Tex. App.—Austin 2007, pet. denied) (explaining that we construe restrictive covenants as a whole in light of the circumstances at the time the parties entered into the agreement, giving effect to every sentence, clause, and word of a covenant, and avoiding constructions that would render parts of the covenant superfluous or inoperative).

We review a trial court's interpretation of a restrictive covenant *de novo*. *Uptegraph*, 312 S.W.3d at 925; *Air Park-Dallas Zoning Committee v. Crow-Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 909 (Tex. App.—Dallas 2003, no pet.). Whether restrictive covenants are ambiguous is a matter of law for the court to decide. *Pilarcik*, 966 S.W.2d at 478; *Uptegraph*, 312 S.W.3d at 925. A covenant is unambiguous if, after appropriate rules of construction have been applied, the covenant can be given a definite or certain legal meaning. *Pilarcik*, 966 S.W.2d at 478; *Uptegraph*, 312 S.W.3d at 925. In contrast, if, after appropriate rules of construction have been applied, a covenant is susceptible of more than one

reasonable interpretation, the covenant is ambiguous. *Pilarcik*, 966 S.W.2d at 478; *Uptegraph*, 312 S.W.3d at 925. That the parties disagree over a restrictive covenant’s interpretation does not necessarily render the covenant ambiguous. *Uptegraph*, 312 S.W.3d at 925.

Covenants restricting the free use of land are not favored, but will be enforced if they are clearly worded and confined to a lawful purpose. *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987). Restrictive covenants are to be construed liberally in order to give effect to their purpose and intent.⁶ TEX. PROP. CODE ANN. § 202.003(a) (Vernon 2007).

Here, the \$250 assessment was a “special assessment,”⁷ imposed against all homeowners in the subdivision for “unusual or emergency matters” under Article 6 of the Declaration, for the legal fees associated with the dispute between DEHA and the Duncans. In question number ten, the jury was asked whether DEHA complied with the Declaration when it assessed the special assessment of \$250.

⁶ This Court has recently addressed the split among the courts of appeals regarding the potential conflict between the common-law requirement of construing restrictions strictly and the Property Code’s requirement of construing residential covenants liberally to effectuate their purposes and intent. *See Uptegraph v. Sandalwood Civic Club*, 312 S.W.3d 918, 925 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.). As in that case, here, neither party asserts that the covenant at issue is ambiguous, and we agree. Thus, we need not address any potential conflict.

⁷ We note that the jury charge referred to this assessment as a “special assessment” in accord with Article 6, and neither party complains about the use of this term in the jury charge.

The jury answered “Yes.” On appeal, DEHA does not dispute the fact that the special assessment was not approved by a vote of homeowners. Rather, DEHA asserts that the jury’s affirmative answer is supported by sufficient evidence because, when properly construed, section 6.4 did “not require a vote of the membership” to approve the special assessment. DEHA contends that the language in section 6.4 requiring a vote “clearly refer[s] to [assessments for] construction, repairs, and capital improvements.” In contrast, the Duncans contend that section 6.4 requires a vote and, because it was undisputed that no vote was held, it is conclusively established that DEHA breached the Declaration when it imposed the special assessment.

We conclude that section 6.4 plainly applies to the special assessments provided for in the Declaration, including those imposed “for unusual or emergency purposes.” We further conclude that the special assessment of \$250 was required to receive the “the affirmative approval of a majority of votes” of homeowners. There was no such vote. Accordingly, we hold that the evidence established, as a matter of law, that DEHA failed to comply with the Declaration when it imposed the special assessment of \$250 for legal fees.

Additionally, in question number 11, the jury was asked to determine the amount of damages that the Duncans were entitled to recover as a result of DEHA’s failure to comply with the Declaration. Because it is undisputed that the

Duncans paid the \$250 special assessment, and because we have held that the evidence conclusively established that DEHA failed to comply with the Declaration in imposing this special assessment, we further hold that the evidence established, as a matter of law, that the Duncans were entitled to recover their \$250 payment as damages for DEHA's failure to comply with the Declaration.⁸

We sustain the Duncans' second and third issues.

The Duncans' Claim for DEHA's Breach of Restrictive Covenants

In their sixth issue, the Duncans argue that the trial court erred in not rendering judgment in their favor against DEHA on their claim for breach of restrictive covenants because the jury found that DEHA did not give the Duncans adequate notice of the Design Guidelines before enforcing them against the Duncans, DEHA did not give the Duncans adequate notice of the alleged violation before imposing fines against the Duncans, DEHA did not give the Duncans a reasonable amount of time in which to correct the alleged violation before imposing fines against the Duncans, DEHA did not comply with the Declaration when it imposed a fine and late fees against the Duncans, and DEHA was not

⁸ We note that the charge incorrectly provided that the jury should only award the Duncans damages for their payment of the special assessment if it found that DEHA had complied with the Declaration in assessing the \$250 special assessment. Of course, the charge should have instructed the jury to consider the appropriate award of damages if it found DEHA had not complied with the Declaration.

entitled to any damages for the Duncans' "unpaid fines and late charges."⁹ In their eighth issue, the Duncans argue that the trial court erred in not ordering the release of funds that they had deposited with the registry of the trial court because they prevailed on their claim for breach of restrictive covenants, there is no longer any support for a property lien against their home, and there is no "legal or factual basis for withholding the funds."

DEHA has not challenged the jury's findings made in the Duncans' favor. Even assuming that the foil on the Duncans' pipes constituted a violation of the Declaration, and even assuming that the Declaration would authorize, in general, the monetary fines and late fees, the jury findings in favor of the Duncans compelled the trial court to enter a judgment in the Duncans' favor on their claim for breach of restrictive covenants against DEHA. The jury found that DEHA did not provide the Duncans adequate notice of the Design Guidelines or the alleged violation or a reasonable amount of time to correct the violation before imposing the challenged fines. The jury further found that DEHA had not complied with the Declaration in imposing the fine and late fees, and, thus, DEHA was not entitled to recover any of the assessed fines and late fees.

⁹ The Duncans also note that the jury found, in their favor, that the Declaration did not "prohibit the placement of tape on pipes located on the exterior pipes of homes." However, the jury, in response to a separate question, made the directly conflicting finding that the "the tape on the pipes located on the exterior pipes of the Duncans' home" constituted a violation of the Declaration.

The Duncans originally brought suit against DEHA after it had imposed the fines and late fees and filed a lien on their house. Although the Duncans pleaded various claims, they were seeking a judgment establishing that (1) DEHA had breached the restrictive covenants by imposing unauthorized fines and late fees, (2) DEHA had no right to impose a lien, and (3) they were entitled to the return of their money deposited with the trial court to remove the *lis pendens*.

Regardless of whether the foil constituted a violation of the Declaration,¹⁰ the critical matter in dispute arose from the imposition of the fines and late fees. The jury's findings that DEHA had failed to comply with the Declaration when it imposed a fine and late fees compels not only a take-nothing judgment entered against DEHA on its counterclaims against the Duncans, which the trial court entered, but also a judgment entered in the Duncans' favor on their claim against DEHA for breach of restrictive covenants. Accordingly, we hold that the trial court erred in not entering judgment in the Duncans' favor on their breach of restrictive covenants claim.

Moreover, because the Duncans were entitled to a judgment in their favor on their claim against DEHA for breach of restrictive covenants, there is no basis for the trial court's refusal to release to the Duncans the funds that they had

¹⁰ The jury's findings in this regard were rendered immaterial by the jury's findings compelling a judgment in the Duncans' favor on their breach of restrictive covenant claim. *See Salinas v. Rafati*, 948 S.W.2d 286, 288 (Tex. 1997).

deposited into the registry of the trial court to remove the lis pendens. Accordingly, we hold that the trial court erred in not ordering the release of the Duncans' funds.

We sustain the Duncans sixth and eighth issues.

Design Guidelines

In their fourth and fifth issues, the Duncans argue that the evidence at trial conclusively established that the "Design Guidelines" that provided for "monetary fines in specific dollar amounts" and "weekly late fees for delinquent assessments" were not authorized by the Declaration because the Declaration afforded only DEHA with the power to impose assessments, the Declaration did not afford the ARC with these powers, the fines were "arbitrary and punitive" and not fixed or established as required by the Declaration, the Declaration limits individual assessments "to amounts spent," and the Declaration afforded DEHA the right to assess "only one late fee for each delinquent assessment."

Having concluded that the Duncans were entitled to a judgment rendered in their favor based upon the jury's other findings, we need not directly address the Duncans' fourth and fifth issues. We also note that DEHA has not challenged on appeal the jury's findings made in favor of the Duncans, which we conclude compel a judgment entered in the Duncans' favor and provide them with all of the relief they have requested on appeal. In sum, the Duncans' fourth and fifth issues

are mooted by our above holdings.

Attorney's Fees

In their seventh issue, the Duncans argue that the trial court erred in not awarding them their attorney's fees because the evidence established, as a matter of law, that DEHA breached the restrictive covenants.

The jury did not reach the attorney's fees question because it was predicated upon the jury awarding some amount of damages for the special assessment.¹¹ We have held that the evidence conclusively established that DEHA had failed to comply with the Declaration when it imposed the \$250 special assessment and the Duncans were entitled to recover \$250 as their damages for their paying this unauthorized special assessment. We have also held that the Duncans are entitled to a judgment in their favor on their claim for breach of restrictive covenants.

In "an action based on breach of a restrictive covenant pertaining to real property, the court shall allow to a prevailing party who asserted the action reasonable attorney's fees in addition to the party's costs and claim." TEX. PROP. CODE ANN. § 5.006 (Vernon 2010). In determining reasonable attorney's fees, the

¹¹ On appeal, the Duncans have not directly challenged the trial court's charge predicating the jury's award of attorney's fees upon an award of damages for the payment of the special assessment. However, they have asserted that, irrespective of the jury's findings, they are entitled to recover attorney's fees pursuant to their breach of restrictive covenant claim and the Declaratory Judgment Act. TEX. PROP. CODE ANN. § 5.006 (Vernon 2010).

court shall consider (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the expertise, reputation, and ability of the attorney; and (4) any other factor. *Id.* The award of attorney's fees under section 5.006 is mandatory, and a court has no discretion to not award fees to a prevailing party. *Ski Masters of Texas, LLC v. Heinemeyer*, 269 S.W.3d 662, 674 (Tex. App.—San Antonio 2008, no pet.); *Mitchell v. LaFlamme*, 60 S.W.3d 123, 130 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Accordingly, we hold that the trial court erred in not awarding the Duncans their attorney's fees, and we remand this matter to the trial court for an award of attorney's fees. *Briargrove Park Prop. Owners, Inc. v. Riner*, 867 S.W.2d 58, 62 (Tex. App.—Texarkana 1993, writ denied) (remanding for attorney's fees award under section 5.006).

We sustain the Duncans' seventh issue.

Summary Judgment

In their first issue, the Duncans argue that the trial court erred in granting summary judgment in favor of the board members because the board members did not challenge any elements of their claims or conclusively establish an affirmative defense.

To prevail on a summary-judgment motion, a movant has the burden of proving that it is entitled to judgment as a matter of law and that there is no

genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When a defendant moves for summary judgment, it must either (1) disprove at least one essential element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of its affirmative defense, thereby defeating the plaintiff's cause of action. *Cathey*, 900 S.W.2d at 341. When deciding whether there is a disputed, material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movant and any doubts must be resolved in her favor. *Id.* at 549.

A motion for summary judgment must stand or fall on the grounds expressly presented in the motion. TEX. R. CIV. P. 166a; *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). We are restricted to reviewing the propriety of the granting of the summary judgment on the basis of the grounds actually asserted in the motion for summary judgment. *Cates*, 927 S.W.2d at 626; *Hendrix v. Port Terminal R.R. Ass'n*, 196 S.W.3d 188, 201–02 (Tex. App.—Houston [1st Dist.] 2006, no pet.). It is reversible error to grant a summary-judgment motion on a claim not addressed in the motion. *Chessher v. Sw. Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983). A trial court errs in granting more relief than was requested by

disposing of issues never presented to it in the motion for summary judgment. *Perry v. Greanias*, 95 S.W.3d 683, 701 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

The Duncans pleaded claims against the DEHA board members for tortious interference with contract, defamation, breach of restrictive covenants, constructive fraud, and breach of fiduciary duties. The DEHA board members, in their summary-judgment motion, simply argued that the Duncans' claims were barred under "statutory law," asserting that the Duncans had not alleged "any ultra vires" acts for which they could be held individually liable. Citing various provisions of the Texas Business Organizations Code, the DEHA board members noted that as members of a corporation, they were "not personally liable for a debt, liability, or obligation of the corporation" and that a "person seeking to establish liability of a director" of a corporation "must prove that the director did not act: (1) in good faith; (2) with ordinary care; and (3) in a manner the director reasonably believed to be in the best interest of the corporation." *See* TEX. BUS. ORG. CODE ANN. §§ 22.152, 22.221 (Vernon Supp. 2010). And the DEHA board members asserted that there was no allegation or evidence that they had failed to use ordinary care.

In their response, the Duncans noted that the DEHA board members had not attached to their summary-judgment motion any evidence in support of their assertions and failed to address the elements of their claims. The Duncans argued

that their claims should survive because “a corporate officer who knowingly participates in tortious or fraudulent acts may be held individually liable to third persons even though he performed the act as an agent of the corporation.” The Duncans attached to their response the affidavit of Gabrielle Duncan, who testified that the Duncans had not received DEHA’s May 10, 2007 letter, DEHA had imposed the \$50 fine without notice, DEHA’s second letter allowed the Duncans only four days to respond, DEHA had failed to notify homeowners in the subdivision that the Design Guidelines had been amended to allow for a \$50 fine,¹² DEHA had failed to post the required notice on the front door of the Duncans’ home before imposing the fine, the DEHA board members had made defamatory statements against them at a meeting in June 2008, the DEHA board members in violation of the Declaration had imposed a \$250 special assessment without a homeowner vote, and the DEHA board members had refused the Duncans’ requests for inspection of DEHA records. She further testified that she and her husband had moved from their home as a result of the conduct of DEHA and the DEHA board members.

We recognize that, based upon our review of the trial record, the majority of the Duncans’ claims appear to arise solely from their dispute with DEHA, not with the DEHA members. Nevertheless, the Duncans did assert a number of direct

¹² As the Duncans emphasize, there is no fine provision in the Declaration.

claims against the DEHA board members, but the summary-judgment motion of the DEHA board members wholly fails to address many of these claims. For example, the Duncans alleged that they were defamed by the DEHA board members at a DEHA meeting, but the DEHA board members' summary-judgment motion does not reference the Duncans' defamation claim. Rather, the DEHA board members' summary-judgment motion discusses general principles of vicarious liability, respondeat superior, express and implied authority, alter ego, and piercing the corporate veil. Much of this discussion has no application to the Duncans' claims or in any way supports the DEHA board members' summary judgment. The DEHA board members also argued in their summary-judgment motion that a "corporation may indemnify" its directors, and thus it was "pointless . . . to keep the board members in this case." Although the Duncans' claims against the DEHA board members may prove to be "pointless," such an argument did not entitle the DEHA board members to summary judgment. The DEHA board members also cited to "current statutory law," noting that they cannot be held personally liable for "debts, liabilities, or obligations" of DEHA. However, this did not address the Duncans' specific claims.

Moreover, to the extent the DEHA board members now argue on appeal that their summary-judgment motion established that there is no evidence to support the imposition of individual liability, we conclude that the motion cannot be fairly

construed as a no-evidence summary-judgment motion. *See* TEX. R. CIV. P. 166a(i). The DEHA board members did not cite rule 166a(i), nor did they attack any specific element of the various causes of action asserted by the Duncans. Finally, although the DEHA board members now argue that they were entitled to summary judgment because the trial court had previously denied the Duncans' request to join them as defendants in the original lawsuit, it is undisputed that the board members became defendants in the underlying suit after consolidation. The fact that the trial court initially denied the Duncans' request to join the DEHA board members in the lawsuit did not establish the DEHA board members' right to summary judgment on the claims pleaded by the Duncans.

We conclude that the DEHA board members failed to establish, as a matter of law, their entitlement to summary judgment on the Duncans' claims. Accordingly, we hold that the trial court erred in granting the DEHA board members' summary-judgment motion.

We sustain the Duncans' first issue.

Conclusion

We reverse the trial court's take-nothing judgment entered in favor of DEHA against the Duncans, render judgment in favor of the Duncans' against DEHA in the amount of \$250 on the Duncans' breach of restrictive covenant claim, render judgment that the money that the Duncans deposited with the registry

of the trial court be released to them in light of the fact that they prevailed on their claim for breach of restrictive covenant, and remand the Duncans' claim for attorney's fees against DEHA to the trial court. We also reverse the trial court's judgment in favor of the DEHA board members against the Duncans, and we remand the Duncans' claims against the DEHA board members to the trial court for further proceedings.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Brown.