CAUSE NO. 2019-33333

TANGLEWOOD HOMES ASSOCIATION, INC.,	§	
	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
versus	§	133rd JUDICIAL DISTRICT
	§	
WMJK, LTD.,	§	
	§	HARRIS COUNTY, TEXAS
Defendant.	§	

TANGLEWOOD HOMES ASSOCIATION'S OPPOSITION TO WMJK'S MOTION TO ABATE AND REQUEST FOR A HEARING

Tanglewood Homes Association, Inc. (THA) opposes WMJK's motion to abate this proceeding and request for hearing.

INTRODUCTION

In what can only be a desperate attempt to avoid summary judgment, the defendant now seeks to abate this action on the specious ground that all 1,144 Tanglewood homeowners need to be joined to this lawsuit before this Court can determine if restrictive covenants are unambiguous or not. In support, WMJK cites a total of two opinions. The lack of authority is not an accident. First, WMJK had to find opinions that predate the two opinions by Texas Supreme Court on this issue because the Supreme Court opinions clearly set a contrary rule. Even then, WMJK had to find opinions that at least facially appear to support their position. Ultimately, WMJK failed, and not just because the Texas Supreme Court rejected the analysis of their outdated caselaw, but because WMJK's opinions stand for the *exact opposite conclusion* as that proposed by WMJK.

Texas law is clear: A suit to enforce restrictive covenants does not implicate the rights of all homeowners in a neighborhood and does not require their joinder. Texas law is also clear that this

Court has broad discretion on issues of joinder and would be well within its discretion to deny WMJK's motion out of hand. In fact, in the one action in which a trial court ordered a joinder following the Supreme Court's two 2004 opinions on the matter, mandamus issued from the Fourteenth Court of Appeals, which found that the order requiring joinder was an abuse of discretion and would unreasonably increase cost and the time needed for resolution of the matter.

Since there is no legal support for the requested relief, the only reasons for WMJK's filing can be to cause the very delay and harassment to Tanglewood's homeowners that the Fourteenth Court of Appeals held would result.

ARGUMENT

1. *WMJK's authority does not support its requested relief.*

WMJK's limited authority is so inapposite that it deserves specific mention. WMJK cites a total of two opinions, neither of which is relevant or authoritative.

A. WMJK's authority is irrelevant and actually supports THA's position.

WMJK's principal authority is an opinion from the Amarillo Court of Appeals—*April Sound Mgmt. Corp. v. Concerned Prop. Owners for April Sound, Inc.*, 153 S.W.3d 519, 526 (Tex. App.—Amarillo 2004, no pet.). Unfortunately for WMJK, the *April Sound* opinion does not support its position.

The *April Sound* opinion squarely states that suits, like this one, to enforce deed restrictions do *not* require joinder of all homeowners. In fact, while the *April Sound* court ordered joinder of all homeowners, it was careful to specifically distinguish actions to enforce deed restrictions: "This action for declaratory judgment is not a suit against a lot owner to enforce compliance with one or more lot restrictions which would not implicate rights of other lot owners." *Id.* Instead, *April Sound* was a suit by the developer's successor (here WMJK) claiming the right to unilaterally amend deed restrictions.

In keeping with *April Sounds* own distinctions, later courts, including the Houston Court of Appeals (14th Dist.), have cited *April Sound*, in concluding that "[a]n action for declaratory judgment that is a suit against a homeowner to enforce compliance with a deed restriction *does not implicate the rights of other homeowners*." *In re Corcoran*, 401 S.W.3d 136, 139 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (emphasis added) (citing, *April Sound*, 153 S.W.3d at 526).

WMJK's second opinion also does not address the enforcement of deed restrictions. In *Dahl v. Hartman*, the court addressed an action seeking a declaration that deed restrictions were unconstitutional. 14 S.W.3d 434 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Again, the Houston Court of Appeals (14th Dist.) in *In re Corcoran* cited *Dahl* in holding that there was no need for joined of other homeowners in action to enforce deed restrictions. *Corcoran*, 401 S.W.3d at 139.

B. WMJK's opinions are outdated.

The *April Sound* opinion was issued in early 2004, *Dahl* in 2000.

What WMJK neglects to mention is that in late 2004 the Texas Supreme Court issued two opinions directly addressing whether individual homeowners needed to be joined in actions brought for or against homeowners' associations— *Simpson v. Afton Oaks Civic Club*, 145 S.W.3d 169 (Tex. 2004) and *Brooks v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004). *Brooks* involved an action by a homeowners' association, and *Simpson* one against a homeowners' association.

The *Brooks* and *Simpson* opinions clarified Texas law and make even WMJK's irrelevant authority outdated. For example, following the Supreme Court's two opinions, the First Court of Appeals altered its view 180 degrees. *See Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, 177 S.W.3d 552, 558 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). The court of appeals issued two opinions in *Wilchester*, the first issued before the Supreme Court's *Brooks* and

Simpson opinions. The court noted, "In our original opinion, we held that all other homeowners in the subdivisions whose property rights and interest were directly at stake were 'indispensable parties,' and WWCH's failure to join these parties deprived the trial court of subject matter jurisdiction over WWCH's declaratory judgment action." *Id.* Following *Brooks* and *Simpson*, however, the court withdrew its opinion and held joinder was not required. *Id.*

Thus, the only authority cited by WMJK is no longer authoritative.

2. *Pursuant to current Texas law, this Court has broad discretion over joinder and abatement.*

WMJK goes too far when it implies that this Court "must" order joinder if there are any property rights of the other homeowners implicated. Motion at 1.

Following *Brooks* and *Simpson*, Texas law is eminently clear that the decision whether to require joinder or to abate lies within this Court's broad discretion. While WMJK's reference to the word "must" is part of a quote from the Texas Declaratory Judgment Act, what WMJK fails to state is that the Texas Supreme Court has squarely tied this seemingly mandatory language to Rule 39 of the Texas Rules of Civil Procedure, which is chiefly discretionary.

The Texas Supreme Court explained the relation between section 37.006 of the Declaratory Judgment Act and Rule 39 in *Brooks* and *Simpson*. As explained by the Fourteenth Court of Appeals:

> The Supreme Court of Texas has concluded that the determination of which parties, if any, must be joined under [the Declaratory Judgment Act] section 37.006(a) should be made using the legal standard from Texas Rule of Civil Procedure 39. *See* Tex.R. Civ. P. 39; *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 162 (Tex. 2004). Under this rule, entitled, "Joinder of Persons Needed for Just Adjudication," "[a] person who is subject to service of process shall be joined as a party in the action if ... he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." Tex.R. Civ. P. 39(a).

Epernay Cmty. Ass'n, Inc. v. Shaar, 349 S.W.3d 738, 746 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

More specifically, the Supreme Court held "that a declaratory judgment action against a property owners' association would not prejudice the rights of the other property owners because unjoined owners would not be bound by the suit, and nothing prevented the trial court from rendering complete relief to those parties before it." *Simpson*, 145 S.W.3d at 170 (citing *Brooks*). In brief, joinder is required only of indispensable parties, but a declaratory judgment does not prejudice the rights of any person not a party to the proceeding. Therefore, additional parties are almost never required because complete relief can always be granted to the parties before the court. *E.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 37.006(a); *Shelton v. Kalbow*, 489 S.W.3d 32, 43 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

Following *Brooks* and *Simpson*, both Houston courts of appeals have expressly held that joinder is not required in actions to enforce deed restrictions. The Fourteenth Court of Appeals has gone so far as finding, after Brooks and Simpson, that requiring joinder of all homeowners would be an abuse of discretion because of the needless cost and delay. *In re Corcoran*, 401 S.W.3d 136. This opinion is discussed further below. The First Court of Appeals has stated, "the failure to join all property owners affected by a restrictive covenant in a declaratory judgment action did not deprive the trial court of jurisdiction to enter the declaratory judgment because nothing prevented the trial court from rendering complete relief between the parties, and because the declaratory judgment did not prejudice the rights of any person not a party to the proceeding." *Elgohary v. Lakes on Eldridge N. Cmty. Ass'n, Inc.*, 01-14-00216-CV, 2016 WL 4374918, at *6 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016, no pet.); *accord*, *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 698 (Tex.App.–Houston [1st Dist.] 2007, no pet.).

In *Indian Beach*, the First Court of Appeals stated. "Here, nothing prevented the trial court from rendering complete relief between Linden, B.J., and Indian, and because a declaratory judgment does not prejudice the rights of any person not a party to the proceeding, any non-joined homeowner will be able to pursue individual claims notwithstanding the ruling in this case. *See* Tex. Civ. Prac. Rem.Code Ann. 37.006(a); Tex.R. Civ. P. 39(a)(1)." *Indian Beach*, 222 S.W.3d at 698.

3. This Court should exercise its discretion to deny the plea in abatement.

There are a number of independent reasons, this Court should exercise its discretion to deny the plea in abatement.

A. There is no need for joinder.

Since the Texas law is clear that this Court can give complete relief to the parties before this Court, there is no reason for the delay and expense in abating this lawsuit and joining more than a thousand unnecessary parties. Indeed, apart from its patently incorrect legal conclusion that this Court "must" join all Tanglewood homeowners, WMJK has wholly failed to articulate even a single reason why joinder would be beneficial.

The Texas Supreme Court has stated that, in most cases, joinder is not required. "Under the provisions of our present Rule 39 it would be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined." *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 204 (Tex. 1974).

Even if other Tanglewood homeowners would undoubtedly be affected by this Court's judgment, this Court still has discretion to deny mandatory joinder and abatement. *See Bd. of Directors of By the Sea Council of Co-Owners, Inc. v. Sondock*, 644 S.W.2d 774, 779 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.). In this opinion, the court noted, "Without a doubt, the absent owners would be

affected by the court's order." But, "This notwithstanding, failure to join the absent owners did not deprive the court of jurisdiction and it was not error for the court to deny the plea in abatement." *Id.*

Even if other Tanglewood homeowners could be affected by this Court's judgment, this Court still has discretion to deny mandatory joinder and abatement. *See Bd. of Directors of By the Sea Council of Co-Owners, Inc. v. Sondock*, 644 S.W.2d 774, 779 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.). In this opinion, the court noted, "Without a doubt, the absent owners would be affected by the court's order." But, "This notwithstanding, failure to join the absent owners did not deprive the court of jurisdiction and it was not error for the court to deny the plea in abatement." *Id.*

B. Independently, this Court can deny the plea because of WMJK's failure to confer on the requested relief.

WMJK failed to comply with Local Rule 3.3. No conference of any kind was made.

C. Requiring joinder would increase costs and would be an abuse of discretion.

The *Corcoran* opinion from the Fourteenth Court of Appeals requires separate consideration.

Corcoran was a mandamus action. 401 S.W.3d at 138. The trial court had granted a motion to abate and ordered joinder of "all persons owning residential real property subject to the governance" of the homeowners' association. *Id.* Faced with the burden of compliance, the plaintiff sought mandamus review of the joinder order.

The Corcoran court stated the general rule that, "[o]rdinarily, a trial court has great discretion regarding joinder of third parties." *Id.* at 140 (citing, *In re Arthur Andersen, L.L.P.*, 121 S.W.3d 471, 483 (Tex.App.—Houston [14th Dist.] 2003, orig. proceeding).

"However, mandamus relief is appropriate if the trial court abuses that discretion." *Id.* (quoting, *In re Arthur Andersen,* 121 S.W.3d at 483).

Turning to *Simpson* and *Brooks*, the court noted "the trial court is not prevented from rendering complete relief to the parties before it, the rights of the other property owners are not prejudiced by

a declaratory judgment action against a property owners' association because un-joined owners would not be bound by the suit." *Id.*

Finally, the court concluded, "In this case, ordering joinder of all homeowners from seven subdivisions will delay the trial and greatly increase costs." *Id.* at 139-40 (footnote omitted). "The increased costs are significant enough to place the Corcorans in danger 'of succumbing to the burden of litigation.' The trial court's order has 'radically skew[ed] the procedural dynamics of the case.'" *Id.* at 140 (citations omitted).

Therefore, the court concluded that requiring joinder was an abuse of discretion and that, "the benefits to mandamus review are not outweighed by the detriments and relators have no adequate remedy by appeal." *Id.*

D. WMJK has failed to support its motion.

"The law is settled in Texas that a party who urges a plea in abatement has the burden of proving by a preponderance of the evidence at the hearing on such plea the facts that are alleged in the plea as grounds for abating and dismissing the plaintiff's case." *Brazos Elec. Power Co-Op., Inc. v. Weatherford Indep. Sch. Dist.*, 453 S.W.2d 185, 188–89 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); *see also Epernay Cmty. Ass'n, Inc. v. Shaar*, 349 S.W.3d 738, 746–47 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("Association One did not provide the trial court with any evidence as to the identity, number, or interests of these other homeowners.").

For these reasons, the motion to abate should be denied.

Dated: September 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing instrument was served on counsel of record on this date.

By: */s/ Andrew Tower*