Opinion issued September 7, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00816-CV

THE LANDING COMMUNITY IMPROVEMENT ASSOCIATION, INC., Appellant
V.

PAUL T. YOUNG, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Case No. 13-CV-0293

MEMORANDUM OPINION

Appellant, The Landing Community Improvement Association, Inc. (the "Association"), challenges the trial court's judgment, entered after a jury trial, in favor of appellee, Paul T. Young ("Young"), on his counterclaims against it for intentional infliction of emotional distress and a declaratory judgment. In five

issues, the Association contends that the evidence is legally and factually insufficient to support the trial court's judgment, and the trial court erred in declaring "void" the Association's Exterior Maintenance Guidelines, awarding Young attorney's fees, applying settlement credits, assessing costs, and not dismissing Young's counterclaims as barred by the judicial-communications privilege.

We reverse and render, in part, and reverse and remand, in part.

Background

The Association is a homeowners' association and non-profit corporation that governs The Landing, Section One, a residential subdivision located in League City, Texas. In its second amended petition and application for permanent injunction, the Association alleged that it was organized for the purpose of promoting the health, recreation, and welfare of all residents and owners within the subdivision; enhancing and protecting the value, desirability, and attractiveness of the land and improvements; managing and maintaining all common areas within the neighborhood; collecting maintenance assessments; providing common services for the subdivision; and enforcing the "Declaration of Covenants, Conditions, and Restrictions" (the "Deed Restrictions"), which govern each of the lots in the subdivision.

The Association asserted that the Deed Restrictions, article III, "Use and Building Restrictions," provides, in pertinent part, as follows:

> Section 2. Architectural Control. No building or other structure shall be . . . altered on any Lot until the . . . specifications therefore . . . have been approved by the Architectural Control Committee ["ACC"] as to harmony with existing structures, with respect to exterior design and color with existing structures.
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> . . . .
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> Section 4. Type of Construction, Materials and Landscape.
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> . . . .
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> (b) No external roofing material other than 235# minimum composition shingles of a wood tone color shall be constructed or used on any building in any part of the Properties unless the [ACC] shall, in its discretion, permit the use of the roofing materials, such permission to be granted in writing . . . .
>
> . . . .
>
> Section 7. Annoyances or Nuisances. (a) No noxious or offensive activity shall be carried on upon any Lot or shall anything be done thereon which may become an annoyance to the neighborhood. . . .

And article IV, "Architectural Control Committee," provides, in pertinent part, as follows:

> Section 1. Approval of Building Plans. No building shall be . . . altered on any Lot until the . . . specifications . . . have been approved in writing as to harmony of exterior design and color with existing structures . . . . A copy of the . . . specifications . . . together with such information as may be deemed pertinent, shall be submitted to the [ACC] . . . prior to commencement of construction. The [ACC] may require submission of such other documents as it deems appropriate, in such form and detail as it may elect at its entire discretion.

Further, article VI, "Covenant for Maintenance Assessments," provides, in pertinent part, as follows:

> Section 1. Creation of the Lien . . . . [E]ach owner of any Lot by acceptance of a deed therefore, whether or not it shall be so expressed

> in such deed, is deemed to covenant and agree to pay to the Association annual maintenance charge assessments ["maintenance assessments"]. . . . The [maintenance assessments], together with interest, costs, and reasonable attorney's fees, shall be a charge on the Lot and shall be a continuing lien upon the Lot against which such assessment[s are] made. . . .
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> . . . .
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> Section 7. Effect of Nonpayment of Assessments . . . . If any [maintenance assessments are] not paid within thirty (30) days from the due date thereof, the same shall bear interest from the due date until paid . . . . The Association may bring an action at law against the [o]wner personally obligated to pay the same, or foreclose the lien created hereby against the Lot.

The Deed Restrictions further provide:

> Upon violation or attempt to violate any of the covenants herein, it shall be lawful for the Association . . . to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenant and either to prevent him or them from doing so or to recover damages for such violations.

The Association further alleged that in 2001, its Board of Trustees (the "Board") adopted "Exterior Maintenance Guidelines" (the "Guidelines"), which it recorded in the real property records of the Galveston County Clerk's Office. The Guidelines provide, in pertinent part, that

> All improvements on a lot must be maintained in a state of good repair and shall not be allowed to deteriorate. Repairs shall include, but [are] not limited to, the following:
>
> 1. All painted surfaces must be clean and smooth with no bare areas or peeling paint . . . .
> 2. All rotted and damaged wood must be replaced. . . .
>
> . . . .

4. Roofs must be maintained in good repair with no missing or curling shingles.

. . . .

10. There shall be no storage of clutter and debris in public view.

In 1992, Young purchased in The Landing subdivision a house, which was conveyed subject to "all restrictions, easements, covenants, and conditions of record." He subsequently allowed the roof of his house to deteriorate to such an extent as to be unsightly, with missing and curling shingles, and large bare and discolored areas. And, despite "numerous written requests" from the Association, its representatives, and its attorney to comply with the Deed Restrictions, Young had "failed and/or refused" to replace the roof of his house with ACC pre-approved roofing materials; remove a large tree stump from his front yard; re-paint the trim, fascia boards, and shutters of his house with an ACC pre-approved paint color; and repair his fence and gate, which had "been allowed to deteriorate to such a state as to become unsightly."

After the Association filed the instant suit, Young cut down the tree stump. However, he continued to store the cut piece in open view against his fence. And although he did replace some of the shingles on the roof of his house, "it appear[ed] that [he] did not use the proper type of roofing shingles," and the roof remained unsightly.

The Association sought injunctive relief, asserting that the condition of Young's property constituted a "nuisance and annoyance to the surrounding neighborhood, and an eyesore to the community." And "unless [Young] is compelled to comply, the [Deed Restrictions] may become meaningless and potentially unenforceable, thereby adversely affecting property values within the neighborhood, and adversely affecting all present and future owners of property within The Landing community." It requested an order directing Young to "completely and fully replace the entire roof of . . . [his house], with roofing materials which have been pre-approved by [the Association]"; "fully repair and re-paint the trim, exterior wood surfaces, siding, fascia boards, and shutters of [his] house . . . with a paint color which has been pre-approved by [the Association]"; "completely and fully remove the tree stump located in the front/side yard of [his] property; and store the tree stump away from public view. The Association also requested statutory[1] damages in the amount of $200 per day for each day that Young was found to be, or to have been, in violation of the Deed Restrictions.

The Association further alleged that, despite its written requests, Young had "failed and refused" to pay the maintenance assessments and charges that had accrued against his property. Although Young had submitted one or more personal checks, he made notations on each as follows: "paid in full" or "full payment of

[1] *See* TEX. PROP. CODE ANN. § 202.004 (Vernon 2014).

account." The Association did not accept his checks because they did not "constitute a payment, in accordance with Texas Law." Thus, it sought a judgment against Young in the amount of $1,603.99 for delinquent maintenance assessments, interest, and costs. The Association further, in response to Young's unpaid annual maintenance assessments, sought, as provided for in the Deed Restrictions, a judgment foreclosing its continuing lien against his property.

In his answer, Young generally denied the Association's claims, and he brought counterclaims against it.[2] In his third amended counterclaims, Young alleged that since 1992, when he purchased his house in the Landing, he has attempted to abide by each of the covenants, outlined in the Deed Restrictions, and timely paid his annual maintenance assessments to the Association. In 2003, he replaced the roof of his house; re-painted his house, changing it from a chocolate-brown color to a cream color; replaced all of his siding, windows, and exterior doors; replaced and added new light fixtures to the exterior; and replaced his garage doors. Subsequently, after some of the shingles were blown off of his

[2] Young also asserted against the individual members of the Board of Trustees ("trustees") third-party claims, which were severed into a separate case. *See Paul T. Young v. William Heins, Leah Vidrine, Emily Lueck, and Wayde Shipman*, No. 13-CV-0293-A (56th Dist. Ct., Harris Cty., Tex.), *aff'd*, *Paul T. Young v. William Heins, Leah Vidrine, Emily Lueck, and Wayde Shipman*, No. 01-15-00500-CV 2017 WL 2376828 (Tex. App.—Houston [1st Dist.] June 1, 2017, no pet. h.).

roof during a storm, he replaced them using spare shingles that he had purchased when he replaced his roof.

In January 2012, Michael Treece, the Association's attorney, sent to Young a letter ordering him to "completely re-roof his home." The Association required that he return a completed ACC form, along with documentation of the proposed roofing material, including style, strength, and color, within ten days of the date of the letter. It further required that he replace his roof within twenty days after receiving notice of ACC approval of the roofing materials. Young, in a letter to Treece, explained that he "faced physical and financial limitations due to disability and being out of work."

In February and May 2012, Treece sent to Young letters, again requiring that he replace his entire roof with materials preapproved by the ACC. Although Treece acknowledged Young's concerns and offered a "few months" to comply, "[n]o hearing or appeal was offered," and Young was "told [it] was his 'final notice.'"

In September 2012, Treece sent to Young a letter, demanding that he replace his roof with ACC pre-approved materials. Noting that the paint on Young's house was faded and peeling, the Association also demanded that he re-paint its trim, fascia boards, and shutters. However, according to Young, his house had no faded, peeling, or bare paint; "only [a] relatively small number of shingles were missing" from his roof; other houses in The Landing had weathered, discolored, or missing shingles,

or had replacements made with shingles of mixed colors; and he had replaced individual shingles on his house with shingles left over from the 2003 roof replacement. He asserted that the Deed Restrictions did not require him to completely re-paint or re-roof his house; it would take time for the replacement shingles to weather and match the rest of the roof; and the Association's demand that he replace his entire roof was "arbitrary, capricious, and discriminatory" and "part of a plan to force [him] from the subdivision."

Also, "sometime in 2012," the Association sent to Young a letter, "request[ing]" that he remove a tree stump from his front yard. Although he complied, he noted that there were tree stumps in other yards in The Landing and the Association did not send violation letters to those homeowners.

Young further alleged that the Association had "deliberately and knowingly misapplied" his checks for maintenance assessments for "the years of 2007 through 2011." And in May 2011, Margaret Eckhardt of AVR Management Consultants, Inc. ("AVR"),[3] a property management company representing the Association, notified him that he was delinquent in paying his 2011 maintenance assessments. Young responded that he had timely "dropped [payment] in the mail slot at the club

[3] Eckhardt and AVR settled Young's claims against them, and they are not parties to this appeal.

house the last weekend of January," as he "ha[d] done many times over 19 years." Eckhardt, in a letter dated May 10, 2011, wrote to Young:

> We are in receipt of your letter informing us of the payment made for the year 2011 Maintenance Fees in January. In reviewing your account, I do see where you have always made payments on time and I apologize for this inconvenience.

And Eckhardt noted that his payment may have been "thrown away by mistake." Young provided Eckhardt with a replacement check, marked "paid in full," and he included a letter stating that his check would pay his account "in full in its entirety." And the Association accepted and cashed his check. According to Young, he has "always" written "paid in full" on the checks that he sent to the Association to pay his maintenance assessments.

In 2012, after Young submitted a check to pay his 2012 maintenance assessments, Treece sent to him a letter, returning the check and claiming that his account had a balance of $487.31 outstanding from 2011. In March 2013, Young re-issued a check for his 2012 maintenance assessments and submitted it and another check to pay his 2013 maintenance assessments. On September 18, 2013, however, the Association returned both checks.

Young further alleged that "[f]or years, he has been assessed fees, fines, and charges by the [Association] . . . for allegedly violating [the] Deed Restrictions, which [he] has never violated." He has "undergone continued threats and harassment by [the Association] . . . to intentionally instill fear in [him] that he might

lose his homestead of over twenty years." Young has been "victimized by . . . deliberate, knowing, and intentional unlawful enforcement [of the Deed Restrictions], when there was no proper basis for enforcement actions against him before and during this lawsuit." And Eckhardt had driven by his house "several times on one day to taunt him."

Young brought counterclaims against the Association for breach of fiduciary duty, breach of contract, intentional infliction of emotional distress, and a declaratory judgment. In his claim for intentional infliction of emotional distress, Young asserted that the Association, after having been informed of his financial hardship, refused his checks for maintenance assessments and charged him "unlawful fees." And it required that he make over $13,000.00 in repairs to his house that were not required under the Deed Restrictions. The Association's conduct was extreme and outrageous, and it intended to harm Young financially and personally by forcing him to move from the subdivision. He further asserted that the fear of losing his house caused him extreme emotional distress; he was, at the time, in pain from multiple surgeries and particularly susceptible to emotional distress; he could not sleep, "especially on days when a letter came from Treece or Eckhardt"; the "continued harassment" by the Association caused him to be depressed and in "constant fear and worry of losing his home," which would subside only until the

next letter came; and he has "not had any peace" since the Association filed its lawsuit. Young generally sought damages in the amount of at least $95,190.00.

Young further sought declarations that

- the Deed Restrictions have an express designation . . . that provides for the extension of, addition to, or modification of the existing restrictions by a designated number of owners of real property in the subdivision[;]
- the Deed Restrictions . . . prevail over the provisions of Texas Property Code Chapter 204[[4];]
- the Deed Restrictions do not have exterior maintenance guidelines and that the homeowners have not approved any extension of, addition to, or modification of the Deed Restrictions by a vote of the majority[;]
- the Deed Restrictions do not allow the [Association] to impose a $200 punitive per diem fine for alleged deed restriction violations but only allow for the recovery of costs and attorney fees[;]
- [Texas Property Code section 202.004[5]], which purports to allow the [Association] to charge a $200 punitive per diem fine is unconstitutional, violates public policy, is inequitable and contrary to Texas common law[;]
- the [Association] ha[s] used the address at 1109 Landing Blvd., League City, Texas 77573 to conduct transactions between themselves and the homeowner's of the Landing Subdivision . . .[;]
- the [Association] ha[s] instructed the Landing subdivision residents to deposit "money in the drop box (below the mail box)" at 1109 Landing Blvd., League City, Texas 77573[;]
- when he deposited the payment for 2012 and 2013 assessments, respectively, in the "drop box" . . . and [the Association] acknowledged receipt of the payment, that Young had fulfilled his

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4 *See* TEX. PROP. CODE ANN. ch. 204 (Vernon 2014).

5 *See id.* § 202.004.

legal obligation to pay assessments under the Deed Restrictions requiring annual payment of his homeowner's fees[;]

- the [Association] [is] not entitled to extra fees, expenses, and attorney's fees over and above Young's Assessment payments if Young's payment was received but lost[;]
- the [Association] [is] not entitled to extra fees, expenses, and attorney's fees over and above Young's annual homeowner's fees if Young's payment was received but returned unprocessed (not cashed) . . . [;]
- the Deed Restrictions in Article III, Sec. VII, titled Annoyance or Nuisances is ambiguous[;]
- the [Association] failed to comply with all the requirements of the Tex. Prop. Code [ch.] 209[6] applicable to Young, which requires the [Association] to send Young a certified letter stating the exact violation, corresponding Tex. Prop. Code, corresponding Deed Restriction, charges, if any, and that Young had thirty (30) days in which Young could request a hearing, and Tex. Prop. Code [ch.] 209[7] wherein the [Association] was required to process and apply Young's Assessment payments for 2012, 2013 and 2014 to his [Association] account[; and,]
- [he] had to hire an attorney to . . . prosecute [his claims].

The Association filed an answer, generally denying Young's claims against it, and it asserted several affirmative defenses, including "absolute and litigation immunity."

At trial, Young testified that he had in the past, as a member of Midtown Park Development Ltd., LLC, developed residential subdivisions of over 200 homes. He is familiar with the governing documents pertinent to residential real estate

6 *See id*. ch. 209 (Vernon 2014 & Supp. 2016).

7 *See id.*

development, i.e., deed restrictions. And he agreed that his house is subject to The Landing's Deed Restrictions, which provide for the creation of an ACC. However, he had "one of the few homes in the neighborhood that has new siding, new paint, new front and back doors, new windows, new roof, new garage door, and new back porch in the last ten years." Thus, he did not understand why the Association was perpetually harassing him with violation letters.

The trial court admitted into evidence a series of letters, dated from 1993 to 2013, between Young and the Association; its previous attorney, Charles A. Daughtry, and later, Treece; its previous property management company, Houston Community Management Services, and beginning in 2006, AVR. Each of the letters from the Association, and its property managers and attorneys, cites various violations of the Deed Restrictions. Young explained that, in each instance, he did not request a hearing on the complained-of matter because "[i]t wasn't necessary."

On January 23, 2012, Treece sent to Young a letter, stating as follows:

> The undersigned attorney has been retained by [the Association] to enforce the deed restrictions which govern the above-referenced property. Please be advised that the following conditions which exists on said property constitute direct violations of the deed restrictions: 1) the commercial vehicle (18 wheeler rig parked/stored on the driveway must be removed from the neighborhood, immediately and permanently; 2) the entire roof of the house must be replaced with new ACC pre-approved roofing materials; and 3) the tree stump must be removed, completely.
>
> . . . .

> Please note that all exterior improvements, including roofing materials must be pre-approved, in writing, by the Association's [ACC], prior to the start of such a project. Please complete the enclosed ACC application and return the document along with documentation of proposed roofing materials, including style, strength, and color of shingles to this office within ten (10) days. . . .
>
> Accordingly, please accept this letter as the Association's formal demand that you remove the large commercial vehicle, permanently, from the neighborhood within (3) days of the da[te] of this letter. In addition, you must return the completed ACC form along with roofing material information within ten (10) days of the date of this letter. The entire roof of the house must be replaced within twenty (20) days, after receiving notice of the ACC approval of the roofing materials. Insomuch as you have failed to respond to the Association's previous requests, my client may have no other choice but to file a lawsuit, seeking a court order requiring you to immediately comply with the deed restrictions. Should such legal action become necessary, you may ultimately be responsible for the Association's costs and legal fees, which typically exceed $5,000.00.
>
> Your immediate attention to these matters will be appreciated. Unless all of the corrective, actions are taken as specified within this letter, a lawsuit may be filed against you without further notice.

Young admitted that, at the time he received Treece's letter, there was, in violation of the Deed Restrictions, a "commercial vehicle parked on the street, [at] the curb" at his house. And he had "probably gotten some" previous letters about moving it. He also admitted that there was a tree stump in his front yard. Moreover, in regard to his roof, "there may have been some missing shingles that had broken off," exposing "other shingles that had laid underneath," and "a bare spot." However, he believed that nothing in the Deed Restrictions required him to replace his entire roof.

Young agreed that the photographs of his house that the trial court admitted into evidence show a "roof in disrepair" that "needs some shingles replaced." Although he was physically unable to make repairs, he noted that his brother, who lives with him, is a general contractor who could make the repairs. He also agreed that the paint on his shutters and trim "look[ed] faded."

In regard to a February 27, 2012 letter from Treece to Young about the commercial vehicle, tree stump, and roof, Young admitted that although he had previously sent Treece a letter in which he agreed to move the truck, he had not yet cured any of the issues. In regard to a May 18, 2012 letter from Treece to Young, again citing the truck, stump, and roof, Young agreed that, in the letter, Treece was "very polite," "sympathetic to [his] situation," and "thank[ed]" him for his letter explaining the situation. Young also noted that Treece "gave [him] some suggestions" on contacting his windstorm insurance provider to discuss replacement of his roof. And there is nothing insensitive in Treece's letter.

Young further testified that on July 12, 2012, he received a "violation letter" from Eckhardt of AVR, the property manager for The Landing, on behalf of the Association. In the letter, Eckhardt, stating that the condition of the paint on Young's house was in violation of the Deed Restrictions, asked him to re-paint his house. She noted that if he, for any reason, needed additional time to correct the problem, he could telephone her. Young acknowledged that although Eckhardt, in

the letter, advised him that he had a right to request a hearing before the Board, he did not ask for more time or request a hearing. Rather, he sent a letter to the Association and Eckardt, asserting that the paint on his house was "neither peeling nor faded," his "home [did] not need new paint at this time," and he "will decide when '[his] home' needs that type of face lift."

In September 2012, Treece sent to Young a letter, thanking him for his previous correspondence and reminding him that he was required to comply with the "documents encumbering [his] property." Treece again cited the problems of the roof, tree stump, and need to re-paint. Young agreed that Treece was "nice enough in telling [him] that [he] ha[s] got to do as asked," even though he stated that the letter was his "final notice" prior to filing a lawsuit. Young could not recall when he finally moved the commercial vehicle, but he did note that he did not have the stump removed until December 7, 2012.

Young also testified about a series of letters, dated from 2002 to 2013, between him and the Association, its property managers, and attorneys about his maintenance assessments and fees. In regard to a May 8, 2002 letter from the Association, asserting that payment for Young's 2002 maintenance assessments was past due, he admitted that although the total due, with interest and collection costs, was $255.32, he had paid only $198.79, based on a payment coupon that the Association enclosed with the invoice.

In 2003, the Association sent to Young a letter explaining that he had an outstanding balance on his account because of an attorney letter in 2001 concerning an inoperable vehicle stored in his driveway. And the Association returned Young's check for his 2003 maintenance assessments, explaining that he had written "paid in full" on his check, but had not actually paid his account in full.

In 2004, the Association's attorney, Daughtry, sent to Young a letter, stating that the Board had elected to accept Young's payments for his 2003 and 2004 maintenance assessments. However, there remained a past due balance of $79.74. Although Daughtry offered a payment plan of $10.00 per month, Young declined. Young also testified about letters that AVR sent to him in 2007 and 2008, again attempting to collect the remaining balance on his account.

In 2007, AVR sent to Young a letter, stating that his having written "paid in full" on his checks did not relieve him of his responsibility to pay for legal fees incurred from his deed-restriction violations. Nevertheless, Young continued to write "paid in full" on his checks for annual maintenance assessments because he did not believe that he owed additional fees.

On May 10, 2011, Eckhardt sent to Young a letter, stating that his check for his 2011 maintenance assessments may have been "thrown away by mistake." And she directed him to send a replacement check for the "original amount." Young provided a check on which he again wrote "paid in full," and the Association cashed

the check. Then, in August 2011, Treece sent him a letter, stating that his account, including unpaid assessments, interest, costs, and attorney's fees incurred, had an outstanding balance of $487.31.

In January 2012, Young paid his 2012 maintenance assessments, again writing "Paid in full to date" on his check. In March 2012, Treece sent to Young a letter, claiming a balance due and returning Young's previous check on the ground that it constituted a partial payment. Treece offered a payment plan to Young, but he declined. Instead, Young had his attorney, who was handling his worker's compensation case in New Jersey, write a letter to Treece to explain his situation. Young noted that he had been injured on October 12, 1994 and his case still "hasn't been finished." Treece responded that the Association was not without sympathy about Young's situation, but it could not wait indefinitely for him to make his payments. Although Treece again offered Young a payment plan, he again declined. Young explained that he refused the payment plans because one of the conditions was that he agree to the debt, which he did not. He explained that the letters from the Association caused him "a lot of anxiety" and he "started to have chest pains." And the more letters that came, the more "despondent" he became.

On September 14, 2012, Treece sent to Young a letter, stating that his account balance was $925.99 and the Association could not accept any partial payments without a formal agreement. Although Treece informed Young that he had a right

to a hearing before the Board, Young did not request a hearing. He "would rather respond with letters."

Finally, Young testified that on October 17, 2012, Treece sent to Young's home-equity lender, Texas Advantage Community Bank, N.A., a letter, notifying it that Young had defaulted on his maintenance assessments and, on that basis, the Association intended to foreclose on its continuing lien against his property. Young was "really, really upset" that the Association had contacted his lienholder, and he "felt that [the Association] had hurt [him] at that bank by telling them [he] owed money that [he] didn't believe [he] did." He then "literally would just go and sit in the back yard and try to figure this out," had "anxiety attacks," and got "kind of physically sick sometimes." Young agreed, however, that the Association "has the legal right under the [D]eed [R]estrictions," to collect assessments from homeowners and, if necessary, to hire an attorney to enforce those rights, file a lawsuit, and foreclose on a home.

Eckhardt testified that there are 873 lots in The Landing, all homeowners are automatically members of the Association, and AVR assists the Association with its collection of assessments. After she explained the collections process that AVR employs with all homeowners, she noted that Young, instead of mailing his payments to the Association in an envelope enclosed with an invoice for his assessments, always dropped his check into a drop box at the swimming pool

clubhouse, which is not designated for such payments. In fact, there is no one at the clubhouse to retrieve his checks until the Board has its monthly meetings. Moreover, the Association rejected Young's checks for his maintenance assessments because he wrote "paid in full" on the memo line of each check without actually paying his account in full. Eckhardt further explained that in her 2011 letter to Young, she had mistakenly noted that he had timely paid his account in prior years. And she noted that Young's total outstanding balance at the time of trial was $1,603.99.

Eckhardt further testified that AVR assists the Association with its deed restriction enforcement and architectural control functions, i.e., receiving applications from members for approval to make changes to the paint color, roofing, or landscaping of their houses, and presenting their applications to the Board. She noted that the Board has assumed the role of the ACC and, every two weeks, she drives through The Landing to inspect homes for violations of the Deed Restrictions. After each inspection, she sends approximately 100 to 150 violation notices to homeowners.

Eckhardt noted that she had taken the photographs, admitted into evidence, of Young's house and, at the time of trial, he had not corrected the problems with his roofing or paint. Although he had replaced some shingles, the color did not match the existing shingles. And she explained that his property "constitutes an annoyance under the Deed Restrictions." Although Eckhardt is familiar with Young and his

property, she did not know him personally before the lawsuit and did not harbor any "ill will or dislike toward him."

Emily Lueck, the treasurer of the Board, testified that the Association employs AVR to assist it with its property management functions, there are 873 houses in The Landing, and it is not possible for her to keep track of the receipts and all matters for each property. She explained that Eckhardt, of AVR, is the Board's property management liaison, and, after a homeowner receives three letters regarding a deed-restriction violation, Eckhardt presents the matter, through the history and photographs, to the Board at a regular meeting. During such meetings, properties are described by address, the Board does not discuss "whose house it is," and the Board, collectively, decides whether to refer the matter to the Association's attorney.

In regard to the violations at Young's property, Lueck noted that he had the truck and tree stump removed. However, the roof and paint on his house, at the time of trial, remained in violation of the Guidelines and constitute an annoyance and nuisance under the Deed Restrictions. Although some of the roof shingles had been replaced, they were not the same color as the rest of the roof. Lueck, who had not met Young before the instant suit, noted that he had not contacted the Board, requested a hearing, or spoken with her about the violations. She explained that the Board authorized the instant litigation against Young to ensure that homeowners maintain their homes and to preserve property values in the neighborhood. Because

the Association had previously sent Young "numerous letters" trying to resolve matters, and it "was not working," she "felt like [it] had no other choice" but to file the lawsuit.

Lueck further testified that Young's account records indicated a delinquency and a pattern of writing "paid in full" on checks "to get out of paying the full amounts owed." Although the Board was aware that Young was involved in an ongoing dispute to obtain worker's compensation benefits, a resolution date, even if successful, was uncertain. And the Association "couldn't sit around and wait forever . . . with no idea of when it would end."

William Heins, the president of the Board, testified that the instant ligation against Young is not "vindictive." He had never met Young and, in approving the lawsuit, he was simply "fulfill[ing his] duties and obligations to the community" as a member of the Board. He considered Young's house to be an annoyance, nuisance, and "eyesore." Because all other efforts to get Young to repair his house and pay his assessments had failed, Heins voted to authorize legal action against him. He further testified that it was necessary to hire Treece to assist with getting Young to remove the truck and the stump. And it is customary that attorney's fees be charged against the account of a homeowner in violation of the Deed Restrictions.

Sharon Fayle, a neighbor of Young, testified that she did not consider his house to be a nuisance, annoyance, or eyesore. Donna Wilkerson, also a neighbor

of Young, testified that other houses in the subdivision are in worse shape than his and she did not "receive violation letters" during the seven months after Hurricane Ike that she did not have shingles on her roof. And Karin Perry, a previous Board member, testified that although she had never received a violation as a Board member, she, since resigning from the Board in 2012, "get[s] a letter pretty much every week."

Larry Corona, a real estate broker, investor, builder, and developer, testified that he has had a business relationship with Young for 30 years in developing subdivisions. Corona, who also owns a house in The Landing, noted that Young's roof had been "patched"; however, after Hurricane Ike, the "majority" of the roofs in The Landing "have been replaced or they are patched," and "there are a lot of patched roofs." Although Corona is not an appraiser, he opined that neither Young's patched roof nor the condition of his home would affect the value of his neighbors' homes.

Mark Young testified that he has lived with his brother, Young, at his house in The Landing for over 20 years. In 2011, when Young's issues with the Association began to escalate, Young "became very miserable" and rarely slept. He was anxious and "miserable every time he got a letter." And, on one or more occasions prior to the filing of the lawsuit, Mark saw Young holding his chest, appearing to be in pain. However, Young refused to go to a hospital. Once The

Landing sued Young, he was "very worried about the entire situation," which became a "24-hour-a-day millstone around his neck."

The jury found in favor of Young on his counterclaims against the Association for breach of fiduciary duty and intentional infliction of emotional distress. It specifically found that Young did not fail to timely pay maintenance assessments and neither Young nor the Association had breached the Deed Restrictions. The jury also found that 90% of the then owners of all the lots in The Landing had not signed the Guidelines. It further found that the Association's enforcement of the Deed Restrictions and Guidelines against Young was arbitrary and capricious. The jury awarded Young damages in the amount $8,000 on his counterclaim for breach of fiduciary duty and damages in the amount of $100,000 for his counterclaim of intentional infliction of emotional distress. It also awarded Young $90,000 in attorney's fees for representation in the trial court; $15,000 for representation through appeal to the court of appeals; $15,000 for representation at the petition for review stage in the supreme court; $15,000 for representation at the merits briefing stage at the supreme court; and $15,000 for representation through oral argument at the supreme court.

Young, in his motion for entry of judgment on the jury's verdict, noted that the jury had found that the Guidelines "were not signed by 90% of the membership."

And he asked the trial court to enter judgment declaring the Guidelines "void and unenforceable."

The Association moved for a judgment notwithstanding the verdict ("JNOV"), arguing, in part, that the trial court should disregard the jury's finding that 90% of the then owners of all the lots in The Landing did not sign the Guidelines because the finding is immaterial. It asserted that the Board's adoption of the Guidelines constituted a valid act authorized by the Texas Property Code.[8]

After Young elected to recover damages on his counterclaim for intentional infliction of emotional distress, the trial court entered a judgment, awarding him actual damages of $100,000, declaring the Association's Guidelines "invalid and void," and awarding Young attorney's fees in the amount of $90,000 for representation through trial, along with those found by the jury for representation in the court of appeals and in the supreme court, plus interest and costs. The trial court further ordered that the Association take nothing on its claims against Young.

Intentional Infliction of Emotional Distress

In its first issue, the Association argues that the evidence is legally and factually insufficient to support the jury's finding against it on Young's counterclaim for intentional infliction of emotional distress because he presented "no evidence"

[8] *See* TEX. PROP. CODE ANN. § 204.010 (Vernon 2014).

of any of the elements of his claim. It asserts that his counterclaim "lacks any legal foundation."

When a party challenges legal sufficiency relative to an adverse finding on which it did not bear the burden of proof, it must show that no evidence supports the finding. *See Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 215 (Tex. 2011). We will sustain a legal-sufficiency or "no-evidence" challenge if the record shows one of the following: (1) a complete absence of evidence of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence establishes conclusively the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). In conducting a legal-sufficiency review, a "court must consider evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it." *Id*. at 822. The term "inference" means,

> [i]n the law of evidence, a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved. . . .

Marshall Field Stores, Inc. v. Gardiner, 859 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.) (quoting *Inference*, BLACK'S LAW DICTIONARY

(5th ed. 1979)). For a factfinder to infer a fact, "it must be able to deduce that fact as a logical consequence from other proven facts." *Id.*

If there is more than a scintilla of evidence to support the challenged finding, we must uphold it. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998). "[W]hen the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). However, if the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then factfinders must be allowed to do so. *City of Keller*, 168 S.W.3d at 822; *see also King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement." *City of Keller*, 168 S.W.3d at 822.

When an appellant challenges the factual sufficiency of the evidence on an issue, we view all of the evidence in a neutral light and set aside the finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Plas–Tex, Inc. v. U.S. Steel Corp*., 772 S.W.2d 442, 445 (Tex. 1989). The factfinder is the sole judge of the witnesses' credibility, and it may choose to believe

one witness over another; a reviewing court may not impose its own opinion to the contrary. *See Zenner v. Lone Star Striping & Paving, L.L.C.*, 371 S.W.3d 311, 314 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

To prevail on a claim for intentional infliction of emotional distress, a plaintiff must prove that: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. *Kroger Tex. L.P. v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006); *Dworschak v. Transocean Offshore Deepwater Drilling, Inc.*, 352 S.W.3d 191, 197 (Tex. App.—Houston [14th Dist.] 2011, no pet.). A plaintiff's emotional distress must be the "intended or primary consequence of the defendant's conduct." *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999); *Espinosa v. Aaron's Rents, Inc.*, 484 S.W.3d 533, 545 (Tex. App.—Houston [1st Dist.] Jan. 14, 2016, no pet.).

To be extreme and outrageous, conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Bruce*, 998 S.W.2d at 611–12. Meritorious claims for intentional infliction of emotional distress are "relatively rare" because "most human conduct, even that which causes injury to others, cannot be fairly characterized as extreme and outrageous." *Suberu*, 216 S.W.3d at 796 (citing *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 815 n.1 (Tex.

2005) (citing cases in which conduct not extreme and outrageous)). It is for the court to determine, in the first instance, whether particular conduct has met this high standard. *Bruce*, 998 S.W.2d at 616. Generally, insensitive or even rude behavior does not constitute extreme and outrageous conduct. *Id.* at 611–12. Similarly, mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities do not rise to the level of extreme and outrageous conduct. *Id*. Except in circumstances bordering on serious criminal acts, even claims stemming from heinous acts rarely have merit as intentional infliction claims. *Jackson*, 157 S.W.3d at 818. It is the severity and regularity of abusive and threatening conduct that brings it "into the realm of extreme and outrageous conduct." *Bruce,* 998 S.W.2d at 617.

"Emotional distress includes all highly unpleasant mental reactions such as embarrassment, fright, horror, grief, shame, humiliation, and worry." *Id.* at 618; *see also Havens v. Tomball Cmty. Hosp*., 793 S.W.2d 690, 692 (Tex. App.—Houston [1st Dist.] 1990, writ denied). Severe emotional distress is distress that is so severe that no reasonable person could be expected to endure it. *Bruce,* 998 S.W.2d at 618.

Collection of Maintenance Assessments

In support of his claim that the Association intentionally inflicted emotional distress upon him, Young asserts that a "remarkable analogy in our jurisprudence is the recognition of the common law intentional tort of unreasonable collection efforts," which "amount to a course of harassment that was willful, wanton,

malicious, and intended to inflict mental anguish and bodily harm." *See EMC Mortg. v. Jones*, 252 S.W.3d 857, 868 (Tex. App.—Dallas 2008, no pet.). He further notes that the United States Court of Appeals for the Fifth Circuit has observed that the tort of unreasonable collection is intended to deter "outrageous collection techniques." *See McDonald v. Bennett*, 674 F.2d 1080, 1089 n.8 (5th Cir. 1982). And he asserts that "[i]n this case, appellate review of the sufficiency of [his] evidence of extreme and outrageous conduct encompasses just such a relationship."

The Association asserts that Young's "argument of the availability of a claim for 'unreasonable collection efforts' demonstrates that an alternative cause of action could provide a remedy" to him. And "[i]f so, Young cannot recover for [intentional infliction of emotional distress] as a matter of law."

Intentional infliction of emotional distress is a gap-filler tort that was "judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress." *Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004); *see also Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 808 (Tex. 2010) (intentional infliction of emotional distress provides remedy where other traditional remedies not available); *Garcia v. Shell Oil Co.*, 355 S.W.3d 768, 775–76 (Tex. App.—Houston

[1st Dist.] 2011, no pet.). It was "never intended to supplant or duplicate existing statutory or common-law remedies." *Jackson*, 157 S.W.3d at 816.

Where the gravamen of a complaint is covered by another common-law or statutory tort, intentional infliction of emotional distress is not available. *Zeltwanger*, 144 S.W.3d at 447; *see also Louis v. Mobil Chem. Co*., 254 S.W.3d 602, 608 (Tex. App.—Beaumont 2008, pet. denied) ("Where the gravamen of the complaint is really another tort, intentional infliction of emotional distress is unavailable even if the evidence would be sufficient to support a claim for intentional infliction of emotional distress in the absence of another remedy."). "Even if other remedies do not explicitly preempt the tort, their availability leaves no gap to fill." *Jackson*, 157 S.W.3d at 816. And a plaintiff cannot maintain his claim for intentional infliction of emotional distress "regardless of whether he . . . succeeds on, or even makes" the precluding claim. *Zeltwanger*, 144 S.W.3d at 448; *see also Garcia*, 355 S.W.3d at 776 ("This is true even if plaintiff does not assert the precluding claim in her petition—such as Chapter 21 of the Texas Labor Code in this instance—or asserts the displacing claim but does not prevail—such as Title VII of the Civil Rights Act of 1964 in this instance.").

In *Hidden Forest Homeowners Association v. Hern*, a homeowner attempted to tender payments to his homeowners association for his maintenance assessments. No. 04-10-00551-CV, 2011 WL 6089881, at *1 (Tex. App.—San Antonio Dec. 7,

2011, no pet.) (mem. op.). The association refused his payments on the ground that the amount tendered was insufficient to pay the full amount due. *Id.* The association then sued the homeowner for failure to pay his assessments and for violations of the restrictive covenants, seeking monetary damages and foreclosure. *Id.* And the homeowner counterclaimed against the association for damages for unreasonable collection efforts. *Id.* at *2.

The homeowner in *Hern*, in support of his unreasonable-collection claim, asserted that the association had failed to accept his payments for maintenance assessments; sued him for non-payment; and, in violation of its bylaws requiring it to monitor its agents, failed to monitor its attorney's fees. *Id.* at *5. The appellate court concluded that there was insufficient evidence to support the jury's finding that the association had engaged in unreasonable collection practices because there was no evidence that the association's "collection efforts were harassing or outrageous." *Id.* To prevail on a claim for unreasonable collection practices, a plaintiff generally must prove that the defendant's "debt collection efforts 'amount to a course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm.'" *Id.* at *4 (quoting *Jones*, 252 S.W.3d at 868–69). The appellate court noted that the tort of "[u]nfair collection practices is an intentional tort derived from the common law." *Id.* (citing *Jones*, 252 S.W.3d at 868). And it

is intended to deter "outrageous collection techniques." *Id.* at *5; *see McDonald*, 674 F.2d at 1088–89.

The appellate court in *Hern* concluded that although the homeowner had attempted to tender payments for amounts that he claimed exceeded what was owed, his proposed payments were less than that demanded by the association. *Id.* And there was no evidence that the association sought excessive attorney's fees for the purpose of inflicting mental anguish on the homeowner. *Id.* Although it held that the evidence before it was insufficient to support the jury's finding that the association had engaged in unreasonable collection practices, the court cited several cases in which "Texas courts have found . . . evidence sufficient to state a cause of action for unreasonable debt collection." *Id.*

Here, Young, in a portion of his claim for intentional infliction of emotional distress, alleged that the Association's efforts to collect maintenance assessments and fees from him amounted to a course of harassment that was malicious and intended to inflict mental anguish and this actually constitutes the common-law tort of unfair collection practices. *See id.* at *5; *see, e.g.*, *Jones*, 252 S.W.3d at 870 (holding evidence sufficient to uphold jury's finding of unreasonable collection efforts and considering mental anguish damages); *see also Shin v. Chase Home Fin., LLC*, No. 05-12-01634-CV, 2014 WL 2993815, at *4 (Tex. App.—Dallas June 30, 2014, no pet.) (mem. op.) (evidence insufficient to raise fact issue showing bank's

collection efforts, which allegedly included improperly posting homeowners' property for foreclosure when not in default, were "willful, wanton, or malicious" or that bank "had the intent to inflict bodily harm or mental anguish" on homeowners).

Because the gravamen of Young's complaint is really another tort, a claim for intentional infliction of emotional distress is not available. *See Zeltwanger*, 144 S.W.3d at 447; *Louis*, 254 S.W.3d at 608 ("Where the gravamen of the complaint is really another tort, intentional infliction of emotional distress is unavailable even if the evidence would be sufficient to support a claim for intentional infliction of emotional distress in the absence of another remedy."). Again, "[e]ven if other remedies do not explicitly preempt the tort, their availability leaves no gap to fill." *Jackson*, 157 S.W.3d at 816. And a plaintiff cannot maintain his claim for intentional infliction of emotional distress "regardless of whether he . . . succeeds on, or even makes" the precluding claim. *Zeltwanger*, 144 S.W.3d at 448; *see also Garcia*, 355 S.W.3d at 776.

Enforcement of Deed Restrictions

In regard to Young's claim for intentional infliction of emotional distress, which is based on the Association's letters to him about enforcing the Deed Restrictions and Guidelines, the Association asserts that "Young presented no evidence that [it] intended to cause him any harm or emotional distress." It further

asserts that "the only evidence before the trial court was that it was trying in good faith . . . to ensure [Young's] compliance with the Deed Restrictions and Guidelines." And it noted that Young conceded at trial that its enforcement attempts were "neither callous nor insensitive."

The record shows that the trial court admitted into evidence a series of letters, dated from 1993 to 2011, between Young and the Association; its previous attorney, Charles A. Daughtry; and its previous property management company, Houston Community Management Services, and beginning in 2006, AVR. Each of the letters from the Association and its agents cites various violations of the Deed Restrictions. And the majority concern improper storage of items on the side of Young's house and an inoperable Ford truck in his driveway. Young testified that these matters were "all resolved as time went on. We resolved them."

Young also testified about various letters that he had exchanged with the Association in 2012. On January 23, 2012, Treece sent to Young a letter, demanding that he remove an "18-wheeler rig parked/stored on the driveway," remove a tree stump, and replace his roof. Young admitted that, at the time he received Treece's letter, there was, in violation of the Deed Restrictions, "a commercial vehicle parked on the street, on the curb" at his house. He also agreed that there was a tree stump in his front yard. Moreover, in regard to his roof, "there may have been some missing shingles that had broken off," exposing "other shingles that had laid

underneath," and "a bare spot"; the photographs of his house in evidence show a "roof in disrepair" that "needs some shingles replaced"; and the paint on his shutters and trim "look[ed] faded."

Young further admitted that he had "probably gotten some" previous letters about moving the truck, which he had agreed to move. However, five months later, on May 18, 2012, Treece sent Young another letter about the truck, stump, and roof because Young had not complied with the Deed Restrictions. Nevertheless, Treece remained "very polite," "sympathetic to [his] situation," and "thank[ed]" him for his previous letter explaining his situation. Young noted that Treece "gave [him] some suggestions" on contacting his windstorm insurance provider to discuss replacement of his roof. And there is nothing insensitive in Treece's letter.

Young further testified that on July 12, 2012, Eckhardt sent him a "violation letter." Stating that the condition of the paint on his house was in violation of the Deed Restrictions, she asked him to re-paint his house. She noted that if he, for any reason, needed additional time to correct the problem, he could telephone her. Young also acknowledged that although Eckhardt, in the letter, advised him that he had a right to request a hearing before the Board, he did not telephone Eckhardt or request a hearing to resolve the matter.

In September 2012, Treece sent to Young a letter, thanking him for his previous letter, and reminding him that he was required to comply with the

"documents encumbering [his] property." Treece again referenced the roof, tree stump, and need to re-paint. Young agreed that Treece was "nice enough in telling [him] that [he] ha[s] got to do as asked." And although he could not recall when he finally moved the commercial vehicle, he noted that the "stump wasn't removed until December 7, 2012."

In *Kroger Texas Limited Partnership v. Suberu*, the Texas Supreme Court, in considering whether the plaintiff had presented more than a scintilla of evidence that the defendant's conduct toward her was extreme and outrageous, also addressed whether the defendant had intentionally caused the plaintiff distress. 216 S.W.3d 788, 796–97 (Tex. 2006). The court concluded that the plaintiff's claimed innocence of shoplifting, by itself, was insufficient to find that the defendant did not honestly and reasonably believe that she was guilty of shoplifting. *Id.* Further, the plaintiff produced no evidence of bad relations, animus, or other ulterior motives. *Id.* The court noted that although it did not doubt that the incident at issue had caused the plaintiff emotional distress, there was "no evidence" that the defendant "intentionally subjected her to such distress knowing she was innocent." *Id.* Thus, the court held that the plaintiff's testimony "d[id] not exceed a scintilla of evidence" and was legally insufficient to support her claim. *Id.*

We conclude that in regard to Young's claim for intentional infliction of emotional distress, based on the Association's letters to him to enforce the Deed

Restrictions and Guidelines, the record does not show, and Young, in his appellate brief, does not direct us to, any evidence that any emotional distress he suffered was the intended or primary consequence of the Association's enforcement actions. *See Bruce*, 998 S.W.2d at 611; *Espinosa*, 2016 WL 191944, at *9.

Accordingly, we hold that the evidence is legally insufficient to support the trial court's judgment on Young's claim of intentional infliction of emotional distress. Having held that the evidence is legally insufficient to support the trial court's judgment, we do not reach the Association's challenge to the factual sufficiency of the evidence.

We sustain the Association's first issue.

Further, because there no longer remains a legal basis to support the trial court's award of actual damages in its judgment, we do not reach the portion of the Association's fourth issue, in which it contends that the trial court erred in not applying settlement credits to the damages awarded.

Jury Charge Error

In its second issue, the Association argues that the trial court, in its charge, erred in submitting to the jury Question No. 2, essentially asking the jury whether the Guidelines constitute an unauthorized amendment to the Deed Restrictions, because the Guidelines are "not amended deed restrictions," but community standards adopted in accordance with a grant of authority under the Texas Property

Code, which the trial court also erred in refusing to apply. *See* TEX. PROP. CODE ANN. ch. 204 (Vernon 2014) ("Powers of Property Owners' Associations Relating to Restrictive Covenants in Certain Subdivisions"). It asserts that the submission of Question No. 2 caused the rendition of an improper judgment (1) declaring the Guidelines "invalid and void" and (2) ordering that it take-nothing on its claim that Young breached the restrictive covenants.

We review a trial court's decision to submit to a jury a particular question or instruction for an abuse of discretion. *See La.-Pac. Corp. v. Knighten*, 976 S.W.2d 674, 676 (Tex. 1998); *Ginn v. NCI Bldg. Sys., Inc*., 472 S.W.3d 802, 828 (Tex. App.—Houston [1st Dist.] 2015, no pet.). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner, or if it acts without reference to any guiding rules or principles. *Moss v. Waste Mgmt. of Tex., Inc*., 305 S.W.3d 76, 81 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). A trial court has wide discretion in submitting jury instructions and questions. *Ginn*, 472 S.W.3d at 828. This discretion is subject only to the requirement that the questions submitted must: (1) control the disposition of the case, (2) be raised by the pleadings and the evidence, and (3) properly submit the disputed issues for the jury's determination. *Id.*; *see also* TEX. R. CIV. P. 277, 278.

An appellate court will not reverse a judgment for charge error unless the error was harmful in that it "probably caused the rendition of an improper judgment" or

"probably prevented the appellant from properly presenting the case to the court of appeals." *See* TEX. R. APP. P. 44.1(a). "Submission of an improper jury question can be harmless error if the jury's answers to other questions render the improper question immaterial." *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995). A jury question is immaterial if it: (1) should not have been submitted; (2) is rendered immaterial by other findings; or (3) called for a finding not within the jury's province, such as presenting a question of law for the court. *Se. Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999). Submission of an immaterial issue is not harmful error unless the submission confused or misled the jury. *Alvarado*, 897 S.W.2d at 752. When determining whether a particular question could have confused or misled the jury, we "consider its probable effect on the minds of the jury in the light of the charge as a whole." *Id*. (citation omitted).

The Association first asserts that the trial court erred in disregarding controlling statutory authority, i.e., Texas Property Code chapter 204, entitled, "Powers of Property Owners' Associations Relating to Restrictive Covenants in Certain Subdivisions." *See* TEX. PROP. CODE ANN. ch. 204 (Vernon 2014). Specifically, it asserts that chapter 204, which sets forth certain powers that an association may exercise, authorized it to promulgate the Guidelines regulating the use, maintenance, repair, and appearance of The Landing. *See id.*

The applicability of a statute is a question of law that we review de novo. *See First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008). We also review questions of statutory construction de novo. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). When construing a statute, our primary objective is to ascertain and give effect to the Legislature's intent. *Id*. "We look first to the statute's language to determine that intent, as we consider it 'a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.'" *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008) (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc*., 996 S.W.2d 864, 866 (Tex. 1999)). We consider the statute as a whole rather than focusing upon individual provisions. *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). If a statute is unambiguous, we adopt the interpretation supported by its plain language unless such an interpretation would lead to absurd results. *Id*.

The provisions of chapter 204 apply "only to a residential real estate subdivision . . . that is located in whole or in part: . . . in a county with a population of not less than 285,000 and not more than 300,000 that is adjacent to the Gulf of Mexico and that is adjacent to a county having a population of 3.3 million or more." TEX. PROP. CODE ANN. § 204.002(a)(2) (Vernon 2014). According to the United

States Census Bureau, Galveston County, at the most recent official census,[9] had a population of 291,309. It is adjacent to the Gulf of Mexico and Harris County, a county having a population of 4,092,459 at the most recent official census.[10] Thus, chapter 204 applies to the Association.

The parties first dispute whether an architectural control committee still exists in The Landing. The Deed Restrictions, article IV, section 5, provides:

> The duties and powers of the [ACC] and of the designated representative shall cease on and after ten (10) years from the date of this instrument. Thereafter, the approval described in this covenant shall not be required, and all power vested in said committee by this covenant shall cease and terminate; provided, that any time after January 1, 1989, whether or not the term of the [ACC] specified in the preceding sentence shall have expired, by a two-thirds (2/3) vote of the members present and voting, the [Board] of the [Association] may assume the duties and powers of the [ACC], and thereafter the [Board] of the [Association] shall have all of the rights, benefits and powers provided herein for the [ACC].

Because the Deed Restrictions were executed on June 12, 1979, the powers that they granted to the ACC expired on June 12, 1989. The Association does not assert that the ACC was preserved by a two-thirds vote.

Property Code section 204.011 provides that unless restrictions vest the ACC authority in the property owners' association before the term of the ACC expires as

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[9] *See* U.S. Census Bureau, Quick Facts, Galveston Cty., Tex., https://www.census.gov/quickfacts/table/PST045215/48167 (Apr. 1, 2010).

[10] *See* U.S. Census Bureau, Quick Facts, Harris Cty., Tex., https://www.census.gov/quickfacts/table/PST045215/48201,48167 (Apr. 1, 2010).

prescribed by the restrictions, ACC authority "automatically vests in the property owners' association." *See* TEX. PROP. CODE ANN. § 204.011(b)(1) (Vernon 2014). Here, when the term of the ACC expired under the terms of the Deed Restrictions, ACC authority automatically vested in the Association.

Section 204.010 provides, in pertinent part, as follows:

> (a) Unless otherwise provided by the restrictions or the association's articles of incorporation or bylaws, the property owners' association, acting through its board of directors or trustees, may:
>
> > (6) regulate the use, maintenance, repair, replacement, modification, and appearance of the subdivision;
> >
> > . . . .
> >
> > (18) . . . if the authority is vested in the property owners' association under Section 204.011:
> >
> > > (A) implement written architectural control guidelines for its own use or record the guidelines in the real property records of the applicable county; and
> > >
> > > (B) modify the guidelines as the needs of the subdivision change.

TEX. PROP. CODE ANN. § 204.010(a)(6), (18) (Vernon 2014). Thus, section 204.010 authorizes the Association to regulate the use, maintenance, repair, replacement, modification, and appearance of the subdivision; implement written architectural control *guidelines*; and modify those guidelines as the needs of the subdivision change. *See id.* (emphasis added).

Young argues that section 204.010 does not apply because the Guidelines constitute actual amendments to the Deed Restrictions. And the Deed Restrictions,

at article VII, section 1, expressly provide that, during their initial term, which expires on December 31, 2019, its covenants and restrictions "may be changed or terminated only by an instrument signed by the then Owners of not less than ninety percent (90%) of all the Lots in The Landing, Section One (1), and properly recorded in the appropriate records of Galveston County, Texas."

We note that section 204.003 provides that

> An express designation in a document creating restrictions applicable to a residential real estate subdivision that provides for the extension of, addition to, or modification of existing restrictions by a designated number of owners of real property in the subdivision prevails over the provisions of this chapter.

Id. § 204.003(a) (Vernon 2014).

Young, in his counterclaim, sought a declaration that "the homeowners have not approved any extension of, addition to, or modification of the Deed Restrictions by a vote of the majority [sic]." And, the trial court, in Question No. 2 of the charge, asked the jury: "Were the Exterior Maintenance Guidelines signed by at least ninety percent (90%) of the then owners of all lots in The Landing?"

The Association asserts that the Guidelines do not constitute an amendment, change to, extension of, addition to, or modification of, the Deed Restrictions. Rather, they simply constitute community standards that more specifically articulate and effectuate the broader power already granted to it under the Deed Restrictions.

"It is the duty of this Court, as it was the duty of the trial court, to review the wording of the restrictive language and determine therefrom, the intent of the drafter." *Vill. of Pheasant Run Homeowners Ass'n, Inc. v. Kastor*, 47 S.W.3d 747, 750 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (citing *Wilmoth v. Wilcox*, 734 S.W.2d 656, 658 (Tex. 1987)). We review a trial court's interpretation of a restrictive covenant de novo. *Uptegraph v. Sandalwood Civic Club*, 312 S.W.3d 918, 925 (Tex. App.—Houston [1st Dist.] 2010, no pet.). Restrictive covenants are subject to the general rules of contract construction. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). We must give liberal construction to the covenant's language, seeking to insure that its provisions are given effect. *See Ashcreek Homeowner's Ass'n v. Smith*, 902 S.W.2d 586, 588–89 (Tex. App.—Houston [1st Dist.] 1995, no writ).

The Deed Restrictions, article III, "Use and Building Restrictions," provide, in pertinent part, as follows:

> Section 2. Architectural Control. No building or other structure shall be erected, placed, or altered on any Lot until the construction plans and specifications therefor and a plot plan showing the location of the structure thereon have been approved by the [ACC] as to harmony with existing structures, as to location with and respect to topography and finished grade elevation, and as to compliance with minimum construction standards, *all as more fully provided for in Article IV hereof.*
>
> . . . .
>
> Section 4. Type of Construction, Materials and Landscape.
>
> . . . .

> (b) No external roofing material other than 235# minimum composition shingles of a wood tone color shall be constructed or used on any building in any part of the Properties unless the [ACC] shall, in its discretion, permit the use of the roofing materials, such permission to be granted in writing . . . .
>
> . . . .
>
> Section 7. Annoyances or Nuisances. (a) No noxious or offensive activity shall be carried on upon any Lot or shall anything be done thereon which may become an annoyance to the neighborhood. . . .

(Emphasis added.) Article IV, "Architectural Control Committee," provides, in pertinent part, as follows:

> Section 1. Approval of Building Plans. No building shall be . . . altered on any Lot until the . . . specifications . . . have been approved in writing as to harmony of exterior design and color with existing structures . . . . A copy of the . . . specifications . . . together with such information as may be deemed pertinent, shall be submitted to the [ACC] . . . prior to commencement of construction. The [ACC] may require submission of such other documents as it deems appropriate, in such form and detail as it may elect at its entire discretion.

And article IV, section 4, provides:

> Minimum Construction Standards. The ACC may from time to time promulgate an outline of minimum acceptable construction standards, provided, however, that such outline will serve as a minimum guideline and such ACC will not be bound thereby.

(Emphasis added.)

Moreover, the Guidelines provide as follows, in pertinent part:

> All improvements on a lot must be maintained in a state of good repair and shall not be allowed to deteriorate. Repairs shall include, but [are] not limited to, the following:
>
> 1. All painted surfaces must be clean and smooth with no bare areas or peeling paint . . . .

2. All rotted and damaged wood must be replaced. . . .

. . . .

4. Roofs must be maintained in good repair with no missing or curling shingles.

. . . .

10. There shall be no storage of clutter and debris in public view.

In *Tien Tao v. Kingsbridge Park Community Association, Inc.*, this Court, considering language virtually identical to that in article III, section 2, and article IV, above, held that it "makes it clear" that (1) an architectural control committee exists and (2) "the committee may establish standards independent from those articulated in the deed restrictions, to effectuate their intent." 953 S.W.2d 525, 529 (Tex. App.—Houston [1st Dist.] 1997, no pet.). The language "gives the ACC the general right to approve in advance any alterations made to a lot or home." *Id.* at 530. And "the ACC guidelines flesh out and particularize this general right." *Id.* In regard to the deed restrictions in *Tien Tao*, we noted that

> [o]ther sections of the deed restrictions deal[t] with such diverse matters as minimum square footage, exterior materials, sidewalk, location of improvements on the lots, offensive activities, temporary outbuildings, storage of cars and boats, animals, mineral operations, walls, fences, hedges, visual obstructions, lot maintenance, rubbish collection, signs and billboards, antennae, and utility lines.

Id. at 529. And we concluded:

> It is clear from the breadth of the restrictions that the subdivision is concerned with virtually every aspect of the appearance and value of the neighborhood. *It is not surprising that minutiae such as lawn*

> *ornaments and decorations would be addressed by the committee or that guidelines would have been formulated to address them*.

Id. (emphasis added). Thus, we held that it was "clear" that a homeowner's responsibility was "to obtain permission for virtually any exterior change." *Id.*

The Fourteenth Court of Appeals, in *Village of Pheasant Run Homeowners Association, Inc.*, held similarly after considering language identical to that in *Tien Tao*. 47 S.W.3d at 752–53 (citing *Tien Tao*, 953 S.W.2d at 529). There, homeowners asserted that the association was without authority to compel them to submit a paint chip for approval prior to re-painting their house and they were unaware of the "'guidelines' that exist[ed] in addition to the restrictions themselves," which prohibited certain colors. *Id.* at 752. They further asserted that although the deed restrictions were very specific on other aesthetic issues, they contained no specific requirements as to color schemes. *Id.* The association asserted that the deed restrictions authorized it to adopt guidelines to interpret the provisions of the deed restrictions. *Id.* And the guidelines specifically disapproved of certain colors. *Id.* at 749. The court concluded that it was "clear," based on the language discussed above, that the homeowners' responsibility was to obtain permission for virtually any exterior change, concerning new or existing structures. *Id.* at 754 (citing *Pilarcik v. Emmons*, 966 S.W.2d 474, 479 (Tex. 1998) (term "altered" applies to changes in existing construction)). And the homeowners' paint color constituted a

"direct violation of the guideline[s] as well as a substantial variation from the uniform scheme." *Id.*

Here, the language in article III, section 2, of the Deed Restrictions providing that "[n]o building or other structure shall be . . . altered on any Lot until the . . . specifications therefore . . . have been approved by the [ACC] as to harmony with existing structures, with respect to exterior design and color with existing structures," grants the Association the general right to approve in advance any alterations made on a lot. *See id.*; *Tien Tao*, 953 S.W.2d at 530; *see also Pilarcik*, 966 S.W.2d at 479 (term "altered" applies to changes in existing construction). And article IV, section 4, which provides that the ACC, "may from time to time promulgate an outline of minimum acceptable construction standards," grants the Association the authority to establish standards, independent from those articulated in the deed restrictions, to effectuate their intent and "flesh out and particularize this general right." *See Tien Tao*, 953 S.W.2d at 530.

Like the Deed Restrictions in *Tien Tao*, these provisions contain general standards governing minimum square footage; sidewalks; location of improvements on the lots; annoyances and nuisances; lot maintenance; temporary outbuildings; storage of cars, trailers, and boats; keeping of animals; mineral operations; walls; fences; landscaping; visual obstructions; signs and billboards; utility lines; and interior and exterior materials. *See Tien Tao*, 953 S.W.2d at 529. The Guidelines

specifically require that "[a]ll painted surfaces . . . be clean and smooth with no bare areas or peeling paint," "all surfaces . . . be free of mildew," and roofs "be maintained in good repair with no missing or curling shingles." Thus, the Guidelines specifically address the subject matter of the Deed Restrictions and "flesh out and particularize" the general standards. *See id.* at 530.

We conclude that the Guidelines do not constitute an amendment, change to, extension of, addition to, or modification of, the Deed Restrictions. Thus, the Association's adoption of the Guidelines was not subject to Property Code section 204.003 or the requirement in the Deed Restrictions that the Guidelines be approved by an "instrument signed by the then Owners of not less than ninety percent (90%) of all the Lots in The Landing, Section One." *See* TEX. PROP. CODE ANN. § 204.003.

We further conclude that the Guidelines were validly promulgated pursuant to Property Code section 204.010, which specifically authorizes the Association to "regulate the use, maintenance, repair, replacement, modification, and appearance of the subdivision"; "implement written architectural control guidelines for its own use or record the guidelines in the real property records of the applicable county"; and "modify the guidelines as the needs of the subdivision change." *See id.* § 204.010(a)(6), (18). Accordingly, we hold that the trial court erred in disregarding section 204.010 and submitting to the jury Question No. 2, which asked, "Were [the

Guidelines] signed by at least ninety percent (90%) of the then owners of all lots in the Landing?"

Again, we will not reverse a judgment for charge error unless the error was harmful in that it "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case to the courts of appeals." *See* TEX. R. APP. P. 44.1(a). We conclude that the jury's negative answer to Question No. 2 was harmful because it caused the rendition of an improper judgment declaring the Guidelines "invalid and void." *See id*.

The Association further complains that the jury, based on its negative answer to Question No. 2, did not reach Question No. 3. Question No. 2, in addition to supporting Young's request for declaratory judgment, served as a predicate to Question No. 3, which asked, "Did [Young] fail to comply with the Landing's [Guidelines]?" In question 3, the trial court instructed the jury not to answer if it answered "No" to Question No. 2. The Association complains that based on the jury's negative answer in Question No. 2, the jury was not afforded an opportunity to consider whether Young had breached the Guidelines.

Submission of an improper jury question can be harmless if the jury's answers to other questions render the improper question immaterial. *Alvarado*, 897 S.W.2d at 752. A jury question is immaterial if its answer can be found elsewhere in the verdict. *Id.*

Reading the charge as a whole, the trial court asked the jury in Question No. 1: "Did [Young] fail to comply with The Landing's Deed Restrictions?" And the jury answered, "No." Thus, notwithstanding the submission of an improper predicate question, the gravamen of the Association's claim, i.e., whether Young had breached the restrictive covenants governing The Landing, was actually submitted to, and answered, by the jury. Accordingly, in regard to the Association's complaint that the erroneous submission of a predicate question caused the rendition of an improper judgment on their claim that Young breached the restrictive covenants, we hold that the error is harmless. *See id*.

We sustain the Association's second issue in part and overrule it in part.

Attorney's Fees

In its third issue, the Association argues that the trial court erred in awarding Young his attorney's fees because he is not entitled to recover attorney's fees and, alternatively, he failed to segregate his attorney's fees.

Young sought recovery of his attorney's fees under the Texas Property Code, Texas Civil Practice and Remedies Code, and the Declaratory Judgments Act ("DJA"). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.009, 38.001 (Vernon 2015); *See* TEX. PROP. CODE ANN. § 5.006 (Vernon 2014). The trial court entered

judgment on the jury's finding that Young was entitled to $90,000 in attorney's fees for representation in the trial court; $15,000 for representation through appeal to the court of appeals; $15,000 for representation at the petition for review stage in the supreme court; $15,000 for representation at the merits briefing stage at the supreme court; and $15,000 for representation through oral argument at the supreme court.

The Property Code provides that "[i]n 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(a). Here, the jury found against Young on his claim that the Association had failed to comply with the terms of the Deed Restriction. Thus, he did not prevail on his claim. Although the jury also found that Young did not breach the Deed Restrictions, this finding did not concern a course of action that he "assert[ed]" and "prevail[ed]" upon, but only one against which he defended. "One defending such a suit is not entitled to attorney's fees under section 5.006." *City of Pasadena v. Gennedy*, 125 S.W.3d 687, 701 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Thus, Young is not entitled to attorney's fees under Property Code section 5.006.

Civil Practice and Remedies Code section 38.001 provides that a "person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written

contract." TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8). To recover fees under the statute, a litigant must (1) prevail on a breach-of-contract claim and (2) recover damages. *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 666 (Tex. 2009) ("[C]laimant must recover some amount on [its] claim[.]"). Young has not prevailed on a breach-of-contract claim and recovered damages. *See id*. Thus, he is not entitled to attorney's fees under section 38.001.

The DJA "entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law." *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 706 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."). Because the grant or denial of attorney's fees is within the sound discretion of the trial court, its judgment will not be disturbed on appeal in the absence of a clear showing that it abused its discretion. *Oake v. Collin Cty*., 692 S.W.2d 454, 455 (Tex. 1985); *Indian Beach Prop*., 222 S.W.3d at 706. A trial court does not abuse its discretion if some evidence reasonably supports its decision. *Butnaru v. Ford Motor Co*., 84 S.W.3d 198, 211 (Tex. 2002); *Indian Beach Prop*., 222 S.W.3d at 706.

Although, as discussed above, the trial court erred in declaring the Association's Guidelines "void," and Young did not prevail on any of his other declaratory claims, an award of attorney's fees under the DJA is not dependent on a finding that the party "substantially prevailed." *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996); *Feldman v. KPMG LLP*, 438 S.W.3d 678, 685 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

Attorney's fees may not, however, be awarded under the DJA in an action for which relief is not available under the DJA. *Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 624 (Tex. 2011). Declaratory relief is available only if a justiciable controversy exists that will be resolved by the declaration sought and is not available to settle disputes already pending before the court. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990) (orig. proceeding).

The declarations Young sought in this case added nothing to what would be implicit in a final judgment for the other remedies sought by the parties. *See Lehmann*, 359 S.W.3d at 624–25. Thus, attorney's fees are not recoverable under the DJA. *Id*.

Accordingly, we hold that the trial court erred in awarding Young his attorney's fees.

We sustain the Association's third issue.

Costs

In the remainder of its fourth issue, the Association contends that the judgment should be modified to order that each party bear its own costs.

Typically, unless otherwise provided, the successful party in a suit shall recover costs from the opposing party. TEX. R. CIV. P. 131. The trial court may, however, "for good cause, to be stated on the record, adjudge the costs otherwise than as provided by law or these rules." TEX. R. CIV. P. 141. Unless the record demonstrates an abuse of discretion, the trial court's assessment of costs for good cause should not be disturbed on appeal. *Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 376 (Tex. 2001). Here, the trial court should hear evidence and conclude how costs should be taxed in view of the results of the appeal. *See Recognition Commc'ns, Inc. v. Am. Auto. Ass'n*, 154 S.W.3d 878, 895 (Tex. App. 2005—Dallas, pet. denied).

Accordingly, we sustain the portion of the Association's fourth issue in which it contends that the judgment should be modified to order that each party bear its own costs.

Immunity

In its fifth issue, the Association argues that the trial court erred in denying its motion for directed verdict, motion for judgment notwithstanding the verdict, objection to Young's proposed judgment, motion to modify the judgment, and

motion for new trial because the judicial communications privilege bars "all tort claims against [it]."

It is well-established that an absolute privilege extends to publications made in the course of judicial proceedings—"meaning that any statement made in the trial of any case, by anyone, cannot constitute the basis for a defamation action, or any other action." *Hernandez v. Hayes*, 931 S.W.2d 648, 650 (Tex. App.—San Antonio 1996, writ denied) (citing *James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982); *Reagan v. Guardian Life Ins. Co*., 140 Tex. 105, 166 S.W.2d 909, 912 (1942)); *see Bird v. W.C.W*., 868 S.W.2d 767, 771–72 (Tex. 1994). "The judicial proceedings privilege is 'tantamount to immunity'; where there is an absolute privilege, no civil action in damages for oral or written communications will lie, 'even though the language is false and uttered or published with express malice.'" *Wilkinson v. USAA Fed. Sav. Bank Trust Servs*., No. 14-13-00111-CV, 2014 WL 3002400, at *6 (Tex. App.—Houston [14th Dist.] July 1, 2014, pet. denied) (mem. op.) (quoting *Hernandez*, 931 S.W.2d at 650). The scope of the absolute privilege extends to all statements made in the course of the proceeding, whether made by the judges, jurors, counsel, parties, or witnesses, and it attaches to all aspects of the proceeding, including statements made in open court, hearings, depositions, affidavits, and any pleadings or other papers in the case. *Daystar Residential, Inc. v. Collmer*, 176 S.W.3d 24, 27 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

Although the majority of cases addressing the judicial communication privilege involve defamation claims, "Texas courts have consistently applied the privilege to claims arising out of communications made in the course of judicial proceedings, regardless of the label placed on the claim." *Laub v. Pesikoff*, 979 S.W.2d 686, 690 (Tex. App.—Houston [1st Dist.] 1998, pet. denied.). To avoid the circumvention of the policy behind the privilege, we have held that "the privilege should be extended beyond defamation when the essence of a claim is damages that flow from communications made in the course of a judicial proceeding." *Id.* at 691.

Whether a statement relates to a proposed or existing judicial proceeding is a question of law for the court. *Russell v. Clark*, 620 S.W.2d 865, 870 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). "[T]he court must *consider the entire communication* in its context, and must extend the privilege to any *statement* that bears some relation to an existing or proposed judicial proceeding" and resolve all doubt in favor of the privilege. *Collmer*, 176 S.W.3d at 28 (emphasis added).

Here, Young, in his petition, alleged that "*[f]or years*, [he] has been assessed fees, fines, and charges by the [Association]" and has undergone continued threats and harassment by the [Association]." (Emphasis added.) At trial, Young testified that the Association's lawsuit against him was

> just the end—cap end to what they have been doing previously with all the letters and, you know, the claims and everything they were doing to me before that I was having to continually answer to and the letters Mr. Treece that you showed me piles of yesterday, those all had an effect.

> It didn't just start on February 25th. It was a real shock February 25th of 2013 when I opened the door and I was handed that envelope for this lawsuit.

And the trial court admitted into evidence over 50 letters to Young from the Association, Eckhardt, Treece, and others, dating back to 1993.

Even were we to conclude that the judicial communications privilege applies in this case, the Association, in its brief, does not discuss any of the content of any of the specific letters and has not demonstrated on appeal that each of the letters at issue were made in the course of judicial proceedings. *See id*. ("[w]e consider the entire communication" and "statement[s]"); *see also Ginn*, 472 S.W.3d at 838 ("On appeal, the party complaining of the court's ruling bears the burden of demonstrating that the trial court erred.")

We overrule the Association's fifth issue.

Conclusion

We reverse the portion of the judgment of the trial court on Young's counterclaims for intentional infliction of emotional distress and declaratory judgment and on the issue of Young's attorney's fees. And we render judgment that he take nothing on his claims. We further reverse the portion of the judgment of the trial court as to costs. And we remand the issue of allocation of trial court costs between the parties to the trial court for the sole purpose of holding a hearing to tax costs for good cause based upon the result on appeal. *See* TEX. R. APP. P. 43.4; TEX.

R. CIV. P. 141; *Price Constr., Inc. v. Castillo*, 147 S.W.3d 431, 443 (Tex. App.—San Antonio 2004, no pet.). We dismiss as moot all pending motions.

Terry Jennings
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.