**Affirmed and Opinion filed May 11, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-01112-CV**

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**ROY WEISINGER, ET AL., Appellants**

**V.**

**DEL MARTIN, TRUSTEE, Appellee**

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**On Appeal from the 9th Judicial District**
**Waller County, Texas**
**Trial Court Cause No. 95-07-13,463**

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## O P I N I O N

Roy Weisinger, John Cunningham, and Gordon Harrison, appellants, appeal the trial court's judgment in favor of Del Martin, appellee, on two points of error. We affirm the judgment of the court below for two reasons: (1) the trial court properly concluded that Martin's activity did not violate the deed restriction; and (2) the trial court did not abuse its discretion in the amount of attorney's fees it awarded to Martin. We also find that this is not an appropriate case to award damages for the filing of a frivolous appeal.

## FACTUAL AND PROCEDURAL HISTORY

A resolution of this case revolves around whether a deed restriction prohibits an owner of property in a residential community built around an airstrip from leasing space in her hangar. The parties in this suit, Weisinger, Cunningham, Harrison, and Martin, reside on separate lots in a subdivision named Sports Flyer Estates Phase II. This subdivision permits residents who have private pilots' licenses to have both a residence and constant runway access. These residents are subject to certain deed restrictions governing land use within the subdivision.

Martin originally sued Weisinger, alleging that he violated the five foot setback restriction in the deed. Martin alleged that Weisinger encroached on her land by erecting a hangar within one foot of her property line. Weisinger answered with a general denial and counterclaimed that Martin was violating the deed restrictions by leasing her airplane hangar space to a non-resident.

The testimony at trial showed that renting or leasing hangar space to non-residents was a commonly practiced and accepted activity by residents in the subdivision governed by the deed restrictions. Throughout the time Martin lived in the subdivision, she leased the hangar space on her lots to at least eleven non-residents. Additionally, Saenger, the original owner of Martin's lot, rented his hangar space to non-residents before he sold the lot to Martin. When Martin bought the lot from Saenger, she inherited some of his tenants. Saenger was one of the first residents in the neighborhood and before he moved in, more than half of the property owners were renting or leasing their property space to non-residents. Most importantly, before he commenced his counterclaim, Weisinger had been renting his hangar space to non-residents for over five years.

During a jury trial, the parties settled Martin's original claim. Thus, only Weisinger's counterclaim and the issue of attorney's fees were submitted to the trial court. The court interpreted the disputed paragraphs within the deed restrictions against Weisinger, held that

Weisinger take nothing, and awarded $35,548.00 in attorney's fees to Martin. The trial court also entered certain findings of fact and conclusions of law supporting its judgment.

## DISCUSSION AND HOLDINGS

### Relevant Deed Restrictions

In reaching its conclusions in this case, the trial court looked to the following three provisions in the deed restrictions:

Paragraph one entitled, "Single Family Residential Construction", reads as follows:

> No building shall be erected, placed, altered or permitted to remain on any lot other than one detached single family residential dwelling not to exceed two stories in height, a private garage for cars, and airplane hanger completely enclosed with new material and bona fide servants' quarters which structures shall not exceed the main dwelling in height or number of stories and the structure may be occupied only by a member of the family occupying the main residence on the building site or by domestic servants employed on the premises. Any garage apartment or servant quarters which may be constructed on any lot shall not be used for rental purposes and may be used only by servants who are employed in the dwelling erected upon the same lot where such quarters are located. Commercial "tie down" of airplanes other than those of the owner is prohibited.

Paragraph seven, entitled "Prohibition of Offensive Activities", states the following:

> No activity, whether for profit or not, shall be carried on any lot which is not related to single family residential purposes. No noxious or offensive activity of any sort shall be permitted nor shall anything be done on any lot which may be or become an annoyance or a nuisance to the neighborhood. However, the operation of airplanes in, on and about the subdivision is planned upon and shall

not be construed as an offensive activity so long as no aerobatics, low flying or stunt flying takes place over the subdivision.

Paragraph twenty-five, entitled “Delegation of Use”, reads as follows:

Any owner may delegate in accordance with the by-laws the owner’s right of enjoyment to the common area and facilities, if any, to the members of the owner’s family, tenants or contract purchasers who reside on the property.

**Trial Court’s Findings of Fact and Conclusions of Law**

After reviewing these provisions and considering the testimony, the trial court reached the followings findings of fact and conclusions of law:

1. Said restrictions do not require the construction of a detached single family dwelling;

2. Said restrictions do not prohibit the rental of hangar space;

3. Defendants, Roy Weisinger, Gordon Harrison, and John Cunningham, constructed their aircraft hangar within 5 feet of the common boundary line between said Lot 59 and said Lot 60, in violation of paragraph 4 of said restrictions;

4. 12Plaintiff should be awarded reasonable attorneys [sic] fees in the amount of $35,548.00 through the trial and post trial of this case, together with the further sum of $5,000.00 if Defendants are unsuccessful in an appeal to a Texas Court of Appeals and the further sum of $5,000.00 if Defendants are unsuccessful in an appeal to the Texas Supreme Court; and,

5. Judgment should be entered in favor of Plaintiff against Defendant consistent with the partial compromise and settlement reached by all parties, as well as the Court’s conclusions stated above.

> It is therefore ORDERED that paragraph 1 of said restriction is not ambiguous, is restrictive in nature and prohibits renting of servant's quarters, construction of multi-family residences and the commercial tie-down of aircraft, permits the construction of single family residences, permits the leasing of single-family residence and/or aircraft hangars, and, does not require that an aircraft hangar be built only in conjunction with a residence.
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> It is further ORDERED that paragraph 7 of said restriction is ambiguous and should be construed as follows: Any commercial use of lots or hangars such as business activity involving advertising and profit from the use of lots or hangars is prohibited. The non-commercial leasing of hangar space for the storage of aircraft is not prohibited. Any use of the land or buildings which would be considered offensive behavior or a nuisance, such as the commercial leasing of aircraft or operating a business, is prohibited.
>
> It is further ORDERED that paragraph 25 of said restrictions is not ambiguous, does not require that the member of an owner's family has to live in a residence on the property, does not require that a tenant reside on the property, does not require that a tenant be a tenant of a single family residence or a hangar, and, does require that a contract purchaser must reside on the property to enjoy a delegation of the use of the common area and facilities.

**Interpretation of Paragraph Seven in the Deed Restrictions**

In his first point of error, Weisinger contends that the trial court erred in its findings of fact and conclusions of law regarding paragraph seven in the deed restrictions. Specifically, appellant claims that Martin's "for profit" activity of leasing hangar space to non-residents violated the prohibitions in paragraph seven. As we explain below, we agree with the trial court that Martin's activity did not violate the deed restriction, and we find that the trial court reached the proper conclusions.

The rules of construction for construing contracts also apply when a court construes deed covenants and restrictions. *See Scoville v. SpingPark Homeowner's Ass'n, Inc.*, 784 S.W.2d 498, 502 (Tex. App.—Dallas 1990, writ denied). In construing a deed restriction, a reviewing court's primary task is to determine the intent of the framers of the restrictive covenant. *See Highlands Management Co. v. First Interstate Bank of Texas, N.A.*, 956 S.W.2d 749, 752 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (citing *Wilmoth v.*

*Wilcox*, 734 S.W.2d 656, 658 (Tex. 1987)). The intent of the parties must be ascertained from the instrument as a whole and from the wording of the restrictive language. *See Scoville*, 784 S.W.2d at 502; *Benard v. Humble*, 990 S.W.2d 929, 930 (Tex. App.—Beaumont 1999, pet. denied).

Whether a deed restriction is ambiguous is a question of law. *See Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 529 (Tex. 1987). A restrictive covenant is ambiguous if it is susceptible to more than one reasonable interpretation. *See Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). Once a restriction is deemed ambiguous, its interpretation becomes a fact issue. *See Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). If the intent or meaning of the restriction is ambiguous, the covenant should be strictly construed against the party seeking to enforce it, and favorably toward the free and unrestricted use of the premises. *See Benard*, 990 S.W.2d at 930.

In a non-jury case, a trial court's findings of fact have the same force and dignity as a jury verdict. *See Criton Corp. v. Highlands Ins. Co.*, 809 S.W.2d 355, 358 (Tex. App.—Houston [14th Dist.] 1991, writ denied). Findings of fact are reviewable for the legal and factual sufficiency of the evidence supporting them by the same standards as are applied in reviewing the legal and factual sufficiency supporting the jury's answers to jury questions. *See id.*

Conclusions of law, on the other hand, are reviewable when attacked as a matter of law, but not on grounds of factual insufficiency. *See Mercer v. Bludworth*, 715 S.W.2d 693, 697 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) *overruled on other grounds*, *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991). Conclusions of law are reviewed *de novo* as legal questions, and will not be reversed unless they are erroneous as a matter of law. *See Hitzelberger v. Samedan Oil Corp.*, 948 S.W.2d 497, 503 (Tex. App.—Waco 1997, pet. denied). Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *See Zieba v. Martin*, 928 S.W.2d 782, 792 (Tex. App.—Houston [14th Dist.] 1996, no pet.).

Here, the trial court held - and we agree - that paragraph seven in the deed restrictions was ambiguous. As we stated, after finding paragraph seven ambiguous, the trial court specifically found that non-commercial leasing of hangar space is not prohibited, and that business activity involving advertising and profit from the use of lots or hangars is prohibited. As we discuss below, we find sufficient evidence to support these findings.

Reading the three paragraphs together, the deed restrictions do not seem to prohibit leasing hangar space to a non-resident. The deed restrictions contemplate tenants, because paragraph twenty-five specifically refers to "tenants," and permits owners to delegate their right to enjoy their property's common area to them. Additionally, the deed restrictions only specifically prohibit two activities: renting a garage apartment and the commercial "tie down" of airplanes other than those of the owner.[1] Thus, although not absolutely clear, the deed restrictions do not seem to prohibit the renting of hangar space as Martin was doing here.

Moreover, the witnesses' testimony during trial supports the trial court's finding that business activity involving advertising and profit from the use of lots or hangars is prohibited. This testimony revealed that leasing hangars was a common practice in the neighborhood because owning aircraft is an expensive activity, and residents, including Weisinger, lease hangar space to non-residents to share expenses. However, they do not advertise or make a profit from this activity. Testimony showed that residents generally cannot afford the costs of a hangar without some type of cost-sharing activity, and residents do not make money from their leases with non-residents. Money collected from leases goes toward the costs of building, insurance, or maintenance fees. The Neighborhood Association and the Architectural Committee in the subdivision also collect money from these rentals. In short, the witnesses' testimony revealed that cost-sharing by leasing or renting hangar space is a custom and practice

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[1] An aircraft is "tied-down" when it is chained, anchored, or attached to the ground, and owners engage in "commercial tie-down" of an aircraft when they accept money for this activity.

in the subdivision, shared by residents to cover costs of operating a hangar, and is not a commercial activity.[2]

Consequently, we do not find the trial court's conclusions of law regarding paragraph seven to be clearly erroneous as a matter of law. Because we find sufficient evidence to support the trial court's findings of fact, we agree that Martin did not violate the deed restriction by leasing her hangar to a non-resident. We, therefore, overrule Weisinger's first point of error.

**Segregation of Attorney's Fees**

In his second point of error, Weisinger asserts that the trial court erred in the amount of attorney's fees it awarded to Martin. Weisinger argues that the award was not properly segregated between prosecuting the original claim and defending the counterclaim. We disagree because, as we explain below, we find sufficient evidence allocating the portion of attorney's fees allotted to the original claim and to the counterclaim.

A trial court may award attorney's fees only if they are reasonable and necessary for the prosecution of the lawsuit. *See Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991). To show the reasonableness and necessity of attorney's fees, the plaintiff must show that the fees were incurred while suing the defendant sought to be charged with the fees on a claim allowing recovery of attorney's fees. *See id.* When a party alleges one or more causes of action, for which attorney's fees are not permitted by statute, and these causes are investigated and pursued at trial, the party has a duty to segregate recoverable fees from nonrecoverable fees.[3] *See Aetna Cas. & Sur. v. Wild*, 944 S.W.2d 37, 40-41 (Tex. App.—Amarillo 1997, writ denied) (citing *Int'l Sec. Life Ins. Co. v. Finck*, 496 S.W.2d 544,

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[2] At least one court has held that renting one's property *per se* is a non-business purpose. *See Benard v. Humble*, 990 S.W.2d 929, 930-31 (Tex. App.—Beaumont 1999, pet. denied) (holding that renting property *per se* is a "residential purpose").

[3] Here, Martin was awarded attorney's fees under Section 5.006 of the Texas Property Code, which permits recovery of reasonable attorney's fees for the prevailing party in a breach of a restrictive covenant suit. *See* TEX. PROP. CODE ANN. § 5.006 (Vernon 1984).

546-47 (Tex. 1973)). The party must allocate the time spent between causes of action for recoverable fees and nonrecoverable fees. *See Bullock v. Kehoe,* 678 S.W.2d 558, 560 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

An exception to this duty to segregate exists when the attorney's fees are incurred in connection with claims arising out of the same transaction, and are so interrelated that the prosecution or defense of the claims arise from proof or denial of essentially the same facts. *See Stewart Title Guar. Co.*, 822 S.W.2d at 11. Therefore, when the causes of action involved in a suit are dependent upon the same set of facts or circumstances and are intertwined to the point of being inseparable, the party suing for attorney's fees may recover the entire amount covering all claims. *See id.* The amount of an attorney's fees award is within the trial court's discretion and absent an abuse of discretion, we will not reverse the trial court's judgment. *See Fowler v. Stone*, 600 S.W.2d 351, 353 (Tex. App.—Houston [14th Dist.] 1980, no writ).

Here, the record does not show that the original claim and the counterclaim are so interrelated that their prosecution or defense arise from proof or denial of essentially the same facts. As we discussed, Martin originally sued Weisinger, alleging that he violated the five foot setback restriction in the deed. She alleged that Weisinger encroached on her land by erecting a hangar within one foot of her property line. Weisinger counterclaimed that Martin was violating the deed restrictions by leasing her airplane hangar space to a non-resident. Thus, the causes of action are not dependent upon the same set of facts or intertwined to the point of being inseparable.

Because Martin did not fall within the exception to the duty to segregate attorney's fees, he must have presented evidence allocating the time he spent prosecuting his claim and defending the counterclaim. Martin's attorney, Odom, presented some evidence regarding the amount of time he spent defending the counterclaim. In response to a question from the trial court about the amount of fees attributable to defending the counterclaim, Odom testified that five percent of the total fees was attributable to defending Weisinger's counterclaim.

Additionally, Odom presented evidence of the total attorney's fees billed in this case. He testified that the fees totaled $37,275.00 as of the date of trial, and that Martin had incurred expenses of about $3,000.00 in connection with Odom's appearance that day in the trial court.

The attorney's fees awarded by the court equal approximately ninety-five percent of the total fees and expenses generated by Odom in representing Martin in the lawsuit. Apparently, the judge subtracted the five percent attributable to defending the counterclaim from the total amount. We find sufficient evidence to support this award, and hold that the trial court did not abuse its discretion in awarding $35,548.00 in attorney's fees and expense to Martin. Weisinger's second point of error is overruled.

**Sanctions for Filing of Frivolous Appeal**

Pursuant to Texas Rule of Appellate Procedure 45,[4] Martin requests that we sanction Weisinger for filing a frivolous appeal. Martin cites two grounds to support his argument for imposing sanctions: (1) Weisinger asserts an argument directly contrary to the clear wording of the deed restrictions; and (2) Weisinger mischaracterizes the record in his argument regarding attorney's fees.

Whether to grant sanctions is within our discretion, and we will do so only in circumstances that are egregious. *See Chapman v. Hootman*, 999 S.W.2d 118, 125 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *City of Houston v. Crabb*, 905 S.W.2d 669, 676 (Tex. App.—Houston [14th Dist.] 1995, no writ). Even though an appellant's argument may not convince the court, if it has a reasonable basis in law and constitutes an informed, good-faith challenge to the trial court's judgment, sanctions are not appropriate. *See Chapman*, 999 S.W.2d at 125; *General Elec. Credit Corp. v. Midland Cent. Appraisal Dist.*, 826 S.W.2d 124, 125 (Tex. 1991) (interpreting former TEX. R. APP. P. 84).

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[4] Rule 45, entitled "Damages for Frivolous Appeals in Civil Cases," reads in pertinent part: "If the court of appeals determines that an appeal is frivolous, it may - on motion of any party or on its own initiative, after notice and a reasonable opportunity for response - award each prevailing party just damages." TEX. R. APP. P. 45.

In determining whether sanctions are appropriate, we carefully consider the record from the appellant's point of view at the time the appeal was filed. *See City of Alamo v. Holton*, 934 S.W.2d 833, 837 (Tex. App.—Corpus Christi 1996, no writ). Among the factors we consider are whether the appellant had a reasonable expectation of reversal, and whether he pursued the appeal in bad faith. *Tate v. E.I. DuPont de Nemours & Co.*, 954 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1997, no pet.); *Color Tile, Inc. v. Ramsey*, 905 S.W.2d 620, 624 (Tex. App.—Houston [14th Dist.] 1995, no writ). We may also consider whether appellant failed to file a response to a cross-point requesting penalties. *See Tate*, 954 S.W.2d at 875.

In reviewing the record from Weisinger's point of view when he filed the appeal, we cannot say that this appeal is frivolous. Although Weisinger failed to file a response to Martin's cross-point requesting sanctions, Weisinger presented a colorable, albeit unpersuasive, argument for reversal of the trial court's findings on the deed restriction issue. Likewise, Weisinger's attorney's fees argument appears to have a reasonable basis in the law. We have held that Odom's testimony on segregation was sufficient, however, it was the bare minimum. Anything less, and we would not have had enough to support an award.[5] We impose appellate sanctions only where the record clearly shows the appellant had no reasonable expectation of reversal, and that he did not pursue the appeal in good faith. *See Chapman*, 999 S.W.2d at 125; *Finch v. Finch*, 825 S.W.2d 218, 226 (Tex. App.—Houston [1st Dist.] 1992, no writ) (interpreting former Rule 84, Texas Rules of Appellate Procedure). Here, the record makes no such showing.

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[5] During the trial, testimony regarding attorney's fees stated as follows:
THE COURT: . . . So your testimony is all of these fees were incurred prosecuting the suit, though a portion has to be contributed to the defendant, defending her.
MR. ODOM: Well, if so, it was only a very minor part because it was all involved with the defenses of waiver and abandonment and the use of the premises by them. You know, they admitted they rented space in there for aircraft and it all just kind of mixed together, so it would be almost impossible to segregate those. It's true the defense of the counterclaim got some benefit from that, but I can't say how much. It would be very small, maybe five percent.

We find that Weisinger's filing of this appeal does not warrant the assessment of damages under Rule 45. Accordingly, we overrule Martin's cross-point for damages and affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed May 11, 2000.

Panel consists of Justices Yates, Fowler and Frost.

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