IN THE COURT OF APPEALS

STATE OF GEORGIA

TUSCANY CONDOMINIUM ASSOCIATION, INC. et al, Appellant, v. C.P., AN ADULT FEMALE, Appellee.	)	COURT OF APPEALS CASE NO.: A25A0145

AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLANT'S APPEAL

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CERTIFICATION

This submission does not exceed the word count limit imposed by Rule 24(f)(1).

I. INTRODUCTION.

Community Associations Institute (hereinafter "CAI") is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 43,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 75.5 million homeowners who live in more than 365,000 community associations in the United States. Most recent industry statistics:

https://foundation.caionline.org/wpcontent/uploads/2024/01/2023StatsReviewDigital-002.pdf

CAI respectfully submits this brief as an *Amicus Curiae* pursuant to Georgia Court of Appeals Rule 26. CAI files this *Amicus Curiae* Brief to highlight for the Court's consideration that tenants and other occupants of condominiums are bound

by all of the recorded covenants governing the condominium[1], including, in this case, the pre-suit dispute resolution[2] and "no security" provisions found in the recorded Declaration of Condominium for Tuscany, A Condominium[3].

The consequences of the Trial Court's decision are of great concern to CAI, its members, and affiliates, and, particularly, to the citizens of Georgia who live in condominium and homeowners associations because the ruling of the Trial Court that Appellee tenant is not bound by two of the duly recorded covenants necessarily

[1] The Appellant Association does not own any real property in the Tuscany Condominium. As the condominium association, it operates and controls the common elements. The unit owners collectively own the common elements as tenants-in-common in accordance with the Georgia Condominium Act, O.C.G.A. § 44-3-70 et seq. (the "Act"), and the Declaration. Paragraph 5 of the Declaration states, in relevant part that: : "Ownership of the Common Elements shall be by the Unit Owners as tenants-in-common." Pursuant to O.C.G.A. § 44-3-71(4) of the, "'Common elements' means all portions of the condominium other than the units." Pursuant to Paragraph 2(h) of the Declaration, "'Common Elements' shall mean those portions of the property subject to this Declaration which are not included within the boundaries of a Unit . . .," Pursuant to §44-3-71(9) of the Act, "'Condominium unit' means a unit, as defined in paragraph (28) of this Code section, together with the undivided interests in the common elements are vested in the unit owners." Pursuant to Paragraph 2(x) of the Declaration, "'Unit' shall mean that portion of the Condominium intended for individual ownership and use as more particularly described in this Declaration and shall include the undivided ownership in the Common Elements assigned to the Unit by this Declaration." See also, O.C.G.A §44-3-79.

[2] Although Appellant does not argue the dispute resolution provision on appeal, the same legal principals discussed in this brief regarding the "no security" provision apply to the dispute resolution provision.

[3] The Trial Court incorrectly held that the "no security" provision at issue is an exculpatory clause. However, Paragraph 19(a) does not purport to limit the Appellant's liability for any duty it might otherwise have regarding security. Rather, it expressly states that the Appellant has no duty to provide security in the first place and that each unit owner is responsible for security, not the Association. See, generally, Hayes et al. v. Lakeside Village Owners Association, Inc., 282 Ga.App. 866, 869-70, 640 S.E.2d 373, 376 (2007) regarding the distinction between an exculpatory clause and a provision stating there is "no duty" in the first place.

implies that tenants are not bound by *any* recorded covenants governing property absent specific, actual notice.

"The function of an amicus curiae 'is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration.... He has no control over the litigation and no right to institute any proceedings therein, he must accept the case before the court with the issues made by the parties.' 4 Am. Jur. 2d 110, 111, Amicus Curiae, § 3." Village of North Atlanta v. Cook, 219 Ga. 316, 322(3), 133 S.E.2d 585 (1963).

For the reasons set forth herein, CAI respectfully requests that this Court reverse the Order of the Trial Court which denied Appellant summary judgment.

II. THE TRIAL COURT'S DECISION DIRECTLY CONFLICTS WITH THE GEORGIA CONDOMINIUM ACT.

The Trial Court's ruling that the "no security" clause in the recorded covenants does not apply to tenants directly conflicts with the Act.

O.C.G.A. § 44-3-76 of the Act states, in relevant portion, as follows:

> Every unit owner ***and all those entitled to occupy a unit*** shall comply with all lawful provisions of the condominium instruments[4]…[emphasis supplied]

The Declaration of Condominium for Tuscany, A Condominium recorded at Deed Book 28776, Page 192 et seq. of the Fulton County, Georgia records (the

[4] Pursuant to § 44-3-71(8) of the Act, "'condominium instruments' means the declaration and plats and plans ***recorded*** pursuant to this article…[emphasis supplied]"

"Declaration") is a "condominium instrument" within the meaning of the Act. Appellee, as a tenant entitled to occupy a unit in the Tuscany Condominium[5] is obligated by the Act to comply with the Declaration. Therefore, the Trial Court erred as a matter of law when it ruled that, without actual notice, Appellant was not bound by the "no security" provision of the recorded Declaration. The Act clearly states that these, and all other, provisions of the recorded Declaration bind Appellant as a tenant entitled to occupy the condominium unit.

Accordingly, the Order of the Trial Court should be reversed.

III. RECORDED COVENANTS ARE ENFORCEABLE AGAINST TENANTS.

Appellee tenant had record notice of the Declaration in general and the "no security" provision contained therein. As stated above, the Declaration was recorded in the Fulton County records where the Tuscany Condominium is located and therefore Appellee was on constructive notice of the recorded covenants.

"Restrictive covenants and subdivision plats may be independently recorded and filed of record, either with the clerk of the superior court as part of the deed records, or the county planning office; such recorded restrictions provide constructive knowledge thereof. The presence of the recordation of such restrictive covenants would provide constructive notice of the existence of such covenants."

[5] Pursuant to Paragraph 2(t) of the Declaration, "Occupant shall mean any Person occupying all or any portion of a Unit for any period of time, regardless of whether such Person is a tenant or the Owner of such Property."

[internal citations omitted]) Roth v. Connor, 235 Ga.App. 866, 871, 510 S.E.2d 550, 556 (1998).

It is well settled that a tenant has constructive notice of a covenant affecting the leased property that is recorded in the land records. See, 20 Am. Jur.2d Covenants, Etc. §255 ("Lessee of commercial property had constructive notice of restrictive covenant of deed for property from grantor to grantee, which prohibited sale of groceries and/or alcoholic beverages as primary products on premises, so as to support enforceability of restrictive covenant against lessee, though apparently lease did not refer to restrictive covenants, given that restriction was recorded in deed from grantor to grantee."); Focus Entertainment Intern., Inc. v. Partridge Greene, Inc., 253 Ga.App. 121, 558 S.E.2d 440 (2001)(Tenant bound by recorded covenant prohibiting sale of pornographic material.)[6]

[6] See also, Langenback v. Mays, 207 Ga. 156, 157, 60 S.E.2d 240, 241 (1950) ("Equity will enforce a lawful restrictive agreement concerning land against a person who takes with notice of the contract. In such case, the person violating the agreement, though not a party to it, is a privy in conscience with the maker…It is well settled in this State that a party will not be permitted to use property in a manner inconsistent with a contract entered into by the owner under whom he claims, and with notice of which he took. Restrictive covenants of this sort, when legal, have been invariably enforced against such third parties." [internal citations omitted]); Hammonds v. Huddle House, Inc., 244 Ga. 48, 257 S.E.2d 508, 509 (1979); Allenfield Associates v. U.S., 40 Fed.Cl. 471, 483, 42 Cont.Cas.Fed. (CCH) 77, 267 (1998)("The defendant cannot contend that it was not aware that the LCIDA/VA lease expired on October 31, 1989, because the LCIDA/VA lease was publicly recorded, and, therefore, the defendant was put on constructive notice of the terms of the prime lease. The current action simply resulted from the VA's actions own actions in executing a sublease for a term longer than was valid under the generally accepted principles of property law, without ascertaining the facts that it could have determined by exercising only the slightest diligence in reviewing the publicly recorded prime lease."; 23 A.L.R.2d 520 §4; 52A C.J.S. Landlord & Tenant § 799 ("Covenants restricting the use of the leased premises run with the land and may be enforced by a grantee or assignee of the lessor. They are binding on those holding

Covenants and agreements entered into by the owner of land affecting the use of the land can be enforced against a person not a party to the agreement, including a tenant. See, Kole v. Linkenhoker, 259 Ga. 82, 84, 377 S.E.2d 671, 672 (1989), ("On numerous occasions we have held that agreements entered into by the owner of land restricting the use that the owner can make of the land can be enforced by the grant of injunctive relief against a person not a party to the restrictive agreement if the person had actual ***or constructive notice*** of the restriction before purchasing or leasing the land. E.g., *Guerin v. Webster,* 233 Ga. 521, 212 S.E.2d 352 (1975); *Rosen v. Wolff,* 152 Ga. 578 (1, 2, 3), 110 S.E. 877 (1921); *Langenback v. Mays,* 207 Ga. 156 (1, 2), 60 S.E.2d 240 (1950)"[emphasis supplied]; see also Rosen v. Wolff, 152 Ga. 578, 110 S.E. 877, 882 (1922)("The tenant is a mere holder of possessions for the landlord, and in equity anything affecting the landlord's title, of which he has notice, applies also to the tenant. This is true where the tenant does not acquire any estate in the demised premises, but only a usufruct therein." [internal citations omitted]). A "'landlord cannot create any greater interest in his lessee than he himself possesses, and the lessee takes subject to all claims of title enforceable against the lessor.'" Kace Investments, L.P. v. Hull, 263 Ga.App. 296, 300, 587

under the lessee, such as sublessees and subtenants, and on the assigns of the lessee whether or not they are mentioned. A waiver by a landlord of the right to insist that the premises shall be used only for the purpose specified in the lease is also binding on the landlord's grantee or assignee."); 1 Law of Condominium Operations § 4:7 ("If the covenant is real—one that runs with the land—it is binding upon the heirs and assigns of the grantees, whether or not the grantee has named them or expressly covenanted on their behalf.").

S.E.2d 800, 805 (2003). Because there is no dispute that the Declaration is recorded in the land records, Appellee, as a tenant of a condominium unit subject to the Declaration, has constructive notice of it as a matter of law and is bound by its terms.

Furthermore, the Residential Rental Agreement referenced both the covenants and the condominium association. Specifically, Paragraph 10, subsection m of the Residential Rental Agreement between the Unit Owner, Umar Sayed, and Appellant states, in relevant part, as follows:

> House Rules: Resident agrees to abide by any and all protective covenants, by-laws or other regulations as set forth by the subdivision or condominium association of the community….

Additionally, Paragraph 18 of the Residential Rental Agreement also states, in relevant portion, as follows:

> USE: … Resident agrees to abide by any condominium or neighborhood association covenants, conditions and rules and regulations that may be in effect for the property.

Therefore, Appellee had actual notice of the existence of the Declaration and could have ascertained its terms by exercising diligence in reviewing the publicly recorded Declaration.

At a minimum, Appellee was placed on inquiry notice based on the express references to the covenants and the condominium association in her Residential Lease Agreement. "Notice sufficient to excite attention and put a party on inquiry shall be notice of everything to which it is afterwards found that such inquiry might

have led. Ignorance of a fact due to negligence shall be equivalent to knowledge in fixing the rights of parties." O.C.G.A. § 23-1-17; see also WW3 Ventures, LLC v. Bank of New York Mellon, 370 Ga.App. 160, 168, 894 S.E.2d 680, 687 (2023); Gulden v. Newberry Wrecker Service, Inc., 154 Ga.App. 130, 132, 267 S.E.2d 763,765 (1980) ("A sublessee is bound by the rights of his lessor; he is charged with notice by implication of every fact affecting the rights of his lessor, and discoverable by examination of his lessor's lease with the owner; and of every fact with which he by reasonable diligence ought to have become acquainted…. It is the duty of contracting parties to inform themselves with reference to the subject matter about which they desire to contract…" [internal citations omitted]); Guerin v. Webster, 233 Ga. 521, 523, 212 S.E.2d 352, 354 (1975), ("It was pointed out that the restriction in the lease that the premises sublet by Rosen could not be used for any purpose but a bakery was sufficient to put him on inquiry as to the restrictive agreement of the lessor contained in the lease with Wolff.").

Finally, Section 5.2 of the Restatement (Third) of Property: Servitudes, expressly includes a "lessee" within the class of persons to whom the benefit and burden of covenant running with the land applies. Section 5.2 states in relevant part:

> **§ 5.2 Persons to Whom an Appurtenant Benefit or Burden Runs**
>
> Except as otherwise provided by the terms of the servitude, and except as provided in subsections (1), (2), and (3), an appurtenant benefit or burden runs to all

> subsequent owners and possessors of the benefited and burdened property, including ***a lessee***, life tenant, adverse possessor, and person who acquires title through a lien-foreclosure proceeding. [emphasis supplied] Restatement (Third) of Property (Servitudes) § 5.2 (2000).[7]

Comment "a." to Section 5.2 sets forth the rationale behind the rule that covenants running with the land, such as the "no security" provision at issue, apply to a lessee of the property burdened as follows:

> *a*. *Rationale.* The rules stated in this section reflect the likely intent or expectations of the parties to a servitude. They are default rules which may be varied by the terms of the servitude. Because servitudes are used to create relatively permanent arrangements with respect to property by tying rights and obligations to the property, their utility would be impaired if the burdens and benefits of the servitudes did not generally run to subsequent **possessors** [emphasis supplied], as well as subsequent owners." Restatement (Third) of Property (Servitudes) § 5.2 (2000).

This Court has previously cited to the Restatement (Third) of Property: Servitudes, and its comments for authority. See, Holman v. Glen Abbey Homeowners Ass'n, Inc., 356 Ga. App. 379, 847 S.E.2d 1 (2020), (§6.10(2) and comment "f."); Davista Holdings, LLC v. Cap. Plaza, Inc., 321 Ga. App. 131, 134, 741 S.E.2d 266, 269 (2013) (§§ 1.2(1), 1.2(4) & 1.3(1) and comments); Mun. Elec.

[7] Subsection (2) concerns limitations on how an "affirmative covenant," such as the obligation to maintain the property or pay assessments, does not normally apply to a lessee. However, the "no security" provision at issue is clearly not an affirmative covenant. See also, the discussion of affirmative covenants and how they differ in Comment "a." to Section 5.2

Auth. of Georgia v. Gold-Arrow Farms, Inc., 276 Ga. App. 862, 869, 625 S.E.2d 57, 63 (2005) (§ 4.10 and comment "f."; Licker v. Harkleroad, 252 Ga. App. 872, 876, 558 S.E.2d 31, 34 (2001)(§§ 4.10 & 6.10(2) and comments). Therefore, the Trial Court erred when it held that Appellee did not have sufficient notice of the "no security" provision of the Declaration. The Declaration was recorded in the land records and therefore ran with the land and Appellee's own lease informed her of its existence.

Accordingly, the Order of the Trial Court should be reversed.

IV. UNLESS EXPRESSLY OBLIGATED BY THE COVENANTS, A CONDOMINIUM ASSOCIATION HAS NO DUTY TO PROVIDE SECURITY TO TENANTS.

In Villages of Cascade Homeowners Ass'n, Inc. v. Edwards, 363 Ga. App. 307, 310, 870 S.E.2d 899, 903 (2022), a tenant was attacked in the parking lot of the townhome community where he resided when the vehicle exit gate was broken. The Court of Appeals held that the trial court erred when it denied summary judgment to the governing homeowners association on the tenant's tort claims based on its alleged failure to provide adequate security. This Court held that because the covenants governing the association's responsibilities did not include a duty to provide security, it did not owe the tenant any such duty that could be breached. In its opinion, the Court of Appeals noted the unique nature of a homeowners

association and ruled in favor of the association in Villages of Cascade because its declaration for covenants did not include any obligation to provide security:

> As a threshold matter, it is important to note that the VCHOA is not a typical property owner in a landlord-tenant dispute. The VCHOA is composed of the individual homeowners themselves and is governed by the covenants agreed to by each owner upon purchase of a townhome. Its budget is limited to the dues paid by its members. Beyond providing physical maintenance of common areas such as shared landscaping, private roadways, parking areas, and the entrance gates, the duties of the VCHOA outlined in the covenants do not include providing security.
>
> * * *
>
> As stated above, the VCHOA was not a landlord and did not have a duty to address overall security issues beyond the physical maintenance of the common roadways, parking lots, and access gates. The homeowners, in turn, addressed shared security needs by instituting a neighborhood watch, sending regular e-mail updates about crime, and insisting on homeowners' cooperation in maintaining certain standards of conduct. Because the covenants governing the VCHOA's responsibilities do not include a duty to control the security of the common elements aside from physical maintenance, the VCHOA "cannot be found responsible for the maintenance of any alleged continuing nuisance existing on the common elements due to an alleged lack of security."

Therefore, under Georgia law, a duty to provide security is not implied from the association's general duty to provide physical maintenance of the common areas. In other words, regardless of whether the "no security" clause set forth in Paragraph 19(b) of the Declaration is enforceable against a tenant who may or may not have

notice of it, this Court held in Villages of Cascade that an owners association does not have a duty to provide security unless expressly required by the declaration of covenants.

In this case, not only does the Declaration not obligate the Appellant to provide security, it expressly states that Appellant is not obligated to provide security.

Under the Villages of Cascade, the Appellant cannot be held liable for failing to provide security where no duty exists in the Declaration or by common law.

V. CONCLUSION.

The decision of the Trial Court directly conflicts with § 44-3-76 of the Act which provides that all occupants are bound to all the lawful provisions in condominium instruments—including tenants. Moreover, Appellee was on notice of the recorded Declaration and the "no security" provision therein.

Upholding the decision of the Trial Court would necessarily imply that tenants are not subject to *any* recorded covenants absent actual notice and lead to an absurd result. Appellant and other associations would have different obligations to tenants and owners with regard to the same physical property in the community. By way of illustration, the Appellant would have to provide security to tenants, but not to the owners. This would directly conflict with the intent of the Georgia legislature and

the well-established right of condominium associations to govern property through covenants.

Accordingly, CAI respectfully requests that this Honorable Court reverse the Trial Court's denial of Appellant's Motion for Summary Judgment.

CERTIFICATION

This submission does not exceed the word count limit imposed by Rule 24(f)(1).

This 2nd day of October 2024.

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Appellee.	)	

CERTIFICATE OF SERVICE

COMES NOW the undersigned, who hereby certifies in accordance with Court of Appeals Rule 6, a true and accurate copy of the within and foregoing **AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLANT'S APPEAL** has been previously served upon the opposing party by depositing (or causing to be deposited) same in the United States Mail, First Class, with sufficient postage affixed to assure delivery, addressed to:

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