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NO. 20-0682

IN THE SUPREME COURT OF TEXAS

Sunchase IV Homeowners Association, Inc. and Board,

Petitioners,

v.

David Atkinson,

Respondent.

On Review from the Court of Appeals
for the Thirteenth District of Texas

BRIEF OF AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE

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Pursuant to Texas Rule of Appellate Procedure 11(c), disclosure is hereby made that no fee was paid, or will be paid, for the preparation of this amicus brief.

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INTEREST OF AMICUS CURIAE

Community Associations Institute ("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 74.1 million homeowners who live in more than 355,000 community associations in the United States.[1]

Approximately 6 million Texans live within the more than 21,000 community associations. *See id.* CAI provides education, advocacy, and resources for these communities. CAI has a substantial interest in fostering best practices and predictability in homeowner association governance, especially the process of enforcing the governing

[1] Foundation for Community Association Research, *Community Association Fact Book 2020*, available at: https://foundation.caionline.org/publications/factbook/statistical-review/.

documents—documents that impact every community association and every owner.

Uniform laws require uniform interpretation. The statutory framework of the Texas Uniform Condominium Act was carefully designed to provide certainty and finality. The Court of Appeals' holding runs counter to the plain language of the Act and injects uncertainty and confusion into the enforcement process for thousands of homeowner associations across the state.

STATEMENT OF THE CASE

CAI adopts the factual background presented in the Court of Appeals' opinion. *See Atkinson v. Sunchase IV Homeowners Ass'n*, No. 13-17-00691-CV, 2020 Tex. App. LEXIS 3637, at *20–21 (Tex. App.—Corpus Christi Apr. 30, 2020).

BACKGROUND

A. Condominiums: A Creature of Statute

Although the concept of condominiums appears to have existed in Europe during the Middle Ages, Puerto Rico was the first United States jurisdiction to adopt legislation recognizing the condominium form of

ownership in 1902.[2] Over half a century later, in 1962, FHA promulgated the first Model Statute for Creation of Apartment Ownership ("FHA Model Statute") based on Puerto Rico's act.[3] The FHA Model Statute was intended to provide a template for states to establish an enabling condominium statute—if the state statute conformed to the FHA Model Statute, the state could be assured that its statute would permit the issuance of FHA mortgage insurance for condominium loans.

B. Condominiums Come to Texas

By the end of 1963, thirty-nine states—including Texas—had enacted condominium legislation. By 1969, that number included all fifty states, the District of Columbia, and the Virgin Islands.[4] The Texas statue, based largely on the FHA Model Statute, was codified as Chapter 81 of the Texas Property Code and known as the Texas Condominium Act ("TCA").[5] This statute gave rise to the condominium form of ownership in Texas.

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[2] P.R. Laws Ann., Tit. 31, §1291 (1902).
[3] U.S. Federal Housing Admin., Dep't of Housing & Urban Development, *Model Statute for Creation of Apartment Ownership* (Form 3285, 1962).
[4] Nicholas M. Cannella, *Recent Innovations in State Condominium Legislation*, 48 St. John's L. Rev. 994 (1974).
[5] Tex. Rev. Civ. Stat. Ann. art. 1301a, §2(c) (Vernon Supp. 1963–1979); Texas Condominium Act, Texas Property Code, §81.001 et seq.

C. Texas Leaves Its Own Brand on Condominium Law

In 1991, a bill was filed by Representative Robert Eckels of Houston proposing passage of a revised condominium statute—the Texas Uniform Condominium Act ("TUCA").[6] Supporters of TUCA believed that it would provide clear, comprehensive guidelines for condominium associations to follow in governing their communities.[7] The drafters used the 1980 Model Uniform Condominium Act as a template, but eliminated, revised, and added many new sections and provisions in order to create Texas's unique body of condominium law.

One such revision was to Model Rule § 4-117. The Model Rule reads:

> [Effect of Violations on Rights of Action; Attorney's Fees] If a declarant or any other person subject to this Act fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. **Punitive damages may be awarded for a willful failure to comply with this Act. The court, in an appropriate case, may award reasonable attorney's fees.**

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[6] *See* HB 156, 73rd Regular Session, Bill Details, Legislative Reference Library of Texas, available at: https://lrl.texas.gov/legis/billsearch/BillDetails.cfm?billFileID=20699&from=advancedsearch&startrow=1&number=50&IDlist=&unclickList=

[7] Tex. H.B. 156, 73d Leg., R.S. (1993).

When adopting the Uniform Condominium Act, the Texas Legislature, leaving its own "brand" on the Model Rule, eliminated the availability of punitive damages, and removed the "appropriate case" discretionary language—opting instead for an entitlement of fees for the prevailing party against the nonprevailing party.[8] The result was Texas Property Code § 82.161:

> [Effect of Violations on Rights of Action and Attorney's Fees]: (a) If a declarant or any other person subject to this chapter violates this chapter, the declaration, or the bylaws, any person or class of persons adversely affected by the violation has a claim for appropriate relief. (b) **The prevailing party in an action to enforce the declaration, bylaws, or rules is entitled to reasonable attorney's fees and costs of litigation from the nonprevailing party.[9]**

D. Condominiums in the Present Day

Fast forward to present day, between July 2020 and June 2021, Texans spent over five billion dollars buying some 17,000 units—a 41%

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[8] Other states also included prevailing party limitations in their versions of Model Rule § 4-117. *See* Minn. Stat. § 515B.4-116(b) ("The court may award reasonable attorney's fees and costs of litigation to the prevailing party."); Nev. Rev. Stat. § 116.4117.6 ("The court may award reasonable attorney's fees to the prevailing party."); *see also* Colo. Rev. Stat. § 38-33.3-123(1)(c) ("In any civil action to enforce or defend the provisions of this article or of the declaration, bylaws, articles, or rules and regulations, the court shall award reasonable attorney fees, costs, and costs of collection to the prevailing party."); Wash. Rev. Code § 64.34.455 ("The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.").
[9] *See* Tex. Prop. Code Ann. § 82.161(b) (West 2021).

year-to-year increase.[10] The importance of predictability and certainty brought about by TUCA cannot be overstated, and has allowed the condominium form of ownership to grow from a novel idea to a multi-billion-dollar industry in the span of 50 years.

ARGUMENTS AND AUTHORITIES

The statutory allowance for prevailing party attorney's fees protects both the interests of homeowners and property owners associations and should be enforced as written.

A. Uniform Laws Require Uniform Interpretation

The preface to the Texas Uniform Condominium Act explains that it was enacted for three primary purposes: (1) to make terminology and details of condominium statutes uniform so that national lenders could more easily assess the appropriateness of condominium documents and financing, (2) to make unit holders' "bundle of rights" more uniform so that "the increasingly mobile consumer" could become more educated "in this very complex area," and (3) to solve problems concerning "termination of condominiums, eminent domain, insurance, and the

[10] Texas Association of Realtors, *Texas Condominium Sales Report 2021 Edition*, available at: https://www.texasrealestate.com/wp-content/uploads/2021TexasCondominiumReport.pdf.

rights and obligations of lenders upon foreclosure of a condominium project," which were "not satisfactorily addressed by any existing statute."[11]

The Court of Appeals opinion, if permitted to stand, will create a situation where the bundle of rights for a condominium owner in Houston will be different for that same condominium owner if they move two and a half hours away and buy a condominium in Corpus Christi.[12] This result undermines the first two purposes of the Act—and until this Court provides a uniform interpretation of the uniform act, the purposes will continue to be frustrated.

B. The Prevailing Party Provision Does Not Contain an "Affirmative Relief" Requirement

The Court of Appeals correctly noted that "[i]t is well-settled under Texas law that 'to prevail, a claimant must obtain actual and meaningful relief, something that materially alters the parties' legal

[11] UNIF. CONDO. ACT, Prefatory Note, 7 Part II U.L.A. 452 (1980); *Plano Parkway Office Condos. v. Bever Props., LLC*, 246 S.W.3d 188, 193–94 (Tex. App.—Dallas 2007).
[12] *Compare Riley v. Caridas*, 2020 WL 7702183 (Tex. App.—Houston [1st Dist.] 2020, pet denied) *with Atkinson v. Sunchase IV Homeowners Ass'n*, No. 13-17-00691-CV, 2020 Tex. App. LEXIS 3637, at *20-21 (Tex. App.—Corpus Christi Apr. 30, 2020).

relationship.'"[13] However, the Court erroneously went beyond the requirement to prevail and held "[i]n the context of § 82.161, to qualify as the prevailing party, the Association must have shown that it was adversely affected by a violation of 'this chapter, the declaration, or the bylaws' **and that it suffered damages or otherwise obtained affirmative relief from the trial court**."[14]

This "affirmative relief" requirement is not found in the statute—the only requirement is to prevail. And as this Court has held, "[a] defendant can obtain actual and meaningful relief, materially altering the parties' legal relationship, by successfully defending against a claim and securing a take-nothing judgment on the main issue or issues in the

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[13] *Atkinson v. Sunchase IV Homeowners Ass'n*, No. 13-17-00691-CV, 2020 Tex. App. LEXIS 3637, at *20-21 (Tex. App.—Corpus Christi Apr. 30, 2020) (citing *Wheelbarger v. Landing Council of Co-Owners*, 471 S.W.3d 875, 896 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *Intercont'l Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 652 (Tex. 2009); *Farrar v. Hobby*, 506 U.S. 103, 109-10 (1992)).

[14] *Id.* (emphasis added) (citing *Wheelbarger*, 471 S.W.3d at 896-97; *Buttross V., Inc. v. Victoria Square Condo. Homeowners' Ass'n Inc.*, No. 03-09-00526-CV, 2010 Tex. App. LEXIS 6803, 2010 WL 3271957, at *3-4 (Tex. App.—Austin Aug. 18, 2010, pet. denied) (mem. op.)).

case."[15] To "prevail" does not mean one must obtain affirmative relief, and other courts reviewing the Uniform Condominium Act agree.[16]

The Legislature also agrees. When the Legislature wishes to limit or restrict a statute's scope, it has done so. The fact that it chose not to limit the meaning of the term "prevail" in this statute must be afforded deference by this Court.

To illustrate this point, in an analogous prevailing party provision (Texas Property Code § 5.006), the Legislature provided: "In an action based on breach of a restrictive covenant pertaining to real property, the court shall allow to a prevailing party **who asserted the action** reasonable attorney's fees in addition to the party's costs and claim."[17]

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[15] *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 486 (Tex. 2019). This Court noted the *Rohrmoos* holding "is consistent with the United States Supreme Court's interpretation of what it means to prevail as a defendant." (citing *CRST Van Expedited, Inc. v. Equal Emp't Opportunity Comm'n*, 136 S. Ct. 1642, 1651 (2016) ("The defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason)).

[16] See *In re LMP* 8500 Shoal Creek, L.L.C., 2007 WL 2713927, at *14 (Bankr. W.D. Tex. 2007) ("While no authority could be found expressly holding that § 82.161 applies to prevailing defendants as well as plaintiffs . . . the plain language of that provision as well as other jurisdictions' interpretation of the substantially similar Uniform Condominium Act provision on which is based, convinces the court that it applies in this case."); *Eagle Point Condominium Owners Ass'n v. Coy*, 9 P.3d 898, 907 (Wash. App. Div. 1 2000) ("[U]nder the [Uniform Condominium Act] either the plaintiff or the defendant may be the prevailing party and receive, in an appropriate case, an award of attorney fees.").

[17] See Tex. Prop. Code Ann. § 5.006 (West 2021) (emphasis added).

The Legislature's omission of this limiting language in § 82.161 must be given effect and interpreted broadly to afford recovery of fees to all parties who prevail, regardless of whether they sought affirmative relief.

C. The Prevailing Party Provision is Good for Homeowners & Homeowners Associations

The Uniform Law Commission promulgated the Uniform Condominium Act because "early statutes were inadequate to deal with the growing condominium industry. Many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums."[18] "Courts have noted regularly that the Condominium Act is a consumer-friendly statute."[19]

TUCA, likewise, is a consumer protection statute. Section 82.161 allows homeowners who successfully defend against enforcement actions

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[18] Unif. Condo. Act (Refs & Annos) (1977).

[19] *See Bragdon v. Bayshore Prop. Owners Ass'n*, 251 A.3d 661, 684–85 (Del. Ch. 2021). *See also, e.g., Mullowney v. Masopust*, 943 A.2d 1029, 1032, 1033 (R.I. 2008) (recognizing "the consumer protection purpose of the statute"; "[T]he Condominium Act contains a strong consumer protection flavor . . . ." (internal quotation marks omitted)); *One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 61 P.3d 1094, 1103 (Wash. 2002) (en banc) ("Washington's Condominium Act contains extensive protections for condominium consumers. We find that the various provisions of the Act should be construed with this purpose as controlling."); *Levin & Stein v. Meadow Valley Condo. Owners Ass'n*, 157 Wash. App. 1003, 2010 WL 2910909, at *5 (2010) ("[T]he Association's action was a legitimate effort to enforce the [Washington Condominium Act's] consumer protection provisions." (internal quotation marks omitted)).

brought by the association to recover their attorney's fees, acting a check on overzealous litigation against homeowners. Requiring an association to only pay fees when the homeowner brings a counterclaim weakens this deterrent—even more so if the homeowner must segregate the fees attributable only to the prosecution of the counterclaim.

Similarly, section 82.161 allows homeowner associations who prevail against homeowners to recover their attorney's fees, acting a check on overzealous litigation against homeowner associations. This case involves a homeowner who has allegedly filed numerous lawsuits against his association, and more than ten lawsuits against various other parties.[20] This litigation against the association is ultimately paid for by the neighbors living in the same community. Section 82.161 allows those neighbors to recover their money—further protecting the homeowners that comprise the association. The consumer-protection goal of TUCA is furthered by enforcing the statute as written—allowing for the party who prevails to recover fees.

[20] Appellee's Motion to Reconsider at 9.

CONCLUSION & PRAYER

When any party "obtain[s] actual and meaningful relief, materially altering the parties' legal relationship," the prevailing party standard is satisfied. The Court of Appeals erred in failing to apply that standard, instead adding an extra-statutory "affirmative relief" requirement.

The Court of Appeals' holding injects uncertainty and confusion into the enforcement process for thousands of homeowner associations, and makes the uniform law lack uniformity from one corner of the state to the other. For these reasons, the decision of the Court of Appeals should be reversed as to the interpretation of § 82.161.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(4), I hereby certify that the above styled document contains 2440 words, excluding the caption, identity of parties and counsel, table of contents, index of authorities, signature, proof of service, and certificate of compliance. Counsel is relying on a word count computer program used to prepare the document.

Frank O. Carroll III

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The undersigned hereby certifies that on the 10th day of December, 2021, a true and correct copy of the foregoing is being electronically filed with the Supreme Court of Texas and served via electronic mail and/or United States mail, first class, certified return receipt requested on all parties or their attorneys of record pursuant to the Texas Rules of Appellate Procedure.

Frank O. Carroll III

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