

No. 03-16-00502-CV

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**IN THE THIRD COURT OF APPEALS
FOR THE STATE OF TEXAS**

JEFFREY D. KYLE
Clerk

**VICKI BELCHER AND MICHAEL BELCHER,
Appellants
(Defendants below)**

v.

**MICHAEL GEARY AND NANCY GEARY AS TRUSTEES OF THE
GEARY FAMILY TRUST AND WOODLAKE PROPERTY OWNERS
ASSOCIATION SECTION ONE, INC.,
Appellees
(Plaintiffs below).**

**On Appeal from the 146TH Judicial District Court of
Bell County, Texas
The Honorable Jack Jones, Judge Presiding**

Appellees' Brief

TO THE HONORABLE JUSTICES OF THE THIRD COURT OF APPEALS:

Appellees, **MICHAEL GEARY** and **NANCY GEARY** as Trustees of the
Geary Family Trust and **WOODLAKE PROPERTY OWNERS ASSOCIATION**

Appellees's Brief

SECTION ONE, file their brief in support of confirming the trial court’s summary judgment. At trial of this case, Appellees were the named Plaintiffs and Appellants were the named Defendants. Appellees, **MICHAEL GEARY** and **NANCY GEARY** will be referred to as the “Gearys,” and Appellee, **WOODLAKE PROPERTY OWNERS ASSOCIATION SECTION ONE, INC.** will be referred to as “Woodlake”. Appellants, **VICKI BELCHER** and **MICHAEL BELCHER** will be referred to as “Belcher.

IDENTITY OF THE PARTIES

Appellants

VICKI BELCHER and
MICHAEL BELCHER

Appellees

MICHAEL GEARY and NANCY GEARY
as Trustees of Geary Family Trust and
WOODLAKE PROPERTY OWNERS
ASSOCIATION SECTION ONE, INC.

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Appellees will address the issues in the order that the Appellants addressed them in their brief.

I. There was Sufficient Evidence of the Amendments to the Restrictive Covenants.

The Belchers purchased a property with restrictions and in a homeowner's association. The Restrictive Covenants with the property provide:

“12. No animals, livestock or poultry of any kind shall be raised, bred or kept on any lot, except that dogs, or other household pets may be kept provided that they are not kept, bred, or maintained for an commercial purposes. All dogs, cats and other pets shall not be allowed to roam the subdivision unattended, and must be kept in fenced enclosures, cages or on a leash at all times. Pets shall not be allowed to make annoying noises or soil neighborhood lawns.” (Clerk's Record 270-275.)

These restrictions were reaffirmed in a document recorded in Volume 7989, Page 388, in the Official Records of Bell County, Texas. In that document, the lot owners of the Cliffs of Woodlake also agreed that any subsequent amendments to the restrictive covenants could be made by a majority of the then current owners of the lots. (Clerk's Record 291-308).

The Belchers actually signed off and agreed to the affirmation agreement. (Clerk's Record 309).

Subsequently, a majority of the lot owners approved the following change and clarified the wording of the above set forth restriction to read as follows:

“No animals, reptiles, rodents, pets, livestock or poultry of any kind shall be raised or kept on any lot, except that dogs, cats and other usual household pets may be kept by an owner on their respective lot and within their

respective dwelling, provided that they are not kept, bred or maintained for any commercial purpose and do not endanger the health of or unreasonably disturb owners of lots within the development. The Board of Directors shall have the right to determine what animal shall be deemed a “usual household pet”, applying the common meaning of the phrase. However, it is expressly understood that animals that fall under the following classification are not “usual house hold pets” and can never be deemed as such: poultry (such as chickens, turkeys, ducks, geese, and guinea fowl); livestock (such as cattle, horses, goats sheep or pigs); and animals whose habitation is normally found in the wild. Pets and animals shall be on a leash at all times when walked or exercised in any portion of the development, except on the owner’s lot. The owner of any pet or animal shall immediately remove such pet’s or animal’s excrement from any portion of the Common Property or any lot not owned by the owner of the animal or pet. In the event an animal or pet is deemed by the Board of Directors to be a nuisance or to be kept in violation of this declaration, the Board of Directors shall have the right to require the Owner of such animal to remove the animal or pet from the development.” (Clerk’s Record 347-350).

Bill King, individually, acting as President of the Woodlake Property Owners Association, and as custodian of the records, provided the history of the development, set forth the wording of the original restrictive covenants, set forth the wording of the clarification, and set forth the fact that the clarification was passed by a majority of the homeowners. Such proof was uncontradicted. (Clerk’s Record 347-350).

Appellants did not produce any summary evidence which would dispute these facts.

The clear intent of the restrictive covenants was to prohibit chickens on the property. The trial court was correct in ruling that the keeping of the chickens on the residential lot was prohibited by the restrictive covenants.

II. The Deed Restrictions are not Ambiguous When it Comes to Poultry.

The original restrictions provided no livestock or poultry of any kind shall be raised, bred or kept on any lot. (Clerk's Record 270 - 275). Such language clearly prohibited poultry of any kind. Even so, as set forth above, the restriction was amended to read as follows:

“No animals, reptiles, rodents, pets, livestock or poultry of any kind shall be raised or kept on any lot, except that dogs, cats and other usual household pets may be kept by an owner on their respective lot and within their respective dwelling, provided that they are not kept, bred or maintained for any commercial purpose and do not endanger the health of or unreasonably disturb owners of lots within the development. The Board of Directors shall have the right to determine what animal shall be deemed a “usual household pet”, applying the common meaning of the phrase. However, it is expressly understood that animals that fall under the following classification are not “usual house hold pets” and can never be deemed as such: poultry (such as chickens, turkeys, ducks, geese, and guinea fowl); livestock (such as cattle, horses, goats sheep or pigs); and animals whose habitation is normally found in the wild. Pets and animals shall be on a leash at all times when walked or exercised in any portion of the development, except on the owner's lot. The owner of any pet or animal shall immediately remove such pet's or animal's excrement from any portion of the Common Property or any lot not owned by the owner of the animal or pet. In the event an animal or pet is deemed by the Board of Directors to be a nuisance or to be kept in violation of this declaration, the Board of Directors shall have the right to require the Owner of such animal to remove the animal or pet from the development.” (Clerk's Record 347 - 350).

The clear intent of the majority of the owners in the subdivision was to prohibit chickens. The trial court was correct in ruling that the chickens on the Belchers' lot violated the restrictive covenants of the subdivision.

III. Waiver was not Properly Presented to the Trial Court and is not now Reviewable by the Appellate Court.

As pointed out by Appellants in their brief, "Waiver is an affirmative defense." (Page 13 of Appellants' brief). Defendants' answer at the time of the summary judgment hearing did not contain any affirmative defenses (Clerk's Record 451 - 454). Tex. R. Civ. P. 94 requires "waiver" to be affirmatively pled in the pleadings. The failure of the Belchers to affirmatively plead waiver was raised at the hearing on February 19, 2016 (Court Reporter Volume 4, Page 13). At the hearing, the Belchers did not seek leave of court to amend the pleadings, nor did they seek a continuance.

Without obtaining leave of court, the Belchers attempted to amend their pleadings to include the affirmative defense of "waiver" on March 11, 2016, many weeks after the initial summary judgment hearing. (Clerk's Record 489 - 493).

The Belchers failed to file a motion for leave to amend their pleadings after the summary judgment hearing and furthermore failed to obtain a ruling on any alleged attempt to amend.

Tex. R. Civ. P. 166a(c) specifically places the burden on the respondent to obtain leave of court to file a late response. Texas courts have repeatedly confirmed that the record must contain an affirmative indication that the court permitted the late filing of the response otherwise the response is a nullity. *Niemes v. Kein Cheuy Ta*, 985 S.W.2d 132. (Tex. App. - San Antonio, pet. denied).

The Belchers waived any argument of waiver at both the trial court level and upon appeal. Since the record contains nothing indicating, the trial court considered the late filing the appellate court must do likewise. See, *Benchmark Bank v. Brower*, 919 S.W.2d 657, 663 (Tex. 1996).

IV. Appellants have Waived any Objections to the Summary Judgment Evidence. Appellees' Summary Judgment Evidence was Proper.

The Belchers complain that there were unauthenticated letters and hearsay in the summary judgment evidence. They make further complaint to the affidavit of Bill King. They assert this affidavit was not based on personal knowledge and contained reference to hearsay from a website. The Belchers, however, have failed to preserve any of objections for this court to review.

It is insufficient to preserve error on appeal that an objection was made as to offered evidence. There must also be a ruling on such offer either from the bench on the record or by written order. See, *Williams v. Conroe Indep. Sch. Dist.*, 809 S.W.2d 954 (Tex.App. – Beaumont 1991, no writ). “In a summary judgment
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proceeding, a party objecting to summary judgment evidence must obtain a ruling on its objections to preserve error for appellate review. Further, the trial court's order must be reduced to writing and filed among the papers of the cause. By failing to obtain a ruling on her objections, [Respondent] has effectively waived her complaint with regard to [Movant's] summary judgment proof.” *Washington v. Tyler Indep. Sch. Dist.*, 932 S.W.2d 686 (Tex.App.–Tyler 1996, no writ). Even when a proper objection is raised regarding an affidavit, it remains a part of the summary judgment record unless there is a written, signed order sustaining the objection. *Alaniz v. Rebello Food & Beverage, LLC*, 165 S.W.3d 7 (Tex. App. – Houston [14th Dist.] 2005, no pet.). All of the objections the Belchers are making were not ruled on by the trial court. Accordingly, they have been waived and cannot be reviewed on appeal.

Alternatively, the affidavit of Bill King was proper. He states in the affidavit he is making such based on his personal knowledge. He, furthermore, states he is making the affidavit in his capacity as both President of the homeowners' association and as custodian of records of the homeowners' association. The dates referenced were taken off the documents which were filed in the Bell County Clerk's office, and furthermore, contained in the records of the subdivision.

Furthermore, the letter from the Workforce Commission (Clerk's Record 351-357) and references to the CDC website are not anything which is relevant to *Appellees's Brief*

the matters which Appellants have brought on appeal. The letters and statements referenced were included in the many violation notices the homeowners' association sent to the Belchers seeking them to remove their chickens. (Clerk's Record 340-346).

V. Woodlake has Met its Burden of Proof.

In this last point in their brief, Appellants just restated and rephrased the issues on appeal. The only new argument here is that Woodlake did not prove chickens were on the Belchers' subdivision property.

Once again, this simply is not supported by the record. There is uncontradicted evidence of chickens on the Belchers' property. The record is full of references to chickens on the Belchers' property. A sampling of these references are as follows:

1. The Defendant/Appellant Vicki Belcher clearly states, in her Affidavit, they purchased chickens and fenced their yard for the chickens. (Clerk's Record 227-229).

2. Mr. King, in his Affidavit, states the Belchers were keeping chickens in the back yard. (Clerk's Record 347-350).

3. The Affidavit of T. M. Saxon states the Belchers keep their chickens in the back yard behind a 6 foot tall fence (Clerk's Record 232-233).

In fact, the Appellants, in their brief, state the following: "The affidavits . . .
Appellees's Brief

demonstrate that Belchers' chickens were kept enclosed within the backyard of the Belchers' property, often times being further enclosed within a coop. . ." Appellees Brief, page 12.

The undisputed summary judgment evidence is that:

1. The Belchers had chickens on their residential property.
2. This property is in a subdivision.
3. The subdivision contains restrictions to the property use.
4. The restrictions prohibit keeping chickens on the property.

PRAYER

For these reasons, the Court should affirm the trial court's summary judgment ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this the 31st day of **October, 2016**, a true and correct copy of the foregoing document has been forwarded to all parties of record by:

- | | | | |
|--------------------------|---|-------------------------------------|--|
| <input type="checkbox"/> | Certified Mail,
Return Receipt Requested | <input checked="" type="checkbox"/> | Telephonic transfer to recipients current
telecopier number |
| <input type="checkbox"/> | US Regular Mail | <input type="checkbox"/> | Hand Delivery |
| <input type="checkbox"/> | US Express Mail | <input type="checkbox"/> | Federal Express |

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CERTIFICATE OF COMPLIANCE

Relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this reply (excluding any caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature proof of service, certification, certificate of compliance, and appendix) is 1926.

/s/ Jay R. Beatty

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