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IN THE SUPREME COURT OF TEXAS

HMC HOTEL PROPERTIES II LIMITED PARTNERSHIP AND HOST HOTELS & RESORTS, L.P., F/K/A HOST MARRIOTT, L.P.,
Petitioners,

vs.

KEYSTONE-TEXAS PROPERTY HOLDING CORPORATION.,
Respondent.

On Petition for Review from the Fourth Court of Appeals San Antonio, Texas, No. 04-10-00620-CV

BRIEF OF *AMICI CURIAE*

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Judge, 166th District Court
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Court of Appeals

Fourth Court of Appeals, San Antonio
Panel: Catherine Stone, C.J. (author), Phylis J.
Speedlin, J., and Marialyn Barnard, J.

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES.......... v

IDENTITY OF *AMICI CURIAE* AND PAYMENT 1

INTRODUCTION 4

ARGUMENT AND AUTHORITIES.......... 5

I. THE COURT SHOULD REVERSE THE DECISION BELOW ON THE GROUND THAT HMC'S CONDUCT DID NOT CONSTITUTE SLANDER OF TITLE. 5

II. THE COURT SHOULD REVERSE THE DECISION BELOW ON THE GROUND THAT IT IMPROPERLY EXPANDS THE MEANING OF LEGAL MALICE. 6

III. CONCLUSION.......... 11

INDEX OF AUTHORITIES

CASES

Page

Am. Nat'l Bank & Trust Co. v. First Wisc. Mortg. Trust,
577 S.W.2d 312 (Tex. Civ. App. - Beaumont 1979, writ ref'd n.r.e.) 8

Cont'l Coffee Prods. Co. v. Cazarez,
937 S.W.2d 444(Tex. 1996)..7

Dempsey v. State,
11 S.W. 372 (Tex. App. 1889)..7

Fairfield Ins. Co. v. Stephens Martin Paving, LP,
246 S.W.3d 653 (Tex. 2008)..10

Formosa Plastics Corp. USA v. Presidio Engineers and Contractors Inc.,
960 S.W.2d 41 (Tex. 1998)..9

Jim Walter Homes, Inc. v. Reed,
711 S.W.2d 617 (Tex. 1986)..8

Jones v. Ross,
173 S.W.2d 1022 (Tex. 1943)..7

Lamar Homes, Inc. v. Mid-Continent Cas. Co.,
242 S.W.3d 1 (Tex. 2007)..8

Printing & Numerical Registering Co. v. Sampson,
19 L.R.-Eq. 462 (1875) 10

Sw. Bell Tel. Co. v. DeLanney,
809 S.W.2d 493 (Tex. 1991)..8

Sw. Inv. Co. v. Alvarez,
453 S.W.2d 138 (Tex. 1970)..7

Transp. Ins. Co. v. Moriel,
879 S.W.2d 10 (Tex. 1994)..7

Ware v. Paxton,
359 S.W.2d 897 (Tex. 1962)..7

Wood Motor Co., Inc. v. Nebel,
238 S.W.2d 181, 185 (Tex. 1951)..10

Page

STATUTES

Tex. Constitution Art. I, § 16 10

OTHER AUTHORITIES

25 C.J.S. Damages § 123 7

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IDENTITY OF *AMICI CURIAE* AND PAYMENT

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, the following brief is presented on behalf of the National Association of Real Estate Investment Trusts (NAREIT), the Commercial Real Estate Development Association (NAIOP), the National Multi Housing Council ("NMHC"), American Hotel & Lodging Association ("AH& LA") and The Real Estate Roundtable ("RER").

NAREIT is the worldwide representative voice for Real Estate Investment Trusts ("REITs") and publicly traded real estate companies with an interest in United States real estate and capital markets. Most, if not all, members of NAREIT will potentially be affected by a decision of this the Court in that it will impact the real estate investment market in Texas. Petitioner is one of the members of NAREIT.

NAIOP is the leading organization for developers, owners and related professionals in office, industrial, and mixed-use real estate. NAIOP has over 15,000 members in North America, advances responsible commercial real estate development, and advocates for effective real estate-related public policy. Petitioner is not one of the members of NAIOP.

NMHC is a national association representing the interests of the larger and most prominent apartment firms in the United States. NMHC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management, and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. One-third of American households rent, and over 14 percent of households live in a rental apartment building with five or more units. Petitioner is not one of the members of NMHC.

AH&LA is the sole national association representing all sectors and stakeholders in the lodging industry, including individual hotel property members, hotel companies, student and faculty members, and industry suppliers. Headquartered in Washington, D.C., AH&LA has been providing its members with representation, education, research and information for over 100 years. Petitioner is one of the members of AH&LA.

RER is a non-profit public policy organization based in Washington, D.C. that represents the leadership of the nation's top privately owned and publicly held real estate ownership, development, lending and management firms, as well as the elected leaders of the 17 major national real estate industry trade associations. Collectively, RER members hold portfolios containing over 5 billion square feet of developed property valued at over $1 trillion; over 1.5 million apartment units; and in excess of 1.3 million hotel rooms. Participating RER trade associations represent more than 1.5 million people involved in virtually every aspect of the real estate business. RER identifies, analyzes, and coordinates policy positions addressing key issues relating to real estate to ensure that a cohesive industry voice is heard by government, the courts, and the public about important issues. Petitioner is one of the members of RER.

The source of any fee paid for the preparation of this brief is NAREIT. Copies of this brief have been served on all attorneys of record as reflected in the Certificate of Service.

TO THE HONORABLE SUPREME COURT OF TEXAS:

The National Association of Real Estate Investment Trusts, the Commercial Real Estate Development Association, the National Multi Housing Council, the American Hotel & Lodging Association and The Real Estate Roundtable respectfully submit this brief, *amicus curiae,* in support of the Petition for Review filed by HMC Hotel Properties II Limited Partnership and Host Hotels & Resorts, L.P. (f/k/a Host Marriott, L.P.).

INTRODUCTION

Amici adopt the Statement of Facts as set forth in the Petition for Review herein. Based on those facts, HMC Hotel Properties ("HMC") and Keystone-Texas Property Holdings Corporation ("Keystone") entered into a lease whereby HMC leased property from Keystone. Section 14.02 of the lease created a "Tenant's Right of First Negotiation." A dispute arose between Keystone and HMC regarding the proper interpretation of the clause. HMC interpreted (and still interprets) Section 14.02 to require Keystone to enter negotiations with HMC upon deciding to sell the property and prior to finding another buyer. Keystone interpreted (and still interprets) the clause to operate only after it had identified a potential buyer.

Keystone decided to sell the property at issue and identified a potential buyer, Ben Ashkenazy. When HMC learned of the proposed sale, HMC notified Keystone that it believed Keystone's actions to be in violation of Section 14.02 of the lease and demanded that Keystone put on hold any sale to Ashkenazy and enter into negotiations with HMC. Keystone declined and continued to pursue the sale of the property to Ashkenazy.

The relevant title insurance company, Fidelity, learned of the dispute and refused to issue clean title insurance on the property without a waiver from HMC of any rights it might have under Section 14.02. All parties agreed that HMC had no obligation to provide a waiver. When it chose not to waive its rights, HMC sent a letter to Keystone on April 18, 2005, urging Keystone to comply with its obligations under Section 14.02. Although Keystone and Ashkenazy continued to negotiate the deal after Keystone received the letter from HMC, the sale to Ashkenazy ultimately failed to close because Fidelity would not issue clean title insurance without a waiver from HMC and Ashkenazy refused to purchase the property without clean title insurance.

HMC sued Keystone for breach of Section 14.02 of the lease agreement, and Keystone counterclaimed against HMC and its parent company, Host Marriott, on several tort theories, including slander of title. Keystone claimed that the April 18 letter from HMC to Keystone caused the sale to Ashkenazy to fail. After the trial judge issued jury instructions essentially adopting Keystone's interpretation of Section 14.02, a jury found that HMC committed slander of title and also awarded punitive damages. The trial court judge set aside the punitive damages and awarded damages to Keystone for slander of title. On appeal, the appellate court upheld the damages for slander of title and reversed the trial court's ruling on punitive damages.

NAREIT, NAIOP, NMHC, AH&LA and RER fully support the arguments set forth in the Petition for Review, which persuasively explain why this Court should reverse the decisions of the trial and appellate court below. Accordingly, *amici* adopt and will not fully replicate those arguments here but will add and/or emphasize certain important points they believe the Court should consider. For the reasons stated in the Petition for Review, as well as for the reasons set forth below, the decision of the court below should be reversed.

ARGUMENT AND AUTHORITIES

I. THE COURT SHOULD REVERSE THE DECISION BELOW ON THE GROUND THAT HMC'S CONDUCT DID NOT CONSTITUTE SLANDER OF TITLE.

As established in detail in HMC's Petition for Review, the appellate court was incorrect in affirming that HMC committed the tort of slander of title.[1]

The April 18 letter did not in any way imply that Keystone did not hold proper title to the property at issue – or even address title – but instead merely raised the question of whether Keystone could sell the property to a third party without undertaking certain procedural steps

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[1] *See* Pet. at 8–9.

established under Section 14.02. As Petitioners have shown, counsel for Keystone has in fact conceded that the letter "does not constitute an encumbrance on title." Pet. at 9.

The court of appeals utterly failed to analyze the "title" aspect of the tort claim set forth by Keystone. By finding the existence of a tort in the circumstances at issue, the decision of the court below will significantly interfere with relationships between lessors and lessees in Texas. Lessees will be discouraged from raising with lessors legitimate questions concerning the terms and meaning of their leases, for fear that a misstatement could be deemed to somehow affect the lessor's title to its property and thus potentially subject the lessee to tort liability. Effectively, the interpretation of a lease by the property owner may improperly govern in many instances, inasmuch as it may be too risky for the lessee to offer its own interpretation.

The decision thus expands the tort of slander of title to an excessive degree, and will have far-reaching negative consequences regarding Texas leases.

II. THE COURT SHOULD REVERSE THE DECISION BELOW ON THE GROUND THAT IT IMPROPERLY EXPANDS THE MEANING OF LEGAL MALICE.

Even if this Court were to assume, despite the points made above, that the April 18 letter somehow called into question Keystone's title to the property, the decision below raises another important problem. As Petitioners have shown, the court below incorrectly concluded that Section 14.02 was unambiguous and therefore that HMC acted with legal malice in sending the April 18 letter. As set forth in the Petition for Review, however Section 14.02 without question is reasonably susceptible to the interpretation advanced by HMC.[2]

Legal malice has been defined by this Court as "any unlawful act done willfully and purposely, to the injury of another, is, as against that person, malicious; this wrong motive, when it is shown to exist, coupled with a wrongful act, willfully done to the injury of another,

[2] *See* HMC's Petition at 11.

constitutes legal malice."[3] Legal malice exists "when wrongful conduct is intentional and without just cause or excuse."[4] In this case, HMC acted only with the intention of protecting what it perceived to be its legal rights, and not with any intent to injure Keystone or to improperly interfere with Keystone's legitimate business purposes.

For the court below to conclude that Section 14.02 was so unambiguous as to make HMC's interpretation malicious constitutes dangerous precedent. Persons reading the appellate court's decision will be extremely wary and ultra-conservative in construing the provisions of any contract, as they will see that a reasonable interpretation of an ambiguous provision was found by the Court to indicate legal malice. This will have the damaging effect of tending to prevent parties from making legitimate assertions of their good-faith beliefs regarding the meaning of contract provisions.

Furthermore, the award of punitive damages based on what is an improper finding of malice will serve only to significantly heighten this chilling effect on parties desiring to set forth good-faith interpretations of ambiguous contract provisions. As stated by this Court, an unlawful act alone is not enough to justify an award of exemplary or punitive damages, but the plaintiff "also must partake of a wanton and malicious nature."[5] Stated differently, "[e]very tort involves conduct that the law considers wrong, but punitive damages are proper only in the most exceptional cases."[6]

Permitting punitive liability where there is malice was designed to serve the important and worthwhile purpose of discouraging intentional misconduct. To reach a finding of malice to

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[3] *Dempsey v. State*, 11 S.W. 372, 373 (Tex. App. 1889) (internal citations omitted).

[4] *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 452 (Tex. 1996).

[5] *Jones v. Ross*, 173 S.W.2d 1022, 1024 (Tex. 1943) (quoting 25 C.J.S. Damages § 123), *cited with approval in Ware v. Paxton*, 359 S.W.2d 897, 899 (Tex. 1962), and *Sw. Inv. Co. v. Alvarez,* 453 S.W.2d 138, 141 (Tex. 1970).

[6] *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 (Tex. 1994).

support the award of punitive damages requires "actual malice, that is, ill will, bad or evil motive, or such gross indifference to or reckless disregard of the rights of others as will amount to a willful or wanton act."[7] Expanding the meaning of legal malice so dramatically as to permit an award of punitive damages based on a good-faith reading of an ambiguous contract provision, however, runs contrary to the very objective underlying punitive damages.

This Court has recognized the need to limit the potential liability of parties to a contract by adopting the economic loss doctrine. Commonly stated, the economic loss doctrine is aimed at preventing the recovery of economic losses in tort where the duty owed has been created by a contract.[8] As construed by this Court, the economic loss doctrine generally "restricts contracting parties to contractual remedies for those economic losses associated with the relationship, even when the breach might reasonably be viewed as a consequence of a contracting party's negligence."[9] Recognizing that "[t]he acts of a party may breach duties in tort or contract alone or simultaneously in both," the Court held that "[t]he nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone."[10] Although exceptions to the doctrine have

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7 *Am. Nat'l Bank & Trust Co. v. First Wisc. Mortg. Trust*, 577 S.W.2d 312, 317 (Tex. Civ. App. - Beaumont 1979, writ ref'd n.r.e.).

8 R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 Wm. & Mary L. Rev. 1789, 1797-98 (2000), http://scholarship.law.wm.edu/wmlr/vol41/iss5/8 ("*Drowning*") (internal citations omitted).

9 *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12-13 (Tex. 2007) (internal citations omitted).

10 *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex. 1991) (quoting *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986)).

been recognized[11], these exceptions do not apply to the facts at hand, and the opinion below does not so conclude or even suggest.

The economic loss rule was aptly developed by courts under the rationale that contract law is deliberately intended to compensate for disappointed economic expectations and, therefore, to limit damage awards to economic losses associated with contracts.[12] Absent the rule, plaintiffs would be able to choose between tort and contract remedies without limitation. Because tort law frequently creates a greater award, if permitted to choose most plaintiffs would elect recovery under tort law. Permitting this choice would "undermine . . . contract law."[13]

The principles behind the economic loss rule are applicable here. The source of HMC's duty to Keystone was a contract – specifically, the lease between the parties. The only damage to Keystone resulting from HMC's good-faith, if potentially inaccurate, interpretation of Section 14.02 is at most the lost value of the sale to Ashkenazy. This is precisely the type of injury that contract, not tort, law was developed to remedy. Inasmuch as HMC's duty to Keystone stemmed from the lease, and since (a) Keystone could be fully compensated for any damages suffered through the application of contract law, and (b) none of the exceptions to the economic loss rule apply, HMC should be limited to recovery in contract and should not be permitted to avail itself of tort damages.

Failure by this Court to limit Keystone's damages to those that can be proved under contract law would result in potentially exorbitant liability for contracting parties and would have the effect of turning any contract case into a tort case. This possibly extreme degree of

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[11] *See, e.g., Formosa Plastics Corp. USA v. Presidio Engineers and Contractors Inc.,* 960 S.W.2d 41, 46-47 (Tex. 1998) (holding that the economic loss rule does not preclude tort damages in cases of fraud).

[12] *Drowning at* 1799.

[13] *Id.* (internal citation omitted).

liability "would decrease certainty and predictability in allocating risk, and thereby impede future business activity and contract negotiation."[14] Almost without exception, parties are forced to take positions regarding the meaning a contract during the course of performance. Upholding this award of damages in tort for the good-faith interpretation of an ambiguous contract provision will create greatly exaggerated liability under the contract.

Recognizing that contracts serve an important public purpose, Texas has a long history of recognizing and protecting a broad freedom of contract.[15] This Court has declared that "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, [under] this paramount public policy . . . [courts] are not lightly to interfere with this freedom of contract."[16]

By permitting parties to sue in tort over a contract dispute, this Court would be allowing Keystone "to rewrite the agreement by allowing [Keystone] to recoup a benefit that was not part of the bargain."[17] To impute tort liability based on an honest disagreement over the meaning of an ambiguous contract provision unjustifiably expands the risk associated with entering into a contract and runs contrary to the well-established deference given under Texas law to the allocation of risk established by the parties.

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[14] *Id.* at 1799 – 1800 (internal citations omitted).

[15] Tex. Constitution Art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligations of contracts, shall be made.").

[16] *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 671 (Tex. 2008) (citing *Wood Motor Co., Inc. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951) (quoting Printing & Numerical Registering Co. v. Sampson, 19 L.R.Eq. 462, 465 (1875)).

[17] *Drowning* at 1798 (internal citation omitted).

III. CONCLUSION

As set forth above and in the Petition for Review, this Court should reverse the decision below on the grounds that petitioners did not commit slander of title and that the court's decision would dramatically expand the meaning of legal malice so as to encompass reasonable behavior undertaken in good faith. The decision below would expose contracting parties to excessive and unreasonable liability in tort for advancing a good-faith interpretation of an ambiguous contract provision and would interfere with the established principles of Texas law regarding contracts.

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