STATE OF MICHIGAN

COURT OF APPEALS

PETER R. MUSCIO,

Plaintiff/Appellant/
Cross-Appellee,

v

OLDE COLONY BUILDERS, INC.,

Defendant/Appellee/
Cross-Appellant,

and

THE VILLAGE OF WOLVERINE LAKE and
EARL GLASPIE

Defendants-Appellees,

and

PAUL J. RICHARD and MICHELLE M.
RICHARD,

Defendants/Third-Party Plaintiffs/
Appellees,

v

JEROME GEORGE & COMPANY, INC.,

Third Party Defendant.

UNPUBLISHED
September 13, 1996

No. 171314
LC No. 92-436663-NI

PETER R. MUSICO,

Plaintiff-Appellant,

v

No. 176134
LC No. 92-436663-NI

OLDE COLONY BUILDERS, INC.,

Defendant/Cross-Defendant/
Appellee,

and

THE VILLAGE OF WOLVERINE LAKE and
EARL GLASPIE,

Defendants,

and

PAUL J. RICHARD AND MICHELLE M.
RICHARD,

Defendants/Cross-Plaintiffs/
Third-Party Plaintiffs/Appellees,

v

JEROME GEORGE & COMPANY, INC.,

Third-Party Defendant.

Before: Markman, PJ, and Saad and W.J. Giovan,* JJ.

PER CURIAM.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

In docket no. 171314, plaintiff appeals, by leave granted, the trial court's order granting summary disposition to defendants Olde Colony Builders, Paul and Michelle Richard, the Village of Wolverine Lake and Earl Glaspie. In docket no. 176134, plaintiff appeals as of right the trial court's decision to amend the order of summary disposition and grant mediation sanctions to defendants Olde and the Richards. We affirm in part, reverse in part, and remand.

This case arises from a property dispute between plaintiff, Peter Muscio, and the Richard defendants. Plaintiff is the owner of two parcels of land neighboring Wolverine Lake. The parcels are separated by a twenty-five foot wide street, known as Delmonte A. In 1989, the Richards purchased from defendant Olde, land on Wolverine Lake and a house situated off Delmonte A. As a condition of sale, Olde built a garage adjacent to the house. The Richards then paved a portion of Delmonte A immediately west of the garage and began using it as a driveway. Plaintiff later discovered that the garage extended beyond the western boundary of the Richards' property and protruded into Delmonte A. Plaintiff filed a complaint against defendants seeking both damages and equitable relief; the circuit court ultimately entered summary disposition against him.

I.

On appeal, plaintiff argues that the record was replete with evidence establishing that he was injured by the conduct of defendants Olde and the Richards. First, plaintiff contends that the placement of the garage and driveway blocks access to lots 219 and 220 and lots 43 through 45. We disagree. At his deposition, plaintiff admitted that neither the garage nor the cars parked along Delmonte A had ever prevented him or his family from access to the property. Moreover, as plainitff conceded, lots 219 and 220 can be accessed from the north by way of Mallow Street. Although plaintiff contends that tradespeople hired to work on his house were denied use of Delmonte A by the Richards, this allegation constitutes hearsay. The existence of a disputed fact must be established by admissible evidence. *Amorello v Monsanto Corp*, 186 Mich App 324, 329; 463 NW2d 487 (1990).

Next, plaintiff argues that cars parked along Delmonte A obstruct his view of the lake. In his deposition, however, plaintiff admitted that he is able to see the lake from his home. Moreover, plaintiff conceded that Delmonte A is a public street and that members of the public are entitled to park there, at least during daylight hours. Furthermore, in the absence of an easement or covenant, a landowner has no right to an unobstructed view. See generally 1 Am Jur 2d, Adjoining Landowners, § 90.

Plaintiff further contends that the garage blocks a public promenade, thereby forcing individuals to trespass through his property in order to access the lake. Yet, in his deposition, plaintiff admitted that members of the public had been arbitrarily using his property to reach the lake long before the garage and driveway were constructed. Furthermore, the survey submitted by plaintiff establishes that the garage merely narrows the entrance to the passageway. Also relevant here is the fact that there were no

signs erected on plaintiff's land indicating that lots 43 through 45 were private property, nor were plaintiff's lots enclosed by a fence. Thus, reversal is not warranted on this basis.

There is no support in the lower court record for plaintiff's assertion that the value of his property has been diminished by the placement of the garage. In fact, when questioned at deposition, plaintiff admitted that he did not know whether his land had decreased in value. Similarly, plaintiff's contention that the garage and driveway will hinder his ability to sell his property are based solely on speculation. Speculation and conjecture are insufficient to establish the existence of a disputed fact. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Accordingly, we conclude that plaintiff suffered no damages as the result of defendants' conduct.

Plaintiff also argues that the trial court erred in granting summary disposition because a question of fact exists over the status of Delmonte A. We disagree. Prior to this appeal, plaintiff consistently maintained that Delmonte A was a public road. By alleging that the road may have been vacated or abandoned, plaintiff is attempting to change his position on appeal. Moreover, because plaintiff, Olde and the Richards all took the position below that the road was public, we cannot now conclude that an issue of material fact exists about the status of Delmonte A.

In his brief on appeal, plaintiff raises several new theories. Because they were not presented to the trial court, we decline to consider them on appeal. Plaintiff "may not shift ground on appeal and come up with new theories here after being unsuccessful on the one presented to the trial court." *Ficano v Lucas*, 133 Mich App 268, 275; 351 NW2d 198 (1983).

Finally, plaintiff contends that he is entitled to judgment as a matter of law. We disagree. By citing MCL 125.587; MSA 5.2937, plaintiff once again attempts to assert a new theory on appeal. Although plaintiff's complaint set forth a claim for nuisance, he never argued below that the garage was a nuisance per se, nor did he cite this statute below. In any event, plaintiff's reliance on this statute is without merit. Private citizens have standing to institute an action to abate a public nuisance only where there is a showing that they have suffered damages distinct and different from the injury suffered by the public generally. *Towne v Harr*, 185 Mich App 230, 232, 233; 460 NW2d 596 (1990). Because plaintiff was not harmed by the actions of Olde and the Richards, there were no such damages.

II.

Although the trial court properly dismissed plaintiff's complaint, in light of the procedural history of this case, we find that the circuit court lacked jurisdiction thereafter to modify the order of summary disposition to provide for mediation sanctions. This Court granted leave to appeal before the trial court's orders were signed and entered. Once a claim of appeal is filed or leave to appeal is granted, a trial court may not set aside or amend the judgment or order appealed from except by order of this Court, by stipulation of the parties, or as otherwise provided by law. MCR 7.208; *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 314; 486 NW2d 351 (1992). Furthermore,

although it is unclear what arguments on the merits of this issue were actually considered by the circuit court, at oral argument on appeal, it appeared that the circuit court had not addressed whether mediation sanctions are appropriate where plaintiff's initial claim sough both legal and equitable relief. We therefore vacate only the portion of the modified order imposing mediation sanctions, and remand the case to the trial court for reconsideration of the mediation sanctions issue. In light of the factual dispute over interpretation of the mediators' note, we express no opinion on the sanctions issue, leaving the matter to the circuit court's discretion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Henry William Saad
/s/ William J. Giovan