

STATE OF MICHIGAN
COURT OF APPEALS

GLENS OF INDIANWOOD HOMEOWNERS
ASSOCIATION,

UNPUBLISHED
August 21, 2001

Plaintiff-Appellee,

v

No. 217866
Oakland Circuit Court
LC No. 98-008205-CZ

JEROME ROMANOWSKI and LINDA
ROMANOWSKI,

Defendants-Appellants.

Before: White, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendants appeal as of right an order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and denying defendants' cross-motion for summary disposition. We reverse and remand.

Defendants own Unit 18 of Glens of Indianwood, a residential condominium subdivision in Oakland County. At the time defendants purchased their unit, the use of the real property was restricted to residential use by several protective covenants, two of which are relevant to this appeal:

1. Each unit shall only be used for residential purposes.
2. No owner shall carry on any commercial activities anywhere on the premises of the condominium.

Defendants operate a family day care home within their residence pursuant to MCL 722.111.¹ Plaintiff brought suit to enjoin defendants from operating a day care facility, alleging that

¹ This statute defines "family day care home":

"Family day care home" means a private home in which 1 but fewer than 7 minor children are received for care and supervision for periods of less than 24 hours a day, unattended by a parent or legal guardian, except children related to an

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defendants' operation of a family day care home within their residence is a commercial activity in violation of the restrictive covenants. The trial court granted plaintiff's motion for summary disposition and denied defendants' cross-motion, holding that the restrictions clearly prohibited commercial uses, and defendants' activities, although residential in nature, constituted a commercial use for purposes of the restriction at issue.

On appeal, defendants argue that plaintiff's motion for summary disposition was improperly granted because defendants' operation of a family day care home was residential in nature, not commercial, and therefore, permitted under plaintiff's condominium documents. We agree. This Court reviews the trial court's grant of summary disposition de novo. *The Herald Co v City of Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). The lower court record is reviewed to determine if the moving party was entitled to judgment as a matter of law. *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 665; 593 NW2d 578 (1999). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) only if the affidavits or other documentary evidence show that there is no genuine issue concerning any material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

In *Terrien v Zwit*, 238 Mich App 412; 605 NW2d 681 (1999), the plaintiffs sought to enforce several covenants, one that provided that "no lot shall be used except for residential purposes," and another that specifically prohibited "any commercial, industrial, or business enterprises" on the premises. *Id.* at 413. The plaintiffs in *Terrien* claimed that under *Beverly Island Ass'n v Zinger*, 113 Mich App 322; 317 NW2d 611 (1982), "a restriction allowing residential uses permits a wider variety of uses than a restriction prohibiting commercial or business uses." This Court, however, found the quoted passage from *Beverly Island* to be mere dicta and held that the characterization of property as residential or commercial did not turn on what covenants were present. Rather, "[t]he focus must be on the activity involved and how it parallels the ordinary and common meaning of use for residential purposes." *Id.* at 415. Applying this test, this Court found both that the difference in obtrusiveness between the defendant's day care homes and homes with large families was minimal, and that the defendant's receipt of compensation was not determinative. *Id.* at 419. In reaching its decision, this Court gave considerable weight to our state's public policy in favor of day care homes, considered the shortage of licensed child care in Michigan, the importance of the availability of quality child care in the success of Michigan's welfare reform efforts, and the need for child care alternatives other than child care centers. *Id.* at 419-420. In light of these considerations, and the fact that the activities involved in operating a family day care home are consistent with the overall plan of the subdivision as a residential area, this Court found that the defendants' family day care homes did not violate the restrictive covenant specifically prohibiting commercial use. *Id.* at 421.

Applying *Beverly Island* and *Terrien* to the instant case, we conclude that defendants' family day care home is consistent with the overall plan of the condominium subdivision as a

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adult member of the family by blood, marriage, or adoption. Family day care home includes a home that gives care to an unrelated minor child for more than 4 weeks during a calendar year. [MCL 722.111(f)(iii).]

residential area and does not violate the restrictive covenant prohibiting commercial uses contained in the condominium documents. The level of obtrusiveness associated with caring for six unrelated children at a time is minimal in comparison to that of homes with large families; the fact that defendants receive compensation for their services or characterized their intended operation as a small business is not determinative. *Terrien, supra* at 419. Therefore, the trial court erred in determining defendants' family day care home to be a commercial use and in violation of the restrictive covenant. *Id.* at 421; *Beverly Island, supra* at 331. Since there are no genuine issues of material fact, we reverse the decision of the trial court granting summary disposition to plaintiff and remand for entry of an order granting defendants' summary disposition pursuant to MCR 2.116(C)(10).

In view of our resolution of the above issue, defendants' remaining arguments need not be addressed.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra