

STATE OF MICHIGAN
COURT OF APPEALS

TORCH LAKE PROTECTION ALLIANCE,
DANIEL SCHWIETERING, JOHN STOPA,
SHIRLEY KOTELES, URSULA CLARK, EVA
NELSON, BARBARA JUNE PREIN, L. P.
SOCHA, HAROLD JACKSON, and MICHAEL
RONTAL, M.D.,

Plaintiffs-Appellees,

v

JEFF ACKERMANN and MARILYNN
ACKERMANN,

Defendants-Appellants.

UNPUBLISHED
November 30, 2004

No. 246879
Antrim Circuit Court
LC No. 02-007840-CZ

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting summary disposition to plaintiffs on their complaint for injunctive relief with respect to defendants' short-term rental use of property in the Torch Lake Woods Subdivision in Milton Township. The court concluded that the rental use of the property violated Milton Township's zoning ordinance, as well as certain deed restrictions. Although plaintiffs had advanced additional theories for obtaining this injunctive relief, the trial court declared those theories moot in light of its decision and declined to address them. We affirm.

I

We first address plaintiffs' claim that this Court lacks jurisdiction to consider defendants' appeal because three of plaintiffs' alternative theories for injunctive relief were not adjudicated by the trial court. A court's subject-matter jurisdiction may be challenged at any time and is a question of law reviewed de novo on appeal. *Smith v Union Charter Twp (On Rehearing)*, 227 Mich App 358, 359 n 1; 575 NW2d 290 (1998).

The trial court's February 10, 2003, judgment disposed of plaintiffs' complaint for declaratory and injunctive relief. The trial court disposed of plaintiffs' alternative injunctive theories by declaring the unadjudicated theories moot in its February 25, 2003, order. Therefore,

the trial court's February 10, 2003, judgment, and February 25, 2003, order disposed of all claims and adjudicated the rights and liabilities of all parties. Accordingly, we have jurisdiction to consider defendants' appeal.

II

Defendants argue that the trial court erroneously held that the short-term rentals of their property violated the deed restrictions established by their predecessor in title.¹ Although the trial court did not specify the subrule of MCR 2.116(C) on which it relied in granting the TLW plaintiffs' motion, it is apparent that the motion was granted under MCR 2.116(C)(10) because the court considered matters outside the pleadings. A trial court's decision to grant or deny summary disposition is reviewed de novo on appeal. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When proffered admissible evidence does not establish a genuine issue regarding any material fact for trial, the moving party is entitled to judgment as a matter of law. *Id.*

Two deed restrictions are in play in this case. The first provides that defendant's property "shall be used for private residence purposes only." The second provides that the premises may not be used for a number of specified business or commercial purposes, including use "as a hotel or tourist camp or public place of resort,"

In *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335; 591 NW2d 216 (1999), our Supreme Court set out the sometimes-conflicting principles that govern review of deed restrictions. The *O'Connor* opinion distills four touchstones for analyzing the applicability of deed restrictions. First is the concept that restrictive covenants are to be construed strictly against grantors and those claiming the right to enforce them, that is, all doubts are to be resolved in favor of free use of property. Second is the admonition that courts not infer restrictions that are not *expressly* provided in the pertinent documents. Third is the balancing of the valuable right of privacy for homes with the importance of protecting property owners who rely on restrictions. Finally, *O'Connor* instructs us that deed restrictions that limit use for residential purposes are favored by public policy, but only if they are "clearly established" by the documents wherein they are found. *Id.* at 341-342. See also *Hickory Pointe Owners v Smyk*, 262 Mich App 512, 515-516; 686 NW2d 506 (2004).

¹ Insofar that defendants challenge the standing of certain plaintiffs to enforce the deed restrictions, we decline to consider this argument because it is not set forth in the statement of questions presented. MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). In any event, we note that the motion for summary disposition on the basis of the deed restrictions was made only by the six plaintiffs who claimed a right to enforce the restrictions based on their property ownership in the same Torch Lake Woods Subdivision (hereafter the "TLW plaintiffs").

The difficulty in deciding cases involving residential-use deed restrictions is summarized in *O'Connor*, *supra* at 345, as follows:

Our decisions are premised on two essential principles, which at times can appear inconsistent. The first is that owners of land have broad freedom to make legal use of their property. The second is that courts must normally enforce unwaived restrictions on which the owners of other similarly burdened property have relied.

To harmonize those principles and apply them properly, this Court has recognized the necessity of deciding such matters on a case-by-case basis. The circumstances of each case thus determine whether a particular use is prohibited by a residential restriction. [Footnote omitted.]

The trial court's carefully reasoned opinion on the record recognized the guiding principles of *O'Connor* and properly applied them to the facts of this case. See also *Wood v Blancke*, 304 Mich 283; 8 NW2d 67 (1943). Accordingly, we conclude that the trial court did not err in granting the TLW plaintiffs' motion for summary disposition based on the deed restriction theory of injunctive relief.

Deed restrictions are generally grounded in contract and the intent of the drafter controls. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). As such, their meaning is a question of law if there is no ambiguity. *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 447-448; 571 NW2d 548 (1997). Deed restrictions will not be enlarged or extended by judicial construction when there is no ambiguity. *Sampson v Kaufman*, 345 Mich 48, 50; 75 NW2d 64 (1956).

The trial court found, and we agree, that the residential use and business prohibition covenants in defendants' deed are not ambiguous, and no genuine issue of material fact was shown with respect to defendants' violation of those covenants. The trial court's reasoning is clear and cogent:

Mr. Crumb when he laid out these parcels and put these covenants in place, ... he did attempt to make as clear as this Court believes any human can, is that the property was to have a private residential purpose; it may be that subsumed within the notion of private residential purpose would be the occasional use of one's property by another, it's certainly not uncommon people swap their homes with friends, they have friends come and visit, they have overnight guests, guests for retractive [sic] periods of time, often people take care of aging parents, family members need to be nursed during a period of illness; I suspect in the vast majority of those occasions no money ever changes hands. ... [B]ut perhaps the best writer to ever serve on the Michigan Supreme Court was Justice Volker. ... Justice Volker wrote about the inherent ambiguity of language and the ability of lawyers to make almost any argument about any set of words that man could be constrained to put together; I think the point is often the more detail one provides it simply provides more opportunity to try to insert ambiguity where none was intended.

If there was one core facet associated with these deed restrictions, it is that they restrict property to a private residential purpose. Has that purpose outlived its meaning? Is this an isolated pocket of residential property surrounded by encroaching motels or businesses? ... This is extraordinary property, it is a precious resource and it is largely residential. There are some commercial establishments, marines, [sic] restaurants, motels, on various parts of the lake, but the property at issue here is private residential property, and it is not surrounded by or being encroached upon by motels or hotels or gas stations. The character of the neighborhood is not changed. The covenants have not outgrown their purpose, which is to preserve a private residential purpose.

* * *

But, to the extent we have clear precedent in *O'Connor v Resort Owners* with regard to what is a residence and what is not, there is no question that rentals are in excess of \$50,000 during the height of the season.

The court's ruling is supported by the record in this case and its construction of the intent of the restrictive covenants properly gives effect to the instrument as a whole. See *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000) (contracts); *Borowski v Welch*, 117 Mich App 712, 716; 324 NW2d 144 (1982) (restrictive covenants).

The meaning of "residential" in a restrictive covenant is not an issue of first impression in this state, but does require a fact-specific inquiry into the use. *Wood, supra*. A restriction *allowing* residential uses is generally viewed as permitting wider uses than a restriction *prohibiting* business uses. *Beverly Island Ass'n v Zinger*, 113 Mich App 322, 326; 317 NW2d 611 (1982); see also *Terrien v Zwit*, 467 Mich 56, 62; 648 NW2d 602 (2002). Hence, incidental uses to a prescribed residential use may not violate the covenant if it is casual, infrequent, or unobstructive, and causes neither appreciable damage to neighboring property nor inconvenience, annoyance, or discomfort to neighboring residents. *Wood, supra* at 288-289.

In *O'Connor, supra* at 345, our Supreme Court also quoted the trial court's reasoning and adopted the following rationale of the trial court:

What's a residential purpose is the question. Well, a residence most narrowly defined can be a place which would be one place where a person lives as their permanent home, and by that standard people could have only one residence, or the summer cottage could not be a residence, the summer home at Shanty Creek could not be a residence if the principal residence, the place where they permanently reside, their domicile is in some other location, but I think residential purposes for these uses is a little broader than that. It is a place where someone lives, and has a permanent presence, if you will, as a resident, whether they are physically there or not. Their belongings are there. They store their golf clubs, their ski equipment, the old radio, whatever they want. It is another residence for them, and it has a permanence to it, and a continuity of presence, if you will, that makes it a residence.

Because this case does not present a question of waiver, defendants' attempt to distinguish the short-term rentals at issue in this case from the interval-ownership activity in *O'Connor* is unavailing. We also reject defendants' claim that the Idaho Supreme Court's decision in *Pinehaven Planning Bd v Brooks*, 138 Idaho 826; 70 P3d 664 (2003), compels a different result. Defendants' reliance on *Pinehaven* is misplaced because that case did not involve a residential use restriction. Further, the restrictive covenants at issue in *Pinehaven*, expressly provided for its terms to be defined as provided in the Uniform Building Code.

Finally, defendants have not demonstrated the relevance of the outbuilding provision in ¶ 10 of the deed restrictions to the question of whether the "private residence purposes only" restriction in ¶ 1 was violated. Although we must give effect to the instrument as a whole, *Perry, supra* at 689; *Borowski, supra* at 716, there was no evidence that defendants' rental structures on the two lots were used only as boathouses, summerhouses, guesthouses, or garages. The material question is whether the short-term rentals violated the "private residence purposes only" provision of ¶ 1.

To survive summary disposition, it was incumbent upon defendants to present admissible evidence establishing support for a reasonable inference that their rental use did not exceed an incidental use of property for "private residence purposes only" within the meaning of *Wood, supra*. Although defendants refer to the incidental use standard in *Wood*, they do not apply the standard to the evidence in this case, as did the trial court, or otherwise attempt to address this necessary issue. As such, we decline to consider it further. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

We also hold that defendants have failed to establish any basis for disturbing the trial court's decision with regard to their violation of the business use prohibition in ¶ 5 of the deed restrictions. Again, defendants' reliance on *Pinehaven, supra*, for purposes of construing this restriction, is misplaced because the language and definitions of the restrictions in that case differ from those in this case. The "business of any description" prohibition is not only broad, but also expressly excludes "a hotel or tourist camp or public place of resort" use. As a whole, the language in the restriction expresses a clear and unambiguous intent to preclude frequent and regular short-term rentals as part of a "business," as that term is commonly understood.

In granting summary disposition in favor of defendants, the trial court determined that defendants operated a business under any meaningful definition of that term and, to some extent, a public resort. Although the financial documentation submitted by the TLW plaintiffs in support of their motion did not show that defendants made a net profit when renting their property, this is not dispositive of whether the business prohibition restriction was violated. Because defendants failed to show a genuine issue of material fact on this issue, we affirm the trial court's grant of summary disposition in favor of the TLW plaintiffs on the basis of both ¶¶ 1 and 5 of the deed restrictions.

III

We decline to consider defendants' issue concerning whether the June 17, 2002, preliminary injunction entered by the trial court violated the federal Fair Housing Act, 36 USC 3601 *et seq.*, or the Michigan Civil Rights Act, MCL 37.2101 *et seq.*, and Michigan common law. This issue is moot in light of the February 10, 2003, permanent injunction, which does not contain the objectionable language. *Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 655-656; 588 NW2d 133 (1998). Defendants' additional claim, that the unclean hands doctrine precluded plaintiffs from obtaining a permanent injunction, presents a distinct question that is not set forth in defendants' statement of questions presented. Hence, we decline to address it. MCR 7.212(C)(5); *Meagher, supra* at 156.

IV

Defendants' final claim, that plaintiffs' nuisance per se theory for obtaining injunctive relief is moot, is based on evidence that was not presented below and, therefore, is not properly before this Court. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Further, defendants have misapplied mootness principles because they are seeking affirmative relief from this Court, namely, the dismissal of plaintiffs' nuisance per se theory of injunctive relief, based on events that occurred after the trial court entered the permanent injunction. An issue is moot when an event occurs that renders it impossible for a court to grant relief. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

If defendants believe that circumstances have changed that warrant modification of the permanent injunction, the appropriate course of action is to move for modification in the trial court. A trial court is empowered to modify a continuing injunction as the circumstances require. *Troy v Holcomb*, 362 Mich 163, 169; 106 NW2d 762 (1961).

Therefore, while we affirm the trial court's February 10, 2003, permanent injunction, we do so without prejudice to defendants filing a proper postjudgment motion for modification in the trial court.² We reject plaintiffs' claim that the nuisance per se theory of relief is moot because the trial court also granted an injunction with respect to the deed restriction theory. Because not all plaintiffs are similarly situated, a modification of the February 10, 2003, permanent injunction may affect which plaintiffs have standing to enforce the permanent injunction. Further, to the extent some plaintiffs would not have standing to enforce the injunction based on the deed restriction theory alone, a modification of the injunction may affect the trial court's February 25, 2003, order declaring other theories of injunctive relief moot. We

² Although the record indicates that defendants filed a post-judgment motion to modify the permanent injunction in the trial court, there is no indication in the record that it was based on the alleged April 2003 amendment to the zoning ordinance. Further, the trial court denied the motion. We express no opinion with respect to the trial court's decision, inasmuch as our jurisdiction is based on the final order issued in February 2003, not any postjudgment proceedings.

conclude that mootness principles do not aid either plaintiffs' or defendants' positions on appeal concerning plaintiffs' nuisance per se theory of injunctive relief.

V

As to plaintiffs' request for sanctions under MCR 7.216(C), the court rules currently require that such requests take the form of separate motions, as opposed to requests contained within other pleadings, including briefs. MCR 7.211(C)(8). Accordingly, we decline to consider plaintiff's request for sanctions.

Affirmed.

/s/ Stephen L. Borrello
/s/ William M. Murphy
/s/ Janet T. Neff