

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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M. CAROL RONAN and FRANKLIN D.  
RONAN, Trustees of the M. CAROL RONAN  
TRUST,

UNPUBLISHED  
October 24, 2006

Plaintiffs-Appellants,

v

WILLIAM W. HOFMANN, MARLA E.  
HOFMANN, JAMES J. MURRAY, PATRICIA C.  
MURRAY, GRAHAM HAGEY, and HELEN  
HAGEY,

No. 263106  
Emmet Circuit Court  
LC No. 04-008127-CH

Defendants-Appellees.

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Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

The parties in this case are all neighboring owners of property located in the Arlington Heights subdivision in Petoskey, Michigan. At issue is whether a recorded deed restriction limits the development of the property of plaintiffs M. Carol Ronan and Franklin D. Ronan, Trustees of the M. Carol Ronan Trust (the Ronans). The Ronans filed this action to quiet title to determine the applicability of the deed restriction to their property. The Ronans also alleged claims for slander of title and tortious interference with a business relationship or expectancy. The trial court granted the motion for summary disposition of defendants Graham and Helen Hagey (the Hageys) of the Ronans' quiet title claim under MCR 2.116(C)(8), and, in light of that decision, dismissed the remaining claims. The Ronans appeal as of right. We affirm.

I. Basic Facts And Procedural History

In 1977, the Ronans purchased lots 21, 22, 23, and 24 of block 1, and lot 7 of block 5 in the Arlington Heights subdivision from Dean and Gwendolyn Elliott (the Elliots). The warranty deed from the Elliots did not expressly refer to any deed restriction regarding the use of the property, but stated that the property was subject to any building or use restrictions "of record." The Elliots acquired the property pursuant to a 1957 warranty deed from Grant and Genevieve Born (the Borns). The 1957 deed contained the following restriction:

It is understood and agreed that no one shall build or cause to be built any building or structure, plant or cause to be planted any shrubbery or trees on the

West side of Lots 21, 22, 23 and 24 within 50 feet of Grand Avenue<sup>[1]</sup> that would tend to obstruct the view on the West side of said Lots.

In 1995, the Ronans conveyed the property to themselves as trustees of the M. Carol Ronan Trust. In 2000, the Ronans sold lot 7 to the Hageys. In 2002, the Ronans attempted to sell lots 21, 22, 23, and 24, but were unable to sell the property after defendant William Hofmann wrote the Ronans a letter, advising them that he and the other defendants intended to enforce the deed restriction that appeared in the 1957 warranty deed from the Borns to the Elliotts. According to Hofmann, the deed restriction was intended to preserve the view to a lake and valley for all lots in the subdivision that have views over Lots 21, 22, 23, and 24.

The Ronans thereafter filed this action against William and Marla Hofmann (the Hofmanns), James and Patricia Murray (the Murrays), and Graham and Helen Hagey (the Hageys). They alleged a claim to quiet title in which they sought a determination that the deed restriction was either not applicable to their property or no longer enforceable. They also sought damages for slander of title and tortious interference with a business relationship or expectancy.

The Hofmanns and Murrays moved to strike portions of the Ronans' pleadings that referred to violations of the Michigan Rules of Professional Conduct (MRPC). They also moved for partial summary disposition on Counts II and III under MCR 2.116(C)(8). The Hageys filed their own motion for summary disposition under MCR 2.116(C)(8), arguing that the Ronans had constructive notice of the restrictive covenant as a matter of law because the prior deed was recorded.

The trial court granted the Hageys' motion for summary disposition, concluding that the Hageys had the right to enforce the restriction because they were in privity with the Ronans and their property was intended to benefit from enforcement of the building restriction. Further, viewing the facts in the light most favorable to the Ronans, the trial court concluded that the restriction in the deed ran with the land. Moreover, the trial court held that the Ronans were on notice that the property was subject to the building restriction, which appeared in their chain of title. The trial court also concluded that the fact that Grand Avenue was vacated did not change the building restriction because a change made by a zoning body cannot affect private deed restrictions. The trial court stated that its ruling granting summary disposition for the Hageys resolved all claims in the matter and that it did not need to address the remaining motions brought by the Hofmanns and the Murrays because the Ronans' remaining claims were dependent upon their position that the deed restriction was not enforceable against their property.

The Ronans moved for rehearing and to amend their complaint, but the trial court denied both motions. The Ronans now appeal.

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<sup>1</sup> Grand Avenue was vacated in 1962.

## II. Summary Disposition

### A. Standard Of Review

The Ronans argue that the trial court erred in granting the Hageys' motion for summary disposition. We review de novo a trial court's summary disposition decision.<sup>2</sup> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone.<sup>3</sup> All well-pleaded factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations.<sup>4</sup> The motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery.<sup>5</sup>

### B. Factual Findings

The Ronans argue that the trial court improperly made factual findings when granting summary disposition for the Hageys. A trial court may not make findings of fact when deciding a motion for summary disposition.<sup>6</sup> However, when a written instrument upon which a claim is based is attached or referred to in a pleading, that exhibit becomes part of the pleading.<sup>7</sup> Here, the Ronans attached copies of the relevant deeds and other documents to their complaint, and the trial court properly confined its review to the pleadings and the attachments. Further, contrary to the Ronans' argument, the map and the summary that the trial court attached to its decision do not demonstrate that it considered material beyond the pleadings. The Ronans attached the same map to their complaint, and the summary was merely a compilation of information already contained in the pleadings.

### C. Restrictive Covenant

The Ronans argue that the trial court erred in determining that the restriction in the 1957 deed from the Borns to the Elliotts was a restrictive covenant that ran with the land, rather than a covenant personal to the Borns, and in determining that the Hageys were entitled to enforce the restriction. "A covenant is a contract created with the intention of enhancing the value of property and is a valuable property right."<sup>8</sup> Restrictive covenants are based in contract, and the

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<sup>2</sup> *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

<sup>3</sup> *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

<sup>4</sup> *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996).

<sup>5</sup> *Patterson*, *supra*.

<sup>6</sup> *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

<sup>7</sup> MCR 2.113(F)(2); *Karam v Law Offices of Ralph J Kliber*, 253 Mich App 410, 418 n 6; 655 NW2d 614 (2002).

<sup>8</sup> *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004).

drafter's intent controls.<sup>9</sup> Restrictive covenants are strictly construed against those seeking to enforce them, and all doubts are resolved in favor of the free use of the property.<sup>10</sup> However, "when the intent of the parties is clearly ascertainable, courts must give effect to the instrument as a whole."<sup>11</sup>

In *Webb v Smith (After Remand)*, this Court observed:

In interpreting a restrictive covenant, our Supreme Court stated that the covenant should be

"construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, the purpose of the restriction, whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers, and whether it was in pursuance of a general building plan for the development and improvement of the property."<sup>12</sup>

The elements necessary for finding that a covenant runs with the land and the distinction between covenants that run with the land and personal covenants are explained in *Greenspan v Rehberg*:

In 21 CJS *Covenants*, § 54, p 923, it is noted:

"The essentials of such a covenant [i.e., a covenant running with the land] have been stated to be that the grantor and grantee must have intended that the covenant run with the land; the covenant must affect or concern the land with which it runs; and there must be privity of estate between the party claiming the benefit and the party who rests under the burden."

In *Mueller [v Bankers Trust Co of Muskegon]*, 262 Mich 53, 56; 247 NW 103 (1933), our Supreme Court quoted with approval from *Keogh v Peck*, 316 Ill 318, 147 NE 266; 38 ALR 1151 (1925), to the effect that:

"The test as to whether a covenant runs with the land or is merely personal, is whether the covenant concerns the thing granted and the occupation or enjoyment of it, or is a collateral and personal covenant not immediately

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<sup>9</sup> *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997).

<sup>10</sup> *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 341-342; 591 NW2d 216 (1999).

<sup>11</sup> *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515-516; 686 NW2d 506 (2004).

<sup>12</sup> *Webb v Smith (After Remand)*, 204 Mich App 564, 570; 516 NW2d 124 (1994), quoting *Brown v Hojnacki*, 270 Mich 557, 560-561; 259 NW 152 (1935), quoting *Library Neighborhood Ass'n v Goosen*, 229 Mich 89; 201 NW 219 (1924).

concerning the thing granted. If a covenant concerns the land and the enjoyment of it, its benefit or obligation passes with the ownership, but to have that effect the covenant must respect the thing granted or demised and the act to be done or permitted must concern the land or the estate conveyed. In order that a covenant may run with the land its performance or nonperformance must affect the nature, quality or value of the property demised, independent of collateral circumstances, or must affect the mode of enjoyment.”<sup>13]</sup>

There is no dispute that the Hageys acquired lot 7, block 5, from the Ronans and that this property was originally owned by the Borns and conveyed to the Elliotts in the 1957 deed. Because the restriction appears in the recorded chain of title for both the Ronans and the Hageys, the Ronans had constructive notice of it. Although the restriction did not appear in the deed that the Ronans received from the Elliotts, that conveyance was subject to building and use restrictions of record. Therefore, the Ronans had constructive notice of the restriction.<sup>14</sup>

Further, the restriction is not a personal covenant. As the trial court observed, the language of the restriction provides that “no one shall build” on a portion of the lots in question. This language reflects a clear intent that the restriction applies to individuals other than the parties to the real estate transaction in 1957 and was intended to apply to all successors to the Elliotts’ interest in the property. Although the Ronans argue that the language “no one shall build” should be interpreted to apply only as long as the Borns owned lots in blocks 4 and 5, nothing in the language of the restriction supports this interpretation, and the argument ignores the plain and unambiguous language of the restriction.

We find it significant that the drafter of the restriction expressed that the intent of the restriction was to avoid obstructing “the view on the West side of said Lots.” This language does not support the Ronans’ argument that the intent was only to protect the Borns’ view from their lots. Rather, the language demonstrates an intent to protect the view of lots west of lots 21 through 24, which would include the Hageys’ property. Accordingly, the trial court correctly held that the Hageys are an intended beneficiary of the building restriction.

The fact that the language of the restriction does not expressly provide that it was intended to run with the land does not mean that it was intended as a personal covenant only. Nor does the fact that the Borns included in other conveyances language expressly providing that other restrictive covenants were intended to run with the land establish that this deed restriction was intended as only a personal covenant. The plain language of the deed restriction indicates that it concerns the use of the property conveyed to the Elliotts, not a collateral or personal matter unrelated to the use of the property. Because the restriction concerns the land conveyed and its future use, it is a covenant that runs with the land.

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<sup>13</sup> *Greenspan v Rehberg*, 56 Mich App 310, 320-321; 224 NW2d 67 (1974).

<sup>14</sup> See *Kerschensteiner v Northern Michigan Land Co*, 244 Mich 403, 435; 221 NW 322 (1928); 1 Cameron, Michigan Real Property Law (3d ed), § 11.24, p 400.

#### D. Reciprocal Negative Easements

The Ronans argue that the trial court incorrectly applied the law regarding reciprocal negative easements<sup>15</sup> in deciding this matter. But we conclude the trial court properly determined from the documentary evidence attached to the Ronans' complaint that the deed restriction was a valid covenant that ran with the land and was enforceable by the Hageys.

#### E. Changed Conditions

The Ronans alternatively argue that the deed restriction should no longer be enforced because of changed conditions. Courts in this state generally enforce valid deed restrictions.<sup>16</sup> However, the Michigan Supreme Court has recognized three equitable exceptions to the general rule regarding enforcement of restrictions.<sup>17</sup> One of those exceptions involves changed conditions.<sup>18</sup>

The Ronans argue that the deed restriction should no longer be enforced because Grand Avenue has been vacated and a house can now be built on the portion of the land that formerly was set aside for Grand Avenue. But the stated purpose of the deed restriction was to prohibit any building or shrubbery "that would tend to obstruct the view on the West side of said Lots." The existence of Grand Avenue as a dedicated street was not itself material to the deed restriction. Rather, Grand Avenue only served as a reference point for measuring the scope of the restriction. That Grand Avenue has since been vacated does not alter the purpose of the restriction, which may still be enforced to prohibit the Ronans or their successors from building within 50 feet of where Grand Avenue formerly existed.

Although the Ronans assert that homes built in blocks west of their property no longer have views over their property, thereby making the restrictive covenant unnecessary, they did not allege this theory in either their original complaint or proposed amended complaint. We also reject the Ronans' argument that the restrictive covenant should not be enforced based on principles of waiver or estoppel. The Ronans do not provide any argument on appeal in support of their waiver or estoppel theories. "A party may not simply announce its position and 'leave it to this Court to discover and rationalize the basis for the party's claim.'"<sup>19</sup> Accordingly, the Ronans' have abandoned any theory based on waiver or estoppel.

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<sup>15</sup> See 2 Cameron, Michigan Real Property Law (3d ed), § 22.9, p 1250.

<sup>16</sup> *Webb v Smith (After Second Remand)*, 224 Mich App 203, 211; 568 NW2d 378 (1997).

<sup>17</sup> *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957).

<sup>18</sup> *Id.*; *Webb (After Second Remand)*, *supra* at 213.

<sup>19</sup> *Badiee v Brighton Area Schools*, 265 Mich App 343, 357; 695 NW2d 521 (2005), quoting *Conlin v Scio Twp*, 262 Mich App 379, 384; 686 NW2d 16 (2004).

### III. Amendment Of The Complaint

#### A. Standard Of Review

The Ronans argue that the trial court erred in denying their motion to amend their complaint. We will not reverse a trial court's decision to deny leave to amend after granting summary disposition absent an abuse of discretion.<sup>20</sup>

#### B. Futility

When a trial court grants summary disposition under MCR 2.116(C)(8), (9), or (10), it must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless amendment would not be not justified.<sup>21</sup> “An amendment is futile if it merely restates allegations already made or adds new allegations that fail to state a claim.”<sup>22</sup>

We agree with the trial court that it would have been futile to allow the Ronans to file their amended complaint. The only new allegations were those in paragraphs 22 and 23. The new allegations in paragraph 22 of the amended complaint involve matters that the trial court already considered in its determination that the deed restriction was a restrictive covenant that ran with the land. Paragraph 23 involved the Ronans' argument regarding changed conditions, namely that Grand Avenue had been vacated. As previously discussed, this argument does not provide an equitable ground for avoiding enforcement of the restrictive covenant.

The Ronans also alleged that the Hageys should be estopped from enforcing the restrictive covenant because, when the Hageys purchased their property from the Ronans, they were aware that the Ronans intended to sell lots 21 through 24 and did not voice an objection to anyone building on those lots at that time. According to the Ronans, they would not have sold their property to the Hageys for the price that they did had they known that they would not be able to sell lots 21 through 24 as buildable property. There is no merit to the Ronans' estoppel theory based on the facts alleged in their complaint. The Ronans do not allege that the Hageys did anything that permitted the Ronans to justifiably believe that they could sell the lots in question as suitable for building. Instead, the Ronans were responsible for properly pricing their property. Even if the Hageys were willing to purchase lots 21 through 24 at some point and pay a higher price because they believed that the lots could be developed, this does not support applying equitable estoppel to prevent the Hageys from now enforcing the restrictive covenant. Therefore, it would have been futile for the Ronans to allege their estoppel theory.

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<sup>20</sup> *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

<sup>21</sup> MCR 2.116(I)(5); *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001).

<sup>22</sup> *Yudashkin, supra* at 651, quoting *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

#### IV. Dismissal Of Other Claims

##### A. Standard Of Review

The Ronans argue that the trial court erred in dismissing their remaining claims against the Hofmanns and the Murrays. The trial court effectively ruled that the Ronans could not establish their claims against the Hofmanns and the Murrays once it ruled that the Hageys were entitled to summary disposition under MCR 2.116(C)(8). We review de novo the trial court's decision.

##### B. Tortious Interference

The Ronans' claims for tortious interference with a business relationship or expectancy and slander of title are based on their allegations that William Hofmann and James Murray made false statements about the applicability of the restrictive covenant. A claim for tortious interference with a business relationship or expectancy consists of the following elements:

(1) [T]he existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy by the interferer, (3) an intentional and wrongful interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship or expectancy was disrupted.<sup>[23]</sup>

Defamatory statements or false statements of fact may support a claim for tortious interference with a business relationship or expectancy.<sup>24</sup> An action for slander of title at common law requires that the "plaintiff must show falsity, malice, and special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages."<sup>25</sup> These same three elements are also required to prove slander of title under MCL 565.108.<sup>26</sup>

William Hofmann's letters to the Ronans expressing an intent to enforce the restrictive covenant were written on behalf of all defendants, including the Hageys. Because the restrictive covenant is valid and may be enforced by the Hageys against the Ronans and anyone else who may purchase their property, the Ronans cannot establish a false or defamatory statement of fact. Thus, their claims for tortious interference with a business relationship or expectancy and slander of title fail as a matter of law, and the trial court did not err in dismissing these claims.

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<sup>23</sup> *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 148; 715 NW2d 398 (2006).

<sup>24</sup> *First Public Corp v Parfet*, 246 Mich App 182, 199; 631 NW2d 785 (2001), vacated in part on other grounds 468 Mich 101 (2003); *Lakeshore Comm Hosp, Inc v Perry*, 212 Mich App 396, 401-402; 538 NW2d 24 (1995).

<sup>25</sup> *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998).

<sup>26</sup> *Id.*

Because the Ronans failed to state claims for slander of title and tortious interference with a business relationship or expectancy, it is unnecessary to decide if they could properly allege violations of the Michigan Rules of Professional Conduct to support either of those claims.

Affirmed.

/s/ William C. Whitbeck

/s/ William B. Murphy

/s/ Michael R. Smolenski