

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

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FRED W. BRZOZOWSKI and LAVERNE S.  
BRZOZOWSKI,

Plaintiffs-Appellees/Counter-  
Defendants/Cross-Appellants,

v

ARTHUR W. WONDRASEK and MARY  
WONDRASEK,

Defendants-Appellants/Counter-  
Plaintiffs/Cross-Appellees,

and

SHEILA FINK,

Intervening Plaintiff.

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UNPUBLISHED  
November 10, 2005

No. 256701  
Berrien Circuit Court  
LC No. 01-003847-CH

FRED W. BRZOZOWSKI and LAVERNE S.  
BRZOZOWSKI,

Plaintiffs-Appellees/Counter-  
Defendants,

v

ARTHUR W. WONDRASEK and MARY  
WONDRASEK,

Defendants-Appellants/Counter-  
Plaintiffs,

and

SHEILA FINK,

Intervening Plaintiff.

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No. 259098  
Berrien Circuit Court  
LC No. 01-003847-CH

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

In these consolidated appeals following a bench trial, defendants appeal as of right the entry of judgment awarding plaintiffs \$86,000 in damages on the basis of defendants' violation of a subdivision deed restriction (Docket No. 256701). Plaintiffs cross-appeal the trial court's calculation of damages and attorney fees. In Docket No. 259098, defendants appeal the trial court's denial of their request for sanctions. We affirm in part and reverse in part, finding that the trial court erred in reducing damages by one-half, from \$172,000 to \$86,000.

## I

The parties own adjacent beachfront homes on Lake Michigan in the Eiffel Tower Bluffs subdivision in Grand Beach in Berrien County. The parties' lots were previously owned by a single owner, who had a home on one lot and a tennis court on the adjacent lot. In May 2000, plaintiffs purchased the home from the previous owner, but did not purchase the adjacent lot with the tennis court. Defendants subsequently purchased the lot with the tennis court in mid-2000. Defendants thereafter constructed a large home, two and one-half stories high, that is positioned lakeward of plaintiffs' home.

Plaintiffs filed this action alleging numerous claims based on violations of the subdivision deed restrictions, local ordinances, and Michigan Department of Environmental Quality (MDEQ)<sup>1</sup> requirements. In particular, plaintiffs alleged that the construction of defendants' home violated the subdivision deed restriction providing for a 150-foot setback of homes constructed on lake front lots, which provides:

10. (c) All permanent structures on lake front lots must be located at least 150 feet from the bluff line.

The trial court denied in part and granted in part defendants' motion for summary disposition under MCR 2.116(C)(10) and held with regard to the interpretation of the setback requirement that the term "bluff line" must be read to mean from the top of the bluff. Following a bench trial, the court found that plaintiffs were entitled to damages for the violation of the setback requirement. The court determined that the plaintiffs suffered damages of \$172,000 based on the diminution in value of their property. However, the court awarded plaintiffs only one-half of that amount, \$86,000, on the basis that some portion of the plaintiffs' damages were not due to the size, height, and forwardness of the defendants' property, but to plaintiffs' own angling of their home, which made the damage much worse than it otherwise would be. The court awarded plaintiffs attorney fees of \$21,500 and costs of \$2,700 pursuant to the deed restriction provisions for the recovery of attorney fees and costs.

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<sup>1</sup> Formerly known as the Michigan Department of Natural Resources (DNR).

On September 2, 2004, after a claim of appeal was filed in this Court, defendants filed a motion for sanctions in the trial court, arguing that several of plaintiffs' claims were frivolous, MCR 2.114. The trial court denied the motion on the grounds that it was filed too late and was unreasonable, and because the court lacked jurisdiction to decide the issue after the claim of appeal was filed.

## II. Docket No. 256701

### A

Defendants argue that the trial court erred in deciding as a matter of law that the term "bluff line" referred to the top of the bluff, because the trial court found the term ambiguous, and, therefore, the court was obligated to strictly construe the term in favor of the free use of defendants' property. Further, because the deed restriction was established to satisfy the MDEQ requirement for a seventy-five-foot setback, the court erred in ignoring the drafter's intent, which was to comply with the MDEQ requirement, and instead construing the term to protect plaintiffs' view of the lake.

"This Court reviews de novo as a question of law a trial court's grant of a motion for summary disposition." *Stoddard v Citizens Ins Co of America*, 249 Mich App 457, 459-460, 643 NW2d 265, 267 (2002). This Court summarized the general rules for construing restrictive covenants in *Borowski v Welch*, 117 Mich App 712, 716-717; 324 NW2d 144 (1982):

When interpreting a restrictive covenant, courts must give effect to the instrument as a whole where the intent of the parties is clearly ascertainable. . . . Where the intent is clear from the whole document, there is no ambiguous restriction to interpret and the rules pertaining to the resolution of doubts in favor of the free use of property are therefore not applicable. . . . In placing the proper construction on restrictions, if there can be said to be any doubt about their exact meaning, the courts must have in mind the subdivider's intention and purpose. . . . The restrictions must be construed in light of the general plan under which the restrictive district was platted and developed. . . . In attempting to give effect to restrictive covenants, courts are not so much concerned with the grammatical rules or the strict letter of the words used as with arriving at the intention of the restrictor, if that can be gathered from the entire language of the instrument. . . . Moreover, the language employed in stating the restriction is to be taken in its ordinary and generally understood or popular sense, and is not to be subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a lexicon. . . . Covenants are to be construed with reference to the present and prospective use of property as well as to the specific language employed and upon the reading as a whole rather than from isolated words. . . .

The trial court properly concluded that the meaning attributed to "bluff line" by defendants was inconsistent with the intent of the drafter and the overall circumstances surrounding the adoption of the restriction. Accordingly, the general rule of construction requiring that all doubts be resolved in favor of the free use of property, *id.*, was inapplicable. "Restrictive covenants are to be read as a whole to give effect to the ascertainable intent of the drafter." *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 505; 686

NW2d 770 (2004), citing *Borowski, supra* at 716. “In an action to enforce such a covenant, the intent of the drafter controls. The provisions are to be strictly construed against the would-be enforcer, however, and doubts resolved in favor of the free use of property.” *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997).

It was undisputed that the deed restriction at issue was added in response to a 1988 letter from MDEQ, which required that “[a]ll permanent structures must be located at least 75 feet from the bluff line” and stated that “[t]his setback is subject to periodic change and updating.” The trial court reasoned that to meet these requirements, the drafter likely doubled the setback footage. Moreover, the court noted that an MDEQ administrative rule in effect at the time defined “bluff line” as follows:

“Bluff line means the line which is the edge or crest of the elevated segment of the shoreline above the beach which normally has a precipitous front including [sic, inclining?] steeply on the lakeward side.”

Consistent with the MDEQ definition in existence when the deed restriction at issue was adopted, the court properly concluded that “bluff line” referred to the top of the bluff. *Oosterhouse v Brummel*, 343 Mich 283, 286-287; 72 NW2d 6 (1955) (restrictive covenant requiring a thirty-foot setback was enforceable by residents to protect their homes and their access to light, air, and view).

The trial court reasoned that plaintiffs’ interpretation of “bluff line” was supported by the drafter’s intention and the circumstances surrounding the adoption of the restriction. In contrast, there was little support for defendants’ alternative, and entirely distinct, interpretations. Defendants failed to present evidence raising a genuine issue of material fact for trial and, therefore, summary disposition on this issue was proper. *City of Livonia v Dep’t of Social Services*, 423 Mich 466, 530; 378 NW2d 402 (1985); *Cleary Trust, supra* at 506.

## B

Defendants argue that the court erred in admitting the testimony of Richard Miller and Gail Lowrie pursuant to MRE 703 because contrary to the amended rule, the bases for their expert opinions were not in evidence. We disagree.

This Court reviews a trial court’s ruling on the admissibility of expert opinion testimony for an abuse of discretion. *Mulholland v DEC Int’l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989). “[P]reliminary issues of law underlying an evidentiary ruling are reviewed de novo.” *Michigan Dep’t of Transportation v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 134; 700 NW2d 380 (2005).

MRE 703 was amended effective September 1, 2003, and now provides:

Bases of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the

court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

The Staff Comment to the 2003 amendment states in relevant part:

The modification of MRE 703 corrects a common misreading of the rule by allowing an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony. . . .

The trial court carefully considered the purpose of the amendment to MRE 703 and circumscribed the testimony accordingly in an effort to comply with the technicalities of the amended rule. The court precluded any testimony based on hearsay, which prevented Miller from testifying concerning any specific dollar amount of damages. The court permitted Miller to testify only in general terms with regard to the effect defendants' violation of the setback had on plaintiffs' view, and only based on his inspection of the properties. With regard to privacy, the court permitted Miller to state an opinion generally regarding whether a loss of privacy detracts from value.

Likewise, with regard to Lowrie's testimony, the court permitted only testimony that was based on her personal knowledge and real estate sales. Lowrie testified that she had personally participated in two real estate closings of lakefront properties in Harbor Country in the past couple years. She testified that one property sold for \$1,550,000 and the other sold for \$2,700,000 and that the properties were generally comparable to the property at issue in this case. The court carefully limited the expert testimony to comply with MRE 703 and, therefore, did not abuse its discretion in admitting the testimony.

## C

On cross-appeal, plaintiffs argue that the trial court erred in disregarding their unrebutted expert testimony and evidence that plaintiffs had been damaged, at minimum, in the amount of \$300,000 and instead finding plaintiffs' total damages were only \$172,000. Plaintiffs also contend that the trial court further erred in reducing the damages by one-half, to \$86,000, on the basis of the orientation of plaintiffs' home, which the court found contributed to their diminished view and privacy. To the extent that the court found the orientation of plaintiffs' home a basis for assessing fault to them for fifty percent of the damages, and therefore reducing their damages by one-half, we find the court clearly erred.

“In bench trials, this Court reviews the award of damages under the clearly erroneous standard. A reviewing court may not set aside a nonjury award merely on the basis of a difference of opinion.” *Meek v Dep't of Transportation*, 240 Mich App 105, 121; 610 NW2d 250 (2000) (citations omitted). Where this Court finds that a trial court was aware of the issues and correctly applied the law, no clear error will be found if the award of damages is within the range of the evidence. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

The only evidence presented with regard to the specific amount of damages was Lowrie's testimony. Lowrie testified that the value of plaintiffs' property was between \$1,200,000 and \$1,300,000, and that defendants' house resulted in at least a twenty-five percent reduction in value of plaintiffs' property. Accordingly, plaintiffs sought damages of \$333,000, i.e., twenty-five percent of the larger amount.

Defendants argued that any reduction in plaintiffs' property value resulted from (1) the fact that their lot was below grade, which resulted in less privacy and greater obstruction of their view when defendants home was built, and (2) the fact that their house was built at an angle. Consequently, plaintiffs were looking up at a fence and then a house. Essentially, plaintiffs were the proximate cause of their own damages, even though plaintiffs' house was constructed before defendants' house.

In ruling on damages, the trial court relied on testimony that Lake Michigan property has essentially doubled in value in the past few years. Accordingly, the court found that the value of plaintiffs' property would be \$1,422,000. The court then stated:

So the court finds that there is a difference in actual versus predicted – and again, the – you know, we can say that you can't determine these with 100 percent certainty, but I think that these are – there was enough reliable testimony in the record that I can make this finding of fact that the plaintiffs have been de – property has been damaged by the amount of \$172,000.

However, the court also accepts as true that a good portion of the plaintiff's [sic] damages are due not to the size, height, and forwardness of the defendant's [sic] property, but to their own angling of their home so that they made the damage much worse than it otherwise would be.

And essentially when I used the angle here and angle the property – if I put it just to a straight out angle, not even to angle it over to the north, but just straight out, I find that that really – so in other words, we got a 90 degree to the property line – to the street line, if you will, angle as opposed to what it really is which is a good 45 degree. [sic] Essentially I find that the plaintiffs are – and it's not their fault, but it's – it came with their property, their own – the uniqueness of their own property and the angle that it is at is responsible for one-half of that decrease in value.

So in other words, half of that decrease in value cannot be blamed in fairness on the defendants, only – half of it can, half of it can't. The other half is just due to the way the people who built that house chose to sit it on the lot.

The trial court's reasoning has general support in the record. There was testimony on the issue of diminished value from privacy, view, the angled orientation of plaintiffs' home, and the grade of their property, as separate factors, and this testimony supports the court's analysis in a general sense. However, there is no particular support for reducing the award by one-half.

Considering the scant support for the overall reduction in damages, we conclude that the additional reduction for the angle at which plaintiffs' home was situated on their lot, was clear error. Any lessened impact from the angling of plaintiffs' home would seem to have been accounted for with respect to the reduction from \$300,000 damages to \$172,000, presumably based on privacy and view factors, which necessarily are based on the angle of plaintiffs' home. The fact remains that defendants' home extended forty-five feet beyond the setback line.

Nonetheless, we conclude that a redetermination of plaintiffs' attorney fees and costs is unwarranted. The trial court's award of fees and costs was not based on the award of damages in particular, but rather, as defendants argue, on the extent to which plaintiffs prevailed in their claims overall and the number of claims that were dismissed. The court found that plaintiffs did not in large part prevail. Additionally, as defendants note, the court found plaintiffs' petition for fees and costs deficient and that there was a lack of documentation to substantiate certain costs. The court concluded that an award of twenty-five percent of plaintiffs' request was equitable. Under these circumstances, any additional award of damages does not warrant an additional award of fees and costs.

### III. Docket No. 259098

Defendants correctly argue that the trial court erred in determining that it lacked jurisdiction to rule on defendants' motion for sanctions because a claim of appeal had been filed in this Court. The trial court may rule on a request for sanctions while appeal is pending unless this Court orders otherwise. *Tingley v 900 Monroe, LLC*, 266 Mich App 233; 255; \_\_\_ NW2d \_\_\_ (2005). Defendants further argue that the court abused its discretion in denying defendants' motion on the basis that it was "too late" and "unreasonable." We find no abuse of discretion.

A trial court's finding that a claim or defense was or was not frivolous is reviewed on appeal for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002); *Attorney General v Harkins*, 257 Mich App 564, 575; 669 NW2d 296 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Kitchen, supra* at 661-662.

The determination whether a motion for sanctions under MCR 2.114 was filed within a reasonable time is a matter within the discretion of the trial court. *In re Costs, supra*; *Maryland Casualty Co v Allen*, 221 Mich App 26, 31; 561 NW2d 103 (1997). To be timely under the rule, a party's request for sanctions should be made before dismissal of the action. *Antonow v Marshall*, 171 Mich App 716, 719; 430 NW2d 768 (1988).

Defendants filed their motion months after the entry of judgment in this case, despite the fact that they based their entitlement to sanctions in part on rulings that occurred long before trial. They apparently were prompted to seek sanctions only after hearing the trial court's criticism of plaintiffs' litigation tactics. Defendants have presented no convincing argument or authority to establish that the court abused its discretion in finding defendants' motion untimely.

Even if the trial court erred in its determination that it lacked jurisdiction over defendants' motion for sanctions, the trial court did not abuse its discretion in denying defendants' motion.

Affirmed in part and reversed in part.

/s/ Janet T. Neff

/s/ Pat M. Donofrio