

STATE OF MICHIGAN
COURT OF APPEALS

GLEN SMILEY, DONNA SMILEY, RICHARD L. HURFORD, JUDI HURFORD, MALCOM J. SUTHERLAND, JULIE T. SUTHERLAND, COLTON P. WEATHERSPOON, DEBORAH J. WEATHERSPOON, BRIT GORDON, ANN GORDON, CURTIS MARSH, JUDI MARSH, DAVID E. SORGE, MADALYNNE SORGE, WILLIAM H. DANCE, NICK SPAIN, SALLY SPAIN, THERESE CARDOZE, RICHARD C. CARDOZE, TODD V. CALLEWAERT, JENNIFER S. CALLEWAERT, ANTHONY PADDOCK, DARBY PADDOCK, MARGARET FERINGA, HELEN P. THURBER, ROY LOMBARDO, SALLY LOMBARDO, NILA L. CARTER, DAVID FITZSIMONS JR., HOLLY FITZSIMONS, ROBERT OLLISON and DEMPSEY OLLISON,

Plaintiffs-Appellants,

v

GROSSE POINTE WAR MEMORIAL ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
February 26, 2008

No. 275937
Wayne Circuit Court
LC No. 06-617425-CZ

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

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(5), (8) and (10) and denying their motion for summary disposition under MCR 2.116(C)(10). In granting defendant's motion, the trial court rejected plaintiffs' attempt to enjoin defendant from constructing condominiums on defendant's property based on an express restrictive covenant and the doctrine of reciprocal negative easement. We reverse and remand for entry of an order granting plaintiffs' motion for summary disposition and issuing a permanent injunction prohibiting defendant from using the property in contravention of the express restrictive covenant.

I. Facts and Procedural History

The Joseph H. Berry subdivision was recorded on April 12, 1895. It is located in Grosse Pointe Farms, Michigan. The subdivision consisted of lots 1 through 6. Lots 1 through 5 are located north of Lakeshore Drive, and Lot 6 is located south of Lakeshore Drive. When Berry died, all of lots 1 through 6 went to his heirs. The heirs developed three subdivisions in the property north of Lakeshore Drive. Plaintiffs all live in the subdivisions north of Lakeshore Drive. The lots in these subdivisions all contain express restrictions limiting buildings to single-family dwellings. Lot 6 is located south of Lakeshore Drive. Berry's heirs subdivided lot 6 into 40, 46, 50 and 60 Lakeshore Drive. Defendant owns 40, 50 and 60 Lakeshore Drive.¹ It is not disputed that each of these properties, as well as 46 Lakeshore Drive, also contains an express restriction limiting buildings to single-family dwellings.² The property at 40 Lakeshore Drive was the subject of previous litigation. Defendant acquired the property at 40 Lakeshore Drive in May 1990 and successfully had the property rezoned from residential to a "community service" district. The plaintiffs, adjacent landowners, sought an injunction, alleging that defendant's proposed use violated the same single-family dwelling restrictive covenant that is at issue in this case. The trial court granted the plaintiffs a permanent injunction prohibiting defendant from using the property in contravention of the restrictive covenant, and this Court affirmed. *Bodman v Grosse Pointe War Memorial Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 1993 (Docket No. 138990).

The property at issue in this case is 50 and 60 Lakeshore Drive. In a letter dated July 27, 2002, defendant explained its rationale for acquiring 50 and 60 Lakeshore Drive:

As deed restrictions are private agreements between property owners which run with the land, the only realistic and viable solution to gain community use of 40 Lake Shore is to acquire the remaining deed restrictions through the purchase of property. Thus, the War Memorial recently acquired 50 and 60 Lake Shore Drive for the purpose of removing the deed restrictions. . . .

Please know that the War Memorial's actions relevant to these land acquisitions are simply strategic efforts to eliminate the deed restrictions so that our original investment in 40 Lake Shore can be maximized for the benefit of the community. . . .

¹ Defendant also owns 32 Lakeshore Drive, but this property is not the subject of this dispute.

² This restriction can be traced back to a 1941 deed, in which Berry's heirs conveyed Lot 6 to Ruth W. Prescott. The deed contained the following express restriction: "No building shall be erected on said premises except a single private dwelling Said dwelling shall be occupied by not more than one family for residence purposes only" The deed also provided that all "the foregoing restrictions . . . shall run with the land."

Defendant razed the residences on 50 and 60 Lakeshore Drive and initiated plans to construct three multi-family residential condominiums, which would each contain four single-family condominiums, on 50 and 60 Lakeshore Drive. Defendant succeeded in effectuating the rezoning of 50 and 60 Lakeshore Drive to permit the construction of the condominiums. Plaintiffs thereafter filed a complaint against defendant, seeking to enjoin defendant from constructing the condominiums.

Plaintiffs and defendant filed cross motions for summary disposition. Defendant moved for summary disposition under MCR 2.116(C)(5), (8) and (10). Defendant argued that plaintiffs lacked standing to enforce a reciprocal negative easement against defendant because plaintiffs' property was not located in the same subdivision as defendant's property at 50 and 60 Lakeshore Drive. Defendant also argued that plaintiffs' complaint failed to state a claim for a reciprocal negative easement and that it was entitled to summary disposition under the doctrine of laches because plaintiffs waited to bring suit, and defendant detrimentally relied on this delay. Finally, defendant argued that the construction of three residential condominium buildings, each containing four single-family condominiums, did not violate the restriction on 50 and 60 Lakeshore Drive that buildings must be "a single private dwelling . . . occupied by not more than one family." Plaintiffs moved for summary disposition under MCR 2.116(C)(10), arguing that "this case clearly and completely falls within the doctrine of reciprocal negative easements" and that because all of the elements of a reciprocal negative easement were met, defendant was precluded from constructing the condominiums it sought to build at 50 and 60 Lakeshore Drive.

The trial court denied plaintiffs' motion for summary disposition and granted defendant's motion under MCR 2.116(C)(5), (8) and (10). The trial court ruled that plaintiffs did not have standing to bring the action against defendant because plaintiffs did not own property in defendant's subdivision. The trial court also ruled that the doctrine of reciprocal negative easement did not apply to the facts of the case because the doctrine is an equitable doctrine that only applies when there is not an express restriction on the land, and defendant's land is already burdened with an express restrictive covenant. The trial court relied on *Sanborn v McLean*, 233 Mich 227; 206 NW 496 (1925) and *Dwyer v Ann Arbor*, 79 Mich App 113; 261 NW2d 231 (1977), rev'd on other grounds 402 Mich 915 (1978), in concluding that the doctrine of reciprocal negative easement did not apply to the facts of the case.

II. Standard of Review

This Court reviews de novo a trial court's grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Summary disposition is proper under MCR 2.116(C)(5) if "[t]he party asserting the claim lacks the legal capacity to sue." This Court must consider the affidavits, depositions, admissions and other relevant documentary evidence when ruling on a motion brought under MCR 2.116(C)(5). MCR 2.116(G)(2).

"A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the pleadings alone to determine whether the plaintiff has stated a claim upon which relief can be granted." *Morden v Grand Traverse Co*, 275 Mich App 325, 331; 738 NW2d 278 (2007). This Court must accept the plaintiff's well-pleaded factual allegations as true

and construe them in a light most favorable to the nonmoving party. *Id.* “The motion should be granted if no factual development could possibly justify recovery.” *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

This Court’s review of a trial court’s grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

This Court reviews de novo a trial court’s grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm’rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court “must consider the documentary evidence presented to the trial court ‘in the light most favorable to the nonmoving party.’” *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) “if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

III. Analysis

A. Reciprocal Negative Easement

We find that the trial court properly concluded that the doctrine of reciprocal negative easement is inapplicable to the facts of this case. The burden of establishing the restrictions by way of reciprocal negative easement is on plaintiffs. *Grant v Craigie*, 292 Mich 658, 662; 291 NW 44 (1940); *Fenwick v Leonard*, 255 Mich 85, 90; 237 NW 381 (1931). As a general rule, restrictions such as those contained in reciprocal negative easements are construed strictly against those seeking their enforcement, and any doubts are resolved in favor of the free use of property. *Moore v Kimball*, 291 Mich 455, 461; 289 NW 213 (1939).

The doctrine of reciprocal negative easement was explained in *Sanborn, supra*:

If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement. It runs with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction. . . . They arise, if at all,

out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner. [*Sanborn, supra* at 229-230.]

In this case, the facts do not support the creation of a reciprocal negative easement. The doctrine of reciprocal negative easement generally applies to circumstances in which a conveyance was made by an owner, who retained some land unburdened by restrictions of record. See *Lanski v Montealegre*, 361 Mich 44, 47; 104 NW2d 772 (1960). In *Dwyer, supra*, this Court refused to apply the doctrine of reciprocal negative easements when the properties in question all contained use restrictions. *Dwyer, supra* at 119-120. The facts in this case are similar to the facts in *Dwyer* in that plaintiffs' lots and defendant's lot all contain an express single-family dwelling restriction. According to the Court in *Dwyer*, the doctrine of reciprocal negative easement was developed "[t]o protect those who were expressly restricted in the use of their lots from uses by unrestricted lot owners that would adversely affect the character of the subdivision[.]" *Id.* at 118. The rationale for the doctrine "is based upon the fairness inherent in placing uniform restrictions upon the use of all lots similarly situated, notwithstanding that less than all of the deeds contain an express restriction. Thus, the implied restriction arises from the express restriction." *Id.* at 118-119. Therefore, this Court in *Dwyer* concluded that because "[a]ll lot owners were subject to a uniform restraint on the use of their land[,] reciprocal negative easements were unnecessary to achieve that uniformity." Similarly, we conclude in the instant case that because plaintiffs' and defendant's property all contained an express single-family dwelling restriction, the doctrine of reciprocal negative easements is not applicable. When there is an express restriction, a court need not determine whether a restriction by implication arises. Therefore, the trial court properly concluded that the facts of the case do not warrant application of the doctrine of reciprocal negative easement.

B. Standing

Plaintiffs argue that they have the right, or standing, to enforce the express restrictive covenant limiting defendant's property at 50 and 60 Lakeshore Drive to single-family dwellings. Whether a party has legal standing to assert a claim is a question of law that this Court reviews de novo. *Michigan Education Ass'n v Superintendent of Public Instruction*, 272 Mich App 1, 4; 724 NW2d 478 (2006). The trial court ruled that plaintiffs lacked standing because they did not own property in the subdivision in which defendant owned property.³ In concluding that plaintiffs did not have standing, the trial court did not distinguish between standing to enforce the express restrictive covenant or standing to enforce a reciprocal negative easement. To the extent that the trial court's standing ruling related to plaintiffs' standing to enforce a reciprocal negative easement, we need not determine whether the trial court's holding in this regard was erroneous in

³ The trial court appeared to grant summary disposition under MCR 2.116(C)(5) based on its conclusion that plaintiffs lacked standing to enforce a reciprocal negative easement. If this is the case, we caution the trial court not to equate standing with capacity to sue for the purposes of dispositive motions under MCR 2.116(C)(5). See *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 374 n 25; 716 NW2d 561 (2006); *Leite v Dow Chemical Co*, 439 Mich 920; 478 NW2d 892 (1992).

light of our conclusion that the doctrine of reciprocal negative easement is inapplicable to the facts of this case. To the extent that the trial court's standing ruling related to plaintiffs' standing to enforce the express restrictive covenants on 50 and 60 Lakeshore Drive, we disagree. In *Civic Ass'n of Hammond Lake v Hammond Lake Estates No 3 Lots 126-135*, 271 Mich App 130, 134-136; 721 NW2d 801 (2006), we held that the plaintiffs had standing to enforce a deed restriction prohibiting the use of motor boats on Hammond Lake even though the plaintiffs did not own lots in the subdivision containing the deed restriction. Defendant attempts to distinguish *Hammond Lake*, arguing that *Hammond Lake* involved riparian rights, whereas the instant case does not. We are not persuaded by defendant's attempt to distinguish *Hammond Lake* on this basis. We also reject defendant's suggestion that the basis for this Court's conclusion that the plaintiff had standing in *Hammond Lake* was that all of the lots involved in that case had originally been part of the same subdivision. A reading of the standing analysis in *Hammond Lake* reveals that whether the property had, at one time, all been part of the same subdivision was not a part of this Court's standing analysis. This Court's conclusion that the plaintiff had standing in *Hammond Lake* was based on protecting the property owners who had complied with the prohibition of the use of motor boats on the lake and preserving the property value of their valuable lakefront real estate. *Hammond Lake, supra* at 135-136. Although this Court in *Hammond Lake* did discuss the fact that all the property at issue had once been a part of a single subdivision platted in 1954, this discussion occurred in the context of determining whether the common grantor and general plan requirements of a reciprocal negative easement were satisfied. We need not determine whether plaintiffs' and defendant's property were located in the same subdivision because under *Hammond Lake*, plaintiffs have standing to enforce the express restrictive covenant applicable to 50 and 60 Lakeshore Drive even if their lots are not located in the same subdivision as defendant's.

“Restrictive covenants are to be read as a whole to give effect to the ascertainable intent of the drafter.” *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 505; 686 NW2d 770 (2004). Courts should not infer restrictions that are not expressly provided for in the controlling documents. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 341; 591 NW2d 216 (1999). Restrictive covenants are construed strictly against individuals claiming the right to enforce them. *Id.* at 341-342. All doubts must be resolved in favor of the free use of property. *Id.* at 341. Nevertheless, “courts must normally enforce unwaived restrictions on which the owners of other similarly burdened property have relied.” *Id.* at 343. Furthermore, courts place a value on residential restrictions: “[r]estrictions for residence purposes, if clearly established by proper instruments, are favored by definite public policy. The courts have long and vigorously enforced them by specific mandate.” *Id.* at 342, quoting *Wood v Blancke*, 304 Mich 283, 288; 8 NW2d 67 (1943). “It is the policy of the courts of this State to protect property owners who have not themselves violated restrictions in the enjoyment of their homes and holdings.” *O'Connor, supra* at 342, quoting *Wood, supra* at 287-288. “Restrictive covenants, especially those pertaining to residential use, enhance and preserve the value of real estate.” *Lakes of the North Ass'n v TWIGA Ltd Partnership*, 241 Mich App 91, 99; 614 NW2d 682 (2000).

The trial court did not decide the issue whether defendant's proposed construction of three multiple-family condominium buildings violated the express restrictive covenant. An issue that has not been addressed by and decided by the trial court is generally not preserved for review; however, if the trial court record provides the necessary facts, appellate consideration of

an issue not decided by the trial court is not precluded. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005). Because the record contains the necessary facts, we exercise our discretion to address this issue.

The restrictive covenant that applies to defendant's property provides: "No building shall be erected on said premises except a single private dwelling Said dwelling shall be occupied by not more than one family for residence purposes only" This deed restriction is not ambiguous. According to its plain and express language, every building on defendant's property must be occupied by only one family. Defendant's proposed condominium buildings are not single-family condominium units. Defendant proposes to build three buildings; each building would be occupied by four single-family condominiums and therefore four families. Our Supreme Court has held that buildings housing more than one single family violates a single-family restrictive covenant. See, e.g. *Michiana Shores Estates, Inc v Robbins*, 290 Mich 384, 387; 287 NW2d 547 (1939) ("It is clear . . . that erection of a dwelling house for two or more families must be held a violation of the language of the deeds limiting structures to 'one residence only.'"). See also *Nechman v Supplee*, 236 Mich 116, 118, 119, 124-125; 210 NW2d 323 (1926) (erection of a four-family flat violates a "one (1) family residence" restriction.). In light of the plain language of the express restrictive covenant, we conclude that defendant's proposed construction of three residential condominium buildings, each with four single-family condominiums, violates the express restrictive covenant that applies to defendant's property. Therefore, the trial court erred in granting defendant's motion for summary disposition.

C. Alternative Grounds for Affirming the Trial Court's Grant of Summary Disposition

Defendant raises alternative grounds for affirming the trial court's decision to grant summary disposition in its favor. Most of these issues were not addressed by the trial court, and we decline to address them on appeal because the record does not contain sufficient facts to enable us to address them. *Hines, supra* at 443-444. However, two of these arguments merit brief discussion. First, defendant argues that the defense of laches bars plaintiffs' action in this case. Although the trial court did not address this argument, we note that the facts of this case do not support defendant's contention that it would be inequitable to enforce plaintiffs' claims against defendant. Defendant also contends that this Court should reject plaintiffs' attempt to enforce the express deed restriction because plaintiffs are attempting to enforce the express deed restriction for the first time on appeal. According to defendant, plaintiffs specifically limited the issue before the trial court to whether the doctrine of reciprocal negative easement precluded defendant's construction of the condominium buildings. We have reviewed the trial court record and conclude that plaintiffs made alternative arguments before the trial court. Plaintiffs attempted to enforce the express restrictive covenant and an implied restrictive covenant under the doctrine of reciprocal negative easement. We further note that even if plaintiffs did not specifically raise before the trial court the issue of enforcement of the express restrictive covenant, this Court is empowered to grant relief on a basis not advanced by the parties or addressed by the trial court under our broad discretion to grant relief as a case may require. MCR 7.216(A)(7).

IV. Holding

For the reasons articulated in this opinion, we find that the trial court did not err in concluding that the doctrine of reciprocal negative easement does not apply to the facts of this

case. However, in light of *Hammond Lake*, the trial court did err in concluding that plaintiffs did not have standing to enforce the express restrictive covenants at 50 and 60 Lakeshore Drive. Furthermore, because defendant's proposed construction of condominiums violates the express single-family dwelling restrictive covenant, the trial court erred in granting defendant's motion for summary disposition.

Reversed and remanded for entry of an order granting plaintiffs' motion for summary disposition and issuing a permanent injunction prohibiting defendant from using the property at 50 and 60 Lakeshore Drive in contravention of the express restrictive covenant. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ William B. Murphy

/s/ Stephen L. Borrello