

STATE OF MICHIGAN
COURT OF APPEALS

ORCHARD ESTATES OF TROY
CONDOMINIUM ASSOCIATION, INC.,
CHRISTOPHER J. KOMASARA, and MARIA
KOMASARA,

UNPUBLISHED
September 18, 2008

Plaintiffs-Appellees,

v

FOUAD DAWOOD and NADIYA DAWOOD,

Defendants-Appellants.

No. 278514
Oakland Circuit Court
LC No. 2006-078471-CZ

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

MURRAY, J. (*concurring in part, dissenting in part*).

I concur in part with the majority’s decision to reverse the trial court’s order granting plaintiffs’ partial motion for summary disposition, though my reasons are entirely different than those of the majority. Rather than deciding the case based on unpreserved arguments, I would hold that the trial court erred in holding that the brick paver driveway constituted a “structure” which may be “erected” under the by-laws, but was correct in all other respects. I would therefore affirm in part, reverse in part, and remand.

Defendants’ arguments on appeal, that plaintiffs lacked standing and that the by-laws were invalid, are premised on the failure of the by-laws to be recorded with the master deed. MCL 559.153. However, neither of these legal issues was timely raised below. A challenge to a party’s standing must be raised in the first responsive pleading or motion, see MCR 2.116(D)(2) and *Stanke v State Farm Mutual Auto Ins Co*, 200 Mich App 307, 319; 503 NW2d 758 (1993), and that was not done here. Additionally, raising a new issue in a motion for reconsideration is untimely, and does not properly preserve an issue for appellate review. *Farmers Ins Exch v Farm Bureau Gen Ins Co of Michigan*, 272 Mich App 106, 117; 724 NW2d 485 (2006). That is the only way the standing issue was raised, and that is insufficient for our review.

And, “[a]s any casual reader of the Michigan Appeals Reports will recognize, we quite frequently inform parties that we will not address an issue not raised to or decided by the trial court, on the basis that it is not properly preserved.” *People v Michielutti*, 266 Mich App 223, 230-231; 700 NW2d 418 (2005) (Murray, J., concurring in part, dissenting in part), rev’d 474 Mich 889 (2005), citing, *inter alia*, *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98;

494 NW2d 791 (1992). Defendants did not raise the invalidity of the by-laws issue before the trial court, and therefore it was not properly preserved, and we should not consider it here.¹

Nevertheless, regarding the issues actually raised and decided by the trial court, I conclude that the trial court erred in part in its interpretation of the restrictive covenants. The trial court held that the brick paver patio and sidewalk constituted a “structure” for purposes of the restrictive covenants, and therefore needed to be approved by the other property owners.² The language at issue provides that, other than a one-family dwelling, garage and pole building, no other “accessory buildings or structures may be erected in any manner or location...” unless approved in writing pursuant to the by-laws. Although the parties and the trial court placed great emphasis on the word “structures”, in my view the dispositive term in the foregoing sentence is “erected.”

Because the term “erected” is not defined by the covenant, we can resort to a dictionary to define the ordinary meaning of the term. *Citizens Ins Co v Pro-Seal Service Group*, 477 Mich 75, 84; 730 NW2d 682 (2007). “Erect” has many definitions, including “to fix in an upright position”, “to cause to stand up or out”, “to put up by the fitting together of materials or parts.” Webster’s New Collegiate Dictionary (1980). Thus, for the “structure” to be prohibited unless approved in writing, it must have been “erected”, or somehow built upwards. Here, the flat driveway was obviously not “erected”, but the patio and surrounding wall was, as it was built upwards, i.e., erected. Accordingly, I would affirm the trial court’s ruling that the patio was in violation of the restrictive covenant, and would reverse the trial court’s holding that the driveway was in violation of the covenant.

/s/ Christopher M. Murray

¹ No doubt we are able to resolve unpreserved legal issues on appeal when the facts are undisputed and in the record. However, we should resist use of that doctrine and decide the merits of the issues decided below.

² The trial court did not err in granting defendants’ motion for summary disposition as to the exterior lighting. MCR 2.116 (G)(4).