STATE OF MICHIGAN

COURT OF APPEALS

JAY and JODY SCHEBEL, individuals, LEE ALBRIGHT, MICHAEL and LINDA BARRETT, RON and KATHY CASTEEL, CURTIS FRAHM, JEANNIE HERRELL, MATTHEW and LAURIE LOURIA, ED and MELISSA LONIEWSKI, DAVID M. MACKOOL, JOHN and SHIRLEY NAJJAR, MARK and MARCIA PAPSUN, FRANK PARCELLA, WILLIAM and BEVERLY PURDY, RICHARD and JULIE ROSS, and REGINA WALLACE,

Plaintiffs-Appellants,

v

THE PINE CREEK RIDGE HOME OWNERS ASSOCIATION, THE PINE CREEK RIDGE CONSERVANCY, RALPH MEZEL, and PINE CREEK RESIDENTS/BRIGHTON LAKEFRONT OWNERS,

Defendants-Appellees.

and

PINE CREEK BLUFFS CONDOMINIUM ASSOCIATION, RIVER PLACE/ABBEY LTD PARTNERSHIP, and LAKE VILLAS AT PINE CREEK CONDOMINIUM ASSOCIATION,

Defendants.

UNPUBLISHED
September 15, 2009

No. 284177
Livingston Circuit Court
LC No. 05-215705-CK

Before: Owens, P.J. and Servitto and Gleicher, JJ.

PER CURIAM.

In this declaratory action, plaintiffs appeal as of right from the trial court's partial grant of summary disposition in favor of defendants. We affirm.

I. FACTS

Plaintiffs are primarily landbound residents of Pine Creek subdivision ("the subdivision") located in Brighton, Michigan.[1] Plaintiffs filed this lawsuit over several grievances they had with the board of the Pine Creek Homeowners Association ("HOA"). Defendants are the HOA and also riparian owners of waterfront lots located on Brighton Lake.

The subdivision is made up of 269 individually owned lots subject to a Planned Unit Development Agreement ("PUD"). The subdivision is governed by a "Declaration" that has been amended five times since the subdivision's inception.[2] All lot owners are also members of the HOA. In addition the developer also created a "Conservancy" which is a separate legal entity charged with preserving the natural resources in the subdivision. The Conservancy is governed by a board of directors who are five members of the HOA.

There are two types of lot owners in the subdivision, "Dock Privilege Owners" (DPOs) and "Landbound Owners." Those owners with lakefront property are not allowed to launch or withdraw boats from the lake on their personal lots. They must use the Westminster Park boat launch. The developer established the boat launch at issue in 1990 in what is now Westminster Park. The DPOs and the landbound owners do not share the same lake access and boating rights in Brighton Lake and Lime Lake. Since 1990, the boat launch has been used exclusively by DPOs residing on Brighton Lake. The DPOs only launched their boats on a seasonal basis.

Between 2001 and 2005, access to Westminster Park was restricted. Signs were posted, the area was gated, and residents were told that the area was restricted for authorized users only, those authorized users being the DPOs. At that time, the developer still owned the land upon which these two parks were located. However, in May 2005, the developer deeded Westminster Park and other parks to the HOA. The recorded deed does not reference the boat launch specifically. After the HOA acquired the land, it came under the Declaration as a "park area."

The subdivision also includes a dam, which controls water flow from Brighton Lake. The dam is located within Pine Creek Park East. In this parcel of land is a strip of land approximately 15 to 20 feet wide and 100 yards long that runs from Lake Ridge Drive down to Brighton Lake. This was the "Dam Access Road" and existed to allow access to the dam for operation, maintenance and repair. The original Dam Access Road ran directly over the dam. Due to structural concerns, a portion of the Dam Access Road was moved to Westminster Park closer to the boat launch, so that vehicles would no longer drive directly on the dam. The old portion of the road was permanently closed to traffic and trees have been planted over the old road.

A system of trails has existed on parts of the Conservancy since the time the property was

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[1] Most of the plaintiffs are non-riparian lot owners, however, two own lots on Brighton Lake and several others own lots on Lime Lake.

[2] All references to the "Declaration" are to the 2000 fifth revised version of that document.

a Boy Scout camp. The Declaration created "Conservation areas" on nearly every lot in the subdivision. "Conservation areas" are defined by the Declaration as "areas of land within [the subdivision] encumbered by private easements for storm drainage and conservation of wetlands" as platted. Residents must leave these areas "predominantly in their natural state."

The trails within the conservation areas located on Lots 43-63 were cleared and marked in 1990 and 2004. A Conservancy director, Ralph Mezel, and an employee of the developer personally maintained and cut trails by authorization of the 2003-2004 HOA board. Debate arose as to whether Mezel was cutting and creating new trails where they did not previously exist, or whether he was simply maintaining existing former Boy Scout trails.

In 2005, plaintiffs filed a lawsuit against the HOA, the Conservancy, and Ralph Mezel seeking declaratory relief and specific performance on the issues of riparian rights, maintenance and construction of nature trials, placement of the dam access road, and the validity of 2006 by-law amendments as adopted by HOA. The trial court granted summary disposition to defendants in part and to plaintiffs in part.

II. THE BOAT LAUNCH

Plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition on the boat launch issue. We disagree.

A. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena County Road Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). Summary disposition is proper if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 166.

B. Analysis

The Declaration and the PUD control this issue. A covenant running with the land is a contract created to enhance the value of property and, accordingly, is a "valuable property right." *City of Livonia v Dep't of Social Services,* 423 Mich 466, 525, 378 NW2d 402 (1985). In an action to enforce a covenant, the intent of the drafter controls, and where the language of a restriction is clear, the parties are confined to the language employed. *Moore v Kimball*, 291 Mich 455, 461, 289 NW 213 (1939). In other words, when interpreting a restrictive covenant that contains no ambiguity, a court should not enlarge or extend the meaning of a covenant by judicial interpretation. *Webb v Smith (After Remand),* 204 Mich App 564, 572, 516 NW2d 124 (1994). In addition, restrictions are generally construed against those attempting to enforce the restrictions, and all doubts are resolved in favor of the free use of the property. *Moore, supra* at 461.

Here, all of the parties are subject to the covenants and deed restrictions contained within the PUD. It states:

> Covenants and deed restrictions governing the use and enjoyment of the land described in Exhibit A shall be submitted for review and approval by the Township Board before any final approval or permission to start residential construction within the PUD. The covenants and restrictions shall be binding on all successors in interest of the property. (PUD § 1, p 6).

The Declaration states:

> Landbound owners of this development will have access to Brighton Lake only in the designated common beach and dock areas in Pine Creek Park North. No Landbound Owners shall have access from within the Subdivision to any portion of Brighton Lake located outside the Subdivision unless and until a park, conservation area or easement specifically designated for that purpose shall be established and brought within this declaration. [Declaration, ¶ 9§ 1].

Plaintiffs urge this court to put emphasis on the last sentence of this statement and to find that Westminster Park boat launch is "designated for that purpose", "that" being the launching of boats on to Brighton Lake.

The clear intent of the comprehensive lake management plan required by the PUD agreement was to limit the number of boats on the lakes. The Declaration also included a provision that specifically prohibited landbound owners from mooring private watercraft in the portion of Brighton or Lime Lake adjacent to the subdivision. Furthermore, even if the second sentence were read as plaintiffs suggest, it contains the phrase "outside the subdivision" and Westminster Park is inside the subdivision.

In addition, the Declaration, which was drafted in 2000, specifically mentions the future inclusion of Westminster Park. Although it was not deeded to the HOA until 2005, its specific reference at the same time and in the same document as ¶ 9§ 1, indicates that the final sentence could not have meant Westminster Park because it was already included as a specifically named park within the Declaration.

Next, plaintiffs argue that if landbound owners cannot use the boat launch, nobody should be allowed to use it. They base this argument on the following portion of the Declaration:

> The Association hereby confirms to each Owner the prior grant by the Declarant of a non-exclusive right and easement of use and enjoyment in and to the Park Areas (other than the Restricted Dam Area) and the Conservation Areas, subject to the limitations of this Declaration, Including Article III below, and subject to rules and regulations adopted by the Declarant or Association, provided such rules and regulations are of uniform application to all owners. [Declaration, Article II, § 2].

However, Article III of the Declaration distinguishes between the rights of DPOs and landbound owners, and limits the rights of the later with respect to lake access and riparian rights. This portion of the Declaration (Article II, § 2), when read in conjunction with the limitations set forth in ¶ 9§ 1 (limiting landbound owners to common beach and dock areas) and the rights set forth in

Article III, clearly refutes plaintiffs' assertion that either everyone or no one should be allowed access to the boat launch.

In sum, the trial court properly interpreted the Declaration and the PUD in finding that plaintiffs did not have the right to access Brighton Lake via the Westminster Park boat launch. The plain terms and intent of the PUD and the Declaration support the trial court's grant of defendants' motion for summary disposition with regard to this issue.

III. THE BOAT LAUNCH

Plaintiffs argue that the Declaration sets the location of the Dam Access Road and that when the HOA moved the Dam Access Road, it caused plaintiffs injury in fact. We disagree.

A. Standard of Review

Whether a party has standing is a question of law subject to de novo review. *Dept of Consumer & Industry Services v Shah*, 236 Mich App 381, 384; 600 NW2d 406 (1999).

B. Analysis

The Declaration defines the "Restricted Dam Area" in the subdivision as the area that "lies entirely within the boundaries of and constitutes a part of Pine Creek Park East." It also provides that ingress and egress to the "restricted dam area" "would be located over Pine Creek Park East." However, the Declaration also imposes on the HOA the responsibility to maintain and operate the dam. The Declaration permits the HOA's board of directors to "restrict access to all or any part of the restricted dam area, if necessary, in its sole judgment to provide for the safety of the residents of the subdivision or others, to preserve the integrity or safety of the dam or to keep the dam free from vandalism or other security threats." The testimony at the trial court level indicated that the Dam Access Road was moved by the HOA in order to protect the structural integrity of the dam and to protect it from any potential damage from vehicular traffic.

Therefore, the HOA had the authority to move the Dam Access Road. Furthermore, we agree with the trial court that plaintiffs have failed to show that they suffered injury due to the movement of the Dam Access Road to a safer location. On the doctrine of standing, the Supreme Court in *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 294-295; 737 NW2d 447 (2007), quoting *Lee v Macomb Co. Bd. of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001), quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992), stated that the following three elements must be proven:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. [External and internal quotations and ellipsis omitted.]

Plaintiffs have failed to demonstrate any legally protected interest in the prior location of the Dam Access Road, or that they have suffered a concrete and particularized injury by its relocation. Vague speculation about the potential future erosion of their voting rights in the HOA is not an injury in fact. Furthermore, they have failed to demonstrate that moving the road back to its original location would in any way benefit them.

IV. NATURE TRAILS

Next, plaintiffs argue that the trial court erred in refusing to grant plaintiffs' motion for summary disposition on the trails issue. We disagree.

The Declaration establishes the Pine Creek Conservancy and grants subdivision homeowners the right to use hiking trails in the Conservancy. Specifically, § 3(B)(2) of the Declaration identifies as "desirable" and "consistent with the Developer's intent and the purpose of the Conservation easement" the "use of Conservation Areas by the Owners for hiking along the trail system established or to be established through the Conservation Areas." Further, the Declaration, in § 3(D) expressly reserves for owners the right to "walk over and across those portions of the Conservation Areas upon which a trail system has or will be constructed."

Article II, § 3(B)(1), states in part:

> The following uses and practices, though not an exhaustive recital of consistent uses and practices, are consistent with the Declarant's intent and the purpose of this Conservation Easement and are desirable and not precluded, prevented, or limited by it:
>
> > 1. the establishment of a system of trails, including trails constructed through or over Wetlands or Wetland Fringe Areas (subject, as to the Wetlands, to the approval of the Michigan Department of Environmental Quality as provided in applicable law) over portions of the Conservation Areas, in a manner which protects the Conservation Areas' environment but permits persons walking through the trail system to enjoy the Conservation Areas through the low-impact activities of hiking and observation…

Furthermore, Article 11, § 3(D) states, in relevant part:

> Declarant hereby reserves for itself, the Owners and the Association the right to walk over and across those portions of the Conservation Areas upon which a trail system has or will be constructed. Declarant further reserves the right of the Association, with the approval of the Pine Creek Conservancy, which will not be unreasonably delayed or withheld, to construct a system of trails, boardwalks and Observation Decks through the Conservation Areas at locations and with materials and construction methods approved by the Pine Creek Conservancy, the purpose of which shall be to provide the Owners and their families with a ready means of access to enjoy the Conservation Areas in the passive recreational way intended and thereby improve the quality of life within the Subdivisions.

These portions of the Declaration make it clear that trails were an intended and integral part of the Conservation Areas. Clearly, in order to enjoy "walking through the trail system" those trails must be maintained. Explicitly, § 3A(4) of the Declaration states that the Conservancy may undertake:

> [A]ny programs of clean-up or restoration of the Conservation Areas and its environment which the Conservancy determines are appropriate to preserve the desirable features of the natural environment or restore previously existing features of the environment of the Conservation Areas which have deteriorated through inattention and neglect over time.

Thus, the trial court properly determined that defendants could maintain existing trails. Furthermore, it appears that plaintiffs' attempt to limit the scope of the trial court's ruling to lots 48 to 60 is also without merit. Plaintiffs contend that there was only one existing trail and that it was located on lots 48 to 60. This is not supported by the testimony of the developer's employees and Mezel, all of whom testified that they walked on trails from lots 43-63 before the Declaration was signed in the early 1990s.

IV. INDIVIDUAL DEFENDANT RALPH MEZEL

Plaintiffs argue that the trial court erred in granting individual defendant Ralph Mezel's motion for summary disposition. We disagree.

A. Standard of Review

We review de novo issues of law. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

B. Analysis

The Declaration states, "neither the Pine Creek Conservancy nor the members of its Board of Directors shall be liable in damages or otherwise for exercising or declining to exercise their rights under this conservation agreement." (Declaration, Article II, § 3(j)). Furthermore, the Declaration states:

> Neither any members of the association, board of directors nor the Declarant shall be personally liable to the owner or to any other party, for the damage, loss or prejudice suffered or claimed on account of any act or omission of the association, the board of directors, the Declarant or any other representative or employees of the association. [Declaration, Article V, § 13].

Here, the claims pled individually against Mezel allege that he acted in the conservation easement, pursuant to his position on the Conservancy Board. The claims also allege that Mezel acted outside the scope of his capacity as a director of the Conservancy. However, in his deposition, Mezel makes clear that when he performed trail maintenance and cut trails, he did so with a directive from the HOA.

Plaintiffs' contention that Mezel was acting outside the scope of the directive from the HOA to maintain the trails in his capacity as a director of the Conservancy is unsupported by the

evidence. The trial court did not err granting Mezel's motion for summary disposition where there was no genuine issue of material fact that he was acting in his capacity as a director of the Conservancy, and, as such, was protected by the Declaration from lawsuit.

VI. JUDGMENT

Plaintiffs argue that the trial court made a procedural error in the entry of the judgment in this case. We find that any procedural error was not grounds for setting aside the judgment.

A. Standard of Review

Whether the trial court violated MCR 2.602 in the entry of the judgment is a question of law. We review questions of law de novo. *Cowles v Bank West,* 476 Mich 1, 13; 719 NW2d 94 (2006).

B. Analysis

The trial court's January 31, 2008 order directed defendants to submit a judgment in accordance with the order. Defendants' counsel filed a proposed judgment on February 15, 2008. The judgment was not set for hearing and was not accompanied by a seven day notice under MCR 2.602(B),

On February 19, 2008 plaintiffs filed an objection to judgment, however, plaintiffs did not submit their objections with a notice of hearing and an alternate proposed judgment under MCR 2.602(B)(3)(c). Plaintiffs allege that the judgment is deficient in that: 1) it should not track the language of any underlying order, because doing so necessarily requires that all other dispositive orders of the court be similarly referenced, which they are not, 2) the judgment should have referenced the dismissal of the developer and Mezel from the suit, 3) the judgment should have identified the lot numbers of the particular lots that were burdened with "existing trails", and 4) the entry of the judgment did not comport with MCR 2.602—the rules do not permit defense counsel to submit a proposed judgment for entry without providing opposing counsel with an opportunity to review the judgment or to be heard.

Under MCR 2.613(A):

> [a]n error ... or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Here, the judgment submitted accurately represented the language of the trial court's underlying January 31, 2008 opinion and order. The underlying opinion did not specifically mention lot numbers, so the order should not do so. Furthermore, even if the judgment should have referenced the dismissal of Mezel and the developer from the lawsuit, plaintiffs suffered no injury from the failure to include this information. In addition, plaintiffs themselves failed to comport with MCR 2.602 in failing to file a notice of hearing and an alternate proposed judgment along with their objections. In short, plaintiffs have not demonstrated that a failure to set aside this judgment would be inconsistent with substantial justice.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher