

STATE OF MICHIGAN
COURT OF APPEALS

CONSUMERS ENERGY COMPANY,

Plaintiff/Counterdefendant-Appellee,

v

MARK ROBERT ADAMS and SUSAN H.
ADAMS,

Defendants/Counterplaintiffs-
Appellants.

UNPUBLISHED

October 08, 2026

11:48 AM

No. 370159

Ingham Circuit Court

LC No. 23-000801-CC

Before: WALLACE, P.J., and CAMERON and KOROBKIN, JJ.

PER CURIAM.

At issue in this case is whether plaintiff, Consumers Energy Company, has the right to construct a second gas pipeline across property owned by defendants, Mark and Susan Adams. Defendants appeal from the trial court’s orders granting summary disposition to plaintiff under MCR 2.116(C)(9) (failure to state a valid defense to a claim) and (C)(10) (no genuine issue of material fact), denying summary disposition to defendants, denying defendants’ motion for a temporary restraining order and a preliminary injunction, and awarding attorney fees and costs to plaintiff. Defendants contend that the trial court erred in determining the scope of the easement and whether the conveyance was void, and by dismissing their counterclaim and awarding attorney fees to plaintiff. For the reasons stated in this opinion, we either reject, decline to address, or lack jurisdiction to consider most of defendants’ claims of error. But we conclude that the trial court did err by granting summary disposition insofar as there are issues of fact pertaining to whether plaintiff’s construction of the second pipeline unreasonably burdens defendants’ servient estate. See *Little v Kin*, 468 Mich 699, 701; 664 NW2d 749 (2003). We therefore affirm in part, reverse in part, dismiss in part without prejudice, and remand for further proceedings.

I. BACKGROUND AND FACTS

Defendants’ property in Locke Township is transected by Line 100A, a natural gas pipeline, in its southwest corner. In 1948, defendants’ predecessors in title executed an agreement entitled “Right of Way.” The right-of-way agreement states that the grantors “Convey – and

Warrant” to the Michigan Storage Gas Company and its successors and assigns (grantees) “[f]orever, the easement and right to lay, construct and maintain one or more lines of gas mains . . . for the purpose of transmitting gas, in, through and across” the parcel of land. The instrument further specifies that “the route to be taken by said gas mains across said land” is “[g]enerally in a [n]orthwesterly and [s]outheasterly direction, in, under, through and across said above described land.” It also grants “full right and authority” for the grantee to enter the land

for the purpose of constructing, repairing, removing, replacing, and maintaining said gas mains, connections, and accessories. Not more than two lines of gas mains may be laid and constructed hereunder. Said lines will not be constructed concurrently, and the second line may be commenced and completed at any time subsequent to the completion of the initial line.

The grantee must pay \$160 per mile for each main line to the grantor before construction begins and for any associated damage to crops or fences. Following the conveyance of the right of way, Line 100A, a 20-inch diameter pipeline, was constructed in 1949.

In August 2002, a dispute arose between defendants and plaintiff, the successor in interest to the Michigan Gas Storage Company, regarding plaintiff’s right to clear trees and brush along Line 100A. Later that year, the dispute was resolved when plaintiff sent a letter to defendants reiterating its right to clear trees and brush as necessary to the enjoyment of the easement and stating that:

Although the easement does not specify an easement width, we are limiting the clearing area to a 50-ft strip (25 feet on each side of the existing pipeline). We believe that is reasonable under the circumstances, particularly considering that the Federal Energy Regulatory Commission has approved easements of that width.

In 2019, plaintiff applied for a certificate of public convenience and necessity by the Michigan Public Service Commission (MPSC) under Public Act 9 of 1929, MCL 483.101 *et seq.*, to construct and operate the Mid-Michigan Pipeline (MMPL), a 36-inch diameter pipeline that would replace the portion of the existing Line 100A pipeline that ran between the cities of Chelsea and Ovid. The MPSC, in the order granting the certificate, determined

that [plaintiff’s] proposal to replace the portion of Line 100A between Chelsea and Ovid, Michigan, is necessary because it will address corrosion issues, seam weld anomalies, and other anomalies on the pipeline. In addition, the [MPSC] finds that [plaintiff’s] proposal to increase the diameter of Line 100A to 36 inches will remove the bottleneck, increase capacity, and provide a more resilient and flexible system. Therefore, pursuant to MCL 483.109, the [MPSC] finds that the proposed MMPL project, when constructed and operated, will serve the public convenience and necessity. [Citations omitted.]

As to plaintiff’s proposed route, the MPSC order stated that:

The [MPSC] finds persuasive [plaintiff’s] testimony that it considered alternative routes, but that, due to system configuration restrictions, service concerns,

geographic limitations, and cost considerations, the company was compelled to design the route as depicted in Exhibit A-3. The [MPSC] also finds persuasive that the route set forth in Exhibit A-3 affects the fewest number of landowners and that [plaintiff's] completed [Environmental Impact Assessment] demonstrates that the construction impact on public lands, wetlands, and the environment is *de minimus*. Therefore, the [MPSC] finds that [plaintiff's] proposed route for the MMPL project is the most reasonable and practicable.

However, as recommended by the Staff, the [MPSC] approves [plaintiff's] proposed route with the condition that the company shall work with affected landowners to implement additional measures to mitigate, on a case-by-case basis, the impact of the MMPL project on their properties. [Citations omitted.]

The MPSC thus granted the application, approving plaintiff's proposed route for the MMPL (with minor route deviations as specified in the order), the proposed map depicting the general route of the MMPL (which would run parallel to Line 100A), and the type of construction.

In late September 2023, plaintiff notified defendants in writing that it planned to begin construction of a second gas line through their property in spring 2024 with preconstruction activities as early as fall 2023, and enclosed a check for \$28.81, an amount that corresponded to the compensation specified in the right-of-way agreement, that is, \$160 per mile of pipeline. Plaintiff also enclosed a survey drawing showing that the MMPL would run parallel to and approximately 30 feet to the east of existing Line 100A on defendants' property and require expanded temporary work areas. Defendants responded via two letters in October 2023 asserting that plaintiff's easement was only 50 feet wide and centered on the existing pipeline, demanding that plaintiff cease and desist from any activities outside of that corridor without defendants' permission, and reserving their right to assert various claims and defenses in litigation.

Shortly thereafter, plaintiff filed the instant lawsuit seeking a declaration that it had the right to "construct, maintain, install, repair, and replace a second natural gas pipeline" through the property, as shown in an exhibit attached to the complaint detailing the bounds of the MMPL, and an injunction against defendants to prevent them from interfering with plaintiff's rights under the right-of-way agreement. Defendants filed an answer, defenses, and counterclaims for injunctive and declaratory relief that would quiet title in defendants to all areas outside a 50-foot-wide strip centered on the existing pipeline and prevent plaintiff from engaging in construction activities outside the 50-foot-wide strip without permission.

Concurrently with its complaint, plaintiff filed a motion for summary disposition under MCR 2.116(C)(9) (failure to state a valid defense to a claim) and (C)(10) (no genuine issue of material fact). Defendants filed a countermotion for summary disposition under MCR 2.116(C)(8) (failure to state a claim), (C)(10) (no genuine issue of material fact), (I)(1) (judgment without delay), and (I)(2) (opposing party entitled to judgment). Following a hearing on the parties' cross-motions for summary disposition on February 29, 2024, the trial court stated on the record that it would grant injunctive and declaratory relief to plaintiff as the language of the easement was clear and unambiguous and there were no questions of fact. About a week later, defendants moved for a temporary restraining order and preliminary injunction. After a hearing on March 13, 2024, the trial court denied defendants' motion and awarded attorney fees and costs to plaintiff. That same

day, the court entered a written order addressing the parties' cross-motions for summary disposition that awarded summary disposition to plaintiff, denied summary disposition to defendants, denied defendants' request for injunctive relief, and dismissed defendants' counterclaims.¹ The court also denied defendants' oral motions for a stay and for a status-quo order enforcing the stipulation from 2002.

This appeal followed.

II. STANDARDS OF REVIEW

"The extent of a party's rights under an easement is a question of fact, and a trial court's determination of those facts is reviewed for clear error." *Blackhawk Dev Corp v Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). "A trial court's dispositional ruling on equitable matters, however, is subject to review de novo." *Id.* "[W]hether the scope of an easement has been exceeded is generally a question of fact," but "when reasonable minds could not disagree concerning" the scope and extent of an easement, "they should be decided by the court on summary disposition as a matter of law." *Wiggins v City of Burton*, 291 Mich App 532, 550; 805 NW2d 517 (2011). "This Court reviews de novo the grant or denial of a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law." *Glasker-Davis v Auvenshine*, 333 Mich App 222, 229; 964 NW2d 809 (2020) (quotation marks and citation omitted).

In actions seeking declaratory and injunctive relief, questions of law are reviewed de novo, but the trial court's decision to grant or deny declaratory or injunctive relief is reviewed for an abuse of discretion. See *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013); *Martin v Murray*, 309 Mich App 37, 45; 867 NW2d 444 (2015). An abuse of discretion occurs when a trial court's decision falls outside the range of principled and reasonable outcomes. *Danhoff v Fahim*, 513 Mich 427, 442; 15 NW3d 262 (2024). An error of law necessarily constitutes an abuse of discretion. *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016).

A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings, so the trial court must accept as true all well-pleaded allegations and grant summary disposition when a defendant fails to plead a valid defense to a claim. *In re Hoppert Estate*, 347 Mich App 450, 465; 15 NW3d 337 (2023). "Documents attached to the pleadings are considered part of the pleadings for purposes of MCR 2.116(C)(9)." *Id.* "Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Id.* (citation and quotation marks omitted).

As for a motion for summary disposition under MCR 2.116(C)(10), a trial court may grant such a motion when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that "there is no genuine issue as to any material fact,

¹ Shortly after these orders were issued, defendants filed a complaint with the MPSC seeking an order for plaintiff to keep the pipeline within the 50-foot-wide strip centered on the existing pipeline. Their complaint was dismissed with prejudice in July 2025 under Case No. U-21622.

and the moving party is therefore entitled to judgment . . . as a matter of law.’ ” *Mich Dep’t of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 368-369; 699 NW2d 272 (2005), quoting MCR 2.116(C)(10). “On the other hand, summary disposition is proper under MCR 2.116(I)(2) ‘if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law.’ ” *Rataj v City of Romulus*, 306 Mich App 735, 746; 858 NW2d 116 (2014) (citation omitted). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Piccione v Gillette*, 327 Mich App 16, 19; 932 NW2d 197 (2019) (quotation marks and citation omitted). Summary disposition under MCR 2.116(C)(10) “is generally premature if granted before discovery on a disputed issue is complete[,]” but “may nevertheless be appropriate if further discovery does not stand a fair chance of uncovering factual support for the opposing party’s position.” *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571, 574-575; 485 NW2d 129 (1992).

“A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint.” *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). “When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery.” *Id.* at 160 (citations omitted).

Finally, “[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.” MCR 2.116(I)(1).

III. ANALYSIS

A. SCOPE OF THE EASEMENT

The main question in this case is whether plaintiff’s proposed pipeline project falls within the scope of its easement. We conclude that the plain language of the right-of-way agreement allows plaintiff to build a second pipeline through defendants’ property. In arguing that it does not, defendants contend that the conveyance language does not expressly allow plaintiff’s proposed pipeline, or in the alternative that it is ambiguous and must be construed using extrinsic evidence, that the parties agreed in 2002 to alter the easement, or that the 2002 agreement controls because of the doctrine of acquiescence. We reject these arguments. However, we agree with defendants that the trial court failed to complete the required analysis under *Little*, 468 Mich at 701, as to whether plaintiff’s project is necessary for the effective use of the easement or unreasonably burdens defendants’ estate. Because there is an issue of fact as to whether there is an unreasonable burden, the trial court erred by granting summary disposition to plaintiff. We address each of the above issues in turn.

1. PLAIN LANGUAGE OF THE EASEMENT-GRANTING INSTRUMENT

“An easement is the right to use the land of another for a specified purpose” and “may be created by express grant, by reservation or exception, or by covenant or agreement.” *Penrose v McCullough*, 308 Mich App 145, 148; 862 NW2d 674 (2014) (quotation marks and citations

omitted). A deed granting a right of way conveys an easement. *Dep't of Natural Resources*, 472 Mich at 371. As our Supreme Court explained in *Blackhawk*:

The existence of an easement necessitates a thoughtful balancing of the grantor's property rights and the grantee's privilege to burden the grantor's estate. And while the easement holder's rights are ultimately paramount . . . to those of the owner of the soil, the latter's rights are subordinate only to the extent stated in the easement grant. Consequently, the use of an easement must be confined strictly to the purposes for which it was granted or reserved. [*Blackhawk*, 473 Mich at 41 (cleaned up).]

"The rights of an easement holder are defined by the easement agreement." *MacDonald*, 193 Mich App at 575. "The language of an express easement is interpreted according to rules similar to those used for the interpretation of contracts." *Wiggins*, 291 Mich App at 551. "Accordingly, in ascertaining the scope and extent of an easement, it is necessary to determine the true intent of the parties at the time the easement was created." *Id.* "The instrument's granting clauses are a natural starting point for discerning the parties' intent." *Dep't of Natural Resources*, 472 Mich at 370-371. Thus, the first step in determining whether a proposed use is within the scope of an easement is to examine the plain language of the granting instrument. *Little*, 468 Mich at 700. Only if the text is ambiguous may extrinsic evidence be used to determine the easement's scope. *Blackhawk*, 473 Mich at 42. If the "language of the legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Little*, 468 Mich at 700.

Turning to the case before us, we first examine the language of the right-of-way agreement to determine whether it conveys the right to construct a second pipeline. By its plain terms, the easement language does so and is not ambiguous. Indeed, the granting document provides "the easement and right to lay, construct and maintain *one or more* lines of gas mains . . . for the purpose of transmitting gas, in, through and across" the property. (Emphasis added.) The document further states that "[n]ot more than two lines of gas mains may be laid and constructed hereunder. Said lines will not be constructed concurrently, and the second line may be commenced and completed at any time subsequent to the completion of the initial line." Thus, the instrument is clear that plaintiff, as successor to the original grantee, may construct a second pipeline. And as there is no dispute that the initial pipeline has been completed, plaintiff is not restricted from building a second one.

Defendants raise several arguments related to the interpretation of the easement language, but we find them unpersuasive. Defendants argue that the right-of-way agreement grants plaintiff the rights only to "construct, repair, remove, replace, and maintain" the Line 100A pipeline, and not to "reconstruct, improve, relocate, change the size of, enlarge, protect or abandon [it] in place." This argument appears to be premised on the notion that plaintiff is seeking merely to "replace" the Line 100A pipeline rather than construct a second pipeline, and from that premise they argue that plaintiff's proposed activity exceeds the scope of what the easement language allows. But defendants' argument about what the agreement allows regarding the Line 100A pipeline is immaterial because the MMPL project is the construction of a second pipeline. As discussed above, the right-of-way agreement unambiguously allows the construction of a second pipeline.

Therefore, plaintiff's argument regarding the scope of the easement as it pertains to the Line 100A pipeline lacks merit.

Relatedly, defendants argue that because the express terms of the right-of-way agreement do not allow plaintiff to reconstruct, improve, relocate, change the size of, enlarge, or abandon in place the Line 100A pipeline, plaintiff's plan to do so is prohibited insofar as such activity will "materially increase the burden of [the easement] upon the servient estate or impose thereon a new and additional burden." *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). Again, defendant's argument lacks merit because plaintiff's MMPL project is not an alteration of the Line 100A pipeline that falls outside the scope of the easement; it is the construction of a second pipeline that the easement language separately and expressly permits. "While it is true that an easement holder may not materially increase the burden on the servient estate beyond what was originally contemplated, this rule does not come into play where the proposed activity was expressly agreed to in the instrument creating the easement." *MacDonald*, 193 Mich App at 577-578.

Defendants also argue, in the alternative, that the easement lacks ascertainable boundaries, and that the trial court therefore erred by failing to consider contemporaneous parol evidence to establish the parties' intent as to the easement's dimensions. They cite *Johnston v Mich Consol Gas Co*, 337 Mich 572; 60 NW2d 464 (1953), which concerned whether the description of a right of way for a "pipeline or pipelines" was void for uncertainty, and held that it was not. *Id.* at 577, 582. In that case, the instrument did not specify where the pipelines were to be built except that they be "over and thru [sic]" the property and could not be constructed closer than 100 feet from buildings on the property. *Id.* at 574. Regarding the initial pipeline, the Court determined that there was no dispute as to where it would be located because the plaintiff testified that he saw the preconstruction stakes marking the placement of the pipeline. *Id.* at 578. Regarding the construction of additional pipelines that had not yet been built, the Court also found that the conveyance in question was valid because

[t]he agreement-conveyance expressly looks to the laying of more than just the first pipe line, and while the exact space which may eventually be required for additional pipe lines is not stated, the area of [the] plaintiffs' farm which [the] defendant may ultimately utilize is not undefined for the instrument expressly states that no pipe line is to be placed within 100 feet of any of the buildings on the premises. [*Id.*]

Thus, it was sufficient that the granting instrument merely prescribed the amount of space required between any pipelines and the property owner's buildings. *Id.*

In this case, the easement language is clear that the route to be taken by any pipelines is "generally in a [n]orthwesterly and [s]outheasterly direction, in, under, through and across" the property. As in *Johnston*, although "the exact space which may eventually be required for additional pipe lines is not stated," *Johnston*, 337 Mich at 578, the conveyance language does not leave the easement "undefined," *id.* Instead, it defines the general cardinal orientation for any pipelines, allows them to be laid "in, through and across the . . . described parcel [] of land," and does not otherwise restrict the area available for construction. That is sufficient. And because the language is unambiguous, resort to extrinsic evidence is not permitted. See *Blackhawk*, 473 Mich at 42; *Little*, 486 Mich at 700.

In this regard, we find persuasive this Court’s opinion in *Consumers Energy Co v Acey*, unpublished per curiam opinion of the Court of Appeals, issued July 17, 2008 (Docket No. 277039), rev’d in part on other grounds 488 Mich 858 (2010), which likewise concerned a dispute between property owners and a utility company over pipeline easements and the utility company’s right to build a second pipeline through the servient estates.² In that case, the language of the express easements granting the right to construct pipelines described the route to be taken as: “Generally in an [e]asterly and [w]esterly direction in, under, through and across” the properties. *Id.* at 4. This Court in *Acey* rejected the defendants’ argument that the easements were ambiguous as to the location of the pipeline, as the language contemplated construction in an “easterly and westerly direction” and did not otherwise “restrict the area available for construction.” *Id.* So too here, the general cardinal direction of the easement is described in the easement language, which unambiguously grants the right to construct a second pipeline “generally in a [n]orthwesterly and [s]outheasterly direction, in, under, through and across” the property.³ As in *Acey*, therefore, we conclude that the right-of-way easement language is not ambiguous.

As another alternative argument, defendants assert that the parties agreed to limit the easement to a 50-foot-wide strip and that plaintiff should be bound to this agreement as to the second pipeline’s location. “Where the rights to an easement are conveyed by grant, neither party can alter the easement without the other party’s consent.” *Blackhawk*, 473 Mich at 46. Defendants base their position on a letter sent by plaintiff to defendant regarding a previous dispute about tree- and brush-clearing on the property near the Line 100A pipeline. Examining the text of the letter relied upon by defendants, we disagree that it constitutes a stipulation regarding plaintiff’s rights under the easement. In the midst of a dispute over plaintiff’s right to clear vegetation along Line 100A, plaintiff’s representative sent a letter to defendants reiterating plaintiff’s right to do so as necessary to its enjoyment of the easement and stating that, “[a]lthough the easement does not specify an easement width, we are limiting *the clearing area* to a 50-ft strip (25 feet on each side of the existing pipeline).” (Emphasis added.) Thus, plaintiff expressly agreed to limit *clearing activities* regarding the *existing pipeline* to a 50-foot-wide strip centered on that pipeline without waiving its rights under the easement, which does not specify a limited width. This letter cannot be read as consent to restrict plaintiff’s rights as to the location of a second pipeline, as it is limited to clearing activities associated with Line 100A.⁴

² “Unpublished opinions are . . . not binding authority but may be persuasive or instructive.” *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5; 957 NW2d 858 (2020).

³ We also note that the Supreme Court’s partial reversal concerned this Court’s holding that reversed the trial court’s order that had limited the easement to a “66-foot working strip” because “the plaintiff voluntarily and expressly agreed on the record to the imposition of this limitation.” *Acey*, 483 Mich at 985. Contrary to defendants’ argument, this fact-specific partial reversal made on the basis of an in-court stipulation did not undermine the remainder of our rationale.

⁴ Defendants relatedly compare this case to our Supreme Court’s order in *Acey*, which reversed this Court’s decision in part because the plaintiff had stipulated in court to limit construction activities to a “66-foot working strip” surrounding the proposed pipeline. *Acey*, 483 Mich at 985.

In a similar vein, defendants argue that the easement width is limited to 50 feet under the doctrine of acquiescence. The doctrine of acquiescence provides that if a boundary line that has been “treated and acquiesced to as the true line” for fifteen years or more, the acquiesced-to boundary becomes the actual boundary. *Walters v Snyder*, 239 Mich App 453, 458; 608 NW2d 97 (2000); see also *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). The doctrine has been applied in cases involving adjoining property owners, and the rationale for the doctrine is promoting “peaceful resolution of boundary disputes.” *Id.* But defendants cite no authority, nor do we discern any, that the doctrine applies to easements, which are a distinct form of property interest. “An easement is, by nature, a limited property interest. It is a right to use the land burdened by the easement rather than a right to occupy and possess [the land] as does an estate owner.” *Dep’t of Natural Resources*, 472 Mich at 378 (quotation marks and footnote omitted). Thus, determining the scope of an easement is a separate inquiry from a boundary dispute, which concerns who owns the property. As such, we decline to apply the doctrine of acquiescence to this dispute.

2. *LITTLE v KIN* ANALYSIS

Although we have determined that the easement unambiguously allows plaintiff to construct a second pipeline, that is not the end of the inquiry. In *Little*, our Supreme Court explained that courts examining easement issues must conduct a multi-part analysis. Confronted in that case with the question of whether construction of a dock was a permitted use under an easement, the Court provided the following instructions to the trial court:

If the easement grants defendants the right to construct or maintain a dock, the trial court must determine whether the *particular* dock at issue is permissible under the law of easements. Under our well-established easement jurisprudence, the dominant estate may not make improvements to the servient estate if such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement. Accordingly, if the trial court concludes that the easement grants defendants the right to construct or maintain a dock, it must then determine (1) whether the dock is necessary for defendants’ effective use of their easement and (2) whether the dock unreasonably burdens plaintiffs’ servient estate. [*Little*, 468 Mich at 701 (emphasis added) (citations omitted).]

We agree with defendants that the same analysis must be conducted here. Applied to the case at hand, although the easement described in the right-of-way agreement unambiguously grants plaintiff the right to construct *a* second pipeline, the next question is whether the *particular* pipeline in question is permitted under the law of easements. And to answer that question, it must be determined (1) whether the pipeline is necessary for the plaintiff’s effective use of the easement and (2) whether the pipeline unreasonably burdens defendants’ servient estate. See *id.*

But here, plaintiff has not stipulated, on the record or otherwise, to limit the width of the second pipeline to a 50-foot-wide strip centered on the existing pipeline.

Defendants are correct that the trial court failed to perform this latter part of the *Little* analysis. Because the trial court decided the case on summary disposition and our review of such decisions is de novo, we undertake that analysis ourselves to determine whether there is an issue of material fact. See *Glasker-Davis*, 333 Mich App at 229.

Beginning with the necessity prong, we conclude that there is no genuine issue of material fact and resolve that prong in favor of plaintiff. “The necessity of an easement holder’s conduct can be informed by the purpose and scope of the easement in addition to the easement holder’s accustomed use of the easement.” *Smith v Straughn*, 331 Mich App 209, 215-216; 952 NW2d 521 (2020). Generally, “[w]hat may be considered a proper and reasonable use by the owner of the fee, as distinguished from an unreasonable and improper use, as well as what may be necessary to [the easement holder’s] use and enjoyment, are questions of fact to be determined by the trial court or jury.” *Harvey v Crane*, 85 Mich 316, 322-323; 48 NW 582 (1891). But “when reasonable minds could not disagree concerning” the scope and extent of an easement, “they should be decided by the court on summary disposition as a matter of law.” *Wiggins*, 291 Mich App at 550; see also *Dep’t of Natural Resources*, 472 Mich at 368-369 (a party is entitled to summary disposition when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.”) (citations omitted).

Reasonable minds could not disagree that building the proposed second pipeline is necessary for plaintiff’s enjoyment of the easement. Indeed, as discussed, the express language of the easement permits plaintiff to construct a second pipeline. Plaintiff also obtained the MPSC order, which determined that plaintiff’s proposal to replace a portion of Line 100A that includes the part on defendants’ property was “necessary because it will address corrosion issues, seam weld anomalies, and other anomalies on the pipeline.” The MPSC found that increasing the diameter of the pipeline to 36 inches “will remove the bottleneck, increase capacity, and provide a more resilient and flexible system” such that the MPPL project “will serve the public convenience and necessity.” The MPSC also found that although plaintiff considered alternative routes, its proposed route was “the most reasonable and practicable” as it “affects the fewest number of landowners” and has minimal impact on “public lands, wetlands, and the environment.” Because the MPSC has essentially ordered plaintiff to build the pipeline through defendants’ property, there is no genuine question of fact that the necessity prong under *Little* is satisfied.

We reach a different conclusion, however, regarding whether the construction of the second pipeline in the location and manner proposed by plaintiff unreasonably burdens defendants’ estate. Defendants principally contest plaintiff’s use of the right of way beyond the previous limitation on clearance activities to 50 feet surrounding the existing pipeline. They argue that plaintiff’s use of the “abandon in place” construction method, which requires additional land to construct the pipeline thirty feet away, is unreasonably burdensome on their estate because plaintiff could instead use the “lift-and-lay” method, which would entail removing the existing pipeline and laying new pipeline in its place. Defendants also urge the use of the horizontal-boring method, which is already being used for a nearby river crossing and surrounding wetlands, to avoid surface impacts to their property. Defendants cite the MPSC order’s statement that plaintiff must “work with affected landowners to implement additional measures to mitigate, on a case-by-case basis, the impact of the MMPL project on their properties,” and an excerpt from the testimony of MPSC staff stating that one method of doing that is to remove existing pipeline and install the replacement pipeline in its place. Defendants further assert that construction in the manner proposed by plaintiff

would unnecessarily destroy trees along the property’s boundary line. In support of this claim, defendants presented historical aerial photographs of the property from 1938 and 1950 as well as a current ground-level photograph that they allege demonstrate that the trees are over 70 years old. According to defendants, the trees have aesthetic value and serve as markers of the property’s boundary. Defendants also acknowledged at the hearing on their motion for a temporary restraining order and a preliminary injunction that a contemporary survey could establish the property line, but that they did not presently have one.

Plaintiff, for its part, has mostly eschewed the *Little v Kin* analysis in its briefing and does not point to uncontested evidence that would eliminate any question of fact as to whether the particular pipeline project it has proposed—including the precise location of the new pipeline, the method of construction, and the accompanying disturbance to the surface of defendants’ land—will unreasonably burden defendants’ property. We therefore conclude that defendants have raised a genuine issue of material fact regarding unreasonable burden. Accordingly, we reverse in part the trial court’s grant of summary disposition to plaintiff and remand to the trial court for further proceedings to evaluate whether the construction of the second pipeline—including the precise location of the new pipeline, the method of construction, and the accompanying disturbance to the surface of defendants’ land—unreasonably burdens defendants’ servient estate. See *Little*, 468 Mich at 701.

B. WHETHER THE EASEMENT IS VOID

In the alternative to their arguments that plaintiff’s proposed pipeline would exceed the scope of the easement, defendants raise arguments that the portion of the easement that allows a second pipeline was not, or no longer is, a valid conveyance. Specifically, defendants argue that the easement-granting language violates Michigan’s rule against the suspension of the absolute power of alienation, and that it attempted to create an option to acquire an interest in land that expired because it was not exercised within a reasonable time. We disagree.

Defendants focus on the following language, the habendum clause,⁵ in the right-of-way agreement:

Not more than two lines of gas mains may be laid and constructed hereunder. Said lines will not be constructed concurrently, and the second line may be commenced and completed at any time subsequent to the completion of the initial line. Party of the second part shall pay said parties of the first part at the rate of One Hundred Sixty dollars (\$160.00) per mile for each line of mains laid on said

⁵ “A deed’s habendum clause limits and defines the estate conveyed to the grantee.” *Nash v Duncan Park Comm*, 304 Mich App 599, 605 n 2; 848 NW2d 435 (2014), vacated in part on other grounds 497 Mich 1016 (2015), citing *Darnell v Smith*, 238 Mich 33; 213 NW 59 (1927) (“[W]hen construing a deed, . . . the habendum is that part which declares and limits the use of the thing conveyed. Its purpose is to limit and define the estate which the grantee is to have in the property.”).

premises, payable, as to each of said lines, on or before the date on which construction of such line commences.

We begin with defendants' argument that this language created a contingent future estate in violation of the rule against the suspension of the absolute power of alienation. MCL 554.1, *et seq.* classifies estates in land into those that are lawful and those that are void in their creation. MCL 554.8 defines two types of estates:

An estate in possession, is where the owner has an immediate right to the possession of the land; [and] an estate in expectancy is where the right to the possession is postponed to a future period.

One type of estate in expectancy, a "future estate," MCL 554.9, is defined as "an estate limited to commence in possession at a future day" MCL 554.10. MCL 554.13 classifies future estates as either vested or contingent:

They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which they are limited to take effect remains uncertain.

At the time of the conveyance, MCL 554.14, repealed by 1949 PA 38, provided that:

Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter: Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.

And MCL 554.15, repealed by 1949 PA 38, provided that:

The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of 2 lives in being at the creation of the estate, except in the single case mentioned in the next section.

Given this statutory background, defendants argue that because the second pipeline could not be constructed until both (1) completion of the first pipeline and (2) payment of a sum that could not be ascertained until the length of the second pipeline was determined, and the language contains no termination date, the cloud on defendants' title was perpetual and suspended the absolute power of alienation forever in violation of former MCL 554.14 and former MCL 554.15.

To evaluate this claim, we must determine whether the conveyance of the right to construct the second pipeline created a future estate, meaning "an estate limited to commence in possession at a future day" MCL 554.10. "The instrument's granting clauses are a natural starting point for discerning the parties' intent." *Dep't of Natural Resources*, 472 Mich at 370-371. The instrument's granting clause states that the grantors "Convey – and Warrant" to the grantees "[f]orever, the easement and right to lay, construct and maintain one or more lines of gas mains . . . for the purpose of transmitting gas, in, through and across" the parcel of land. This language

indicates that plaintiff has an estate in possession, not a future estate, because it grants an “immediate right to the possession of the land,” MCL 554.8, that is, the right to construct “one or more lines of gas mains.” However, defendants lean on the habendum clause, which, as discussed, limits the grantee to constructing two pipelines, the second of which must be constructed after the first is completed “at any time,” and provides an amount of compensation due to the grantors before or upon construction.

Thus, the next question is whether the habendum clause undermines the estate in possession conveyed by the granting clause. Several principles regarding the interpretation of habendum clauses guide our analysis:

It is well settled by numerous cases that when the habendum is repugnant and contrary to the granting clause it is void. It can only affect the grant when it can be construed as consistent with the premises. It cannot divest the grantee of the legal estate already granted him in the premises, nor can the habendum frustrate a grant complete before, or abridge or lessen the estate granted. . . . It must be conceded that the habendum cannot perform the office of divesting the estate already vested by the granting clause[.] [*Smith v Smith*, 71 Mich 633, 640-641; 40 NW 21 (1888) (citations omitted).]

The rule from *Smith* is subject to some exceptions, including that if there are “inconsistencies between the granting clause and the habendum,” the granting clause “will be deemed . . . to control when it is impossible to determine from the instrument in question and surrounding circumstances which the grantor intended to control[.]” “ ‘if it clearly appears that it was the intention of the grantor to enlarge or restrict the granting clause by the habendum, the latter must control,’ ” and “when the granting clause contains language sufficient to convey a fee, but the habendum contains language limiting the conveyance to some lesser estate, the habendum will control if the court finds from the entire conveyance or attendant circumstances that the grantor so intended” *Thompson v Thompson*, 330 Mich 1, 9; 46 NW2d 437 (1951), quoting *Putman v Pere Marquette Railroad Co*, 174 Mich 246, 252; 140 NW 554 (1913). Although the cases discussing the interpretation of habendum clauses generally concern disputes over whether the parties intended to convey fee simple or a lesser estate, their principles may also be analogized to deeds granting easement rights.

Particularly relevant to our inquiry are the principles that a habendum clause “can only affect the grant when it can be construed as consistent with” the rights in the land and cannot “divest[] the estate already vested by the granting clause.” *Smith*, 71 Mich at 640-641. Because the granting clause in this case clearly gave plaintiff the right to “construct and maintain one or more lines of gas mains,” we decline to read the habendum clause to undermine this conveyance and render the construction of a second pipeline a mere future interest. Instead, we read the habendum consistently with the granting clause to describe the circumstances under which the use right may be exercised. And in context, we do not read the habendum clause to clearly restrict the granting clause. See *Thompson*, 330 Mich at 9. Thus, because the right-of-way agreement conveyed a present estate as to the second pipeline, not a future estate, the conveyance does not violate former MCL 554.14 or former MCL 554.15.

We likewise reject defendants' argument that the easement for the second pipeline was an option that expired. Defendants cite *Rex Oil & Gas Co v Busk*, 335 Mich 368, 373; 56 NW2d 221 (1953), for the proposition that when "an option agreement contains no provision as to its duration, rights thereunder must be exercised within a reasonable time, the extent of which must be determined in the light of the circumstances of the case." Defendants thus urge that 75 years is an unreasonable timeframe to exercise the option, especially given that the agreement specified a contemporaneous price. They seek to distinguish the case from *MacDonald*, 193 Mich App at 573-576, in which this Court, considering an easement somewhat like that in the present case, rejected the defendants' argument that the agreement created only an option to construct a second pipeline. In *MacDonald*, the granting clause conveyed an easement for activities concerning "a pipeline or pipelines" "until said easement is exercised and so long thereafter as any facility installed hereunder is used or remains on said land." *Id.* at 573-574. The habendum clause provided for several conditions "[s]hould more than one pipeline be installed under this agreement," including the compensation to be paid and specifying the location and positioning for additional pipelines. *Id.* at 574. This Court rejected the defendants' argument that the conveyance merely created an option to install a second pipeline partly because "[t]he agreement very clearly gives [the] plaintiff the right to construct more than one pipeline" *Id.* at 575.

Our analysis follows *MacDonald*. The granting clause here unambiguously gives plaintiff the present right to construct more than one pipeline, not merely a future option. And the duration of the conveyance stated in the granting clause is "[f]orever." For the "reasonable time" principle from *Rex Oil* to apply, an option agreement must arise "by the express language of the instrument." *Id.* at 576. No such language appears in the right-of-way agreement in this case. That the habendum provides more specificity regarding the number of pipelines, timing of construction in the case of multiple pipelines, and compensation to be paid does not render the right to construct a second pipeline a contingent option that expires if not exercised.

In sum, we reject defendants' arguments that the part of the right-of-way agreement granting the right to build a second pipeline is void because it is a future interest or an option.

C. COUNTERCLAIM FOR INJUNCTIVE RELIEF

Defendants also contend that the trial court erred by dismissing their counterclaim for injunctive relief. Because this issue is unpreserved, we decline to address it.

Defendants argue that the trial court erred because it failed to apply MCL 600.2919(3)(a), which recognizes a cause of action and provides for injunctive relief when there is threatened destruction of trees and the trespass is of a continuing nature. However, defendants did not cite this statute in pleading their counterclaim, in their summary-disposition briefing, or elsewhere in the trial court proceedings. Under the "raise or waive" rule of appellate review in Michigan, litigants must preserve issues for appellate review. *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, 347 Mich App 280, 289; 14 NW3d 472 (2023) (citation omitted). "To preserve an issue, the party asserting error must demonstrate that the issue was raised in the trial court." *Id.* "Moreover, the moving party must show that the same basis for the error claimed on appeal was brought to the trial court's attention." *Id.* Here, defendants did not bring MCL 600.2919(3)(a) to the trial court's attention, and it appears to be the only basis for defendants' argument that the trial

court's dismissal of their counterclaim for injunctive relief was in error. Therefore, the issue is unpreserved.

This Court need not consider an issue that a litigant failed to preserve in the trial court. *Id.* We decline to address this unpreserved issue here.

D. ATTORNEY FEES

Lastly, defendants contend that the trial court erred by awarding attorney fees to plaintiff. Plaintiff counters that this Court lacks jurisdiction to consider this issue because the order granting costs and fees was not a final order under MCR 7.202(6)(a)(i). We agree with plaintiff.

This Court has jurisdiction over an appeal by right filed by an aggrieved party from a final judgment or final order of the circuit court. MCR 7.203(A)(1). A final judgment or order under MCR 7.203(A)(1) includes “a postjudgment order awarding or denying attorney fees and costs under court rule or other law.” MCR 7.202(6)(a)(iv). See also *Mathew R Abel, PC v Grossman Investments Co*, 302 Mich App 232, 243; 838 NW2d 204 (2013) (“[P]ostjudgment orders awarding attorney fees or costs constitute final orders appealable as of right under MCR 7.203(A)(1).”). However, our Supreme Court has held that an order that directed appellants to pay attorney fees and costs as sanctions was not a final order because the amount of attorney fees and costs had not been determined. *In re Hemminger Estate*, 463 Mich 941, 941; 620 NW2d 852 (2000). And in *John J Fannon Co v Fannon Prod, LLC*, 269 Mich App 162, 166; 712 NW2d 731 (2005), this Court reaffirmed the principle from *Hemminger* that “under the Michigan Court Rules . . . an order that merely grants the imposition of sanctions is not a ‘final order’ if the amount of fees and costs remains to be determined.”

Here, the order in question denied defendants’ motion for a temporary restraining order and preliminary injunction and awarded attorney fees and costs to plaintiff, but did not specify the amount of fees and costs awarded. Because the order did not determine the amount of costs and fees owed, it is not a final order under the court rule. See MCR 7.202(6)(a)(i); *Hemminger*, 463 Mich at 941; *John J Fannon Co*, 269 Mich App at 166. Accordingly, this Court lacks jurisdiction to review it. We will therefore dismiss this portion of defendants’ appeal without prejudice.

IV. CONCLUSION

To summarize, plaintiff has an easement through defendants’ property to build a second pipeline. There is no genuine issue of material fact that construction of the pipeline is necessary, but we reverse in part the trial court’s grant of summary disposition to plaintiff and remand to the trial court to determine whether the construction of the second pipeline—including the precise location of the new pipeline, the method of construction, and the accompanying disturbance to the surface of defendants’ land—unreasonably burdens defendants’ servient estate. See *Little*, 468 Mich at 701. The remainder of defendants’ arguments regarding the scope of the easement lack merit as indicated in this opinion. We also reject defendants’ arguments that the easement conveyance was void; we consider waived defendants’ argument that their counterclaim was improperly denied; and we lack jurisdiction to consider defendants’ argument regarding attorney fees.

Affirmed in part, reversed in part, dismissed in part without prejudice, and remanded for further proceedings consistent with this opinion. No costs are awarded, neither party having prevailed in full. MCR 7.219(A). We do not retain jurisdiction.

/s/ Randy J. Wallace
/s/ Thomas C. Cameron
/s/ Daniel S. Korobkin