STATE OF MICHIGAN

COURT OF APPEALS

MELVIN R. BERLIN REVOCABLE TRUST, RANDY LAMM BERLIN REVOCABLE TRUST, JANIS HEHMEYER TRUST, CAROL J. NEWTON REVOCABLE TRUST, JEAN I. SMITH REVOCABLE TRUST, and STEPHEN L. SMITH REVOCABLE TRUST,

Plaintiffs/Counterdefendants-Appellees,

v

THOMAS C. RUBIN, NINA D. RUSSELL, and 14288 LAKESHORE ROAD, LLC,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants,

and

SWIFT ESTATES ASSOCIATES, also known as SWIFT ESTATES ASSOCIATES, INC., CHRISTOPHER HEHMEYER, and STEPHEN L. SMITH,

Third-Party Defendants-Appellees.

UNPUBLISHED
July 20, 2023

No. 359300
Berrien Circuit Court
LC No. 2019-000034-CH

Before: SHAPIRO, P.J., and LETICA and FEENEY, JJ.

PER CURIAM.

Defendants/counterplaintiffs/third-party plaintiffs, 14288 Lakeshore Road, Thomas C. Rubin, and Nina D. Russell (collectively, defendants) appeal as of right the injunction and judgment entered in favor of plaintiffs, Melvin R. Berlin Revocable Trust, Randy Lamm Revocable Trust, Janis Hehmeyer Trust, Carol J. Newton Revocable Trust, Jean I. Smith Revocable Trust, and Stephen L. Smith Revocable Trust (collectively, plaintiffs). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Swift Estates is comprised of 10 large lots with nine homes spread over 22 acres; a private road (Swift Lane); a private beach on Lake Michigan; a private tennis court, and a pathway and stairs that go through a ravine to the beach. Seven of the nine homes are owner-occupied for at least six months of the year. Each of the plaintiff-trusts owns a lot in Swift Estates.[1] Defendant 14288 Lakeshore Road, LLC (Lakeshore LLC), formed for the benefit of Laura and Scott Malkin. They purchased Swift Estates' Lot 8 and began renting the property in 2012. They reside in London, England. Defendants Thomas Rubin and Nina Russell, husband and wife, purchased Lot 5, and live in Washington.

Historically, Swift Estates owners occasionally rented their homes to family and friends. Scott and Laura Malkin, through Lakeshore LLC, acquired Lot 8 in 2011.[2] According to Laura Malkin, being able to rent their Swift Estates home when they were not using it was an important factor in their decision to purchase the home. She asserted it was general knowledge that rentals were permitted in Swift Estates, and she claimed to receive confirmation of rentals through realtor Karen Strohl, and with the seller of the home. Shortly after they purchased the home, the Malkins signed a homeowner rental agreement with Aqua Vacation Rentals, which began to use its online platform to market the home as a seasonal vacation rental. Rentals began in summer 2012 and generated a number of complaints most revolving around the renters' use of the common properties, especially the subdivision's private beach. The complaints were addressed by Aqua Vacation Rentals and by the Malkins, who offered to adopt certain voluntary restrictions for their renters in response to the concerns of other owners. The Malkins' home rented 49 times from 2012 to 2018.

Rubin and Russell purchased their home in Swift Estates in 2017. Russell attested that being able to rent the home when they were not using it was critical to their decision to purchase it because the rental income offset the expenses of ownership. Rubin and Russell asserted that their broker, Strohl, contacted the president of the Swift Estates Association, the homeowners association that oversees Swift Estates, and was advised that rentals were permitted in Swift Estates. Rubin and Russell contracted with Aqua Vacation Rentals, which rented their home several times from 2018 to 2020.

Over the years, there was debate regarding whether rentals were allowed, and a formal opinion was eventually requested. The Association's attorney opined that short-term, transient

---

[1] The Melvin R. Berlin Revocable Trust, whose trustee is Melvin Berlin, and the Randy Lamm Berlin Revocable Trust, whose trustee is Randy Lamm Berlin, own Lot 2; the Randy Lamm Berlin Revocable Trust also owns Lot 1. The Janis Hehmeyer Trust, whose trustee is Christopher Hehmeyer, owns Lot 9. The Carole J. Newton Revocable Trust, whose trustee is Carole J. Shortlidge, owns Lot 6. The Stephen L. Smith Revocable Trust, whose trustee is Stephen Smith, and the Jean I. Smith Revocable Trust, whose trustee is Jean Smith, own Lot 3; the Jean I Smith Revocable Trust also owns Lot 4.

[2] For convenience, and to be consistent with the parties' practice in the trial court and in their briefs to this Court, the plaintiff-trusts are referred to as "plaintiffs" or by the names of their trustees.

rentals were not allowed, nor was renters' use of the common properties. The owners were advised of this opinion, and a special meeting of the Association was held to discuss the matter. When a consensus could not be reached, plaintiffs filed a complaint for declaratory and injunctive relief to enforce the Declaration that governed property use in Swift Estates. After the trial court issued a ruling that the Declaration did not allow short-term rentals, defendants counterclaimed against plaintiffs for acquiescence, unclean hands, equitable estoppel, laches, and waiver. Defendants also raised claims against third-party defendants, Stephen L. Smith and Christopher Hehmeyer, in their official capacities as Association officers for fraudulent misrepresentation, negligent misrepresentation, and silent fraud. Defendants later amended their third-party complaint to add Smith and Hehmeyer as defendants in their individual capacities, and added additional claims.

Ultimately, the trial court granted summary disposition in favor of plaintiffs addressing the interpretation of the Declaration.[3] The trial court entered a permanent injunction prohibiting defendants from "all renting or leasing of their respective Swift Estates properties that do not have a single family residence purpose, as provided for in the July 15, 1977 Declaration of Covenants and Restrictions . . . including the enjoinment of short-term vacation rentals by Defendants which were [the] subject of this action." The injunction restricted use of the common properties to "lot owners/members, their respective resident family members, or those duly delegated tenants who reside upon the respective property instead of the lot owners/members under a leasehold interest" as long as "the names and relations of all such resident family members and/or delegated tenants to the lot owners/members have been provided to the Swift Estates Association's Secretary in writing." Defendants now appeal.

II. STANDARDS OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Empire Iron Mining Partnership v Tilden Twp*, 337 Mich App 579, 586; 977 NW2d 128 (2021). Summary disposition is appropriate under MCR 2.116(C)(10) if there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition challenged under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and other admissible 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)(4), (G)(5); *Buhl v City of Oak Park*, 507 Mich 236, 242; 968 NW2d 348 (2021).

III. RESTRICTIVE COVENANTS

Defendants contend that the trial court erred in its interpretation of the deed restrictions to exclude rentals and improperly imposed dictionary definitions. We disagree.

The interpretation of restrictive covenants presents a question of law that this Court reviews de novo. *Mazzola v Deeplands Dev Co, LLC*, 329 Mich App 216, 223; 942 NW2d 107 (2019). The interpretation of a contractual agreement also presents a question of law subject to de novo

[3] The trial court rejected the claims of waiver, acquiescence, and fraud. The parties dismissed other claims to which the trial court did not grant summary disposition.

review. *Conlin v Upton*, 313 Mich App 243, 254; 881 NW2d 511 (2015). "[D]eed restrictions allow landowners to preserve the neighborhood's character." *Thiel v Goyings*, 504 Mich 484, 496; 939 NW2d 152 (2019). A covenant is a contract created with the intent to enhance the value of property and constitutes a valuable property right. *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002); *Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515; 686 NW2d 506 (2004). "Deed restrictions preserve not only monetary value, but [also] aesthetic characteristics considered to be essential constituents of a family environment." *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007) (quotation marks and citation omitted). Because the foundation of a covenant lies in contract, the intent of the drafter is deemed controlling. *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 628; 761 NW2d 127 (2008).

Restrictive covenants are examined on a case-by-case basis. *O'Connor v Resort Custom Builders*, 459 Mich 335, 343; 591 NW2d 216 (1999); *Aldrich v Sugar Springs Prop Owners Ass'n*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 359664), slip op at 3. Restrictive covenants are strictly construed against the party seeking enforcement and any doubt must be resolved in favor of the free use of property. *O'Connor*, 459 Mich at 341; *Huntington Woods*, 279 Mich App at 628. When the intent of the parties may be clearly ascertained, the courts must give effect to the whole instrument. *Hickory Pointe Homeowners Ass'n*, 262 Mich App at 515-516. Nonetheless, the intention to limit the use of property to maintain a residential neighborhood of a specific character, if established by proper instruments, are favored by definite public policy. *Terrien*, 467 Mich at 72. The designated right to live in a district free from stores, garages, businesses, and apartment buildings is a valuable right. *Id*. The nullification of such restrictions would create an injustice to those property owners because the right of privacy in the home is a valid property right. *Id*. "It is the function of the courts to protect such rights through the enforcement of covenants." *Id*. Despite the rules of application pertaining to construction of a restrictive covenant, they must not be applied in a manner to defeat the plain and obvious purposes of the contractual instrument or restriction. *Brown v Hojnacki*, 270 Mich 557, 560; 259 NW 152 (1935).

> [A restrictive covenant] is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, the purpose of the restriction, whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers, and whether it was in pursuance of a general building plan for the development and improvement of the property. [*Id*.]

The entity's articles of incorporation, operating agreements, and bylaws are intended to govern the future conduct of the entity and its members. *Aldrich*, ___ Mich App at ___, slip op at 3. These governing documents allow the parties to preserve desired aesthetic or other characteristics in their neighborhood. *Id*., slip op at 4. We must not engage in a party's tortured attempt to read an ambiguity into a restrictive covenant that does not exist. *Eager v Peasley*, 322 Mich App 174, 188; 911 NW2d 470 (2017).

A residential purpose is the one place where a person lives as their permanent home, and, when applying that standard, a summer home cannot constitute a permanent residence when a person's domicile is in another location. *O'Connor*, 459 Mich at 345. In a residence, a person

lives, has a permanent presence, and stores their belongings there, even when they are not at home. A residence reflects permanence and a continuity of presence. *Id*. Occasional rentals do not alter the character of a subdivision, do not defeat the original purpose of the restrictions, and do not result in a waiver of restrictions. *Id*. at 346. Additionally, short-term rentals violate a restrictive covenant barring commercial use of a property. *Eager*, 322 Mich App at 191. The act of renting property to another for short-term use presents a commercial use despite the fact that the activity is residential in nature. *Terrien*, 467 Mich at 63-64.

IV. THE COVENANTS

In June 1977, restrictive deed covenants for Swift Estates were recorded with the register of deeds and stated in pertinent part:

> Swift Estates, Inc., a Michigan corporation, being the owner and dedicator of all the land in the plat of Swift Estates situated in Chikaming Township, Berrien County, Michigan, for and in consideration of the covenants and restrictions herein contained, do hereby declare that said plat shall be subject to the following restrictions:
>
> If any owner or owners of any lot or lots in said plat shall violate or attempt to violate any of the covenants herein, they shall be liable to prosecution and proceedings at law or in equity, to restrain any person or persons violating or attempting to violate any such covenant and to recover damages resulting to him or them from such violation.

In July 1977, the Declaration of Covenants and Restrictions (Declaration), was recorded, and Art 1, § 1, delineated this purpose:

> The Developer is the owner of that certain real estate located in Berrien County, Michigan as described in Exhibit A attached hereto and made a part hereof which has been subdivided and provision made in said subdivision for *common properties designed for the private use of owners in said subdivision*, except as otherwise provided herein. The Developer desires to provide for the preservation of the values and amenities in said subdivision and for the maintenance of the common properties therein and to this end desires to subject the real property described in Exhibit A to the covenants, restrictions, easements, charges and liens hereinafter set forth, each and all of which is and are for the benefit of said property and each owner thereof. [Emphasis added.]

To ensure that the developed properties were of good and attractive design, in harmony with the area's natural setting, preserved and enhanced the existing natural area setting, and assessment of the workmanship of improvements, an architectural review committee (ARC) was established to approve and disapprove of pertinent matters. The Declaration, Art III. Therefore, no building, fence, wall, or other structure could be commenced, erected, or maintained on the properties unless submitted to and approved by the ARC. Additionally, plans and specifications and changes to the property grade had to be submitted to the ARC.

In Art 4, § 1, addressing land use, the Declaration stated:

> No lot shall be used for other than single family residence purposes. No lot shall be improved with other than one single family residence structure and one accessory building structure designed for use in conjunction with the residence as a private garage or servants' quarters for accommodation of owner's servants, or both, except that the Committee in its discretion may authorize one additional accessory building structure on a lot. No structure may be erected or maintained on any lot except as shall be approved in writing by the Committee. The living area of a single family residence shall not be less than 1,600 square feet in the case of a one-story structure, and not less then 2,200 square feet in the case of a one and a one-half or two story structure. No structure shall exceed two stories in height. Notwithstanding the foregoing provisions, no existing structures on any lot shall be deemed to violate the provision of this Section 1, except that existing structures shall be used only for single purposes or as an accessory building structure with respect thereto.

In Art II, § 1, the terms pertaining to single family were defined as:

> (e) "Single family residence" shall mean any dwelling structure on a lot intended for the shelter and housing of a single family.
>
> (f) "Single family" shall mean one or more persons each related to the other by blood, marriage, or adoption, or a group of not more than three persons not all so related together with his or their domestic servants, maintaining a common household in a residence.

The Declaration established requirements addressing the quality of the design, workmanship, and materials utilized in the construction of any structure. And, the location of any building, driveway, and culvert had to be submitted to the ARC for a determination of setback lines, although the property owner had the opportunity to recommend their desired construction site. Art IV, §§ 3-4.

The Declaration also addresses nuisances in Art IV, § 5, stating:

> No noxious or offensive activity shall be carried on in or upon any premises nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood. No plants or seeds or other things or conditions harboring or breeding infectious plant diseases or noxious insects shall be introduced or maintained upon any lot.

The Declaration also addressed maintenance of the lots and gave the Association the authority to remedy any inappropriate condition by a special assessment. Furthermore, the Declaration governed the placement of materials on the property, the location of the garbage receptacles and fuel tanks, and the screening of those objects if placed outside.

In the Declaration, Art IV, § 10 addressed other prohibited matters:

> No animals other than unoffensive domestic household pets such as dogs and cats shall be kept on any lot. No home occupation or profession shall be conducted on any lot except as may be authorized by the Committee.

Art VIII, § 1, addressed the duration of the covenants and restrictions and any change thereto:

> The covenants and restrictions herein contained shall run with and bind the land, and shall inure to the benefit of and be enforceable by the Association or any owner, his representatives, heirs, successors and assigns for a period of 20 years from the date this Declaration is recorded after which time said covenant shall be automatically extended for successive periods of 10 years unless an instrument signed by the then owners of 8 lots has been recorded agreeing to change said covenants and restrictions in whole or in part or to revoke the same provided that no such agreement of change or revocation shall be effective unless made and recorded one year in advance of the effective date of such change.

The bylaws of Swift Estates did not appear to be recorded. However, in Art III, § 2, addressing property rights and enjoyment of common properties, it stated:

> Any member may delegate his rights of enjoyment in the Common Properties and facilities to the members of his family who reside upon The Properties or to any of his tenants who reside thereon under a leasehold interest. Such Member shall notify the secretary in writing of the name and relationship of any such person. The rights and privileges of such person are subject to suspension as stated herein to the same extent as those of the Member.

V. ANALYSIS

As noted, we must apply the rules pertaining to construction of restrictive covenants in a manner consistent with the plain and obvious purposes of the instrument. *Brown*, 270 Mich at 560. The restrictive covenant is construed in light of the surrounding circumstances, the parties' intent at the time the covenant was written, the location and character of the entire tract of land, the restriction's purpose, the nature of the benefit and whether it was designed to aid the grantor, grantee, and subsequent purchasers, and whether it was designed to support the general building plan of the community. *Id*. And, an individual's rental of their residential property, even for short-term use, constitutes commercial use even when the activity is residential in nature. *Terrien*, 467 Mich at 63-64. Applying these rules, we conclude that defendants' rentals of the properties is contrary to the Declaration, Art IV, § 1 that states that "[n]o lot shall be used for other than single family residence purposes."

The Declaration was recorded in 1977, and at that time, the property was composed of various lots with access to a private beach. Although the lots were spread across 22 acres, the ARC was created to ensure quality of buildings and materials, control over the number of buildings to include either servant quarters or a garage, limitations on setbacks, and even the location of garbage cans and their screening to prevent an eyesore. Thus, it is apparent that the Declaration was designed to ensure uniformity in the buildings and design. The plain language of the

restrictive covenants only provided for single family residences on the lots, and there was no provision for short-term or other rentals in the Declaration. And, at the time the Declaration was created, the Swift Estate lots were not advertised on internet-related rental sites,[4] but attracted a clientele desirous of a private community environment.[5] Plaintiffs had the right to contract that their properties would be limited in their nature and free from business purposes.

Additionally, it is apparent that defendants did not utilize their property as a single family residence. Defendants, as purchasers of the properties, did not use the properties as a permanent home, and a summer home cannot constitute a permanent residence when their domicile is in another location. *O'Connor*, 459 Mich at 345. In the present case, defendant purchasers either resided in England and Washington. Defendants did not delineate the extent to which they stored their belongings at their homes. Instead, their use was intermittent and inconsistent with a single family residence; it did not reflect permanence and a continuity of presence generally associated with a single family residence but rather, a vacation home. *Id.*[6]

Defendants further submit that the trial court erred in failing to conclude that there were factual issues regarding acquiescence and waiver. However, occasional rentals by other members did not alter the character of a subdivision, did not defeat the original purpose of the restrictions, and did not result in a waiver of restrictions. *O'Connor*, 459 Mich at 346. Moreover, the plain language of the Declaration expressly provided that the "[f]ailure by the Association or any owner to enforce any covenant or restriction in no event shall be deemed a waiver of any right to do so thereafter." The Declaration, Art VIII, § 3. In light of this plain language, the trial court did not err in granting summary disposition of these claims in favor of plaintiffs. *Conlin*, 313 Mich App at 254.

Lastly, defendants submit that the trial court erred in dismissing the claims of fraudulent and negligent misrepresentation. To establish common-law fraud or fraudulent misrepresentation,

---

[4] Consequently, it was unlikely that the drafter of the Declaration envisioned that unrelated parties from near and far would become aware of Swift Estate properties and demonstrate a disregard for neighboring property owners, including trespassing, commandeering the neighbors' personal property, and inappropriately using the common areas during the middle of the night.

[5] Defendants asserted that the rentals of Swift Estate properties were well-known and widespread. But member testimony indicated that the rentals were generally to "strong referrals" such as family, friends, or community members and for a lengthy period of time. Apparently, residents in nearby communities that renovated their homes sought to lease Swift Estate homes during the construction. The member testimony did not reflect prevalent leasing by plaintiffs.

[6] Defendants submitted that the trial court improperly considered a dictionary definition when examining the single family residence provision, failed to conclude that express exclusions meant that rentals were permitted by an omission to their reference, improperly examined other portions of the Declaration not raised by the parties, and failed to deem the Declaration ambiguous such that free use of the property was appropriate. The trial court was entitled to examine the Declaration as a whole and apply the plain language to the applicable caselaw. *Conlin*, 313 Mich App at 254.

a defendant must make a false representation of material fact with the intention that the plaintiff would rely on it, the defendant must either know at the time that the representation was false or make it with reckless disregard for its correctness, and the plaintiff must actually rely on the representation and suffer damage as a result. *Alfieri v Bertorelli*, 295 Mich App 189, 193; 813 NW2d 772 (2012). "A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care."[7] *Id*. at 194 (citations and quotation marks omitted). In Michigan, fraud is not presumed but must be established by clear and convincing evidence. *Deschane v Klug*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 360677), slip op at 6. Fraud cannot be perpetrated on a party who has full knowledge that a representation is actually to the contrary. *Titan Ins Co v Hyten*, 491 Mich 547, 555 n 4; 817 NW2d 562 (2012); *Montgomery Ward & Co v Williams*, 330 Mich 275, 284; 47 NW2d 607 (1951). There is no duty at common-law to acquire such knowledge. *Titan Ins Co*, 491 Mich 555 n 4. However, a party claiming fraud cannot succeed if given direct information refuting the misrepresentations. *Id*.

In the present case, defendants failed to demonstrate clear and convincing evidence of fraud, either purposefully or negligently, by Smith or Hehmeyer. As an initial matter, defendants failed to identify clear statements by either Association member made directly to Rubin, Russell, and the Malkins before the purchase of their respective properties. Rather, defendants relied principally on communications between Smith and real-estate agent Strohl, not a direct conversation with Smith or Hehmeyer at the time of their respective purchases. See *Buhl*, 507 Mich at 242. Defendants failed to demonstrate that this hearsay presented clear and convincing evidence of fraud. *Id*. Furthermore, defendants apparently were given the Declaration as well as the covenants and restrictions and did not question any conflict between the bylaws reference to "tenants" and the Declaration's limitation of the premises to single family residential purposes

[7] Smith, as Association president, was a long-term Swift Estates resident and was in his mid-70s. He was not an attorney. Strohl asked Smith to submit documents for Rubin and Russell's review; however, he was rushed to provide the documentation before he left the state and would not have access to the documents. There is no indication that Smith was aware that a representation regarding rentals was false. Rather, when other members questioned the rental activity at Swift Estates, Smith received a legal opinion about the Declaration and the restrictive covenants that did not permit defendants' rentals. Further, as Russell testified, she was aware that rentals were occurring because she was related to Laura Malkin, who had purchased her property years earlier and engaged in rentals. Despite the definition of a single family residence, Rubin did not question the provision or retain an attorney at that time to question its validity.

only. Indeed, when Strohl questioned defendant Rubin about the attorney that would handle the closing, Rubin, an attorney, opted not to retain an attorney for the transaction despite raising an issue pertaining to title insurance. Under the circumstances, the trial court did not err in dismissing these claims.[8]

Affirmed.

/s/ Douglas B. Shapiro
/s/ Anica Letica
/s/ Kathleen A. Feeney

[8] Finally, defendants asserted that the trial court erred in its entry of an injunction and judgment that did not limit its scope to short-term rentals only. The trial court's judgment mirrored the language of the documents governing the Association, and therefore, no error occurred. The parties were free during the litigation and thereafter to enter into an agreement to engage in long-term rentals to a clientele premised on a referral system that apparently did not disrupt the nature and character of the Swift Estates community.