STATE OF MICHIGAN

COURT OF APPEALS

RICHARD BATCHELDER, ELAINE BATCHELDER, JAMES D'ARCY, and CHRIS D'ARCY,

Plaintiffs-Appellants,

v

GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan corporation, and GRAND TRUNK WESTERN RAILROAD, INCORPORATED, a Delaware corporation,

Defendants,

and

STATE OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
August 16, 2002

No. 228876
Lapeer Circuit Court
LC No. 98-026945-CZ

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

In this property case, plaintiffs, Richard and Elaine Batchelder and James and Chris D'Arcy, appeal by right from the trial court's grant of summary disposition in favor of defendant State of Michigan. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

On November 23, 1882, Nathaniel and Mary Ann Morrison sold a fifty-foot strip of land in Lapeer County to the Pontiac Oxford and Port Austin Railroad Company, on which a railroad track was constructed and operated. Although it is not clear from the record exactly how, Grand Trunk Western Railroad Company, whose successor corporation was Grand Trunk Western Railroad Incorporated, became the successor-in-interest. When Grand Trunk Western Railroad Incorporated stopped using the railroad, it sold the land to the State of Michigan ("defendant") which intended to convert the land into a recreational walking trail.

Plaintiffs own adjoining parcels of land through which the railroad ran and objected to the land's conveyance to defendant. Plaintiffs contended that when the land ceased to be used

for railroad purposes, it reverted to plaintiffs. Plaintiffs filed a complaint which alleged six counts: (I) abandonment of easement; (II) ejectment; (III) breach of covenant; (IV) nuisance; (V) diminution in property value; and (VI) local zoning violation. On April 27, 2000, defendant filed a motion for summary disposition, which the trial court granted and dismissed all of plaintiffs' claims. This appeal followed.

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition of all or part of a claim or defense may be granted when

> [e]xcept as to the amount of damages, 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).]

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra* at 337. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000).

Plaintiffs first argue that the 1882 deed executed between the Morrisons and the Pontiac Oxford and Port Austin Railroad Company only conveyed a restrictive easement, which reverted back to the grantors when the land ceased to be used for railroad purposes. Defendant argues that the deed conveyed a fee simple with no reversion rights, and we agree.

Courts must follow the plain language in a deed if there is no ambiguity. *Taylor v Taylor*, 310 Mich 541, 545; 17 NW2d 745 (1945). The deed was entitled "Rt. of way." However, contrary to plaintiffs' assertion, this language is not determinative as to the type of conveyance the deed intended. As our Supreme Court explained,

> "Right of way" has two meanings in railroad parlance: the strip of land upon which the track is laid, and the legal right to use such strip. In the latter sense it may mean an easement. But in this State and others the character of the title taken to the strip depends on the language of the conveyance. [*Quinn v Pere Marquette Railway Co*, 256 Mich 143, 150; 239 NW 376 (1931).]

Thus, it is possible that the heading "Right of Way" was merely an indication that the deed was conveying a strip of land. Therefore, we must turn to the language of the conveyance.

The pertinent transfer language read:

> Nathaniel Morrison and Mary Ann Morrison of Arcadia County of Lapeer and State of Michigan, in consideration of One Hundred and Forty Dollars ($140.00) to them in hand paid by the Pontiac Oxford and Port Austin R. Cos., the receipt of which is hereby acknowledged, have granted bargained and sold, and by these presents do grant, bargain sell and Forever Quit-Claim unto the said

> Pontiac Oxford and Port Austin Railroad Company and to its assigns, all those certain land and premises, situated in the County of Lapeer, and State of Michigan described as follows. To wit: - Fifty feet in width with sufficient for slope, on the route of their Railroad from the City of Pontiac to the Village of Caseville, in Huron County, over and across the following land to wit: The West half of the South East Quarter of Section Fifteen Town Eight North of Range Eleven East Lapeer Co. State of Michigan.
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> The purpose of the grant was set forth in the deed as follows:
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> > Provided, that said lands hereby conveyed, shall be used for the purpose of constructing and maintaining a Railroad, and the appurtenances thereto, and for no other purpose whatever. Together with all and singular, the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and all the state, right, title, claim and demand of the said parties of the first part both legal and equitable: To Have and to Hold said above granted premises to the said party of the second part, and its assigns, for the uses herein expressed, but for no other uses, Forever.

Where the grant is not of the land, but is "of the or for the use of the right of way", or of the land specifically for the right of way, the conveyance is an easement. *Quinn, supra* at 150. However, "[w]here the land itself is conveyed, although for railroad purposes only, without specific designation of a right of way," the conveyance is a fee simple. *Id*. at 150-151. The *Quinn* Court further explained that the law favors construing a deed to convey a fee simple, and provisions indicating another type of conveyance are construed against the grantor. *Id.* at 151.

There are indications in the deed which evince a fee simple in the land was conveyed, rather than an easement. First, the word "easement" or the phrases "right of" or "right to use" do not appear in the body of the deed. Second, the conveyance was for "certain lands and premises" and the deed also refers to the "lands hereby conveyed." Therefore, we hold that the deed conveyed a fee simple and not an easement.

We must now determine what type of fee was conveyed. If the grant contained a reverter clause, then the deed conveyed a fee simple determinable subject to a condition subsequent. *Quinn, supra* at 152; *Epworth Assembly v Ludington & Northern Railway Co*, 236 Mich 565, 573; 211 NW 99 (1926). The deed in the present case contained the phrase, "Provided, that said lands hereby conveyed, shall be used for the purpose of constructing and maintaining a Railroad, and the appurtenances thereto, and for no other purpose whatever." The words "provided that" plus a right of re-entry provision[1] would create a fee simple determinable subject to a condition subsequent. Restatement of the Law of Property, § 45, p 139 (1936). Because the deed at issue did not contain a right of re-entry provision, a fee simple was conveyed. *Quinn, supra* at 151-152. Therefore, plaintiffs held no reversionary interest in the property and the trial court properly dismissed their abandonment of easement claim.

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[1] Such a provision may have stated that the grantor "may enter and terminate the estate hereby conveyed" or an indication that title will revert to the grantors. Restatement of the Law of Property, § 45, p 139 (1936); *Epworth*, supra at 574.

Plaintiffs also argue that this phrase constituted an express covenant. The deed in *Quinn* stated that the land conveyed was "to be used for railroad purposes only." *Quinn, supra* at 146. The Court concluded that "where there is no reverter clause, a statement of use is merely a declaration of the purpose of conveyance, without effect to limit the grant." *Id*. at 151. The Court explained that the reasoning for this was because a railroad company could "take real estate only for railroad purposes, the declaration that it is to be so used is merely an expression of the parties that the deed is for a lawful purpose." *Id*. Thus, the phrase placed no restriction on the land's use and defendant was "free to do with the property as it wishe[d]." *O'Dess v Grand Trunk Western Railroad Company*, 218 Mich App 694, 700; 555 NW2d 261 (1996).[2] Therefore, the trial court did not err in granting summary disposition as to plaintiffs' breach of covenant claim.[3]

Plaintiffs next argue that the trial court erred when it dismissed their nuisance (count IV) and diminution in value (count V) claims as too speculative.[4] We disagree. "To prevail in nuisance, a possessor of land must prove significant harm resulting from the defendant's unreasonable interference with the use or enjoyment of the property." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich 51, 67; 602 NW2d 215 (1999), emphasis in original omitted. The tort contemplates an existing interference.

When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In their complaint, all of plaintiffs' allegations regarding interference with the use or enjoyment of their property involve *possible future* interferences. They alleged no "facts" regarding existing harm or interference, only speculation as to potential outcomes with no supporting documentary evidence.

Furthermore, an injunction to prevent an anticipated nuisance may only be issued where the nuisance is practically certain, strongly probable, or an inevitable consequence. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 490; 608 NW2d 531 (2000). Plaintiffs asserted that the use of the land as a recreational trail "will result in hundreds of people

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[2] We recognize that, on its face, the phrase at issue in this case could be construed as an express covenant. However, we are also cognizant of the fact a separate body of property law has been created regarding railroads, and *Quinn* specifically involved the conveyance of a piece of land to a railroad. Therefore, because the Supreme Court has not overruled *Quinn*, we are bound to follow its holding, as was this Court in *O'Dess, supra*.

[3] Based on the trial court's reasoning and the case upon which it relied, it is apparent that the trial court concluded no implied covenant existed in the deed. A trial court's decision will be affirmed on appeal if it reached the right result, even if for an alternative reason. *Lavey v Mills*, 248 Mich 244, 250; 639 NW2d 261 (2001). Because plaintiffs did not assert on appeal that the phrase constituted an implied covenant, we decline to address it.

[4] Plaintiffs argue that the trial court was required to accept as true the assertions in their complaint. Plaintiffs would be correct if summary disposition regarding these claims had been granted pursuant to MCR 2.116(C)(8). However, it is clear from the record that the trial court granted summary disposition pursuant to MCR 2.116(C)(10)—no genuine issue of material fact existed.

per hour frequenting and using the trail during the Summer, and other seasonal, months" and that they would be unable to freely hunt, trap, recreate outdoors. Again, plaintiffs offer no evidence to support that their dire predictions are practically certain to occur.

Similarly, in support of their diminution in value claim, plaintiffs asserted that they will have fewer potential buyers of their property because of the lack of freedom to recreate outdoors, noise, heavy use, and liability associated with the trail. However, plaintiffs presented no documentary evidence from area realtors or even potential buyers to support their allegations. Therefore, we hold that the trial court did not err when it dismissed plaintiffs' counts IV and V.

Plaintiffs further argue that the trial court erred in dismissing its count VI. Plaintiffs asserted that defendant was in violation of the local zoning ordinance because the trail was to be used for recreational purposes and the area through which it passed in Arcadia Township was zoned agricultural residential. In dismissing this claim, the trial court relied on *Bingham Twp v RLTD Railroad Corp*, 237 Mich App 538; 603 NW2d 795 (1999). At issue in that case was whether development of a piece of land formerly used as a railroad corridor, which was deeded to Leelanau Trails Association by RLTD, was subject to the local zoning ordinances. *Id*. at 539-541. The Court held that the Michigan trailways act ["MTA"] did apply to the case and that the trail was a "Michigan trailway" as defined by the act. *Id*. at 545-546. The Court further held that the MTA preempts local zoning control of a Michigan trailway. *Id*. at 552-553.

Subsequently, our Supreme Court reversed that case. *Bingham Twp v RLTD Railroad Corp*, 463 Mich 634; 624 NW2d 725 (2001). The Court held that the trail in that case was not a "Michigan trailway" because the trail had not been designated as such by the Commission of Natural Resources, and thus, the MTA was inapplicable. *Id*. at 644. The case was then remanded. The Court declined to decide the issue of whether the MTA preempts local zoning authorities because the MTA was not applicable in that case. *Id*. at 645.

It appears from the record that the trial court assumed that the trail in the present case was a "Michigan trailway." However, we can find no evidence of this in the record that the trail had been designated as such by the Commission of Natural Resources. Therefore, we reverse the trial court's grant of summary disposition regarding plaintiffs' count VI and remand in order for the trial court to consider the issue in light of our Supreme Court's decision in *Bingham*.

Finally, we address plaintiffs' motion for a preliminary injunction, which the court denied on July 20, 1999. This Court reviews a trial court's decision whether to grant injunctive relief for an abuse of discretion. *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001).

Because we have affirmed the trial court's dismissal of plaintiffs' counts I, III, IV, and V, plaintiffs' request for a preliminary injunction is moot with regards to these counts.[5] Plaintiffs only remaining claim involves defendant's alleged violation of the local zoning ordinance, and, therefore we review the trial court's denial of a preliminary injunction with respect to this issue only. We conclude that plaintiffs have not demonstrated that they will suffer irreparable harm,

[5] Plaintiffs did not appeal the trial court's dismissal of count II.

which is "an indispensable requirement to obtain a preliminary injunction." *Michigan Coalition of State Employee Unions, supra* at 225-226. If the recreational trail was found to be a violation of the local zoning ordinance, defendant could be ordered, if necessary, to cease its operation and restore the land to its previous state. Additionally, it appears that defendant has voluntarily refrained from developing the trail pending the outcome of this litigation. Therefore, the trial court did not abuse its discretion in denying plaintiffs' motion for a preliminary injunction.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White