

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM VanBYNEN, CHARLOTTE
VanBYNEN, BERNICE ROZWOD, RANDY
VanBYNEN, ELLEN VanBYNEN, JON ZEEFF,
JOSEPH McGUIRE, and SANDRA McGUIRE,

UNPUBLISHED
April 14, 2009

Plaintiffs-Appellants,

v

No. 282726; 284333
Livingston Circuit Court
LC No. 04-021161-CK

BUHL BURTON, JoANN BURTON, FRANK
DAY, TERESA DAY, DENNIS GRABOW,
CHRISTINE GRABOW, TIMOTHY
PRZYSIECKI, RENEE PRZYSIECKI, MARK
WOOD, and BARBARA WOOD,

Defendants-Appellees,

and

RICHARD BAKKA and JENNIFER BAKKA,

Defendants.

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Plaintiffs appeal as of right the dismissal of all four counts of their complaint against defendants. The trial court granted summary disposition in defendants' favor on three counts; the fourth proceeded to trial, and the trial court granted defendants' motion for dismissal after the conclusion of plaintiffs' proofs. Defendants appeal as of right the trial court's subsequent denial of their motion for attorney fees and costs. We affirm the trial court in its entirety.

This case involves deed restrictions applicable to the property surrounding Sunset Lake in Hamburg Township, Livingston County. The property was purchased in 1956 by Stanley and Bernice Rozwod ("Rozwod"). It consisted of five numbered lots in the Supervisors Plat of Fernlands subdivision ("the Fernlands lots"), which had been platted in 1932; it also consisted of an undivided, wooded area surrounding Sunset Lake. The Fernlands lots did not have any frontage on Sunset Lake, and they were accessed by a road through the Fernlands subdivision. In 1973, Rozwod divided the property into "Parcel 1" and "Parcel 2." Rozwod sold Parcel 2 to

Buhl Burton. The legal description of Parcel 1 included the Fernlands lots.¹ All the deeds and deed restriction documents at issue in this matter were properly recorded.

In 1979, Rozwod sold Parcel 1 to Conrad Ganzhorn III, Inc (“CGI”) on a land contract that explicitly anticipated CGI reselling Parcel 1 in smaller lots, each of which was to be individually released from the land contract under certain conditions. Pursuant to the terms of the land contract, eleven blank deeds were placed in escrow, and as CGI paid off portions of the land contract, several were actually released to CGI. CGI had a survey performed and split the undivided portion of Parcel 1 into nine lots: A, B, C, D, E, F, G, H, and I. Joseph McGuire entered into a purchase agreement with CGI for lot C, although McGuire did not close on the transaction until 1982. The survey was not recorded until 1980.

In 1980, Burton, as owner of Parcel 2, and CGI entered into an “Agreement Establishing Land Use Restrictions” (hereinafter, the “Restrictions Agreement”). The Restrictions Agreement stated that Parcels 1 and 2 surrounded Sunset Lake, and “the owners desire to adopt a plan to assure that the existing quiet, wooded environment of the lake and its shoreline is not disrupted as a result of the future use and development of their said lands.” Among other provisions, “Parcel 1 shall be divided into 11 lots, none of which shall be further subdivided.”

In 1981, CGI, Burton, and Ian Higgins² entered into a “Modification to Agreement Establishing Land Use Restrictions” (hereinafter, the “Modification”). The Modification referred to the Restrictions Agreement and to the survey. It also changed two parts of the Restrictions Agreement, which originally provided that (a) each owner of each lot other than Parcel 2 would be responsible for one eleventh of various expenses, and (b) the terms could be amended by a recorded instrument executed by at least nine lot owners, including Parcel 2. The Modification altered these provisions to make each lot owners other than Parcel 2 responsible for one ninth of the enumerated expenses, and to make the terms amendable by vote of seven lot owners, including Parcel 2.

CGI subsequently defaulted on the remainder of the land contract. CGI and Rozwod entered into a mutual release agreement that included, among other things, an “assignment of land contract” stating that CGI “conveys and Warrants to [Rozwod] the land above described subject to any restriction upon the use of the same”

McGuire split lot C and sold one of the created sub-parcels to John Zeeff. Rozwod split lots D, E, and H, and conveyed various portions thereof. Rozwod conveyed lot I to William and Charlotte VanVynen. The VanBynens split lot I and conveyed one sub-parcel to Hamid and Sheila Kia. It is undisputed that all of the property owners in this matter were either actual parties to the deed restriction documents or took their property by a conveyance explicitly stating that it was subject to encumbrances of record. Indeed, Zeeff negotiated a lower purchase price

¹ As we discuss *infra*, the Fernlands lots have no role in this litigation.

² Higgins had, by this time, purchased one of the split parcels, lot A, from CGI.

from McGuire, in part based on Zeeff's discovery of the deed restrictions. Again, it is significant that all of the deeds at issue stated that they were subject to any encumbrances of record.

Although a few houses were constructed, the area remained mostly undeveloped woodland, and it apparently remains in that state today.³ Although plaintiffs apparently began splitting their lots as early as 1995, there was no evidence that defendants had any knowledge thereof until at least 1998; indeed, the plaintiffs did not even know about each others' lot splits until later. In 1998, the VanBynens sought a variance from Hamburg Township, and at that meeting, several neighbors raised objections to the VanBynens splitting their lot. The Township approved the VanBynens' request with the admonition that doing so did not affect the deed restrictions, which were a civil matter. A neighborhood meeting took place in 2000, the exact details of which are unclear, but it appears that in this time period, McGuire and Zeeff attempted to persuade the neighbors to revise the deed restrictions, but that approval was not obtained.

In 2002, plaintiffs recorded a "Second Modification to Agreement Establishing Land Use Restrictions" (hereinafter the "Second Modification"). In significant part, the Second Modification listed all of the split parcels and their owners, and it recognized them as valid. In 2004, defendants recorded a "Repudiation of 'Second Modification to Agreement Establishing Land Use Restrictions'" (hereinafter the "Repudiation"), which in significant part stated that the Second Modification was invalid because it had only been agreed to by five of the required seven votes: Rozwod had three votes as owner of lots D, E, and H; McGuire had one vote as owner of lot C, and the VanBynens had one vote as owner of lot I. The Repudiation was signed by the owners of Parcel 2 and lots A, B, F, and G, for a total of six votes because by that time Parcel 2 had been properly split into two lots.

Plaintiffs then commenced this action. The complaint alleged four counts: Count I, slander of title; Count II, quiet title/declaratory relief; Count III, tortious interference with contract and/or advantageous business relationship and/or expectancy; and Count IV, waiver, acquiescence, abandonment, estoppel, change of conditions, and laches. The trial court granted summary disposition in favor of defendants on the first three counts, and the matter proceeded to trial on the equitable theories. After the conclusion of plaintiffs' proofs, the trial court granted defendants' motion for dismissal. Thereafter, the trial court denied defendants' motion for attorney fees and costs. Both parties have appealed.

"We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). We review de

³ None of the houses are alleged to violate any of the deed restrictions. Although defendant Frank Day constructed a shed on his property that plaintiffs alleged was too close to the lake, plaintiffs presented no evidence that it actually was, and they further admitted that they did not even attempt to measure it.

novo a trial court's ultimate decision whether to grant a motion for involuntary dismissal pursuant to MCR 2.504(B)(2), under which "on the facts and the law the plaintiff has shown no right to relief," but the trial court's underlying factual findings will not be disturbed unless this Court is definitely and firmly convinced that the trial court made a mistake. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). We review de novo a trial court's grant of summary disposition and a trial court's interpretation of a contract. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

As an initial matter, we have reviewed the record carefully, and we are satisfied that all of the learned trial judge's factual findings are amply supported. We additionally note that plaintiffs' equitable theories are typically considered to be defenses, rather than causes of action, but because we agree with the trial court's conclusion that plaintiffs failed to demonstrate the requisite elements of any of them, the unusual procedural posture is of no consequence.

We note initially that plaintiffs' equitable theories are typically considered to be defenses, not causes of action. Nevertheless, the trial court did not make any clearly erroneous findings of fact, and on the basis of those factual findings, its legal conclusions regarding the equitable theories set forth in plaintiffs' Count IV were correct: plaintiffs failed to demonstrate that the requisite elements of any of them had been satisfied. The entirety of Count IV was premised on the general theory that defendants had failed to enforce the deed restrictions and/or had themselves violated those deed restrictions, and as a consequence they were no longer equitably entitled to enforce those deed restrictions. We disagree.

"A waiver is a voluntary relinquishment of a known right." *McDonald, supra* at 204, quoting *Dahrooge v Rochester German Ins Co*, 177 Mich 442, 451-452; 143 NW 608 (1913). A waiver entails "an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted upon." *Warren v Crane*, 50 Mich 300, 301; 15 NW 465 (1883). It is logically necessary, therefore, for a party to have full awareness of any material facts in order to make a truly voluntary and intentional decision to waive a right. See *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718; 179 NW2d 252 (1970).

Acquiescence simply means some kind of consent or agreement that is implied from a lengthy period of peaceful inaction when presented with something to which a party could object. "The doctrine of estoppel by acquiescence presupposes that the party against whom the doctrine is asserted was guilty of inaction." *B.P.A. II v Harrison Twp*, 73 Mich App 731, 735; 252 NW2d 546 (1977). It is a venerable doctrine as to settling property line disputes:

It has been held very generally, that when there has been an honest difficulty in determining the lines between two neighboring proprietors, and they have actually agreed by parol upon a certain boundary as the true one, and have occupied accordingly with visible monuments or divisions, the agreement long acquiesced in shall not be disturbed, although the time has not been sufficient to establish an adverse possession. Where the transaction has not been such as to amount merely to an honest attempt to determine a doubtful line, the authorities have not permitted an agreement to stand which would operate as a violation of the statute of frauds. But where the parties have only tried to find the true boundary, it has

been held that the statute was not infringed, and the line was fixed by acquiescence. [*Smith v Hamilton*, 20 Mich 433, 438 (1870).]

However, a “mere act of acquiescence” is not sufficient. *Wood v Denton*, 53 Mich App 435, 439-440; 219 NW2d 798 (1974). There are three theories of legal acquiescence: acquiescence for the statutory period of fifteen years, acquiescence in a mutual agreement following a dispute, and acquiescence based on a description in a subsequent deed. *Pyne v Elliott*, 53 Mich App 419, 426-428; 220 NW2d 54 (1974). As with waiver, it is not logically possible to “acquiesce” in something without knowledge that there was something in which to acquiesce or without some genuine uncertainty as to the matter in which the party has allegedly acquiesced.

“Two requirements must be met to establish abandonment. First, it must be shown that there is an intent to relinquish the property and, second, there must be external acts that put that intention into effect. Nonuse alone is insufficient to prove abandonment.” *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 717-718; 583 NW2d 232 (1998) (internal citation omitted). Whether this applies to property or to rights, it is again clear that one cannot intentionally abandon something without knowledge that one is doing so.

Taking waiver, acquiescence, and abandonment together, all three legal concepts require the party against whom they are asserted (in this case, defendants) to have had knowledge of something (in this case, plaintiffs’ violations of the deed restrictions) and to have acted in a way that, at a minimum, reflected a lack of interest. In other words, as defendants correctly conclude, plaintiffs were required to show that defendants knew about the lot splits and that defendants *minimally* did nothing at all in response to that knowledge. The trial court correctly found that none of these three doctrines could have applied. The testimony showed that none of the plaintiffs gave notice to any of their neighbors – or even each other – that they were splitting their lots. When defendants did become aware of split lots, they reacted by protesting at a township meeting, apparently telling Zeeff that they would not approve of an amended set of deed restrictions permitting lot splitting, and recording a repudiation of the Second Amendment to the deed restrictions. The trial court’s factual findings are not clearly erroneous, and on the basis thereof, plaintiffs have shown no right to relief on the basis of waiver, acquiescence, or abandonment.

We presume that by “change of conditions,” plaintiffs refer to the doctrine under which deed restrictions may be lifted if the nature of the area changes so drastically from the conditions under which the restrictions were created that it has become inequitable to enforce those restrictions. See generally, *Rofo v Robinson*, 415 Mich 345; 329 NW2d 704 (1982). It is unnecessary for this Court to consider what kind of changes would warrant application of this doctrine, because the testimony uniformly and firmly agreed that, other than the legal establishment of more, smaller parcels around Sunset Lake, the heavily wooded character of the area was unchanged. As a consequence, “change of conditions” cannot apply; again, plaintiffs have shown no right to relief on the basis of change of conditions.

The doctrine of laches will operate to bar the enforcement of some claim where there has been a lack of due diligence by the claimant that has resulted in some prejudice to the party against whom the claim is asserted. *Regents of Univ of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 734; 650 NW2d 129 (2002). In the absence of some demonstrated prejudice caused thereby, a lack of diligence alone is not sufficient to warrant application of the doctrine of

laches. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 97; 572 NW2d 246 (1997). Put another way, the applicability of laches turns on the effects of a lack of diligence rather than the bare fact of it, as would be the case with a statute of limitations. *Lothian v City of Detroit*, 414 Mich 160, 167-168; 324 NW2d 9 (1982). However, a delay that is neither unexcused nor unexplained will also not trigger application of laches. See *Public Health Dept v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996).

The trial court found that whatever prejudice plaintiffs suffered was entirely their own doing. Plaintiffs did not notify defendants of their lot splits, so until defendants *did* learn of those splits, any delay in doing anything about them would have been both explained and excused. Zeeff purchased his lot from McGuire after acquainting himself with the fact that there was a problem with the deed restrictions that he concluded posed a low risk. The Kias purchased their lot before defendants were given any notice, and they have done nothing since then in reliance on defendants' actions or inactions. The VanBynens were made aware that defendants did not intend to permit violations of the deed restrictions, and the VanBynen children took their lots as gifts. No construction has taken place on any of the property that would, if the lot splits were rescinded, violate the original deed restrictions. The trial court did not commit clear error in making its factual finding that no prejudice resulted from defendants' inaction; as a consequence, plaintiffs have not shown any right to relief on the basis of the doctrine of laches.

Finally, plaintiffs assert that equitable estoppel bars defendants from enforcing the deed restrictions because defendants *themselves* engaged in violations thereof. "For equitable estoppel to apply, plaintiff[s] must establish that (1) defendant[s'] acts or representations induced plaintiff[s] to believe that the [deed restrictions] would not be enforced, (2) plaintiff[s] justifiably relied on this belief, and (3) [they were] prejudiced as a result of [their] reliance on [their] belief that the [restrictions] would not be enforced." *McDonald, supra* at 204-205. Additionally, failure to take any efforts to halt violations of some deed restrictions does not nullify those restrictions or preclude later efforts to halt other such violations, but "[o]nly if the present violation constitutes a 'more serious' violation of the deed restriction." *Bloomfield Estates v Birmingham*, 479 Mich 206, 219; 723 NW2d 910 (2007).

Plaintiffs assert that a host of violations of the deed restrictions were ignored for many years, some since their very inception. Among these,⁴ it was undisputed that no environmental quality committee was ever formed, no homeowners' association was formed until 2001, the homes that were constructed did not receive the approval of the (nonexistent) quality committee, lots C, D, E, H, and I were split, and no enforcement efforts were undertaken regarding the deed restrictions for more than twenty years. However, plaintiffs' argument relies in significant part on defendants' failure to commence a lawsuit to enforce the lot splits. Plaintiffs concede, and the testimony shows, that the other violations were relatively minor and had no practical effect on the area or anyone living in the area. As to the lot splits, defendants contended that they believed

⁴ Plaintiffs also point out that CGI allegedly split Parcel 1 into fourteen lots, rather than the eleven permitted in the first deed restrictions. This is contrary to the trial court's correct finding, discussed *infra*, that the Fernlands Lots were not part of the deed restriction scheme at all.

it would be sufficiently effective that the township admonished the VanBynens that they had to comply with the deed restrictions, and in any event, as discussed, the lot splits were not done with notice to defendants. A party does not lose the right to pursue a suit on the basis of first attempting to resolve a perceived problem in a less-expensive and less-dramatic manner. Furthermore, we find no clear error in the trial court's factual analysis of the seven "relevant factors" set forth in *Bloomfield Estates, supra* at 219-220. The trial court found that defendants' violations had no practical effect on the area surrounding Sunset Lake, but the increased number of lots, particularly if construction were to commence on them, would result in an affirmative finding under all seven factors.

In summary, the trial court did not make any clearly erroneous findings of fact, and on the basis of those factual findings, its legal conclusions regarding the equitable theories set forth in plaintiffs' Count IV were correct and should be affirmed. Plaintiff has failed to show that it has a right to relief on any of the grounds on which this matter went to trial.

Plaintiffs additionally contend that the trial court erred in dismissing the other counts of their complaint. We disagree.

Plaintiffs' Count I alleged slander of title, and plaintiffs' Count III alleged tortious interference with a contract or business expectancy. Slander of title requires proof "that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages." *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). Malice can have either of two meanings: "a desire or intention to injure" or "a wrongful act, done intentionally, without just cause or excuse." *Glieberman v Fine*, 248 Mich 8, 12; 226 NW 669 (1929). "The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy by the interferer, (3) an intentional and wrongful interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship or expectancy was disrupted." *PT Today, Inc v Commissioner of Office of Financial and Ins Services*, 270 Mich App 110, 148; 715 NW2d 398 (2006). A plaintiff alleging tortious interference must show that the defendant committed an act that is inherently wrongful and unjustifiable under any circumstances; or the plaintiff must provide specific, affirmative acts demonstrating that the defendant's acts had an unlawful purpose. *Badiee v Brighton Area Schools*, 265 Mich App 343, 367; 695 NW2d 521 (2005). Merely asserting a right that one does not ultimately prove to possess is insufficient, by itself, to constitute malice. *Glieberman, supra* at 12.

Defendants correctly asserted, and the trial court correctly concluded, that both causes of action ultimately require proof of some kind of malice. Specifically, that defendants' recordation of the Repudiation was done with the actual intention of injuring plaintiffs, or that defendants' recordation of the Repudiation was an intrinsically wrongful act. Plaintiffs' complaint did *allege* malice. However, pursuant to MCR 2.116(C)(10), plaintiffs essentially conceded that they had no evidence thereof and could not even show that such evidence would be forthcoming, arguing that they had not yet deposed anyone "to determine, you know, the mind set and why they did what they did." The only evidence of malice plaintiffs presented in their brief was legal conclusions about the nature of the deed restrictions that were ultimately, and correctly, rejected. The trial court did not specify under which court rule it granted summary disposition, but this Court will affirm the correct result even if it is for the wrong reasons. *Shember v Univ of*

Michigan Medical Ctr, 280 Mich App 309, 329; ___ NW2d ___ (2008). Plaintiffs failed to present any evidence to the trial court suggesting even the possibility of a genuine question of fact for trial. Therefore, summary disposition was proper pursuant to MCR 2.116(C)(10).

Plaintiffs' Count II, for "quiet title/declaratory relief," asserted that CGI did not have the authority to execute the deed restrictions, and even if it did, the Fernlands lots are included and therefore are entitled to vote to change the deed restrictions. Thus, plaintiffs contend either that the initial deed restrictions are not binding or that the initial deed restrictions were properly amended. We disagree and find that the trial court properly dismissed this count.⁵

As the trial court correctly found, "[a] vendor who takes from his vendee a voluntary surrender of a contract takes it subject to all the obligations assumed by the latter to third parties and is, therefore, obligated to perform his vendee's contract." *Stark v Robar*, 339 Mich 145, 153; 63 NW2d 606 (1954), citing *Woodward v Clark*, 15 Mich 104, 111 (1866). Significantly, our Supreme Court explained that any burdens placed on the property by a land contract vendee would vanish *pursuant to summary forfeiture or foreclosure proceedings*. But a voluntary surrender and assignment, particularly where, as here, doing so was "'subject to restrictions of record,'" constitute "clear evidence of [the vendor's] intent to fulfill his vendee's obligation and to carry out the general agreement of restrictions for the subdivision." See *Stark, supra* at 152-153. The trial court therefore correctly found that the deed restrictions here are valid and binding notwithstanding the fact that they were entered into by a land contract vendee. Although the original Restrictions Agreement was only signed by the land contract vendee's owner in his *personal* capacity, the First Modification, which incorporated the Restrictions Agreement by reference, was executed by the owner in *both* his individual *and* corporate capacities. To the extent the Restrictions Agreement was defective, the trial court correctly found the defect cured by the First Modification. Both were valid and binding.

Deed restrictions are contracts and interpreted as such: if they are unambiguous and are not illegal, the courts may not construe them and must enforce them precisely as they are written. *Bloomfield Estates, supra* at 212-214. A contract is ambiguous if it contains terms that irreconcilably conflict or are equally susceptible to more than one meaning; whether a contract is ambiguous is a question of law, but if it is, the proper meaning is a question of fact. *Coates v Bastian Brothers, Inc.*, 276 Mich App 498, 503-504; 741 NW2d 539 (2007). The trial court found that there was an ambiguity in the deed restrictions regarding the Fernlands lots: although the formal property description included them, they were not mentioned again thereafter and, as the trial court found, treating them as included in the Sunset Lake deed restrictions made no sense in light of their practical independence and the purpose of the deed restrictions.

⁵ Although the trial court initially identified "the heart of the matter" as whether the Fernlands lots were entitled to vote to change the deed restrictions, the trial court also initially denied a motion by plaintiffs for summary disposition on the ground that the meaning of "owners" in the deed restrictions was ambiguous. Plaintiffs assert that the trial court erred. Defendants do not address this challenge, but we conclude that, because the trial court reached the correct result on other grounds, including a finding of ambiguity in the deed restrictions, it is unnecessary for us to address this issue, either.

The trial court determined that inclusion of the Fernlands Lots in the Sunset Lake deed restrictions was simply not compatible with the restrictions' stated purpose of protecting the environment of Sunset Lake. Supporting the trial court's conclusion was deposition testimony from one of the parties to the restrictions documents. Additionally, construing a contract against the drafter is an interpretation methodology of last resort, *Klapp, supra* at 474, but plaintiffs here are the drafters and grantors, whereas defendants were all grantees. The trial court's "common sense" approach to resolving the ambiguity, and its finding that the Fernlands Lots were not part of the deed restrictions scheme, is not clearly erroneous.

The trial court also concluded that the number of lots was ambiguous. It is not disputed that the original Restrictions Agreement provided for eleven lots to be created out of Parcel 1, consistent with escrowing eleven blank deeds. The trial court found that only nine lots were *actually* created. The First Modification reduced the pro-rata contribution of each property owner to infrastructure costs from one-eleventh to one-ninth. The First Modification also explicitly referred to the survey that depicted the creation of nine lots out of Parcel 1. Furthermore, the original Restrictions Agreement provided for amendments by a vote of seven parcels, which would be a majority of eleven, whereas the First Modification reduced the number of necessary votes to five, which would be a *minority* of eleven but still a majority of nine. However, the First Modification failed to change the total number of lots into which Parcel 1 was to be divided. As a consequence, the trial court correctly found that the deed restrictions were open to multiple interpretations regarding the total number of lots – the changes all suggested a reduction to nine, but the actual reduction did not occur. Again, it was not clear error for the trial court to conclude that the "common sense" interpretation was that there were a total of nine lots permitted under the First Modification, rather than eleven.

Plaintiffs finally assert that they actually had the requisite number of votes, even without the Fernlands Lots. The trial court disagreed, as do we. Plaintiffs were the owners of lots C, D, E, H, and I. This gave them a total of five votes under the nine-lot scheme, which is an insufficient number. Plaintiffs' attempt to add additional lots by inclusion of the Fernlands lots or by their improper lot splits was rejected by the trial court; to do so would amount to "ratifying a violation of the restriction agreement."

Defendants then contend that the trial court erred in denying their motion for attorney fees and costs. We disagree. Attorney fees and costs are generally not recoverable by the prevailing party in a lawsuit unless they are specifically authorized by a court rule, statute, or contractual provision. *Watkins v Manchester*, 220 Mich App 337, 342; 559 NW2d 81 (1996). Contractual provisions for recovery of attorney fees by a prevailing party in the event of a dispute are enforceable by the courts, and the resulting award is considered to be damages rather than costs. *Fleet Business Credit v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007).

Defendants asserted that they were entitled to attorney fees and costs under the terms of the deed restrictions. The parties agree that the relevant language in the Restrictions Agreement is as follows:

The agreements and restrictions herein contained are for the benefit of the owners of Parcels 1 and 2 (hereinafter called lotowners [sic]), and may be enforced at any time by any owner of any portion thereof by an action to restrain

violation, to recover damages or to secure such other relief as may be appropriate. Failure to act in the enforcement of this agreement with respect to any violation shall not prevent its enforcement with respect to any other violation.

Defendants concede that the Restrictions Agreement does not explicitly provide for “attorney fees,” but assert that “damages” or “other relief as appropriate” should include attorney fees anyway.⁶ Although this language is open-ended, it is in the context of damages and enforcement, suggesting that it was intended to permit property owners to recover for any kind of harm they suffered due to a violation of the deed restrictions, not for the harm generally incurred in pursuing a lawsuit. The “American rule” obligates parties to pay for their own suits in the absence of an explicit provision to the contrary. The Restrictions Agreement is simply not so explicit. The trial court’s result was therefore correct. Attorney fees are not recoverable for any party under the deed restrictions.

In summary, the trial court decided this lengthy and complex matter correctly in all respects. Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis

⁶ Plaintiffs contend that defendants cannot recover attorney fees or costs because they are not the party who commenced an actual lawsuit. We disagree. The broad language only requires a party to engage in some kind of action in the lay sense. More importantly, plaintiffs’ Count IV consisted of allegations that are more properly considered defenses than causes of action, suggesting that, procedural posture notwithstanding, even plaintiffs considered themselves to be in a defensive posture regarding the deed restrictions’ enforcement.