STATE OF MICHIGAN

COURT OF APPEALS

B.P. PRODUCTS NORTH AMERICA, INC., Plaintiff-Appellee,	UNPUBLISHED August 25, 2009
v	No. 284954 Wayne Circuit Court
CANTON HOLDINGS, L.L.C., Defendant-Appellant.	LC No. 06-616369-CZ

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

PER CURIAM.

In this action involving the applicability of a real property use restriction, defendant Canton Holdings, L.L.C. appeals as of right from the trial court's entry of a "Final judgment and injunction" that awarded relief to plaintiff BP Products North America, Inc. We affirm.

I. Factual and Procedural Background

A. Agreements Between the Parties

The parties do not dispute the basic facts underlying their dispute. Hakim Fakhoury owns Canton Holdings, which since 2000 has operated a gas station and car wash on a divided parcel of land at 125 Canton Center Road in Canton. The property is split into two parcels that the parties refer to as Parcel A and Parcel B. BP's initial interest in 125 Canton Center dates back to October 1989, when Amoco Oil Company, BP's predecessor in interest, leased Parcel A to construct and operate a gas station for a term extending between January 1, 1990 and December 31, 2012. In September 1992, Amoco purchased Parcel B.

According to a Canton Holdings flow chart documenting ownership and possession of 125 Canton Center, Canton Holdings entered the picture when "[i]n 1998 Hakim Fakhoury, owner of Defendant Canton Holdings, L.L.C., purchased the gas station operation business, and its goodwill, from . . . a[n] Amoco Sublessee." In early 2002, Canton Holdings commenced negotiations with BP concerning its purchase of BP's leasehold interest in Parcel A and BP's fee simple interest in Parcel B. The Canton Holdings-BP negotiations yielded an October 2002 "Purchase and sale agreement," pursuant to which Canton Holdings agreed to assume the remainder of BP's lease of Parcel A and to purchase Parcel B from BP.

The purchase and sale agreement culminated in February 2003, when BP conveyed Parcel B to Canton Holdings by "[c]ovenant deed," the parties signed an "Assignment and conveyance of lease and improvements" with regard to Parcel A, and the parties executed a "Dealer supply agreement" that contemplated BP's provision of fuel to Canton Holdings "for a period of 5 years beginning on 2/26/03 . . . and ending on 2/25/08 . . . ." In a separate transaction on February 26, 2003, Canton Holdings obtained via warranty deed from third parties ownership of Parcel A. The parties' dispute on appeal focuses on the ongoing validity of use restriction language contained in the purchase and sale agreement, the covenant deed, and the lease assignment.

Section 5 of the October 2002 purchase and sale agreement, denominated "Use Restriction," sets forth the following:

> The Property shall be assigned and conveyed by BP and accepted by Buyer subject to a restriction and covenant prohibiting for a period of fifteen (15) years from the date the Deed and Lease Assignment are recorded, the use of the Property in whole or in part, directly or indirectly, for automobile service station, convenience store, car wash, automobile repair purposes, or for the sale, offering for sale, storage or distribution of any gasoline, motor vehicle fuels, lubricants, tires, batteries, automotive parts and accessories, other petroleum products or convenience store items. Such restriction and covenant of Buyer shall run with the Property for the benefit and protection of any adjoining property of BP and/or other property of BP used and operated by BP or its representatives for such purposes within a distance of five (5) miles from the Property, whether owned or leased by BP or its representatives during said fifteen (15) year period. Such restriction and covenant shall not, however, prohibit the storage of motor fuels, lubricants, other petroleum products or convenience store items on the Property solely for the use or consumption by Buyer or other occupants of the Property. Notwithstanding the foregoing, so long as Buyer is (a) complying with all terms of the Supply Agreement, this Agreement and any other agreement between BP and Buyer, and (b) operating the Property pursuant to all such terms, BP conditionally waives its right to enforce the use restriction contained in this Section 5. This Section 5 shall survive Closing.

A note handwritten at the conclusion of § 5 reads, "See Exhibit A attached and incorporated herein." Exhibit A to the purchase agreement consists of an email message between Fakhoury and a BP representative stating in relevant part,

> In the event that Seller is no longer desirious [sic] of continuing to supply the Property as a BP, Amoco or affiliated company branded service station and, therefore, does not renew the Supply Agreement and Buyer is not in default of the Supply Agreement, then Seller hereby agrees to terminate the remainder of the use restrictions specified in the Deed.

The February 2003 Parcel A lease assignment contains in § 4 a use restriction nearly identical to the first four sentences of the above-quoted use restriction in purchase agreement § 5; however, the lease assignment use restriction omits the conditional use restriction termination language attached in exhibit A to the purchase agreement. The February 2003 covenant deed conveying

Parcel B from BP to Canton Holdings contains in § 2 a use restriction that almost identically tracks the first four sentences of the quoted use restriction from purchase agreement § 5, and in its fifth and final sentence incorporates language nearly mirroring the conditional use restriction termination language quoted above.

Also in February 2003, the parties signed an amendment to the dealer supply agreement pursuant to which BP agreed to pay Canton Holdings an "end-of-the-month allowance" or rebate calculated on the quantities of BP fuels that Canton Holdings had received. The dealer supply agreement amendment further contemplated, in pertinent part, the following:

> At any time, BP may cancel the above end-of-month and end-of-year allowances or either of them, on thirty (30) days written notice to Dealer, if in the opinion of BP competitive conditions no longer warrant payment. In the event that BP cancels the end-of-month and end-of-year allowances or either of them, the parties may either renegotiate the terms of the Agreement or either party may terminate the Agreement with thirty (30) days advance written notice to the other party subject to the terms of the Agreement.

In May 2005, BP assigned to Armada Oil and Gas Company, a BP "jobber" or distributor of fuels, "all of its obligations and duties of performance under" its dealer supply agreement with Canton Holdings.

B. Trial Court's Resolution of this Action

BP commenced this case in June 2006 by filing a one-count complaint alleging that Canton Holdings had violated a use restriction contained in documentation of a property transfer from BP to Canton Holdings. BP averred that Canton Holdings "has violated the Use Restriction by, among other things, selling non-BP gasoline on the Premises." On March 19, 2008, the trial court issued a lengthy bench opinion finding in BP's favor.

The court summarized the BP-Canton Holdings transactions in 2002 and 2003, then described the circumstances leading to the parties' present dispute:

> In May 2005, Plaintiff decided to get out of the distribution business of its gasoline products in southeastern Michigan. This was something it was doing around the country. Plaintiff entered into a Branded Jobber Contract with Armada on May 11, 2005. On May 17, 2005, Plaintiff entered into an Assignment and Assumption Agreement with Armada whereby Plaintiff assigned its Dealer Supply Agreements to Armada. This included the Dealer Supply Agreement with Defendant executed January 27, 2003.
>
> Problems ensued between Defendant and Armada. . . .
>
> * * *
>
> Armada was owned by Allie Berry. Berry and Hakim Fakhoury had a history of bad relations.

The end-of-the month allowances from Armada to Defendant were late from May 2005 through January 2006.

In a letter dated July 11, 2005 to Allie Berry of Armada, and copied to Plaintiff, Steve George, the attorney for Defendant, ... advised that the end-of-the-month allowances had not been received by Hakim Fakhoury. George further stated that the failure to make the payment of the allowances within 30 days following the end of the month shall result in termination upon written notice of the Supply Agreement and all other agreements between dealers and Armada.

It's not really clear from this letter if George is claiming that there's some provision in the Dealer Supply Agreement or the February 14, 2003 Amendment that would allow this or he was just claiming that this was a material breach of the contract that caused a termination.

* * *

Again, this Court makes no findings of fact or any determination at all regarding the disputes between Armada and Defendant. This is because the Court has only heard Defendant's side of the story.

* * *

On March 16, 2006, Marathon approved Defendant's gas station at 125 Canton Center to become a Marathon gas station.

At some point in time, and the time frame is not clear from the record, Gregg Levine, Plaintiff's regional sales manager for jobbers, had a discussion with Allie Berry in which he stated that he understood there was a situation with Hakim Fakhoury and asked whether there was a way to resolve the dispute to the satisfaction of Fakhoury, Berry, and Plaintiff. Berry responded that if something could be worked out where he would be left whole, he would be willing to do that. Levine asked John Soard, Plaintiff's jobber's sales manger for eastern Michigan, to pick it up and see if he could work something out. Soard spoke to Barrick Oil, another jobber for Plaintiff. Soard suggested that Barrick deliver to Hakim Fakhoury's gas stations. Barrick was not interested because he did not want to get in the middle of the dispute.

No other efforts were made by Plaintiff or its employees to resolve the dispute between Armada and Defendant or obtain an alternate jobber for Defendant. There were other jobbers available like Barron & Company, but Plaintiff never contacted Barron regarding supplying to Defendant and switching dealers with Armada. Soard only talked to Barron when he learned Barron was delivering gas products to Defendant in violation of the Dealer Supply Agreement between Armada and Defendant.

* * *

Although Hakim and Mohammed "Michael" Fakhoury, who ran the gas station at 125 Canton Center, did not want to change the Defendant's gasoline station from Amoco to Marathon, they made the decision to do so when the dispute with Armada could not be resolved.

The trial court then made several conclusions of law:

> The Purchase and Sale Agreement that was entered into between the parties is fairly clear that it was the intent of the parties that if Defendant was going to be assigned Plaintiff's rights under the lease with the Whelans [prior owners of both Parcel A and Parcel B] and the option to purchase Parcel A, as well as the right to purchase Parcel B from Plaintiff, Defendant was required under this Agreement to purchase Plaintiff's products and use them at the gas station.
>
> Now things become a little bit confusing when you look at the documents that subsequently were executed by the parties. That is because the Covenant Deed for Parcel B that was executed by the parties contained the Use Restriction. The Assignment that was executed by the parties regarding . . . Parcel A only contained that part of the Use Restriction that related to the fact that Parcel A was not to be used as a gas station, et cetera. The case law recognizes that if there is any doubt as to the exact meaning of the Use Restriction, the Court should consider the parties' intentions. . . .
>
> *It is very clear that the parties all intended that, in fact, there would be a Use Restriction at the gas station requiring Defendant to purchase Plaintiff's gasoline products and sell them at the gas station.* This is evidenced by facts like Hakim Fakhoury requested that the Use Restriction be less than 15 years or tied to the Supply Agreement, and the Plaintiff refused. It's also demonstrated by the evidence that, in fact, from the time that these documents were executed up until May of 2006, the parties operated under this Agreement. Plaintiff's products were purchased and sold with a few exceptions at the premises. *It was clearly the intention of the parties that, in fact, this Use Restriction apply to Parcel A. And this Court so finds as a matter of law*. [Emphasis added.]

The trial court next addressed whether through the doctrine of merger Canton Holdings's purchase of Parcel A from its original owners extinguished the use restriction contained in the prior BP-Canton Holdings lease assignment regarding Parcel A:

> Now, Defendant relies upon the case of *Refiners Oil Co v Low*, 28 Ohio NP 606, 1931 West Law [sic] 2234 (1931). And basically that case does have a somewhat similar factual scenario because in that case the Defendant acquired a number of parcels of property that he had previously leased, one from the Plaintiff that had a Use Restriction that the property could not be used as a gas station. And once he acquired the deed to the property . . . the Court held that, in fact, the lease was merged into the title . . . and the Use Restriction was extinguished.

> Now, Plaintiff says there's a distinction between that case and what happened here. And the distinction is in the Purchase and Sale Agreement, which is Exhibit 9, paragraph 23, which basically provides that even if Defendant obtains title, the Use Restriction continues. And I agree that is a distinction with the *Refiners Oil Company* case that requires me to hold that the Use Restriction in the lease was not extinguished by the Defendant obtaining title from the Whelans because of this paragraph 23.

The court then rejected Canton Holdings's suggestion that because BP never possessed title to Parcel A, it could not impose the use restriction on that portion of the property:

> Now, Defendant makes a similar argument with respect to stranger of title saying that Plaintiff never was in the chain of title for Parcel A and consequently, cannot attach a Use Restriction. And generally that is the rule. But again, paragraph 23 of the Purchase and Sale Agreement makes it clear that the parties agreed that, in fact, this would be the situation. And when the parties agreed that this would be the situation, they are bound by their contract. So I reject the Defendant's argument that the case law that enunciates the principle that a stranger to a title cannot impose a restriction on the land . . . appl[ies] to this case because of paragraph 23 in the Purchase and Sale Agreement.

The court subsequently ruled regarding Canton Holdings's position that the use restriction "in the Purchase and Sale Agreement" had terminated:

> . . . And basically the exception says this.
>
> "In the event that Plaintiff is no longer desirous of continuing to supply the property as a BP, Amoco, or affiliated company branded service station and, therefore, does not renew the Supply Agreement and buyer's not in default of the Supply Agreement, then seller hereby agrees to terminate the remainder of the Use Restriction specified in the deed."
>
> There are three elements here. The first element is that Plaintiff is no longer desirous of continuing to supply the property. The facts demonstrate that Plaintiff was desirous of continuing to supply the property. So that element is not met.
>
> The second element is that the Plaintiff does not renew the Supply Agreement. The Supply Agreement had not come to its conclusion. It was a five-year contract. It was actually terminated by Defendant when the dispute with Armada could not be resolved. Consequently, that element has not been proved also. Consequently, the exception does not apply. I make no finding with respect to whether Defendant was in default.

Before turning to BP's request for injunctive relief, the trial court lastly considered and rejected Canton Holdings's suggestion that Armada Oil's alleged suspension of the end-of-the-month allowances payable under the assigned and amended dealer supply agreement precluded enforcement of the October 2002 purchase agreement's use restriction:

> The next issue relates to this end-of-the-month allowance. And as I noted in my findings of fact, you cannot tell from Steve George [sic] letter if he is claiming a right to terminate the contract, that is, the Dealer Supply Agreement, because Armada . . . allegedly breached the Dealer Supply Agreement by not paying end-of-the-month allowances within 30 days of the . . . end of the month actually. Or there was some provision that he is relying upon that allows Defendant to terminate the Dealer Supply Agreement.
>
> Now, Plaintiff basically argued that under the February 14, 2003 Amendment, Defendant could only renegotiate or terminate the Dealer Supply Agreement if Plaintiff had given 30 days written notice that it was ending either the end-of-the-month allowance or the end-of-the-year allowance. And as my findings of fact indicated, there was no such evidence that, in fact, plaintiff and/or Armada ever gave written notice that it was ending the end-of-the-month allowance or the end-of-the-year allowance.
>
> If Steve George [sic] letter was based upon the February 14, 2003, Amendment to the Dealer Supply Agreement, then he is wrong. There is no right to terminate the Dealer Supply Agreement under that provision. I suspect he was not operating under that provision. I suspect he was operating under the rule of law that if a party commits a material breach of contract, then you can terminate a contract. *Again, with respect to that issue, I'm making no determination as to whether Armada committed a material breach of contract because as I said, I did not have Armada as a party to this lawsuit. And it's an issue I really do not need to resolve. All I am going to say about this issue is this. It doesn't affect the rights between Plaintiff and Defendant, whatever happened.* [Emphasis added.]

In concluding that it would grant BP's request for injunctive relief, the trial court explained that "when we are dealing with [violation of] Use Restrictions, you do not have to demonstrate irreparable injury." The court also declined to find that BP had unclean hands because it had the right to assign to Armada its responsibilities under the dealer supply agreement, and, notwithstanding its general policy to refrain from becoming involved in dealer-jobber disputes, BP did make an effort, although unsuccessful, to locate an alternate fuel distributor for Canton Holdings. The trial court then offered the following conclusory remarks:

> I can't find from any of this evidence that Plaintiff acted inequitably or in bad faith and consequently, and reluctantly, I must enter an injunction in this matter.
>
> I will say that I found both Hakim Fakhoury and Michael Fakhoury . . . very credible witnesses. And I do not believe for one second that the reason they changed the Defendant gas station from an Amoco to a Marathon was because Hakim Fakhoury wanted to further his interest as a jobber for Marathon Oil. It was very clear to me that he would have preferred to stay an Amoco gas station dealer but because the problems with Armada could not be resolved, he felt compelled to make the change and not because he had obtained a jobber contract . . . with Marathon Oil.

> The last issue is . . . Plaintiff has requested that I extend the restrictive covenant two years; that's because it was around . . . May 17th, 2006 when the conversion was made from Amoco to Marathon gas. It's now March 19th. It's going to be some period of time involved to make the conversion back if, in fact, Defendant decides to do that. Defendant has indicated that it may just close up shop at that location. And that may very well happen. But I will grant . . . Plaintiff's request to extend the restrictive covenant two years.
>
> And I say I do this with reluctance because all the problems started when [Plaintiff] made the decision to get out of the distribution business and place this jobber contract with Armada. And I really hate to give Plaintiff the relief that I'm giving because of the fact that their actions started the problem and they really did very little to try to resolve it. But it's in conformity with what the law requires and sometimes I must do things that I don't like to do, and this is one of those occasions. I'm not happy with my decision. I wish it could be the other way frankly.

The final judgment and order entered by the trial court enjoined Canton Holdings "from violating the use restriction contained in Paragraph 5 of the October 24, 2002 Purchase and Sale Agreement . . . regarding the real property located at 125 Canton Center South," which prohibits Canton Holdings through February 24, 2020 from "selling gasoline on the . . . property except as provided in Paragraph 5 of the" purchase agreement.

II. Stranger to Title

Canton Holdings first contends that the trial court incorrectly entered the injunction on the basis of the use restriction contained in the BP-Canton Holdings lease because "BP is a complete stranger to the title and cannot burden the property with any covenants or restrictions." Given that the parties do not dispute the relevant underlying course of events or the contents of the various documents related to their positions, whether BP held a sufficient interest in Parcel A to introduce the use restriction applicable to Canton Holdings constitutes a legal question that we consider de novo. *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 18; 654 NW2d 610 (2002).

Canton Holdings invokes one Michigan decision in support of its position that BP lacked an interest adequate to render the use restriction applicable to Canton Holdings's current fee simple interest in Parcel A, *Doxtator-Nash Civic Ass'n v Cherry Hill Professional Bldg, Inc*, 12 Mich App 468; 163 NW2d 262 (1968). The plaintiff in *Doxtator-Nash* sought injunctive relief mandating that the defendants remove a parking lot "on land alleged to be subject to restrictions," but the circuit court granted the defendants' motion for summary disposition, and this Court affirmed. *Id*. at 469-470. The passage cited by Canton Holdings involves the Court's examination whether the record supported a finding that reciprocal negative easements burdened the property in question, specifically the Court's observation, "Even more fundamental is the proposition that no property may be restricted in its use solely by the covenant of strangers to the title of such property." *Id*. at 471-472. The Court declined to find that negative reciprocal easements existed because the "[d]efendants' chain of title is free from any mutual covenants imposing building restrictions between defendants or their predecessors in title and any property owners in the subdivision." *Id*. at 472.

This case bears no similarity to the scenario presented in *Doxtator-Nash*. The primary and decisive difference constitutes the fact that BP does not qualify as a stranger to Canton Holdings's interest or title in Parcel A. As set forth within the underlying facts, BP held a 12-year leasehold interest in Parcel A with an option to purchase the property, which it assigned to Canton Holdings in 2003. In both the October 2002 purchase agreement and the February 2003 lease assignment, the parties undisputedly agreed to the plain and unambiguous terms of the use restriction broadly prohibiting non-BP service station-related activities on Parcel A for a period of 15 years. Canton Holdings simply offers no authority tending to establish that a possessor of a leasehold interest, like BP, that assigns its interest subject to a use restriction, amounts to a "stranger to title." *Hughes v Almena Twp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 279085, issued May 26, 2009), slip op at 11 (noting that a party's failure to cite sufficient authority for its position results in the abandonment of an issue on appeal).

III. Applicability of Use Restriction to Parcel A

Canton Holdings next maintains that contrary to the trial court's conclusion, the "terms of the Purchase Agreement between BP and Canton clearly and unambiguously establish that the Use Restriction applied only to Parcel B, and not Parcel A." Canton Holdings additionally points out that the deed pursuant to which they purchased Parcel A from third parties contained no use restrictions.

"Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are . . . reviewed de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). In interpreting a contract, this Court's obligation "is to determine the intent of the contracting parties." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). We must examine the contractual language and accord it "its ordinary and plain meaning if such would be apparent to a reader of the instrument." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). "If the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Products*, *supra* at 375. "Courts may not impose an ambiguity on clear contract language." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). A contract qualifies as ambiguous only when "two provisions irreconcilably conflict with each other, or when (a term) is equally susceptible to more than a single meaning." *Id*. (internal quotation omitted).

The Canton Holdings position that the purchase agreement use restriction only governs Parcel B rests in part on the agreement's first section, which sets forth the following:

> SALE. BP shall sell, assign and convey to Buyer and Buyer shall purchase from BP, upon and subject to the provisions of this Agreement: all of BP's right, title and interest in and to (a) that certain real property more particularly described in *Exhibit A* attached hereto, together with BP's right, title and interest in and to all buildings, structures and other improvements thereon and all easements appurtenant thereto ("Fee Property"), (b) BP's leasehold interest in and to that certain real property ("Leased Property") more particularly described in *Exhibit A* attached hereto, pursuant to that certain lease more particularly described in *Exhibit A* attached hereto, as said lease may have been amended from time to time ("Lease"), including without limitation rights of renewal and options

> to purchase, if any, set forth in the Lease, and all easements appurtenant to the Leased Property, and (c) all buildings, structures and other improvements on the Leased Property ("Improvements"), and (d) the certain equipment, movable assets and personal property listed in *Exhibit B* attached hereto ("Personal Property"), but excluding any advertising, trade names, trade marks, trade dress, service marks, signs, sign poles, slogans, identifications, copyrights or copyrighted materials of any BP Entity, as defined below ("Trade Marks"). *The Fee Property, Lease, Improvements and Personal Property are collectively (or individually, as the context requires) referred to herein as the "Property."* [Emphasis added.]

Canton Holdings suggests that because the use restriction language in purchase agreement § 5 refers solely to the term "Property," which according to the last sentence of § 1 does not encompass "Leased Property," the trial court erred in finding the use restriction applicable to Parcel A.

The structure of the first sentence in § 1 delineates in the four separate subheadings the different types of property that "Buyer shall purchase from BP": the "Fee Property," the "Lease" or "Leased Property," "Improvements," and "Personal Property." Notwithstanding that the last sentence of § 1 did not specifically refer to the term "Leased Property" mentioned in the prior sentence, the final sentence in § 1 plainly intends to reincorporate all four types of property into the agreement's subsequent references to "Property," unless the context of the agreement indicates otherwise. Section 1's ultimate sentence expressly includes in the broad category or definition of "Property" the "Lease" previously referenced, and the parties do not dispute that the only property that Canton Holdings ever leased from BP was Parcel A. Because § 1, when viewed as a whole, reasonably admits of only the interpretation that the parties intended Parcel A to fall within the purchase agreement's definition of "Property," and because § 5 of the purchase agreement plainly imposes the use restriction on this "Property," we conclude that the purchase agreement's use restriction clearly and unambiguously applies to Parcel A.

Even assuming that the trial court misconstrued the purchase agreement as extending the use restriction to Parcel A, we observe that the nearly identical use restriction in the February 2003 lease assignment plainly and unambiguously renders the restriction applicable to Parcel A. The lease agreement's first paragraph announces in relevant part as follows:

> That, BP Products North America Inc. (formerly Amoco Oil Company, successor in interest to BP Exploration & Oil Inc.) . . . ("Assignor"), for Ten Dollars . . . and other good and valuable consideration received to its full satisfaction from Canton Holdings, LLC, . . . ("Assignee"), . . . does hereby assign and convey to Assignee all of Assignor's right, title and interest in and to (a) BP's leasehold interest in and to that certain real property ("Leased Property") more particularly described in *Exhibit A* attached hereto, pursuant to that certain lease more particularly described in *Exhibit A* attached hereto, as said lease may have been amended from time to time ("Lease"), including without limitation rights of renewal and options to purchase, if any, set forth in the Lease, and all easements appurtenant to the Leased Property, and (b) all buildings, structures and other improvements on the Leased Property ("Improvements") . . . (*with (a) and (b) being collectively referred to herein as "Property"*), upon and subject to the terms, conditions and restrictions set forth herein and in the Agreement

("Assignment). Unless otherwise defined herein, all terms defined in the Agreement shall have the same meaning herein. [Exhibit G to BP's brief on appeal (emphasis added).]

Like the use restriction in the purchase agreement, the use restriction contained in the lease assignment clearly and unambiguously imposes on "the Property" a 15-year restriction on non-BP service station-related activities. Consequently, the lease assignment also plainly evidences the parties' intent that the use restriction applies to Parcel A.

IV. Extinguishment of Use Restriction by Merger

We next address Canton Holdings's assertion that the trial court should have deemed any use restriction extinguished. According to Canton Holdings, when it "became both the holder of the fee interest and the leasehold interest in Parcel A," "any purported Use Restriction on Parcel A was extinguished by the Doctrine of Merger." "Whether the merger doctrine applied to preclude the trial court from considering the parties' prior negotiations and agreement is a question of law." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 374; 761 NW2d 353 (2008).

Both Canton Holdings and BP cite as a case recognizing the doctrine of merger in Michigan *Goodspeed v Nichols*, 231 Mich 308; 204 NW 122 (1925). Our Supreme Court in that case analyzed whether the terms of a real estate purchase agreement, which contained a provision relating to the seller plaintiff's repair of certain items, had merged into and thus been extinguished when the seller gave the buyer a deed, which did not expressly contemplate the seller's compensation for repairs. *Id*. at 309-312. The Supreme Court supplied the following guiding principles:

> As to plaintiff's claim of merger, it may be conceded that a deed made in full execution of a contract for the sale of land is presumed to merge the provisions of a preceding contract pursuant to which it is made, including all prior negotiations and agreements leading up to execution of the deed, *with the long recognized exception that*:
>
> "*Where, however, the deed constitutes only a part performance of the preceding contract, other distinct and unperformed provisions of the contract are not merged in it. And where a contract of sale provides for the performance of acts other than the conveyance, it remains in force as to such acts, until full performance*." 18 Corpus Juris, § 231.
>
> The purpose of a deed is to convey title to land, not to describe the terms of a preceding contract under which the land was sold. Its recognized office as a legal instrument is to pass the title to the grantee. To that extent Goodspeed fully fulfilled his obligations under the agreement to convey a good title, and thereby *merged in the deed he gave all matters in the agreement relating to title, but it did not merge the distinct and unperformed provision relating to the repairs under consideration here*. The provision of the contract is neither contradictory of nor inconsistent with the deed.

> Plaintiff began his foreclosure proceeding by suit in chancery. Under the situation presented here a court of equity will look through the deed to the contract in performance of which it is given, and, *if it contains other valid, relevant provisions not covered by the deed nor inconsistent with it*, may enforce the same. This is such a case. We find nothing in the cases cited for plaintiff to the contrary. [*Id*. at 315-316 (emphasis added).]

More recently, in *Johnson Family Ltd Partnership*, *supra* at 374-375, this Court reaffirmed the long-recognized merger doctrine and the well-established exceptions to it. The Court in *Johnson Family Ltd Partnership*, *id*. at 375, cited *Goodspeed*, *supra* at 316, and *Chapdelaine v Sochocki*, 247 Mich App 167, 171; 635 NW2d 339 (2001), in support of the principles that "Michigan courts have long recognized that, where delivery of the deed represents only partial performance of the preceding contract, the unperformed portions are not merged into it." In *Chapdelaine*, *supra* at 172, the Court concluded that

> in the present case, the easement reserved by plaintiff [in the parties' purchase agreement] was not capable of fulfillment until after the deed was delivered and, therefore, was not fulfilled by the deed. Because the deed plaintiff delivered to defendants did not constitute full performance of the easement provision in the purchase agreement, the doctrine of merger does not apply here to extinguish plaintiff's express easement reservation.

Consistent with the case law discussed above, we reject that the use restriction in the parties' October 2002 purchase agreement merged into the February 2003 deed transferring fee simple ownership of Parcel A to Canton Holdings. The purchase agreement's use restriction, which by its clear and unambiguous terms precludes Parcel A's service station-related use for a 15-year period, constitutes a "distinct and unperformed" matter beyond the scope of the February 2003 deed's conveyance of title to Parcel A. *Goodspeed*, *supra* at 316, quoting 18 Corpus Juris, § 231. Stated differently, the October 2002 purchase agreement "contains other valid, relevant provisions not covered by the [February 2003] deed nor inconsistent with it." *Id*.

Furthermore, the October 2002 purchase agreement's final section, § 23, plainly contemplates as follows:

> Notwithstanding anything to the contrary, *after Closing all of the rights of BP and corresponding obligations of Buyer recited in this Agreement which survive Closing, including* without limitation rights of entry, the Refusal Option any Mortgage, and *restrictions on use,* shall be deemed to run with the land of the Leased Property and *shall continue in full force and be enforceable in accordance with the terms of this Agreement. If Buyer should ever increase or change its interest in the Leased Property, whether by acquiring the fee title thereto* or a new or longer lease thereof or otherwise, *such rights of BP and corresponding obligations of Buyer shall continue in full force and apply to and be enforceable against Buyer's increased or changed interest in the Leased Property, in accordance with the terms of this Agreement*. . . . [Emphasis added.]

In summary, we conclude that the trial court correctly rejected Canton Holdings's merger claim.

V. Elements of Injunctive Relief

Canton Holdings avers that the trial court erred in granting BP an injunction because BP made no demonstration that it would endure an irreparable injury absent the grant of injunctive relief. "This Court reviews equitable actions under a de novo standard," but reviews "for clear error the findings of fact supporting" an equitable decision or ruling. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

> Under Michigan law, a covenant [or other type of real property restriction] constitutes a contract, created by the parties with the intent to enhance the value of property. As such, a covenant is a valuable property right. When interpreting restrictive covenants, therefore, when the intent of the parties is clearly ascertainable, courts must give effect to the instrument as a whole. [*Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515-516; 686 NW2d 506 (2004).]

"Michigan courts generally enforce valid restrictions by injunction." *Webb*, *supra* at 211. "As equitable exceptions to the general rule that the courts will enforce valid restrictions by injunction we find these: (a) Technical violations and absence of substantial injury; (b) Changed conditions; (c) Limitations and laches." *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957), citing 26 CJS, Deeds, § 171.

Michigan courts consistently have adhered to the notion that clear and unambiguous and otherwise valid real property covenants and restrictions will be enforced "regardless of the extent of the owners' damages," *Webb*, *supra* at 211, as reflected in the following analysis:

> The further claim is advanced on behalf of appellants that the granting of relief to plaintiffs will result in a material interference with plans for developing lot 12 of Assessor's Plat No. 12 and constructing residences thereon. It is said that such prejudice greatly outweighs any harm that may result to plaintiffs if the use of the claimed right-of-way is permitted. Based on such claim it is argued that the equitable relief sought by plaintiffs should be denied. . . .
>
> * * *
>
> In the case at bar we have a controversy in which the plaintiffs are insisting on a legal right. In *Austin v Van Horn*, 245 Mich 344[; 222 NW 721 (1929)], a suit in equity to enjoin the violation of building restrictions, it was held that each owner of a lot in the subdivision had a right in the nature of a negative easement in other lots therein, *and that such right might be enforced in equity regardless of the extent of the damages of the lot owner or owners whose right was violated*. Prior decisions were cited in support of the holding that plaintiff was entitled to the relief sought. Likewise in *Smart Farm Co v Promak*, 257 Mich 684[; 241 NW 813 (1932)], plaintiff, which sought to enjoin the violation of a restriction relating to the use of lots in a subdivision, *was held entitled to relief although it was not shown that it had suffered consequential damages*. The rule in this respect was also recognized in *Oosterhouse v Brummel*, 343 Mich 283, 289[; 72 NW2d 6 (1955) (emphasizing that "[e]quity acts . . . because of the

nature of the violation itself"]. [*Birmingham Park Improvement Ass'n v Rosso*, 356 Mich 88, 99; 95 NW2d 885 (1959) (emphasis added).]

Contrary to Canton Holdings's assertion on appeal, the same principles governing a right to injunctive relief for violation of a real property-related covenant or other restriction apply irrespective whether the covenants or restrictions affect residential, commercial or other categories of property. See, e.g., *Longton v Stedman*, 182 Mich 405; 148 NW 738 (1914) (finding, with respect to "properties situated in the heart of the business district of Kalamazoo," that the "violation of complainants' rights by the erection of a permanent structure obstructing an easement and right of way created by deed will be relieved by injunction in a court of equity," whether or not the "complainants have an adequate remedy at law"). In conclusion, the trial court did not misapply the elements warranting injunctive relief for violation of real property-related covenants or other restrictions.

VI. Estoppel and Waiver

Canton Holdings next complains that the trial court incorrectly dismissed its contentions that estoppel or waiver precluded BP from seeking to enforce the use restriction. Canton Holdings suggests that "when BP assigned its interest in Parcel A . . . , the assignment expressly prohibited the sale of 'any gasoline.' However, for three years BP, through its assignee Armada, sold fuel to Canton for resale from which BP directly profited."

"Because equity is involved, this Court's review of a trial court's application of the doctrine of equitable estoppel is de novo. We will reverse if the trial court's findings were clearly erroneous or if we conclude that we would have reached a different result had we occupied the lower court's position." *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 309; 583 NW2d 548 (1998). Whether the available facts support a finding of a party's waiver involves a legal question that this Court considers de novo, although the Court again reviews the trial court's findings of fact for clear error. MCR 2.613(C).

"Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *West American Ins Co*, *supra* at 310. The distinct act of waiver signifies a party's voluntary and intentional abandonment of a known right. *Quality Products*, *supra* at 374; *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64 n 4; 642 NW2d 663 (2002).

Canton Holdings also maintains that BP's actions in knowingly permitting Canton Holdings to violate an applicable use restriction amount to "acquiescence," citing our Supreme Court's explanation that

> [w]hen determining whether prior acquiescence to a violation of a deed restriction prevents a plaintiff from contesting the current violation, we compare the character of the prior violation and the present violation. Only if the present violation constitutes a "more serious" violation of the deed restriction may a plaintiff contest the violation despite the plaintiff's acquiescence to prior violations of a less serious character. In general, a "more serious" violation

> occurs when a particular use of property constitutes a more substantial departure from what is contemplated or allowable under a deed when compared to a previous violation. That is, use that constitutes a "more serious" violation imposes a greater burden on the holder of a deed restriction than the burden imposed by a previous violation. [*Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 219; 737 NW2d 670 (2007).]

Canton Holdings's acquiescence, estoppel and waiver theories all rest on the faulty premise that BP permitted Canton Holdings to violate the lease assignment use restriction by allowing Canton Holdings to sell BP-brand fuel. The October 2002 purchase agreement, the February 2003 lease assignment concerning Parcel A, and the covenant deed conveying Parcel B all contain identical, broad use restriction language plainly prohibiting for a 15-year term either parcel's use "in whole or in part, directly or indirectly, . . . for automobile service station, convenience store, car wash, automobile repair purposes, or for the sale, offering for sale, storage or distribution of *any gasoline, motor vehicle fuels, lubricants, tires, batteries, automotive parts and accessories, other petroleum products or convenience store items*." (Emphasis added).

But other provisions of the October 2002 purchase agreement and the parties' dealer supply agreement executed in February 2003 clearly reflect their intention that Canton Holdings would sell BP fuel and other products on Parcel A. Section 4 of the October 2002 purchase agreement, entitled "Dealer relationship," summarizes the status of the parties' relationship as follows:

> Buyer and BP acknowledge the existence of that certain Dealer Lease and Supply Agreement and exhibits and ancillary agreements thereto ("Dealer Lease") between them pursuant to which Buyer is currently operating a BP-branded service station at the Property. At Closing, the parties shall execute a Mutual Cancellation Agreement in the form attached hereto as *Exhibit E* mutually canceling the Dealer Lease. At Closing, the parties shall further execute (a) BP's standard form Dealer Supply Agreement and exhibits and ancillary agreements thereto ("Supply Agreement"). [Deleted material.] This Section 4 shall survive Closing.

The introductory clause of the referenced dealer supply agreement between BP and Hakim Fakhoury explains that the supply agreement is "regarding the purchase and sale of branded motor fuel at the motor fuel sales facility ("Facility") located at 125 Canton Center South, Canton," and further discusses in pertinent part the nature of the parties' relationship as follows:

> 1. Term
>
> (a) The term covered by the Agreement will be for a period of 5 years beginning on 2/26/03 . . . and ending on 2/25/08, unless terminated earlier by law or by the terms of this Agreement or unless extended by Supplier upon written notice. If the franchise relationship underlying this Agreement continues for any reason beyond the expiration date indicated above, this Agreement will be extended until terminated or until superseded by a new dealer supply agreement, if offered.

* * *

3. Prices

(a) The price for motor fuels purchased by Dealer from Supplier will be Supplier's dealer buying price for Dealer's brand (plus all taxes, duty, fees or charges levied on the products) for each grade of said products in effect for Supplier's pricing area in which the above-identified Facility is located at the time when title to said products passes from Supplier to Dealer or when the product is loaded, at Supplier's option. Supplier has the right to change prices for all products at any time. . . .

* * *

4. Delivery—Motor Fuels

(a) During the term of this Agreement, Supplier will deliver branded motor fuels to Dealer at the Facility in accordance with the Electronic Dealer Delivery Plan (EDDP) Agreement in effect at the time of delivery. . . .

* * *

9. Condition of Facility

Dealer recognizes that Supplier has developed a favorable reputation for the sale of motor fuel and associated products and the rendering of high quality services and that the Supplier Trade Identities and facility designs and appearance represent an image distinguished for high standards of product quality, facility appearance (inside and out) and customer service. Therefore, Dealer agrees to manage, operate and maintain the Facility in a manner which will maintain and enhance this image and which in no event will detract form or disparage this image.

(a) In particular, without limiting the foregoing obligation, Dealer (and employees where applicable) agrees to do the following:

* * *

(3) Operate the Facility in a manner that actively promotes the sale of Supplier branded motor fuels and branded motor oils and other merchandise and services customarily sold at such facilities, keeping the Facility open for operation for the hours stated in paragraph 5.

Because the terms of the October 2002 purchase agreement and the 2003 dealer supply agreement clearly and unambiguously envision that, irrespective of the broad use restriction language quoted above, Canton Holdings would sell BP-brand fuel and other products on Parcel A, we find groundless Canton Holdings's claim that BP tolerated violation of the use restriction by permitting the sale of BP fuel on Parcel A. Canton Holdings points to no other conduct by BP

allegedly supporting its acquiescence, estoppel and waiver claims, and we thus conclude that the trial court correctly rejected them as unfounded.

VII. Unclean Hands

Canton Holdings also alleges that the trial court erroneously declined to find that BP had unclean hands in light of the evidence that BP repeatedly declined to supply Canton Holdings with fuel or arrange for an alternate avenue of fuel distribution. We consider de novo the trial court's decision whether to apply an equitable doctrine like unclean hands, but review for clear error the court's underlying findings of fact. *West American Ins Co, supra* at 310.

The trial court reasoned as follows in declining to apply the unclean hands doctrine:

> But I raised the issue of whether Plaintiff was entitled to an injunction because of unclean hands. And basically the law with respect to unclean hands is that one who seeks the aid of equity must come in with clean hands. *Charles E Austin, Inc v Secretary of State*, 321 Mich 426, 435[; 32 NW2d 694] (1948). In *Stachnik* [*v Winkel*, 394 Mich 375, 382; 230 NW2d 529] (1975), the Michigan Supreme Court quoted from a United States Supreme Court decision in *Precision Instrument Mfg Co v Automotive Maintenance Machinery Co*, 324 US 806, 814[; 65 S Ct 993; 89 L Ed 1381 (1945)], which stated,
>
> "The clean hands maxim is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however . . . improper may have been the behavior of the defendant. The doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be the abettor of an equity [sic]."
>
> Therefore, in considering Plaintiff's request for injunctive relief, there must be some demonstration that Plaintiff acted inequitably or in bad faith. And I can find neither of those factors. It appears that the Plaintiff had the right under the Dealer Supply Agreement to assign the Agreement to . . . Armada. And there doesn't appear that at the time of the Assignment that Plaintiff was aware of any poor relationship between Allie Berry, the principal in Armada, and Hakim Fakhoury, the principal in Defendant. Moreover, once the Assignment of the contract was made, basically in my opinion, that eliminated Plaintiff's responsibilities under the Dealer Supply Agreement and the relationship was there from that point forward between Armada and Defendant. Period.
>
> It is also clear to me that although there were some complaints that were made, and it was generally Plaintiff's policy to keep a hands-off policy with respect to disputes between its jobbers and its dealers, there was at least an attempt made when Gregg Levine approached Allie Berry about seeing if they could workout an arrangement where Defendant would be supplied by another jobber as long as Armada received substitute business. Gregg Levine asked John Soard to talk to at least one other jobber, Barrick & Company. And when Soard

> talked to the principal at Barrick & Company, that person was not interested in getting into a dispute—in the middle of a dispute.
>
> I can't find from any of this evidence that Plaintiff acted inequitably or in bad faith and consequently, and reluctantly, I must enter an injunction in this matter.

With respect to the trial court's finding that BP had the right to assign the BP-Canton Holdings dealer supply agreement to another BP fuel delivery entity, we find that the court correctly interpreted the plain language in the dealer supply agreement. We located no provision expressly stating that BP could assign its fuel delivery obligations under the dealer supply agreement, but other portions of the supply agreement reflect that BP possessed the right to do so. For example, in § 3(b) relating to fuel prices, the dealer supply agreement mentions, "*If this Agreement is assigned by Supplier to a Supplier jobber or other party*, the prices to be paid by Dealer for motor fuel and other products hereunder will be as established by said jobber or other party." (Emphasis added). In § 25, entitled "Assignment, Subletting," subsection (d) sets forth the following:

> If Supplier gives its consent to an assignment by Dealer, or if Supplier agrees to enter into a new Dealer Supply Agreement with Dealer's assignee, Dealer will pay to Supplier before the Dealer change, Supplier's administrative cost to effect the Dealer change. This cost is $10,000.00. No administrative fee is due if this Agreement is transferred pursuant to paragraph 21, *if Supplier assigns its rights to a third party*, or if Supplier exercises its right of first refusal pursuant to paragraph 26. [Emphasis added.]

Because unambiguous language in the dealer supply agreement contemplates that BP could or might assign the agreement to a third party, and because Canton Holdings on appeal points to no language in the dealer supply agreement or elsewhere purporting to limit or condition BP's right to assign, we conclude that Canton Holdings has failed to demonstrate error in the trial court's finding that BP properly assigned the dealer supply agreement to Armada Oil.

Furthermore, Canton Holdings's brief on appeal simply fails in any respect to challenge, question or even address the trial court's additional findings that it "doesn't appear that at the time of the Assignment that Plaintiff was aware of any poor relationship between Allie Berry, the principal in Armada, and Hakim Fakhoury, the principal in Defendant," or that BP did make an attempt to locate an alternate fuel distributor agreeable to supplying Canton Holdings with BP fuel. In light of Canton Holdings's total failure to demonstrate clear error in these findings of fact by the trial court, we find no basis for disturbing the trial court's ruling that the unclean hands doctrine does not bar BP's claim for injunctive relief. See *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (observing that if a party fails to dispute the basis of the trial court's ruling, this Court need not even consider granting the relief they seek).

VIII. Summary Disposition Ruling Against Canton Holdings

Canton Holdings offers the additional argument that the trial court should have granted its motion for summary disposition on the basis that, as a matter of law, it terminated its

relationship with BP and Armada Oil. For two reasons, we have the authority to decline appellate review of this contention: (1) Canton Holdings neglected to identify this issue within its statement of questions presented, *DeGeorge v Warheit*, 276 Mich App 587, 596; 741 NW2d 384 (2007) ("An appellant must properly argue issues identified in the statement of the questions in order to properly present an appeal.") (internal quotation omitted), and (2) Canton Holdings has failed to present a transcript containing the trial court's summary disposition ruling, *PT Today, Inc v Ins & Financial Service Comm'r*, 270 Mich App 110, 151-152; 715 NW2d 398 (2006) (explaining that "this Court will refuse to consider issues for which the appellant failed to produce the transcript").

We will briefly address the summary disposition argument. The Canton Holdings motion, premised on MCR 2.116(C)(8) and (10), alleged that as a matter of law Canton Holdings had terminated the use restriction previously applicable to Parcel A. The parties agree that in accordance with the use restriction language in the October 2002 purchase agreement, the use restriction would cease to apply if three circumstances existed: (1) BP no longer wished to supply Canton Holdings with BP fuel, (2) BP did not renew the dealer supply agreement with Canton Holdings, and (3) Canton Holdings had not defaulted under the terms of the dealer supply agreement. According to BP's brief on appeal, "The Circuit Court correctly held that Canton failed to establish any, let alone all, of the three conditions. There were factual issues as to each element that precluded summary disposition in favor of Canton."

After carefully reviewing the parties' filings and exhibits in support of and in opposition to summary disposition, we find that genuine issues of material fact existed with respect to whether BP remained desirous of providing Canton Holdings with BP fuel, which precluded summary disposition in favor of Canton Holdings under MCR 2.116(C)(10).[1] When viewed in the light most favorable to Canton Holdings, the evidence supporting its motion for summary disposition arguably gave rise to a reasonable inference that BP did not wish to locate another fuel distributor for Canton Holdings, which fact in turn at least arguably gives rise to a reasonable inference that BP no longer desired to supply Canton Holdings with fuel. However, the evidence as a whole did not warrant summary disposition as a matter of law concerning whether BP still wished to supply Canton Holdings with BP fuel, particularly in light of the evidence establishing (1) that BP properly assigned the BP-Canton Holdings dealer supply agreement to Armada Oil, (2) BP's expressed position that it would not illegally interfere with the Armada Oil-Canton Holdings contractual relationship, and (3) that BP did take some

[1] Because the parties and the trial court certainly considered documentation beyond the pleadings in determining the propriety of summary disposition, subrule (C)(10) governs this Court's analysis. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). The Court considers de novo "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id.*

measures to locate an alternate distributor. Because genuine issues of material fact existed concerning the first element of the use restriction termination conditions, we conclude that the trial court properly denied Canton Holdings's motion for summary disposition under subrule (C)(10).

Affirmed.

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