IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 17, 2015 Session

CAROL A. MOLLOY v. MICHAEL J. HRISKO, ET AL.

Appeal from the Circuit Court for Giles County
No. CC11145 Robert L. Jones, Judge

No. M2014-01351-COA-R3-CV – Filed July 14, 2015

Landowner had a contract to sell two five-acre parcels of her 38.29 acres. Some of her neighbors heard about the sale and discussed it with a lawyer, who sent a letter to the real estate broker whose firm represented the buyers and the seller. The letter informed the broker of a purported restriction on the property whereby there could be only one house per twenty acres. The buyers subsequently pulled out of the contract. The landowner sued three neighbors, the attorney, and his law firm for tortious interference with contract, intentional interference with business relationship, libel of title, and civil conspiracy. The trial court granted the defendants' motion for summary judgment. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Jonathan L. Miley, Nashville, Tennessee, for the appellant, Carol A. Molloy.

Darrell G. Townsend, Nashville, Tennessee, for appellees Stephen K. Heard and Stewart, Estes & Donnell, PLC.

Samuel B. Garner, Jr., Pulaski, Tennessee, for appellees Michael J. Hrisko and Jessica L. Hrisko.

Stanley K. Pierchoski, Pulaski, Tennessee, for appellee Stephen R. Savage.

OPINION

FACTUAL AND PROCEDURAL HISTORY

Carol A. Molloy ("Molloy") owned 38.29 acres of land in Giles County, Tennessee on Buford Station Road. She purchased the property in October 2005. During the pertinent time period, Michael and Jessica Hrisko ("the Hriskos") owned fifty acres that adjoined Molloy's property. Stephen Savage ("Savage") previously owned property that included the property owned by Molloy and the Hriskos.

Molloy decided to sell two five-acre parcels of property and retained Lisa Miller, who was associated with Grassland Real Estate, as her agent. Prospective purchasers placed an offer on the two parcels sight unseen, and a purchase and sale contract was signed on January 3, 2008, with a closing date of February 28, 2008. When Mr. Hrisko learned that the property was under contract, he expressed disappointment to Molloy that he could not buy it. At a social event, Savage informed Ms. Hrisko that he had put a restriction on the property allowing only one house per twenty acres. Savage and Ms. Hrisko then conferred with attorney Stephen Heard ("Heard"), who advised writing a letter to Molloy's real estate agent, whom he mistakenly believed was Melinda Barrington.

Heard's letter states:

> I represent certain parties interested in the preservation of and adherence to restrictive covenants attendant to certain land parcels sold several years ago by Dr. Stephen Savage. I have been advised that you are representing Ms. Carol Molloy and, in fact, have obtained a contract for sale of some 11 or so acres which she intends to subdivide from the 38.29 acres Ms. Molloy purchased from David Gibson and Lisa A. Gibson. Please be advised that there is a restrictive covenant on the 38.29 acres owned by Ms. Molloy. This restriction is as follows:
>
> > There shall be only one house per 20 acres on the subject property, so that no more than a total of two (2) houses can be built on the subject property, containing 40 acres.
>
> This restrictive covenant was applicable to 40.44 acres transferred from Stephen Savage to Ronnie Lee, but was also referenced as a restrictive covenant in the transfer of property from Stephen Savage to David Gibson. Because Ms. Molloy does not own 40 acres, the only house that can legally exist on her 38.29 acres is the house in which she resides.

> I am enclosing the deeds applicable to Ms. Molloy's property for your perusal.
>
> If, in fact, Ms. Molloy has entered into a contract for the sale of a portion of her property to individuals who have the intention of building a house on that property, such building would be impermissible because of the attendant restrictive covenant.

After the prospective buyers saw this letter, they agreed to grant an extension of the purchase and sale agreement through March 28, 2008. On February 22, 2008, Heard received a letter from attorney James Freeman, on behalf of Molloy, in which he stated that the "certain parties" referenced in Heard's letter lacked standing to challenge Molloy's property sale. Freeman further posited that Heard's letter was written "in an attempt to cause the sale to fail." He went on to give his analysis of the law, from which he concluded that the restrictive covenant did not apply to Molloy's property. Freeman requested that Heard send him a letter "withdrawing your claims and releasing Ms. Molloy, her heirs, successors and/or assigns from any cause of action regarding the alleged restrictions on the 38.29 acres owned by Ms. Molloy."

Heard replied to Freeman's letter on February 26, 2008. He discussed the reasons why his sending the original letter did not constitute tortious interference with contract and stated that the purpose of the letter "was to provide information that is a matter of public record." He contended that his letter did not threaten suit; he interpreted Freeman's request for a letter withdrawing claims and releasing Molloy as a request for either "(1) some sort of title opinion letter from me, or (2) some advance assurance that no party on whose behalf the letter was written will ever seek to enforce the restrictive covenant, assuming it is indeed enforceable by any such party; neither of these actions will be forthcoming."

On March 21, 2008, Heard sent a letter to the Hriskos stating that he was closing his file. He recommended that, if Molloy proceeded with the sale, they see Sam Garner, another attorney. On March 26, 2008, the prospective buyers refused to extend the purchase and sale agreement.

On February 13, 2009, Molloy filed suit against Mr. Hrisko alleging that, "[b]ased on the pronouncements, allegations and accusations in the [February 15, 2008] letter, the title company that was to perform the closing refused to issue a title insurance policy due to the fact that the letter made the property unmarketable, resulting in significant loss to Plaintiff." Molloy asserted causes of action for tortious interference with contract/inducement of breach of contract pursuant to Tenn. Code Ann. § 47-50-109 and common law principles; intentional interference with business relationship; and libel of title.

In January 2010, Molloy filed a motion for partial summary judgment seeking a holding as a matter of law that there was "no restriction in her chain of title that runs with the land restricting her heirs or assigns to a requirement that only one house can be built on each twenty acres." The court denied Molloy's motion in an order detailing some of the pertinent background in its findings of fact:

> 2. . . . The Savages retained 38.29 acres constituting the western one-half approximately of their property on Buford Station Road, which they conveyed to Mr. & Mrs. David Gibson in 2001.
> 3. Even though the Savages imposed no restrictions on the fifty acres conveyed to the Coles in 1998, they attempted to restrict the 40.44 acres conveyed to the Lees in 1999 to residential or agricultural purposes with only one house per twenty acres and with any house having a minimum square footage of 1,800 square feet. The attempted restriction did not say that it would "run with the land" or that it was binding upon "heirs and assigns" of the Grantors or the Grantees. In the 2001 deed to the Gibsons, the Savages attempted to place the same restrictions upon the 38.29-acre conveyance by referring to the book and page number where the Lee deed was recorded, placing a handwritten star near the deed reference and then attaching below the signatures and acknowledgment the express language from the deed to the Lees as to use, density, and square footage of any residence.
> 4. The Plaintiff, Carol Molloy, has since acquired the 38.29 acres previously owned by the Gibsons. The Defendant, Mike Hrisko, now owns the fifty acres conveyed to the Coles without any attempt to impose restrictions.
> 5. In 2001 Mr. and Mrs. Lee conveyed their forty-acre tract to Mr. and Mrs. T.C. Holley, who in 2004 retained twenty acres and conveyed twenty acres to Mr. and Mrs. James Beall. The Holley twenty acres and the Beall twenty acres each is improved by a residence in apparent compliance with the attempted restrictions included in the 1999 deed to the Lees.
> 6. After the Plaintiff attempted to sell 11.2 acres of her 38.29 acres and after the Defendant communicated to the prospective purchasers his belief about the restrictions of one house per twenty acres, that proposed transaction failed to close. . . .
> 7. The Court denies the summary judgment relief sought by the Plaintiff for several reasons. First, the land owned by the Defendant, as a successor to the Coles, was never subjected to the restrictions. The Defendant probably has no standing to enforce such restrictions and is not a proper party against whom the Plaintiff could litigate for the purpose of having the alleged restrictions declared invalid. The Holleys and Bealls [current owners of Lee property] are necessary parties in any litigation to determine the validity of the restrictions. If there was an attempt by the owners to

remove the restrictions by an agreed document to be recorded in the Register's Office, it now appears to the Court that the Holleys, the Bealls, and the Plaintiff would need to join in the execution and recording of such document.

8. Second, when the Savages conveyed approximately forty acres to the Lees and imposed restrictions, the doctrine of negative reciprocal easement may have made the same restrictions applicable to the tract of approximately forty acres being then retained by the Savages. In fact, when the Savages conveyed to the Gibsons the remaining 38.29 acres, they expressly, even if inartfully, attempted to impose those same restrictions upon the 38.29 acres now owned by the Plaintiff. Even if the deed from the Savages to the Gibsons was not fully effective in causing such restrictions to "run with the land," the intent of the parties may have established an equitable servitude in accordance with the authorities cited by the Defendant.

9. Third, though the parties suggest the facts are essentially undisputed, the intent of the parties to previous deeds is material and may be disputed, so that summary judgment would be inappropriate.

In June 2010, Molloy filed an amended complaint adding Ms. Hrisko and Savage as defendants. In October 2011, she was granted leave to file a second amended complaint adding Heard as a defendant and adding a cause of action for civil conspiracy. In November 2012, Molloy was granted leave to file a third amended complaint naming Stewart Estes Donnell, PLC ("Stewart Estes"), Heard's law firm, as a defendant and adding a cause of action for respondeat superior liability as a basis for liability of the Hriskos for the actions of their agent, Heard, and of Stewart Estes for the actions of its agent, Heard. Plaintiff also added Bank of America, N.A. ("BOA") and CB&S Bank ("CB&S") as interested parties. BOA claimed a first lien on Molloy's property, and CB&S claimed a second and third lien on her property.

In October 2013, Molloy filed a motion for summary judgment on her third amended complaint. In support of her motion, Molloy submitted a statement of undisputed material facts as well as an affidavit of Laura Perry, title agent for Chicago Title Insurance Company. Ms. Perry testified, in pertinent part, as follows:

5. On or about February 2008, I received a title request and a purchase and sale agreement for property located at 6724 Buford Station Road, Lynnville, TN ("the Property") for the sale of approximately 11 acres of land.

6. The Purchase and Sale Agreement for the Property had a scheduled closing date of "on or before February 29, 2008."

7. Prior to the scheduled closing, I became aware of a letter written by Stephen K. Heard ("Heard") dated February 15, 2008 to the buyers of the

Property whereby Heard raised the issue of a restriction which he believed ran with the land.

8. The scheduled closing was cancelled and an extension of the Purchase and Sale Agreement was sent to my office extending the time for performance to March 28, 2008.

9. After becoming aware of the letter written by Heard, I checked with Chicago Title Insurance Company about whether the Heard letter effected [sic] the "marketability" of the Property.

10. I was advised by Chicago Title that in order for the Property to be insurable as marketable, it had to be "reasonably free from litigation."

11. Because of the Heard letter, Chicago Title was unwilling to write an insurance policy for the property located at 6724 Buford Station Road, Lynnville, TN, without an exception. The exception would have excepted any claim by the new owners for damages resulting from a lawsuit filed by "certain parties" referred to by Attorney Stephen Heard.

12. Chicago Title indicated to me that they "didn't want to buy a lawsuit" and because of the Heard letter, and the tone in which it was written, they could not be sure that the "certain parties," whoever they might have been, would not file a lawsuit.

13. In my extensive review of the chain of title, there was no cloud on the title of the two lots under contract. In my review and discussion with Chicago Title, we did not have any other concerns regarding the insurability of the property other than the letter from Attorney Heard threatening litigation. Chicago Title specifically indicated that its unwillingness to provide a title insurance policy without exception stemmed from the fact that they believed the letter was an indication that there would be an immediate claim by the new owners regarding marketability of the property.

14. In fact, Chicago Title indicated to me that had it not been for the Heard letter they would have been willing to write a title policy without exception.

15. The letter Attorney Stephen Heard sent to Realtor Melinda Barrington made the property uninsurable for marketability purposes and caused the purchase and sale contract to fail.

16. The seller, Carol Molloy would have been able to provide her buyers with a title insurance policy free from any exceptions but for the February 15, 2008 letter written by Attorney Heard to Realtor Melinda Barrington.

Ms. Molloy also submitted her own affidavit, in which she testified, in pertinent part, as follows:

9. On August 30, 2006 I attended a trail ride with Hill McAlister ("H. McAlister"), his wife Emily ("E. McAlister") (collectively the "McAlisters") and Stephanie Saveskie ("Ms. Saveskie").

> 10. During the trail ride on August 30, 2006, H. McAlister told me that he and his wife were members of the Hillsboro Hounds Hunt ("Hunt").
> 11. Prior to my trail ride of August 30, 2006 I learned from Ms. Saveskie that she worked as the farm manager for the McAlisters at their farm located down the street from my home on Buford Station Road, Lynnville, TN.
> . . .
> 13. During the trail ride with the McAlisters, H. McAlister told me that the "Hunt" did not hunt on land near my land because there was a piece of property between my land and McAlister's land which prevented the "Hunt" from being able to get over to Abernathy Road.
> 14. During the trail ride with the McAlisters on August 30, 2006, H. McAlister told me that the "Hunt" wants to preserve as much land as possible in the area so that they could expand the area upon which they hunt and as soon as the land on Happy Hill Road became available, the land that prevented the "Hunt" from expanding toward my home, the "Hunt" would make sure the land was somehow purchased and preserved.
> 15. The land on Happy Hill Road, which prevented the Hunt from expanding toward my property, was purchased in 2010 by a member of the Hillsboro Hounds Hunt, Orrin Ingram.
> 16. In 2008, Orrin Ingram, along with H. McAlister, became joint Master[s] of the "Hunt."
> 17. The "Hunt" presently hunts on the land purchased by Orrin Ingram, which has now expanded the land upon which the "Hunt" utilizes for their pleasure to include land in the area of Plaintiff's property.
> 18. Since expanding the Hunt toward my property, the "Hunt's" hounds have been on my property twice within the last year and another time the hounds ran along my fence line while Defendant Jessica Hrisko, sitting on horseback in the Street in front of my house, attempted to retrieve the hounds.

(Citations to record omitted).

Molloy later filed affidavits of Lisa Miller and Melinda Barrington of Grassland Real Estate clarifying their respective roles. Miller was Molloy's buying agent when she originally bought her property in 2005; she then acted as the seller's agent when Molloy wanted to sell the two five-acre plots. Barrington was the owner/broker of Grassland Real Estate and acted as the buyer's agent for the Hriskos when they bought their property in 2003. When she received the February 15, 2008 letter from Heard, Barrington "had an obligation to notify both Lisa Miller, acting as selling agent from my office, and Mariah Tellez, acting as buying agent from my office, of the content of said letter."

On January 17, 2014, defendants Heard and Stewart Estes filed for summary judgment. They asserted that all of Molloy's claims were barred by the statute of limitations; that attorney Heard was privileged to take the action he took on behalf of his clients; that the claim for inducement of breach of contract failed for lack of intent to induce a breach, lack of malice, and lack of proximate cause; that the claim of intentional interference with contractual relationships failed for lack of intent to interfere, for lack of improper means or motive, and for lack of causation; that the claim for libel of title failed for lack of false statements, lack of malice, opinions only with respect to matters of public record, a good faith basis for Heard's statements, and lack of proximate cause; and that the claim of civil conspiracy failed because Heard did not commit any underlying tort.

The Hriskos moved for summary judgment in January 2014 arguing that each of the plaintiff's claims failed for reasons similar to those asserted by Heard and his law firm. In support of this motion, the Hriskos submitted the affidavit of Mr. Hrisko in which he stated: "I knew that Stephen Heard was acting as my attorney from the time that I talked with him by telephone a few days after my wife consulted him at the tea on the evening of February 9, 2008." In an affidavit by Ms. Hrisko, she testified: "I knew that Stephen Heard was acting as my attorney from the time that I consulted with him at the tea on the evening of February 9, 2008 and discussed with him and with Dr. Savage the restrictions which Dr. Savage had placed on the property which he had sold to Mr. and Mrs. Gibson and which they in turn had sold to Ms. Molloy."

The Hriskos also submitted an affidavit of Stephen Heard, who testified in pertinent part as follows:

> I represented Mr. and Mrs. Mike Hrisko. I discussed the property restrictions which Dr. Savage had placed on the property which he had conveyed to Mr. and Mrs. Gibson and which was later purchased by Ms. Molloy with Leilani Hrisko and with Dr. Savage at the tea on February 8, 2008. I discussed my findings and opinions with Michael Hrisko and, to a lesser degree, with Leilani Hrisko by phone in the following days. At the request of the Hriskos I prepared a letter to Melinda Barrington, who Mike Hrisko had told me was the real estate agent for Carol Molloy, and I read the letter over the phone to Mr. Hrisko. At Mr. Hrisko's request, I changed the letter so that it would refer to my clients without disclosing that Mr. and Mrs. Hrisko were those clients. Mike Hrisko authorized me to send the letter which I sent on February 15, 2008.
>
> . . .
>
> Mr. and Mrs. Hrisko told me that they wanted me simply to inform Carol Molloy and her real estate agent of what they understood was a restriction on house construction on lots of less than twenty acres on Molloy's property. They understood from talking to Dr. Savage and from my

> reporting my findings after reviewing deeds that such restriction existed. I did what Mr. and Mrs. Hrisko requested that I do and nothing more.
> . . .
> In no sense whatsoever did I intend or did my clients intend to interfere with Ms. Molloy's efforts to sell her property. In no way was it our intent to cause Ms. Molloy's contract for the sale of her property not to close.
> . . .
> In no way was it our intent to cause Ms. Molloy's contract for the sale of her property not to close.

Also in January 2014, Savage filed a motion for summary judgment arguing that the plaintiff could not prove at least one element of each cause of action. The defendants relied upon portions of the depositions of Molloy, the Hriskos, Heard, and Savage to support their motions for summary judgment. All of the parties submitted statements of undisputed material facts.

The opposing motions for summary judgment were heard on February 19, 2014.[1] The court denied the plaintiff's motion for summary judgment and granted the defendants' motions for summary judgment. The court restated certain of the findings and conclusions from its ruling on the plaintiff's motion for partial summary judgment on May 13, 2010. The court noted that the record had been expanded with amended pleadings and comprehensive discovery and proceeded to make additional findings of fact and conclusions of law. Because the court found that there were factual disputes as to whether Heard acted as an attorney for the Hriskos when he wrote the February 15, 2008 letter, the court denied Heard's motion for summary judgment on statute of limitations grounds.

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[1] Molloy submitted an affidavit of Dale Crary, one of the prospective buyers, after the oral arguments, and the defendants objected. Mr. Crary testified, in pertinent part:

> My wife and I were purchasing the property as an investment and did not have any plans on building on the property.
>
> . . .
>
> My wife and I were not willing to extend the Purchase and Sale Agreement beyond March 28, 2008 once we saw the letter from Stephen Heard because we felt we were going to be sued by his unnamed clients for merely purchasing the property.
>
> We never got any assurances from the unnamed "certain parties" that they would not sue us.

The court considered the affidavit but concluded that no information in the affidavit created a dispute of material fact and that the court's consideration of the affidavit did not affect its decision on the motions for summary judgment.

The court then considered the claims raised by the plaintiff. The court concluded "that none of the statements made in Heard's February 15, 2008 letter were untrue." The court continued:

> . . . When Heard's letter was written, there was, and there still is, a valid restriction on the plaintiff's 38.29 acres of property so that no house may be built on that property unless the lot on which the house is built is at least 20 acres in size. It follows that written statements made by Heard in his February 15, 2008 letter were factually true and correct and that there was nothing untrue about Heard's statements.
>
> The Court concludes that the valid restriction on the residential development of plaintiff's property could be modified. First, a court of equity could modify the restriction in a proper lawsuit. Second, the plaintiff and adjoining property owners who possess the right to enforce the restriction could modify the restriction by agreement. Neither, however, has occurred.
>
> Accordingly, the Court concludes that Heard's conduct in writing the February 15, 2008 letter and communicating it to Melinda Barrington and plaintiff Carol Molloy does not rise to the level of conduct which gives rise to a cause of action in favor of the plaintiff on any of her stated claims. It follows that none of the other defendants—Mr. and Mrs. Hrisko and Dr. Stephen Savage—can be held liable to the plaintiff on any of her stated claims.

The court granted the motions for summary judgment of defendants Mr. Hrisko, Ms. Hrisko, Savage, Heard, and Stewart Estes and denied Molloy's motion. Pursuant to Tenn. R. Civ. P. 54.02, the order was made a final judgment.

Molloy filed a motion to alter or amend pursuant to Tenn. R. Civ. P. 59, which was denied by the trial court on June 24, 2014.

ISSUES ON APPEAL

On appeal, Molloy argues that (1) she raised sufficient questions of fact as to all of her causes of action to defeat summary judgment; (2) the truth of Heard's statements concerning the restriction is irrelevant for purposes of her causes of action; and (3) the statements concerning the alleged restrictions in Heard's letter were false. Heard and Stewart Estes argue that, if this Court concludes that the trial court erred in granting Heard's motion for summary judgment for the reasons relied upon by the trial court, and if this Court concludes that Heard acted as an attorney when he wrote the February 15, 2008 letter, this Court should consider the following issues: (a) whether all of the

plaintiff's claims against Heard are barred by the applicable statute of limitations; and (b) whether Heard is immune from liability to Molloy.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. A trial court's award of summary judgment does not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). We consider the evidence in the light most favorable to the non-moving party and resolve all reasonable inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether any factual disputes exist. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Id.*; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). To shift the burden of production to the nonmoving party who bears the burden of proof at trial, the moving party must negate an essential element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008).[2]

ANALYSIS

In its decision, the trial court concluded that "none of the statements in Heard's February 15, 2008 letter were untrue," and that "Heard's conduct in writing the February 15, 2008 letter and communicating it to Melinda Barrington and plaintiff Carol Molloy does not rise to the level of conduct which gives rise to a cause of action in favor of the plaintiff on any of her stated claims."[3] On this basis, the court granted the defendants' motions for summary judgment. On appeal, Molloy asserts that the trial court erred in granting the defendants' motions for summary judgment.

Tortious inducement of breach of contract

[2]Tennessee Code Annotated section 20-16-101 (2011), a provision that is intended to replace the summary judgment standard adopted in *Hannan*, is inapplicable to this case. *See Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 25 n.2 (Tenn. 2011) (noting that section 20-16-101 is only applicable to actions filed on or after July 1, 2011). Molloy filed her initial petition on February 13, 2009.

[3] While the trial court made findings of fact regarding the underlying facts in this case, the court did not make specific findings of fact regarding the different causes of action Molloy alleged in her complaint.

The defendants argue that the statements of fact in Heard's February 15, 2008 letter were true and that this fact negates any claim of malice, one of the elements of the tort of inducement of breach of contract. *See Hart v. First Nat'l Bank of Memphis*, 690 S.W.2d 536, 540 (Tenn. Ct. App. 1985) (listing the following elements of the tort of inducement of breach of contract: (1) a legal contract, (1) knowledge that contract exists, (3) intention to induce breach, (4) malice, (5) breach of contract, (6) proximate cause, (7) damages).

We first address the truth of Heard's statements regarding the restrictions applicable to Molloy's property. Under Tennessee law, a deed must contain language stating that restrictions bind one's heirs and assigns in order for the restrictions to "run with the land." *Essary v. Cox*, 844 S.W.2d 169, 171 (Tenn. Ct. App. 1992). There is no dispute that, in this case, Molloy's deed did not contain such language.

There is a second way, however, that restrictions can apply to a piece of property, which is pursuant to the doctrine of equitable servitude or reciprocal negative easements. This doctrine provides that the grantor's intent to bind the successors and assigns may be gleaned from the surrounding circumstances, which may include the terms of deed restrictions or a common plan or development scheme. *See Land Developers, Inc. v. Maxwell*, 537 S.W.2d 904, 912 (Tenn. 1976); *Leach v. Larkin*, 1993 WL 377629, at *3 (Tenn. Ct. App. Sept. 24, 1993).

The following passage from an opinion by then Judge Koch provides a helpful summary of the legal principles governing negative reciprocal easements:

> Negative reciprocal easements circumscribe the free use of property and, therefore, are not favored even though they have been part of our jurisprudence for many years. *Land Developers, Inc. v. Maxwell*, 537 S.W.2d at 913; *Essary v. Cox*, 844 S.W.2d 169, 171 (Tenn. Ct. App. 1992); *Cherokee Hills Util. Dist. v. Stanley*, C.A. No. 19, slip op. at 10-11, 14 T.A.M. 30-10 (Tenn. Ct. App. June 9, 1989), *perm. app. dismissed*, (Tenn. Jan. 2, 1990). The courts enforce them with great care and resolve all ambiguities in favor of the free use of property.
>
> Both the grantor and the fellow grantees whose titles contain similar restrictive covenants may enforce their reciprocal negative easement rights in either a legal or an equitable proceeding. *Laughlin v. Walker*, 146 Tenn. at 654-55, 244 S.W. at 477. Grantees seeking equitable enforcement of a reciprocal negative easement must prove: (1) that the parties derived their titles from a common grantor; (2) that the common grantor had a general plan for the property involved; (3) that the common grantor intended for the restrictive covenant to benefit the property involved; and (4) that the grantees had actual or constructive knowledge of the restriction when they

> purchased their parcels. *See Ridley v.* Haiman, 164 Tenn. at 256, 47 S.W.2d at 755.
>
> Grantees seeking judicial enforcement of their negative reciprocal easement rights are not necessarily limited to the recitals in the deeds to prove their case. In addition to the deeds from the common grantor, *Land Developers, Inc. v. Maxwell*, 537 S.W.2d at 912-913, they may also use recorded plats, *Arthur v. Lake Tansi Village, Inc.*, 590 S.W.2d 923, 928 (Tenn.1979); *Stracener v. Bailey*, 737 S.W.2d at 538-39, or parol evidence of the circumstances surrounding the purchase of the property. *Ridley v. Haiman*, 164 Tenn. at 250, 47 S.W.2d at 753; *Maxwell v. Land Developers, Inc.*, 485 S.W.2d 869, 873 (Tenn. Ct. App. 1972); *Owenby v. Boring*, 38 Tenn. App. 540, 549, 276 S.W.2d 757, 761 (1954).

Leach v. Larkin, 1993 WL 377629, at *3. Thus, for an equitable servitude to be enforceable, a grantee must have notice of the restrictions when he or she purchased the property. *Tennsco Corp. v. Attea*, No. M2001-01378-COA-R3-CV, 2002 WL 1298808, at *2 (Tenn. Ct. App. June 13, 2002).

In this case, the uncontroverted evidence shows that Savage attempted to impose restrictions on two pieces of property that he originally conveyed to the Lees and the Gibsons. While he did not put the required language in the deeds so as to create covenants running with the land, Savage was the common grantor for the two pieces of property and his actions and language (as well as his deposition testimony) evidenced a general plan intended to benefit the property by keeping it from becoming overly developed. Thus, as stated in Heard's letter, Molloy's property was under a restriction requiring that no house be built unless the lot was at least twenty acres in size. This restriction was enforceable against any grantee with actual or constructive notice prior to the time of purchase. *See Ridley v. Haiman*, 47 S.W.2d 750, 755 (Tenn. 1932).

Molloy asserts that she did not know of the restriction until Heard's letter. We must determine whether she had constructive notice by virtue of the language in her chain of title. The deed from Gibson to Molloy states: "This conveyance is subject to any and all existing easements and restrictions as shown of record." The immediately preceding deed, from Savage to Gibson, states: "There shall be only one house per 20 acres on the subject property, so that no more than a total of two (2) houses can be built on the subject property, containing 40 acres." Contrary to Molloy's assertion, we believe this language on the immediately preceding deed, restricting building to one house per twenty acres, coupled with the language in her own deed, was sufficient for constructive notice. *See Moore v. Phillips*, No. 01A01-9605-CH-00197, 1998 WL 272942, at *4 (Tenn. Ct. App. May 29, 1998) (restrictions on warranty deed constituted constructive notice).

Does the truth of the statements of fact in Heard's letter negate the element of malice?[4] This question has not been addressed in Tennessee. The Restatement (Second) of Torts recognizes tortious interference with contractual relations in section 766, and this section has been cited by a federal court in Tennessee. *See AmeriGas Propane, Inc. v. Crook*, 844 F. Supp. 379, 389 (M.D. Tenn. 1993) (quoting RESTATEMENT (SECOND) OF TORTS § 766 cmt. h (1979)); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 n.4 (Tenn. 2002) (adopting discussion of § 766B cmt. c.). Sections 767 through 773 of the Restatement define factors that constitute improper interference for purposes of tortious interference with contractual relations; at least one of these factors, often referred to as "privileges," has been relied upon in a Tennessee case. *See Polk & Sullivan, Inc. v. United Cities Gas Co.*, 783 S.W.2d 538, 543 (Tenn. 1989) (citing RESTATEMENT (SECOND) OF TORTS § 768(1)).

One of these factors, or privileges, directly addresses the effect of the truth of the information. Section 772 of the Restatement (Second) of Torts states:

> One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person
> (a) truthful information, or
> (b) honest advice within the scope of a request for the advice.

Furthermore, comment b to section 772 of the Restatement addresses truthful information in more detail:

> *Truthful information.* There is of course no liability for interference with a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another. The interference in this instance is clearly not improper. This is true even though the facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking his contract or refusing to deal with another. It is also true whether or not the information is requested.

[4] In the context of Tenn. Code Ann. § 47-50-109, malice has been interpreted to mean "'the willful violation of a known right.'" *AmeriGas Propane, Inc. v. Crook*, 844 F. Supp. 379, 389 (M.D. Tenn. 1993) (quoting *In re: AM Int'l*, 46 B.R. 566, 575 (Bankr. M.D. Tenn. 1985)).

Although section 772 of the Restatement has not been adopted in Tennessee, it has been cited with approval by this court in a previous case. *See Unarco Material Handling, Inc. v. Liberato*, 317 S.W.3d 227, 236 (Tenn. Ct. App. 2010).[5]

We find the rule of section 772 compelling and hold that the truthfulness of Heard's statements in the letter negates the element of malice required for the tort of inducement of breach of contract.

Intentional interference with business relations

The tort of intentional interference with business relations requires "an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons." *Trau-Med*, 71 S.W.3d at 701 n.4 (adopting RESTATEMENT (SECOND) OF TORTS § 766B cmt. c[6]). One of the elements of this tort is "improper motive or improper means." *Id.* at 701.

Chapter 37 of the Restatement (Second) of Torts is titled "Interference with Contract or Prospective Contractual Relation." RESTATEMENT (SECOND) OF TORTS Ch. 37 Introductory Note. Chapter 37 consists of sections 766 through 774A. Sections 768 through 773 address factors affecting whether interference is improper, and these factors apply to both intentional interference with contract and intentional interference with business relations. RESTATEMENT (SECOND) OF TORTS § 767 cmt a. Thus, the reasoning discussed above concerning section 772 applies with respect to intentional interference

[5] Many state and federal jurisdictions have relied upon section 772 of the Restatement (Second) of Torts and held that there is no liability for tortious interference with contract for the communication of truthful information. *See Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1092 (11th Cir. 1994); *George A. Fuller Co. v. Chicago Coll. of Osteopathic Med.*, 719 F.2d 1327, 1332 (7th Cir. 1983); *Landess v. Borden, Inc.*, 667 F.2d 628, 632 n.6 (7th Cir. 1981); *Church of Scientology Int'l v. Eli Lilly & Co.*, 848 F. Supp. 1018, 1031 (D.D.C. 1994); *Weiss v. Lehman*, 713 F. Supp. 489, 503 (D.D.C. 1989); *Vajda v. Arthur Andersen & Co.*, 624 N.E.2d 1343, 1352 (Ill. Ct. App. 1993); *Montrone v. Maxfield*, 449 A.2d 1216, 1217-18 (N.H. 1982); *C.R. Bard, Inc. v. Wordtronics Corp.*, 561 A.2d 694, 697 (N.J. Super. Ct. 1989); *Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468, 470 (Pa. 2011); *Tarleton State Univ. v. Rosiere*, 867 S.W.2d 948, 953 (Tex. Ct. App. 1993); *Liebe v. City Fin. Co.*, 295 N.W.2d 16, 19-20 (Wis. Ct. App. 1980); *Four Nines Gold, Inc. v. 71 Constr., Inc.*, 809 P.2d 236, 238 (Wyo. 1991).

[6] Comment c states, in pertinent part:

> The relations protected against intentional interference by the rule stated in this Section include any prospective contractual relations, except those leading to contracts to marry (see § 698), if the potential contract would be of pecuniary value to the plaintiff. . . . Also included is interference with a continuing business or other customary relationship not amounting to a formal contract.

RESTATEMENT (SECOND) OF TORTS § 766B cmt. c (1979).

with business relations. The truth of the statements made in Heard's letter negates the improper motive or means necessary for this cause of action. Thus, the trial court properly granted summary judgment on the claim for intentional interference with business relations.

Libel of title

One of the elements that a plaintiff must prove in order to make a claim for libel of title is that "the defendant published false statements about the title to the property." *Brooks v. Lambert*, 15 S.W.3d 482, 484 (Tenn. Ct. App. 1999). The truth of the statements in Heard's letter negates this element, therefore the trial court properly granted summary judgment on this cause of action.

Conspiracy

To make out a claim for civil conspiracy, the plaintiff must show "an underlying predicate tort allegedly committed pursuant to the conspiracy." *Watson's Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 186 (Tenn. Ct. App. 2007). Because all of the other torts Malloy alleged were properly dismissed, there can be no claim for civil conspiracy, and the trial court properly dismissed this cause of action on summary judgment.

CONCLUSION

The judgment of the trial court is affirmed. Costs of appeal are assessed against the appellant, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE