COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1758 **Cir. Ct. No. 02CV000580**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

THE TRUSTEE OF THE RONALD ZUELSDORF AND PATRICIA ZUELSDORF FAMILY LIVING TRUST, CHERYL BRABAZON, KRAMER ROCK, CAROLINE ROCK, AND JACQUELINE VAINISI,

PLAINTIFFS-APPELLANTS,

V.

ANDREW HETZEL AND JULIE HETZEL,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Ronald and Patricia Zuelsdorf and four of their neighbors (Zuelsdorf) appeal a summary judgment granted to Andrew and Julie Hetzel (Hetzel). The circuit court concluded that a restrictive covenant for the

parties' subdivision prohibited landscaping after the 200th day of occupancy and ordered any prohibited landscaping removed and the property restored. Zuelsdorf argues that the court misinterpreted the covenant. We agree and reverse the judgment.

Background

¶2 Zuelsdorf and Hetzel live in the Park Ridge Heights First Addition subdivision in the Village of Howard. Fifteen restrictive covenants are included in the deeds for each parcel in the subdivision. Zuelsdorf noticed and objected to Hetzel erecting an unattached 12' x 16' "outbuilding," specifically prohibited by one of the covenants.

¶3 Zuelsdorf brought this action to enforce the restrictive covenant against Hetzel. Hetzel counterclaimed, arguing that Zuelsdorf had completed extensive landscaping, contrary to a covenant stating all landscaping must be completed within 200 days of occupancy. Each side brought a motion for summary judgment on its claim, and the circuit court granted both motions. It concluded that Hetzel's structure was an impermissible outbuilding, ordering it removed. The court also concluded that additional landscaping could not be done after the 200th day of occupancy, ordered any post-200th day landscaping removed, and the property restored to its condition before the prohibited landscaping. In addition, the court issued permanent injunctions against building by Hetzel and landscaping by Zuelsdorf. Zuelsdorf appeals the judgment against him on Hetzel's counterclaim, arguing the circuit court misinterpreted the covenant and the remedy ordered is inappropriate.

Discussion

¶4 Generally, our review of a summary judgment is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). When the grant of summary judgment is based in equity, however, we have a two-tiered standard of review. ***Pietrowski v. Dufrane***, 2001 WI App 175, ¶5, 247 Wis. 2d 232, 634 N.W.2d 109. We review the legal issues de novo, but the decision to grant equitable relief is reviewed for an erroneous exercise of discretion. ***Id.*** A decision based on an error of law is an erroneous exercise of discretion. ***Sullivan v. Waukesha County***, 218 Wis. 2d 458, 470, 578 N.W.2d 596 (1998).

¶5 The interpretation of a restrictive covenant is a question of law, as is the question whether the covenant is ambiguous. ***Zinda v. Krause***, 191 Wis. 2d 154, 165, 528 N.W.2d 55 (Ct. App. 1995). Public policy favors the free and unrestricted use of property, so restrictions in deeds must be strictly construed to favor the unencumbered, free use of property. ***Pietrowski***, 247 Wis. 2d 232, ¶7. "It is contrary to the public policy of this state to impose a restriction upon the use of land when that restriction is not imposed by express terms." ***Id.*** (citation omitted).

¶6 Part of restrictive covenant fourteen says, "All landscaping must be completed within 200 days of the occupation of a structure for residential purposes." The circuit court concluded:

> I find that the covenants are, on their face, enforceable. … [They] exist to preserve property values, to assure property owners certain material expectations that they may have about their neighborhood … to essentially preserve a standard or quality of life in that neighborhood. …

> I believe that in order to satisfy those objectives, the language chosen in these particular covenants … is nonetheless plain language … it is nonlegal language, it is nontechnical language ….
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> ….
>
> … I do find this plain language is clear, I believe that the restrictive covenants prohibit landscaping after 200 days and that they proscribe outbuildings.

¶7 Zuelsdorf argues that the covenant does not expressly prohibit additional landscaping. He also argues that such an interpretation would be absurd because nothing, including shrubs, trees, or annual flowers, could ever be added. Hetzel argues that the covenant clearly states landscaping must be completed within 200 days of occupancy, and that this must be interpreted to mean no landscaping after the 200th day.[1]

¶8 We conclude that the circuit court misinterpreted the landscaping covenant. We conclude that the covenant refers on its face to initial landscaping following the construction of the home. The landscaping covenant is only half of covenant fourteen. In full, along with covenant fifteen, the restrictions say:

> 14. All construction must be completed within 200 days of granting of a building permit on each specific lot. All landscaping must be completed within 200 days of occupation of a structure for residential purposes.

[1] Hetzel also argues that Zuelsdorf engaged in this prohibited landscaping and therefore cannot enforce the outbuilding restriction because of "unclean hands." First, we note that Hetzel's argument has merit only if the landscaping is prohibited, which we conclude is not the case. Additionally, although the counterclaim alleges violations of other covenants, it appears the circuit court dealt only with the landscaping and outbuilding covenants, and these are the only covenants addressed on appeal. Moreover, to the extent this might be a challenge to the summary judgment against Hetzel and requiring the outbuilding to be removed, Hetzel has not cross-appealed. *See* WIS. STAT. § 809.10(2)(b) (a respondent who seeks modification of the judgment appealed from, or of another judgment entered in the same action or proceeding, shall file a cross-appeal).

> 15. All plans, specifications and landscaping must be approved, in writing, by the architectural review committee of the subdivider.

When read with the construction portion, it is evident that covenant fourteen is designed to create an initial timeline for changing the construction site into a homestead in order to prevent neighbors from having to look indefinitely at an unseeded, unplanted lot landscaped with dirt.

¶9 In addition, covenant fifteen requires the plans, specifications, and landscaping to be approved by the *subdivider's* review committee, not a committee of the residents. The committee has since disbanded. Hetzel argues this means there can be no landscaping because the committee cannot approve any plans. However, the fact that it was the subdivider, not the subdivision, that set up the committee suggests

> the greatest need for an architectural control committee was when the subdivision was first being developed. As the subdivision became older, with fewer houses being built, the architectural control committee was no longer necessary. Thus, the architectural control committee's dissolution does not demonstrate an intent to abandon the restrictions.

Pietrowski, 247 Wis. 2d 232, ¶17. Similarly, the committee's dissolution in this case does not demonstrate an intent to foreclose additional landscaping.

¶10 Alternatively, if we concluded that the covenant is ambiguous and fails to clearly set forth a restriction, we would have to construe the covenant in such a way so as to reflect Wisconsin's policy of "free and unrestricted use of property." ***Id.***, ¶7 (citation omitted). Then, we would still have to conclude that the covenant applies only to initial deadlines during the initial construction period.

¶11 Because we reverse the judgment on the legal basis of the covenant's interpretation, we need not reach Zuelsdorf's second argument regarding the propriety of the ordered remedy.[2] Only dispositive issues need be addressed. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] Because the two judgments were issued in one document, we again note that Hetzel did not cross-appeal the judgment against him on Zuelsdorf's claim.