STATE OF MICHIGAN

COURT OF APPEALS

LIGHTHOUSE PLACE DEVELOPMENT, LLC,

Plaintiff/Counter-Defendant-Appellee,

v

MOORINGS ASSOCIATION, d/b/a MOORINGS CONDOMINIUM ASSOCATION,

Defendant/Counter-Plaintiff/Third-Party-Plaintiff-Appellant.

v

HARBOR GRAND, LLC and LIGHT HARBOR MOORINGS CONDOMINIUM ASSOCIATION,

Third-Party-Defendants,

and

LIGHT HARBOR MOORINGS CONDOMINIUM ASSOCATION,

Cross-Plaintiff,

v

HARBOR GRAND, LLC

Cross-Defendant.

UNPUBLISHED
April 28, 2009

No. 280863
Berrien Circuit Court
LC No. 05-003263-CH

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

In this action to quiet title and damages for slander of title, defendant Moorings Association (Moorings), appeals by right the trial court's September 5, 2007 opinion and order in favor of plaintiff Lighthouse Place Development, L.L.C. (Lighthouse), awarding plaintiff $15,000 in special damages and attorney fees totaling $146,550.[1] Defendant also appeals the trial court's February 22, 2006 order granting plaintiff summary disposition on defendant's counterclaim and third-party claim against the Harbor Grand Limited Partnership (Harbor Grand) and its general partner, KEM Development, Inc. The Moorings sought to reform its 1997 agreement with Harbor Grand, which terminated a 1985 seasonal parking easement the Moorings held in property that Lighthouse acquired in 2003 to develop a 10-unit residential condominium project, Light Harbor Moorings Condominium (Light Harbor). Additionally, defendant appeals the trial court's March 27, 2006 grant of partial final judgment quieting plaintiff's title free from any claim by the Moorings to an easement. Defendant argues on appeal that plaintiff lacked standing to bring this action, that the 1997 agreement was a unilateral action by the Moorings that could not modify or destroy the 1985 easement, that the termination of the 1985 easement resulted from a mutual mistake of the parties to the 1997 agreement, entitling the Moorings to the equitable remedy of reformation, that plaintiff's slander of title claim must fail because the Moorings acted without malice on the advice of counsel, and that the trial court erred in assessing damages and by awarding plaintiff attorney fees. We affirm.

I. Factual Background

The lawsuit involves property situated near Lake Michigan in New Buffalo, Michigan. The Moorings is a condominium of 369 boat slips that defendant refers to as a "dockominium association" in which its members own boat slips rather than residences. The common predecessor in title to Lighthouse, the Moorings, and Harbor Grand, is New Buffalo Harbor, Inc. To support parking for Moorings owners, New Buffalo Harbor granted to the Moorings several non-exclusive, seasonal (from April 15 to October 15), parking easements to run with the land. Some of these parking easements were on both sides of Oselka Drive, which runs parallel to an Amtrak line that runs across the back part[2] of property plaintiff later acquired and its adjacent neighbor to the southwest, Harbor Grand. New Buffalo Harbor granted the parking easement at issue in this case to the Moorings on June 19, 1985; the easement was recorded in the office of Berrien County Register of Deeds in Liber 1234, Page 417.

In 1994, Harbor Grand and KEM began to develop a hotel on its property. A dispute soon arose between defendant and Harbor Grand regarding parking rights of Moorings owners and Harbor Grand hotel quests. The Moorings sued Harbor Grand and KEM seeking to confirm its parking rights under the easements were exclusive; KEM and Harbor Grand in turn filed a

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[1] Attorney fees were allocated as follows: $48,000 for the quiet title action, $87,750 for legal work on the slander of title action up to trial, and $10,800 for trial preparation, trial, and post-trial briefing. The trial court entered a "final judgment" on September 26, 2007 for a total monetary award to plaintiff of $161,550 and $345 in taxable costs.

[2] Oselka Drive and the railroad tracks run in a southwesterly or northeasterly direction generally parallel to Lake Michigan. The "back part" refers to the property furthest from Lake Michigan.

third-party complaint against New Buffalo Harbor and others. To settle this litigation the Moorings and Harbor Grand and KEM entered an agreement to terminate certain easements, which provided in part, "the parties agree that any and all easements and rights of way, whether of record or not of record as of the date of this Agreement, including, but not limited to, the Parking Easements recorded at Liber 1206, Page 933, Liber 1133, Page 846, Liber 1186, Page 292, and Liber 1234, Page 417, and burdening the parties hereto or the Parking Parcels, shall be terminated . . . ." This agreement was dated July 26, 1997 and recorded August 1, 1997 in Liber 1824, Page 237. As part of the settlement agreement, Harbor Grand conveyed certain property to the Moorings, and the parties drafted new documents to reflect their respective rights. Attorneys Michael Chojnowski and James Geary represented defendant in the KEM litigation. Chojnowski had represented the Moorings since its creation and drafted or reviewed all the easements or agreements pertinent to this case.

In 2003, plaintiff acquired its property immediately adjacent and to the east of Harbor Grand's property. After plaintiff began constructing its 10-unit condominium project, a city of New Buffalo building inspector informed James Gierczyk, plaintiff's principal, that the Moorings had complained the construction was encroaching on the Moorings 1985 parking easement along Oselka Drive. According to Gierczyk's testimony, he believed that plaintiff had purchased its property free and clear of any encumbrances but could not halt construction to dispute the Moorings' claim. Further, Gierczyk testified he was led to believe that he could make the problem "go away" by paying to the Moorings $15,000. Consequently, plaintiff paid defendant $15,000, and the parties on September 16, 2003 executed a sales agreement of a 10-foot strip of the 1985 easement, which the Moorings quit claimed to plaintiff.

The present dispute developed in 2004-2005 when plaintiff became a leading advocate of a plan to relocate the Amtrak station from south of the city to downtown New Buffalo along Oselka Drive. Plaintiff desired to build an Amtrak station on its property along Oselka Drive and donate the property to the city, which in turn could lease the train station to Amtrak. Defendant's principal manager, Byron Higgins, complained to the city manager that this plan would interfere with the 1985 parking easement. The city manager in an August 24, 2005 letter to Gierczyk stated that for the Amtrak project to go forward, plaintiff would have prove it held unrestricted fee simple title to the property, unencumbered by any parking easements, so that parking for the proposed Amtrak station could be accommodated. Gary Gillings, plaintiff's on-site manager, responded to the city manager's letter to Gierczyk with a September 23, 2005 memorandum attaching copies of the following: (1) the 1985 parking easement recorded at Liber 1234, Page 417; (2) the July 26, 1997 agreement terminating easements recorded at Liber 1824, Page 237; (3) a July 26, 1997 parking easement agreement between the Moorings and Harbor Grand and KEM recorded at Liber 1824, Page 417 (including ¶ 8 providing the "parties acknowledge and agree that the Parking Easements recorded at . . . Liber 1234, Page 417 have been terminated . . . ."); and (4) title work showing plaintiff's fee simple ownership in the subject property.

The trial court in its September 5, 2007 opinion and order, referring to stipulated trial exhibits,[3] described the flurry of activity that followed:

> On October 4, 2005, Defendant's attorney [William Redman] wrote a letter to Mr. Gierczyk and the Lighthouse Board, with a copy to the New Buffalo City Manager, demanding that Plaintiff cease interfering with its seasonal easement, even though counsel and the Moorings Board had personal knowledge that the 1985 Easement had been terminated in 1997 and was no longer in existence, Exhibit 5. Shortly thereafter, on October 12, 2005, Plaintiff's counsel [Stephen Hilger] responded to the October 4th letter with a plea for Defendant to withdraw its claim of interest by reason of an easement that had been terminated. Defendant refused to do so, Exhibit 7. On November 8, 2005, Plaintiffs counsel sent a final plea to Defendant, which was disregarded. City Manager Johnson testified that this litigation cloud made it impossible for the City to go forward with the approval process for the [Amtrak] platform. [Opinion & Order, p 8.]

While attorneys Redman and Hilger were corresponding, attorney Chojnowski on October 12, 2005 forwarded to Harbor Grand's attorney a proposed "First Amendment to Agreement Terminating Easements," the purpose of which Chojnowski wrote was to "eliminate the prior termination of the easement recorded at Liber 1234, Page 417, which was inadvertently included in the list of recorded easements previously terminated in 1997." Harbor Grand's representative signed the "First Amendment to Agreement Terminating Easements" on November 4, 2005, and Ronald E Specht, the Moorings' president, signed on November 10, 2005. Attorney Redman forwarded a copy of the document to attorney Hilger on November 14, 2005. The document was record at Liber 2665, Page 992 on November 16, 2005.

Plaintiff filed this lawsuit on December 7, 2005, asking for declaratory relief, to quiet title, and damages for slander of title.[4] Plaintiff subsequently filed a motion for a temporary restraining order or preliminary injunction to preclude defendant from asserting to Amtrak and the city of New Buffalo and others that it held easement rights to plaintiff's property. The trial court held a hearing on plaintiff's motion on December 20 and 21, 2005, at which Gillings, Chojnowski, and Bryon Higgins, defendant's manager, testified. During the course of this hearing, the trial court ruled that the November 2005 amendment to the 1997 agreement terminating easements was ineffective as a matter of law in reviving the 1985 easement. The court ruled that reformation was a judicial, equitable remedy that defendant must seek by way of a counterclaim or cross-claim. Specifically, the court ruled that defendant, who no longer had an easement, could not "just create [one] out of whole cloth" by an extrajudicial amendment to an agreement terminating an easement. Consequently, at the conclusion of the hearing the court determined that as the case then stood, plaintiff had shown the likelihood of success on the

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[3] Before the June 26-27, 2007 bench trial, the parties entered into a stipulation of facts with 62 paragraphs. In the last paragraph the parties agreed to the admission of 198 trial exhibits.

[4] In its first amended complaint filed January 10, 2006, plaintiff added a count seeking rescission and restitution regarding the $15,000 it had paid defendant in 2003 for a quit claim deed.

merits and the elements necessary for the issuance of a preliminary injunction, which was issued January 18, 2006. The order included the statement: "All issues regarding reformation lie within the province of this Court after a hearing on the merits."

Defendant subsequently filed a third-party complaint against Harbor Grand and Light Harbor to reform the 1997 agreement terminating easements, and a similar cross-claim against Lighthouse. The trial court heard the parties' arguments on plaintiff's motion for summary disposition regarding these claims on February 8, 2006. The trial court ruled that the motion should be granted on the third-party complaint against Harbor Grand under MCR 2.116(C)(4) (lack of jurisdiction) because there was no adversarial relationship between defendant and Harbor Grand as both wanted to reform the 1997 agreement consistent with the November 2005 amendment the court had ruled was a nullity. The court granted plaintiff summary disposition on defendant's counterclaim and third-party claim against Light Harbor under MCR 2.116(C)(8), ruling that neither Lighthouse nor Light Harbor were parties or privies of parties to the 1997 agreement. In addition, citing *von Meding v Strahl*, 319 Mich 598, 606; 30 NW2d 363 (1948)[5] (an easement cannot "be granted by deed, estoppel, or otherwise, by anyone but the landowner"), the trial court further reasoned:

> In this case it is clear that the 1985 seasonal parking easement ended in 1997. Once the seasonal parking easement was terminated by the agreement terminating easements, the only way the easements can be revived is by creation of a new easement signed by the grantor, which at this time would exclusively be plaintiff or third party defendant, [Light Harbor].
>
> Since neither plaintiff nor -- excuse me -- Light Harbor -- since neither plaintiff nor Light Harbor were parties to the agreement terminating easements, no reformation of the agreement terminating easements can affect or be imputed to plaintiff or Light Harbor. Thus, plaintiff's motion for summary disposition pursuant to MCR 2.I16(C)(8) is granted. [Hearing 02/08/2006, p 38.]

The trial court's order regarding these rulings was entered on February 22, 2006.

The parties were before the court again to argue plaintiff's motion for partial summary disposition on its quiet title claim and defendant's motion for summary disposition on the basis that plaintiff lacked standing and was not the real party in interest. The essence of defendant's claim is that the 1985 easement only affected the common areas of Light Harbor, and, after plaintiff recorded the master deed of condominium on February 25, 2004, only the Light Harbor Condominium Association could take legal action to enforce rights with respect to the common areas of Light Harbor Condominium. The trial court granted plaintiff's motion and denied defendant's motion, reasoning as follows:

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[5] *Harrison v Heald*, 360 Mich 203; 103 NW2d 348 (1960) overruled the holding of *von Meding* regarding the creation of an easement by reservation as explained in *Schmidt v Eger*, 94 Mich App 728, 733-735; 289 NW2d 851 (1980).

> The court finds that defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) should be and is denied.
>
> In this case, plaintiff asserts that it is the owner of the property. For a (C)(8), the court has to accept as true all well pled allegations. Therefore, the court must deny the motion under MCR 2.116(C)(8).
>
> Furthermore, the court denies the motion if I'm considering it as a (C)(10). Rather, the court finds in favor of the plaintiff as to motion for entry of partial final judgment on the quiet title claim based upon my earlier rulings. The only question is whether the partial final judgment should be in the name of plaintiff, Lighthouse Place Development, LLC, or whether it should be in the name of Light Harbor Moorings Condominium Association, or whether it should be in favor of both.
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> Because the motion was filed in the name of the development company, and in fairness to the defense, I'm going to grant the motion in favor of plaintiff. But it's going to be plaintiff as presently named, not the condominium association. I don't know if it would have an affect on the slander of title action. But I don't want to prejudice the defendant in that regard. [Hearing 03/27/2006, pp 17-18.]

The trial court presided over a two-day bench trial of plaintiff's slander of title claim on June 26-27, 2007. The trial court issued its opinion and order on September 5, 2007, ruling in plaintiff's favor as noted already. In doing so, the trial court found as fact that the Moorings acted intentionally and without mistake by terminating the 1985 easement as part of the agreement settling the KEM litigation. The trial court wrote in this regard:

> The KEM litigation, Paragraph 10 of the Complaint, was premised in part upon the 1985 Easement. The Court finds that there was no mistake about including the 1985 Easement in the KEM litigation. The Board's counsel testified that including the 1985 Easement was an intentional act in order to cast a "wide net" to include all of the easements. The KEM litigation was settled prior to trial, thus the issue of exclusivity of the easements was never decided on the merits. KEM and the Moorings resolved their dispute by the Moorings acquiring the fee underlying certain easements and by drafting new easements on the balance of properties. The new Parking Easement Agreement is part of Exhibit 86, and was signed and entered at the same time as the Agreement Terminating Easements, Exhibit 3.
>
> The Agreement Terminating Easements, Exhibit 3, and the new Parking Easement Agreement, Exhibit 86, paragraph 8, both refer to the termination of the 1985 Easement by specific reference to the recording information, Liber 1234, Page 417.
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> The language of the Agreement Terminating Easements demonstrates the Moorings' intent to terminate all easements by the specific language that they were terminating "any and all easements," "whether of record or not," and "including but not limited to" the 1985 easement. In an April 25, 1997 letter,

Exhibit 21, attorney Chojnowski related that he saw "no harm" in terminating all of the easements, which included the 1985 Easement, and even stated that there may be some benefit in terminating the easements. Since there is both direct and circumstantial evidence of intent, with no contrary testimony by anyone who was on the Moorings Board in 1997, the Court finds that the 1985 Easement was intentionally terminated as part of the KEM litigation settlement.

II. Analysis

A. Standard of Review

"An action to quiet title is an equitable action, and the findings of the trial court are reviewed for clear error while its holdings are reviewed de novo." *Fowler v Doan*, 261 Mich App 595, 598; 683 NW2d 682 (2004). "Likewise, both the interpretation of a statute and a contract are questions of law this Court reviews de novo." *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). Indeed, we review de novo all questions of law that are raised on appeal. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998).

An appellate court will not determine a trial court's finding of fact is clearly erroneous unless there is no evidence to support it or the appellate court is left with a definite and firm conviction that a mistake has been made. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). Also, in reviewing findings of fact, we accord deference to the trial court's special opportunity to judge the credibility of witnesses who appear before the court. MCR 2.613(C); *Hill*, *supra*.

B. Standing

Defendant first argues that plaintiff lacked standing to bring this action, or was not the real party in interest that possessed the ability to enforce the property rights of the condominium co-owners. See MCR 2.201(B): "An action must be prosecuted in the name of the real party in interest . . . ." "'A real party in interest is one who is vested with a right of action in a given claim, although the beneficial interest may be with another.'" *MOSES, Inc v Southeast Michigan Counsel of Gov'ts*, 270 Mich App 401, 415; 716 NW2d 278 (2006) (citation omitted). Here, defendant argues that under the Condominium Act, MCL 559.101 *et seq*., after plaintiff recorded the master deed of condominium on February 25, 2004, it lost its property rights in fee to the common areas of the condominium project and only possessed rights in common with other condominium co-owners. MCL 559.161; MCL 559.163. Further, defendant contends the condominium act vests the right of action regarding condominium common areas in the association of co-owners. MCL 559.160. Thus, defendant argues that only the Light Harbor Condominium Association could bring a legal action regarding the 1985 easement because it affected only the common areas of Light Harbor. We disagree.

First, plaintiff possessed sufficient interest in the common areas of Light Harbor to satisfy constitutional standing. Standing refers to the right of a party to invoke the power of the court to adjudicate a claimed injury in fact. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). It is a constitutional requirement based on the doctrine of the separation of powers. *Miller v Allstate Ins Co*, 481 Mich 601, 606-607; 751 NW2d 463 (2008). In general, standing requires not only that a party have a sufficient interest in the outcome of

litigation to ensure vigorous advocacy, but also have "'in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.'" *Bowie v Arder*, 441 Mich 23, 42; 490 NW2d 568 (1992), quoting 59 Am Jur 2d, Parties, § 30, p 414 (1987 ed). "[T]o have standing a plaintiff (1) must have suffered 'an injury in fact,' that is, an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct at issue; and (3) it must be likely that the injury will be redressed by a favorable decision." *MOSES, Inc*, *supra* at 413, citing *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992).

Here, plaintiff, as the condominium developer and owner of 4 of 10 condominium units held for sale, possessed a real interest in the litigation both as an individual and as a representative of the Light Harbor co-owners, thereby satisfying the three criterion for constitutional standing. Plaintiff established an injury in fact "when the defendant's activities directly affected the plaintiff's recreational, aesthetic, or economic interests." *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, 479 Mich 280, 296; 737 NW2d 447 (2007). There also existed a causal connection between the injury and the defendant's conduct at issue, and it was likely that the injury would be redressed by a favorable decision. *MOSES*, *supra* at 413.

Defendant's argument that plaintiff lacked "statutory standing," see *Miller*, *supra* at 608, also fails. Defendant relies on MCL 559.160, which provides:

> Actions on behalf of and against the co-owners *shall* be brought in the name of the association of co-owners. The association of co-owners *may* assert, defend, or settle claims on behalf of all co-owners in connection with the common elements of the condominium project. [Emphasis added.]

Plainly, § 160 grants standing to a condominium co-owners association to sue "on behalf of . . . the co-owners" with respect to asserting claims regarding the common areas of a condominium and requires that such action must be "brought in the name of the association of co-owners." But this section does not provide that a condominium association has the exclusive right to "assert, defend, or settle claims on behalf of all co-owners in connection with the common elements of the condominium project." Rather, § 160 confers standing on a co-owners association, which "*may*" take action to assert, defend, or settle claims on behalf of all co-owners in connection with the common elements of the condominium project." Read in conjunction with other provisions of the Condominium Act and the master deed in this case, we conclude plaintiff as the developer of the condominium project also possessed statutory standing to enforce both its own interests in developing the condominium project and the co-owners' interest in the common areas of Light Harbor.

The Condominium Act recognizes that a person, firm, corporation, partnership, or other legal entity engaged in such business will develop a "condominium project." MCL 559.104(1), 106(2), 109(2). Further, before the condominium project developer can sell any condominium units, it must record a master deed with bylaws governing the condominium project. MCL 559.108, 172. "The administration of a condominium project shall be governed by bylaws recorded as part of the master deed, or as provided in the master deed." MCL 559.153. The Condominium Act impliedly acknowledges that control of the condominium project resides with

the developer until the "transitional control date" when "a board of directors for an association of co-owners takes office pursuant to an election in which the votes that may be cast by eligible co-owners unaffiliated with the developer exceed the votes which may be cast by the developer."

In the present case, before and during this litigation, there had had not yet been any transition of control to a Light Harbor co-owners' association. The project was in the "development and sales period," defined in ¶ 3.1(m) of the master deed as the period during which the developer or its successor continued to offer for sale any unit of the condominium that had not been previously conveyed or leased. Further, ¶ 4.5 of the master deed provides that by acceptance of conveyance of a condominium unit, co-owners appoint the developer "as their agent and attorney to act in connection with all matters concerning the common elements and their respective interests in the common elements" during the "development and sales period." Condominium co-owners only have "rights to share with other co-owners the common elements of the condominium project as are designated by the master deed," MCL 559.163, and must "comply with the master deed, bylaws, and rules and regulations of the condominium project," MCL 559.165. Consequently, by operation of the Condominium Act and the terms of the master deed, control over the common areas of the Light Harbor was vested in plaintiff during the timeframe of this litigation. Thus, plaintiff had both standing and was the real party interest, vested with the right to bring this action even though the beneficial interest also resided with other co-owners. MCR 2.201(B); *MOSES, Inc*, *supra* at 413-415.

The present case is also distinguished from *Jenness v Smith*, 58 Mich 280; 25 NW 191 (1885), on which defendant relies. In that case, the Court held that a party owning only an interest in land in common with others could not alone bring an action to quiet title because the other "owners must be represented so as to be bound by it in case the decree is adverse." *Id*. at 258. In contrast, here by operation of law and the terms of the master deed, plaintiff had "full power and authority to grant easements over, to sever or lease mineral interests, and/or to convey title to land or improvements constituting the common elements or any part of them . . . and in general to execute al documents and to do all things necessary or convenient to the exercise of such powers." Master Deed, ¶ 4.5. Consequently, *Jenness* is both factually and legally distinguishable and does not control the instant situation.

C. Unilateral Modification

Defendant next argues that its 1997 settlement agreement with Harbor Grand terminating the 1985 easement was an unlawful unilateral modification of an easement.[6] Defendant cites *Schadewald v Brule*, 225 Mich App 26; 570 NW2d 788 (1997). "Once granted, an easement cannot be modified by either party unilaterally." *Id*. at 36. While this is an accurate statement of the law, we disagree with defendant's characterization of the voluntary extinguishment of its easement rights as part of its settlement of the KEM litigation as a unilateral modification.

[6] Plaintiff argues this issue was not preserved for appeal by argument and decision below. We choose to consider the merits because "the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

Defendant not only stated its clear and unequivocal intent to terminate the 1985 easement in two written documents, but also put the world on notice of the termination by recording the documents. Although the owner of the dominant estate may not unilaterally expand and the owner of the servient estate may not unilaterally limit the scope of an easement, defendant cites no authority for the proposition that the owner of an easement may not voluntarily extinguish it. When "a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

D. Mutual Mistake

Next, defendant argues that the 1997 agreement terminating the 1985 easement was based on a mutual mistake of the contracting parties (that the 1985 easement affected Harbor Grand's property); therefore, the trial court erroneously held that reformation was unavailable. While we do not necessarily agree with the trial court's reasoning, we conclude it reached the right result in dismissing defendant's claims for reformation under the facts and circumstances of this case. This Court will not reverse when the trial court reaches the correct result, albeit for a wrong reason. *Scherer v Hellstrom*, 270 Mich App 458, 464; 716 NW2d 307 (2006).

Defendant relies primarily on two Michigan cases for its argument on this issue: *Kowatch v Darnell*, 354 Mich 197; 92 NW2d 342 (1958) and *Scott v Grow*, 301 Mich 226; 3 NW2d 254 (1942). In the latter case, all parties to a deed intended to create a joint tenancy but conveyed the property to the grantees as "tenants by entireties and not as joint tenants" creating an ambiguity because the grantees were not married and could not hold property by the entireties. *Id*. at 234. The *Scott* Court held that the stated facts would support an equitable claim for reformation of the deed. *Id*. at 236-241. Defendant quotes the following passage from *Scott*:

> "Where a written instrument fails to express the intention of the parties because of a mutual mistake as to the interpretation or legal effect of the words of the writing, though there is no misapprehension as to what words have been used, reformation is allowed. It is not necessary, moreover, in order to establish a mistake which may be reformed that it should be shown that particular words were misunderstood. 'It is sufficient that the parties had agreed to accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effectuate their intention.'" 5 Williston on Contracts (Rev. Ed.), p. 4423, § 1585, quoting from *Leitensdorfer* v. *Delphy*, 15 Mo. 160, 167 (55 Am. Dec. 137). [*Scott*, *supra* at 237.]

Pertinent to defendant's claims in the present case, however, the *Scott* Court observed that equity "will not grant relief for mistake as to the legal effect of the entire instrument." *Id*. at 239. Here, the wording of the 1997 settlement agreement accomplished exactly what the parties to the agreement intended at the time: to terminate the named 1985 easement described at Liber 1234, Page 417. Thus, the present case is unlike *Scott* where the words used in the deed did not create the tenancy the parties intended to create. The only possible mistake the parties could have made here was the location of the property the 1985 easement affected. This is a fact external to the 1997 agreement that will not support an equitable claim for reformation. See *Dingeman v Reffitt*, 152 Mich App 350, 356; 393 NW2d 632 (1986) ("If the asserted mutual mistake is with respect to an extrinsic fact, reformation is not allowed, even though the fact is

one which would have caused the parties to make a different contract, because courts cannot make a new contract for the parties.").

In *Kowatch*, three different parties agreed to buy, and the Highway Commissioner agreed to sell, excess land adjacent to the parties' property not needed for highway purposes. The three purchasers engaged the same attorney to draft necessary deeds. The deeds contained inaccurate descriptions which inadvertently conveying more property to two parties and less to the third, contrary to what they had agreed. *Kowatch, supra* at 199-200. The Court affirmed the lower court's granting reformation of the deeds relief on the petition of the party that received less property than all parties had agreed because "[e]ach of the purchasers took with notice of what the others intended to buy and thought they were buying, which, in turn, coincided with what the seller intended to sell to each." *Id*. at 200. Thus, *Kowatch*, like *Scott*, was a case where a mistake in the drafted wording of the deed did not accomplish what the parties intended. Consequently, *Kowatch*, differs from the present case for the same reasons as *Scott*.

Finally, we do not believe the present case can be distinguished from *Farm Bureau Ins Co v Buckallew*, 471 Mich 940; 690 NW2d 93 (2004). In that case, the parties agreed to the settlement of a personal injury lawsuit for the amount of $300,000. Both parties mistakenly believed the settlement amount was the policy limits of the tort defendant's liability insurance. When the mistake was discovered, Farm Bureau sought reformation of the agreement. This Court, although agreeing a mutual mistake occurred, affirmed the trial court's denial of reformation on the basis that Farm Bureau must bear risk of the mistake. *Farm Bureau Ins Co v Buckallew*, 262 Mich App 169, 180-181; 685 NW2d 675 (2004), vacated at 471 Mich 940 (2004). Because the settlement agreement resulted in the dismissal of the plaintiff's lawsuit, our Supreme Court concluded that Farm Bureau's claim for reformation must be analyzed under MCR 2.612, governing relief from judgment. The Court held relief was not warranted, opining:

> Plaintiff's mistake in understanding its own policy is not a mistake or excusable neglect that can be a basis for relief under MCR 2.612(C)(1)(a). Plaintiff had access to all the necessary information, and its error is not excused by its own carelessness or lack of due diligence. See 3 Longhofer, Michigan Court Rules Annotated (5th ed), p 507; *Lark v The Detroit Edison Co*, 99 Mich App 280, 283; 297 NW2d 653 (1980), lv den 410 Mich 906 (1981). [*Buckallew, supra*, 471 Mich at 940-941.]

Here, defendant had access to all information necessary to determine the location of property to which the 1985 easement applied. In fact, defendant's counsel wrote that he believed the title company was wrong in its conclusion where the easement lay. Defendant, through diligence, could have ascertained the correct location of the 1985 easement before including it in the complaint against Harbor Grand and KEM. At the very least, defendant certainly could have made that determination before drafting the 1997 settlement agreement that terminated the 1985 easement. As in *Buckallew*, defendant "had access to all the necessary information, and its error is not excused by its own carelessness or lack of due diligence." Quite simply, defendant has not alleged facts supporting its claim for the equitable relief of reformation.

E. Slander of Title

In Michigan, actions for slander of title exist under the common law and by statute. *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). MCL 565.108 provides:

> No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to land, and in any action brought for the purpose of quieting title to land, if the court shall find that any person has filed a claim for that reason only, he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff, and in addition, shall decree that the defendant asserting such claim shall pay to plaintiff all damages that plaintiff may have sustained as the result of such notice of claim having been so filed for record.

The elements of the claim are the same under the statute or the common law. *B & B Investment Group*, *supra* at 8. "To establish slander of title at common law, a plaintiff must show falsity, malice, and special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages." *Id*. Malice is the crucial element and may be either actual or implied. *Glieberman v Fine*, 248 Mich 8, 12; 226 NW 669 (1929). Implied malice "means a wrongful act done intentionally without just cause or excuse," i.e., without probable cause to believe the validity of the claim asserted. *Id*. Thus, there must be evidence from which to infer "'that the defendant could not honestly have believed in the existence of the right he claimed, or at least that he had no reasonable or probable cause for so believing.'" *Harrison v Howe*, 109 Mich 476, 479; 67 NW 527 (1896), quoting Newell on Defamation, 206.

The question of whether defendant acted with malice is for the trier of fact. *Harrison, supra* at 480. Also, malice may be proved by circumstantial evidence. *Sullivan v Thomas Organization, PC*, 88 Mich App 77, 86; 276 NW2d 522 (1979). However, malice "may not be inferred merely from the filing of an invalid lien; the plaintiff must show that the defendant knowingly filed an invalid lien with the intent to cause the plaintiff injury." *Stanton v Dachille*, 186 Mich App 247, 262; 463 NW2d 479 (1990).

Defendant argues that evidence that a defendant acted on the advice of counsel establishes a "complete defense" to a slander of title claim. Defendant, however, cites no Michigan authority for this proposition. We are not bound by the foreign authority that defendant cites. Moreover, we find these cases stand for the unremarkable proposition that evidence a defendant acted on the advice of counsel may negate a finding of malice. See, e.g., *Rowland v Lepire*, 99 Nev 308, 313; 662 P2d 1332 (1983) ("evidence of a defendant's reliance on the advice of counsel tends to negate evidence of malice"). The essence of defendant's argument is that the trial court clearly erred by finding that plaintiff "established the elements of falsity, express malice or malice implied in law, and certain special damages . . . ."

Although, defendant asserts on brief that its reliance on advice of counsel was undisputed, its citation to record evidence to support its claim is sparse. Defendant refers the Court only to limited testimony of attorney Chojnowski. Our review of the cited testimony reveals that Chojnowski did not believe that the parties to the 1997 settlement agreement intended to terminate the 1985 easement but that a mutual mistake had occurred. This claim was then placed in the 2005 amendment that he conveyed to his client. But defendant cites no evidence regarding any advice Chojnowski provided defendant regarding the efficacy of the

1997 agreement or the 2005 document purporting to amend it. Indeed, the pages defendant cites in the transcript contain the following question and answer by Chojnowski:

> *Q*. All right. Well, I'm not really interested in that. What I'm interested in is, is you know as a real estate lawyer, that once that agreement terminating easements was signed and filed and recorded, then the easement was history? It was over, it was done with, correct?
>
> *A*. You're asking me for a legal conclusion that I'm not comfortable answering because it's - - I'm not capable of determining that.

A party may not leave it to this Court to search for the factual basis to sustain or reject his position, but must support factual assertions with specific references to the record. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). We conclude defendant's citations to the record are insufficient given the deference we must accord under MCR 2.613(C) to convince this Court that the trial court clearly erred in finding the malice necessary to support plaintiff's slander of title claim. *Hill*, *supra* at 308; *Fowler*, *supra* at 598.

F. Damages & Attorney Fees

Defendant argues that the trial court erred by awarding plaintiff attorney fees with respect to legal services on its slander of title claim. Defendant does not contest the court's award of attorney fees to plaintiff regarding its quiet title claim because such an award is considered "special damages" caused by defendant's slander of plaintiff's title. See *B & B Investment Group*, *supra* at 9, and *Sullivan*, *supra* at 85. But defendant argues that there is no causal connection to legal fees plaintiff incurred after it obtained its quiet title judgment. Further, defendant argues that the award of attorney fees for plaintiff's slander of title claim violates the "American Rule" under which litigants are generally responsible for their own legal expenses. We disagree that the "American Rule" precludes an award of attorney fees in this instance. Because defendant does not assert that the trial court otherwise abused its discretion, we affirm the trial court's award of attorney fees to plaintiff.

Under the "American Rule," attorney fees are generally not recoverable as an element of costs or damages unless expressly provided for by statute, court rule, judicial exception, or by contract. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004); *Fleet Business Credit, LLC v Krapohl Ford Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). With respect to a claim for slander of title, MCL 565.108 contains specific language permitting the trial court after a finding of slander of title to "award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff." While the statute also refers to actions to quiet title, the statute itself as discussed already, is a basis in addition to the common law for a slander of title claim. Indeed, in *B & B Investment Group*, *supra* at 11, a statutory slander of title case, this Court held that the statute's grant of discretion to trial courts to award attorney fees to a party prevailing on a slander of title claim was not limited to quiet title actions. The Court opined:

> The plain language of the statute does not limit the award of attorney fees and grants the court discretion in awarding such fees; the statute states that "if the court shall find that any person has filed a claim for that reason [to slander the

> title to land] only, he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow." The statute contemplates recovery of attorney fees, at the court's discretion, expended in actions for slander of title, not simply to quiet title. Further, even though the claims of interest were discharged in late June 1992, the trial of the slander of title claim was not held until November and December of 1993. And, while plaintiff did not prevail on the separate damage issues at trial, it was entitled to proceed to trial of the slander of title claim to recover the attorney fees and costs incurred as special damages and in seeking to recover these amounts. [*B & B Investment Group*, *supra* at 11.]

Consequently, defendant's argument regarding the trial court's award of attorney fees fails.

Last, defendant asserts the trial court erred by awarding as special damages for slander of title $15,000 that plaintiff paid defendant for a quit claim deed in 2003. We disagree. As we concluded in part II(E), defendant has failed by its argument and citation to the record to convince us that the trial court clearly erred. *Hill*, *supra* at 308; *Fowler*, *supra* at 598.

Defendant first argues that plaintiff did not include the 2003 quit claim transaction as part of its slander of title claim, and further, that only the recording of the 2005 amendatory agreement could form the basis for plaintiff's claim. Thus, defendant argues that filing the 2005 amendment could not possibly have been causally related to the 2003 transaction. We disagree with both defendant's premises. First, plaintiff included the $15,000 transaction in ¶ 28 of its amended complaint for slander of title claim. Second, the essence of plaintiff's slander of title claim went beyond the mere recording of the 2005 amendment. Plaintiff stated the essence of its slander claim in ¶ 15 of the amended complaint: despite its termination, defendant continued to claim the seasonal parking easement in plaintiff's property pursuant to the 1985 easement. Oral disparagement of title will support a common-law slander of title claim. See, e.g., *Harrison*, *supra* 477 (a lessor's false statement to a prospective tenant that the lessee had no right to sublet the premises for the purpose operating a saloon).

Next, defendant argues plaintiff cannot recover damages for the 2003 transaction because the one-year statute of limitations for slander had expired before plaintiff filed its complaint on December 7, 2005. See MCL 600.5805(9). Again, we disagree. Defendant did not plead the limitations period as an affirmative defense. Rather, defendant pleaded that the 2003 transaction either estopped plaintiff from asserting its slander claim or acted to revive the 1985 easement. Defendant waived the application of the statute of limitations by failing to plead it as an affirmative defense. See *Walters v Nadell*, 481 Mich 377, 389; 751 NW2d 431 (2008) ("a defendant waives a statute of limitations defense by failing to raise it in his first responsive pleading").

Finally, there was evidence before the trial court from which it could find the elements of slander of title, and that the slander was causally related to plaintiff paying $15,000. Defendant asserted its easement claim at a critical point in plaintiff's construction of Light Harbor. Plaintiff's principal testified that he could not delay construction to contest the claim and therefore paid the $15,000 to make the problem "go away." Further, although the trial court's findings are not entirely clear, it is apparent that the court found at a minimum that defendant had constructive knowledge that the 1985 easement had been terminated at the time of the 2003

transaction. Consequently, there was evidence that supports the trial court's award to plaintiff of $15,000 as special damages for slander of title. We are unconvinced clear error occurred.

G. Conclusion

For all the foregoing reasons, we affirm. Plaintiff, as the prevailing party, may tax costs. MCR 7.219(A).

/s/ Jane E. Markey