

STATE OF MICHIGAN
COURT OF APPEALS

NICHOLAS MUSHOVIC, MIA MUSHOVIC,
SOFIA MUSHOVIC, CHAYA STRINGER,
CHARON STRINGER, CHANON STRINGER,
SUE ABRAMS, and ALAN H. PETERSON,

Plaintiffs-Appellees/Cross-
Appellants,

and

RICHARD R. COLT and ATTORNEY
GENERAL,

Plaintiffs-Appellees,

v

BLOOMFIELD HILLS SCHOOL DISTRICT and
BLOOMFIELD HILLS BOARD OF
EDUCATION,

Defendants-Appellants/Cross-
Appellees.

UNPUBLISHED
March 18, 2010

No. 293841
Oakland Circuit Court
LC No. 09-098669-AW

CHRISTOPHER MARK FELLIN and JAMES
HAROLD STRINGER,

Plaintiffs-Appellees/Cross-
Appellants,

and

ATTORNEY GENERAL,

Plaintiff-Appellee,

v

BLOOMFIELD HILLS SCHOOL DISTRICT and

No. 293842
Oakland Circuit Court
LC No. 09-100784-AW

BLOOMFIELD HILLS BOARD OF
EDUCATION,

Defendants-Appellants/Cross-
Appellees.

Before: M.J. Kelly, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendants, Bloomfield Hills School District and Bloomfield Hills Board of Education, appeal as of right an order establishing a deed for real property as a charitable trust and compelling compliance with the terms of the trust regarding the operation of a Bloomfield Hills school on the subject property. Plaintiffs cross-appeal the same order. We affirm in part and reverse in part.

I. Factual and Procedural History

This case is based on a deed for real property executed in 1955 by Mae Callow. The deed gave to Bloomfield Hills District No. 2¹ approximately 11.72 acres of land in West Bloomfield Township. Defendants also obtained additional surrounding parcels of land from other grantors and subsequently built Pine Lake Elementary School², which sits partially on the property encompassed by the Callow deed and on at least one other parcel as the School's total property area is comprised of 21.34 acres. Since the time these parcels were acquired, until 2009, an elementary school has continuously existed and was operated by defendants on the property for the benefit of defendants' students.

The Callow deed specifically "convey[ed] and warrant[ed] to Bloomfield Hills School District No. 2 for the sum of \$1.00 and other valuable considerations" the above referenced property. In addition, the deed delineated that the conveyance was "subject to the restriction that these premises shall be used for School purposes only." The deed did not contain a reverter clause. The problem leading to the initiation of this litigation occurred in late 2008/early 2009 when defendants, allegedly based on decreases in financing and a declining student enrollment, decided to close the school located on the subject property, Pine Lake Elementary School, and lease the building to the Waterford School District. The lease to the Waterford School District was for a one-year period, spanning July 1, 2009 through August 31, 2010, for their operation of a temporary school on the property. While no definitive plans or contracts existed following the termination of this lease, the trial court determined as part of its initial findings of fact and

¹ Bloomfield Hills District No. 2 is defendant, West Bloomfield Hills School District's, predecessor in interest.

² Other versions of a Pine Lake school existed before defendants obtained the Callow property, including a one-room schoolhouse, which was located in the general vicinity.

conclusions of law that defendants were considering the sale of the property for residential or other development.

Plaintiffs are comprised of property owners residing adjacent to the school, successors-in-interest to property once owned by Callow or parents as the next friends and children who would have been eligible to attend Pine Lake Elementary School had it remained open. The Michigan Attorney General was added as a necessary party. Plaintiffs' complaints comprised multiple counts, primarily seeking declaratory and injunctive relief and mandamus. The trial court denied plaintiffs' motion for a preliminary injunction. Subsequently, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) contending they paid a substantial sum for the subject property and that it was not donated. Defendants asserted that the deed restriction comprised merely a statement of intention and not a perpetually binding restriction on the land and did not establish a charitable trust. Defendants also challenged the standing of plaintiffs to enforce the deed restrictions. In response, plaintiffs argued that the deed established that the property was donated and constituted a charitable trust. Plaintiffs further asserted that the restriction contained within the deed was binding and runs with the land and that the deed mandates that the land be used solely as Pine Lake Elementary School for the benefit of the children of Pine Lake and not for the broader or more general use of Bloomfield Hills school children.

The trial court denied defendants' request for summary disposition finding that genuine issues of material fact existed. The trial court initially found that there was conflicting evidence regarding whether the deed created a charitable trust and that the use of the word "School" in the deed's restrictive language was ambiguous, necessitating the use of extrinsic evidence to determine its meaning. The trial court did grant summary disposition to the student plaintiffs on the issue of standing. The matter then proceeded to a bench trial. The trial court made several findings of fact, which included, in relevant part: (a) that Callow received de minimus consideration of \$1.00 for the land and that prior options to purchase the property had expired before a purchase occurred; (b) the deed restriction required defendants to only use the property for a school to be operated and governed by defendants for students enrolled in that district; (c) that defendants accepted the deeded property and understood that the word "School" in the deed restriction required the use of the property as a Bloomfield Hills school for Bloomfield Hills students; and (d) that Callow did not intend to have the property revert to her or her heirs if the restriction was violated, but rather intended to have defendants "be subject to a duty to comply with the restriction." The trial court also found that the conveyance established a charitable trust that required defendants to only use the property as a Bloomfield Hills school for the benefit of Bloomfield Hills' students, which defendants subsequently breached by leasing the subject property to the Waterford School District. The trial court also ruled that all of the plaintiffs, with the exception of one individual who was merely a next friend, had standing and rendered a verdict in plaintiffs' favor regarding all of the allegations pertaining to a violation of a charitable trust.

A separate hearing pertaining to the remedy to be imposed was conducted. The trial court found that defendants committed "a blatant and unadulterated violation of a charitable trust, from which they reaped over a generation of benefits." The trial court rejected the applicability of the doctrine of cy pres having found that compliance with the trust is possible, legal and not impractical because defendants acknowledged they could have elected to close an

alternative, local elementary school. In addition, the trial court rejected defendants' argument that it lacked subject-matter jurisdiction, in part due to the failure of defendants to properly plead this issue and their assumption of irreconcilable positions within their briefs by seeking the court's invocation of cy pres jurisdiction while simultaneously arguing the trial court lacked authority over cy pres proceedings. Although the trial court found that plaintiffs were entitled to equitable relief, the court rejected plaintiffs' claims that they are entitled even greater restrictions limiting the operation of the Pine Lake Elementary School for the use of Pine Lake students only. Rather, the trial court ruled that defendants were required to continue to operate a Bloomfield Hills school solely for the use of Bloomfield Hills' students, thereby necessitating the termination of the lease with the Waterford School District. This appeal ensued.

II. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Klapp v United Ins Group Agency, Inc.*, 468 Mich 459, 463; 663 NW2d 447 (2003). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the pleadings alone to determine whether the plaintiff has stated a claim upon which relief can be granted." *Morden v Grand Traverse Co.*, 275 Mich App 325, 331; 738 NW2d 278 (2007); MCR 2.116(G)(5). "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted." *Martin v Ledingham*, 282 Mich App 158, 160; 774 NW2d 328 (2009). The evidence must be considered in the light most favorable to the nonmoving party, *Corley v Detroit Bd of Educ.*, 470 Mich 274, 278; 681 NW2d 342 (2004), and the trial court is required to draw all reasonable inferences in favor of the nonmovant. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). "A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) 'if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.'" *Clerc v Chippewa Co War Mem Hosp.*, 267 Mich App 597, 601; 705 NW2d 703 (2005), quoting *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact is found to exist "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 426; 751 NW2d 8 (2008). Similarly, this Court reviews de novo challenges to a trial court's subject-matter jurisdiction, *Polkton Twp v Pellegrom*, 265 Mich App 88, 98; 693 NW2d 170 (2005), and issues pertaining to a party's legal standing as questions of law, *American Family Ass'n of Michigan v Michigan State Univ Bd of Trustees*, 276 Mich App 42, 44-45; 739 NW2d 908 (2007).

III. Analysis

The obvious starting point for this Court in attempting to simplify the primary issue involved in this litigation is to define the type of conveyance covered by the Callow deed. While we reserve judgment regarding whether the parties have acted purposefully or unwittingly, the matter before the trial court resulted in unnecessary confusion and complication. Hence, we initially restrict our analysis to the deed for the subject property and decline to speculate on the alleged motivations or intentions of the parties' as they existed 55 years ago because it is unnecessary to a resolution of this matter. Based on the content of the deed we find it unnecessary to superimpose or construe the existence of a charitable trust to determine the nature of the grant or to enforce any restrictions pertaining to the conveyance and its permissible uses.

As explained by our Supreme Court:

(1) In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of the parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable. [*Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005), quoting *Purlo Corp v 3925 Woodward Avenue, Inc*, 341 Mich 483, 487-488; 67 NW2d 684 (1954).]

Furthermore:

Deeds are contracts, and when courts can ascertain from the deed itself the intent of the grantor, the deed will be construed so as to give that intent effect, and that intent will be carried out 'as the mass of mankind would view it,' and not in accord with the technical definition of the words If there is a doubt as to the meaning, courts will consider the situation of the parties, the subject-matter of the transaction, the acts, conduct, and dealing of the parties, in determining the meaning of any particular clause. [*Nagaunee Iron Co v Iron Cliffs Co*, 134 Mich 264, 279-280; 96 NW 468 (1903).]

"A court of equity will not enlarge the scope of deed restrictions beyond the clear meaning of the language employed." *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 158; 336 NW2d 778 (1983).

"The rules applicable to the construction of deeds or conveyances generally have been applied in construing a grant or conveyance of land for public school purposes and conditions and restrictions therein." 78 CJS Schools and School Districts, § 526. Further, "the effect of a deed or grant is to be determined by the law as it existed on the date of the grant." *Id.* As denoted by the actual deed language, at its most basic or elemental level the document at issue conveys real property from Callow to the Bloomfield Hills School District "subject to the restriction that these premises shall be used for School purposes only."

Mae Callow conveyed the real property to defendants subject to a specific limitation of use. "A conveyance of land to be held as long as it is used for a school creates a determinable or qualified fee, subject to termination and reversion on cessation of that use, or, it has been said, the words fix a conditional limitation on the title to the land conveyed." *Id.* The deed language supports this determination. First, the devise is only to the School District and does not include any provisions for the grantee's assigns, demonstrating ownership is contingent on the limitations contained in the deed, implying that the property is not to be conveyed to another

entity.³ Second, the phrase “subject to the restriction that these premises shall be used for School purposes only” is a clear limitation on the use of the property. Specifically, the words “shall” and “only” indicate a mandate regarding the required use of the property. Further, the phrase “subject to the restriction” is akin to words long recognized in property law as designating a special limitation such as “until,” “during,” and “so long as.” Based on the existence of the deed’s wording expressing a condition of use a determinable fee was granted. As a result, despite the absence of a reversionary clause within the Callow deed, the grantor retains a right of re-entry upon the failure of the condition imposed on the conveyance of the fee. In other words:

A conveyance of land to be held as long as it is used for a school creates a reversionary interest in the grantor or his or her heirs or assigns even though there is no express provision to that effect. Such interest, it has been held, is not a full or true reversion, but only a possibility of reverter [78 CJS, Schools and School Districts, § 526; see also *Puffer v Clark*, 202 Mich 169, 198-199; 168 NW 471 (1918).]

Based on the wording of this deed and our determination that it grants a determinable or qualified fee, it is distinguishable from the line of cases cited by defendants, such as *Quinn v Pere Marquette Ry Co*, 256 Mich 143; 239 NW 376 (1931), which indicate that “where there is no reverter clause, a statement of use is merely a declaration of the purpose of conveyance, without effect to limit the grant.” *Id.* at 151. The factual circumstances of this case include distinctions regarding the difference between land that is sold for valuable consideration rather than gifted and statutory restrictions, which existed at the time, pertaining specifically to railroads. However, consistent with our findings in this case, *Quinn*, which was concerned with gas and oil interests, recognized that “it is held that a school district takes title in fee and may lease part of its premises [for the production of oil and gas] where it continues to conduct the school, although the grant was for ‘school purposes only’ . . . or where a reverter clause operates ‘when no longer use for common school purposes.’” *Id.* at 154.

In addition, contrary to plaintiffs’ arguments in reliance on *Huntington Woods v Detroit*, 279 Mich App 603, 627; 761 NW2d 127 (2008), this limitation on use does not comprise a restrictive covenant running with the land. This Court’s ruling in *Huntington Woods* is distinguishable based on the factual circumstances pertaining to the history of the property and changes in platting of the land at issue in that case, along with differences in the wording of the sequential deeds and the indication that the restriction on use of the subject property was part of the consideration given for conveyance of the land. The mere fact that the properties encompassed by the Callow deed and in the Baker deed in *Huntington Woods* were not the result of a purchase for fair market or other significant monetary value is insufficient to require them to be similarly construed.

Consequently, there exists no useful purpose in the labors undertaken by the trial court to justify this conveyance as establishing a charitable trust. As previously recognized by our

³ We recognize that, “[t]he grantee being a corporation, words of inheritance were not needed to convey a fee.” *School Dist No 5 of Delhi v Everett*, 52 Mich 314, 317; 17 NW 926 (1883).

Supreme Court, the imputed or supposed intent of the restrictors is insufficient to overcome the express language used in the documents creating the restrictions. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003); *Moore v Kimball*, 291 Mich 455, 460-461; 289 NW 213 (1939). Callow's intent was sufficiently effectuated based on the language of the deed. We need not resort to speculation regarding the donor's motivation in granting the conveyance because it would result in the improper expansion of both the type of conveyance actually granted and the limitations to be imposed on use of the property. *Rofo, supra* at 158.

Having ascertained the nature of the conveyance, we are next confronted with the task of determining whether the limitation on use within the deed has been or would be breached by defendants through lease of the property to another school district. The dispute centers on the meaning of the alleged ambiguity regarding the capitalized word "School" contained within the deed limitation on the use of the land. The trial court interpreted the meaning of the term as restricted to a Bloomfield Hills school solely for Bloomfield Hills' students. It did not, as requested by plaintiffs, more narrowly interpret the term to encompass only students eligible within the Pine Lake community to attend the Pine Lake Elementary School. We reject both positions and find that the words "School" and "used" comprise the determining factors to enforce the deed.

The terms "School" and "used," in the phrase "subject to the restriction that these premises be used for School purposes only," are not defined within the deed. As discussed by our Supreme Court in *Linton v Howard*, 163 Mich 556, 562; 128 NW 793 (1910), the term "use," when applied to real property, "does not mean the thing itself, but means that the user is to enjoy, hold, occupy, and have the fruit thereof. If the thing to be used is in the form or shape of real estate, the use thereof is its occupancy, or cultivation, etc., or the rent which can be obtained for the same." See also, *In re Moor's Estate*, 163 Mich 353, 358; 128 NW 198 (1910). It is undisputed that defendants' lease of the property to the Waterford School District for the operation of a school resulted in a monetary gain, thus establishing a benefit to defendants while retaining their ownership interest.

Further, we agree that the word "School," because it is capitalized, suggests a specific rather than a general reference. As such, we concur with the trial court that the term "School" references defendant Bloomfield Hills School District pursuant to their designation within the deed itself as the grantee. Consequently, while we agree with the trial court that defendants are required to use the subject property for the District's purposes, we reject the trial court's conclusion that such use is narrowly restricted solely to students of the District. Rather, in accordance with case law, we find that the term "used" encompasses the lease of the property as long as a school continues to be operated on the premises. In other words, because the rent obtained from leasing real property has been determined by our courts to comprise an acceptable "use," defendants' lease to the Waterford School District of the premises for the operation of a school resulting in a monetary gain to defendants comprises a proper and acceptable "use" within the strictures of the document conveying the property and it is unnecessary to consider extrinsic evidence as this matter can be resolved within the four corners of the deed. Based on our determination, plaintiffs' cross-appeal seeking a more narrow interpretation to limit the operation of a school by defendants solely for the benefit of Pine Lake community students is rendered moot.

Defendants further contend that the trial court lacked subject-matter jurisdiction. “Circuit courts are courts of general jurisdiction with original jurisdiction over all civil claims and remedies, except when the Michigan Constitution or a statute confers exclusive jurisdiction on another court.” *Ammex, Inc v Treasury Dep’t*, 272 Mich App 486, 494; 726 NW2d 755 (2006), citing MCL 600.601 and MCL 600.605. Specifically:

“Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending. The question of jurisdiction does not depend on the truth or falsity of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry. Jurisdiction always depends on the allegations and never upon the facts.” [*Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004), quoting *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992).]

“[A] court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous.” *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993). “Subject-matter jurisdiction cannot be conferred by consent of the parties, and a court must take notice when it lacks jurisdiction regardless of whether the parties raised the issue.” *In re Complaint of Knox*, 255 Mich App 454, 457; 660 NW2d 777 (2003) (internal citations omitted). Contrary to the circuit court’s assertion, “It is beyond question that a party may attack subject matter jurisdiction at any time,” and, therefore, “a proven lack of subject matter jurisdiction renders a judgment void.” *In re Hatcher, supra* at 438. However, an alleged error in a court's exercise of jurisdiction is not subject to collateral attack. *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992). Based on our determination that this matter involves the interpretation of a deed conveying real property during the grantor’s lifetime and not as part of an estate or a charitable trust, contentions pertaining to the trial court’s lack of subject-matter jurisdiction cannot be sustained.

Finally, we address defendants’ contentions challenging plaintiffs’ standing to initiate this litigation. In order to have standing, a party must have “a legal or equitable right, title or interest in the subject matter of the controversy.” *MOSES, Inc, v Southeastern Michigan Council of Gov’ts*, 270 Mich App 401, 414; 716 NW2d 278 (2006) (internal citation omitted). In discussing standing, we address 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, 291-292; 715 NW2d 846 (2006). Generally, for standing to exist a party must have a sufficient interest in the outcome of litigation to ensure vigorous advocacy and 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, supra* at 42, quoting 59 Am Jur 2d, Parties, § 30, p 414 (1987 ed). Specifically:

[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).]

Consistent with this definition of standing, we agree with the trial court that the minor children as potential students and land owners either abutting or with a direct view of the property have standing based on their special interest.⁴ *Huntington Woods, supra* at 617-618. Having determined that this matter merely involves a deed for real property and not a charitable trust, the presence of the Attorney General as a party to the litigation is not necessary and there exists no basis to assert his continued standing as a plaintiff.

We affirm in part, reverse in part and remand to the circuit court for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

⁴ This includes, Christopher Fellin, Alan Peterson, Mia and Sofia Mushovic, Chanon and Charon Stringer.