# STATE OF MICHIGAN

# COURT OF APPEALS

GEORGE P. ASKER and CHARLOTTE ASKER,

Plaintiffs-Appellants,

v

WXZ RETAIL GROUP GREENFIELD,

Defendant-Appellee.

UNPUBLISHED
August 5, 2010

No. 290234
Wayne Circuit Court
LC No. 06-625093-CZ

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting in part and denying in part the parties' cross motions for summary disposition pursuant to MCR 2.116(C)(10) in this action to enforce deed restrictions in a 1964 deed. The trial court held that a restriction requiring plaintiffs' approval of any improvements on defendant's property was no longer enforceable, but that plaintiffs could enforce a restriction requiring free traffic flow between the parking lots on defendant's property and plaintiffs' adjoining property. We reverse.

As a preliminary matter, we note that in addition to arguing that the trial court properly declined to enforce the deed restriction requiring approval of any building plans, defendant also argues that the trial court erred by enforcing the parking lot restriction. Although a cross appeal is not necessary to argue an alternative basis for affirming the trial court's decision, an appellee may not seek relief more favorable than that rendered by the trial court without filing a cross appeal. MCR 7.207; *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998). Because defendant's argument regarding the parking lot restriction seeks to enlarge the scope of relief it received below, and defendant did not file a cross appeal, the issue involving the enforceability of the parking lot restriction is not properly before this Court. Thus, we decline to consider it.

Plaintiffs argue in their appeal that the trial court erred in determining that the 1964 deed restriction requiring approval of any improvements on defendant's property was no longer enforceable. We agree.

When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). A trial

court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

This case involves the meaning and enforceability of a deed restriction. A deed restriction is a contract between a buyer and a seller of property. *Bloomfield Estates Improvement Ass'n v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007). "[U]nambiguous contracts are not open to judicial construction and must be *enforced as written*," unless contrary to law or public policy. *Id*. (emphasis in the original). Courts are not free to modify or disregard portions of a contract based on notions of fairness or the public good. *Id*. at 212-213. Thus, a court will enforce an unambiguous deed restriction as written, unless it contravenes law or public policy, or has been waived by acquiescence to prior violations.[1] *Id.* at 214.

"In interpreting a contract, [a court's] obligation is to determine the intent of the contracting parties." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id*. "[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). "[I]f the language of a contract is clear and unambiguous, its construction is a question of law for the court." *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998)

Conversely, a "contract is ambiguous when its provisions are capable of conflicting interpretations." *Klapp*, 468 Mich at 467. "[T]he meaning of an ambiguous contract is a question of fact that must be decided by the jury" or other trier of fact. *Id.* at 469. In determining the meaning of an ambiguous contract, the trier of fact may consider extrinsic evidence. *Id*. at 469-472. In *Klapp*, the Supreme Court explained that, "[i]n interpreting a contract whose language is ambiguous, the jury should also consider that ambiguities are to be construed against the drafter of the contract." *Id*. at 470. "This is known as the rule of contra proferentem." *Id*. at 471. However, "[t]he rule of contra proferentem is a rule of last resort because . . . [it] does not aid in determining the parties' intent." *Id*. at 473. Thus, it should be applied only as a tie-breaker, i.e., "merely to ascertain the winner and the loser in connection with a contract whose meaning has . . . [remained unclear] despite all efforts to apply conventional rules of [contract] interpretation," including the consideration of extrinsic evidence. *Id*. at 472-474.

The deed restrictions at issue in this case provide, in pertinent part:

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[1] In this case, defendant's waiver and estoppel arguments based on prior violations are directed only at the parking lot restriction. As previously indicated, that issue is not properly before this Court.

> This deed is also subject to the following restrictions which are covenants running with the land and not conditions, which restrictions shall be binding upon the Grantor and Grantee herein, their respective successors and assigns:
>
> 1. The Grantee shall within two (2) years from the date hereof cause to be erected and fully completed upon said premises a brick building adopted for and which shall be used for a bank building.
>
> 2. No improvements shall be placed upon said property until the site plan and architectural plans for the building or buildings to be erected thereon have been approved in writing by Grantor, which approval shall not be unreasonably withheld.
>
> 3. That portion of the premises which is to be devoted to a parking area shall be improved in a manner similar to and compatible with the parking area already established by Grantor on contiguous property and shall be so constructed that traffic may flow freely between the respective parking areas of the parties, it being the intention of the respective customers and invitees of the parties may conveniently use the two parking areas.

The first restriction requires the grantee to construct a bank on the property within two years. As plaintiffs observe, the second restriction requires the grantor's[2] approval of any buildings constructed on the property. The second restriction provides that "no improvements shall be placed upon said property until . . ." Defendant contends that this language presumes that there has been no prior construction on the parcel and that when the second restriction is read in context with the first restriction, it is apparent that the disputed building restriction refers only to approval of the site plan and architectural plans for the intended bank. This is a reasonable interpretation, taking into consideration the reference to "no improvements." However, the second restriction specifically provides that no improvements shall be placed upon the property until the plans for the *building or buildings* erected thereon have been approved in writing by the grantor. The first restriction contemplated that "*a* brick building" would be built on the property to be used as "*a* bank." Use of the language "building or buildings" in the second restriction and of the singular "a" in the first restriction indicates that the second restriction was not necessarily intended to be applicable only to the originally contemplated bank. Given the ambiguity in the interplay between the first and second deed restrictions, whether the building restrictions required plaintiffs' approval of defendant's proposed improvements on defendant's property presented a question of fact. The original parties' intent in the drafting of the provisions at issue cannot be ascertained from the language of the deed itself. Because the meaning of an ambiguous contract is a question of fact that must be decided by the jury or other trier of fact, *Klapp*, 468 Mich at 469, summary disposition was inappropriate.

[2] Plaintiffs are successors in interest to the original grantor.

Reversed and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Deborah A. Servitto