STATE OF MICHIGAN

COURT OF APPEALS

THOMAS CARNEY and MAUREEN CARNEY,

Plaintiffs-Appellants,

v

MICHAEL J. HASKELL,

Defendant-Appellee.

UNPUBLISHED
September 17, 2020

No. 349204
Kent Circuit Court
LC No. 17-005625-CH

Before: REDFORD, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this property dispute, plaintiffs, Thomas and Maureen Carney, appeal as of right the trial court's order denying their motion for summary disposition and granting judgment in favor of defendant, Michael Haskell, pursuant to MCR 2.116(I)(2) (nonmoving party entitled to summary disposition). For the reasons set forth below, we vacate the trial court's order and remand the matter for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arose from a property dispute between the owners of adjoining condominium units. Plaintiffs own Unit 38 in the Strawberry Farms residential site condominium project (hereinafter referred to as "the condominium project"). Defendant owns Unit 35 in the condominium project, which adjoined Unit 38 on its southern border. The condominium project was established in 1996 by the developer, and the master deed for the condominium project was recorded with the Kent County Register of Deeds on November 27, 1996, along with the subdivision plan and other documents.

The master deed and subdivision plan originally provided for 28 individual units in the condominium project, not including Units 35 and 38. However, the condominium project was later expanded to include plaintiffs' and defendant's properties. On April 29, 1997, the developer obtained defendant's property, and the garage and house on defendant's property were built in 1997 and 1998 respectively. On July 27, 2012, plaintiffs purchased Unit 38, at which time defendant's driveway had already been constructed. On June 30, 2015, defendant purchased Unit 35, and later that year, plaintiffs contacted defendant to discuss an alleged encroachment of

defendant's driveway and landscaping on plaintiffs' property. Plaintiffs requested that defendant remove the alleged encroachments, but defendant refused.

Eventually, plaintiffs filed a complaint against defendant alleging that defendant's driveway and landscaping improvements encroached on their property. Plaintiffs requested that the trial court recognize the encroachments, grant them the authority to remove the encroachments, and order defendant to pay the cost of removal. Plaintiffs attached to their complaint a survey of their property that showed the alleged encroachments. Defendant denied that his driveway and landscaping encroached on plaintiffs' property and requested that the trial court dismiss plaintiffs' complaint. Defendant also asserted a variety of affirmative defenses, including adverse possession and acquiescence.

Plaintiffs filed a motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), arguing that they were entitled to summary disposition as a matter of law because the survey they submitted with their complaint clearly showed that defendant's landscaping and driveway encroached on plaintiffs' property, and defendant failed to present any evidence to the contrary. Before the hearing on plaintiffs' motion for summary disposition, the trial court wrote to the parties and asked that they be prepared at oral argument to address "MCL 559.140 and *Rossow v Brentwood Farms Dev, Inc*, 25l Mich App 652; 651 NW2d 458 (2002)." As enacted by 1978 PA 59, MCL 559.140 read as follows:

> To the extent that a condominium unit or common element encroaches on any other condominium unit or common element, whether by reason of any deviation from the plans in the construction, repair, renovation, restoration, or replacement of any improvement, or by reason of the settling or shifting of any land or improvement, a valid easement for the encroachment shall exist.

The Legislature later amended the statute with 2000 PA 379, effective January 2, 2001. The amendment added the following sentence at the end of the statute:

> This section shall not be construed to allow or permit any encroachment upon, or an easement for an encroachment upon, units described in the master deed as being comprised of land and/or airspace above and/or below said land, without the consent of the co-owner of the unit to be burdened by the encroachment or easement.

Absent clear indication of its retroactive application, the amended statute was to be applied prospectively. See *Rossow*, 251 Mich App at 662-663.

The parties' dispute at the hearing on plaintiffs' motion for summary disposition revolved primarily around the question of who created the alleged encroachment. Plaintiffs asserted that defendant's private driveway was a co-owner created improvement that was part of defendant's condominium unit, but acknowledged that they did not know who installed the driveway. Defendant maintained that the developer of the condominium project had "poured the driveway, planted the—the landscaping that [was] right there on the disputed property, and determined the actual size of the property" and that, pursuant to the master deed, the developer "had the right to

make a minor boundary change such as" the one in this case.[1] Upon further questioning by the court, defendant said it was his understanding that the developer was responsible for the encroachments, but admitted that, "at this point, no proofs have been presented either way." Plaintiff responded to defendant's argument by asserting that, although the master deed authorized the developer to amend the boundaries of condominium units belonging to the developer, i.e., Units that had not yet been sold, it also required the developer to file any changes to the master deed. The developer had not filed any changes or provided any information from which the developer's intentions could be discerned.

In addition, the parties also disputed the application of MCL 559.140. The parties appeared to agree that defendant had an easement by operation of MCL 559.140 if the developer had created the alleged encroachments. Plaintiffs contended that MCL 559.140 provided a means of correcting any deviations from the subdivision plans during the development period. They surmised that it was the "intention of the legislature to clean that up, so they don't have a hundred thousand people standing in courts saying, hey, he is over my boundary three inches." The court affirmed that it understood the purpose of the statute similarly. In addition, defendant impliedly agreed with this view of the statute's purpose when he denied any encroachment because, as far as he knew, it was the developer who had placed the landscaping and the portion of the driveway at issue.

However, if the court deemed MCL 559.140 to apply to co-owner created encroachments, plaintiffs urged the court to apply MCL 559.140, as amended by 2000 PA 379. Plaintiffs contended that the amendment did not grant any new rights, it simply clarified the Legislature's original intent that the statute should not automatically grant an easement to a co-owner who mistakenly or intentionally encroached on another person's property without consent. Failure to apply the amended version of MCL 559.140 would effectively reward co-owners for encroaching on their neighboring co-owner's property. Defendant observed that this Court held in *Rossow* that the amendment to MCL 559.140 did not apply retroactively,[2] and contended that the original language of MCL 559.140 clearly and unambiguously granted defendant an easement for any encroachment, without requiring plaintiffs' consent. Defendant argued that to apply the statute as amended would be to interfere with the contract rights accorded the developer by the master deed.

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[1] Section 10.1 of the master deed authorizes the developer to adjust boundaries of condominium units as follows: "The Developer may, without the consent of the other Co-Owners of the Association, amend this Master Deed to relocate the boundaries of the Units owned by the Developer as desired by the Developer."

[2] Arguably, this Court limited its holding to the facts of the *Rossow* case when it stated, "[b]ecause retroactive application of the amended statute will interfere with the contract rights established in Article IX(A) of the master deed, we conclude that § 40, as amended by 2000 PA 379, does not apply to the instant case." *Rossow*, 251 Mich App at 662-663. Nevertheless, earlier in the opinion, the Court had referred to the general principle that, "[s]tatutes are to be applied prospectively unless the Legislature's intent for retroactive application is clear." *Id.* at 662.

The trial court took the matter under advisement and, on May 15, 2019, issued an opinion and order denying plaintiffs' motion for summary disposition and granting judgment in favor of defendant. The trial court reasoned as follows:

> By the plain statutory language contained in MCL 559.140, when an improvement to a condominium unit or common element, even though not planned for, encroaches on another condominium unit or common element, a valid easement shall exist. Therefore, MCL 559.140 expressly grants an easement over the burdened property to the encroaching property. . . .
>
> In our case, the parties do not contest that the driveway and landscape are improvements. Based on the master deed definitions, this court agrees that the driveway and landscaping, including a sunken animal fence should it exist, are improvements.
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> Next, this court finds that the area of encroachment is wholly between two adjacent condominium units. Section 2 of the master deed's Article 4 expressly defines what *limited common elements* are and excludes the area at issue from that definition. Further, the plaintiff conceded that the driveway is an improvement *to the condominium unit* and not to either type of common element.
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> Therefore, the facts of this matter as applied to the former MCL 559.140 require the conclusion that, to the extent the defendant's driveway and landscaping portions encroach from Unit 35 onto the plaintiff's [sic] Unit 38, the defendant holds a validly granted, statutory easement over that area safe from recourse.
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> * * *
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> Plaintiffs concede the second added sentence [of MCL 559.140] does not apply to this dispute, but argue that the addition of the second sentence was intended by the legislature to clarify how the former version [of MCL 559.140] should be interpreted. This court disagrees.
>
> First and foremost, *Rossow* answers the question: the 2001 amendment to MCL 559.140 does not apply retroactively. . . .
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> Moreover, unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, considering the context in which the words are used. Further, the language must be applied as written and nothing should be read into a statute that is not within the manifest intent of the Legislature as evidenced from the act itself. . . .
>
> Plaintiffs argued that the added language shows that the former MCL 559.140 really applied only to developers and their work relating to infrastructure changes, not private owners constructing or altering private improvements. Such an interpretation reads too much beyond the plain language of the former version of MCL 559.140. Plaintiffs argue the legislature could not have intended for private

> owners to be granted easements over their neighbors' yards because of mistakenly placing improvements thereon. But this court must apply the statute as written and may not read more into it than evidenced from the act itself.

The trial court dismissed plaintiffs' case and ordered that "defendant shall prepare an order for the court's issuance settling title to the encroaching area. This is not a final order closing this case."

On June 6, 2019, plaintiffs filed a claim of appeal from the trial court's May 2019 order. Then, on August 8, 2019, defendant submitted a proposed order quieting title to the disputed area between plaintiffs' and defendant's properties. Plaintiffs objected to defendant's proposed order for being overbroad and submitted an alternative proposed order. However, on September 20, 2019, the trial court adopted defendant's proposed order, thereby establishing a statutory easement for the encroachments on plaintiffs' property. Additionally, the trial court ordered that defendant and his successors in interest be permitted to "use, maintain, repair and replace the encroachments and enter [plaintiffs' property] as necessary for such purposes," but prohibited them from "increase[ing] the footprint of, or relocat[ing] any structures or defined planting beds as depicted [in a survey of plaintiffs' and defendant's properties that was attached to the order]." The trial court also prohibited plaintiffs and their successors in interest from interfering with the easement and directed that its order be recorded with the Kent County Register of Deeds.

II. JURISDICTIONAL CHALLENGE

Defendant argues that this Court does not have jurisdiction over this appeal because the trial court's May 2019 order was not a final order. We disagree.

This Court has jurisdiction over an appeal from a "final judgement or final order of the circuit court." MCR 7.203(A)(1). Pursuant to MCR 7.202(6)(a)(*i*), the final order in a civil case is "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." In this case, the trial court's May 2019 order resolved all claims and adjudicated the rights and liabilities of plaintiffs and defendant to the disputed property by granting defendant a statutory easement and dismissing plaintiffs' complaint.[3] See MCR 7.202(6)(a)(*i*). The trial court's subsequent order was simply a ministerial order meant to more clearly define the easement for the encroachments and to allow the easement to be recorded at the Kent County Register of Deeds. Because the May 2019 order constituted a final order under MCR 7.202(6)(a)(*i*), we have jurisdiction over this appeal. See MCR 7.203(A)(1).

III. MCL 559.140

On appeal, plaintiffs first argue that the trial court erred by incorrectly interpreting and applying MCL 559.140 to automatically grant defendant an easement for the area where defendant's driveway and landscaping encroach on plaintiffs' property, regardless of whether the

[3] The fact that the trial court's May 15, 2019 order indicated it was "not a final order closing this case" is not controlling on the matter of this Court's jurisdiction. *Faircloth v Family Independence Agency*, 232 Mich App 391, 400; 591 NW2d 314 (1998).

encroachment was caused by the developer or a predecessor owner of defendant's condominium unit. We agree.

We review de novo questions of statutory interpretation and a trial court's decision whether to grant summary disposition. *Rossow*, 251 Mich App at 657. "[A] trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Id*. at 658. "The goal of statutory interpretation is to discern the intent of the Legislature." *Estate of Buol by Roe v Hayman Co*, 323 Mich App 649, 654; 918 NW2d 211, 215 (2018). "The first step in this Court's interpretation of a statute is to review the language of the statute itself; if the language is unambiguous, we must give the language its plain and ordinary meaning, without judicial construction." *Id*. The provisions of a statute should be construed reasonably and in context. *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012). Statutes that relate to the same subject or share a common purpose are said to be *in pari materia*—on or about like matter—and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. See *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998).

The statute at issue, MCL 559.140 is part of the Condominium Act, MCL 559.101 *et seq*. The Condominium Act, as well as the condominium project's master deed, sets forth specific procedures co-owners of adjacent condominium units must follow if they wish to change the boundaries between their Units. Because MCL 559.140 relates to boundary lines that have changed because of deviations from the subdivision plan, MCL 559.140 must be read together with related statutes in the Condominium Act. *Id*. Here, the trial court inadvertently violated the rule of *in pari materia* when it applied MCL 559.140 to resolve the present dispute without first determining who created the alleged encroachment. As a result, the court effectively sanctioned a change in adjoining boundaries lines that was inconsistent with the procedures set forth in the Condominium Act and in the master deed for the condominium project and, consequently, violative of plaintiffs' rights under both.

The Condominium Act defines a "condominium unit" as that portion of the condominium project designed and intended for separate ownership and use . . . ." MCL 559.104(3).[4] A condominium unit is owned by a "co-owner," which can be "a person, firm, corporation, partnership, association, trust, or other legal entity or any combination of those entities." MCL 559.106(1). Each co-owner has an exclusive right to his or her condominium unit . . . ." MCL 559.163. The co-owners of adjoining condominium units may adjust the boundaries between their

[4] The Condominium Act has been infrequently amended since its enactment by 1978 PA 59, Eff. July 1, 1978. With the exception of the amendment to MCL 559.140, already discussed, none of the amendments significantly changed any of the statutes relied upon in this opinion. Therefore, the language used is from the current version of the Condominium Act.

units if certain conditions are met. Among those conditions, the condominium documents[5] must "expressly permit the relocation of boundaries between adjoining condominium units," the co-owners must agree to relocation of the boundaries and submit a written application to the person specified by the condominium documents to receive it, and relocation must accord with MCL 559.148 and any lawful restrictions specified by the condominium documents. MCL 559.148(1) and (2). After receiving the co-owners' written application to change boundaries, the person so tasked by the condominium document shall "forthwith prepare and execute an amendment to the master deed duly relocating the boundaries pursuant to the condominium documents and [the Condominium Act]." MCL 559.148(2). Further, "[a] relocation of boundaries shall not occur without approval of an affected mortgagee." MCL 559.148(1).

Article X, section 1, of the master deed for the condominium project expressly provides for the adjustment of adjoining boundaries by co-owners as follows:

> If non-developer Co-Owners owning adjoining Units, or a non-developer Co-Owner and Developer owning adjoining Condominium Units desire to relocate the boundaries of those Units or either of those Units, then the Board of Directors of the Association will, upon written application of the Co-Owners, accompanied by the written approval of the Developer during the Development Period and, in any event, of all mortgagees of record of the adjoining Units, forthwith prepare or caused to be prepared an amendment to this Master Deed duly relocating the boundaries. No relocation of the Boundaries shall result in the creation of any additional Unit.

As the foregoing illustrates, the Condominium Act and the relevant master deed provide specific instructions for co-owners who wish to adjust adjacent boundaries. Neither the Condominium Act nor the master deed provides express authority for a co-owner to unilaterally change the boundary between his or her condominium unit and that of an adjacent neighbor, nor to encroach on that neighbor's exclusive right to his or her condominium unit. Co-owners are required "to comply with the master deed, bylaws, and rules and regulations of the condominium project and [the Condominium Act]." MCL 559.165.

That brings us to MCL 559.140, which very clearly provides for an automatic easement in certain situations. The issue is, does the case at bar present such a situation for purposes of summary disposition? We think not. The plaintiffs observed during the summary disposition hearing, and the trial court agreed, that MCL 559.140 was designed to remedy errors that occur in the construction phase of a condominium project so as to prevent countless co-owners from bringing suit after suit seeking remedies for deviations from the condominium plans. Although defendant argued that the plain language of the statute contemplated changes a co-owner would

[5] " 'Condominium documents' means the master deed, recorded pursuant to this act, and any other instrument referred to in the master deed or bylaws which affects the rights and obligations of a co-owner in the condominium." MCL 559.103(10).

make to what the developer initially did, he appears to have abandoned that argument on appeal, arguing instead that the changes at issue were undoubtedly made by the developer.

No appellate court has held that the purpose of MCL 559.140 is to correct errors made during the developmental phase of a condominium project or during the condominium association's subsequent "repair, renovation, restoration, or replacement of any improvement" initially installed during the developmental phase of the project. Nevertheless, such an interpretation makes sense, given that errors may occur, and some deviations from the plan may be impossible to control, e.g., those arising from the "settling or shifting of any land or improvement." Further, the scant caselaw applying this statute has applied it to encroachments caused by developers' deviations from the plan. See, e.g., *Rossow*, 251 Mich App at 655 (involving a nine-foot encroachment of one co-owner's driveway onto the adjacent property of another co-owner thought to have arisen from a surveying and staking error that occurred during the developmental phase of the condominium project).[6]

By reasoning that MCL 559.140 provided defendant with an automatic easement, regardless of who created the encroachment, i.e., the deviation from the planned boundary, the trial court neglected to interpret the statute *in pari materia* with those statutes in the Condominium Act establishing a co-owner's right to his or her condominium unit, MCL 559.163, setting forth precise procedures to follow when adjusting boundaries between adjacent condominium units and incorporating related procedures in the condominium documents, MCL 559.148, and requiring co-owners to comply with the Condominium Act and the condominium documents, MCL 559.165. The result of the court's application of the statute in this situation was to potentially reward with an easement a co-owner who encroached on the adjacent condominium unit, inadvertently or otherwise.[7]

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[6] See also *Pond v Harbian*, unpublished per curiam opinion of the Court of Appeals, issued April 13, 2010 (Docket No. 289290) (affirming dismissal of a trespass claim against the defendants on grounds that MCL 559.140 operated to give the defendants an easement for the portion of their driveway that encroached on the plaintiff's property because of the builder's deviation between the siting of the defendant's driveway on the plot plan and its actual placement). Of course, unpublished opinions of this Court have no precedential effect, but may be considered persuasive. MCR 7.215(C)(1). We mention it because it is one of only two appellate cases addressing the application of MCL 559.140, the other case being *Rossow*.

[7] The court admitted during the hearing on plaintiffs' motion for summary disposition that the statute was "puzzling in some respects. It does seem to give free license to people to encroach on other people's property . . . ." Nevertheless, the court indicated that it was compelled to apply the statute according to its plain language. We agree that "the first step in this Court's interpretation of a statute is to review the language of the statute itself . . . ." *Estate of Buol*, 323 Mich App at 654. However, as this case illustrates, other principles of statutory construction must also be employed where necessary to interpret a statute in harmony with other statutes that share a common purpose. See *State Treasurer*, 456 Mich at 417.

This is not to say that MCL 559.140 does not apply. However, without first determining who created the encroaching driveway, landscaping, and underground fence encroachments,[8] application of the statute was error. In addition, even if the developer did create the encroachments, if the encroachments were created on or after January 2, 2001, the amendment to MCL 559.140 would apply, and a statutory easement would not exist automatically. Accordingly, we vacate the trial court's order denying summary disposition to plaintiffs and granting summary disposition to defendant and remand the matter for further proceedings. If it is determined by the factfinder that the developer created any of the encroachments before MCL 559.140 was amended on January 2, 2001, defendant would be entitled to an easement. However, if the encroachment was created by a predecessor of defendant, the trial court would have to entertain defendant's arguments that he acquired rights to the property by way of acquiescence or adverse possession. Because the trial court did not weigh in on defendant's contention that these common law claims apply to condominium ownership, or that he met the requirements of either, we decline to decide these issues in the first instance.

Plaintiffs also argue that the trial court erred by denying their motion for summary disposition under MCR 2.116(C)(10). We disagree. Even if we assume for the sake of argument that the encroachments at issue were created by co-owners, and not the developer, as noted above defendant raised several affirmative defenses that the trial court did not consider because of its reliance on MCL 559.140. Defendant urges us to conclude that, because the undisputed facts show that plaintiffs and their predecessors acquiesced to the encroachment for the required statutory period of 15-years, MCL 600.5801(4), defendant was entitled to summary judgment and title to the disputed strip of property. We decline to so rule. Not only does the record show that plaintiffs consistently asserted that their actions were not to be understood as acquiescence to the encroachment, but defendant bases his argument in part on his unsupported assertion that it was the developer who deviated from the plan when it placed defendant's driveway and landscaping, and that the encroachments were created prior to January 2, 2001. Without further factual development, neither party is entitled to summary disposition at this juncture.

Vacated and remanded for further proceedings consistent with this opinion. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full. This Court does not retain jurisdiction.

/s/ James Robert Redford
/s/ Jane M. Beckering
/s/ Michael J. Kelly

[8] We acknowledge that these encroachments may have been created at different times by different persons.