COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2260

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

WEXFORD VILLAGE HOMES ASSOCIATION, INC.,

PLAINTIFF-APPELLANT,

V.

WILLIAM WOEHRLE, JR., AND TRACY WOEHRLE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Reversed and cause remanded.*

Before Eich, Roggensack and Deininger, JJ.

ROGGENSACK, J. The Wexford Village Homes Association appeals from a judgment of the circuit court concluding that William and Tracy Woehrle, Wexford Village residents, did not violate the plat's covenants by parking their motor home in their driveway for extended periods of time; that the Association was not entitled to a permanent injunction; and that based on these

rulings, it was not necessary to reach the Association's private nuisance claim or the Woehrles' affirmative defenses. We conclude that paragraph ten of the covenants has an aesthetic purpose which is manifest by its terms which unambiguously prohibit the Woehrles from parking their Winnebago in their driveway, except for loading and unloading it. Accordingly, we reverse the circuit court's determination with regard to the enforceability of the covenants, and because our decision in that regard may affect the circuit court's consideration of the Association's request for equitable relief, we vacate its decision denying an injunction to enforce the covenants against the Woehrles. Furthermore, the Association's private nuisance claim and the Woehrles' affirmative defenses involve disputed material facts; therefore, they cannot properly be resolved on summary judgment. Accordingly, we remand for further proceedings on the private nuisance claim, the affirmative defenses and the request for injunctive relief.

BACKGROUND

William and Tracy Woehrle, residents of the Harvest Hill Addition to Wexford Village in Madison, Wisconsin, have parked their Winnebago LaSharo motor home in their driveway since they purchased the vehicle in 1986. The Winnebago is too large to fit in the Woehrles' garage, but despite its size, the Woehrles use the vehicle for daily transportation.

As residents of the Harvest Hill Addition to Wexford Village, the Woehrles' property is subject to the Declaration of Conditions, Covenants, Restrictions and Easements for the plat, a sixteen-paragraph, eight-page document which controls the use of all lots in the subdivision. Paragraph ten of the covenants provides:

> Parking of service vehicles owned or operated by residents of the homes is prohibited unless they are kept in garages. Storage of boats, travel trailers, mobile homes, campers, and other recreational vehicles are prohibited unless kept inside garages. This shall not prohibit the temporary storage of such vehicles for the purpose of loading or unloading.

In July 1996, the Association, on behalf of various Wexford Village residents who complained about the Woehrles' practice of keeping their Winnebago in their driveway, demanded that the Woehrles cease this practice because it violated paragraph ten of the covenants. In response, the Woehrles indicated that they would park the Winnebago in the street, if they could not park it in their driveway. They also removed the potable water supply system, toilet and cooking facilities from the Winnebago and had the vehicle reclassified as a truck with the Wisconsin Department of Transportation. The outward appearance of the Winnebago remained the same.

On October 1, 1996, the Association filed a lawsuit against the Woehrles seeking judgment declaring that parking their Winnebago in their driveway violated paragraph ten of the covenants and that parking their Winnebago in the street in front of their house constituted a private nuisance. The Association also requested an injunction prohibiting the Woehrles from parking their Winnebago in either their driveway or on the street in front of their house.

Both parties moved for summary judgment. The circuit court granted summary judgment in favor of the Woehrles, concluding that their conduct did not violate the covenants because paragraph ten was ambiguous; the terms "parking" and "storing" have different meanings; and the Woehrles were not "storing" their Winnebago as the term is commonly understood. The court also held that the Association was not entitled to a permanent injunction because the

threatened injury was not substantial. Based on these rulings, the court did not reach the Association's private nuisance claim and held that the Woehrles' affirmative defenses of waiver, estoppel and laches were unnecessary to defeat the Association's motion for summary judgment and permanent injunction. This appeal followed.

DISCUSSION

Standard of Review.

We review summary judgment decisions *de novo*, applying the same standards employed by the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis.2d 226, 232, 568 Wis.2d 31, 34 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer, to determine whether it joins a material issue of fact or law. ***Id.*** If we determine that the complaint and answer are sufficient, we proceed to examine the moving party's affidavits, to determine whether they establish a *prima facie* case for summary judgment. ***Id.*** at 232-33, 568 N.W.2d at 34. If they do, we look to the opposing party's affidavits, to determine whether there are any material facts in dispute which entitle the opposing party to a trial. ***Id.*** at 233, 568 N.W.2d at 34.

The interpretation of a written covenant affecting land is a question of law that we review independently of the circuit court. ***Zinda v. Krause***, 191 Wis.2d 154, 165, 528 N.W.2d 55, 59 (Ct. App. 1995). In contrast, injunctive relief is addressed to the sound discretion of the circuit court. ***Pure Milk Products Coop. v. National Farmers Org.***, 90 Wis.2d 781, 800, 280 N.W.2d 691, 700 (1979). When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that

a reasonable judge could reach. ***State v. Keith***, 216 Wis.2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997).

Covenants.

Public policy favors the free and unrestricted use of property; however, restrictions will be enforced if the intention of the parties is clearly shown in the covenants which affect the property. ***Voyager Village Property Owners Ass'n v. Johnson***, 97 Wis.2d 747, 749, 295 N.W.2d 14, 15 (Ct. App. 1980). "[W]here the purpose of a restrictive covenant may be clearly discerned from the terms of the covenant, the covenant is enforceable against any activity that contravenes that purpose." ***Zinda***, 191 Wis.2d at 167, 528 N.W.2d at 59.

For example, in ***Voyager Village***, 97 Wis.2d at 749-50, 295 N.W.2d at 15-16, we enforced a covenant which restricted property owners from leaving camping equipment that they were not using on their lots because the intention of the common grantor, "to protect neighboring lot owners from the continuing eyesore of parked, unused camping equipment," was clearly and unambiguously set forth in the covenants. Furthermore, a covenant need not expressly prohibit the specific activity in question, in order to be enforceable; it is enough that the purpose of the covenant is clearly discernible from its terms. ***Zinda***, 191 Wis.2d at 170, 528 N.W.2d at 60. In ***Bubolz v. Dane County***, 159 Wis.2d 284, 294, 464 N.W.2d 67, 71 (Ct. App. 1990), we confirmed that when the purpose or general plan evinced by a covenant is ascertainable from its terms, the restriction should be construed to give effect to that purpose.

Wexford Village's covenants prohibit "[s]torage of … recreational vehicles … unless kept inside garages" but allows "temporary storage of such vehicles for the purpose of loading or unloading." The Woehrles contend that this

restriction does not apply to them because the Winnebago is not being "stored" on their property, nor is it a "recreational vehicle."

We must give effect to the purpose of a covenant as manifest by the language used. *See* ***Zinda***, 191 Wis.2d at 166, 528 N.W.2d at 59. The covenants which affect the Woehrles' property are unambiguously an attempt to regulate what other owners are forced to look at on their neighbor's property, for more than short periods of time. The use of the word "store" rather than "park" does not cloud the purpose of the covenants. To explain, requiring that recreational vehicles be kept out of view inside garages, except for loading and unloading, has nothing to do with the definitions of the words "store" and "park" and everything to do with how a lot will appear to others, if large vehicles are routinely kept in plain view. Therefore, we conclude that the covenants' language is unambiguous because it is susceptible of only one reasonable interpretation as to the purpose sought to be achieved. *See* ***Zinda***, 191 Wis.2d at 165-66, 528 N.W.2d at 59. And, based on that language, we conclude that the clear intent of the covenants is to limit the amount of time when large vehicles may be observed by others on the premises, in order to protect neighboring residents from the eyesore of exposed recreational vehicles on Wexford Village lots for more than short periods.

We are also not persuaded by the Woehrles' argument that their Winnebago is not a "recreational vehicle" subject to the covenants. They assert it would not be so classified under the statutory and administrative code definitions of "recreational vehicle." They also assert that due to their reclassification of the Winnebago as a truck by the Department of Motor Vehicles, and their regular use of the Winnebago for general transportation, it is not a recreational vehicle. However, the circuit court made a finding that the Winnebago looks like a motor home, which is a type of recreational vehicle. Furthermore, there is no dispute

that the Winnebago was parked in the Woehrles' driveway, for extended periods of time, when it was not being loaded or unloaded. Because the covenants have an aesthetic purpose that is not affected by the use to which the Woehrles place their Winnebago, or by the definition of recreational vehicle in the statutes or administrative code, and because the circuit court found that by all outward appearances it looks like a recreational vehicle, we conclude that, as a matter of law, the covenants unambiguously prohibit the Woehrles from parking their Winnebago in their driveway, except for short periods of time.

Injunction.

The Association requested an injunction to prevent the Woehrles from continuing to park their Winnebago in their driveway. Injunctions are not issued for trivial causes; the cause must be substantial. ***Pure Milk***, 90 Wis.2d at 800, 280 N.W.2d at 700. To obtain an injunction, the moving party must show a sufficient probability that the future conduct of the opposing party will violate a right of the movant. ***Id.*** The movant must also establish that the injury is irreparable, *i.e.*, not adequately compensable by money damages. ***Id.*** Moreover, competing interests must be reconciled and the movant must satisfy the circuit court that, on balance, equity favors issuing the injunction. ***Id.*** Whether to grant an injunction for a violation of a covenant affecting real estate is a decision left to the sound discretion of the circuit court. ***Zinda***, 191 Wis.2d at 174-75, 528 N.W.2d at 62.

When the circuit court examined the facts and the law relevant to the Association's request for an injunction, it did so after concluding that parking the Winnebago in the Woehrles' driveway was not a violation of the covenants. Because we have concluded that the circuit court erred in this regard, and because

our decision may affect the decision of the circuit court as it exercises its discretion, we vacate the circuit court's decision to deny the injunction and remand the Association's request for equitable relief for further consideration in light of our decision.

Nuisance.

A private nuisance is an unreasonable interference with the interests of another in the use and enjoyment of land. ***Bubolz***, 159 Wis.2d at 298, 464 N.W.2d at 73. The activity complained of must cause significant harm, *i.e.*, it must create more than a slight inconvenience and must be offensive to a person of ordinary and normal sensibilities. ***Id.***

That the Woehrles' conduct in parking their Winnebago in the driveway is a violation of the covenants does not establish that parking the Winnebago in the street is unreasonable because the streets are City of Madison streets and the Association does not have a legal right to determine what kind of vehicle may be parked on a public street. Whether parking the Winnebago on the street is unreasonable pursuant to the Madison General Ordinances involves factual questions not appropriately decided on summary judgment. Furthermore, there are material facts in dispute about whether parking the Winnebago on the street interferes with the rights of others by creating a safety hazard or by changing the aesthetic character of the neighborhood or whether such conduct causes significant harm such as a reduction in property values. Accordingly, resolution of the private nuisance claim on summary judgment is inappropriate.

Affirmative Defenses.

The Woehrles' claim that waiver,[1] equitable estoppel,[2] and laches[3] bar enforcement[4] of the covenants because they relied on a determination in 1988 by Linda Brumm, the Association board member in charge of covenant issues, that they were not storing their Winnebago in violation of the covenants and because no subsequent enforcement action was taken; therefore, it would be unfair to force them to remove their Winnebago from their driveway now. Whether these affirmative defenses bar enforcement of the covenants involves material questions of fact which cannot be resolved without a trial. Therefore, we remand them to the circuit court for further proceedings.

CONCLUSION

The covenants' aesthetic purpose, as manifest by its terms, unambiguously prohibits the Woehrles from parking their Winnebago in their driveway. Because our decision in this regard may affect the circuit court as it

---

[1] "Waiver consists of three factors: (1) a right possessed by the waiving party; (2) knowledge of the right by the waiving party; and (3) an intentional and voluntary waiver." ***Shannon v. Shannon***, 145 Wis.2d 763, 775, 429 N.W.2d 525, 530 (Ct. App. 1988), *aff'd* in part, *rev'd* in part on other grounds, 150 Wis.2d 434, 442 N.W.2d 25 (1989).

[2] Equitable estoppel requires three elements: "(1) [a]ction or inaction which induces, (2) reliance by another, (3) to his [or her] detriment. ***Harms v. Harms***, 174 Wis.2d 780, 785, 498 N.W.2d 229, 231 (1993) (quoting ***Mercado v. Mitchell***, 83 Wis.2d 17, 26-27, 264 N.W.2d 532 (1978)).

[3] Laches bars a claim when: (1) an unreasonable delay occurs; (2) the plaintiff knows the facts and takes no action; (3) the defendant does not know that the plaintiff would assert the right on which the suit is based; and (4) prejudice to the defendant occurs. ***Jensen v. Janesville Sand & Gravel Co.***, 141 Wis.2d 521, 529, 415 N.W.2d 559, 562 (Ct. App. 1987). The terms "detriment" and "prejudice," in this context, mean injury or damage. ***Milas v. Labor Ass'n of Wisconsin***, ***Inc.***, 214 Wis.2d 1, 13, 571 N.W.2d 656, 661 (1997).

[4] The Woehrles also asserted the affirmative defense of promissory estoppel in their Answer; however, because they did not address promissory estoppel in their brief to this court, we deem that defense abandoned. *See* ***Truttschel v. Martin***, 208 Wis.2d 361, 369, 560 N.W.2d 315, 319 (Ct. App. 1997).

exercises its discretion in regard to the Association's request for a permanent injunction, we remand the request for equitable relief to the circuit court for further consideration. And finally, the Association's private nuisance claim and the Woehrles' affirmative defenses involve material factual disputes; therefore, they are not appropriate for resolution by summary judgment and we remand them to the circuit court for further proceedings as well.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.