STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

JOHNSON FAMILY LIMITED PARTNERSHIP
a Michigan limited partnership,

Plaintiff,

v

File No. 06-25433-CK
HON. PHILIP E. RODGERS, JR.

WHITE PINE WIRELESS, LLC, d/b/a Cellere,
a Michigan limited liability company, and
J.P.M.S., INC., a Michigan corporation,

Defendants
/

Mark A. Hullman (P15254)
Attorney for Plaintiff

Steven R. Fox (P52390)
Attorney for Defendant White Pine Wireless

Tom H. Evashevski (P31207)
Attorney for Defendant J.P.M.S.

DECISION AND ORDER ON
CROSS-MOTIONS FOR SUMMARY DISPOSITION

This is an action for reformation of a Warranty Deed to include building and use restrictions that were provided for in the parties' Purchase Agreement but not included in the Warranty Deed and to interpret those restrictions to preclude the current lessee from erecting a fence and constructing and maintaining a cell tower on the subject property.

The issues presented are:

1. Whether the Plaintiff is entitled to reformation of the Warranty Deed;
2. Whether the doctrine of merger applies:
3. Whether Defendant White Pine was a bona fide purchaser;
4. Whether Plaintiff has stated a claim upon which relief can be granted; and
5. Whether the building and use restrictions prohibit the erection of a fence and the construction and maintenance of a cell tower on the subject property.

FACTUAL BACKGROUND

Plaintiff Johnson Limited Partnership ("Johnson Family") owns property in Acme Township ("Township") and sold a portion thereof to Defendant J.P.M.S., Inc. ("JPMS"). The Purchase Agreement stated that the Warranty Deed to be executed in conveyance of the property would contain certain building and use restrictions, including: "(j) * * * No power, telephone or other utility wires or conduits shall be installed above ground on the property other than the currently existing power lines" and "(k) No statue, fence or other unnatural improvements shall be permitted on the Property without the approval of the Seller or successor."

Jerome Jelinek, an attorney and President of Corporate Title, drafted the Warranty Deed used to convey the property. The Warranty Deed did not include the building and use restrictions. None of the parties was present at the closing.

JPMS granted an option to lease a portion of the property to White Pine Wireless, LLC ("White Pine"), doing business as Cellere. White Pine procured a title search which did not disclose the restrictions. It subsequently applied to the Township for a special use permit to construct a cell tower on the property.

At the hearings held by the Township regarding White Pine's application for a special use permit, the Johnson Family was represented by Lee Bussa, a real estate broker, who obtained a copy of the deed and discovered that the restrictions were not included in the Warranty Deed. He contacted Jerome Jelinek who prepared and recorded an affidavit of scrivener's error, pursuant to MCL §565.451a, stating that he drafted and recorded the Warranty Deed and that, at the recording, the building and use restrictions were not attached to the Warranty Deed as provided by the Purchase Agreement.

By letter dated July 14, 2006, the attorney for the Johnson Family put the Township and White Pine on notice of the scrivener's error and his client's position that a cell tower was prohibited by the building and use restrictions. Defendant White Pine continued to pursue its application for a special use permit and the Township ultimately approved and issued a special use permit for the construction of a cell tower on the property.

On September 6, 2006, the Johnson Family filed this action against White Pine for a declaratory judgment and injunctive relief. On October 23, 2006, White Pine assigned the option to lease to SBA Towers, Inc. At his deposition on October 27, 2006, JPMS's President

Donald Schappacher testified that the option to lease had not yet been exercised. On December 7, 2006, the Johnson Family amended its Complaint to include JPMS as a Defendant.

PROCEDURAL HISTORY

The parties have filed motions for summary disposition. They are in agreement that there is no genuine issue of material fact.[1] Plaintiff Johnson Family's motion is brought pursuant to MCR 2.116(C)(10). The Johnson Family claims that it is entitled to judgment as a matter of law that (1) the property is subject to the building and use restrictions and it is entitled to reformation of the deed to include those restrictions; (2) Defendant White Pine had knowledge of the restrictions before exercising its option to lease; and (3) Defendant White Pine and its assignees are prohibited from erecting a fence and constructing and maintaining a cell tower on the property.

Defendant JPMS claims that it is entitled to summary disposition pursuant to MCR 2.116(I)(2) because there was no mutual mistake about the contents or meaning of the warranty deed. Defendant White Pine filed a motion for summary disposition, pursuant to MCR 2.116(C)(8) and (10), claiming that the Plaintiff has failed to state a claim upon which relief can be granted and, because there is no genuine issue of material fact, it is entitled to judgment as a matter of law that the property is not subject to any restrictions. Defendant White Pine claims that the restrictions are invalid, JPMS did not intend to purchase the property subject to restrictions, and it is a bona fide purchaser.

On March 19, 2006, the Court heard the oral arguments of counsel and took the matter under advisement. The Court now issues this written decision and order. For the reasons stated herein, the Plaintiff Johnson Family's motion for summary disposition is granted. The Defendants' motions are denied.

STANDARD OF REVIEW

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along

[1] The Defendants argue that Plaintiff has admitted that the cell tower at issue does not violate the restrictions due to Plaintiff's failure to answer a request to admit. The Court is persuaded from the Affidavit of Attorney Hullman and supporting exhibits that the Requests to Admit were not received.

with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc,* 167 Mich App 202, 205; 421 NW2d 631 (1988). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. *NuVision v Dunscombe,* 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). See also, *Roberts v Pinkins,* 171 Mich App 648, 651; 430 NW2d 808 (1988).

MCR 2.116(C)(10)

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant 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. MCR 2.116(C)(10), (G)(4).
> >
> > In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the

pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

ISSUE I

WHETHER THE JOHNSON FAMILY IS ENTITLED TO REFORMATION

The Johnson Family claims that it is entitled to reformation of the deed to include the building and use restrictions because the restrictions were a part of the parties' Purchase Agreement and they were inadvertently left out of the Warranty Deed that was prepared by Jerome Jelinek. The Johnson Family relies upon the Purchase Agreement and Mr. Jelinek's Affidavit.

The Defendant JPMS claims that, in order to justify granting reformation, there must have been a mutual mistake by the parties regarding the building and use restrictions. JPMS denies that it made a mistake or misunderstood the contents or meaning of the Warranty Deed and that any discrepancy between the Purchase Agreement and the Warranty Deed was due to Plaintiff's negligence and failure to read the Warranty Deed before signing it. In addition, it contends that the Johnson Family is not entitled to reformation because of the doctrine of merger.

The Defendant White Pine relies upon JPMS' assertions of no mutual mistake and the doctrine of merger. It also contends that, even if the restrictions are valid, they do not apply to White Pine because it was a bona fide purchaser.

It is undisputed that the building and use restrictions at issue were included in the parties' Purchase Agreement which was executed in 2000, but not in the Warranty Deed that was recorded on December 29, 2000. In June of 2006, Jerome Jelinek, the President of Corporate Title who prepared the Warranty Deed for the parties, filed an affidavit attesting to the fact that when he recorded the Warranty Deed, the building and use restrictions were not attached as provided by the Purchase Agreement. The Johnson Family filed this action in September of 2006, seeking reformation of the Warranty Deed to include the building and use restrictions because of the scrivener's error.

Defendant JPMS claims that Plaintiff is only entitled to reformation if there was a mistake that was mutual and common to both parties. It denies there was a mutual mistake because it did not make a mistake or misunderstand the content or effect of the Warranty Deed. Instead, JPMS claims that any error was caused by Plaintiff's negligence and failure to read the Warranty Deed before signing it. Defendant White Pine relies upon JPMS's arguments.

Courts are required to proceed with utmost caution in exercising jurisdiction to reform written instruments. *Ivinson v Hutton*, 98 US (8 Otto) 79; 25 L Ed 66 (1878), see also 66 Am Jur 2d, Reformation of Instruments, § 3, p 528. The burden of proof is upon the party seeking reformation to present clear and convincing evidence that the contract should be reformed in order to carry out the true agreement of the parties. *ER Brenner Co v Brooker Engineering Co*, 301 Mich 719, 724; 4 NW2d 71 (1942). As the Supreme Court has stated, "the burden of proof is upon one seeking reformation of a written instrument." *River Rouge Bank v Fisher*, 372 Mich 558, 562, 127 NW2d 426 (1964).

The power of a court in equity to grant relief by way of reformation of a conveyance of property, or other instrument in writing, on the ground of mutual mistake is not open to question. *Gustin v McKay*, 196 Mich 131; 162 NW 996 (1917); *Jaerling v Longsdorf*, 254 Mich 558; 236 NW 862 (1931); *Maki v Karvonen*, 322 Mich 696; 34 NW2d 469(1948); *Potter v Chamberlin*, 344 Mich 399; 73 NW2d 844 (1955); *Kidder v Collum*, 61 Mich App 281; 232 NW2d 384 (1975). A court of equity may reform a contract where there is clear evidence of a mutual mistake, *Ross v Damm*, 271 Mich 474, 481; 260 NW 750 (1935); *Kidder v Collum*, 61 Mich App 281, 283; 232 NW2d 384 (1975). "To entitle plaintiffs to reformation of the contract, they must show by clear and convincing proof that by a mutual mistake the provisions of the contract, as written, do not express the true agreement of the parties." *Harris v Axline*, 323 Mich 585; 36 NW2d 154, 155 (1949). In order to decree the reformation of a written instrument on the ground of mistake, the mistake must be mutual and common to both parties to the instrument. *Stevenson v Aalto*, 333 Mich 582, 589, 53 NW2d 382 (1952). Courts can neither make a new agreement for the parties nor, by addition, give it a meaning contrary to its express and unambiguous terms. *Bonney v Citizens' Mutual Automobile Ins Co*, 333 Mich 435, 438-439; 53 NW2d 321 (1952); *Britton v John Hancock Life Ins Co*, 30 Mich App 566, 569; 186 NW2d 781 (1971).

In addition to situations where the parties make a mutual mistake, a mistake of the scrivener has long been recognized as grounds for reformation, *Newland v Baptist Church Soc of Bellvue*, 137 Mich 335; 100 NW 612 (1904). "Equity will reform, to the express agreement of parties, an instrument which fails to express such agreement through a mistake of the scrivener." *Id.* at 337. "The 'scrivener's mistake' doctrine allows a court of equity to correct human error. In order for this doctrine to apply the scrivener must be acting for both parties." *Miles v Shreve*, 179 Mich 671, 679; 146 NW 374 (1914). See also, *Freybler v Lucas*, 39 Mich App 78; 197 NW2d 284 (1972) ("The record established a mistake of the scrivener in failing to designate the mortgagees, plaintiff and her father, as joint tenants with right of survivorship, and such mistake was ground for reformation.")

Courts will also reform a contract in other appropriate circumstances such as where there is a mistake by one party and fraud or inequitable conduct by the other. *Najor v Wayne National Life Ins Co*, 23 Mich App 260; 178 NW2d 504 (1970), lv den, 383 Mich 802 (1970); *DeGood v Gillard*, 251 Mich 85, 88; 231 NW 102 (1930); *Hammel v United States Fidelity & Guaranty Co*, 246 Mich 251, 254; 224 NW 337 (1929); *Usher v St Paul Fire & Marine Ins Co*, 126 Mich App 443; 337 NW2d 351 (1983), quoting *Stein v Continental Casualty Co*, 110 Mich App 410, 418; 313 NW2d 299 (1981), lv den 414 Mich 853 (1982). Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties. *Ross v Damm*, 271 Mich 474, 480-481; 260 NW 750 (1935). Absent a mutual mistake or a unilateral mistake coupled with fraud, shown by clear and convincing evidence, this Court has declined to reform written instruments. *Windham v Morris*, 370 Mich 188, 192; 121 NW2d 479 (1963).

In *Barryton State Sav Bank v Durkee*, 325 Mich 138; 36 NW2d 892 (1949), the plaintiff sold land to the defendant under a land contract containing a limited mineral reservation. After the defendant paid the unpaid balance, he requested a good title. The receipt for payment recited an agreement to deliver a deed conveying unencumbered title in fee simple and the deed did not contain a mineral reservation but recited that it was given pursuant to the terms of the land contract. The testimony that the omission of the mineral reservation was a mistake was undisputed. The court held that the plaintiff was entitled to reformation of the deed to include the mineral reservation because both parties intended the reservation when they entered into the

land contract, no change was ever discussed, there was no meeting of the minds to the contrary, and the defendant purchasers admitted that they did not know why the plaintiff was giving them the reserved rights. The Court said:

> There is no testimony that plaintiff at any time expressed an intention or agreed to relinquish any of its rights under the contract or that defendants ever requested it. It is not shown that defendants had any reason or right to think that plaintiff was doing so aside from the bare fact that the reservation was not expressed in the receipt or deed and that the receipt provided for good and unencumbered title, the same as was agreed to be furnished in the contract. Testimony for plaintiff that the omission of the reservation from the receipt and deed was a mistake on its part stands undisputed on the record. The trial court, in consequence, found that, 'In the present case the instrument did not express the intent of the plaintiff.'
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> Distinguishing this case from those in which reformation was granted, where the mistake was made by a scrivener representing both parties, the trial court held that because here the mistake was made by the plaintiff only and not by defendants the case falls within the scope of cases holding that reformation will not be granted when the mistake is unilateral and not mutual. The latter type of cases involve situations in which the instruments sought to be reformed express the intention of one party, but, through unilateral mistake, not that of the other. This is not such a case. Here both parties intended the reservation when the contract was entered into. No change in that respect was ever discussed by or between the parties. No meeting of the minds to the contrary was shown. Defendants admitted that they did not know why plaintiff would be giving them the reserved rights, that they noticed that the reservation was not expressed in the receipt or deed, but that they, nevertheless, said nothing about the omission to plaintiff. Under such circumstances the receipt and deed cannot be said to express completely the understanding or intent of either of the parties at the time those instruments were executed. The facts in this case are so similar to those in *Retan v Clark*, 220 Mich 493; 190 NW 244, that decision there must be held controlling. In that case we said:
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> > The consideration named in the contract was $8,000. The consideration actually agreed upon by the parties and which should have been stated in the contract as claimed by plaintiffs was $8,000 and 'the unpaid installments of paving taxes assessed against the premises.' * * *
> >
> > It is not clear that the scrivener made the mistake. Rather it appears that plaintiffs neglected or forgot to have the contract recite the agreement respecting the taxes. The mistake was on the part of plaintiffs. Defendants observed during the preparation of and at the time of signing the contract that the provision relative to payment of the taxes had been left out. * * *

> Defendants were silent as to such omission, but after the contract was signed defendant Frank Clark sought counsel of his rights under such contract. * * *
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> So it appears that defendants signed the contract knowing that it said nothing of such taxes and that plaintiffs signed it under mistake. It is a general rule that equity will not relieve by reformation unless the mistake is mutual. *A. E. Wood & Co v Standard Drug Store*, 192 Mich 453; 158 NW 844; *Schlossman v Rouse*, 197 Mich 399; 163 NW 889; *Standard Oil Co v Murray*, 214 Mich 299; 183 NW 55; *Gustin v McKay*, 196 Mich 131; 162 NW 996. But here there was mistake on the part of the plaintiffs and knowledge of the mistake and concealment thereof on the part of the defendants, both producing the inequitable result. Of a case of this class it is said in 23 RCL, p 331, citing cases:
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> > There is, however, still another class of cases--that where one party to an instrument has made a mistake and the other party knows it and conceals the truth from him. Such inequitable conduct accompanying a mistake is generally held to be sufficient ground for reformation of the instrument in question. * * *
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> See also *Davis v Keys*, 252 Mich 580; 233 NW 422; *Holbeck v Williamson*, 255 Mich 430; 238 NW 269; *Blake v Fuller*, 274 Mich 534; 265 NW 455.

In the instant case, the building and use restrictions were a part of the parties' Purchase Agreement. The scrivener, Jerome Jelinek, states in his affidavit that he prepared and recorded the Warranty Deed and that the building and use restrictions were not attached to the Warranty Deed when it was recorded.

Defendant JPMS relies upon the affidavit of its President Donald Schappacher to support its claim that there was no mutual mistake. Mr. Schappacher attests to the fact that JPMS's attorneys were concerned about "the interpretation of some of the restrictions" and "suggested we clarify some of the language before closing." In addition, he attests to the fact that "[t]he closing documents, including the Warranty Deed, were approved by legal counsel with notice and understanding that the use restrictions were not contained therein." JPMS would have the Court infer from these statements that the Plaintiff Johnson Family knew the restrictions were not included in the Warranty Deed because of last minute negotiations

between the parties' counsel or that it did not know the restrictions were left out of the Warranty Deed because of its negligence in not reading before signing the Warranty Deed. But, that is not what Mr. Schappacher says in his affidavit. All he actually attests to is that the restrictions were not in the documents that were reviewed by JPMS's counsel before the closing and that its counsel knew it.

Defendant White Pine claims Plaintiff was negligent for failing to read the Warranty Deed before signing it. "The rule requiring a party to read a contract is not a rule of thumb, but one of equity and sense. It cannot apply where the undisputed testimony shows the agreement of the parties [and] that the executed contract does not express that agreement . . ." *Health Delivery Service, Inc v Michigan Mutual Liability Co,* 257 Mich 482, 486; 241 NW 191 (1932); *Mantua v Auto Club Ins Assoc,* 206 Mich App 274; 520 NW2d 380 (1994).

This Court believes that *Barryton State Sav Bank v Durkee, supra,* is factually analogous and dispositive. In *Barryton*, both parties intended to provide for a limited mineral reservation when they entered into the land contract. No change in that respect was ever discussed by or between the parties. No meeting of the minds to the contrary was shown, but when the defendants noticed that the reservation was not expressed in the deed, they said nothing about the omission to the plaintiff. Under such circumstances the deed could not be said to express completely the understanding or intent of either of the parties at the time it was executed.

In the instant case, the parties intended to include the building and use restrictions in the Warranty Deed when they entered into the Purchase Agreement. No change in this respect was ever discussed by or between the parties, nor was any consideration paid for a change. No meeting of the minds to the contrary has been shown. When the Defendant JPMS or its counsel noticed that the restrictions were not expressed in the Warranty Deed, it said nothing about the omission to the Plaintiff. Therefore, the Warranty Deed cannot be said to express the understanding or intent of either of the parties at the time it was executed.

ISSUE II

WHETHER THE DOCTRINE OF MERGER APPLIES

Defendants JPMS and White Pine rely on the doctrine of merger to defeat the Johnson Family claim that it is entitled to reformation of the Warranty Deed to include the building and

use restrictions. JPMS cites *Michaels v Chamberlain Real Estate Co*, 26 Mich App 317, 319-320; 182 NW2d 360 (1970) as support. However, JPMS has misrepresented the holding in the *Michaels* case.

In *Michaels*, the plaintiff vendor entered into a preliminary sale agreement pursuant to which he was to convey his property by warranty deed to defendant. One of the conditions set forth in the preliminary sale agreement provided that the plaintiff vendor could remove existing structures within 90 days of receipt of written notice by the purchaser. Later the plaintiff conveyed the property by quit claim deeds in which no reference was made to plaintiff's right to remove the existing structures. The defendants eventually had the structures demolished without giving notice to the plaintiff.

In lieu of an answer, the defendants filed a motion for summary disposition. The issue presented to the trial court was whether the preliminary sales agreement was merged into the subsequent quit claim deeds. The doctrine of law upon which defendants relied was based on the theory that the preliminary sale agreement was merged into the deeds of conveyance. The trial court granted summary disposition for the defendant purchasers.

The Court of Appeals reversed. Since the appeal was from a summary judgment, the issue before the Court of Appeals was whether, as a matter of law, defendants' duty to give notice to plaintiff pursuant to the contract of sale was extinguished by the later quit claim deeds. The Court of Appeals held that whether the doctrine of merger operated to extinguish the vendees' obligations under the contract of sale was a question of fact under the circumstances of the case and could not be disposed of summarily. The Court further said:

> Where applicable, the doctrine of merger operates relative to all matters in the preliminary agreement relating to the title of land. *Goodspeed v Nichols*, 231 Mich 308; 204 NW 122 (1925). This is not due to any peculiar sanctity of the deed; rather, the deed is regarded as the final repository of the agreement which led to its execution. As stated in *Goodspeed, supra*, 316; 204 NW 125: 'The purpose of a deed is to convey title to land, not to describe the terms of a preceding contract under which the land was sold.'
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> In this case, we are not satisfied that the quit claim deeds represent the final repository of the parties' agreement. * * *
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> It is a general rule that a deed must be construed according to its terms. *Kirby v Meyering Land Co*, 260 Mich 156; 244 NW 433 (1932). But if there is an ambiguity or if the deed fails to express the obvious intention of the parties, an inquiry should be directed to that intent. *Taylor v Taylor* (1945), 310 Mich 541;

17 NW2d 745; *Negaunee Iron Co v Iron Cliffs Co*, 134 Mich 264; 96 NW 468 (1903).

Thus, the Court could not, as a matter of law, find that the preliminary agreement was merged into the deeds.

In *Chapdelaine v Sochocki*, 247 Mich App 167; 635 NW2d 339 (2001), the plaintiff real estate vendor brought an action against the defendant purchasers to enforce an easement over the property. The trial court granted the vendor an easement by reservation and necessity. The purchasers appealed. The Court of Appeals held that the doctrine of merger did not extinguish the express easement reservation in the purchase agreement. Accord, *Goodspeed v Nichols*, 231 Mich 308; 204 NW 122 (1925); *Mueller v Bankers Trust Co*, 262 Mich 53; 247 NW 103 (1933); *Greenspan v Rehberg,* 56 Mich App 310; 224 NW2d 67 (1974). See also, *Neumeier v Donovan*, 127 Mich App 772; 339 NW2d 255 (1983) ("The ultimate goal of any court called upon to construe a deed is to reach the probable intent of the parties to the deed in order that the court may give it effect.) See also, *Purlo Corp v 3925 Woodward Av In* 341 Mich 483, 488; 67 NW2d 684 (1954); *Bassett v Budlong*, 77 Mich 338, 346; 43 NW 984 (1889); *Fry v Kaiser*, 60 Mich App 574, 577; 232 NW2d 673 (1975), lv den 394 Mich 830 (1975); *Michaels v Chamberlain*, 26 Mich App 317, 320; 182 NW2d 360 (1970). If such an intent cannot be determined from the language of the deed, a court must consider the situation, acts, conduct and dealings of the parties to the instrument as well as the subject matter. *Farabaugh v Rhode*, 305 Mich 234, 240; 9 NW2d 562 (1943), citing *Negaunee Iron Co v Iron Cliffs Co*, 134 Mich 264, 279-281; 96 NW 468 (1903).

Thus, the Defendants are wrong. The doctrine of merger does not automatically extinguish the express provision in the Purchase Agreement that the land will be conveyed by Warranty Deed subject to the building and use restrictions.

ISSUE III

WHETHER DEFENDANT WHITE PINE WAS A BONA FIDE PURCHASER

On February 28, 2006, JPMS granted to White Pine a one-year option to lease the subject property. A Memorandum of Site Lease with Option was recorded in the Grand Traverse County Register of Deeds on March 30, 2006. White Pine sought and acquired approval from the Federal Aviation Administration, the Michigan Department of

Transportation and the Federal Communications Commission for construction of the cellular tower on the property. On March 23, 2006, White Pine applied to Acme Township for a special use permit to construct a cellular tower on the property.

At the public hearings held by the Township, a representative of the Johnson Family obtained a copy of the Warranty Deed and discovered that it did not include the building and use restrictions as required by the Purchase Agreement. The Johnson Family representative contacted Corporate Title and Jerome Jelinek prepared and, on June 30, 2006, recorded his affidavit of scrivener's error, pursuant to MCL 565.451a. By letter, dated July 14, 2006, the Johnson Family's attorney gave both the Township and White Pine notice of the scrivener's error. On August 1, 2006, the Township approved a special use permit. On August 29, 2006, White Pine assigned all of its right, title and interest in the lease to SBA Towers, Inc. At his deposition in this matter, JPMS's President Donald Schappacher testified that as of October 27, 2006, the option to lease had not been exercised. A cell tower was subsequently erected on the property.

Defendant JPMS, citing MCL §565.29, argues that title properly vested in him when the Warranty Deed was recorded, prior to the recording of the affidavit of scrivener's error. In addition, Defendant White Pine claims that the lease option on the property without the restrictions was valid because the Memorandum thereof was recorded prior to the recording of the affidavit of scrivener's error.

MCL §565.29 provides:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

Under MCL §565.29, the holder of a real estate interest who first records his interest generally has priority over subsequent purchasers. *Graves v American Acceptance Mortgage Corp*, 246 Mich App 1, 5; 630 NW2d 383 (2001), rev'd on other grounds 467 Mich 308; 652 NW2d 221 (2002), vac 467 Mich 1231 (2003), on rehearing 469 Mich 608; 677 NW2d 829 (2004). "Michigan is a race-notice state . . ., and owners of interests in land can protect their

interests by properly recording those interests." *Lakeside Associates v Toski Sands*, 131 Mich App 292, 298; 346 NW2d 92 (1983).

Under MCL §565.29, "[a] good-faith purchaser is one who purchases without notice of a defect in the vendor's title." *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). "Notice" in the context of real estate law can be actual or constructive and has been defined by our Supreme Court as follows:

> When a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, and fails to make them, he is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed. [*Kastle v Clemons*, 330 Mich 28, 31; 46 NW2d 450 (1951).]

"Notice" has been defined by the Court of Appeals as follows:

> Notice is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry. Notice need only be of the possibility of the rights of another, not positive knowledge of those rights. Notice must be of such facts that would lead any honest man, using ordinary caution, to make further inquiries in the possible rights of another in the property. [*Schepke v Dep't of Natural Resources*, 186 Mich App 532, 535; 464 NW2d 713 (1990).]

In the instant case, Defendant White Pine had notice both at the hearings held by the Township on its application for a special use permit and by the Johnson Family's attorney's letter of July 14, 2006 that the Johnson Family was contesting the absence of the building and use restrictions from the Warranty Deed. White Pine nonetheless pursued a special use permit and assigned its right, title and interests to SBA and a cell tower was ultimately erected on the property.

Since White Pine had actual notice of alleged defects in JPMS's title before it exercised its option to lease the subject property, it could not have been a bona fide purchaser.

ISSUE IV

WHETHER PLAINTIFF'S
AMENDED COMPLAINT STATES A CLAIM

In *Scott v Grow*, 301 Mich 226; 3 NW2d 254 (1942), the plaintiff sought relief by way of reformation of a deed on the ground that the instrument of conveyance had not been drawn in accordance with the intention and agreement of the parties. It was held that the bill of

complaint stated a case for the granting of equitable relief by way of reformation. The Court found that the plaintiff's complaint, assuming the facts therein alleged to be true, stated a cause of action and grounds for equitable relief, saying:

> Wherever an instrument is drawn with the intention of carrying into execution an agreement previously made, but which by mistake of the draftsman or scrivener, either as to law or fact, does not fulfill the intention, but violates it, there is ground to correct the mistake by reforming the instrument.

Thus, the Defendants' motion for summary disposition brought pursuant to MCR 2.116(C)(8) should be denied.

ISSUE V

WHETHER THE BUILDING AND USE RESTRICTIONS PROHIBIT DEFENDANT WHITE PINE FROM ERECTING A FENCE AND CONSTRUCTING AND MAINTAINING A CELL TOWER ON THE SUBJECT PROPERTY

Defendant White Pine claims that, even if the building and use restrictions apply, they do not prohibit the erection of a fence and the construction and maintenance of a cell tower on the property.

Two of the building and use restrictions are pertinent here. They are: the second sentence of (j) * * *No power, telephone or other utility wires or conduits shall be installed above ground on the property other than the currently existing power lines" and "(k) No statue, fence or other unnatural improvements shall be permitted on the Property without the approval of the Seller or successor." Therefore, the question is whether a fence and a cell tower are a "statue, fence or other unnatural improvement" or consist of "power, telephone or other utility wires or conduits . . . installed above ground."

"Fence" is defined as at Dictionary.com Unabridged (v 1.1) "a barrier enclosing or bordering a field, yard, etc., usually made of posts and wire or wood, used to prevent entrance, to confine, or to mark a boundary." "Statue" is defined as "a three-dimensional work of art, as a representational or abstract form, carved in stone or wood, molded in a plastic material, cast in bronze, or the like."

The adjective "unnatural" means "1. contrary to the laws or course of nature; 2. at variance with the character or nature of a person, animal, or plant; 3. at variance with what is normal or to be expected; 4. lacking human qualities or sympathies; monstrous, inhuman; 5.

not genuine or spontaneous; artificial or contrived; 6. obsolete; lacking a valid or natural claim; illegitimate."

"Structure" is defined as "1. mode of building, construction, or organization; arrangement of parts, elements, or constituents; 2. something built or constructed, as a building, bridge, or dam; 3. a complex system considered from the point of view of the whole rather than of any single part; 4. anything composed of parts arranged together in some way; an organization; 5. the relationship or organization of the component parts of a work of art or literature."

"Improvement" is defined as "an act of improving or the state of being improved; bringing into a more valuable or desirable condition, as of land or real property; betterment; something done or added to real property that increases its value."

"Tower" is defined as a "building or structure high in proportion to its lateral dimensions, either isolated or forming part of a building."

A cell site is a site where antennas and electronic communications equipment are placed to create a cell in a cellular network for the use of cellular phones. It is composed of a tower or other elevated structure for mounting antennas, and one or more sets of transmitter/receivers transceivers, digital signal processors, control electronics, a GPS receiver for timing, regular and backup electrical power sources, and sheltering, commonly known as a "cell tower." Increasingly, multiple mobile operators are co-located on a single tower.

The fence that has been erected on the subject property is clearly prohibited by paragraph (k) of the building and use restrictions. It is debatable whether the cell tower that has been erected on the property is an "unnatural improvement" as that term is used in paragraph (k) of the building and use restrictions. However, it is clear that the tower is a "power, telephone or other utility . . . conduit[] . . . installed above ground." Consequently, it is prohibited by paragraph (j) of the building use and restrictions.

CONCLUSION

The Plaintiff Johnson Family's Amended Complaint states a cause of action upon which relief can be granted. The Plaintiff Johnson Family has shown by clear and convincing evidence that it is entitled to reformation of the Warranty Deed to include the building and use restrictions that were expressly contained in the parties' Purchase Agreement and inadvertently

not attached to the Warranty Deed when it was recorded. White Pine had notice of the defect in the Warranty Deed prior to exercising its option to lease the subject property and, therefore, could not have been a bona fide purchaser.

Paragraphs j and k of the building and use restrictions prohibit the erection of a fence and the erection and maintenance of a cell tower on the subject property.

The Warranty Deed is hereby reformed to include the building and use restrictions. Defendants are hereby permanently enjoined from erecting a fence or constructing or maintaining a cell tower on the subject property. The fence and cell tower that are currently located on the subject property must be removed within 90 days of the date of this decision and order. Plaintiff's counsel shall prepare a Judgment in recordable form that will reform the Warranty Deed and otherwise reflect the decision and order of this Court.

Costs incurred by the Plaintiff are hereby awarded to the Plaintiff as the prevailing party. MCR 2.625(A)(1). Counsel for the Plaintiff shall file and serve a bill of costs pursuant MCR 2.625(F).

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 5/04/07