STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

MATTHEW T. THIEL and
NIKOLE M. THIEL,

Plaintiffs - Counter-Defendants -Appellees,

WILLIAM TRAYWICK and
MARCIA TRAYWICK,

Intervening Plaintiffs – Counter Defendants - Appellees,

vs.

DAVID L. GOYINGS and
HELEN M. GOYINGS,

Defendants – Counter Plaintiffs -Appellants.

Supreme Court Docket No. 156708

Court of Appeals Docket No. 333000

Allegan County Circuit Court
Case No.: 15-55184-CK

Todd Schebor (P66358)
Dykema Gossett PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, MI 48304
(313) 568-6672

Krista L. Lenart (P59601)
Dykema Gossett PLLC
2723 South State Street, Suite 400
Ann Arbor, MI 48104
(734) 214-7676
Counsel for Plaintiffs-Appellees and
Intervening Plaintiffs-Appellees

James E. Spurr (P33049)
Paul D. Hudson (P69844)
Miller Canfield Paddock & Stone PLC
277 South Rose Street, Suite 5000
Kalamazoo, MI 49007
(269) 381-7030
Attorneys for Defendants-Appellants

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF ORDERS APPEALED FROM AND RELIEF SOUGHT

Plaintiff-Appellees Matthew T. Thiel and Nikole M. Thiel, and Intervening Plaintiffs-Appellees William Traywick and Marcia Traywick (collectively, "Plaintiffs") agree that Defendants-Appellants David Goyings and Helen Goyings ("Defendants") seek leave to appeal from the Court of Appeals' unanimous, unpublished August 8, 2017 decision (the "Court of Appeals Opinion"). The Court of Appeals reversed the Allegan County Circuit Court's March 11, 2016 opinion and order following a bench trial and April 27, 2016 amended order. The Court of Appeals denied Defendants' motion for reconsideration of the Court of Appeals Opinion by order dated September 20, 2017. Defendants' Application for Leave to Appeal was filed with this Court on November 1, 2017.

Defendants' Application should be denied for the reasons stated herein, including that it does not meet the requirements of MCR 7.305(B).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Whether this Court should deny Defendants' Application for Leave to Appeal where:

A. Defendants do not show, nor can they show, that the Court of Appeals' decision reversing the Circuit Court's March 11, 2016 opinion and order following a bench trial and April 27, 2016 final judgment is clearly erroneous and conflicts with a decision of this Court or another decision of the Court of Appeals, and where this matter does not involve legal principles of major significance to the state's jurisprudence?

B. The Court of Appeals did not err in holding that the Defendants' home is a modular home in violation of the restrictive covenant, that the Circuit Court was required to enforce the restrictions as written to uphold the freedom of contract, and that it was error for the Circuit Court to not order the Defendants to remove the modular home?

Plaintiffs-Appellees answer:	Yes
Defendants-Appellants would answer:	No
The Circuit Court would answer:	No
The Court of Appeals would answer:	Yes
This Court should answer:	Yes

INTRODUCTION

This action involves the violation of a Restrictive Covenant that prohibits modular homes in Timber Ridge Bay subdivision, which is located in Watson Township, Allegan County. In 2006, the developer of the subdivision drafted and recorded a set of restrictive covenants that apply to fourteen of the parcels located in the subdivision. Plaintiffs-Appellees Matthew and Nikole Thiel, and William and Marcia Traywick (collectively, the "Plaintiffs") and Defendants-Appellants David and Helen Goyings (the "Defendants") are each owners of parcels governed by these Restrictive Covenants, which unambiguously prohibit modular homes from being located or erected on the lots. Despite this restriction, and fully knowing and understanding this restriction, the Defendants purchased a modular home constructed by Ritz-Craft in Jonesville, Michigan, and had it delivered to their lot on three separate trailers on June 8, 2015. Prior to installation of the modular home, the Plaintiffs warned the Defendants that the installation would violate the Restrictive Covenant. The Defendants nonetheless proceeded with the installation. On June 18, 2015, the Thiels filed a complaint seeking injunctive relief to enforce the terms of the Restrictive Covenants, and to enjoin the Defendants from constructing a modular home on their property. [1] Following a bench trial, the Circuit Court correctly found that the Defendants' house was constructed from "modules" and that the term "systems built," which the Defendants used to describe the house, was essentially "synonymous with" the term "modular." Yet the Circuit Court was apparently unwilling to enforce the restrictions as written, and unlawfully read ambiguity into the covenant to strive to find an equitable solution. On August 8, 2017, the Court of Appeals unanimously reversed the Circuit Court because Defendants' home is a modular home, the restrictive covenants unambiguously prohibit modular homes, and the Circuit Court

[1] The Traywicks intervened in the case on August 19, 2015.

therefore erred when it failed to enforce the restrictions as written to uphold the freedom of contract. ("COA Opinion" attached as **Exhibit A**). The Defendants now seek the extraordinary remedy of review by this Court, which should be denied.

Defendants' Application for Leave to Appeal — like their briefing to the Court of Appeals — is comprised largely of attempts to invoke sympathy from the Court and to create ambiguity where none exists. However, this case is not about whether the Defendants are good people, whether the parties get along, what portion of Defendants' house is "stick built," or even what constitutes a "prefabricated" home. As correctly noted by the Court of the Appeals, this case is also not about whether the Defendants' house is "visually attractive," the quality of construction, or the effect (or lack thereof) the Defendants' modular home has on the Plaintiffs or the subdivision, "because the breach of a covenant, no matter how minor and no matter how de minimis the damages, can be the subject of enforcement." *Terrien v Zwit*, 467 Mich 56, 65; 648 NW2d 602 (2002). This case is also not about the economic effect the Court of Appeals' decision will have on the Defendants because "the economic damages suffered by the landowner seeking to avoid the restriction do not, by themselves, justify a lifting of the restrictions." *Webb v. Smith*, 224 Mich App 203, 211; 568 NW2d 378 (1997). Rather, this is a case about: (1) the ordinary and generally understood meaning of "modular home," and (2) whether Defendants built a "modular home" in violation of the restrictive covenants for the Timber Ridge Bay subdivision.

The Application merely restates Defendants' arguments presented to the Court of Appeals – indeed, it is a virtual recycling of their brief to the Court of the Appeals with the exception of their Introduction – and provides no legitimate basis for this Court to grant review. First, the Court of Appeals' decision does not involve legal principles of major significance to

the state's jurisprudence. It did not make any new law or break new ground; instead, it simply applied well-settled law to the unique facts of this case. Second, the Court of Appeals' decision is not clearly erroneous, nor does its opinion conflict with a decision of this Court or another decision of the Court of Appeals. The Court of Appeals correctly reversed the Circuit Court because "Defendants' home was in clear violation of the unambiguous restrictive covenant" and therefore the Circuit Court "was required to enforce the restrictions as written" instead of "striv[ing] to find an equitable solution." (COA Opinion at 6). While there are certain equitable exceptions, the Court of Appeals correctly held that none of them apply to this case. (*Id.*) As the enforcement of restrictive covenants are reviewed on a case-by-case basis, Defendants have failed to show that this case has any impact on anyone other than the parties. There is nothing about this case that merits review by the highest Court in this State, and accordingly Defendants' Application for Leave to Appeal should be denied.

COUNTER-STATEMENT OF FACTS AND LEGAL PROCEEDINGS

I. FACTUAL HISTORY

A. The Parcels and Restrictive Covenant At Issue

Timber Ridge Bay is a residential subdivision located on Big Lake in Watson Township, Allegan County, Michigan, which consists of sixteen parcels. (Trial Exhibit 29). The subdivision is subject to a "Declaration of Restrictions, Covenants and Conditions" which was drafted by the developer of Timber Ridge Bay and recorded with the Allegan County Register of Deeds on December 7, 2006 (liber 3066, page 473 / Doc. #2006012481). (Trial Exhibit 3, attached hereto as **Exhibit E**, and referenced herein as "Restrictive Covenant"). The Restrictive Covenant sets forth various restrictions, limitations and conditions that apply to Parcels 1 through 14 in Timber Ridge Bay. The Restrictive Covenant specifically states that "[n]o Parcel shall be used for any purpose other than that of a single family residence and accessory uses customarily incidental to single family residences. (*Id.*) The Restrictive Covenant then goes on

to indicate what kind of residence may not be in the subdivision, and specifically, section 1, paragraph C.4. states that "[n]o geodesic dome, berm house, pre-fabricated or *modular home*, mobile home, shack or barn will be erected on any of the Parcels unless provided for herein." (*Id.*, p. 5) (emphasis added).[2]

The Thiels own Parcels 13 and 14 in Timber Ridge Bay, and the Traywicks own Parcel 2, which is directly adjacent to the Defendants' parcel. (Trial Transcript 2/23/16 at 160; 212.) In deciding to purchase their property, the Plaintiffs placed significant reliance upon the Restrictive Covenant because it provided them with a set of rules for Timber Ridge Bay that were suitable to their taste and provided them with valuable property rights. (Trial Transcript 2/23/16 at 161-162; 214.)

B. Defendants Purchase Their Lot And Enter Into Contracts For The Construction Of A Modular Home

The Defendants purchased Parcel 1 in Timber Ridge Bay on May 15, 2014. (Trial Transcript 2/23/16 at 56.) The Defendants' Warranty Deed notes that Parcel 1 was conveyed to the Defendants "subject to easements, restrictions, interests, reservations of record, and taxes and assessments not yet due and payable." (Trial Exhibit 12.) Furthermore, the Defendants had actual notice of the Restrictive Covenant as Mrs. Goyings acknowledged that she received a copy of the Restrictive Covenant prior to purchasing their property in Timber Ridge Bay. (Trial Transcript 2/23/16 at 57.)

[2] Modular homes are also prohibited pursuant to section 1, paragraph B.3. of the Restrictive Covenant ("No residences, including modular, manufactured, mobile or prefabricated homes, may be moved from a location outside the Premises and placed or located within a Parcel within the Premises") and section 1, paragraph B.4. of the Restrictive Covenant ("No manufactured homes, whether classified as a mobile home, modular home, or otherwise, and no prefabricated homes hall be permitted on any Parcel in the Premises, regardless of which building codes are applicable to said homes"). (Restrictive Covenant, p. 2, Exhibit E.)

After purchasing Parcel 1 and having received a copy of the Restrictive Covenant, the Defendants entered into an agreement with Cassidy Builders, Inc., on October 1, 2014, for a "29-11 X 56 *MODULAR HOME* ON 9 FT. WALK OUT BASEMENT." (Trial Exhibit 9) (emphasis added). The agreement signed by the Defendants indicates that accessory items such as a garage, deck, and porch would also be constructed, but it also makes clear that the manufacturer of the modular home is Ritz-Craft Custom Homes, which describes its business on its website as "the largest family owned, off-site built *modular home* manufacturer in the United States." (*Id*.; Trial Transcript 2/25/2016 at 19) (emphasis added).

After purchasing Parcel 1, the Defendants obtained an appraisal of Parcel 1 for the purpose of securing financing and obtaining a construction mortgage before the modular home was complete. (Trial Transcript 2/24/16 at 126-127.) The appraisal report was prepared by C. Douglas Snell, a Certified General Appraiser with the John A. Meyer Appraisal Company, and is dated December 4, 2014. (Trial Exhibit 7.) On page 1, the appraisal report states that "[t]here is a building contract dated 10/01/2014 between the borrowers and Cassidy Builders, Inc. for the site improvements and Heritage Custom Builders for the *modular unit* for a total of $272,134.43" and at the bottom of page 1 of the appraisal report it states that "[t]he subject dwelling is a *modular home*." (*Id*.) (emphasis added).

Due to the fact that Defendants' modular home was manufactured by Ritz-Craft at its facility in Jonesville, Michigan, the Stille-DeRossett-Hale Single State Construction Code Act[3] required that the modular home be inspected and approved by the State of Michigan prior to installation and assembly on Parcel 1. (Trial Transcript 2/24/16 at 12-15.) On January 20, 2015, the State of Michigan issued a Building System Approval Report for the modular home Ritz-

[3] See MCL § 125.1501, *et seq*.

Craft built for the Defendants, and in doing so categorized the Defendants' home as a modular home. (Trial Exhibit 5, 20.)

After Ritz-Craft constructed the modules in its facility in Jonesville, Michigan, and the State of Michigan issued the Building System Approval Report, Cassidy Builders, Inc., filed an Application for Building Permit with Watson Township on February 10, 2015. (Trial Exhibit 4.) The project was described in the Application for Building Permit as "MODULAR" and it further described the project as "single family *modular* with 24x24 attached garage, 22x6 front porch, 12x12 deck." (*Id.*) (emphasis added). On February 13, 2015, Watson Township issued a Building Permit for the Defendants' home, in which it referred to the Defendants' home as "*Modular* on an unfinished basement w/a Minimum of One Egress, Three Bedrooms, Two Full Baths, Front Porch, Back Deck, Two Stall Attached Gragae [sic]." (Trial Exhibit 6) (emphasis added).

C. Defendants Begin Construction Of Their Modular Home

Excavation of the basement for the Defendants' home began in early May 2015 in advance of the arrival of the modules. Once the three modules were completed by Ritz-Craft, they left the factory in Jonesville on trailers for purpose of transport to the Defendants' parcel. On June 8, 2015, at approximately 7:00 p.m., the Traywicks discovered that the modular home had been delivered to the Defendants' parcel in three sections (or modules) via trucks. (Trial Transcript 2/23/16 at 72-73, 224; *see also* Trial Exhibits 14b-d, photos of the three modules taken shortly after they arrived at the Defendants' parcel, attached hereto as **Exhibit F**.)[4]

[4] The roof of Defendants' house is comprised of special hinged trusses which were part of the modular units that were transported to Defendants' property. The hinged roof trusses were folded down for transport purposes, then folded up on site in order to create the pitched roof. Shingles were added on-site. (Trial Transcript 2/24/16 at 100-101; Trial Transcript 2/25/16 at 27-28.) Trial Exhibits 26zz and 26ccc are photographs of the interior of the modules as they

Immediately after the modular home was initially discovered by the Plaintiffs, and before the modules were installed atop of the basement foundation via a crane, Mr. Thiel called the Defendants on the evening of June 8, 2015, and notified the Defendants that the installation of the modular home on Parcel 1 would constitute a violation of the Restrictive Covenant. (Trial Transcript 2/23/16 at 171.) The Defendants responded to Mr. Thiel by stating that a crane was scheduled for installation at 10:00 a.m. on June 9 and that the Defendants would be moving forward with installation and assembly despite Mr. Thiel's objection. (*Id.*) On June 9 at 6:53 a.m., prior to the arrival of the crane, Mr. Traywick sent an email to the Defendants echoing Mr. Thiel's objection and notifying the Defendants that the property owners in Timber Ridge Bay would file legal action if necessary. (Trial Exhibit 1.) Defendants proceeded with the installation and assembly of the modular home on June 9-10, 2015.

II. PROCEDURAL HISTORY

A. Commencement of the Lawsuit

On June 18, 2015, the Thiels brought suit against the Defendants in Allegan County Circuit Court seeking to enforce the terms of the Restrictive Covenant and requesting that the Court enter an order prohibiting any further construction by the Defendants of their modular home and requiring the Defendants to remove the modular units from their property. On July 22, 2015, Defendants filed an answer to the Complaint, and also filed a counter-claim for declaratory judgment, waiver and estoppel. On August 19, 2015, the Traywicks intervened as plaintiffs in the case. On October 9, 2015, Defendants filed a counter-claim for declaratory judgment, waiver, and estoppel against the Traywicks, alleging that the Traywicks had failed and refused to

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arrived from the factory, and show a fully installed bathtub with faucet and fixtures, and a bathroom with cabinets, hardware, counters, mirrors, and the lighting fixture installed. (Trial Transcript 2/23/16 at 82-83.)

enforce violations found throughout the subdivision subject to the Restrictive Covenant, and that they themselves were in violation of the Restrictive Covenant as it related to their dock, liquid petroleum tank, and use of pre-fabricated concrete panels for their basement foundation. The counter-claim sought an order that the Traywicks had waived their rights to enforce the restrictions and were estopped from bringing their claims. On October 15, 2015, the Plaintiffs filed a combined motion for summary disposition under MCR 2.116(C)(10). The Circuit Court heard oral argument on November 30, 2015, and denied Plaintiffs' combined motion for summary disposition indicating that a question of fact remained as to whether the Defendants' home was modular. An order denying the motion was entered on December 15, 2015. A motion for reconsideration was subsequently denied by the Circuit Court on January 26, 2016.

B. The Bench Trial

A three-day bench trial was held on February 23, 2016 through February 25, 2016, during which 39 exhibits were admitted into evidence and testimony was taken from witnesses that included the plaintiffs and defendants and the following individuals:

- Mr. Kirk Scharphorn, the contracted building official for Watson Township who was admitted as an expert witness in construction codes and inspections. Mr. Scharphorn testified that the Defendants' house is a modular home, and that added accessories such as a garage, porch, or deck did not change the qualification or the classification of the house. (Trial Transcript 2/24/16 at 21-22, 24, 31-32; Trial Exhibit 2.)
- Mr. Douglas Snell, the Defendants' appraiser, who was admitted as an expert witness in the area of residential real estate appraisals. Mr. Snell also testified that the Defendants' house is a modular home. (Trial Transcript 2/24/16 at 147.)
- Mr. Paul Lindsley, the general manager for Ritz-Craft Custom Homes that built the three modules for the Defendants' house and which describes its business on its website as "the

largest family owned, off-site built *modular* home manufacturer in the United States." (Trial Transcript 2/25/16 at 19) (emphasis added). Mr. Lindsley testified that Ritz Craft builds homes that are comprised of modules which are shipped to builders, and referred to that "method" of building as "systems built" (Trial Transcript 2/25/16 at 5, 11), but he later testified that a systems built home is synonymous with a modular home (Trial Transcript 2/25/16 at 10-11, 18).

- The Circuit Court also received *de bene esse* deposition testimony of Mr. Zachary Bossenbroek, the attorney that drafted the Restrictive Covenant. Mr. Bossenbroek testified that the intent of the Restrictive Covenant was to prevent modular homes, no matter what percentage of the house is modular. (Trial Exhibit 31 at 12-13.)

C. The Circuit Court's Opinions and Orders

In its Opinion and Order of March 11, 2016 ("CC Order," attached hereto as **Exhibit B**), as amended on April 27, 2016 ("CC Amended Order," attached hereto as **Exhibit C**), the Circuit Court dismissed the Complaint with prejudice for no cause of action.[5] The Circuit Court found that while Defendants, Ritz-Craft, and the representative from Cassidy Builders all preferred to use the term "systems built" instead of "modular" to describe the construction of the Defendants' home, "it is clear that the term is similar to, if not synonymous with, modular." (CC Order at 3.) But the Circuit Court went on to "decline to find that Defendants' home" was in violation of the Restrictive Covenant because the home was not "entirely modular," since finishing work on plumbing and roofing would be completed on site and a garage, gable, deck and porch would

[5] The Circuit Court also granted the relief requested in Count I of the Counter-Complaint by finding that none of the parties have violated the Restrictive Covenant. The Circuit Court further held that there had been no equitable estoppel and waiver, and therefore denied the relief requested in Count II of the Counter-Complaint. (CC Amended Order at 2.)

also be constructed on the Defendants' lot. (*Id*. at 4, 9-10.)[6] The Circuit Court also held that although the Restrictive Covenant "may not seem to be ambiguous," the court nonetheless was required to look "beyond the implied meaning" of the terms used in the restrictive covenant to "ascertain the intent of the drafter," and it found that the Defendants' home was "not in violation of congeniality standards and does not endanger the value of the other parcels within the subdivision." (*Id*. at 9-10.)

D. The Court of Appeals Reverses the Circuit Court

On May 7, 2016, Plaintiffs appealed as of right to the Court of Appeals. After briefing and oral argument, the Court of Appeals unanimously reversed the Circuit Court in an unpublished opinion dated August 8, 2017, holding that the Circuit Court "was required to enforce the restrictions as written." (COA Opinion at 2 and 6, attached as Exhibit A). After holding that the Circuit Court correctly concluded that the terms "systems built" and "modular" are synonymous, the Court of Appeals held that the Circuit Court "erred, however, when it concluded that the covenant was nevertheless ambiguous because 'modular' was not defined in the restrictive covenant." (*Id.* at 6). The Court of Appeals held that instead, "the restriction should have been accorded its ordinary and generally understood or popular sense, without technical refinement." (*Id.*). "[W]here defendants' home was in clear violation of the unambiguous restrictive covenant, the only solution was to grant injunctive relief and order that the non-conforming home be removed." (*Id*.). Therefore, the Court of Appeals held that the

[6] Mr. Michael Coeling, general manager of Cassidy Builders, testified that some of the plumbing, such as plumbing underneath the sinks or the toilets, would be in the modules when they left the factory (Trial Testimony 2/24/16 at 69), and that the roof trusses were on the modules when they left the factory, but were folded down for purposes of transport. (Trial Transcript 2/24/16 at 100-101; *see also* Trial Transcript 2/25/16 at 27-28 (Mr. Paul Lindsley testifying that the roof trusses were on the Defendants' modules when they left the factory)).

Circuit Court should have "granted judgment in plaintiffs' favor and ordered defendants to remove the modular home." (*Id*. at 2).

E. The Court of Appeals Denies Defendants' Motion for Reconsideration

On August 29, 2017, Defendants filed a Motion for Reconsideration of the Court of Appeals Opinion. By order dated September 20, 2017, the Court of Appeals denied Defendants' Motion. (**Exhibit D**). On November 1, 2017, Defendants filed an Application for Leave to Appeal to this Court.

COUNTER-STATEMENT OF STANDARD OF REVIEW

An applicant for leave to appeal must show that its case satisfies one of the six grounds for review enumerated in MCR 7.302(B), which includes an issue that involves "legal principles of major significance to the state's jurisprudence," or a Court of Appeals' decision that "is clearly erroneous and will cause material injustice." MCR 7.302(B)(3) and (B)(5). Whether to grant leave to appeal is within this Court's discretion.

Should the Court grant leave, the interpretation of restrictive covenants is a question of law that this Court reviews de novo. *Terrien v Zwit*, 467 Mich 56, 60-61; 648 NW2d 602 (2002). In construing restrictive covenants, the overriding goal is to ascertain the intent of the parties. *Tabern v Gates*, 231 Mich 581, 583; 204 NW 698 (1925). Where the restrictions are unambiguous, they must be enforced as written. *Hill v Rabinowitch*, 210 Mich 220, 224; 177 NW 719 (1920).

In recognition of the freedom to contract, this Court has established a highly deferential framework for reviewing deed restrictions which allows property owners to create and enforce covenants affecting their own property:

> If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations, because enforcement of such restrictions

> grants the people of Michigan the freedom "freely to arrange their affairs" by formation of contracts to determine the use of land. *Rory, supra* at 468. Such contracts allow the parties to preserve desired "aesthetic" or other characteristics in a neighborhood, which the parties may consider valuable for raising a family, conserving monetary value, or other reasons particular to the parties.

Bloomfield Estate Improvement Ass'n v City of Birmingham, 479 Mich 206, 214; 737 NW2d 670 (2007). "In reviewing the language of restrictive covenants, this Court recognizes that [b]uilding and use restrictions in residential deeds are favored by public policy.' Judicial policy requires that we seek to protect property values as well as 'aesthetic characteristics considered to be essential constituents of a family environment.'" *Brown v Martin*, 288 Mich App 727, 731; 794 NW2d 857 (2010) (citations omitted).

A trial court's findings of fact in a bench trial are reviewed for clear error. *Alan Custom Homes, Inc. v Krol*, 256, Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id*.

ARGUMENT

I. THIS CASE DOES NOT INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE

A party seeking leave to appeal to this Court *must show* that the case meets one of the criteria set forth in MCR 7.302(B). Defendants appear to argue in their Introduction that their case meets the criteria set forth in either MCR 7.302(B)(3) or (B)(5). However, Defendants have not shown, and cannot show, that this case meets the criteria of either provision. Leave to appeal therefore should be denied.

MCR 7.302(B)(3) is simply inapplicable. The Court of Appeals' decision is a unanimous, unpublished per curiam decision with no precedential value under MCR 7.215(C)(1). Even if it were published, the decision does not create new law in Michigan. It simply applies

three well-settled principles regarding the interpretation and enforcement of restrictive covenants, all of which were cited by the Court of Appeals in its opinion:

> "If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations, because enforcement of such restrictions grants the people of Michigan the freedom freely to arrange their affairs by the formation of contracts to determine the use of lane." *Bloomfield Estates Improvement Ass'n, Inc. v City of Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007);
>
> "[T]he fact that a contract does not define a relevant term does not render the contract ambiguous. Rather, if a term is not defined in a contract, we will interpret such term in accordance with its 'commonly used meaning.'" *Terrien v Zwit*, 467 Mich 56, 76; 648 NW2d 602, 613 (2002); and
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> "Owners may enforce negative easements regardless of the extent of the owners' damages. When enforcing a negative easement, it is wholly immaterial to what extent any other lot owner may be injured by the forbidden use. The economic damages suffered by the landowner seeking to avoid the restriction do not, by themselves, justify a lifting of the restrictions." *Webb v Smith*, 224 Mich App 203, 211; 568 NW2d 378 (1997).

Defendants' unsupported assertion that the Court of Appeals' decision "threatens the entire 'systems-built' segment of the market, and would result in fewer building choices and lower-quality, higher-priced homes for all Michiganders" is nothing more than inaccurate hyperbole and is outside of the six grounds for review enumerated in MCR 7.302(B). Furthermore, as held by this Court, cases involving the enforcement of a restrictive covenant are decided on a "case-by-case basis." *O'Connor v Resort Custom Builders, Inc.*, 459 Mich 335, 343; 591 NW2d 216 (1999). This case involves only this particular house and these particular restrictive covenants, and applies well settled law. It is certainly for these reasons that the Court of Appeals did not consider the case significant enough to issue an authored or published decision. Simply put, nothing about this case would set a meaningful precedent. Under these circumstances, this matter is of little or no significance to the jurisprudence of this State. This

Application is nothing more than another bite at the litigation apple, and leave to appeal should be denied.

II. THE COURT OF APPEALS DID NOT CLEARLY ERR IN REVERSING THE CIRCUIT COURT

MCR 7.302(B)(5) is similarly not applicable. Defendants' Application does not explain why the Court of Appeals' decision is clearly erroneous, but simply restates the same arguments rejected by the Court of Appeals. In addition, Defendants do not explain how the Court of Appeals decision conflicts with other decisions of the Court of Appeals or this Court. Defendants' Application should be denied.

A. Defendants' House Fits Within The Generally Understood Definition of "Modular Home"

All of the evidence presented at trial demonstrated that the Defendants' house fit within the generally understood meaning of "modular home." As the Court of Appeals noted, at trial Ms. Goyings acknowledged that the home was comprised in part of three modules, which were manufactured at Ritz-Craft in Jonesville, Michigan, brought to the lot on a trailer, and a crane was used to swing the modules into place. (COA Opinion at 3; Trial Transcript 2/23/16 at 51, 64, 87). Furthermore, documents created before the litigation was filed identified the house as a "modular" home: the purchase agreement between the Defendants and Cassidy Builders identified the structure as a "MODULAR HOME" (Trial Exhibit 9); the Building System Approval Report categorized the structure as a modular home (Trial Exhibit 5, 20); the Application for Building Permit filed by Cassidy Builders described the project as a "single family modular" (Trial Exhibit 4); and the Building Permit issued by Watson Township referred to the house as "Modular" (Trial Exhibit 6). Expert witnesses also testified that they would consider the Defendants' house to be a modular home. (Trial Transcript 2/24/16 at 21-22, 24, 147.)

The only evidence to the contrary was testimony from lay witnesses to the effect that the house was "systems built" and was therefore not modular. (Trial Transcript 2/23/16 at 60-63; Trial Transcript 2/24/16 at 61; Trial Transcript 2/25/16 at 5, 11.) But as the Court of Appeals properly noted in its Opinion, the Circuit Court concluded that it is "clear that the term [systems built] is similar to, if not synonymous with, modular." (COA Opinion at 3; CC Order at 3).

As correctly noted by the Court of Appeals, the Circuit Court's analysis should have stopped at that point. The relevant terms of the Restrictive Covenant clearly provide that "no geodesic dome, berm house, pre-fabricated or *modular home*, mobile home, shack or barn will be erected on any of the Parcels unless provided for herein." (Restrictive Covenant, **Exhibit E**) (emphasis added). There is absolutely no ambiguity; a modular home is not permitted to be erected on the Defendants' parcel in Timber Ridge Bay. After noting that the Defendants' house fits within the generally understood definition of a "modular home," the Court of Appeals correctly held that the Circuit Court should have enforced the unambiguous terms of the Restrictive Covenant as written and ordered Defendants to remove the modular home.

B. The Circuit Court Erred By Reading Ambiguity Into Contractual Language That Clearly And Unambiguously Prohibited Modular Homes From Being Located Or Erected On Defendants' Property

The Court of Appeals correctly held that the "Circuit Court erred when it concluded that the covenant was nevertheless ambiguous because 'modular' was not defined in the restrictive covenant." (COA Opinion at 6). In what can only be viewed as a veiled attempt to avoid ordering removal of the Defendants' house, the Circuit Court ignored the evidence set forth above and read ambiguity into the unambiguous language of the Restrictive Covenant, erroneously interpreting the Restrictive Covenant to find that the Defendants' modular home was not prohibited by the Restrictive Covenant. The Circuit Court held that although the Restrictive Covenant "may not seem to be ambiguous," the court nonetheless was required to look "beyond

the implied meaning" of the terms used in the restrictive covenant to "ascertain the intent of the drafter." (CC Order at 10). Because the restrictive covenant did not "clarify what percentage of a home is allowed to be prefabricated before the entirety of the home is barred by the restrictions," (*Id.* at 9), the Circuit Court essentially developed its own definition of "modular home," and ruled that the Defendants' house was not a prohibited "modular home" because some additional finishing work had to be performed on the modules on site. As the Circuit Court explained, the "modules here are not a residence as they are delivered; additional construction is required to add in the electrical, duct work, plumbing" and roof. (*Id.* at 9.) The Circuit Court also took into account the fact that "enhancements" to the home, including a garage, gable, deck, and porch, would be "stick built on site." (*Id.* at 4, 9.)

However, the Court of Appeals correctly held that because Defendants' home was in clear violation of the unambiguous restrictive covenant, it was error for the Circuit Court to strive to find an equitable solution. (COA Opinion at 6). As correctly noted by the Court of Appeals, this Court has cautioned against judicial over-stepping when interpreting restrictive covenants: "[t]he fact that a contract does not define a relevant term does not render the contract ambiguous. Rather, if a term is not defined in a contract, we will interpret such term in accordance with its 'commonly used meaning.'" *Terrien v Zwit*, 467 Mich 56, 76; 648 NW2d 602, 613 (2002). Because Defendants' house clearly fits within the ordinary and generally understood meaning of "modular home," the Court of Appeals correctly held that it was error for the Circuit Court to read ambiguity into the restrictive covenant and not order the removal of Defendants' home.

The plain language of the Restrictive Covenant contains no requirement that a modular home be comprised solely of modules that are delivered as a complete "residence," without any

finishing work required. Nor was any evidence presented that the "ordinary and generally understood meaning" of "modular home" consists only of modules that are delivered as a complete, finished residence. In fact, no evidence was presented that such a product even exists. Similarly, the Circuit Court's holding that a house is not "modular" if "enhancements" such as a garage, deck, or porch are added means that a resident simply needs to add a deck onto a modular home to avoid prohibition under the Restrictive Covenant, which is essentially what the Defendants did in this case. Thus, the Circuit Court's interpretation reads the term "modular home" out of the Restrictive Covenant, and it conflicts with the basic contract law tenet that "courts 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 Grp Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

As this Court has predicted, if every undefined term in a contract is found to be ambiguous, "virtually all contracts would be rife with ambiguity," and would be subject to "judicial interpretation" in "'words mean whatever I say they mean' fashion." *Terrien*, 467 Mich at 76. Yet that is precisely how the Circuit Court interpreted the term "modular" in the Restrictive Covenant at issue in this case — applying a definition of the Circuit Court's own creation that was supported by neither the plain language of the restriction nor the evidence presented at trial. Therefore, the Court of Appeals was correct in holding that the Circuit Court "was not at liberty to decide whether it agreed with the covenant; it was required to enforce the restrictions as written." (COA Opinion at 7). As this Court stated in an *en banc* opinion in *Bloomfield Estate Improvement Ass'n v City of Birmingham*:

> A deed restriction represents a contract between the buyer and the seller of property. *Uday v City of Dearborn*, 356 Mich. 542, 546; 96 N.W.2d 775 (1959). "Undergirding this right to restrict uses of property is, of course, the central vehicle for that restriction: the freedom of contract, which is . . . deeply

> entrenched in the common law of Michigan." *Terrien*, supra at 71 n 19, citing *McMillan v Mich. S & N I R Co*, 16 Mich. 79 (1867). The United States Supreme Court has listed the "right to make and enforce contracts" among "those fundamental rights which are the essence of civil freedom." *United States v Stanley*, 109 U.S. 3, 22; 3 S. Ct. 18; 27 L. Ed. 835 (1883). We "respect[] the freedom of individuals freely to arrange their affairs via contract" by upholding the "fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be enforced as written," unless a contractual provision "would violate law or public policy." *Rory v. Cont'l Ins. Co.*, 473 Mich. 457, 468, 470; 703 N.W.2d 23 (2005) (emphasis in original).
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> "'Were courts free to refuse to enforce contracts as written on the basis of their own conceptions of the public good, the parties to contracts would be left to guess at the content of their bargains . . . .'" *Fed Deposit Ins Corp v Aetna Cas & Surety Co*, 903 F.2d 1073, 1077 (CA 6, 1990), quoting *St Paul Mercury Ins Co v Duke Univ*, 849 F.2d 133, 135 (CA 4, 1988). Because the parties have freely set forth their rights and obligations toward each other in their contract, when resolving a contractual dispute, "society is not motivated to do what is fair or just in some abstract sense, but rather seeks to divine and enforce the justifiable expectations of the parties as determined from the language of their contract." *Rich Products Corp v Kemutec, Inc*, 66 F. Supp. 2d 937, 968 (ED Wis, 1999). Rather than attempt to apply an abstract notion of "justice" to each particular case arising out of a contract, we recognize that refusal to enforce a contract is "contrary to the real justice as between [the parties]." *Mitchell v Smith*, 1 Binn 110, 121 (Pa, 1804). See also *Brown v Vandergrift*, 80 Pa 142, 148 (1875) (holding that enforcing a contract is "essential to do justice"). Consequently, when parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, if the contract is not "contrary to public policy." *Sands Appliance Services, Inc v Wilson*, 463 Mich. 231, 239; 615 N.W.2d 241 (2000). When contracts are formed, the parties to the contract are the lawmakers in such realm and deference must be shown to their judgments and to their language as with regard to any other lawmaker.

479 Mich 206, 213; 737 NW2d 670 (2007). Accordingly, the Court of Appeals did not clearly err in reversing the Circuit Court, because the Circuit Court erred by failing to adhere to these principles in interpreting the Restrictive Covenant in this case.

C. Defendants' Remaining Arguments Fail to Show How The Court of Appeals' Decision is Clearly Erroneous

Whether a home could have a bathroom module, or a sunroom, or a screened-in porch, or a modular shower, or a modular closet, and still fit within the commonly understood definition of "modular home" – or contain a single "prefabricated component" and therefore be considered a "prefabricated home" – is yet another red herring presented by Defendants, because *that is not this case*. The photographs and other evidence presented at trial established that, as the Circuit Court found, Defendants' house was comprised of three large modules that were built off-site, delivered to the property, and then "attached to the foundation, which was the same square footage as the assembled modules." (CC Order at 2). While there may be tougher calls to make at the margins of other hypothetical situations, this is not one of those situations because Defendants' home is a "modular home" under any commonly understood definition of the term, and therefore the Court of Appeals was not required to opine as to what percentage of a home needs to be "modular" in order to fall within the restrictive covenant. As the Court of Appeals correctly noted, "where defendants' home was in clear violation of the unambiguous restrictive covenant, the only solution was to grant injunctive relief and order that the non-conforming home be removed." (COA Opinion at 6). Therefore, the Court was correct in holding that the trial court should have "granted judgment in plaintiffs' favor and ordered defendants to remove the modular home." (*Id.* at 2).

Furthermore, Defendants' assertion that the Court of Appeals' decision is a "textualist mess" is without merit because the commonly understood definition of the term "prefabricated home" was not before the Court of Appeals. The ordinary and generally understood meaning of any particular category of home or structure prohibited in the Restrictive Covenant, whether it is a prefabricated home, manufactured home, mobile home, geodesic dome, berm house, shack, or

barn, does not establish the ordinary and generally understood meaning of other categories of structures included in the Restrictive Covenant. Each category of home or structure necessarily has its own ordinary and generally understood meaning, independent of the others.

III. THE COURT OF APPEALS DID NOT CLEARLY ERR WHEN IT HELD THAT THE APPROPRIATE RELIEF WAS TO ORDER THAT DEFENDANTS' NON-CONFORMING HOME BE REMOVED

Because the plain language of the Restrictive Covenant prohibits the Defendants' modular home from being located or erected in Timber Ridge Bay, the Court of Appeals correctly held that the only appropriate relief "was to grant injunctive relief and order that the non-confirming home be removed." (COA Opinion at 6). As stated in *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 343; 591 NW2d 216 (1999):

> Our decisions are premised on two essential principles, which at times can appear inconsistent. The first is that owners of land have broad freedom to make legal use of their property. The second is that courts must normally enforce unwaived restrictions on which the owners of other similarly burdened property have relied.

See also Rofe v. Robinson, 415 Mich. 345, 349, 329 N.W.2d 704 (1982) ("Deed restrictions are property rights. The courts will protect those rights if they are of value to the property owner asserting the right and if the owner is not estopped from seeking enforcements.").

As correctly noted by the Court of Appeals, enforcement is required regardless of the effect (or lack thereof) of the violation on property owners, and the Circuit Court erred in this case by justifying its disregard for the Restrictive Covenant on the basis that the court believed that neighboring homeowners would not be harmed by Defendants' prohibited use. *See* CC Order at 9 (supporting ruling with finding that "Defendants' home is not in violation of congeniality standards and does not endanger the value of the other parcels within the subdivision.") As this Court held in *Terrien*,

> It is of no moment that, as defendants assert, the "family day care homes" cause

> no more disruption than would a large family or that harm to the neighbors may not be tangible. As we noted in *Austin v VanHorn*, 245 Mich. 344, 347; 222 N.W. 721 (1929), "the plaintiff's right to maintain the restrictions is not affected by the extent of the damages he might suffer for their violation." This all comes down to the well-understood proposition that a breach of a covenant, no matter how minor and no matter how de minimis the damages, can be the subject of enforcement. As this Court said in *Oosterhouse v Brummel*, 343 Mich. 283, 289; 72 N.W.2d 6 (1955), "'If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of the covenant affords sufficient ground for the Court to interfere by injunction.'" (Citations omitted.)

Terrien, 467 Mich at 65.

Nor should the remedy be rejected on the basis of perceived harshness to the Defendants. In this regard, this case is strikingly similar to the case of *Webb v Smith*, 224 Mich App 203; 568 NW2d 378 (2010). The Court in *Webb* was called upon to determine whether the trial court had properly ordered defendants to remove their home from defendants' property due to an alleged violation of restrictive covenants that prohibited the construction of a dwelling closer than 20 feet from the front lot line and prohibited the construction of more than one dwelling per lot. Like this case, *Webb* involved lakefront lots and the defendants had already built their home despite the restrictive covenants. The Opinion in *Webb* begins by pointing out that, as in this case, the defendants continued construction of their home despite knowledge of the restrictive covenants and essentially took a gamble whereby they sought forgiveness rather than permission:

> Defendants concede that they built their home on the property despite two deed restrictions that prohibited this construction. This case illustrates the folly of gambling on the prospect that Michigan's judicial system will ignore and fail to enforce the property rights of others. Defendants' gamble has resulted in the unfortunate outcome that they must now tear down the home that they built.

Id at 205-206.

The Court in *Webb* began its analysis by recognizing that a restrictive covenant is a valuable property right and that monetary damages are irrelevant to the trial court's analysis

regarding the enforcement of that valuable property right:

> Initially, we note that a negative easement is a valuable property right. *Austin v Van Horn*, 245 Mich 344, 346; 222 NW 721 (1929). Further, public policy favors use of restrictions in residential deeds. *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983). The judiciary's policy is to protect property owners who have complied with the deed restrictions. *Id.* Restrictive covenants protect property values and 'aesthetic characteristics considered to be essential constituents of a family environment.' *Id.* (citations omitted).
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> Michigan courts generally enforce valid restrictions by injunction. *Cooper v. Kovan,* 349 Mich. 520, 530, 84 N.W.2d 859 (1957). Moreover, courts typically do not consider the parties' respective damages, as is illustrated by the case law that follows. Owners may enforce negative easements regardless of the extent of the owners' damages. When enforcing a negative easement, "it is wholly immaterial to what extent any other lot owner may be injured by the forbidden use." *Austin, supra* at 346, 222 N.W. 721. The economic damages suffered by the landowner seeking to avoid the restriction do not, by themselves, justify a lifting of the restrictions. *Rofe v. Robinson,* 415 Mich. 345, 350, 329 N.W.2d 704 (1982). Because courts regularly enforce injunctions based on valid restrictions and because the parties' damages are immaterial, the circuit court did not err in failing to apply a balancing test.

Id at 210-211.

As established by *Webb,* it is wholly immaterial the extent to which the Plaintiffs may be injured by the Defendants' violation of the Restrictive Covenant, and any economic damages that may be suffered by the Defendants as a result of enforcement of the Restrictive Covenant cannot justify lifting the restrictions imposed by the Restrictive Covenant. This is especially true here, as in *Webb*, where the party that violated the restrictive covenants did so with knowledge of the covenants and based upon a gamble that the trial court would fail to enforce the property rights of others.

CONCLUSION AND RELIEF REQUESTED

There is absolutely nothing about this case that merits review by this Court, and Defendants have failed to meet their burden to show otherwise. Plaintiffs respectfully request that this Court deny Defendants' Application for Leave to Appeal and deny Defendants' request

for a peremptory order to reverse the Court of Appeals decision and reinstate the decision of the Circuit Court.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Dated: November 29, 2017

By: s/Todd C. Schebor

Todd C. Schebor (P66358)
Dykema Gossett PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, MI 48304
(313) 568-6672

Krista L. Lenart (P59601)
Dykema Gossett PLLC
2723 South State Street, Suite 400
Ann Arbor, MI 48104
(734) 214-7676

Attorneys for Plaintiffs-Appellees and
Intervening Plaintiffs-Appellees

DYKEMA GOSSETT•A PROFESSIONAL LIMITED LIABILITY COMPANY•39577 WOODWARD AVENUE, SUITE 300•BLOOMFIELD HILLS, MICHIGAN 48304

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

By: s/Todd C. Schebor

Todd C. Schebor (P66358)
Dykema Gossett PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, MI 48304
(313) 568-6672

Attorneys for Plaintiffs-Appellees and
Intervening Plaintiffs-Appellees

4835-7247-2151.2
ID\SCHEBOR, TODD - 102997\000002