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

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

ORAL ARGUMENT REQUESTED

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BASIS FOR SUPPLEMENTAL BRIEF

Defendants-Appellants David Goyings and Helen Goyings ("Defendants") filed an Application for Leave to Appeal to this Court from the August 8, 2017 unpublished *per curiam* opinion of the Court of Appeals (Hoekstra, PJ, Murphy and K.F. Kelly). 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 by order dated September 20, 2017. Defendants' Application for Leave to Appeal was filed with this Court on November 1, 2017. Plaintiffs-Appellees Matthew T. Thiel and Nikole M. Thiel, and Intervening Plaintiffs-Appellees William Traywick and Marcia Traywick (collectively, "Plaintiffs") opposed the Application.

In an Order dated March 28, 2018, this Court directed the Clerk to schedule oral argument on the Application and required the parties to file supplemental briefs addressing the following issues:

(1) whether the Defendants' home is a "modular home" as defined by Timber Ridge Bay's "Declaration of Restrictions, Covenants and Conditions"; and if so,

(2) whether the violation was a technical violation that did not cause substantial injury, *Cooper v Kovan*, 349 Mich 520, 530 (1957).

QUESTIONS PRESENTED

I. IS THE DEFENDANTS' HOME A "MODULAR HOME" AS DEFINED BY TIMBER RIDGE BAY'S "DECLARATION OF RESTRICTIONS, COVENANTS AND CONDITIONS?"

Plaintiffs-Appellees answer……...…..…….……..……Yes

Defendants-Appellants would answer….…….……No

The Circuit Court answered……..……No

The Court of Appeals answered ……..……Yes

This Court should answer……..Yes, and therefore deny leave to appeal

II. IF THE ANSWER TO THE FIRST QUESTION IS "YES," IS THE VIOLATION A TECHNICAL VIOLATION THAT DOES NOT CAUSE SUBSTANTIAL INJURY, *COOPER V KOVAN*, 349 MICH 520, 530 (1957)?

Plaintiffs-Appellees answer……..…….No

Defendants-Appellants would answer ……..……..Yes

The Circuit Court answered……..Did not answer

The Court of Appeals answered…….No

This Court should answer……No, and therefore deny leave to appeal

INTRODUCTION

This action involves the violation of a Restrictive Covenant that unambiguously prohibits modular homes in Timber Ridge Bay subdivision: "no geodesic dome, berm, house, prefabricated or *modular home*, mobile home, shack or barn will be erected on any of the Parcels unless provided for herein." (Trial Ex. 3, Declaration of Restrictions, Covenants and Conditions at 5, AA 31a)[1] (emphasis added). Despite this restriction, and fully knowing and understanding this restriction, Defendants purchased a modular home constructed by Ritz-Craft in Jonesville, Michigan, and had the three modules comprising the home delivered to their lot on trailers on June 8, 2015. The three modules are of the same square footage as the foundation of the home. Prior to installation of the modular home, Plaintiffs warned Defendants that the installation would violate the Restrictive Covenant. Instead of mitigating their damages by changing their plans, Defendants proceeded with the installation of the modular home. However, Defendants cannot knowingly violate the restrictions, and then ask the Court to excuse and forgive their behavior.

Defendants' Supplemental Brief – like their Application for Leave to Appeal and briefing in the Court of Appeals — is comprised largely of attempts to invoke sympathy from the Court and to create ambiguity where none exists. However, try as Defendants might, this case is not about whether Defendants are good people, whether the parties get along, what portion of Defendants' house is "stick built," or what constitutes a "prefabricated" home. Nor, as correctly noted by the Court of Appeals, is it about whether the Defendants' house is "visually attractive," the quality of construction, or the effect (or lack thereof) Defendants' modular home has on the Plaintiffs' home or the subdivision, "because the breach of a covenant, no matter how minor and

[1] Citations to Appellants' Appendix are abbreviated as "AA."

no matter how de minimus the damages, can be the subject of enforcement."[2] *Terrien v Zwit*, 467 Mich 56, 65; 648 NW2d 602 (2002). And this case is also not about the economic effect the Court of Appeals' decision will have on Defendants (or, for that matter, the modular home industry), 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 case is 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 governing their property.

Defendants' Application and Supplemental Brief provide 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 (i.e., Defendants' house). Second, the Court of Appeals' decision is not clearly erroneous, nor does it 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, AA 22a). While there are certain equitable exceptions to enforcing a restriction, the Court of Appeals correctly held that no such exception applies to this case. (*Id.*) As shown below,

[2] In their Supplemental Brief, Defendants repeatedly refer to their modular home as either "enhancing" or "increasing" the value of the neighborhood. *See, e.g.*, Defendants/Appellants MOAA Supplemental Brief at 1, 3, 13, 18, 20 and 26. It should be noted that there was no evidence presented at trial on this point, and there was no factual finding by the Circuit Court that Defendants' home either "enhanced" or "increased" the value of the neighborhood. Rather, the court only opined that Defendants' home does not "endanger" the value of the other parcels in the subdivision. (Circuit Court Order at 9, AA 10a).

Defendants' home is indeed a modular one, and their construction of a modular home, when such homes are expressly prohibited by an enforceable restrictive covenant, is not a technical violation; rather, it is a complete divergence from the general purpose and scheme of the Restrictive Covenant. This Court should either deny the application for leave to appeal or, if it grants the application for leave to appeal, peremptorily affirm the Court of Appeals.

ARGUMENT

I. DEFENDANTS' HOME IS A MODULAR HOME AS DEFINED BY THE DECLARATION OF RESTRICTIONS, COVENANTS AND CONDITIONS.

All of the evidence presented at trial demonstrated that Defendants' house fits 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 trailers, and a crane was used to swing the modules into place.[3] (COA Opinion at 3, AA 19a; Trial Transcript Vol I, Helen at 51, 64, 87, SA 44b, 49b, 50b). The modules are comprised of the same square footage as the foundation of the house. (CC Order at 2, AA 3a).

The best evidence that Defendants' home is "modular" comes from the people who best know what that term means. All of the following 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, SA 2b);

[3] Photos of the three modules taken shortly after they arrived at Defendants' parcel are attached to Appellee's Supplemental Appendix ("SA") at 75b-77b (Trial Exhibits 14b, 14c, and 14d). 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 Vol II, Coeling at 100-101, SA 63b-64b; Trial Transcript Vol III, Lindsley at 27-28, SA 73b-74b.)

- the appraisal report prepared by C. Douglas Snell, a Certified General Appraiser with the John A. Meyer Appraisal Company states that "[t]he subject dwelling is a modular home" (Trial Exhibit 7 at p 1, AA 37a);

- the State of Michigan issued Building System Approval Report categorized the structure as a modular home (Trial Exhibit 20, SA 5b);

- the Application for Building Permit filed by Cassidy Builders described the project as a "single family modular" (Trial Exhibit 4, SA 33b); and

- the Building Permit issued by Watson Township referred to the house as "Modular" (Trial Exhibit 6, SA 39b).

Expert witnesses also testified that they would consider the Defendants' house to be a modular home:

- Mr. Kirk Scharphorn, the contracted building official for Watson Township who was admitted as an expert witness in construction codes and inspections, testified that 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: "***There is no doubt. It's a modular home***." (Trial Transcript Vol II at 21-22, 24, 31-32, SA 56b-60b; Trial Exhibit 2, Affidavit of Scharphorn, SA 40b); and

- the Defendants' appraiser, Mr. Douglas Snell, who was admitted as an expert witness in the area of residential real estate appraisals, testified that the Defendants' house is a modular home: "***It is a modular house***." (Trial Transcript Vol II at 147, SA 65b).

The only evidence to the contrary was testimony from lay witnesses to the effect that the house was "systems built" and therefore not modular. (Trial Transcript Vol I, Helen at 60-63, SA 45b-48b; Trial Transcript Vol II, Coeling at 61, SA 61b; Trial Transcript Vol III, Lindsley at 5, 11, SA 68b, 70b.)[4] But as the Court of Appeals properly noted, the Circuit Court concluded that

[4] Mr. Paul Lindsley, the general manager for Ritz-Craft Custom Homes that built the three modules for 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" 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," but he later testified that a systems built

it is "clear that the term [systems built] is similar to, if not synonymous with, modular." (COA Opinion at 3, AA 19a; CC Order at 3, AA 4a).

As the Court of Appeals correctly held, 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."(Covenant at 5, AA 31a) (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. There is no reason for this Court to revisit the issue.

A. The Court of Appeals Properly Held that 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

Per the Court of Appeals, 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, AA 22a). In what can only be viewed as a veiled attempt to avoid ordering removal of the Defendants' house, the Circuit Court ignored the evidence and read ambiguity into the unambiguous language of the Restrictive Covenant, in order 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

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home is synonymous with a modular home (Trial Transcript Vol III at 5, 10-11, 18, 19, SA 68b-72b).

required to look "beyond the implied meaning" of its terms to "ascertain the intent of the drafter." (CC Order at 10, AA 11a). 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, AA 10a), the Circuit Court essentially developed its own definition of "modular home." It then used its own definition to rule that the Defendants' house was not a prohibited "modular home" because some additional finishing work had to be performed on the modules on site. Per the Circuit Court, 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, AA 10a.) 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, AA 5a, 10a).

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, AA 22a). 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*, 467 Mich at 76.

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 what the Circuit Court did in "interpreting" the term "modular" in the Restrictive Covenant — 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, AA 23a). As this Court stated in *Bloomfield Estate Improvement Assn 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 NW2d 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 US 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 NW2d 23 (2005)
>
> ***
>
> "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). 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. This Court should deny leave.

B. Defendants' Arguments On Why Their House is Not a Modular Home are Inconsistent with the Plain Language of the Restrictive Covenant.

Defendants assert that "under Plaintiffs' and the Court of Appeals' reading, if a home contains a single modular component, it is a 'modular home' in violation of the Restrictive Covenant." (Defendants' Supplemental Brief at 14). However, whether a home with a bathroom module, or a sunroom, or a screened-in porch, or a modular shower, or a modular closet, would

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*. This case is about whether the *Defendants' house* is a modular home, and the Court of Appeals did not err in finding it was, and therefore was in violation of the Restrictive Covenant. 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, AA 3a). These modules arrived at the property complete with plumbing fixtures, cabinets, counters, lighting fixtures, and even mirrors already installed.[5] While there may be tougher calls to make at the margins of other hypothetical situations, this is not one of those situations because Defendants' is a "modular home" under any commonly understood definition of the term. The Court of Appeals was not required to, and therefore did not, 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, "defendants' home was in clear violation of the unambiguous restrictive covenant.…" (COA Opinion at 6, AA 22a). Therefore, the Court of Appeals 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, AA 18a). There is no reason for this Court to grant leave and weigh in on whether a hypothetical home with just one module or modular component would constitute a violation of the Restrictive Covenant.

[5] *See* Trial Exhibits 26zz and 26ccc, SA 78b and 79b. This evidence directly refutes Defendants' repeated description of their modules as "just a raw piece of construction," and implications that the three modules were nothing more than framed walls and a ceiling and floor. *See* Defendants' Supplemental Brief at 5, 6, and 18.

Defendants' argument that a house can only be considered a "modular home" if it is "relocated" in its entirety from outside the neighborhood (Defendants' Supplemental Brief at 16-17) is yet another example of the lengths to which Defendants seek to stretch the plain language of the Restrictive Covenant to avoid the result that is clearly required. "Relocated Residences" and "Manufactured Housing Units" are two separate sections of the Restrictive Covenant, and the fact that modular homes are an example of one type of residence that can be "relocated" or "manufactured" does not mean that such homes are permitted if they are *not* "relocated" as a single unit onto the property.

Since they cannot prevail under the plain language of the Restrictive Covenants, Defendants ask this Court to follow the Circuit Court's lead, throwing out the objective terms used in the contract and replacing them with a wholly subjective standard, under which the only structure prohibited would be "a low cost, low-quality, visually unattractive structure that is cheaply made in a factory and then strapped to a foundation and habitable after some basic plumbing and electrical hookups."[6] (Defendants' Supplemental Brief at 18; *see also* at 22 (asserting that the covenants bar only "cheap, low-quality eyesores that are entirely or predominately built in a factory and then dropped down on a lot in Timber Ridge Bay.")). But this definition is not supported by the plain language of the restriction and is contrary to the evidence presented. The Restrictive Covenant contains no requirement that a modular home must be low cost, low quality, or generally visually unattractive in order to be prohibited. As the Court of Appeals correctly noted, "Defendants' labored attempt to argue that a modular home is

[6] Defendants assert on page 16 of their Supplemental Brief that their home was *not* a modular home because it needed additional hookups (and therefore was not a "relocated residence"), yet on the very next page admit that a modular home still needs plumbing and electrical hookups.

just as good as a stick built home is of no consequence in the face of the plain reading of the restrictive covenant." (COA Opinion at 6, AA 22a).

Nor was any evidence presented at trial that the ordinary and generally understood meaning of "modular home" requires that it be low cost, low quality, or generally visually unattractive. In fact, evidence was presented at trial to the contrary. Mr. Michael Coeling, general manager of Cassidy Builders, testified that the quality and cost of construction of modular homes in the industry varies:

> Q: A moment ago you spoke about how the modular industry, you saw an evolution in two different directions, one for the budget conscious, one for the high end. And that you were focusing as a company upon the higher end path.
>
> A: Yes.
>
> Q: Is this an example of what's possible with modules?
>
> A: Absolutely.

(Trial Transcript Vol II at 65, SA 62b). This variation in quality and cost in the industry confirms that the ordinary and generally understood meaning of "modular home" does not take into consideration aesthetics, cost, or quality.[7]

Not only is Defendants' definition of a "modular home" not supported by the plain language of the Restrictive Covenant and contrary to the evidence presented at trial, it would inject an enormous subjective element into the definition of "modular," creating chaos in the enforcement of the Restrictive Covenant. The drafter of the Restrictive Covenant could have written it such that any residence is prohibited that is "low-cost, low-quality, generally visually

[7] Although Defendants cite various snippets of testimony from the Plaintiffs regarding their personal opinions about "modular homes" (Defendants' Supplemental Brief at 18, 23), they do not—and cannot—argue that any such testimony can overcome the plain language of the Restrictive Covenant, which imposes no restrictions regarding aesthetics or cost of residences, but does separately prohibit modular homes, manufactured homes, and mobile homes.

unattractive structure that is cheaply made," as Defendants have now attempted to re-write it. But the drafter smartly did not do so because that would inject a subjective determination each and every time a residence is built within the subdivision. One person's trash is another's treasure; some may view a certain home design as creative and beautiful while others view the same design as an eyesore. And in virtually all instances, such a subjective determination cannot be made until after the modular home is substantially or completely built, because as currently written, there is no requirement in the Restrictive Covenant for the landowner or home builder to provide other landowners in the Timber Ridge Bay subdivision with the specifications and cost to construct their future home. Defendants' definition of modular home would therefore require a retrospective, subjective, evaluation each and every time a modular home is built in the Timber Ridge Bay subdivision and would create chaos in the enforcement of the Restrictive Covenant.

And that is precisely why this case is not about whether or not Defendants' home is attractive, or their "dream home," but rather whether it complies with the Restrictive Covenant. In-home day cares may be attractive and are quite useful to many individuals, but have been found improper if they violate a neighborhood restrictive covenant. *See Terrien*. Similarly, bed and breakfasts are almost always attractive in most people's eyes, but they too are improper if not permitted. *See Johnson v Kristin*, unpublished per curiam opinion of the Court of Appeals, issued March 6, 2007 (Docket No. 266649), attached as Exhibit 1.[8] The Court of Appeals did not err in finding that Defendants' home was "modular" and therefore in violation of the Restrictive Covenant and the issue does not warrant further review by this Court.

[8] Per MCR 7.215(C), Plaintiffs cite unpublished decisions in this brief as most cases involving restrictive covenants are unpublished, likely because they are highly individualized.

II. DEFENDANTS' VIOLATION OF THE RESTRICTIVE COVENANT IS NOT A MERE "TECHNICAL VIOLATION" AND THE COURT OF APPEALS' DECISION TO UPHOLD THE ENFORCEMENT OF THE RESTRICTIVE COVENANT NEED NOT BE REVISITED.

Defendants' construction of a modular home in direct violation of a restrictive covenant prohibiting such structures is not a "technical violation" that falls within one of the three equitable exceptions to the general rule that courts will strictly enforce valid deed restrictions through injunction. *See Cooper v Kovan*, 349 Mich 520; 84 NW2d 859 (1957). The plaintiffs in *Cooper* were residential property owners who sought to restrain the construction of commercial buildings within a residential subdivision, in violation of recorded deed restrictions. (*Id*. at 524). The Court examined whether the violation of the restrictive covenant was a "technical violation" and held, in part, that it was not because the proposed commercial construction was "in direct violation of a contrary covenant" and the violation was "far from technical and we cannot hold from the facts recited that injury feared would be unsubstantial." (*Id*. at 530). The Court further reasoned that residential restrictions constitute property rights of distinct worth and, as a result, enforcement was necessary. (*Id*. at 531).

As in *Cooper*, Defendants' construction of a modular home here was "in direct violation of a contrary covenant" and there is nothing technical about the violation. Rather, Defendants committed an intentional and substantial breach of an unambiguous covenant, and the covenant must be enforced in order to protect Plaintiffs' valuable property rights. This conclusion is consistent with the body of law that has developed under *Cooper*, and as set forth below, this case does not present any unique factual circumstances or novel legal issues of significance to the jurisprudence of this State. The application should be denied.

A. Michigan Courts Have Consistently Found That Construction Of A Structure Prohibited By A Restrictive Covenant Is Not A "Technical Violation."

This Court has not expanded on its definition of the term "technical violation," but the

term has been discussed in numerous opinions of the Court of Appeals, none of which were cited in Defendants' Supplemental Brief. In *Webb v Smith*, the Court of Appeals defined the term "technical violation" as a "slight deviation or a violation that 'can in no wise, we think, add to or take from the objects and purposes of the general scheme of development . . . .'"[9] The defendants in *Webb* built a home in a lakeshore residential subdivision in violation of several recorded deed restrictions. The court concluded that the construction of the second home—which violated the restrictive covenant's prohibition on the construction of more than one dwelling per lot—was more than a "slight deviation from the terms of the covenant." (*Id.*). The court reasoned that "[c]ourts give effect to the instrument as a whole when interpreting restrictive covenants . . . [i]f any doubt arises surrounding the meaning of the restrictions the court must consider the subdivider's intention and purpose." (*Id.*) (citing *Rofe v Robinson*, 126 Mich App 151, 157; 336 NW2d 778; 781 (1983)). In this regard, the present matter is similar to *Webb* because Defendants' violation of the Restrictive Covenant is a material deviation from the "general scheme" of development and the subdivider's "intention and purpose" in preventing the construction of modular homes in the subdivision.

Following *Cooper* and *Webb*, the Court of Appeals has been asked numerous times to determine whether specific violations of a restrictive covenant constitute a "technical violation." Though unpublished, and thus nonbinding on this Court, the decisions cited below demonstrate that Michigan courts have applied the equitable "technical violation" exception very narrowly and only under limited circumstances, and have consistently found that building a structure expressly prohibited by an enforceable restrictive covenant is not a "technical violation" of the covenant.

[9] 224 Mich App 203, 212; 568 NW2d 378, 382 (1997) (citations omitted).

For example, in *Oakwood Meadows Homeowners Ass'n v Urban*,[10] the Court of Appeals held, in part, that the construction of a pump house on a property was not a "technical violation." The court reasoned:

> The restrictions at issue here expressly forbid sheds and outbuildings, and the pump house violates that restriction. The general scheme of development in this subdivision contemplates a neighborhood free of sheds and outbuildings. The existence of a shed clearly takes away from the purpose of the general scheme of development.

(*Id*. at 12). Similarly, the Court of Appeals in *Thom v Palushaj*,[11] held, in part, that violating a restrictive covenant requiring two houses built on the same lot to be at least 100 feet apart from each other, was also not a "technical violation." The court concluded that the case presented a substantial violation, and that "defendants' violations were intentional." (*Id*. at 1). The court further reasoned that "it would appear from *Terrien* and *Hickory Pointe* [*Homeowners Ass'n v Smyk*, 262 Mich App 512, 516; 686 NW2d 506, 509 (2004)] that, to the extent that the technical violation doctrine has any continued viability in Michigan, it is to be applied only in situations where the violation is unintentional." (*Id*. at 8). Similar to *Oakwood Meadows* and *Thom*, Defendants' construction of a modular home also takes away from the general purpose and scheme of development. Defendants' violation was also intentional, and therefore not merely a "technical violation."

Most recently, *Beach Forest Subdivision Ass'n v Omran*,[12] held, in part, that defendants'

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[10] Unpublished per curiam opinion of the Court of Appeals, issued June 26, 2014 (Docket No. 316193), attached as part of Exhibit 1.

[11] Unpublished per curiam opinion of the Court of Appeals, issued Aug 23, 2007 (Docket No. 268074), attached as part of Exhibit 1.

[12] Unpublished per curiam opinion of the Court of Appeals, issued Nov 01, 2016 (Docket No. 326976), lv den by 500 Mich 1022; 896 NW2d 787 (2012), recon den by 501 Mich 912; 902 NW2d 864 (2017), attached as part of Exhibit 1.

violation of a restrictive covenant prohibiting the installation of lawn ornament fountains was not a "technical violation." The court enforced the restriction because the violation "detract[ed] from the objects and purposes of the general scheme of development." (*Id*. at 3). The court reasoned:

> It is apparent from the terms of the deed at issue that aesthetic quality and uniformity are among the objects and purposes of this subdivision's general scheme of development. This case is similar to *Webb*, in which this Court rejected defendants' argument that a deed violation was technical and unenforceable when their violation "detracted from the . . . aesthetic enjoyment [of] the subdivision's landowners."

(*Id*.) (citing *Webb*, 224 Mich App at 212). Construction of a modular home, as in Defendants' case, is a more substantial violation than lawn ornament fountains, or a pump house, and accordingly is not a mere "technical violation."

B. The "Technical Violations" Exception Is Rarely Applied, And Has Never Been Applied To Construction Of A Structure Expressly Prohibited By A Restrictive Covenant.

As discussed above, Michigan courts routinely conclude that construction of a structure that is prohibited by a restrictive covenant is not a "technical violation" under *Cooper*. The only circumstances under which the exception has been applied involve extremely slight deviations from setback requirements, temporary violations of covenants, or de minimus violations that did not involve construction of prohibited structures. For example, the Court of Appeals in *Kamphaus v Burns*[13] applied the "technical violation" exception to some of the defendants' violations, but not others. It held that the construction of a chimney, which extended 28 feet past the restrictive covenant's required size requirements, was not a mere "technical violation."

[13] Unpublished per curiam opinion of the Court of Appeals, issued Feb 26, 2009 (Docket No. 279962), attached as part of Exhibit 1

However, it found that pillars on a garage—located only nine inches into the fifty-foot front setback—were a mere "technical violation." (*Id*. at 22-23). This translates into a 1.5% deviation from the requirement, and since Defendants here concede that a far greater percentage of their home is modular, there is nothing "technical" about the violation.

In *Dean v Hanson*,[14] the Court of Appeals found "technical" violations of a restrictive covenant where the parties at issue had (1) placed trash cans at the curb the night before trash pickup, (2) failed to conduct a meeting regarding shared payment of road maintenance with respect to repairs for which costs were not being shared, (3) failed to mow certain parts of their lawn in the past, (4) performed framing of a garage despite the fact that they were not licensed builders, and (5) temporarily allowed visitors to park recreational vehicles on their property. (*Id*. at 20-22). These violations were mostly temporary and, unlike the violations at issue in this case and in *Oakwood Meadows*, *Thom*, and *Beach Forest*, they did not involve construction of an entire structure that was expressly prohibited by the restrictive covenant at issue. Defendants' construction of a prohibited modular home takes away from the general purpose and scheme of the development, and to hold that it is a "technical violation" would allow this exception to swallow the rule that covenants are to be enforced. The Court of Appeals' opinion in this case is in accord with applicable law, and there is no reason to grant Defendants' application.

C. Even if Defendants' Violation of the Restrictive Covenant is Deemed to be a "Technical Violation," Plaintiffs Will Suffer Substantial Harm If The Restrictive Covenant Is Not Enforced as Written.

Defendants cannot establish that their construction of a modular home in direct violation of the Restrictive Covenant was a "technical violation," and they also cannot establish that

[14] Unpublished per curiam opinion of the Court of Appeals, issued Nov 18, 2003 (Docket No. 241317), attached as part of Exhibit 1.

Plaintiffs were not substantially harmed by the violation. Although Defendants assert that their home has increased and enhanced the value of the neighboring parcels, that Plaintiffs have suffered "not a penny in damages," and that Defendants' home "puts money" in the pockets of Plaintiffs (Defendants' Supplemental Brief at 1, 3, 13, 18, 20), Defendants presented no evidence to support any such findings. And Defendants disregard the fact that they are seeking to deprive Plaintiffs of the valuable property right they have in the Restrictive Covenant at issue. As the Court of Appeals has noted:

> 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).

Webb, 224 Mich App at 210. *See also Cooper*, 349 Mich at 531 (noting that "residential restrictions generally constitute a property right of distinct worth.").

Further, this Court has made clear that a party that violates a restrictive covenant cannot avoid enforcement by asserting a lack of harm to other parties. As this Court held in *Terrien*:

> 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."

467 Mich at 65. There, this Court considered whether restrictions on the use of residential property prohibited the use of a family day care—the Court held that the restriction did in fact prohibit this use. The Court reasoned that it was clear "the intention was to limit the use of the property in order to maintain a residential neighborhood of a specific character." (*Id*. at 72). In

the present case, and like *Terrien*, it is clear from the Restrictive Covenant that the prohibitions on modular homes was intended to create a neighborhood of a specific character. Therefore, not enforcing the Restrictive Covenant would undoubtedly interfere with Plaintiffs' valued property rights—no matter how *de minimis* the damages may be.

Subsequently, in *Hickory Pointe* the Court of Appeals applied the *Terrien* analysis and enforced the subject restrictive covenant as written. The court held that as long as the breach was clear, the violation of the covenant afforded sufficient ground for the court to issue an injunction. (*Id.*). Similar to *Terrien* and *Hickory Pointe*, in the present matter, the Court of Appeals did not err in its decision to enforce the Restrictive Covenant and order the removal of Defendants' non-conforming modular home because Defendants' violation was a clear breach of the instrument. This Court should deny leave to appeal.

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. Defendants' house, which was comprised of three modules attached to a foundation of the same square footage as the modules, is unquestionably a modular home and therefore not permitted in the Timber Ridge Bay subdivision because the Restrictive Covenant unambiguously prohibits modular homes. The construction costs, craftsmanship, quality, aesthetics or amount of finishing required to complete the house after delivery of the modules are not relevant under the plain language of the Restrictive Covenant, and replacing the objective terms used in the covenant with the subjective standard proposed by Defendants would require a retrospective evaluation that would result in chaos in the enforcement. Nor is this a "technical" violation, since it involves construction of a structure that is prohibited by the Restrictive Covenant, and Plaintiffs will be substantially harmed if the Restrictive Covenant is not enforced. Plaintiffs-Appellees respectfully request that

this Court enter an Order denying Defendants-Appellants' Application for Leave to Appeal, or, if it determines that action is warranted by the Court, it peremptorily affirm the Court of Appeals.

Respectfully submitted,

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Dated: May 30, 2018

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INDEX TO EXHIBITS

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May, 2018, 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.

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