STATE OF MICHIGAN
IN THE SUPREME COURT

MATTHEW T. THIEL and NICOLE M. THIEL,

Plaintiffs/Counterdefendants-Appellees,

SC: 156708
COA Docket No. 333000

and

Allegan County Circuit Court
No. 15-55184-CK

WILLIAM TRAYWICK and MARCIA TRAYWICK,

Intervening Plaintiffs/
Counterdefendants-Appellees,

vs.

DAVID L. GOYINGS and HELEN M. GOYINGS,

Defendants/Counterplaintiffs-Appellants.

Todd Schebor (P66358)
Krista L. Lenart (P59601)
Dykema Gossett PLLC
39577 Woodward Ave, Suite 300
Bloomfield Hills, MI 48304
2723 South State Street, Suite 400
Ann Arbor, MI 48104
(248) 203-0538
(734) 214-7676
Attorneys for Appellees

James E. Spurr (P33049)
Paul D. Hudson (P69844)
Miller, Canfield, Paddock and Stone, P.L.C.
277 S. Rose Street, Suite 5000
Kalamazoo, MI 49007
(269) 383-5805
hudson@millercanfield.com
Attorneys for Appellants

APPELLANTS' REPLY BRIEF

Table of Contents

Page

Table of Authorities ii

I. The circuit court did not clearly err when it concluded after a three-day bench trial that a home that was not predominantly modular was not a "modular home" within the meaning of these covenants. 1

II. The Court does not have to tear the house down, because any violation of the covenants was a technical one that did not cause substantial injury to Plaintiffs. 5

III. Conclusion 8

Table of Authorities

Page(s)

Cases

Bynum v ESAB Grp, Inc, 467 Mich 280; 651 NW2d 383 (2002).....3

Cooper v Kovan, 349 Mich 520; 84 NW2d 859 (1957) 5, 6, 7

Terrien v Zwit, 467 Mich 56; 648 NW2d 602 (2002).....7

I. The circuit court did not clearly err when it concluded after a three-day bench trial that a home that was not predominantly modular was not a "modular home" within the meaning of these covenants.

Is a home a "log cabin" because it contains some logs? If a neighborhood covenant bars construction of a "log cabin," does this bar any home containing a log? How about 50 logs? How about a home that is 41% logs and the majority something else?

The undisputed trial testimony here established that the Goyings' home was constructed of 41% modular components, just 31% of the total cost of the home. (App H, 94-a.) The rest—a majority—was not modular. The circuit court therefore concluded that this not-predominantly-modular home was not a "modular home" within the meaning of the covenants. The Goyingses submit that this conclusion was logical and reasonable, and was not clearly erroneous. "While an entirely modular, premanufactured or prefabricated home cannot be moved onto the properties located within Timber Ridge Bay," the Goyings' home is not entirely or even predominantly modular and therefore does not violate the covenants. (App 11-a.)

Plaintiffs call this a "definition of the Circuit Court's own creation," and impugn the court's motives, saying this was a "veiled attempt to avoid ordering removal of the Defendants' house[.]" (Appellees' Suppl Br at 5, 7.) But what is truly striking about all of Plaintiffs' critiques is that, although they are abundantly scornful of *everyone else's* definition of "modular home," they do not offer one up themselves. We are now three years into this case and Plaintiffs still have not put down on paper *any* definition of "modular home." Plaintiffs say—over and over and over—that there is a "generally understood meaning of 'modular home,'" a "generally understood definition," an "ordinary and generally understood meaning of modular home." (See Appellees' Suppl Br at 2, 3, 5, 9, and 11.) But *what is* that definition? Plaintiffs won't say. Plaintiffs do not offer a definition to this Court anywhere in their supplemental brief; they didn't

offer one in the Court of Appeals; they didn't provide one to the trial court either. They simply assert that there is some all-purpose definition out there somewhere, and then assert that the Goyings' home "unquestionably" meets it. (*Id.* at 19.) Plaintiffs' argument is therefore entirely circular: the covenants bar a "modular home"; there is an (unstated) "ordinary and generally understood meaning of 'modular home'"; the Goyings' home "is a 'modular home' under any commonly understood definition of the term"; and—there you have it—the Goyings' home "is unquestionably a modular home and therefore not permitted[.]" (*Id.* at 2, 9, 19.)

Plaintiffs thus ask the Court to tear down the Goyings' house because it violates a secret definition of "modular home" that they are not willing to divulge to the Court. We know it when we see it, say the Plaintiffs.

The closest Plaintiffs came to offering any sort of definition of "modular home" was in Mr. Thiel's trial testimony. Under his definition, if the home contains anything more than "zero percent" modular components, it violates the "modular home" covenant. (See Tr Vol I, M. Thiel at 205.) But this definition is as easy to rebut as the cabin-with-one-log hypothetical: nobody with a basic grasp of the language would call this a "log cabin." Plaintiffs dance around whether they are sticking with Mr. Thiel's absolutist definition of modular home and whether their definition would bar a home that has a single modular component. If this is still their definition, it is not a good one: no one would call a home with a single modular sunroom a "modular home."

That's a "red herring," Plaintiffs say, "because *that is not this case*." (Appellee's Suppl Br at 9; emphasis is theirs.) The Goyings' home contains *three* modules, not one, and these modules comprise the main floor of the house. (See *id.* at 1, 9.) *That*, the Plaintiffs say, makes this "unquestionably" a "modular home." (*Id.* at 19.) So is their definition of "modular home" a

home that contains three modules that comprise the main floor of the house? One begins to suspect that Plaintiffs' definition of "modular home" is "whatever home the Goyings' built." What about a home that has two stick-built stories on top of the modular main floor and a basement beneath, such that the modular components are just 25% of the square footage?

The Goyingses do not mean to suggest that there are obvious answers to these questions. There is a continuum from "cabin with a log" to "cabin with some logs" to "cabin mostly of logs" to "cabin all of logs." And pinpointing where on that continuum the cabin becomes a "log cabin" is a knotty factual question. But one way to answer these sorts of questions is to have a trial. We had one here. The trial judge, after hearing three days of trial testimony, concluded that the Goyings' home was not sufficiently modular to be considered a "modular home." This finding was well-grounded in the factual record: it was undisputed that the home was mostly *not* modular—"[t]he majority of the residence is being stick built on site" (App A, 1-a, Opinion at 9)—so the trial court appropriately concluded that the home fell on the not-modular end of the continuum. This factual finding is reviewed only for clear error (see *Bynum v ESAB Grp, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002))—another point Plaintiffs do not divulge in their brief.

Plaintiffs argue that the circuit court "read[] the term 'modular home' out of the Restrictive Covenant[.]" (Suppl Br at 7.) But that's not true. The circuit court held that "an entirely modular, premanufactured or prefabricated home cannot be moved onto the properties located within Timber Ridge Bay." (App 11-a.) Thus the covenant would still bar an entirely modular home: if someone plopped down three modules on a lot and bolted them together, the home would almost certainly be a "modular home" within the meaning of the covenants. That might be a rare beast these days, but Plaintiffs did not offer any evidence at trial showing that it

does not exist. (Just the opposite, Plaintiffs themselves testified that there is a whole outcrop of them across the highway in Martin, behind the car wash. App 128-a.) Thus the circuit court's definition, although narrow, still honors the plain text of the covenant.

Plaintiffs argue that under the circuit court's definition a resident could end-run the covenant simply by adding a deck to his otherwise-entirely-modular home. Probably not, but fair enough. That might be a good reason to re-write the covenants to be more specific about what is and is not permitted. It might also be a good reason to avoid maximalist definitions at either end of the continuum: in the natural use of the language, a log cabin would still be a log cabin even if it had a brick (or a deck). And a brick house would not be a log cabin if it had just one log. This is why the Goyingses have offered up a definition of "modular home" that requires the home to be *predominantly* modular. This definition harmonizes the uses of "modular home" in the covenants and squares with the natural use of the language. After all, the covenants do not bar "modular components" in the neighborhood; they bar a "modular *home*." And a home does not become a "modular home" unless it is at least predominantly modular, just like a cabin does not become a log cabin unless it is predominantly built of logs. So the circuit court did not clearly err by finding the Goyings' not-predominantly-modular home was not a "modular home."

Plaintiffs nowhere address the glaring internal inconsistency that their (or at least Mr. Theil's) maximalist reading of the covenants would create. The covenant bars a "prefabricated or modular home," so what's good for one is good for the other. Yet Plaintiffs insist that their homes are not "prefabricated homes," even though they contain a *lot* of prefabricated components, while the Goyings' home is a "modular home," because it contains three modular components. Plaintiffs make no attempt to grapple with this inconsistency; they again just brush it aside as "*not this case*." (Appellee's Suppl Br at 9; emphasis in original.) But reading the

covenants harmoniously *is* this case. And if Plaintiffs cannot offer up a harmonious definition of "modular home," then they cannot prevail. Plaintiffs have offered up *no* definition of "modular home," much less a harmonious one.

Should the Court tear down the Goyings' home when the Plaintiffs cannot even offer a coherent definition of the covenant they claim the home violates? Plaintiffs' "we know it when we see it" definition is antithetical to the rule of law and makes compliance and enforcement impossible. The truth is that the covenants did not contemplate the type of home that the Goyingses built. A traditional "modular home" is built entirely or predominantly of modular components. The Goyings' "system-built" home, on the other hand, combines stick-built construction with modular construction, such that the modular components blend into the final product and do not predominate. The circuit court did not err by distinguishing between the two and concluding that the Goyings' home was not a "modular home" within the meaning of the covenants.

II. The Court does not have to tear the house down, because any violation of the covenants was a technical one that did not cause substantial injury to Plaintiffs.

Plaintiffs concede that they have suffered no actual injury from the Goyings' home. Not one penny of damages. Not one moment of aesthetic discomfort. Their only argument to this Court is that it doesn't matter: a violation is a violation, and they get to inflict (real, actual, life-altering, financially devastating) harm on the Goyingses even though they have suffered none themselves.

The Court held otherwise in *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957). There the Court recognized an "equitable exception[] to the general rule that the courts will enforce valid restrictions by injunction," for "[t]echnical violations and absence of substantial injury." *Id.* This case is still good law, and no party asks the Court to overturn it. Thus the law

is that the Court does *not* have to tear down the Goyings' house if a violation of the "modular home" covenant was a technical violation that did not cause Plaintiffs substantial injury. See *id.*

Any violation here was a technical one that did not cause Plaintiffs substantial injury. As set forth above, the "prefabricated or modular home" covenant does not bar any home that contains a prefabricated or modular component, any more than a "log cabin" covenant would bar any home that contains a log. If one accepts this premise, then any violation of the covenant by the Goyingses was a matter of degree: the covenant might not have barred the use of one or two modules in their system-built home, but three was too many; it might not have barred 33% modular components, but 41% was too much. These fractional differences are the very definition of a "technical" violation. See *Cooper*, 349 Mich at 530. And Plaintiffs have not produced any evidence that they have been injured at all by a violation, much less "substantially." See *id.* The Court therefore does not have to tear the Goyings' house down. See *id.*

Plaintiffs quibble that there is no evidence that the Goyings' home "'puts money' in the pockets of Plaintiffs," as the Goyingses asserted in their opening brief. (Appellees' Suppl Br at 18.) But of course Plaintiffs are not "substantially injured" whenever a neighbor fails to enrich them; the Goyingses do not have a duty to line Plaintiffs' pockets. It was *Plaintiffs*' burden to produce evidence that they were substantially injured by the Goyings' home. See *Cooper*, 349 Mich at 530. They produced nothing. Moreover, there *was* evidence at trial that the Goyings' home increases the property values in the neighborhood. The appraiser, for example, found that the market value of the Goyings' home was roughly $40,000 to $60,000 *higher* than other recent comparable sales in the neighborhood. (*See* App F, 34-a, Tr Ex 7, Appraisal.) Thus the Goyings' house *does* put money in the Plaintiffs' pockets. (Removing the modular components,

on the other hand, leaving Helen and Dave destitute and the property a rubble field, would actually *lower* Plaintiffs' property values.)

Plaintiffs cite *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002), where the Court held that a home daycare violated a covenant barring commercial or business enterprises in the neighborhood. The Court noted that "[a] breach of a covenant, no matter how minor and no matter how *de minimis* the damages, can be the subject of enforcement." *Id.* at 65. But *Terrien* did not overrule *Cooper*, and *Cooper* sets forth an equitable exception to this general rule, when the breach is a technical violation that does not substantially injure the plaintiff. 349 Mich at 530. That equitable exception was not at issue in *Terrien* because there was tangible injury to the plaintiffs from the daycare, including increase in "vehicular traffic in the morning and afternoon when the children arrive and depart." 467 Mich at 62.

Finally, Plaintiffs argue that the Goyingses "knowingly" and "intentional[ly]" breached the covenant, because "[p]rior to the installation of the modular home, Plaintiffs warned Defendants that the installation would violate the Restrictive Covenant." (Suppl Br at 1, 13.) But the trial testimony showed just the opposite. Helen had a specific conversation with Plaintiff William Traywick before construction about including modular components in the home. (App H, 78-a, Trial Tr Vol 1, Helen at 62.) Traywick remembers the conversation, and specifically remembers Helen mentioning "component[s]" being used in the construction. (*Id.* at 103-a, Traywick at 222.) The two neighbors also discussed Traywick's own violations of the covenants, including his permanent dock (barred by Section I.B.16) and unscreened propane tank (barred by Section I.B.11). But far from "warn[ing] Defendants that the installation would violate the Restrictive Covenant"—as Plaintiffs now insist he did (Suppl Br at 1)—Traywick in fact responded, "well, what's the big deal" (*id.* at 102-a, Traywick at 221), and "[n]obody cares

about that" (*id.* at 88-a, Helen at 104). Thus this whole case has proceeded in rope-a-dope fashion: Plaintiffs assured the Goyingses that including modular components in their home wasn't a "big deal" and that "[n]obody cares," but then dragged them through financially ruinous litigation for the next three years.

In the end, the trial court did not clearly err by concluding that the Goyings' home was not a "modular home" within the meaning of the covenants. And even if the home did technically violate the covenants, it is undisputed that the Plaintiffs have not suffered *any* injury. The Court therefore can and should decline the Plaintiffs' request to tear the Goyings' home down.

III. Conclusion

We ask the Court to reverse the Court of Appeals' decision and reinstate the judgment of the trial court. Helen and Dave's house should stand.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s Paul D. Hudson

James E. Spurr (P33049)
Paul D. Hudson (P69844)
Miller, Canfield, Paddock and Stone, P.L.C.
277 S. Rose Street, Suite 5000
Kalamazoo, MI 49007
(269) 381-7030
hudson@millercanfield.com
Attorneys for David and Helen Goyings

Dated: June 13, 2018

31566976.1\154372-00001