STATE OF MICHIGAN

IN THE SUPREME COURT

MELVIN R. BERLIN REVOCABLE TRUST, RANDY LAMM BERLIN REVOCABLE TRUST, JANIS HEHMEYER TRUST, CAROL J. NEWTON REVOCABLE TRUST, JEAN I. SMITH REVOCABLE TRUST, and STEPHEN L. SMITH REVOCABLE TRUST,
Plaintiffs/Counterdefendants-Appellees,

v

THOMAS C. RUBIN, NINA D. RUSSELL, and 14288 LAKESHORE ROAD, LLC,
Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants,

and

SWIFT ESTATES ASSOCIATES, also known as SWIFT ESTATES ASSOCIATES, INC., CHRISTOPHER HEHMEYER, and STEPHEN L. SMITH,
Third-Party Defendants-Appellees.

SC: 166228

COA: 359300

Berrien CC: 2019-000034-CH

AMICUS CURIAE BRIEF ON BEHALF OF MICHIGAN REALTORS®

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STATEMENT OF THE BASIS OF JURISDICTION

Amicus Curiae, Michigan Realtors®, adopts the Statement of the Basis of Jurisdiction of Defendants/Counterplaintiffs/Appellants, Thomas C. Rubin ("Rubin"), Nina D. Russell ("Russell") and 14288 Lakeshore Road, LLC (collectively, "Appellants"), as stated in their Brief, filed on September 20, 2024.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE LOWER COURTS REVERSIBLY ERRED BY CONCLUDING THAT SOME, BUT NOT ALL, RESIDENTIAL RENTALS ARE PROHIBITED BY A CERTAIN RESTRICTIVE COVENANT?

The Court of Appeals answered:	"No."
The Circuit Court answered:	"No."
Appellants answered:	"Yes."
Appellees answered:	"No."
Amicus Curiae Michigan Realtors® answers:	"Yes."

II. WHETHER PUBLIC POLICY CONCERNS FAVOR REVERSAL OF THE LOWER COURTS' OPINIONS?

The Court of Appeals answered:	"No."
The Circuit Court answered:	"No."
Appellants answered:	"Yes."
Appellees answered:	"No."
Amicus Curiae Michigan Realtors® answers:	"Yes."

I. INTRODUCTION[1]

The State of Michigan borders four out of five of the Great Lakes and has the most freshwater coastline of any state in the continental United States,[2] boasting 3,288 miles of freshwater coastline, including 1,056 miles of island shoreline.[3]

Michigan has 16 designated Natural River systems.[4] Michigan has 62,798 inland lakes with a surface area of 0.1 acres or larger, all providing critical aquatic habitats for 154 species of freshwater fish.[5] Surrounding many of these inland lakes are Michigan's 74 State Parks.[6] The value of the shoreline of Michigan's inland lakes alone exceeds $200 billion and generates $3.5 billion in local property tax revenue for local governments.[7]

Michigan's bounty of natural resources has enabled its residents to capitalize on a year-round tourist industry through the promotion of recreational activities including fishing, hunting, boating, sailing, canoeing, kayaking, camping, bicycling, hiking, skiing, snowmobiling,

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[1] Counsel for a party did not author any part of this Brief. Neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this Brief.

[2] Michigan Department of Environment, Great Lakes, and Energy, *Michigan's Resilient Coast*, https://www.michigan.gov/egle/about/organization/water-resources/coastal-management/michigans-resilient-coast (accessed January 3, 2025).

[3] Michigan Department of Environment, Great Lakes, and Energy, *Shoreline Management*, https://www.michigan.gov/egle/about/organization/water-resources/shoreland-management (accessed January 3, 2025).

[4] Michigan Department of Natural Resources, *Natural Rivers*, https://www.michigan.gov/dnr/managing-resources/fisheries/natural-rivers (accessed January 6, 2025).

[5] Michigan Lakes & Streams Association, Inc., *Managing Our Inland Lakes*, https://mymlsa.org/lake-and-watershed-management/managing-our-inland-lakes/ (accessed January 6, 2025).

[6] Michigan Economic Development Corporation, *An Extensive List of Beautiful Michigan State Parks*, https://www.michigan.org/article/trip-idea/extensive-list-beautiful-michigan-state-parks (accessed January 6, 2025).

[7] Michigan Lakes & Streams Association, Inc., *Managing Our Inland Lakes*, https://mymlsa.org/lake-and-watershed-management/managing-our-inland-lakes/ (accessed January 6, 2025).

snowboarding and ice skating. And, at last count, Michigan was fourth on the list of states with the most golf courses at 825.[8]

Second homes in Michigan resort areas have been a mainstay of Michigan's vacation and tourist economy for generations. As second homes, they pay all school taxes – contributing state and local property tax support for both school operating and school debt expenses, often with high taxable values. For many owners, purchasing those homes would not have been possible without renting them for a portion of the year. As a result, renting is also a practice that goes back generations. It was not recently invented by the Internet, Airbnb or VRBO. The practice of renting second homes has long been permitted under existing zoning, as local zoning administrators have testified.[9]

Short-term rentals also support the value of other cottages and homes in resort communities. In fact, Michigan resort communities depend on short-term rentals as a regular and important part of the community and its economy. For example, local restaurants, art, book and gift shops, and other businesses, which constitute the heart of resort business communities, are dependent on vacationers who rent these cottages and homes. In addition, without short-term rentals, many families find it financially impossible to spend a week or two-week vacation together in these resort communities.

With a multi-million dollar resort industry already in place and a Governor who has "given new life to the Pure Michigan tourism promotion and branding campaign,"[10] the advent of online

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[8] *America's Most Golf-Rich States*, https://golf-info-guide.com/golf-tips/golf-in-the-usa/americas-most-golf-rich-states/ (accessed January 3, 2025).

[9] See, e.g., *Bauckham v Skarin*, unpublished opinion of the Allegan County Circuit Court, issued April 5, 2006, p 7, app sub nom *John H. Bauckham Trust v Petter*, unpublished opinion per curiam of the Court of Appeals, issued Sept 19, 2017 (Docket No. 332643), attached as Exhibit 1.

[10] Egan and Gray, *Whitmer Budget Revives Pure Michigan, Boosts Schools and Environment*, Detroit Free Press (February 7, 2020), p A1.

marketplaces for arranging short-term rental vacation homes moves Michigan's unique geography and long resort history online. However, instead of supporting this vital part of Michigan's economy, both local governments, under the guise of zoning ordinances, and private citizens, in the form of restrictive covenants, prohibit short-term rentals – despite years of practice to the contrary – taking away the basic rights of property owners. The right to use one's property in lawful manners is at the heart of constitutional protections for property owners, and neither "local control" nor "personal preference" should be a cover for taking those rights away.

Michigan Realtors® (the "Association") is Michigan's largest, nonprofit trade association, comprised of 38 local boards and a membership of more than 34,000 brokers and salespersons licensed under Michigan law. Each year, the Association's members handle thousands of transactions involving short-term vacation rental property and act as property managers for these rental properties.

One of the primary goals of the Association is to oppose laws and court decisions which restrict or otherwise impede long-held property rights and the ability of its members to conduct and grow business in the State of Michigan. The opinions of the Lower Courts in this case greatly diminish the opportunities for the Association's members in this regard and stifles a traditional resort culture and economy in the area of tourism and short-term rentals.

In addition, the present case involves issues which are significant to both this State's jurisprudence and the Association's members. The decisions of the Lower Courts impinge on the broad freedoms granted to Michigan citizens to make legal use of their property. More specifically, the Court of Appeals' flawed analysis of the Restrictive Covenant at issue, to exclude some rentals but allow other rentals based primarily on its perception of the "nature and character" of the Swift Estates community," adversely impacts many similarly situated property owners, potential tourists,

as well as employees and businesses associated with Michigan's tourist industry. The resultant depreciation of property values forecasts a drop in tax revenue for local governments and the support of Michigan's schools.

The Association believes that this is a case of important public interest, and that the outcome of this case is of continued and vital concern to the Association, its members and residents of the State of Michigan. The Association's experience and expertise could be beneficial to this Court in the resolution of the issues presented by this appeal. In *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae . . . ." The Association, therefore, seeks leave to file this brief amicus curiae in support of the position of the Appellant.

II. STATEMENT OF FACTS

The Association accepts and adopts the Statement of Facts set forth in Appellants' Brief as highlighted by the following:

1. Swift Estates is comprised of 22 acres and was developed in 1977 with nine single-family homes and a lakeside beach.

2. Also in 1977, the developer of Swift Estates recorded a Declaration of Covenants and Restrictions (the "Restrictive Covenant") which, in relevant part, provides:

   a. "No lot shall be used for other than single family residence purposes."

   b. "'Single family residence' shall mean any dwelling structure on a lot intended for the shelter and housing of a single family."

   c. "'Single family' shall mean one or more persons each related to the other by blood, marriage, or adoption, or a group of not more than three persons

> not all so related together with his or their domestic servants, maintaining a common household in a residence."

The term, "residence," is not defined by the Restrictive Covenants.

3. The Restrictive Covenant also contains the following subjective and thus, arbitrary restraints:

a. architectural restrictions and pre-construction approval requirements;

b. a prohibition against "annoyances" and "offensive activities";

c. a prohibition against infectious plant diseases and noxious insects;

d. constraints on the placement of materials on the property, including garbage receptacles and fuel tanks;

e. a limitation on pets to "unoffensive domestic household pets"; and

f. a prohibition on home occupations and professions.

Neither "commercial" nor "business uses" are prohibited.

4. The various prohibitions and restrictions contained in the Restrictive Covenant are enforceable by the Swift Estates Associates, Inc. (the "Homeowners Association"). In particular, the Homeowners Association is granted the authority to remedy any "inappropriate condition" on any individual homeowners' lot by special assessment.

5. The Restrictive Covenant had an initial 20-year term with automatic renewals of 10-year terms unless changed or revoked by written instrument signed by eight of the nine then lot owners in Swift Estates.

6. **The Homeowners Association Bylaws expressly anticipate and permit rentals** as follows:

> Any member may delegate his rights of enjoyment in the Common Properties and facilities to the members of his family who

> reside upon The Properties **or to any of his tenants who reside thereon under a leasehold interest**. Such Member shall notify the secretary in writing of the name and relationship of any such person. The rights and privileges of such person are subject to suspension as stated herein to the same extent as those of the Member.

7. Swift Estates has, from its inception, had a transient, temporarily occupied component to the community –

a. Beginning in 1977, multiple homeowners in Swift Estates (not Appellants) rented their residences to unrelated third parties.

b. Seven out of nine current Swift Estates homeowners have primary residences elsewhere and use their Swift Estates residences on a temporary basis as summer cottages or vacation homes.

8. The members of Appellant 14288 Lakeshore Road LLC, Laura and Scott Malkin (collectively, the "Malkins"), were well-acquainted with the history of rentals in Swift Estates when they purchased Lot 8 in Swift Estates in 2011. Both their Realtor® and seller advised them that rentals were historically and currently permitted in Swift Estates – a true statement at the time it was made.

9. The Malkins began renting their Swift Estates lot in 2012.

10. Shortly thereafter, the homeowners of Swift Estates discussed adopting rules that would regulate rentals in Swift Estates. However, no agreement was reached, and both the President and Secretary of the Homeowners Association emailed the Malkins admitting to them that "[i]t is your property and **there is no prohibition on renting**," and "I have rented our house on occasion, as is my legal right, and **I plan to rent it in the future**."

11. Thereafter, over the course of the next **six** years, and in reliance upon the statements and actions of the Officers of the Homeowners Association, the Malkins rented their Swift Estates lot approximately 43 times for intervals of days to weeks.

12. During the timeframe that the Malkins were renting their Lot 8, and after personally witnessing multiple rentals of lots within Swift Estates and receiving unequivocal confirmation from the Homeowners Association President that rentals were permitted, Appellants Rubin and Russell purchased Lot 5 in Swift Estates. Rubin and Russell then advertised their Lot 5 for rent.

13. In response, the President of the Homeowners Association sought and received an attorney's opinion that the Restrictive Covenant barred short-term rentals. From there, individual homeowners in Swift Estates sued Appellants to permanently enjoin what they deem to be short-term rentals, but allow other, longer rentals desirable to them, in Swift Estates.

14. The Circuit Court granted summary disposition in favor of Plaintiffs/Appellees and permanently enjoined "all renting and leasing of their respective Swift Estates properties that do not have a single-family residence purpose … including the enjoinment of short-term vacation rentals by Defendants which were [the] subject of this action." The Circuit Court allowed, however, use of the common elements within Swift Estates, such as the lakeside beach, to "lot owners/members, their respective resident family members, or those "duly delegated tenants who reside upon the respective property instead of the lot owners/members under a leasehold interest." **From this ruling, it is obvious that the Circuit Court attempted to "draw a line" between the types of rentals based on their duration – a distinction that is wholly unsupported by the facts of this case.** The Circuit Court also rejected and dismissed Defendants/Appellants' Counter-Claims of waiver, acquiescence and fraud on motion. The Court of Appeals affirmed. See, Opinion of the Court of Appeals, July 20, 2023, attached as Exhibit 2.

III. ARGUMENT

A. Standard of Review

Whether equitable relief, including a permanent injunction, is proper under a given state of facts is a question of law that this Court reviews *de novo*. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371; 761 NW2d 353 (2008). The interpretation of a contract is a question of law, also reviewed *de novo*. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

Likewise, this Court's review of cases decided on motion for summary disposition is *de novo*. *Brunsell v Zeeland*, 467 Mich 293, 295; 651 NW2d 388 (2002). Summary disposition is suspect where intent is at issue. *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). Rather, it is the function of the trier of fact to resolve issues regarding intent. *Triple E Produce Corp v Mastronardi Produce Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995).

B. Burden of Proof

Plaintiffs/Appellees claim, at page 17 of their Brief, that "[i]f there is a doubt about the precise meaning of any restrictions, the courts must keep in mind the drafter's intent and purpose for the restrictions in light of the document as a whole." This statement is not a true reflection of Michigan law. Rather, as a matter of law, the burden of proof in this case is clearly on Plaintiffs/Appellees with "all doubts … resolved in favor of the free use of property." *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 341; 591 NW2d 216 (1999), citing *Wood v Blancke*, 304 Mich 283, 286; 8 NW2d 67 (1943) (emphasis supplied).

C. The Court of Appeals Opinion Should be Reversed

The analysis of the Court of Appeals was abbreviated – summarized in a few all-encompassing sentences.

First, the Court of Appeals held that "an individual's rental of their residential property, even for short-term use, constitutes a commercial use even when the activity is residential in nature." COA Op, p 7 citing *Terrien v Zwit*, 467 Mich 56, 62-63; 648 NW2d 602 (2002). However, as discussed below, this statement of what amounts to strict liability against all rentals in residential areas misstates this Court's discussion in *Terrien*. In addition, the statement constitutes a faulty basis upon which to decide the case given the undisputed fact that the Restrictive Covenant does not preclude "commercial" uses. In other words, the Court of Appeals has apples mixed in with its oranges.

Second, the Court of Appeals' ultimate ruling was reliant upon its observation that "[t]he plain language of the restrictive covenants only provided for single family residences on the lots, and there was no provision for short-term or other rentals in the Declaration." COA Op, pp 7-8. This statement, however, fails to account for the plain language in the Homeowners Association Bylaws anticipating rentals and expressly allowing any homeowner in Swift Estates to delegate their "rights of enjoyment in the Common Properties and facilities … to any of his tenants who reside thereon under a leasehold interest." The term, "leasehold interest," is not, in any way, limited by a durational component. This statement is also expressly contradicted by the Court's earlier statement that rentals constitute a prohibited commercial use even when the activity is residential in nature. And, finally, the statement that the Restrictive Covenant does not provide for "other rentals" is completely at odds with the Court's ruling that expressly allows some rentals in Swift Estates, just not rentals of the nature that occurred on Appellants' properties.

Third, the Court of Appeals made the global statement that "… a summer home cannot constitute a permanent residence when their domicile is in another location." COA Op, p 8. This statement has limited, if any, relevance to this case – there is nothing in the Restrictive Covenant

requiring "permanency" or restricting use to that of a "domicile." Moreover, there is nothing in the Restrictive Covenant limiting the use of the various lots to "permanent" residences. To the contrary, all but two homeowners in Swift Estates claim permanent residences elsewhere and use their Swift Estates properties as temporary vacation homes. Intermittent and inconsistent use is actually the "norm" in Swift Estates.

Finally, the Court of Appeals held that "occasional rentals by other members did not alter the character of a subdivision, did not defeat the original purpose of the restrictions and did not result in a waiver." COA Op, p 8. There are several things wrong with this statement.

First, there are no facts cited by the Court of Appeals to support a dichotomy between "occasional" and "short-term" rentals. In fact, the opposite is true. Short-term rentals are occasional; that is, it is undisputed that Appellants' properties were not rented every day of every week of every month of every year. Appellants' properties were rented occasionally.

Second, the Court of Appeals never definitively opined on the "original purpose" of the Restrictive Covenant. The Covenant itself says "single family residence purposes" – plural. So, there is more than one residential purpose available to the residents of Swift Estates. "Single family residence," as defined in the Covenant, does not expressly exclude any rentals, including short-term rentals. Rather, a "single family residence" is a structure intended for shelter and housing. That definition includes short-term rentals.

Third, whether the facts of a case constitute a waiver or acquiescence is a question of fact rarely subject to summary disposition. *Patel v Patel*, 324 Mich App 631, 634; 922 NW2d 647 (2018). The Court of Appeals, however, cited no facts to support its conclusion regarding the waiver other than an anti-waiver clause in the Restrictive Covenant which, as a matter of law, is

not an impediment to waiving or modifying a contract. *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003).

The Court of Appeals is inconsistent in its statements of law, "cherry-picked" certain facts while disregarding others and, ultimately, reached the wrong conclusion. Its Opinion should be reversed.

D. The Restrictive Covenant is Ambiguous

In its Order granting the Application for Leave to Appeal, this Court asked: whether a restrictive covenant limiting use to "single family residence purposes" unambiguously prohibits all short-term rentals. It does not.

The definition of "Single Family Residence" in the Restrictive Covenant is a "dwelling structure" intended for "shelter and housing" of a "single family." "Single family" includes unrelated persons. Thus, the Restrictive Covenant allows use of a dwelling structure by unrelated people for shelter and housing. That definition includes short-term rentals.

Moreover, as discussed below, under Michigan law, a court's analysis of a restrictive covenant is broader in scope than merely supplying dictionary definitions to words parsed out from phrases or definitions within the covenants itself. Rather, context, including surrounding circumstances, reasonableness and the drafter's intent, is a necessary consideration. As recently stated by this Court when interpreting a restrictive covenant: "even an unambiguous term must be construed relative to the drafter's intent." *Thiel v Goyings*, 504 Mich 484, 505; 939 NW2d 152 (2019).

E. The Restrictive Covenant Does Not Prohibit Short-Term Residential Rentals

This Court has previously provided all the tools necessary to reach the correct result in this case. In 1924, this Court ruled on a deed restriction purporting to limit the use of property to

"single residences." *Library Neighborhood Ass'n v Goosen*, 229 Mich 89; 201 NW 219 (1924). The defendant therein wanted to construct a 10-story apartment building on certain lots that were subject to the restrictive covenant. *Id*. at 90. The precise issue before this Court was whether the restriction applied solely to the original purchasers of lots within the subdivision or also to their subsequent grantees. *Id*. at 91-92. This Court enforced the restrictive covenant based on the specific facts of the case, including a prior lawsuit to enforce the single residence restriction and testimony demonstrating 29 years of consistent enforcement of the covenant. *Id*. at 94-95. Those facts are obviously not present in this case. Importantly, this Court clearly spelled out factors, in addition to the language of the covenant, that must be inquired into and analyzed before ruling on the enforceability of a restrictive covenant, stating:

> This question cannot be answered by a literal interpretation of the covenant. We must look to the **surrounding circumstances** to discover **the intention** of the parties and the purpose of the original grantor in imposing the restriction.

Id. at 92. Accord, *Brown v Hojnacki*, 270 Mich 557, 560-561; 259 NW 153 (1935) (rights of the parties are not to be determined based on a literal interpretation of the restriction).

However, in the years following the *Library Neighborhood* and *Brown* decisions, this Court began placing greater emphasis on the specific language employed by the drafter of the restrictive covenant at issue rather than surrounding circumstances. This change of focus led to rulings that the maintenance of racing pigeons and "time-shares" are not "residential purposes" within the meaning of a covenant restricting use of property to "residential purposes only." *Wood v Blancke*, 304 Mich 283, 288-289; 8 NW2d 67 (1943); *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 345-346; 591 NW2d 216 (1999). This Court's inquiry shifted from an analysis focused on intent and surrounding circumstances to one focused on whether the proposed use of property is "unusual and extraordinary" or "usual, ordinary and incidental" to use of the property as

residential, defined as "a place of abode." *Wood*, 304 Mich at 288-289; *O'Connor*, 459 Mich at 344-345. Under this analysis, emphasis was placed on the nature of the ownership interest and permanence. *O'Connor*, 459 Mich at 345-346. In fact, the *O'Connor* Court adopted the trial court's reasoning in which the focus was on a *permanent presence* and whether individuals at the property had the right to occupy it whenever they desired and to leave belongings at the property. This Court stated:

> Proceeding on that basis, we return to the trial court's analysis. We conclude that its reasoning is sound, and adopt it as our own:
>
> > [W]hat's a residential purpose is the question. Well, a residence most narrowly defined can be a place which would be one place where a person lives as their permanent home, and by that standard people could have only one residence, or the summer cottage could not be a residence, the summer home at Shanty Creek could not be a residence if the principal residence, the place where they permanently reside, their domicile is in some other location, but I think residential purposes for these uses is a little broader than that. It is a place where someone lives, and has a permanent presence, if you will, as a resident, whether they are physically there or not. Their belongings are there. They store their golf clubs, their ski equipment, the old radio, whatever they want. It is another residence for them, and it has a permanence to it, and a continuity of presence, if you will, that makes it a residence.

Id. at 345.

Then, in *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002), this Court addressed the issue of whether the operation of a family daycare violated a restrictive covenant limiting use to "private residential purposes" and barring any "commercial, industrial or business enterprises" and "the storing of any equipment used in any commercial or industrial enterprises." *Id*. at 59-60. The Court of Appeals, relying on its earlier opinion in *Beverly Island Ass'n v Zinger*, 113 Mich App

322; 317 NW2d 611 (1982), concluded that the covenant did not prohibit a family daycare use by defendant. *Id*. at 62.[11]

In an Opinion authored by Justice Markman and joined by Justices Corrigan, Taylor and Young, this Court reversed the Court of Appeals and distinguished *Beverly Island* on the basis of the covenant or covenants at issue, stating:

> … the covenant at issue in *Beverly Island* merely prohibited nonresidential uses, whereas the covenants at issue here prohibit not only nonresidential uses, but also any commercial, industrial, or business uses as well. There is a significant distinction between such restrictions, as more is prohibited in our case then was prohibited in *Beverly Island*. Not only did defendants in this case covenant not to use their property for nonresidential uses, but they also covenanted not to use their property for commercial, industrial, or business uses.
>
> * * *
>
> While the former proscribes activities that are nonresidential in nature, the latter proscribes activities that, although perhaps residential in nature, are also commercial, industrial, or business in nature as well.

Terrien, 467 Mich at 62-63. The majority then drilled down on the single unremarkable fact that a daycare is operated for profit to conclude that use of property as a daycare is a "commercial" use, prohibited by the restrictive covenant. *Id*. at 65. As a result, the range of "residential purposes or uses" was judicially narrowed.

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[11] In *Beverly Island*, the Court of Appeals analyzed the specific facts of the case and, relying on this Court's Opinion in *Wood, supra*, concluded that the particular daycare at issue did not violate an "except for residential purposes" restriction. *Beverly Island*, 113 Mich App at 331. Among the Court's considerations were the inherently residential nature of caring for children in a home, *Id*. at 331, and the non-determinative circumstance that the defendant was generating income. As to the latter consideration, the Court stated:

> The receipt of compensation may be a factor to consider but its existence or absence is not controlling. Instead, the focus must be on the activity involved and how it parallels the ordinary and common meaning of use for residential purposes.

Id. at 327.

Justices Marilyn Kelly, Cavanaugh and Weaver dissented in *Terrien*. Justice Weaver found that the essential characteristics of the family daycare at issue "are compatible with a residential neighborhood." *Id*. at 96. Justice Kelly, with whom Justice Cavanaugh concurred, focused on the surrounding circumstances and the reasonableness of the covenant at issue rather than the multiple dictionary definitions of the terms of the covenant. Justice Kelly wrote:

> It is apparent from the interpretations of the terms "commercial, industrial, or business enterprises" that have been advanced by this Court that there is considerable disagreement about their meanings. The absence of a definition in the restrictive covenants leaves the ambiguity unresolved and opens the terms to judicial interpretation. See *Craig v. Bossenbery,* 134 Mich.App. 543, 548, 351 N.W.2d 596 (1984). Restrictive covenants must be **reasonably construed**. *Boston–Edison Protective Ass'n v. Paulist Fathers, Inc.,* 306 Mich. 253, 257, 10 N.W.2d 847 (1943). And they are strictly construed against the party seeking to enforce them, **all doubts regarding the restrictions being resolved in favor of the free use of property**. *City of Livonia, supra* at 525, 378 N.W.2d 402.
>
> Applying these rules of construction, I cannot agree with the majority's conclusion that the restrictive covenants prohibit family day-care homes. The majority's absolute prohibition of all forms of activity generating compensation would preclude activities that normally have no visible effect on a community, such as babysitting services and freelance writing.

Id. at 87 (emphasis supplied).

Justice Kelly relied, in part, on the approach taken by this Court in *City of Livonia v Dept of Social Services*, 423 Mich 466; 378 NW2d 402 (1985). In *City of Livonia*, this Court held that the use of a residence as an adult foster care home did not violate a restrictive covenant for single-family dwelling and residential purposes only. *Id*. at 529. More specifically, this Court found that, contrary to the plaintiff's claims, the developmentally disabled adults and their resident caretakers constituted a single family using the home for residential purposes. *Id*. at 526. Significantly, this Court stated that only restrictive covenants that are "reasonable in scope" and do not violate public

policy will be upheld. *Id*. at 525. Thus, Michigan courts do not enforce deed restrictions that are unreasonable on their face or as applied.

Most recently, this Court seems to have arrived back to where it started in *Library Neighborhood*, focusing on the intent behind the restriction and surrounding circumstances. In *Thiel v Goyings*, 504 Mich 484; 939 NW2d 152 (2019), this Court reviewed a restrictive covenant that prohibited manufactured homes within the lakefront subdivision, among other things. *Id*. at 490. The Court of Appeals enforced the covenant. This Court reversed, stating:

> It is a bedrock principle in our law that a landowner's bundle of rights includes the broad freedom to make legal use of her property. *O'Connor v. Resort Custom Builders, Inc.* , 459 Mich. 335, 343, 591 N.W.2d 216 (1999). Restrictive covenants are at once in tension with and complementary to this right: deed restrictions allow landowners to preserve the neighborhood's character. And the failure to enforce the deed restriction thus deprives the would-be enforcer of a valuable property right. *Bloomfield Estates* , 479 Mich. at 214, 737 N.W.2d 670. But enforcing a restriction beyond the restrictor's intent deprives the landowner of an even more fundamental property right—**his right to legal use of his own property.**
>
> Weighty interests are at stake, but the balance tilts in favor of the right to control one's own land. Unambiguous covenants must, of course, be enforced as written, but any uncertainty or doubt must be resolved in favor of the free use of property. *Stuart* , 454 Mich. at 210, 560 N.W.2d 336.
>
> * * *
>
> **Finally, even an unambiguous term must be construed relative to the drafter's intent.**

Id. at 496-497 and 505 (emphasis supplied). This Court explained the lower court's error:

> The Court of Appeals erred when it held that the defendants' home violated the unambiguous terms of the covenant and that "the only solution was to grant injunctive relief and order that the non-conforming home be removed." *Thiel* , unpub. op. at 6. The panel found that this result was self-evident, given the **dictionary definition** of the word "modular." But the panel set up a straw man: it cited a definition of modular that all could agree upon and

> concluded that if the modular components used here fit that definition, then, *ipso facto* , the Goyingses' home was a modular home. This faulty reasoning allowed the panel to wrap up its analysis before it ever reached the parties' dispute: how to construe the term "modular *home.*" As a result, it provided no textual support for its implicit conclusion that the covenants prohibit any home that contains a module.

Id. at 509-510. Further guidance is found in Justice Viviano's concurrence, quoting 26 CJS Deeds, § 171:

> **Restrictive covenants, to be enforceable in equity, must be reasonable**. Further, they must not be vague or uncertain, nor may the right to relief be doubtful; and where a restrictive covenant is being used as a means of annoyance or oppression, equity may cancel it.... Equity will withhold its hand where such a restrictive is sought to be created by parol, where the reason for the enforcement of the covenant has entirely ceased, or where the consequences of enforcement would be inequitable ....

Id. at 514 (emphasis supplied).

Thus, the evolution of Michigan law on restrictive covenants has produced a number of varied results and has seemingly bounced back and forth between an analysis that emphasizes the "intent of the parties," surrounding circumstances and reasonableness to an analysis that is conservative, focused on dictionary definitions and elevates freedom of contract above all else. However, at the end of the day, as illustrated by the *Thiel* decision and its recognition of the fundamental right of a landowner to legally use his or her property as he or she sees fit, where the activity is inherently residential (that is, living purposes or, in this case, shelter and housing), then it is a reasonable use that is consistent with other residential uses in the surrounding circumstances.

Here, the Court of Appeals reasoned that there is nothing in the Restrictive Covenant expressly permitting short-term rentals – glass half empty. But, it is just as true that there is nothing in the Restrictive Covenant expressly precluding short-term rentals – glass half full. The Court of Appeals paid "lip service" to the requirement that it consider "intent," "reasonableness" and the

"surrounding circumstances" but then ignored the very facts that shed light on these considerations:

1. The Bylaws, drafted in unison with the Restrictive Covenant, expressly anticipate rentals and allow homeowners to delegate their "rights of enjoyment of the Common Properties," such as the beach, to any tenants who "reside" thereon under a leasehold interest. The Bylaws thus define "reside" to include leasehold interests and tenants. Even the Court of Appeals acknowledged that these are contract rights that the Appellants may enforce.[12] There is no law, rationale or even argument as to why contract rights in the Restrictive Covenants should be elevated above those in the Bylaws. Certainly, neither the plaintiffs nor the Lower Courts offered any.

2. The term, "single-family," as defined in the Restrictive Covenant, is expansive and includes non-related individuals. This indicates an intention to allow uses by groups of people other than the traditional "single family" and thus rentals.

3. "Single-family residence" is defined broadly as a structure intended for "shelter and housing" – without regard to duration or permanence. This definition coincides with the definition of "residential" that seems to be most prevalent across the country – "living purposes." By contrast, judicially added limitations such as duration and permanence appear to have been borrowed from other aspects of real property law (*e.g.*,

[12] Specifically, the Court of Appeals stated:

> The entity's articles of incorporation, operating agreements, and bylaws are intended to govern the future conduct of the entity and its members. *Aldrich*, ___ Mich App at ___, slip op at 3. These governing documents allow the parties to preserve desired aesthetic or other characteristics in their neighborhood. *Id.*, slip op at 4.

COA Op, p 3.

Personal Residence Exemption under the General Property Tax Act) or Daniel Webster or created "whole-cloth" by the legal community.

4. From its inception, the residents of Swift Estates have rented their respective properties on multiple occasions.

5. Various plaintiffs have admitted that rentals do not violate the Restrictive Covenant.

6. The majority of the property owners in Swift Estates use their respective properties as vacation homes – they do not reside there year-round and do not claim them as their principal residences. Curiously, under the Court of Appeals analysis, these are "commercial," not residential, uses. And, if almost 70% of the neighborhood uses their properties commercially, as vacation homes, then "surrounding circumstances" weigh in favor of short-term rentals.

7. Short-term rentals occurred, time-and-time again, for almost a full decade before this lawsuit was filed. While at first blush this fact appears to only support an estoppel argument, it also supports short-term rentals; specifically, for many years, the surrounding circumstances included short-term rentals which, at least for that period of time, were seen from an objective standpoint as reasonable and residential.

8. Prior to some attorney's opinion regarding the Restrictive Covenant, the obvious common understanding between the homeowners of Swift Estates was that rentals, of whatever variety, are a permitted use under the Restrictive Covenant – that is, that rentals were intended to be permissible.

In sum, the Court of Appeals decision should be reversed. The Court ignored the foregoing facts. Further, to reach its desired result, the Court equated residential purposes with words and

phrases not found in any of the relevant documents such as "permanent," "continuity of presence," "commercial use" and "business purposes." The Court of Appeals provided no legal or factual basis for its rather arbitrary conclusion that long-term rentals are "single family residential purposes" while short-term rentals are not. Nor did the Court indicate who decides what constitutes long versus short and pursuant to what criteria. To the contrary, the Restrictive Covenant does not preclude any form of rentals.

F. Public Policy Concerns Favor Reversing the Court of Appeals

From all that appears, Michigan courts, including the Court of Appeals in this case, have struggled, at times, to find a balance between what is perceived to be dueling and contradictory policies:

> Restrictive covenants are strictly construed against the party seeking enforcement and any doubt must be resolved in the free use of property.
>
> - versus -
>
> The limitation on the use of property, if established through proper instruments, is favored by public policy.

COA Op, p 4, citing *O'Connor*, 459 Mich at 341 and *Terrien*, 467 Mich at 72.[13] One policy – the free use of property – is a constitutional right. *Rafaeli, LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020). The other – the limitation on the use of property – is, at its core, a contractual right, enforced by the Courts under the common law in favor of freedom to contract. *Terrien*, 467 Mich at 70-71.

But, there is a strong policy reason supporting Michigan law that "all doubts" must be rendered in favor of the free use of property. Justice McCormick stated as follows:

[13] In fact, here, the primary public policy that the Court of Appeals stated it was upholding was "to maintain a residential neighborhood of a specific character." COA Op, p 4.

> … enforcing a restriction beyond the restrictor's intent deprives the landowner of an even more fundamental property right–his right to legal use of his own property.

Thiel, 504 Mich at 496-497. And, "where there are definite indications in the law of some contrary public policy, the contract provision must yield to public policy." *Bonner v Detroit*, 507 Mich 158, 166; 968 NW2d 310 (2021). This is particularly true where the specific property use at issue is unquestionably a lawful use. Simply put, the arbitrary preclusion of lawful activities and uses of property leads to unlawful acts such as discrimination, steering and segregation.

It follows then that conditions in subdivisions deemed undesirable by some residents, but not others, should not be resolved by a draconian "all or nothing" permanent injunction barring users from current and future homeowners infinitum – particularly when the barred uses are legal. Rather, traditional legal actions such as of nuisance and trespass are available as is a phone call to the property owner or the local police. After all, in almost all respects, renters are no different than owners – both eat, sleep and live at the home, both may be noisy at times, both may park where you do not want them to at times and both may spend the day at the beach with friends when you don't want them there. In some respects, annoying renters are better than annoying neighbors – the renters go away after a week or two. Short-term renters are, in general, not engaged in any activities that the property owners themselves might engage in while residing at the property.

These policy considerations find their roots in the case law from other states which is, overwhelmingly, in favor of short-term rentals. For example, in *Slaby v Mountain River Estates Residential Ass'n, Inc,* 100 So 3d 569 (Ala Civ App, 2012), the Court of Civil Appeals of Alabama held that a restriction to single family residential purposes only and specifically barring commercial use did not preclude property owners from renting their vacation home on a short-term basis. *Id.* at 576, 579 and 582. In accordance with the reasoning of the majority of courts from other jurisdictions, the Court held that:

> We agree with those courts that property is used for "residential purposes" when those occupying it do so for ordinary living purposes. Thus, so long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities, as the undisputed evidence indicates renters did in this case, they are using the cabin for residential purposes.
>
> * * *
>
> We conclude that the restriction in the covenant at issue prohibiting "commercial use" of the property does not prohibit the Slabys from renting their property on a short-term basis. We agree with the reasoning in *Pinehaven Planning Board v Brooks, supra*, and the majority of other jurisdictions that have addressed the issue, that the purposes for which the property is used in this case, such as for eating, sleeping, and other residential purposes, does not amount to commercial use.

Id. at 579 and 582.

In *Pinehaven Planning Bd v Brooks,* 138 Idaho 826; 70 P3d 664 (2003), relied on by the *Slaby* court, the restrictive covenants at issue contained provisions prohibiting "commercial or industrial ventures or businesses of any type" as well as a restriction for "no more than one (1) single family dwelling." *Id*. at 665. The owners of a home subject to these restrictive covenants listed the property for rental as a vacation home. The Pinehaven Planning Board sued the owners, seeking a declaration that the rental activity violated the restrictive covenants. The Idaho Supreme Court disagreed, stating:

> [R]enting the property for residential purposes, whether short or long-term, does not fit within these prohibitions. The only building on the [owners'] property remains a single-family dwelling and renting this dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood.

Id. at 668.

The Court of Appeals of Maryland, in *Lowden v Bosley,* 395 Md 58; 909 A2d 261 (2006), interpreted a similar provision restricting use of land for "single family residential purposes only."

Id. at 262. Defendants intended to offer their homes as short-term vacation rentals or sell them to others who would offer the homes as short-term rentals. Plaintiffs filed a complaint for injunctive relief, damages and a declaratory judgment. The *Lowden* Court held that "receipt of rental income in no way detracts from the use of the properties as residences by the tenants," and that "[t]he transitory or temporary nature of such use does not defeat the residential status."

Id. at 267.

The Colorado Court of Appeals relied on the *Pinehaven* and *Lowden* opinions to conclude that prohibitions against commercial use in restrictive covenants did not bar short-term vacation rentals. In relevant part, the Court stated:

> We agree with the cases discussed above [*Pinehaven* and *Lowden*] and conclude that short-term vacation rentals such as Houston's are not barred by the commercial use prohibition in the covenants. Our conclusion is consistent with the Colorado Supreme Court's holding, in a different context, that receipt of income does not transform residential use of property into commercial use. In *Double D Manor*, the court addressed a homeowners association's challenge to use of property in the subdivision as a home for developmentally disabled children. 773 P2d at 1046. In rejecting the association's argument that such use was not a permissible "residential use" because Double D used the property to earn money to pay wages and cover costs, the court stated: "Double D's receipt of funding and payment to its staff to supervise and care for the children do not transform the use of the facilities from residential to commercial." *Id*. at 1051.

Houston v Wilson Mesa Ranch Homeowners Ass'n, Inc, 360 P3d 255, 260; 2015 COA 113 (Colo App, 2015).

Similarly, the Oregon Supreme Court determined that property restricted "exclusively for residential purposes" and not for "commercial enterprise" did not preclude use of a beachfront residence as a short-term vacation rental. *Yogman v Parrott*, 325 Or 358; 937 P2d 1019 (1997). The Court found that the provision at issue was ambiguous and, after examining the definitions of "residential" and "commercial enterprise," stated:

> In the absence of clarity in wording and in the absence of an understanding of the parties' actual intent, this maxim serves at least four purposes: to avoid imposing a restriction on the buyer of property that the buyer cannot reasonably be expected to know, to allow full use of property, see *Aldridge v Saxey*, 242 Or 238, 242; 409 P2d 184 (1956) (public policy favors untrammeled land use), to reduce litigation by increasing certainty, and to promote uniform interpretation of like covenants. Additionally, this court has stated that, "when property rights are at stake, consistency, that is, adherence to precedent, is a . . . virtue" because of the need for certainty. *Dorsey et ux v Tisby et ux*, 192 Or 163, 180; 234 P2d 557 (1951).

Id. at 1023 (footnote omitted).

The North Carolina Court of Appeals relied on *Yogman* as it addressed a restrictive covenant that provided that "no lots shall be used for commercial or business purposes." *Russell v Donaldson*, 222 NC App 702; 731 SE2d 535 (2012). There, the Court held:

> Under North Carolina case law, restrictions upon real property are not favored. Ambiguities in restrictive covenants will be resolved in favor of the unrestricted use of the land. A negative covenant, prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals.

Id. at 539.

The New Mexico Supreme Court also relied on the *Yogman* decision in *Mason Family Trust v Devaney,* 146 NM 199; 207 P3d 1176 (2009). Therein, the court held that a deed restriction that permitted use for dwelling purposes only and not for business or commercial purposes, did not forbid the short-term rental, for dwelling purposes, by the owner of a vacation cabin. The Court stated:

> We think that rental of a house or abode for a short-term use as a shelter to live in is significantly different from using the property to conduct a business or commercial enterprise on the premises.

Id. at 1178. See also, *Estates of Desert Ridge Trails Homeowner's Ass'n v Vazquez*, 2013-NMCA-51; 300 P3d 736 (2013) ("Residential purpose" restriction in restrictive covenants did not bar

homeowner's short-term rentals; An economic benefit flowing to the homeowner from the rental of his home, whether long- or short-term, does not by itself constitute an impermissible business or commercial activity under "residential purposes" restrictive covenant.).

In a Texas case, neighbors sued a homeowner and property owners association to prevent the homeowner from renting his home on a short-term basis. In *Schack v Property Owners Ass'n of Sunset Bay*, 555 SW3d 339 (Tex App, 2018), the Court held that a restrictive covenant, which provided that property was intended for a single family dwelling unit, and its use was restricted to that purpose, was solely a structural restriction, and thus did not prohibit homeowner from renting his house on a short-term basis. *Id.* at 349.

In *Ross v Bennett*, 148 Wash App 40; 203 P2d 383 (2008), the Washington Court of Appeals construed a restrictive covenant limiting property use to "residential" or "residence purposes" under claims by plaintiff neighbors that defendant's short-term rental constituted a "commercial" use. The Court stated:

> We agree with Bennett that the trial court erred in finding that short-term vacation rentals were prohibited by the CPE Covenant. On its face, the CPE Covenant does not prohibit the short-term rental of Bennett's house to a single family who resides in the home. The CPE Covenant merely restricts use of the property to residential purposes. Renting the Bennett home to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of the CPE Covenant. The transitory or temporary nature of such use by vacation renters does not defeat the residential status. This is consistent both with the evidence of context and with preserving the free use of the land.

Id. at 388.

The State of Wisconsin likewise favors the free and unrestricted use of property unless a restriction clearly applies to prohibit the use. *Forshee v Neuschwander*, 321 Wis 2d 757; 2018 WI 62; 914 NW2d 643, 647 (2018). Accordingly, upon consideration of whether the short-term rental

of property constitutes a "commercial activity," barred by a restrictive covenant, the Wisconsin Supreme Court found that it did not. *Id.* at 649. In a concurring opinion,

Justice Kelly stated:

> The restrictive covenant's plain meaning simply does not say what the [Plaintiffs] want it to say. No grammatical reading of the covenant could prevent the [Defendants] from renting their property – so long as the renters do not engage in "commercial activity" while residing there. The [Plaintiffs] do not appear to be claiming that activities like sleeping, cooking, eating, and recreating are commercial in nature. Nor could they – if such activity is commercial, the [Plaintiffs] could no more engage in it than the renters.

Id. at 656. See also*, Morgan Co v May*, 305 Ga 305; 824 SE2d 365 (2019) ("single-family detached dwelling" did not prohibit short-term rental).

And, finally, in *Brown v Sandy City Bd of Adjustment,* 957 P2d 207 (Utah App, 1998), the Utah Court of Appeals construed a zoning ordinance, rejected the reinterpretation of "single-family dwelling" as prohibiting short-term rentals and held that by failing to expressly prohibit short-term rentals, the defendant city implicitly determined that such practices were conducive to a residential environment. *Id.* at 212.

As these cases illustrate, Michigan is an outlier in prohibiting short-term rentals and proclaiming them to be commercial uses. From all that appears, the Court of Appeals here did not consider the fact that short-term rentals do not result in any type of "commercial" use on the property – no one is selling anything, manufacturing anything or repairing anything. To the contrary, the activities engaged in by renters such as sleeping and eating, are residential uses. The transitory or temporary nature of such use does not defeat its residential status. And, neither does the owners' attempts to make a profit; that is, the fact that property may yield a profit does not change the residential nature of the activities occurring on the property. Accordingly, use descriptions such as "single-family" or "residential" do not bar short-term rentals.

IV. CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Amicus Curiae, Michigan Realtors®, respectfully requests that this Court grant its Motion for Leave to file an Amicus Brief, accept this Brief for filing and reverse the Opinions of the Lower Courts.

Pursuant to MCR 7.212(B), this Brief contains 8,284 countable words.

Respectfully submitted,

COHL, STOKER & TOSKEY P.C.

Dated: January 8, 2025

/s/ *Melissa A. Hagen*

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EXHIBIT 1

STATE OF MICHIGAN

COURT OF APPEALS

JOHN H. BAUCKHAM TRUST, JOHN H. BAUCKHAM, Trustee of the John H. Bauckham Trust, BRUCE BRANDON, KATHY BRANDON, ROBERT BROUWER, SHARON BROUWER, CLARK REVOCABLE TRUST, SARAH J. CLARK, Trustee of the Clark Revocable Trust, WILLIAM COLE, SANDRA COLE, ROBERT & SHARON CURTIS TRUST, ROBERT CURTIS, Co-trustee of the Robert & Sharon Curtis Trust, SHARON CURTIS, Co-trustee of the Robert & Sharon Curtis Trust, TIMOTHY ISAACSON, JENNIFER ISAACSON, KEVIN MUNTTER, LAURIE MUNTTER, JOHN SHKOR, KERRY SHKOR, BOB SMITH, DIANE SMITH, CHARLES ZELLER, and PAMELA ZELLER,

Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants,

v

MATTHEW PETTER, CONSTANCE PETTER, BERNARD T. DOHERTY, JOAN M. DOHERTY, KEVIN BOODY, JANALYN BOODY, PATRICK DOHERTY, and ANDREW T. SCHOFIELD,

Defendants,

and

JAMES SKARIN, LINDA SKARIN, HENKEL VACATIONS, LLC, DANIEL MOESCH, HEATHER MOESCH, MELISSA K. LOEW TRUST, and MELISSA K. LOEW, Trustee of the Melissa K. Loew Trust,

Defendants/Counter-Plaintiffs-Appellants/Cross-Appellees.

UNPUBLISHED
September 19, 2017

No. 332643
Allegan Circuit Court
LC No. 15-054455-CH

Before: TALBOT, C.J., and O'CONNELL and CAMERON, JJ.

PER CURIAM.

Defendants James Skarin, Linda Skarin, Henkel Vacations, LLC, Daniel Moesch, Heather Moesch, Melissa K. Loew Trust, and Melissa K. Loew as trustee of the Melissa K. Loew Trust (collectively referred to as defendants[1]) appeal as of right an opinion and final order enforcing deed restrictions that prohibit use of restricted lots for commercial purposes. Plaintiffs cross-appeal the same order. We affirm in part, vacate in part, and remand for proceedings consistent with this opinion.

This mater involves a dispute among the owners of several lots in the Sunset Shores Subdivision in Casco Township concerning the rental activities taking place on lots owned by defendants. Defendants purchased their respective lots subject to the following deed restrictions:

> 1. No building shall be erected or maintained on any lot in Sunset Shore, sold by the grantor herein, other than a private residence and a private garage for the sole use of the owner or occupant, except those lots designated as Commercial on the plat map.
>
> * * *
>
> 3. No part of said premises shall be used for commercial or manufacturing purposes, except those lots designated as Commercial on the plat map.[2]

In 2015, plaintiffs filed suit against defendants, seeking a declaratory judgment and injunctive relief prohibiting defendants from engaging in short-term rental activity, which plaintiffs alleged violated the above deed restrictions. Plaintiffs also alleged that defendants' short-term rental practices constituted a nuisance per se because they violated Casco Township's zoning ordinances concerning permissible uses in districts zoned for low-density residential use.

Defendants raised several equitable defenses to plaintiffs' claims, arguing that short-term renting was a common and long-accepted practice in Sunset Shores. Defendants presented evidence demonstrating that a number of plaintiffs had acquiesced to or engaged in similar rental activity over the years, and that the neighborhood's voluntary homeowners association promulgated rules recognizing that vacation renters were welcome in the neighborhood. Defendants also asserted counter-claims regarding several plaintiffs' improper use of a parcel (the "Beach Parcel") jointly owned as tenants in common by the owners of all lots within Sunset Shores.

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[1] The remaining defendants named in plaintiffs' original complaint were dismissed before trial and are not relevant to this appeal.

[2] There are no lots designated as commercial on the plat map produced by the parties.

After discovery, the trial court granted partial summary disposition in plaintiffs' favor, finding that there was no material dispute concerning the following facts:

> a. The defendants admitted in deposition to having constructive of actual knowledge of the deed restrictions when they purchased their lots.
>
> b. On the internet, the Defendants advertise their properties to the public for short term rentals year round for a fee. Nightly occupancy rates range from between $250.00 per night and $400.00 per night.
>
> c. Three of the Defendants have received a combined $140,000 in fees for short term rental of their subdivision properties during 2014.
>
> d. Two of the Defendant's [sic] are Illinois residents, according to their deposition testimony.
>
> e. Two of the Defendants admitted in their depositions that they spent less than two weeks on their subdivision lots in year 2014.
>
> f. None of the Defendants make significant personal use of the property[.]
>
> g. None of the Defendant's [sic] were present on the property when their licensees/customers were using the property.
>
> h. Two Defendants employ 3rd party enterprises to provide "concierge" services and maid service, clear up after guests and perform grounds maintenance.
>
> i. The Defendants collect and pay Michigan's 6% state use tax governing public accommodations in the nature of "hotel, motel and vacation rentals."[3]

In light of these findings, the trial court concluded that defendants were not using their respective properties as private residences and were instead engaging in commercial activity, i.e., renting the lots to the public for a fee, contrary to the deed restrictions. However, the court also found that material questions of fact existed concerning defendants' equitable defenses and plaintiffs' alternative nuisance theory. These issues, as well as defendants' counterclaims, proceeded to trial. The parties do not challenge the court's findings or conclusions of law regarding plaintiffs' dispositive motion.

Following a three-day bench trial, the court issued a written opinion and order rejecting defendants' equitable defenses and agreeing that defendants' rental activities violated the Casco Township zoning ordinance barring commercial activity in low-density districts. Based on its

[3] Footnote omitted.

findings, the court entered an order prohibiting all rental activity within Sunset Shores. With respect to defendants' counterclaims, the court found that certain plaintiffs had installed fixtures on the commonly owned Beach Parcel, including stairs, decks, a motorized tram, and a storage outbuilding. These plaintiffs also took steps to preclude other cotenants from using the encroaching structures, thereby interfering with the other cotenants' right to use and enjoy the entire Beach Parcel. To remedy the problem, the court ordered that the existing structures be made available for the use and benefit of all cotenants and placed restrictions on the continued maintenance of those structures.

I. DEFENDANTS' EQUITABLE DEFENSES

On appeal, defendants contend that the trial court erred by rejecting their equitable defenses to enforcement of the deed restrictions. Plaintiffs, on the other hand, argue that we should not consider this issue because the limited scope of defendants' claim of appeal renders the issue moot. We agree with plaintiffs and decline to consider the merits of defendants' argument.

"Michigan courts exist to decide actual cases and controversies, and thus will not decide moot issues."[4] An issue is moot if its resolution in the aggrieved party's favor "cannot for any reason have a practical effect on the existing controversy."[5] As noted by plaintiffs, the trial court enjoined all further rental activity for two, independent reasons: (1) defendants' rental activities violated the deed restrictions banning use of defendants' lots for commercial purposes; and (2) defendants' rental activities amounted to a nuisance per se because they violated the Casco Township zoning ordinances. Despite the court's conclusion that there were two bases for granting injunctive relief, defendants explicitly excluded the trial court's ruling regarding the zoning violation from the scope of this Court's review, stating that they intended to seek modification of the ordinance through the legislative process. However, there is no indication that defendants' proposed amendments will be adopted by Casco Township. Thus, even if this Court were to agree that the trial court erred by rejecting defendants' equitable defenses to enforcement of the deed restrictions, reversal of that portion of the trial court's order would not have a practical effect on defendants' ability to resume their short-term rental practices, which would continue to be enjoined as a nuisance per se. Accordingly, this issue is moot and does not warrant further consideration.[6]

II. SCOPE OF INJUNCTION

Next, defendants argue that the trial court erred by enjoining all rental activity. We disagree.

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[4] *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 254; 833 NW2d 331 (2013).

[5] *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010).

[6] *Id*.

Matters involving the interpretation of restrictive covenants involve questions of law that this Court reviews de novo.[7] A trial court's decision to grant injunctive relief is reviewed for an abuse of discretion, which occurs when "the court's decision falls outside the range of reasonable and principled outcomes."[8] This Court reviews a trial court's factual findings for clear error.[9] "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."[10]

When the construction of a restrictive covenant is clear, "the mere circumstances of the breach of the covenant affords sufficient grounds for the court to interfere by injunction."[11] In this case, the court determined before trial that the restrictive covenants at issue unambiguously restricted use of the lots within Sunset Shores to residential purposes and categorically barred *all* commercial uses of the restricted lots. The court construed the term "commercial" to mean "able or likely to yield a profit," and found that defendants' practice of renting their lots to the public for a fee constituted a prohibited commercial use. The court's reasoning was consistent with caselaw construing similar restrictions on commercial uses[12] and supported by the record. While defendants maintain that the trial court should not have enforced the deed restrictions because of the equities involved, they do not seriously dispute the trial court's findings or rationale regarding their breach of the deed restrictions.

Instead, defendants take issue with the scope of the injunctive relief granted by the court, arguing that the court erred by prohibiting *all* rental activity, including long-term renting,[13] because the controversy at issue in the case related only to short-term rentals to vacationers. Defendants are correct in their contention that plaintiffs' request for relief was limited to enjoining continued operation of "vacation rentals," and that the parties did not present evidence concerning long-term renting at trial. However, MCR 2.601(A) provides that a court may grant any relief to which a party is entitled, "even if the party has not demanded that relief . . . ." As such, that the court's injunction exceeded the scope of the relief sought by plaintiffs is not dispositive.

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[7] *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 389; 761 NW2d 353 (2008).

[8] *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 32-33; 896 NW2d 39 (2016).

[9] *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

[10] *Id*.

[11] *Terrien v Zwit*, 467 Mich 56, 65; 648 NW2d 602 (2002) (citation omitted).

[12] See, e.g., *id.* at 64.

[13] Although the court did not explicitly ban long-term renting, we agree that the court's unequivocal prohibition against "all rental activity for a fee" is not limited to the short-term rental activity that plaintiffs' complained of below.

Defendants' argument is unpersuasive because the court's rationale concerning defendants' short-term rental practices is equally applicable to rentals of any length, regardless of whether long-term renting was challenged by plaintiffs. As the trial court observed,

> "Commercial" is commonly defined as "able or likely to yield a profit." Random House Webster's College Dictionary (1991). "Commercial use" is defined in legal parlance as "use in connection with or for furtherance of a profit-making enterprise." Black's Law Dictionary (6th ed). "Commercial activity" is defined in legal parlance as "any type of business or activity which is carried on for a profit." *Id.*[14]

The act of renting property to a third-party for any length of time involves a commercial use because the property owner is likely to yield a profit from the activity. Restrictions barring commercial uses of property proscribe a wide variety of activities, even activities that are residential in nature, such as renting to residential tenants for extended periods of time.[15] As such, the trial court's decision to bar "all rental activity for a fee" was not outside the range of principled outcomes because the court was authorized to "interfere by injunction" as a result of defendants' breach of the deed restrictions, and the restrictions clearly barred any commercial activity from occurring on defendants' lots.[16]

III. DEFENDANTS' TRESPASS AND WASTE COUNTER-CLAIMS

Next, defendants argue that the trial court erred by rejecting their counterclaims against the Smith and Bauckham plaintiffs. We disagree.

This Court reviews a trial court's factual findings for clear error.[17] "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."[18] Conclusions of law are reviewed de novo.[19]

In their first amended complaint, defendants brought a claim of trespass against several plaintiffs, alleging that

> Plaintiffs/Counter-Defendants Bauckham, Brouwer, Cole, Smith, Shkor and Zeller have trespassed upon the beach parcel owned in common . . . by i.) placing

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[14] *Terrien*, 467 Mich at 64.

[15] *Id.* at 62-63.

[16] Plaintiffs' did not respond to this issue in their brief on appeal. If plaintiffs are similarly dissatisfied by the extended scope of the court's injunction, there is nothing to prevent the parties from negotiating a more narrow remedy for the trial court's consideration.

[17] *Alan Custom Homes, Inc*, 256 Mich App at 512.

[18] *Id.*

[19] *Id.*

> personal property and installing real fixtures on the beach parcel, in such manner and with the intent and effect of excluding other co-owners from using that portion of the commonly owned beach parcel and ii.) cutting trees and removing natural vegetation beneficial to the natural beauty and stability of the dune and placing such at great risk of erosion, without first obtaining the unanimous consent and permission of all common owners.

Later, defendants clarified that their trespass claim against the Smiths involved an erosion control system commissioned by the Smiths, which purportedly caused an unnatural amount of surface water to flow from the Smith lot onto the Beach Parcel. The trial court rejected defendants' trespass claim reasoning that, as a matter of law, a cotenant cannot trespass on a commonly owned parcel. It also reasoned that defendants' water-trespass theory lacked merit because the erosion control system was installed with proper permits and there was no evidence that the project harmed the interest of any cotenant.

On appeal, defendants argue that the trial court erred by focusing on the Smiths' mitigating measures, rather than the technical trespass. In Michigan, an action for trespass requires "proof of an unauthorized direct or immediate intrusion of a physical, tangible object *onto land over which the plaintiff has a right of exclusive possession*."[20] Thus, while defendants are correct that the focus of a trespass claim must be on the challenged intrusion upon real property, their claim must fail because the trial court correctly concluded that the Smiths, as cotenants of the Beach Parcel, could not trespass upon their own property. One of the hallmark features of tenancy in common is that each cotenant is entitled to possession of the whole property.[21] Because the Smiths, like all cotenants of the Beach Parcel, have a possessory interest in the land, they did not cause a physical intrusion onto land that defendants had an exclusive right of possession over. This is not to say that cotenants are left without a legal or equitable remedy when faced with misuse of commonly owned property, as other theories of liability may support a similar claim. However, a trespass claim is not the appropriate vehicle for defendants' complaints concerning the erosion control system. The trial court did not err by rejecting defendants' trespass claim as pled.

Defendants also argue that the trial court erred by failing to rule upon their claim regarding the dilapidated stairs leading from the Bauckham lot, the remains of which encroach upon the Beach Parcel. On appeal, defendants characterize the presence of the remaining materials as an act of trespass and waste. The presence of the stair remnants could arguably fit into the broad scope of defendants' trespass claim, as pled in their amended complaint, because it involves the placement of personal property on the Beach Parcel. However, to the extent that this claim sounds in trespass, it must fail for the same reason: the Bauckham plaintiffs are also cotenants holding a possessory interest in the Beach Parcel.

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[20] *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999) (emphasis added).

[21] *Kay Investment Co, LLC v Brody Realty No 1, LLC*, 273 Mich App 432, 441; 731 NW2d 777 (2007).

Defendants' alternative characterization of their claim as one for waste is at odds with their amended complaint. Defendants alleged a separate count for common law waste against "certain owners who own property adjacent to the Beach Parcel," alleging that these owners "have from time to time removed timber and brush from the Beach Parcel, thus committing waste and damaging the property as detailed above." Notably, the trial court *did* dispose of defendants' waste claim *as pled*, by finding that defendants failed to present sufficient credible testimony concerning the improper removal of trees or resulting damages, and defendants do not challenge this finding on appeal. We find no error in the trial court's failure to address a theory that was not properly pled or argued in a clear manner.

IV. EFFECT OF SETTLEMENT STIPULATION

On cross-appeal, plaintiffs argue that the trial court erred by failing to give effect to the parties' partial settlement stipulation placed on the record at trial. We conclude that the stipulation is ambiguous and the record requires further factual development.

Courts interpret a stipulation that "embod[ies] all the essential characteristics of a contract" like a contract.[22] Courts interpret contracts according to the parties' intent, so long as their intent is clear.[23] Accordingly, courts must determine if the stipulation is clear and unambiguous.[24] A stipulation is unambiguous "if it fairly admits of but one interpretation."[25] If the stipulation is unambiguous, "construction of the [stipulation] is a question of law for the court."[26] This Court reviews questions of law de novo.[27] A stipulation is ambiguous if "its language can be reasonably understood in different ways,"[28] or "a term is equally susceptible to more than a single meaning."[29] If ambiguous, "factual development is necessary to determine the intent of the parties"[30] and a court may consult relevant extrinsic evidence to determine the stipulation's meaning.[31] This Court reviews a trial court's factual findings for clear error.[32] "A

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[22] *Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 378-379; 521 NW2d 847 (1994) (quotations and citation omitted).

[23] *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997).

[24] See *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 206; 476 NW2d 392 (1991).

[25] See *Steinmann v Dillon*, 258 Mich App 149, 154; 670 NW2d 249 (2003).

[26] See *Klein v HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 76; 854 NW2d 521 (2014) (quotations and citations omitted).

[27] *Id*. at 75.

[28] See *Steinmann*, 258 Mich App at 154.

[29] See *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1, 8; 792 NW2d 372 (2010) (quotations, emphasis, alteration, and citation omitted).

[30] See *Klein*, 306 Mich App at 76 (quotations and citations omitted).

[31] See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470-471; 663 NW2d 447 (2003).

[32] *Alan Custom Homes, Inc*, 256 Mich App at 512.

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."[33]

In this case, the trial court found that a number of plaintiffs had constructed fixtures on the Beach Parcel, including stairs, decks, a motorized tram system, and at least one outbuilding, and that use of these structures was limited by locks, gates, and "no trespassing" signs. The parties discussed a stipulation that defendants agreed to withdraw their request that fixtures already situated on the Beach Parcel be removed and, in exchange, defendants could introduce four late-filed surveys of various Sunset Shores lots. Defense counsel explained the stipulation. Then, plaintiffs' counsel stated,

> I understand that what we agreed on is that there wouldn't be destruction, demolition or removal. So I mean if they're trying to hide something from me please let me know now, but the idea is the stuff that's been on the beach parcel gets to stay on the beach parcel. The requested relief I'm assuming is going to be limited now to they want to be able to use it. We don't agree to that, but we're not looking at a case where they're asking for the removal or the destruction or demolition of those structures that have been in place.

Further, plaintiffs' counsel opined that contribution should be required if the court ordered that the structures be made available for use by all cotenants, but cautioned that some plaintiffs might prefer to remove the structures if forced to make them open for common use.

The trial court ordered:

> As to the parts of the structures which encroach on the Beach Parcel, minimal repairs may be performed on them in the future, but only to preserve the current function of the structure and not to expand the encroachment or extend the structures useful life. Once the structure has surpassed its useful life, the ultimate removal of any structure will be done at the expense of the owner of the parcel adjoining the Beach Parcel and no contribution will be had from any other cotenant. If the encroaching structures are damaged by catastrophic acts of God the encroaching structure cannot be replaced.

To the extent that these structures remain in place, the trial court ruled that the exclusion of other cotenants from the portions of the parcel occupied by these structures was inconsistent with the remaining cotenants' rights. To remedy the problem, the court ordered the removal of locks, gates, and exclusionary signage within 90 days and declared that the structures would be available for the use and benefit of all cotenants thereafter.

On cross-appeal, plaintiffs argue that the trial court's order is inconsistent with the parties' stipulation because the parties intended that the existing structures would be allowed to remain on the Beach Parcel indefinitely. We agree. We conclude that the language in the

[33] *Id.*

stipulation is ambiguous because it can be reasonably understood in different ways. Determining the parties' intent requires further factual development. Therefore, we vacate the portions of the trial court's order discussed in this section and remand for an evidentiary hearing to determine the parties' intent in making the stipulation.[34] On remand, the trial court is free to resolve the ambiguities in the stipulation based on the proofs presented at the evidentiary hearing. Alternatively, the parties may reach a new stipulation and submit the new stipulation to the trial court. In all other respects, the balance of the trial court's decision is affirmed.

We affirm in part, vacate in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Thomas C. Cameron

[34] See MCR 7.216(A)(5).

EXHIBIT 2

STATE OF MICHIGAN

COURT OF APPEALS

MELVIN R. BERLIN REVOCABLE TRUST, RANDY LAMM BERLIN REVOCABLE TRUST, JANIS HEHMEYER TRUST, CAROL J. NEWTON REVOCABLE TRUST, JEAN I. SMITH REVOCABLE TRUST, and STEPHEN L. SMITH REVOCABLE TRUST,

Plaintiffs/Counterdefendants-Appellees,

v

THOMAS C. RUBIN, NINA D. RUSSELL, and 14288 LAKESHORE ROAD, LLC,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants,

and

SWIFT ESTATES ASSOCIATES, also known as SWIFT ESTATES ASSOCIATES, INC., CHRISTOPHER HEHMEYER, and STEPHEN L. SMITH,

Third-Party Defendants-Appellees.

UNPUBLISHED
July 20, 2023

No. 359300
Berrien Circuit Court
LC No. 2019-000034-CH

Before: SHAPIRO, P.J., and LETICA and FEENEY, JJ.

PER CURIAM.

Defendants/counterplaintiffs/third-party plaintiffs, 14288 Lakeshore Road, Thomas C. Rubin, and Nina D. Russell (collectively, defendants) appeal as of right the injunction and judgment entered in favor of plaintiffs, Melvin R. Berlin Revocable Trust, Randy Lamm Revocable Trust, Janis Hehmeyer Trust, Carol J. Newton Revocable Trust, Jean I. Smith Revocable Trust, and Stephen L. Smith Revocable Trust (collectively, plaintiffs). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Swift Estates is comprised of 10 large lots with nine homes spread over 22 acres; a private road (Swift Lane); a private beach on Lake Michigan; a private tennis court, and a pathway and stairs that go through a ravine to the beach. Seven of the nine homes are owner-occupied for at least six months of the year. Each of the plaintiff-trusts owns a lot in Swift Estates.[1] Defendant 14288 Lakeshore Road, LLC (Lakeshore LLC), formed for the benefit of Laura and Scott Malkin. They purchased Swift Estates' Lot 8 and began renting the property in 2012. They reside in London, England. Defendants Thomas Rubin and Nina Russell, husband and wife, purchased Lot 5, and live in Washington.

Historically, Swift Estates owners occasionally rented their homes to family and friends. Scott and Laura Malkin, through Lakeshore LLC, acquired Lot 8 in 2011.[2] According to Laura Malkin, being able to rent their Swift Estates home when they were not using it was an important factor in their decision to purchase the home. She asserted it was general knowledge that rentals were permitted in Swift Estates, and she claimed to receive confirmation of rentals through realtor Karen Strohl, and with the seller of the home. Shortly after they purchased the home, the Malkins signed a homeowner rental agreement with Aqua Vacation Rentals, which began to use its online platform to market the home as a seasonal vacation rental. Rentals began in summer 2012 and generated a number of complaints most revolving around the renters' use of the common properties, especially the subdivision's private beach. The complaints were addressed by Aqua Vacation Rentals and by the Malkins, who offered to adopt certain voluntary restrictions for their renters in response to the concerns of other owners. The Malkins' home rented 49 times from 2012 to 2018.

Rubin and Russell purchased their home in Swift Estates in 2017. Russell attested that being able to rent the home when they were not using it was critical to their decision to purchase it because the rental income offset the expenses of ownership. Rubin and Russell asserted that their broker, Strohl, contacted the president of the Swift Estates Association, the homeowners association that oversees Swift Estates, and was advised that rentals were permitted in Swift Estates. Rubin and Russell contracted with Aqua Vacation Rentals, which rented their home several times from 2018 to 2020.

Over the years, there was debate regarding whether rentals were allowed, and a formal opinion was eventually requested. The Association's attorney opined that short-term, transient

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[1] The Melvin R. Berlin Revocable Trust, whose trustee is Melvin Berlin, and the Randy Lamm Berlin Revocable Trust, whose trustee is Randy Lamm Berlin, own Lot 2; the Randy Lamm Berlin Revocable Trust also owns Lot 1. The Janis Hehmeyer Trust, whose trustee is Christopher Hehmeyer, owns Lot 9. The Carole J. Newton Revocable Trust, whose trustee is Carole J. Shortlidge, owns Lot 6. The Stephen L. Smith Revocable Trust, whose trustee is Stephen Smith, and the Jean I. Smith Revocable Trust, whose trustee is Jean Smith, own Lot 3; the Jean I Smith Revocable Trust also owns Lot 4.

[2] For convenience, and to be consistent with the parties' practice in the trial court and in their briefs to this Court, the plaintiff-trusts are referred to as "plaintiffs" or by the names of their trustees.

rentals were not allowed, nor was renters' use of the common properties. The owners were advised of this opinion, and a special meeting of the Association was held to discuss the matter. When a consensus could not be reached, plaintiffs filed a complaint for declaratory and injunctive relief to enforce the Declaration that governed property use in Swift Estates. After the trial court issued a ruling that the Declaration did not allow short-term rentals, defendants counterclaimed against plaintiffs for acquiescence, unclean hands, equitable estoppel, laches, and waiver. Defendants also raised claims against third-party defendants, Stephen L. Smith and Christopher Hehmeyer, in their official capacities as Association officers for fraudulent misrepresentation, negligent misrepresentation, and silent fraud. Defendants later amended their third-party complaint to add Smith and Hehmeyer as defendants in their individual capacities, and added additional claims.

Ultimately, the trial court granted summary disposition in favor of plaintiffs addressing the interpretation of the Declaration.[3] The trial court entered a permanent injunction prohibiting defendants from "all renting or leasing of their respective Swift Estates properties that do not have a single family residence purpose, as provided for in the July 15, 1977 Declaration of Covenants and Restrictions . . . including the enjoinment of short-term vacation rentals by Defendants which were [the] subject of this action." The injunction restricted use of the common properties to "lot owners/members, their respective resident family members, or those duly delegated tenants who reside upon the respective property instead of the lot owners/members under a leasehold interest" as long as "the names and relations of all such resident family members and/or delegated tenants to the lot owners/members have been provided to the Swift Estates Association's Secretary in writing." Defendants now appeal.

II. STANDARDS OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Empire Iron Mining Partnership v Tilden Twp*, 337 Mich App 579, 586; 977 NW2d 128 (2021). Summary disposition is appropriate under MCR 2.116(C)(10) if there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition challenged under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(4), (G)(5); *Buhl v City of Oak Park*, 507 Mich 236, 242; 968 NW2d 348 (2021).

III. RESTRICTIVE COVENANTS

Defendants contend that the trial court erred in its interpretation of the deed restrictions to exclude rentals and improperly imposed dictionary definitions. We disagree.

The interpretation of restrictive covenants presents a question of law that this Court reviews de novo. *Mazzola v Deeplands Dev Co, LLC*, 329 Mich App 216, 223; 942 NW2d 107 (2019). The interpretation of a contractual agreement also presents a question of law subject to de novo

[3] The trial court rejected the claims of waiver, acquiescence, and fraud. The parties dismissed other claims to which the trial court did not grant summary disposition.

review. *Conlin v Upton*, 313 Mich App 243, 254; 881 NW2d 511 (2015). "[D]eed restrictions allow landowners to preserve the neighborhood's character." *Thiel v Goyings*, 504 Mich 484, 496; 939 NW2d 152 (2019). A covenant is a contract created with the intent to enhance the value of property and constitutes a valuable property right. *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002); *Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515; 686 NW2d 506 (2004). "Deed restrictions preserve not only monetary value, but [also] aesthetic characteristics considered to be essential constituents of a family environment." *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007) (quotation marks and citation omitted). Because the foundation of a covenant lies in contract, the intent of the drafter is deemed controlling. *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 628; 761 NW2d 127 (2008).

Restrictive covenants are examined on a case-by-case basis. *O'Connor v Resort Custom Builders*, 459 Mich 335, 343; 591 NW2d 216 (1999); *Aldrich v Sugar Springs Prop Owners Ass'n*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 359664), slip op at 3. Restrictive covenants are strictly construed against the party seeking enforcement and any doubt must be resolved in favor of the free use of property. *O'Connor*, 459 Mich at 341; *Huntington Woods*, 279 Mich App at 628. When the intent of the parties may be clearly ascertained, the courts must give effect to the whole instrument. *Hickory Pointe Homeowners Ass'n*, 262 Mich App at 515-516. Nonetheless, the intention to limit the use of property to maintain a residential neighborhood of a specific character, if established by proper instruments, are favored by definite public policy. *Terrien*, 467 Mich at 72. The designated right to live in a district free from stores, garages, businesses, and apartment buildings is a valuable right. *Id*. The nullification of such restrictions would create an injustice to those property owners because the right of privacy in the home is a valid property right. *Id*. "It is the function of the courts to protect such rights through the enforcement of covenants." *Id*. Despite the rules of application pertaining to construction of a restrictive covenant, they must not be applied in a manner to defeat the plain and obvious purposes of the contractual instrument or restriction. *Brown v Hojnacki*, 270 Mich 557, 560; 259 NW 152 (1935).

> [A restrictive covenant] is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it, the location and character of the entire tract of land, the purpose of the restriction, whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers, and whether it was in pursuance of a general building plan for the development and improvement of the property. [*Id*.]

The entity's articles of incorporation, operating agreements, and bylaws are intended to govern the future conduct of the entity and its members. *Aldrich*, ___ Mich App at ___, slip op at 3. These governing documents allow the parties to preserve desired aesthetic or other characteristics in their neighborhood. *Id*., slip op at 4. We must not engage in a party's tortured attempt to read an ambiguity into a restrictive covenant that does not exist. *Eager v Peasley*, 322 Mich App 174, 188; 911 NW2d 470 (2017).

A residential purpose is the one place where a person lives as their permanent home, and, when applying that standard, a summer home cannot constitute a permanent residence when a person's domicile is in another location. *O'Connor*, 459 Mich at 345. In a residence, a person

lives, has a permanent presence, and stores their belongings there, even when they are not at home. A residence reflects permanence and a continuity of presence. *Id*. Occasional rentals do not alter the character of a subdivision, do not defeat the original purpose of the restrictions, and do not result in a waiver of restrictions. *Id*. at 346. Additionally, short-term rentals violate a restrictive covenant barring commercial use of a property. *Eager*, 322 Mich App at 191. The act of renting property to another for short-term use presents a commercial use despite the fact that the activity is residential in nature. *Terrien*, 467 Mich at 63-64.

IV. THE COVENANTS

In June 1977, restrictive deed covenants for Swift Estates were recorded with the register of deeds and stated in pertinent part:

> Swift Estates, Inc., a Michigan corporation, being the owner and dedicator of all the land in the plat of Swift Estates situated in Chikaming Township, Berrien County, Michigan, for and in consideration of the covenants and restrictions herein contained, do hereby declare that said plat shall be subject to the following restrictions:
>
> If any owner or owners of any lot or lots in said plat shall violate or attempt to violate any of the covenants herein, they shall be liable to prosecution and proceedings at law or in equity, to restrain any person or persons violating or attempting to violate any such covenant and to recover damages resulting to him or them from such violation.

In July 1977, the Declaration of Covenants and Restrictions (Declaration), was recorded, and Art 1, § 1, delineated this purpose:

> The Developer is the owner of that certain real estate located in Berrien County, Michigan as described in Exhibit A attached hereto and made a part hereof which has been subdivided and provision made in said subdivision for *common properties designed for the private use of owners in said subdivision*, except as otherwise provided herein. The Developer desires to provide for the preservation of the values and amenities in said subdivision and for the maintenance of the common properties therein and to this end desires to subject the real property described in Exhibit A to the covenants, restrictions, easements, charges and liens hereinafter set forth, each and all of which is and are for the benefit of said property and each owner thereof. [Emphasis added.]

To ensure that the developed properties were of good and attractive design, in harmony with the area's natural setting, preserved and enhanced the existing natural area setting, and assessment of the workmanship of improvements, an architectural review committee (ARC) was established to approve and disapprove of pertinent matters. The Declaration, Art III. Therefore, no building, fence, wall, or other structure could be commenced, erected, or maintained on the properties unless submitted to and approved by the ARC. Additionally, plans and specifications and changes to the property grade had to be submitted to the ARC.

In Art 4, § 1, addressing land use, the Declaration stated:

> No lot shall be used for other than single family residence purposes. No lot shall be improved with other than one single family residence structure and one accessory building structure designed for use in conjunction with the residence as a private garage or servants' quarters for accommodation of owner's servants, or both, except that the Committee in its discretion may authorize one additional accessory building structure on a lot. No structure may be erected or maintained on any lot except as shall be approved in writing by the Committee. The living area of a single family residence shall not be less than 1,600 square feet in the case of a one-story structure, and not less then 2,200 square feet in the case of a one and a one-half or two story structure. No structure shall exceed two stories in height. Notwithstanding the foregoing provisions, no existing structures on any lot shall be deemed to violate the provision of this Section 1, except that existing structures shall be used only for single purposes or as an accessory building structure with respect thereto.

In Art II, § 1, the terms pertaining to single family were defined as:

> (e) "Single family residence" shall mean any dwelling structure on a lot intended for the shelter and housing of a single family.
>
> (f) "Single family" shall mean one or more persons each related to the other by blood, marriage, or adoption, or a group of not more than three persons not all so related together with his or their domestic servants, maintaining a common household in a residence.

The Declaration established requirements addressing the quality of the design, workmanship, and materials utilized in the construction of any structure. And, the location of any building, driveway, and culvert had to be submitted to the ARC for a determination of setback lines, although the property owner had the opportunity to recommend their desired construction site. Art IV, §§ 3-4.

The Declaration also addresses nuisances in Art IV, § 5, stating:

> No noxious or offensive activity shall be carried on in or upon any premises nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood. No plants or seeds or other things or conditions harboring or breeding infectious plant diseases or noxious insects shall be introduced or maintained upon any lot.

The Declaration also addressed maintenance of the lots and gave the Association the authority to remedy any inappropriate condition by a special assessment. Furthermore, the Declaration governed the placement of materials on the property, the location of the garbage receptacles and fuel tanks, and the screening of those objects if placed outside.

In the Declaration, Art IV, § 10 addressed other prohibited matters:

> No animals other than unoffensive domestic household pets such as dogs and cats shall be kept on any lot. No home occupation or profession shall be conducted on any lot except as may be authorized by the Committee.

Art VIII, § 1, addressed the duration of the covenants and restrictions and any change thereto:

> The covenants and restrictions herein contained shall run with and bind the land, and shall inure to the benefit of and be enforceable by the Association or any owner, his representatives, heirs, successors and assigns for a period of 20 years from the date this Declaration is recorded after which time said covenant shall be automatically extended for successive periods of 10 years unless an instrument signed by the then owners of 8 lots has been recorded agreeing to change said covenants and restrictions in whole or in part or to revoke the same provided that no such agreement of change or revocation shall be effective unless made and recorded one year in advance of the effective date of such change.

The bylaws of Swift Estates did not appear to be recorded. However, in Art III, § 2, addressing property rights and enjoyment of common properties, it stated:

> Any member may delegate his rights of enjoyment in the Common Properties and facilities to the members of his family who reside upon The Properties or to any of his tenants who reside thereon under a leasehold interest. Such Member shall notify the secretary in writing of the name and relationship of any such person. The rights and privileges of such person are subject to suspension as stated herein to the same extent as those of the Member.

V. ANALYSIS

As noted, we must apply the rules pertaining to construction of restrictive covenants in a manner consistent with the plain and obvious purposes of the instrument. *Brown*, 270 Mich at 560. The restrictive covenant is construed in light of the surrounding circumstances, the parties' intent at the time the covenant was written, the location and character of the entire tract of land, the restriction's purpose, the nature of the benefit and whether it was designed to aid the grantor, grantee, and subsequent purchasers, and whether it was designed to support the general building plan of the community. *Id*. And, an individual's rental of their residential property, even for short-term use, constitutes commercial use even when the activity is residential in nature. *Terrien*, 467 Mich at 63-64. Applying these rules, we conclude that defendants' rentals of the properties is contrary to the Declaration, Art IV, § 1 that states that "[n]o lot shall be used for other than single family residence purposes."

The Declaration was recorded in 1977, and at that time, the property was composed of various lots with access to a private beach. Although the lots were spread across 22 acres, the ARC was created to ensure quality of buildings and materials, control over the number of buildings to include either servant quarters or a garage, limitations on setbacks, and even the location of garbage cans and their screening to prevent an eyesore. Thus, it is apparent that the Declaration was designed to ensure uniformity in the buildings and design. The plain language of the

restrictive covenants only provided for single family residences on the lots, and there was no provision for short-term or other rentals in the Declaration. And, at the time the Declaration was created, the Swift Estate lots were not advertised on internet-related rental sites,[4] but attracted a clientele desirous of a private community environment.[5] Plaintiffs had the right to contract that their properties would be limited in their nature and free from business purposes.

Additionally, it is apparent that defendants did not utilize their property as a single family residence. Defendants, as purchasers of the properties, did not use the properties as a permanent home, and a summer home cannot constitute a permanent residence when their domicile is in another location. *O'Connor*, 459 Mich at 345. In the present case, defendant purchasers either resided in England and Washington. Defendants did not delineate the extent to which they stored their belongings at their homes. Instead, their use was intermittent and inconsistent with a single family residence; it did not reflect permanence and a continuity of presence generally associated with a single family residence but rather, a vacation home. *Id.*[6]

Defendants further submit that the trial court erred in failing to conclude that there were factual issues regarding acquiescence and waiver. However, occasional rentals by other members did not alter the character of a subdivision, did not defeat the original purpose of the restrictions, and did not result in a waiver of restrictions. *O'Connor*, 459 Mich at 346. Moreover, the plain language of the Declaration expressly provided that the "[f]ailure by the Association or any owner to enforce any covenant or restriction in no event shall be deemed a waiver of any right to do so thereafter." The Declaration, Art VIII, § 3. In light of this plain language, the trial court did not err in granting summary disposition of these claims in favor of plaintiffs. *Conlin*, 313 Mich App at 254.

Lastly, defendants submit that the trial court erred in dismissing the claims of fraudulent and negligent misrepresentation. To establish common-law fraud or fraudulent misrepresentation,

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[4] Consequently, it was unlikely that the drafter of the Declaration envisioned that unrelated parties from near and far would become aware of Swift Estate properties and demonstrate a disregard for neighboring property owners, including trespassing, commandeering the neighbors' personal property, and inappropriately using the common areas during the middle of the night.

[5] Defendants asserted that the rentals of Swift Estate properties were well-known and widespread. But member testimony indicated that the rentals were generally to "strong referrals" such as family, friends, or community members and for a lengthy period of time. Apparently, residents in nearby communities that renovated their homes sought to lease Swift Estate homes during the construction. The member testimony did not reflect prevalent leasing by plaintiffs.

[6] Defendants submitted that the trial court improperly considered a dictionary definition when examining the single family residence provision, failed to conclude that express exclusions meant that rentals were permitted by an omission to their reference, improperly examined other portions of the Declaration not raised by the parties, and failed to deem the Declaration ambiguous such that free use of the property was appropriate. The trial court was entitled to examine the Declaration as a whole and apply the plain language to the applicable caselaw. *Conlin*, 313 Mich App at 254.

a defendant must make a false representation of material fact with the intention that the plaintiff would rely on it, the defendant must either know at the time that the representation was false or make it with reckless disregard for its correctness, and the plaintiff must actually rely on the representation and suffer damage as a result. *Alfieri v Bertorelli*, 295 Mich App 189, 193; 813 NW2d 772 (2012). "A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care."[7] *Id*. at 194 (citations and quotation marks omitted). In Michigan, fraud is not presumed but must be established by clear and convincing evidence. *Deschane v Klug*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 360677), slip op at 6. Fraud cannot be perpetrated on a party who has full knowledge that a representation is actually to the contrary. *Titan Ins Co v Hyten*, 491 Mich 547, 555 n 4; 817 NW2d 562 (2012); *Montgomery Ward & Co v Williams*, 330 Mich 275, 284; 47 NW2d 607 (1951). There is no duty at common-law to acquire such knowledge. *Titan Ins Co*, 491 Mich 555 n 4. However, a party claiming fraud cannot succeed if given direct information refuting the misrepresentations. *Id*.

In the present case, defendants failed to demonstrate clear and convincing evidence of fraud, either purposefully or negligently, by Smith or Hehmeyer. As an initial matter, defendants failed to identify clear statements by either Association member made directly to Rubin, Russell, and the Malkins before the purchase of their respective properties. Rather, defendants relied principally on communications between Smith and real-estate agent Strohl, not a direct conversation with Smith or Hehmeyer at the time of their respective purchases. See *Buhl*, 507 Mich at 242. Defendants failed to demonstrate that this hearsay presented clear and convincing evidence of fraud. *Id*. Furthermore, defendants apparently were given the Declaration as well as the covenants and restrictions and did not question any conflict between the bylaws reference to "tenants" and the Declaration's limitation of the premises to single family residential purposes

[7] Smith, as Association president, was a long-term Swift Estates resident and was in his mid-70s. He was not an attorney. Strohl asked Smith to submit documents for Rubin and Russell's review; however, he was rushed to provide the documentation before he left the state and would not have access to the documents. There is no indication that Smith was aware that a representation regarding rentals was false. Rather, when other members questioned the rental activity at Swift Estates, Smith received a legal opinion about the Declaration and the restrictive covenants that did not permit defendants' rentals. Further, as Russell testified, she was aware that rentals were occurring because she was related to Laura Malkin, who had purchased her property years earlier and engaged in rentals. Despite the definition of a single family residence, Rubin did not question the provision or retain an attorney at that time to question its validity.

only. Indeed, when Strohl questioned defendant Rubin about the attorney that would handle the closing, Rubin, an attorney, opted not to retain an attorney for the transaction despite raising an issue pertaining to title insurance. Under the circumstances, the trial court did not err in dismissing these claims.[8]

Affirmed.

/s/ Douglas B. Shapiro
/s/ Anica Letica
/s/ Kathleen A. Feeney

[8] Finally, defendants asserted that the trial court erred in its entry of an injunction and judgment that did not limit its scope to short-term rentals only. The trial court's judgment mirrored the language of the documents governing the Association, and therefore, no error occurred. The parties were free during the litigation and thereafter to enter into an agreement to engage in long-term rentals to a clientele premised on a referral system that apparently did not disrupt the nature and character of the Swift Estates community.