STATE OF MICHIGAN

COURT OF APPEALS

ROBERT KAMPHAUS, DONNA KAMPHAUS, MICHAEL CIUCHNA, KRISTY CIUCHNA, GERALD RYNKOWSKI, and VIRGINIA RYNKOWSKI,

Plaintiffs-Appellees/Cross Appellants,

v

DAVID A. BURNS,

Defendant-Appellant/Cross Appellee,

and

JOHN DOE and MARY ROE,

Defendants.

UNPUBLISHED
February 26, 2009

No. 279962
Macomb Circuit Court
LC No. 2003-005067-CZ

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Defendant, David A. Burns, appeals by right the denial of his motion for case evaluation sanctions following the dismissal of plaintiffs' complaint after a bench trial.[1] We reverse and remand for a determination of the proper amount of case evaluation sanctions to be awarded to defendant. Plaintiffs cross-appeal by right the dismissal of their complaint. We affirm.

Plaintiffs filed this action against defendant seeking equitable and monetary relief on the grounds that (1) defendant failed to submit his building plans to the Ardmore Park Subdivision Association's Building and Use Restriction Committee in violation of their Bylaws, (2) defendant's house violated the two-story height restriction contained in his deed, and (3) defendant's bay window, porch, garage pillars, and chimney violated setback requirements of the deed restrictions. In response, defendant argued that (1) he was not required to submit his

[1] On November 1, 2006, a stipulation and order of dismissal as to plaintiffs Michael and Kristy Ciuchna was entered.

building plans to the Building and Use Restriction Committee but, in any case, he did submit his plans, (2) the 1975 deed restrictions were invalid and unenforceable, (3) if the deed restrictions were valid, he complied with them, and (4) if his bay window, porch, garage pillars, or chimney did violate a deed restriction, such violation was subject to an equitable exception to enforcement.

Eventually, defendant moved for summary dismissal on the ground that the 1975 deed restrictions were invalid and unenforceable. The trial court agreed and dismissed the action. Plaintiffs appealed. This Court held that the trial court's reasoning was flawed and reversed the holding. *Kamphaus v Burns*, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2005 (Docket No. 261586) (*Kamphaus I*). The matter was remanded for determination, in relevant part, whether, consistent with this Court's reasoning, the 1975 restrictions were valid and enforceable against defendant. Further, if they were, the trial court was directed to determine whether defendant remained entitled to summary disposition.

On remand, a thirteen-day bench trial was conducted. During the course of the proceedings, the trial court personally viewed defendant's premises and the immediate vicinity. At its conclusion, the trial court held that (1) the 1975 amendments to the deed restrictions were valid and enforceable against defendant; (2) defendant did not violate the height restriction because the house is two stories and has some unfinished attic space, not a third story; (3) the front porch, bay window, and portico of defendant's house were architectural features and thus not subject to the setback requirements but, even if they were, they merely constituted "technical violations" that did not result in substantial harm to plaintiffs; and (4) defendant's garage and chimney violated the restrictions, but they constituted merely "technical violations," the restrictions had been selectively enforced, and plaintiffs had unduly delayed in seeking to enforce those restrictions. Accordingly, the trial court dismissed plaintiffs' complaint with prejudice. Plaintiffs' motion for reconsideration or rehearing was denied.

Thereafter, defendant moved for case evaluation sanctions and frivolous action sanctions and/or costs. Defendant argued that he accepted the case evaluation award of $7,500 in favor of plaintiffs, but plaintiffs rejected the award and failed to receive a verdict more favorable at trial. Defendant further argued that he was entitled to frivolous actions sanctions and/or costs because the action was intended to harass or injure him. Plaintiffs responded that they did obtain the equitable relief they sought—a finding that the 1975 amendments were valid and enforceable. Further, plaintiffs argued, defendant was not entitled to sanctions because the action was not "frivolous" as illustrated by the fact that a multiple day bench trial was conducted and defendant's motion for a directed verdict was denied. The trial court denied defendant's motion on the ground that, although defendant had violated some of the deed restrictions, an equitable remedy was denied because the court was not "going to have him take his house down." The court concluded that "taking everything into account, the Court is denying your motion for costs under both frivolous action and the case evaluation." Defendant appeals the decision to deny his request for case evaluation sanctions, and plaintiffs cross appeal the trial court's decisions related to the deed restrictions and its ultimate dismissal of their complaint.

We first address plaintiffs' issues on cross-appeal. First, plaintiffs argue that the trial court erred in failing to consider the issue of defendant's failure to obtain approval for his project from the Building and Use Restriction Committee as required by Article IX, Section 12 of the Ardmore Park Subdivision Association's Bylaws which states:

> The Building and Use Restriction Committee shall consist of the Vice President as chairperson, the Regulations Officer and the Public Relations Officer. They shall review and approve or reject plans for proposed buildings and additions. They shall also review proposed seawall plans to insure that water easements are maintained as platted.

Plaintiffs argue that "[d]espite the requirement that 'plans for proposed buildings and additions' be submitted for approval, [d]efendant conceded that he did not obtain approval for his project before beginning construction, except from his mother, Mary Ellen Burns, who was one of the members of the Building and Use Restriction Committee." However, Article IX, Section 12 does not require a lot owner to submit plans for proposed buildings and additions; it merely sets forth, as its title indicates, the "Duties of Officers." It does not set forth any duties of the membership. And plaintiffs have failed to direct us to any provision in the Building and Use Restrictions that requires lot owners to submit plans for proposed buildings and additions to the Association or any committee of the Association. Further, our review has failed to reveal such a provision.

Plaintiffs' reliance on *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 514-515; 686 NW2d 506 (2004), in support of their position is misplaced. In that case the subdivision covenants contained a specific and detailed provision—labeled "Section 7.02 Submission of Plans and Plan Approval"—which clearly provided that "no structures were to be erected within the subdivision without the prior submission and approval of plans for such construction by the association." *Id*. at 514, 516. The Ardmore Park Subdivision covenants contain no such provision. Therefore, plaintiffs' claim that defendant was required, and failed, to submit his plans for his proposed buildings and additions to the Building and Use Restriction Committee is without merit. We note further, however, that there is ample evidence that two members of the initial Building and Use Restriction Committee who were actually given plans by defendant, apparently as a courtesy or in request for guidance, failed in their duties to "review and approve or reject [the] plans."

Next, plaintiffs argue that the trial court erred in failing to enforce the plain and unambiguous language of the two-story height restriction. We disagree. Findings of facts made by the trial court following a bench trial are reviewed for clear error, while conclusions of law are reviewed de novo. MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Clear error is found only when this Court is definitely and firmly convinced that the trial court was mistaken. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003).

The Building and Use Restrictions contain the following provision:

> 1. That no structure shall be erected on any lot in said subdivision except one detached single family dwelling not to exceed two stories in height. The ground floor area shall not be less that [sic] 1200 square feet in the case of 1 or 1-1/2 story dwellings, nor less than 1000 square feet for two-story structures, exclusive of open porches and garages in each case. No garage shall accommodate more than two vehicles.

"A deed restriction represents a contract between the buyer and the seller of property." *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007). "If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations . . . ." *Id*. at 214.

Here, plaintiffs argue that the trial court improperly focused on whether the space above defendant's second floor was an attic or a third story because "*any* construction above the second story is prohibited, regardless whether the construction is an 'attic space,' a 'living area,' or a 'third story.'" Defendant argues that during trial, plaintiffs' counsel specifically stipulated "that attics are allowed" in houses in the subdivision. A stipulation of fact is binding. See *Dana Corp v MESC*, 371 Mich 107, 110; 123 NW2d 277 (1963); *Board of Co Rd Comm'rs for Co of Eaton v Schultz*, 205 Mich App 371, 378-379; 521 NW2d 847 (1994). And after review of all of the trial testimony, including plaintiffs' expert's as well as the arguments of counsel, the issue with regard to this particular deed restriction was whether the space above defendant's second floor was an attic or a third story—not whether *any* space above the second floor was a violation. Nevertheless, the interpretation of a deed restriction is a question of law and a stipulation by the parties regarding a matter of law is not binding on a court. *Terrien v Zwit*, 467 Mich 56, 60-61; 648 NW2d 602 (2002); *Yeo v Yeo*, 214 Mich App 598, 602; 543 NW2d 62 (1995).

At issue here, then, is the meaning of the phrase "single family dwelling not to exceed two stories in height." Accordingly, the only height limitation for the dwelling is that it cannot exceed two stories, regardless of its specifically measured height. The term "stories" is the dispositive term, thus we must consider its meaning. Because it is not defined by the restrictions, we consider its ordinary, generally understood, and popular meaning, as well as the context in which it is found. *Bloomfield Estates Improvement Ass'n, Inc*, *supra* at 215; *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). We do not, however, turn to the definitions adopted for legislative purposes in housing codes and zoning ordinances because those regulations dictate the property owners' obligations to the community at large, not the owners' obligations assumed by contract to their subdivision. See *Terrien*, *supra* at 79 n 30.

We conclude that the term "stories" as it is used in this deed restriction pertaining to single family dwellings in the Ardmore Park Subdivision refers to habitable living space, not merely any space above a second story. The ordinary, generally understood, and popular meaning of the term "story," as pertains to homes, is that it is a level of habitable living space in the home. For example, reasonably considered, a "two story home" is a home with two levels of living space—not one story with a crawl space or *any* space above it. This interpretation is consistent with dictionary definitions which include that a story is: "1. a complete horizontal section of a building, having one continuous or practically continuous floor. 2. the set of rooms on the same floor or level of a building." *Random House Webster's College Dictionary* (1997). These definitions indicate that a "story" is something more than just the space between the ceiling of a lower floor and the roof of the house—which is the space at issue in this case. In fact in this case it appears that the space in dispute exists only over a small portion of the second floor, and not the entire second floor. And our interpretation is consistent with the other language in the restriction which is primarily concerned with the habitable living space, i.e. dimensions of the ground floor area, exclusive of open porches and garages.

On appeal, plaintiffs take issue with the trial court's characterization as an "attic" of this space between the second floor ceiling and the roof. But, by whatever name it is called, most houses have this space where, as plaintiffs' expert testified, joists, trusses, framing and/or rafters, i.e., structural components of the home, are contained. Plaintiffs' expert testified that, because there were stairs leading to this area in defendant's home, he considered the space a third story. He did not consider the dimensions of the space, whether the space was finished, habitable, or any other feature. Other witnesses testified as to the condition of the space, including Richard Munro who testified that it was an unfinished space, roof sheeting and nails were obvious, and trusses and beams sticking out of the floor that had to be stepped over. Defendant testified that the space is unfinished, several structural beams project up from the floor, and it contains "attic trusses" that are not weight bearing.

The trial court viewed the space and opined that the space was not a third story. In light of the record evidence, including the dimensions of the space, we agree with this finding. The space between the second floor ceiling and the roof of defendant's house does not violate the deed restriction prohibiting dwellings exceeding two stories in height. The unfinished space contains structural components of the house that would otherwise be fully exposed to the second story but for the placement of the ceiling. That defendant utilizes a very small portion of that space for storage and uses stairs to access the space is irrelevant to the determination. The deed restriction does not prohibit the existence of this space. Plaintiffs' claim that the house "towers over" others in the neighborhood is not persuasive. The deed restriction is not a height restriction, it is only a story restriction. Thus, we conclude that the trial court properly resolved this issue in defendant's favor.

Next, plaintiffs argue that the trial court erred in concluding that defendant's front porch and bay window were "architectural features," and thus did not violate the setback requirements in the deed restrictions. We disagree.

The deed restriction at issue provides:

> 2. No lot shall be used other than residential purposes. Building lines shall be maintained in strict accordance with the building line diagram as show upon the recorded plat of said subdivision. No structure erected upon any lot shall be less than 5 feet from the side lines of such lot at grade level and no part of any structure, such as roof overhang, shall be less than 3 feet from said side lines.

Plaintiffs argue that the trial court applied an "architectural feature" exception that does not appear in the plain language of the deed restriction. However, as most of the witnesses testified, the critical and disputed term in this restriction is the term "structure." If the porch and bay window are not "structures" within the contemplation of the restriction, they need not be considered for purposes of the setback requirements. The testimony at trial supports the trial court's holding.

First, we consider the testimony of residents of the subdivision who have also been officers of the Subdivision Association. John Bennett, a resident of the subdivision since 1964 who has been an officer of the Subdivision Association and a member of the Building and Use Restriction Committee many times for many years—and who actually assisted in the drafting of these restrictions—testified that cantilevered bay windows have not violated the front setback

requirement in the past and he was not sure if front porches were even considered with regard to the front setback requirement.

Diane Warnack, a resident of the subdivision since 1968 who has been an officer of the Subdivision Association and a member of the Building and Use Restriction Committee many times for many years—and who was actually on the committee when defendant submitted his remodel plans—testified that she did not know if bay windows could violate the front setback requirement but she knew that there were several on the street.

William Martin, a resident of the subdivision since 1983 who has been President of the Subdivision Association for many years, testified that only "structures" are considered with respect to the application of the setback requirements and a "structure" is something with a foundation at grade level. Thus, Martin testified, defendant's cantilevered bay window does not violate the deed restriction, and the side part of his porch that is cantilevered does not violate the deed restriction, but the front of the porch that is not cantilevered does violate the front setback restriction.

Richard Munro, a resident of the subdivision since 1999 who became an officer of the Subdivision Association in 2000, as well as a member of the Building and Use Restriction Committee, testified that he inspected defendant's porch and found no violation. The side of the porch was not at grade and thus was considered an overhang which did not violate the side setback requirements. The front of the porch did not violate the front setback because porches have always been allowed in front setbacks.

Testimony from two of the plaintiffs is next considered. Plaintiff Gerald Rynkowski testified that his bay window protrudes into the front setback restriction and he did not seek or obtain approval from the Building and Use Restriction Committee for it because he considered it an overhang. Plaintiff Robert Kamphaus also testified that his bay window protrudes into the front setback restriction and he did not seek or obtain approval for it from the Committee.

Finally, the expert testimony is considered. Plaintiffs' expert, John Eckstein, an architect, testified that defendant's porch was cantilevered and, consequently, it was an architectural feature similar to a roof overhang and not a structure. Defendant's expert, John Vitale, also an architect, testified that an architectural feature is different than a "structure" in that it is a feature on the exterior of a building that is not a main part of the footprint of the building. These features are typically allowed to protrude into setback restrictions. According to Vitale, examples of architectural features include chimneys, porches, overhangs, and porticos.

The trial court, which viewed the premises, held that the porch is not in violation of the governing restrictions because it is cantilevered and above grade. Consistent with plaintiffs' expert's testimony, the court held that the cantilevered porch is an architectural feature, rather than a structure. The court further held that the bay window is an architectural feature, as opposed to a structure, and did not violate any setback restrictions. We agree with the trial court's conclusions.

The deed restriction clearly applies only to "structures." Testimony of officers or former officers of the Subdivision Association—who would be most familiar with the restrictions—support the trial court's conclusion that neither the bay window nor porch were "structures."

From Bennett's testimony one could surmise that neither bay windows nor porches are "structures." Warnack's and Martin's testimony also indicated that bay windows were not "structures." Martin claimed that the side of the porch was not a "structure," but the front of the porch was a "structure" and protruded into the front setback. But Munro testified that porches have always been allowed to protrude into the front setback, i.e., they are not considered "structures." The two plaintiffs who testified indicated that they believed bay windows were not "structures." Plaintiffs' expert testified that defendant's porch was not a "structure." Defendant's expert testified that neither the bay window nor the porch were "structures." Only Martin believed that part of defendant's porch—not the entire porch—was a "structure," but plaintiffs' own expert testimony disagreed with that conclusion. No one testified that defendant's bay window was a "structure." Accordingly, whether called "architectural features" or some other name, we agree with the trial court that neither the porch nor bay window were "structures" within the contemplation of the restriction. Thus, this issue is without merit.

Next, plaintiffs argue that the trial court erred in refusing to enforce the deed restrictions with respect to defendant's garage pillars and chimney on the ground that equitable exceptions to their enforcement applied. We disagree.

It is well established that generally courts will enforce valid, unambiguous deed restrictions. See *Bloomfield Estates Improvement Ass'n, Inc*, *supra* at 214. However, three equitable exceptions to enforcement were identified in *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957): (a) technical violations and absence of substantial injury, (b) changed conditions, and (c) limitations and laches. See, also, *Webb v Smith (After Second Remand)*, 224 Mich App 203, 211; 568 NW2d 378 (1997). These exceptions are at issue here. First, because the trial court held that the "technical violation" exception applied with regard to the garage pillars and chimney, we turn to it. We must consider whether the claimed violation was a "technical violation" and, if so, whether it caused substantial injury. This Court has defined a "technical violation" as a slight deviation or a "violation that can in no wise . . . add to or take from the objects and purposes of the general scheme of development." *Webb*, *supra* at 212, quoting *Camelot Citizens Ass'n v Stevens*, 329 So2d 847, 850 (La App, 1976).

Plaintiffs argue that our Supreme Court, in *Terrien*, *supra*, renounced the "technical violation" exception with regard to deed restrictions and, instead, held that "no matter how *de minimis* and no matter the scope of the plaintiff's injury, [the restriction] must be enforced." We disagree with plaintiffs' interpretation of the holding. In *Terrien*, the defendants were operating day care businesses in their homes despite a covenant permitting only residential uses and prohibiting commercial, industrial, or business uses. The *Terrien* defendants argued that, even if they were in violation of the covenant, an injunction was not warranted because no substantial harm resulted. In response to that argument, the *Terrien* Court held:

> It is of no moment that, as defendants assert, the "family day care homes" cause no more disruption than would a large family or that harm to the neighbors may not be tangible. As we noted in *Austin v Van Horn*, 245 Mich 344, 347; 222 NW 721 (1929), "the plaintiff's right to maintain the restrictions is not affected by the extent of the damages he might suffer for their violation." This all comes down to the well-understood proposition that a breach of a covenant, no matter how minor and no matter how *de minimis* the damages, can be the subject of enforcement. As this Court said in *Oosterhouse v Brummel*, 343 Mich 283, 289; 72 NW2d 6

> (1955), "'If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of the covenant affords sufficient ground for the Court to interfere by injunction.'" [*Id*. at 65 (Citations omitted).]

Because the operation of a day care facility was a substantial deviation from the deed restriction—not a slight deviation—the covenant could be enforced even if only de minimis damages were sustained. In other word, the first element of the technical violation exception was not met.

Plaintiffs also rely on the case of *Village of Hickory Pointe Homeowners Ass'n*, *supra*, for their position that the "technical violation" exception is no longer viable law. In that case, the defendants built a deck without first receiving permission from the homeowners association in clear violation of the deed restriction requirement. The trial court held that the breach was a technical violation and denied relief. Quoting *Terrien*, *supra* at 65, this Court reversed, holding that the failure to submit the plans before constructing the deck constituted a substantial violation of the deed restriction—not a technical violation—and that, regardless of the damages, the plaintiff was entitled to relief. *Village of Hickory Pointe Homeowners Ass'n*, *supra* at 516.

Because the case law that plaintiffs have set forth in support of their position that the "technical violation" exception is no longer viable law, and our own research, has failed to substantiate that claim, we reject that position. The cases of both *Terrien* and *Village of Hickory Pointe Homeowners Ass'n* clearly involved substantial violations of deed restrictions. Accordingly, the respective Courts held that the amount of damages sustained as a consequence of the substantial violations was irrelevant.

Here, the trial court held that the placement of defendant's garage pillars and chimney constituted technical—not substantial—violations of the setback requirements. We first address the garage pillars. The garage pillars are located nine inches into the fifty-foot front setback. Considering its size and percentage, we agree that this constitutes a technical, not substantial, violation of the deed restriction. Plaintiffs also appear to argue that such violation causes them substantial harm because it causes an obstruction of the Kamphauses' lakeward view. However, there was unrebutted testimony—including from the Kamphauses—that defendant could have constructed his whole garage, and not just these pillars, closer to the front setback which would have completely blocked the Kamphauses' lakeward view and that he did not do so in an effort to preserve their lakeward view. Defendant's efforts were successful because, as the trial court noted, the Kamphauses have a lakeward view through the pillars. Accordingly, we agree with the trial court's conclusion that the placement of the garage pillars constitutes a technical violation that does not warrant relief.

We next consider the issue of the chimney. The trial court held that it was in violation of the deed restrictions because it "extends approximately twenty-eight feet beyond the end of the habitable wall of the house that had previously been situated on the property." Although the trial court did not specify, it appears that this addition was in violation of the restriction providing that "[b]uilding lines shall be maintained in strict accordance with the building line diagram as shown

upon the recorded plat of said subdivision."[2] However, applying all three equitable exceptions to the application of the deed restriction, the trial court concluded that removal was not warranted; thus, we consider each exception in turn.

First, the court held that the violation was merely a technical violation. The trial court failed to set forth its rationale and it is unclear to us. To the extent that the trial court meant that the extension of 28 feet constituted a "slight deviation," we disagree. The extension is substantial, not slight. And to the extent the trial court meant that the violation did not "add to or take from the objects and purposes of the general scheme of development," we also disagree. It is clear that an object and purpose of the general scheme of development is to ensure that this residential subdivision contains fairly uniform homes, in size and structure, that enjoy a fair amount of distance between them for privacy, air, light, and views. Defendant's extension of 28 feet is not consistent with this object and purpose.

Second, and in the alternative, the trial court held that removal of the chimney was not warranted because "the evidence shows that the restrictions have been selectively enforced inasmuch as William Martin, Sam Gizzi, and John Bennett, among others, were allowed to construct additions or new dwellings that did not strictly comply with the restrictions." Thus the court appears to have relied on the second equitable exception to enforcement of the deed restriction, apparently holding that there has been a change of conditions because of inconsistent enforcement resulting in a waiver of the restriction. We disagree.

In *Cooper*, *supra* at 531, our Supreme Court explained when the "changed condition" exception would be applicable as follows: "If the purpose for which restrictions were imposed can no longer be accomplished, equity will not enjoin their violation." In *Margolis v Wilson Oil Corp*, 342 Mich 600, 603; 70 NW2d 811 (1955), it was similarly stated that "[a]bandonment of restrictions by permitted violations and resultant change of character of the neighborhood amounts to a waiver." In *Rofe v Robinson*, 415 Mich 345; 329 NW2d 704 (1982), it was likewise stated that "the restrictions will not be lifted unless the character of the subdivision has changed in such a way as to subvert the original purpose of the restrictions." *Id*. at 352. More recently, in *Tottis v Dearborn Hills Civic Ass'n, Inc*, 467 Mich 945; 656 NW2d 525 (2003), our Supreme Court held: "There is no waiver of restrictions where the character of the subdivision has not been so altered as to defeat the original purpose of restriction." See, also, *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 346; 591 NW2d 216 (1999).

Here, as discussed above, an object and purpose of the deed restrictions was to prohibit haphazard building and the crowding of lots and lot lines. It also appears that preserving the lakeward view was a significant consideration. The evidence regarding William Martin's home included that he had steps that encroached on the side setback about 20 inches. With regard to John Bennett's home, it is unclear to us as to what violation the trial court was referring. There

[2] In their motion for rehearing or reconsideration, plaintiffs appeared to claim that the deed restriction violated by the chimney related to the purported prohibition against obstructing the lakeward view. Although the trial court did not specifically indicate which deed restriction was violated and plaintiffs certainly were not clear on their claim, it appears to us that the deed restriction found violated by the trial court related to defendant's failure to follow the proper building line when he added on to the house.

is no evidence that the addition to Bennett's house failed to adhere to the setback requirements or the building line diagram. And it appears that his addition did not block the lakeward view of his neighbors. The evidence regarding Sam Gizzi's home indicates that he has a basement egress window that extends between a foot and two-feet into the side setback, but there is no evidence that his house violates any other setback requirements or the building line diagram. As for the trial court's reference to "others" who have been "allowed to construct additions or new dwellings that did not strictly comply with the restrictions," we cannot conclude that any such violations were similar to defendant's violation or that they were of significant magnitude.

In summary, the trial evidence does not support a conclusion that there are so many deed restriction violations that the object and purpose of the restrictions has been either defeated or abandoned. That is, we are not persuaded that the character of the neighborhood intended and fixed by the restrictions has been altered by any of the purported violations of the deed restrictions. See *O'Connor*, *supra*.

Next, we turn to the third equitable exception to the application of the deed restriction with respect to defendant's chimney. The trial court concluded, in the alternative, that the doctrine of laches applied because plaintiffs "unduly delayed in seeking to enforce the restrictions, to the detriment of defendant, who continued to invest time and money into the construction project." We agree with this conclusion.

In *In Re Crawford Estate*, 115 Mich App 19, 25-26; 320 NW2d 276 (1982), this Court explained that for a defense of laches to succeed, it must be shown that there was a passage of time, in addition to some prejudice to the party asserting the defense such that it would be inequitable to grant relief to the dilatory plaintiff. "Laches is concerned mainly with the question of the inequity of permitting a claim to be enforced and depends on whether the plaintiff has been wanting in due diligence." *Id*. at 26. Similarly, in *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996), our Supreme Court explained that laches applies when there has been an unexcused delay in commencing an action, which has resulted in prejudice. Likewise, in *Edgewood Park Ass'n v Pernar*, 350 Mich 204, 209; 86 NW2d 269 (1957), the Court held that, when action has been taken by a plaintiff with reasonable promptness after it has become evident that a defendant intends to permanently violate the applicable deed restriction, the plaintiff is not guilty of laches.

Here, it appears that defendant began the construction on his home in approximately February of 2003. The trial evidence includes that, before beginning construction, defendant showed his plans to, at least, plaintiffs Donna and Robert Kamphaus. It appears that the concrete work for the chimney's foundation was then completed in about April of 2003. Defendant testified that the chimney was framed in on May 11, 2003. Robert Kamphaus testified that he saw defendant's chimney stand in a roughed in condition for about three or four weeks before it was bricked. Robert further testified that defendant had asked his permission to allow scaffolding on his property so that the side of the house and chimney could be bricked and Robert gave his permission. Defendant testified that Robert merely asked that they keep his yard clean. Robert admitted that he was a member of the subdivision association's board of directors and that he understood the Building and Use Restrictions from having been on the Board. Nevertheless, no action was taken by Robert or any other plaintiff with regard to defendant's chimney while it was under construction.

This lawsuit was not filed until November 6, 2003, over seven months after it became apparent to plaintiffs that defendant intended a permanent violation of the applicable deed restriction. We agree with the trial court that plaintiffs' actions were not taken with reasonable promptness which resulted in prejudice to defendant who had completed the construction of the chimney. Under the facts and circumstances of this case, including plaintiffs' awareness of, and familiarity with, the Building and Use Restrictions, we conclude that plaintiffs are guilty of laches and are precluded from enforcing the deed restriction. Therefore, we affirm the trial court's holding that plaintiffs are not entitled to equitable relief with regard to defendant's chimney.

In summary, none of plaintiffs' issues on cross-appeal warrant relief. In brief, Article IX, Section 12 of the Ardmore Subdivision Association's Bylaws does not require a lot owner to submit plans for proposed buildings and additions. Defendant's home does not violate the two-story height restriction. Defendant's front porch and bay window do not violate the setback requirements in the deed restrictions. And, although defendant's garage pillars and chimney violate the deed restrictions, the "technical violation" exception applies with regard to the garage pillars, and the laches exception applies with regard to the chimney. Accordingly, we affirm the trial court's dismissal of plaintiffs' complaint and the entry of a judgment in defendant's favor.

Next, we address defendant's issue on direct appeal which challenges the trial court's denial of his request for case evaluation sanctions. Defendant argues that he was entitled to case evaluation sanctions under MCR 2.403(O) because plaintiffs were awarded $7,500, which defendant accepted and plaintiffs rejected. Ultimately, plaintiffs were denied any relief and their complaint was dismissed; thus, defendant argues that he is entitled to case evaluation sanctions. We agree. Generally a trial court's decision to grant or deny case evaluation sanctions is reviewed de novo. See *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003). However, to the extent that the trial court's decision was discretionary, our review is for an abuse of discretion. See *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005).

MCR 2.403(O)(1) provides:

> If a party rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.

And MCR 2.403(O)(5) provides:

> If the verdict awards equitable relief, costs may be awarded if the court determines that
>
> (a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and
>
> (b) it is fair to award costs under all of the circumstances.

In this case, plaintiffs filed their complaint initially seeking monetary and equitable relief as a consequence of defendant's alleged violations of several deed restrictions. Defendant responded that the deed restrictions were invalid but, even if they were valid, either he was not in violation of them or such violation was subject to an equitable exception to enforcement. The matter proceeded through case evaluation with plaintiffs receiving an award of $7,500, which defendant accepted and plaintiffs rejected. Thereafter, defendant moved for summary dismissal on the ground that the deed restrictions were invalid and unenforceable against him. The trial court agreed with defendant and granted his motion. On plaintiffs' appeal, that decision was reversed by this Court, and the matter was remanded for further consideration and determination whether defendant remained entitled to summary dismissal. At some point, plaintiffs apparently abandoned their claim for monetary relief. The matter proceeded to a bench trial and, although the deed restrictions were found to be valid, plaintiffs were denied any equitable relief and their complaint was dismissed.

Defendant argues that, because plaintiffs were denied relief on any of their claims, he is entitled to case evaluation sanctions. Plaintiffs argue that they were awarded equitable relief when the trial court held that the restrictions were valid and enforceable against defendant, although they were denied injunctive or other relief. We disagree. Plaintiffs rejected the case evaluation of $7,500 and, following a bench trial, their complaint was dismissed. Clearly, under MCR 2.403(O)(1), the verdict was not "more favorable to the rejecting party than the case evaluation." And, under MCR 2.403(O)(5), "taking into account both monetary relief . . . and equitable relief, the verdict [was] not more favorable to the rejecting party than the evaluation." Plaintiffs, in fact, did not prevail on any of their claims and thus failed to improve their pre-trial position in any respect. Instead, the defenses raised by defendant were successful, and defendant was the prevailing party.

Specifically, plaintiffs claimed throughout this case that defendant failed to submit his building plans for approval or rejection as purportedly required by the deed restrictions but, as defendant argued, there is no such provision. Plaintiffs also claimed that defendant's house exceeded two stories in violation of the deed restriction but, as defendant argued, it does not. Plaintiffs claimed that defendant's front porch and bay window were structures within the contemplation of the setback requirements of the deed restrictions and, as defendant argued, they are not structures. Plaintiffs claimed that defendant's garage pillars encroached into the front setback requirement by nine inches but, as defendant argued, such encroachment constituted a mere technical violation that did not cause substantial injury—a well-established exception to enforcement. And finally, plaintiffs claimed that the location of defendant's chimney failed to conform to the platted building lines but, as defendant argued, plaintiffs were guilty of laches—a well-established exception to enforcement.

The trial court justified denying defendant's motion for case evaluation sanctions on the ground that it did find violations of the Building and Use Restrictions, it just was not going to require defendant to "take his house down." Apparently in reaching this conclusion the trial court was relying on MCR 2.403(O)(5)(b). However, MCR 2.403(O)(5), provides that "If the verdict awards equitable relief, costs may be awarded . . . ." As we discussed above, plaintiffs were not awarded any equitable relief thus that provision is not applicable. But even if we were to agree with plaintiffs' argument that the finding that the deed restrictions were valid and enforceable constituted equitable relief, which we do not, we would conclude that the trial court

abused its discretion in denying defendant's motion for case evaluation sanctions. See *Haliw v City of Sterling Heights (On Remand)*, 266 Mich App 444, 450; 702 NW2d 637 (2005); *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 78-79; 577 NW2d 150 (1998). The two deed restrictions that were violated were clearly subject to two very well-established equitable exceptions to enforcement. Accordingly, we reverse the denial of defendant's motion for case evaluation sanctions and remand this issue to the trial court for determination of the proper amount of case evaluation sanctions to be awarded to defendant.

Affirmed in part, reversed in part, and remanded for a determination of the proper amount of case evaluation sanctions to be awarded to defendant. We do not retain jurisdiction. Defendant, being the prevailing party, is entitled to costs pursuant to MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

STATE OF MICHIGAN

COURT OF APPEALS

ROBERT KAMPHAUS, DONNA KAMPHAUS, MICHAEL CIUCHNA, KRISTY CIUCHNA, GERALD RYNKOWSKI, and VIRGINIA RYNKOWSKI,

Plaintiffs-Appellees/Cross-Appellants,

v

DAVID A. BURNS,

Defendant-Appellant/Cross-Appellee,

and

JOHN DOE and MARY ROE,

Defendants.

UNPUBLISHED
February 26, 2009

No. 279962
Macomb Circuit Court
LC No. 2003-005067-CZ

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I concur in the result reached by the majority with respect to the issues raised by plaintiffs on cross-appeal. I respectfully dissent, however, from the majority's conclusion that defendant was entitled to case evaluation sanctions under MCR 2.403(O).

It is true that the ultimate verdict in this case was less favorable to plaintiffs than was the case evaluation award of $7,500. However, as noted by the majority, plaintiffs had abandoned their claim for money damages by the time of the bench trial in this matter. The trial court ultimately concluded that certain of defendant's actions had not violated the deed restrictions, but that certain of defendant's other actions had constituted "technical violations" of the deed restrictions. Because no money damages were awarded, the trial court's verdict in this regard essentially amounted to a declaratory judgment.

Suits for declaratory relief are equitable in nature. *Coffee-Rich, Inc v Dep't of Agriculture*, 1 Mich App 225, 228; 135 NW2d 594 (1965). Although case evaluation sanctions are generally mandatory when the ultimate verdict is less favorable to the rejecting party than the

case evaluation award would have been, MCR 2.403(O)(1), sanctions are merely discretionary when the verdict awards equitable relief, MCR 2.403(O)(5). When a verdict awards equitable relief, case evaluation sanctions "may" be awarded, MCR 2.403(O)(5), but only when "it is fair to award costs under all of the circumstances," MCR 2.403(O)(5)(b).

The trial court's verdict was essentially a declaratory judgment, and therefore clearly amounted to an award of "equitable relief" within the meaning of MCR 2.403(O)(5). See *Coffee-Rich, Inc*, 1 Mich App at 228; see also *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 79-80; 577 NW2d 150 (1998). Therefore, the court was entitled to award case evaluation sanctions to defendant only if doing so would have been "fair . . . under all of the circumstances." MCR 2.403(O)(5)(b). I conclude that it would not have been fair to award case evaluation sanctions under the circumstances of this case because, as the trial court properly determined, defendant had, indeed, violated the deed restrictions in many respects. Even assuming that many of defendant's violations were merely "technical violations", and therefore not sufficiently egregious to warrant relief for plaintiffs, defendant still acted wrongfully by violating the deed restrictions in the first instance.

Although I disagree with the trial court's exact reasoning, I conclude that it reached the correct result in denying defendant's motion for case evaluation sanctions. See MCR 2.403(O)(5)(b). In general, this Court should affirm when the trial court has reached the correct result, even if it has done so for the wrong reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006). I would affirm the trial court's denial of defendant's request for case evaluation sanctions in this case.

/s/ Kathleen Jansen