Michigan's Procrustean Deed Restriction Jurisprudence

It is Time to Correct Michigan's Accidental Deed Restriction Caselaw

By Joseph E. Viviano

In 1934, the Michigan Supreme Court cautioned, "Building restriction cases are governed by particular facts, and it is neither possible nor desirable to establish a measuring stick and thereafter cut cases to fit, for that would be too Procrustean."[1] Procrustes is the figure in Greek mythology who chopped or stretched his victims to make them fit into an iron bed. Nearly 80 years after this warning, through a traceable mutation of the law, Michigan courts apply just such a Procrustean measuring stick in deed restriction cases—with the predicted arbitrary, unjust, and incorrect results.

In a 1957 case, *Cooper v Kovan*,[2] the Michigan Supreme Court cited 26 CJS, Deeds § 171 for the following proposition: "As equitable exceptions to the general rule that the courts will enforce valid restrictions by injunction we find these: (a) Technical violations and absence of substantial injury; (b) Changed conditions; (c) Limitations and laches."[3] Through this one sentence, the misconception has entered Michigan law that where the defenses of laches, waiver by changed conditions, or technical violations are not present, all violations of deed restrictions must be remedied by injunction, in every case, without consideration of the facts or equities.[4]

The *Cooper* rule is a radical departure from classical deed restriction jurisprudence (as expressed in Michigan and elsewhere). It arose from a mis-citation of 26 CJS, Deeds § 171 and has caused absurd results and inconsistencies in Michigan law. It is not accepted by any other state and is contradicted by leading treatises. It should be removed, root and branch, from Michigan law.

Deed restriction cases are equitable in nature. It is a foundational principle of equity that a party is never automatically entitled to an injunction. This principle was established in English law centuries ago. In his history of the Supreme Court, Chief Justice William Rehnquist explained:

> To mitigate the harshness of some results reached in common-law courts, the king's chancellor began dispensing a second brand of justice known as "equity." An injunction—which is nothing more than a court order directed to a party and requiring the party to do something or not to do something—was a creature of the courts of equity, and because of this, *one was never automatically entitled upon a showing of a particular set of facts to obtain an injunction; it was a matter of discretion with the court, based on a careful weighing of all surrounding circumstances.*[5] [Emphasis added.]

Consistent with this, a long line of Michigan deed restriction cases has held that injunctive relief is never a matter of absolute right and is within the sound discretion of the trial court.[6]

The *Cooper* rule states exactly the opposite—on violation of a restrictive covenant and the absence of three specific defenses (technical violations, changed conditions, and laches), trial courts must ignore the equities and issue an injunction. That blanket rule—unique to Michigan—converts discretionary injunctive relief into a mandatory injunctive remedy. How did this happen?

The *Cooper* error

The *Cooper* rule entered Michigan law through a careless citation. In *Cooper*, the Michigan Supreme Court cited *Corpus Juris Secundum* for a rule of law that is nowhere stated in that treatise (or anywhere else). *Cooper* solely relied on 26 CJS, Deeds § 171. Section 171 of the relevant edition does contain the following heading:

> § 171 ——— Enforcement
>
> a. In general…
> b. Technical violations and absence of substantial injury…
> c. Changed conditions…
> d. Limitations; laches…[7]

Apparently, the person who derived the *Cooper* rule from Section 171 stopped reading after the heading. Section 171 does not state or even remotely suggest that a party is absolutely entitled to an injunction in all deed restriction cases in the absence of technical violations, changed conditions, or laches. Instead, Section 171 directs the reader to Injunctions, Section 87 for a discussion of the right to enjoin violations of restrictive covenants.[8] Section 87 recites classic principles of deed restriction law and states:

> [N]ot every violation of a building restriction will entitle plaintiff to injunctive relief. *The granting or refusal of relief is a matter of the discretion of the trial court and not a matter of absolute right*, and is to be governed by equitable considerations. Each case must depend on its peculiar circumstances.[9] [Emphasis added.]

Thus, the only legal authority cited for the *Cooper* rule flatly contradicts the *Cooper* rule.

FAST FACTS

The misconception has entered Michigan law that when the defenses of laches, waiver by changed conditions, or technical violations are not present, all violations of deed restrictions must be remedied by injunction, in every case, without consideration of the facts or equities.

It is a foundational principle of equity that a party is never automatically entitled to an injunction.

The *Cooper* rule is unique to Michigan in the history of Anglo-American law. It entered Michigan law through a careless citation.

The absence of harm?

Generally, a showing of substantial and irreparable harm is required before a court may grant injunctive relief. In the context of deed restrictions, because of their intangible and often difficult-to-quantify nature, an exception to this general rule exists: a party is not required to show substantial or irreparable harm before obtaining an injunction.[10]

This entirely correct statement of the law has become a springboard to an error and a non sequitur in the Michigan cases applying the *Cooper* rule. The fact that a party is not required to show irreparable harm does not mean that a party has an absolute right to an injunction to remedy every violation of a deed restriction. The proper equitable principle was stated in *Kernen v Homestead Development Company*,[11] where the Michigan Court of Appeals held that trial courts are *permitted* but not *required* to balance the equities in determining whether injunctive relief is appropriate.[12]

These two bedrock principles (no requirement of substantial harm and no absolute right to injunctive relief) have resided comfortably together in classical deed restriction law.[13] The *Cooper* rule misapplies the first rule to destroy the second.

Contradictions, confusion, and absurdity

The *Cooper* rule is not accepted anywhere outside of Michigan. It is contradicted by numerous Michigan authorities,[14] scores of cases from other states,[15] and leading treatises.[16]

In *Oosterhouse v Brummel*,[17] none of the three *Cooper* defenses were present, but the Michigan Supreme Court held that whether to issue an injunction remained in the "discretion of the trial chancellor" and depended "upon the accomplishment of an equitable result in light of all of the circumstances surrounding the particular case."[18]

Similarly, in *Harrigan v Mulcare*,[19] the Michigan Supreme Court stated:

> No benefit would result from a comparison of the many cases which have reached this court where the enforcement of building restrictions has been sought. Each has been decided with reference to the factual situation shown.
>
> "Courts of equity, in passing upon cases of this character, grant or withhold injunctive relief depending upon the accomplishment of an equitable result in the light of all the circumstances surrounding the particular case."[20]

The *Cooper* rule also contradicts another universally accepted principle of equity: a party with unclean hands (for example, a party that is itself in violation of a restrictive covenant) may not seek equitable relief.[21] If unclean hands is a defense in deed restriction cases, then consideration of the equities is permitted in the absence of the three listed defenses, and the *Cooper* rule must fall. If unclean hands is not a defense—as the *Cooper* rule states—then Michigan law mandates ridiculous outcomes. Consistent application of the *Cooper* rule would permit a person with a greater violation of a restrictive covenant to sue a neighbor with a lesser violation. It would even permit a person who tricks his neighbor into violating a restrictive covenant—perhaps by supplying false drawings or documents—to sue that neighbor for the violation. The *Cooper* rule supplies no escape from these outcomes.

Trial courts have discretion to balance the equities and decline to issue an injunction when a neighbor purposely builds *on someone else's property*. But in restrictive covenant cases involving negative property rights such as setbacks *on the violator's own property*, trial courts are absolutely forbidden to balance the equities. There is no logical explanation for this.

The *Cooper* rule has introduced other absurdities into Michigan's equity jurisprudence. In intentional trespass cases, involving deliberate actions, it is settled law that a trial court may—but is not bound to—consider the equities and grant or deny an injunction based on a consideration of all the particular facts.[22] This means that trial courts have discretion to balance the equities and decline to issue an injunction when a neighbor purposely builds *on someone else's property*. But in restrictive covenant cases involving negative property rights such as setbacks *on the violator's own property*, trial courts are absolutely forbidden to balance the equities. There is no logical explanation for this.[23]

The confusion in Michigan deed restriction law was discussed at length in *In re Signature Developments, Incorporated*,[24] which held, contrary to the *Cooper* rule, that trial courts should retain discretion on whether to issue injunctive relief in deed restriction cases.

In 2012, in *Thom v Palushaj*,[25] a case that was frequently in the news, the Michigan Court of Appeals ordered the destruction of a mansion valued at $2 million because of violations of restrictive covenants—specifically lot-line setback restrictions.[26] The alleged violations were on the Palushaj's *own property*. The claim was that the home was built too close to the property boundaries. The home was 80 feet away from the home of the complaining neighbors.

The trial court exercised its discretion, balanced the equities, and declined to order destruction of the home because the complaining neighbors could barely see the offending structure and had suffered no loss of privacy, no loss of view, no loss of use or enjoyment, no loss of value, and no tangible harm whatsoever.[27]

The Court of Appeals reversed on the ground that the trial court "did not have discretion to balance the equities where the exceptions described in *Cooper* were not present."[28] Under this illogical litmus test, born of a mis-citation, the Court of Appeals held that a $2 million home had to be destroyed—and that no other remedy could be considered—despite the total absence of harm and the presence of other mitigating factors.

Conclusion

The *Cooper* rule, as currently applied by the Court of Appeals, is inconsistent with numerous Michigan precedents and is a radical departure from principles of equity that are universally accepted outside of Michigan. It has introduced absurd contradictions into Michigan law. The *Cooper* rule survives because, at a glance, it appears to be laudable—a clear rule that advances strict enforcement of restrictive covenant agreements.

But upon examination, it leads to arbitrary, unpredictable, and senseless outcomes. Equitable jurisdiction is not an invitation to judicial rule-making. It arose from the recognition—centuries ago in England—that some decisions are not amenable to formulas and require the exercise of discretion and the weighing of particular facts and circumstances. There is no basis in precedent or logic for stripping trial courts of this discretion in the area of deed restrictions. ■

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ENDNOTES

1. *Hamburger v Kramp*, 268 Mich 611, 613; 256 NW 566 (1934).
2. *Cooper v Kovan*, 349 Mich 520; 84 NW2d 859 (1957).
3. *Id.* at 530.
4. See, e.g., *Lake Columbia Prop Owners Ass'n v Walby*, unpublished opinion per curiam of the Court of Appeals, issued January 9, 1998 (Docket No. 198959); *Dean v Hanson*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2003 (Docket No. 241317); *BP Products N America, Inc v Canton Holdings, LLC*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2009 (Docket No. 284954); and *Thom v Palushaj*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2012 (Docket No. 301568).
5. Rehnquist, *The Supreme Court* (New York: First Vintage Books Edition, 2002), pp 157–158.
6. See, e.g., *Davison v Taylor*, 196 Mich 605, 611; 162 NW 1033 (1917) (enforcement of restrictive covenants "in a court of equity is not a matter of absolute right, and is governed by the same general rules which control equitable relief by specific performance."); *Windemere-Grand Impr & Protective Ass'n v American State Bank of Highland Park*, 205 Mich 539, 548; 172 NW 29 (1919); *Frigo v Janek*, 237 Mich 642, 645; 212 NW 959 (1927); *Johnstone v Detroit, Grand Haven & Milwaukee Rwy Co*, 245 Mich 65, 86; 222 NW 325 (1928).
7. 26 CJS, Deeds (1956 ed), § 171, p 1172.
8. *Id.* at 1174–1175.
9. 43 CJS, Injunctions, § 87, p 590.
10. *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002).
11. *Kernen v Homestead Dev Co*, 223 Mich App 503, 514; 591 NW2d 369 (1998).
12. *Id.* The case of *Webb v Smith (Aft Sec Rem)*, 224 Mich App 203; 568 NW2d 378 (1997) is often mis-cited as creating a rule of absolute enforcement regardless of harm. Read properly, *Webb* is an application of the rule stated in *Kernen*. See *In re Signature Developments, Inc*, 348 BR 758, 765–766 (ED Mich 2006). See also *Bloomfield Estates Improvement Ass'n v City of Birmingham*, unpublished opinion of the Court of Appeals, issued March 14, 2006 (Docket No. 255340) at 4. Another reason to conclude that *Webb* and *Kernen* should be read consistently with each other: the current chief justice of the Michigan Supreme Court, Robert Young, wrote both opinions.
13. See *Oosterhouse v Brummel*, 343 Mich 283; 72 NW2d 6 (1955); *Hartford Electric Light Co v Levitz*, 173 Conn 15; 376 A2d 381 (1977); *Turpin v Watts*, 607 SW2d 895, 901 (Mo App 1980); 43 CJS, Injunctions, § 87, pp 587–588.
14. In addition to the cases discussed in this section, see n 6.
15. See, e.g., *Bauby v Krasow*, 107 Conn 109; 139 A 508 (1927); *Hall v Liebovich Living Trust*, 300 Wisc 2d 725; 731 NW2d 649 (2007); *Schwartz v Holycross*, 83 Ind App 658; 149 NE 699 (1925); *Harksen v Peska*, 1998 SD 70; 581 NW2d 170 (1998); *Herman v Hartwood Holding Co, Inc*, 193 AD 115; 183 NYS 402 (1920); *McRae v Grunow*, 40 Ariz 496; 14 P2d 478 (1932); *Massengill v Jones*, 308 SW2d 535 (Tex App 1957); *Holmes Harbor Water Co, Inc v Page*, 8 Wash App 600; 508 P2d 628 (1973); *Turpin v Watts*, 607 SW2d 985 (Mo App 1980); *Kilian v City of West Linn*, 112 Ore App 549; 744 P2d 1314 (1992); *Martin v Lake Mohawk Prop Own Ass'n*, 2005 Ohio 7062 (Ohio App 2005).
16. See, e.g., 20 Am Jur 2d, Covenants, § 328; Restatement Property, 3d, § 8.3; 43A CJS, Injunctions, § 80.
17. *Oosterhouse v Brummel*, 343 Mich 283; 72 NW2d 6 (1955).
18. *Id.* at 290.
19. *Harrigan v Mulcare*, 313 Mich 594; 22 NW2d 103 (1946).
20. *Id.* at 606–607, quoting *Cherry v Bd of Home Missions*, 254 Mich 496, 500; 236 NW 841 (1931); see also *Bloomfield Estates Improvement Ass'n v City of Birmingham*, unpublished opinion per curiam of the Court of Appeals, issued March 14, 2006 (Docket No. 255340) at 4, affirmed by *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206; 737 NW2d 670 (2007) (finding a violation of a restrictive covenant but holding that whether to issue an injunction was in the sound discretion of the trial court); *RR Improvement Ass'n v Thomas*, 374 Mich 175, 184; 131 NW2d 920 (1965) (in a restriction case, requiring the trial court to balance the equities and stating that "[a]n injunction that bears heavily on the defendant, without benefiting the plaintiff, will always be withheld as oppressive."); *Hasselbring v Koepke*, 263 Mich 466; 248 NW 869 (1933) (refusing to issue an injunction in a negative easement case based on what "was most consistent with justice and equity under all the circumstances of the case.").
21. See *Rose v Nat'l Auction Group*, 466 Mich 453, 462–463; 646 NW2d 455 (2002).
22. See *Kratze v Indep Order of Oddfellows*, 442 Mich 136; 50 NW2d 115 (1993); *Kernen v Homestead Dev Co*, 232 Mich App 503; 591 NW2d 369 (1998).
23. The same contradiction exists in nuisance cases. See *Obrecht v National Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960); see also *Kurle v Walker*, 56 Mich App 406; 224 NW2d 99 (1974).
24. *In re Signature Developments, Inc*, 348 BR 758 (ED Mich, 2006).
25. *Thom v Palushaj*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2012 (Docket No. 301568).
26. *Id.* For the sake of full disclosure, the author of this article represented the Palushajs for roughly half of this nine-year legal odyssey.
27. Order of the Macomb County Circuit Court, issued April 30, 2010 (Case No. 04-3383-CZ), pp 3–4.
28. *Thom*, *supra* at *5.