STATE OF MICHIGAN

COURT OF APPEALS

ROBERT SHIRK and MARY LEE SHIRK,

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

v

ARNOLD VANDYK,

Defendant/Counter-Plaintiff-Appellant/Cross-Appellee.

UNPUBLISHED
April 26, 2002

No. 227193
Barry Circuit Court
LC No. 99-000537-CZ

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant appeals by right from an order granting partial judgment to plaintiffs following a bench trial. The court ruled that defendant must remove three sections of a fence located on his property because it violated a county ordinance by obstructing plaintiffs' view of a lake. Plaintiffs cross-appeal, challenging the court's decision to order only three sections of the fence removed. We affirm in part and reverse and remand in part.

Defendant first argues that the trial court erred in dismissing Jim McManus, the Barry County Zoning and Planning Administrator, as an additional defendant from the case, because defendant was not informed of the dismissal until after the trial commenced and never stipulated to the dismissal. We review for an abuse of discretion the decision whether to drop a party to an action. *Ombrello v Montgomery Ward Long Term Disability Trust*, 163 Mich App 816, 824; 415 NW2d 658 (1987). We discern no abuse of discretion here. Indeed, defendant had not filed a cross-claim against McManus, and the dismissal of McManus did not prevent McManus from testifying at the bench trial. Accordingly, no prejudice to defendant resulted, and appellate relief is unwarranted.[1]

[1] We note that the order of dismissal does not prevent defendant from filing a separate lawsuit against McManus for any damages he may have caused. We further note that contrary to defendant's assertion, MCR 2.504(A)(1)(b) did not govern the dismissal of McManus in this case.

Next, defendant argues that the trial court erred in ordering parts of the fence removed because the county ordinance prohibiting view-blocking fences applies only to fences located on lots with "water frontage." Defendant contends that his lot does not have water frontage because it merely abuts a road that fronts on the lake. Accordingly, defendant contends that the ordinance was inapplicable. We review de novo a trial court's interpretation of a zoning ordinance. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 421; 616 NW2d 243 (2000). As noted in *Brandon*:

> We interpret ordinances in the same manner that we interpret statutes. *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 498; 597 NW2d 858 (1999). If the language is clear and unambiguous, the courts may only apply the language as written. *Id*. However, if reasonable minds could differ regarding the meaning of the ordinance, the courts may construe the ordinance. See generally *Adrian School Dist v Michigan Public School Employees Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998). We follow these rules of construction in order to give effect to the legislative body's intent. *Ballman v Borges*, 226 Mich App 166, 167; 572 NW2d 47 (1997). [*Brandon, supra* at 422.]

Moreover, "[t]his Court reviews equitable actions under a de novo standard." *Webb v Smith (After Second Rem)*, 224 Mich App 203, 210; 568 NW2d 378 (1997). It reviews "for clear error the findings of fact supporting the decision." *Id*.

Section 4.26 of the Barry County Zoning Ordinance provides:

> In all cases where a lot has water frontage, the front lot line shall be the boundary line of the lot immediately opposite to the street right of way with the narrowest frontage, and the rear lot line shall be adjacent to the street right of way with the narrowest frontage. In no case, except as specified in the NR and CR zoning district, no[2] structure or fence shall be allowed to be constructed in the setback area that would restrict the view of the occupants of the dwellings on the adjacent properties.

In the context of this case, this ordinance is ambiguous, because it is not immediately apparent whether defendant possesses a lot with "water frontage." Indeed, the ordinance does not define what qualifies as a lot having water frontage. Accordingly, judicial construction is warranted.

The rules of statutory construction apply in construing ordinances. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995). If legislative intent cannot be determined from a statute itself, a court may consult dictionary definitions. See *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 470; 521 NW2d 831 (1994). The *Random House Webster's College Dictionary* (2nd Ed, 1997), p 521, defines "frontage" as "land abutting on a river, street, etc."

In our opinion, defendant's property fits within this definition. Defendant's deed to his property states that his land includes "Lot 28 [the parcel across the street from the lake] . . . [and]

[2] It is apparent to us that the use of a double negative here was inadvertent and unintentional.

also all land Northeast of said Lot on the Northeast side of the County Road and adjacent thereto between said County Road and Gun Lake." While some evidence seemed to indicate that the only land that separates Lot 28 from the water's edge is land that belongs to the county for use as a county road, a 1998 survey shows that the water's edge was ten feet beyond the right of way. Moreover, a photograph entered into evidence at trial shows a pile of rocks jutting out into the lake, and trial testimony established that some of those rocks were on defendant's side of the property line rather than on plaintiffs' side. Defendant's deed, as noted, includes any land between the road and the lake. Thus, it would include the land between the road right of way and the water's edge identified in the 1998 survey and the photographs regardless of whether that land came into existence through accretion or was there at the time of conveyance.[3]

Moreover, in construing a statute, this Court should not "abandon the canons of common sense." *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). The trial testimony established that both parties used land along the water's edge to the north of their respective lots and treated it as their own. For example, defendant testified that he allows a neighbor to tie his boat up to "his" tree.

In light of all the above circumstances, and using the dictionary definition of "frontage" as a guide, we conclude that defendant's property is a lot having water frontage because his property indeed includes land that abuts the lake.[4] Because defendant's fence is a fence proscribed by § 4.26 of the zoning ordinance, the trial court was correct when it concluded that the fence was a nuisance per se.[5]

We note that we reject the dissent's treatment of defendant's property as consisting of two distinct pieces of land for purposes of § 4.26 of the zoning ordinance. Indeed, we believe that such an interpretation does not accord with the legislative intent behind the ordinance. The land of "Lot 28" and the land across the street were deeded as *one parcel* to defendant. Moreover, the zoning ordinance defines "lot" as "[a] piece of land described . . . by metes and bounds. . .," and Black's Law Dictionary (7th Ed, 1999), p 1005, defines "metes and bounds" as follows:

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[3] We note that defendant admits in his appellate brief that "there is now always some land . . . between the road right of way and the lake on a portion of [defendant's] property."

[4] Moreover, we note that even assuming that the only land separating defendant's property from the lake was the county road, we would still consider defendant's property as a lot having water frontage. Indeed, the Supreme Court has noted that riparian property includes those lots abutting a right of way that is contiguous to water. *Thies v Howland*, 424 Mich 282, 293; 380 NW2d 463 (1985). The *Thies* Court described riparian property as land that "includes or abuts" a lake or river. *Id*. at 288 n 2.

[5] Defendant briefly contends in his appellate brief that even if the fence violated the ordinance at issue, the county "may well be estopped" from enforcing the ordinance because defendant constructed it only after being given the "green light" from the county zoning office. However, defendant waived this issue for appeal by failing to raise it in the statement of questions presented. See *In re BKD*, 246 Mich App 212, 218; 631 NW2d 353 (2001). Moreover, we note that defendant does not explicitly request relief on this issue but merely argues that the county "may" be estopped from enforcing the ordinance.

> The territorial limits of real property as measured by distances and angles from designated landmarks and in relation to adjoining properties. Metes and bounds are usu. described in deeds and surveys to establish the boundary lines of land.

The deed here conveyed "Lot 28 . . . [and] also all land Northeast of said Lot on the Northeast side of the County Road and adjacent thereto between said County Road and Gun Lake." Therefore, the conveyed parcel as a whole was described by metes and bounds and fell within the definition of "lot" under the ordinance.[6] Keeping in mind these definitions and using the canons of common sense, see *Marquis, supra* at 644, we conclude that defendant's parcel as a whole is subject to the fence restrictions of the zoning ordinance.

Next, defendant argues that plaintiffs' claim was barred by laches. While defendant raised laches as an affirmative defense in general, he failed to argue the defense in closing arguments at trial and the trial court did not address it; we therefore could conclude that the issue is waived. Even reviewing this issue, however, we find no error warranting appellate relief.

Laches applies when there has been "an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice. . . ." *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). The defendant bears the burden of proving a lack of due diligence on the part of the plaintiff and resultant prejudice. *Gallagher v Keefe*, 232 Mich App 363, 369-370; 591 NW2d 297 (1998). Here, defendant did not sustain his burden of proving that plaintiffs did not exercise due diligence in timely filing their lawsuit. Plaintiff Mary Lee Shirk testified that defendant's fence was constructed in June of 1998. She further averred that she called McManus when defendant first began construction on the fence. McManus testified that, while his initial reaction was that the fence did not violate the zoning ordinance, his opinion concerning its legality changed after plaintiffs furnished him with case law concerning what types of property are considered riparian. Thereafter, McManus notified the county prosecutor's office about what he perceived to be a potential violation of the ordinance. On June 14, 1999, the county prosecutor's office wrote to McManus stating that it would not pursue the matter because of its opinion that the fence did not violate section 4.26 of the zoning ordinance. Approximately four weeks later, on July 27, 1999, plaintiffs filed this lawsuit. Thus, the record establishes that plaintiffs sought other means of halting the construction of the fence before filing suit. Because defendant did not sustain his burden of showing that plaintiffs' delay in filing this action was unreasonable, his laches argument lacks merit.

Defendant additionally argues that the trial court should not have granted equitable relief to plaintiffs because plaintiffs had unclean hands. In particular, defendant asserts that plaintiff Robert Shirk struck defendant and that plaintiffs unreasonably contacted the police about an incident involving defendant. However, defendant cites no legal authority and provides no citations to record evidence in making his "unclean hands" argument and has therefore waived it for purposes of appeal. See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 421 (2001),

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[6] Moreover, the conveyed parcel as a whole met the definition of "lot of record" under the ordinance.

and MCR 7.212(C)(7). Even if we *were* to address this argument, we would discern no basis for appellate relief. Indeed, the principle of unclean hands applies when the actions of bad faith relate to the matter for which relief was requested, see *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975), and defendant's assertions of bad faith here concern matters outside the scope of the construction of the fence.

On cross-appeal, plaintiffs argue that the trial court erred in concluding that defendant need only remove three sections of his fence. The trial court ruled that the fence could extend to the edge of defendant's deck, but plaintiffs contend that under the language of the zoning ordinance, the fence could only extend to the edge of defendant's *house*.

As noted, § 4.26 of the zoning ordinance provides that "no structure or fence shall be allowed to be constructed *in the setback area* that would restrict the view of the occupants of the dwellings on the adjacent properties" (emphasis added). Section 4.32, the section of the zoning ordinance establishing supplementary setback requirements, requires structures constructed on lots abutting a county primary roadway to be set back from the road either fifty feet or to the existing building line, whichever is closer.[7]

Here, trial testimony established that defendant's house is forty-two feet from the road. Attached to the house is an uncovered deck. In concluding that defendant must remove three sections of his fence, the trial court decided that the fence must end at the point where the deck extends farthest from the house. The trial court viewed the setback area as extending to that point rather than to where the deck and house meet. However, a review of § 4.32 reveals that the appropriate setback was to the "existing building." Under the ordinance, the term "building" is defined as "[a] structure either temporary or permanent, having a roof supported by columns or walls." Thus, we agree with plaintiffs that the fence must be set back to defendant's house rather than to the point of the deck farthest from the house.

Defendant contends that the trial court did not err by ordering only three sections of the fence removed because "[t]here is nothing to prohibit the construction of a fence within the setback area if it does not 'restrict the view' of adjacent properties." He asserts that "[t]he trial court obviously called for the removal of that portion of the fence (three sections) which it

[7] We note that the dissent at one point in its opinion seems to believe that defendant's fence must be deemed a "structure" under the ordinance in order for the setback requirement to apply. This is not a proper interpretation. Indeed, as noted, § 4.26 states that "no structure *or fence* shall be allowed to be constructed in the setback area that would restrict the view of the occupants of the dwellings on the adjacent properties" (emphasis added). Section 4.32 merely defines the applicable setback area within which a view-blocking fence may not be constructed, i.e., fifty feet or to the existing building line, whichever is closer. We additionally note the dissent's suggestion that the setback area should be defined by § 3.1(84) instead of § 4.32 and that an application of § 3.1(84) precludes a finding that the fence is located within the setback area. With regard to this argument, we must emphasize that defendant in his brief on cross-appeal *does not even contend* that the fence is not located in the setback area. Indeed, he essentially concedes that the fence is located within the setback area and instead argues that the fence was allowable because it did not restrict the view of the occupants of the adjoining properties. Accordingly, we do not agree with the dissent's desire to apply § 3.1(84) and to find that the fence is not located within the setback area.

determined restricted the view of [plaintiffs]." This assertion is contrary to the trial court's ruling from the bench. Indeed, the court indicated that it was viewing the setback as extending to the far edge of the deck, stating that if plaintiffs had a problem with this interpretation, they could seek relief in the Court of Appeals. At no point did the trial court state that it was limiting the removal of the fence because the part closest to the house did not obstruct plaintiffs' view. We believe that implicit in the trial court's ruling was a finding that the fence as a whole obstructed plaintiffs' view and that any part contained within the setback area had to be removed. In light of our conclusion that the setback area extended to the edge of the actual house, we hold that the court should have ordered defendant Vandyk to remove all sections of his fence that protruded beyond the edge of the house.

Affirmed in part, reversed in part, and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Jane E. Markey