[Cite as *Omran v. Lucas*, 2021-Ohio-4592.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

IKREMAH OMRAN ET AL.,

Plaintiffs-Appellants,

v.

KENNETH D. LUCAS ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0031

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 19 CV 02473

BEFORE:
David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Reversed and Vacated in part. Reversed and Remanded in part. Affirmed in part.

Atty. Thomas C. Nader, Nader and Nader, 7011 East Market Street, Warren, Ohio 44484, for Plaintiffs-Appellants and

Atty. Jason Rebraca, 129 North Meridian Road, Youngstown, Ohio 44509, for Defendants-Appellees.

Dated: December 13, 2021

D'Apolito, J.

{¶1} Appellants, Ikremah Omran ("Ike") and Ami Omran, appeal the entry of summary judgment by the Mahoning County Court of Common Pleas in favor of their next-door neighbors, Appellees, Kenneth D. and Ashely S. Lucas, on Appellants' claims for violations of deed restrictions, intentional violations of deed restrictions, and violation of city zoning ordinances, as well as Appellees' cross claim for abuse of process. Appellants' claims are predicated upon Appellees' construction of a two-story garage attached to their main residence by a concrete footer and breezeway.

{¶2} The trial court opined that Appellants waived their first deed restriction claim, which is based on the proximity of the new construction to the property line, when they failed to assert a challenge at the zoning board hearing on Appellees' request for a sideline variance, or file an appeal from the decision of the zoning board granting the variance. With respect to Appellants' second deed restriction claim, based on the number of automobiles that can be stored in the new construction, the trial court entered summary judgment in favor of Appellees due to a lack of evidence that the new construction can house more than three motor vehicles. The trial court further opined that Appellants had failed to establish any damages resulting from the alleged deed restriction violation, and further, that Ohio does not recognize a claim for intentional violation of a deed restriction. Appellees do not challenge the trial court's conclusion that Ohio does not recognize a cause of action for intentional violation of a deed restriction. Finally, the trial court opined that Appellants failed to demonstrate that there exists a genuine issue of material fact regarding the alleged zoning violation based on the affidavit of the city zoning inspector, in which he avers that the new construction was not an "accessory building," as that term is defined by the City of Canfield zoning ordinances, but instead, an "addition" to the main structure. The term "addition" is not defined in the ordinances.

{¶3} The trial court also entered summary judgment in favor of Appellees on Appellees' abuse of process claim. The trial court predicated its decision on the fact that Appellants assert claims based on the proximity of the new construction to their property line and its square footage in the amended complaint, but Ami concedes in a text

message exchange with Kenneth that Appellees' actual objection is the height of the new construction.

{¶4} Appellants assert seven assignments of error, which are grouped together for clarity of analysis. First, Appellants argue that Appellees failed to establish an essential element of their abuse of process claim. Next, Appellants contend that the new construction is an "accessory building," as defined by various city zoning ordinances, and as a consequence, its square footage violates the city zoning ordinances. Third, Appellants assert that they did not waive their zoning ordinance claim based on the size of the garage due to their failure to object to the sideline variance. Finally, Appellants argue that Ike's testimony regarding the value of the property before and after the new construction is sufficient evidence of damages to survive summary judgment.

{¶5} For the following reasons, the entry of summary judgment in favor of Appellees on their abuse of process claim is reversed and the judgment entry awarding attorneys' fees is vacated. The entry of summary judgment in favor of Appellees on Appellants' zoning claims is reversed and remanded for proceedings consistent with this opinion and judgment entry. Finally, the entry of summary judgment on Appellants' deed restriction claims in favor of Appellees is affirmed.

FACTS AND PROCEDURAL HISTORY

{¶6} Appellants and Appellees reside at 110 and 100 Montgomery Drive in Canfield, Ohio, respectively. According to Appellees' affidavits, they contemplated constructing a pole barn on their property in 2018. A pole barn is a farm building with no foundation and sides consisting of corrugated steel or aluminum panels supported by poles set in the ground typically at eight-foot intervals.

{¶7} However, Appellees reconsidered the idea when they learned that a pole barn is considered by the city to be an "accessory building" subject to specific size limitations set forth in the city's zoning ordinances. The term is defined in section 1123.01(1) of the Canfield City Codified Ordinances, captioned "Definitions," which reads, in its entirety:

"Accessory building" means a subordinate building which is customarily incidental to and located on the same lot as the main or primary building, such as a detached garage or utility building, within a residential zoning district. An accessory building in an R-1 zoning district shall not contain more than thirty-five percent (35%) of the first floor area of the main building and in no case shall the total area of all accessory buildings on a lot comprise more than thirty-five percent (35%) of the building area of the rear yard in which it is located.

{¶8} Similarly, section 1123.01(2) reads, in its entirety:

"Accessory use" means a subordinate use which is customarily incidental to and located on the same lot as the main or primary building. An accessory use in an R- 1 zoning district shall not contain more than thirty-five percent (35%) of the first floor area of the main building, and in no case shall the total area of all accessory uses on a lot comprise more than thirty-five percent (35%) of the building area of the rear yard in which it is located.

{¶9} However, section 1169.03, captioned "Accessory Buildings," reads, in its entirety:

(a) An accessory building may be erected as an integral part of a principal building, or it may be connected thereto by a breezeway or other similar structure.

(b) An accessory building may be erected detached from the principal building. No detached accessory building shall be erected in any required yard except a rear yard, and shall not occupy more than thirty-five percent of the area of the required rear yard and shall be located a minimum of five feet from lot lines. For computing the percentage of occupancy of a rear yard, as required herein, if a detached accessory building is connected to the principal building by a breezeway, the ground area of such breezeway

> shall be considered as a part of the accessory building and be included in the computation.
>
> (c) Any accessory building, if not located in the rear yard, shall be an integral part of, or connected with, the principal building to which it is an accessory, and shall be so placed as to meet all yard requirements for a principal building of the same height and other dimensions as such accessory building.

{¶10} In order to avoid the statutory square footage limitations, Appellees decided to attach the pole barn to the main structure. However, the Mahoning County Building Department declined to issue a permit on the proposed construction.

{¶11} As a consequence, Appellees chose instead to construct an "attached" two-story garage. Section 1123.01(48) of the city ordinances reads, in its entirety, "'Garage, private' means a detached accessory building or a portion of the principal building used only for the storage of vehicles and incidental personal property."

{¶12} Prior to the commencement of construction, Appellees sought a variance with respect to the proximity of the new construction to Appellants' property line from the Planning and Zoning Commission of the City of Canfield. Kenneth submitted an adjustment application on April 11, 2019, requesting a "5 [foot] – 8 [inch] side yard adjustment for an attached garage." Legal notice of a hearing, which was scheduled for May 16, 2019, was sent to Appellees. Appellees do not dispute that they received the notice of hearing.

{¶13} Kenneth's request was the only matter considered at the May 16, 2019 meeting and was summarized in the notice as a request for "a 5 foot 8 inch side yard adjustment for an attached garage." Appellants did not attend the meeting. The adjustment application was approved that same day.

{¶14} A copy of the adjustment application, the notice, and the minutes of the meeting are attached to the motion for summary judgment. Primitive drawings of the proposed construction are also attached to the motion for summary judgment. The drawings have no separate exhibit number, and although they follow the notice in the attachments to the motion for summary judgment, it is not clear that they were an

attachment to the notice. With the exception of the sideline variance, no additional paperwork concerning the approval of the new construction by the city or county is attached to the motion for summary judgment.

{¶15} In his uncontroverted affidavit, Kenneth avers that Appellees had "multiple conversations with [Appellants] regarding [Appellees'] plans and offered to show them the plans," however, "[Appellants] seemed disinterested." (10/29/2020 Kenneth Aff., ¶ 4.) Both Appellees aver in their respective affidavits that an accommodation could have been made had Appellants voiced their disapproval of the variance.

{¶16} Excavation began on September 2, 2019, and the block foundation was laid on September 15, 2019. On October 11, 2019, the concrete floor was poured. By the end of November, the second floor, stairs, and roof tresses were installed. Kenneth estimates that $30,000 had been invested in the new construction on December 7, 2019, two days after the original complaint was filed.

{¶17} Attached to Kenneth's affidavit is a text message chain between Kenneth and Ami, which begins on December 14, 2018 and concludes on November 26, 2019. It commences with Kenneth inquiring about the "other Kris [sic] reaction." Ami responds that "[Kris] has no problem if [Appellants] build a big garage as long as [they] keep all of the vehicles put away and cleaned up." Kenneth responds, "[t]hat's the plan."

{¶18} One year later, on November 25, 2019, Kenneth writes, "[c]ity inspector called someone's [sic] not happy." Ami responds:

> I certainly hope we can figure out a way to get through this and still remain friendly to each other. But from our point of view that "garage" is way bigger than we ever thought and the height really is the issue. From our view it looks like a house was dropped in our back yard. It very much has us boxed in.

{¶19} Kenneth replies, "Oh I'm sorry. I didn't know it was you." Ami responds, "Truly our issue may be with the city allowing that type of structure. I'm sure you guys did your homework and you are well within your rights to build it." Kenneth adds, "Ya [sic] mike white was just there , [sic] I just need to submit drawing [sic] to has [sic] it attaches to house. Mike cook [sic] will be there later from Canfield."

{¶20} After some general conversation, Kenneth writes, "I apologize I was never intending to box you in or anything of the such [sic]." Ami responds, "I know you didn't. I think the height is the problem." Kenneth replies, "Can't be higher than the house, two foot shy that why [sic] he came out."

{¶21} According to Michael Cook, the Canfield Zoning Inspector, he had a conversation with Appellees around November 26, 2019 "because they didn't put a wall up [sic]." (Cook Depo., p. 35.) Cook testified that he had "never seen footers without a wall attached to another structure, so [he] asked [counsel for the city] his opinion on that, and he said [the city] was fine with just the footers. (*Id.* at 36.)

{¶22} However, according to Cook's deposition, Mahoning County required the installation of another footer as well as another structure in order for the new construction to be considered an "addition." (*Id.* at 36-37.) Cook testified:

> When I talked to the county, I says [sic], I consider an addition to the house with a footer. And he said, no, you would need another footer on the other side with more or less a breezeway coming through that would make an addition from the county's standpoint.

(*Id.* at 37.)

{¶23} With respect to the county's requirements for the new construction to be considered an "addition," Kenneth testified at his deposition that "the only way structurally to be attached, physically attached, the most important [sic] is the footer. Sometimes they also ask for a roofline." (Kenneth Depo., p. 32.) He continued, "[a]t one point in time when they were calling and he was disputing, [Appellants] were disputing it, it was or could be attached, Mike [Cook] said that he would also like a drawing submitted to attach a roofline also in addition to the footer, so we accommodated him with such [sic]." (*Id.* at 36.)

{¶24} On November 26, 2019, Kenneth writes in the text chain with Ami, "Wow * * *[t]his thing has gone crazy , [sic] I never thought between can field [sic] and personal attorneys it would go this far." Ami responds, "I know our complaint was just the height, we have no problem with anything else. What is everyone else's complaint? Kenneth

responds, "Height is not issue, Canfield has got weird [sic], now I have to get a attorney [sic]."

{¶25} Ami replies, "Ugh. Did they ever ask you to To [sic] make sure our subdivision, Montgomery Estates, does not have any subdivision governing rules. We bought our house on the sheriff's auction so we never got anything without title paperwork." Kenneth responds, "They have no teeth."

{¶26} Kenneth continues, "They want an attached hall way [sic] now which would look like shit. Never stated before." In his affidavit, Kenneth writes, "[Cook] then called the following day [November 27, 2019] and informed me that a breezeway would not suffice and I was required to complete a fully enclosed hallway to attach the new garage." (Kenneth Depo., p. 45; 12/19/2019[1] Kenneth Aff., ¶ 14.)

{¶27} No photographs of the new construction were attached to the summary judgment motion and briefs. Consequently, it is not clear from the record that the new construction is attached by an open breezeway or an enclosed hallway. Kenneth states in his affidavit that he abandoned the idea of a pole barn and, "[i]nstead, [Appellees] decided to build an attached garage connected by a concrete footer and breezeway, which qualified as an attached garage." (10/29/2020 Kenneth Aff., ¶ 4.) He made no averment about the completed project. Cook, at his deposition, refers to the structure built over the footers as a breezeway. (Cook Depo., p 16.) As a consequence, we will refer to the structure connecting the new construction as a breezeway.

{¶28} The original complaint was filed on December 5, 2019 and sought an order both temporarily and permanently enjoining Appellees from constructing any building in violation of the deed restrictions and the city ordinances, and for costs and attorneys' fees. The amended complaint was filed on December 10, 2019 and adds the claim for intentional violation of a deed restriction, as well a request for compensatory and punitive damages.

{¶29} Appellees attached Cook's affidavit to their motion for summary judgment. According to Cook, Appellees were approved to build the structure at issue. He opines

[1] The notary seal contains the date – "fourteenth of October" with no year. At Kenneth's deposition, Kenneth and his counsel stated that the affidavit was prepared on or about December 19, 2019.

that the structure is not an accessory building because it is attached to the main structure, and as a consequence, it is considered an addition.

{¶30} Cook was deposed during the discovery phase of this case. He testified that he met with Appellees in early 2019 to discuss new construction on their property. When they inquired about restrictions, he explained that "they were limited to accessory building [sic] for the square footage of their house and their rear yard [, but if] they were going to put something that was going to be connected to the primary structure, then it wouldn't – wouldn't matter. They just needed setbacks." (Cook Depo., p. 7-8.) He further explained that an addition must be attached to the main structure by a footer, because "[i]t's automatically a continuous footer." (*Id.*, p. 9.)

{¶31} Cook conceded that there was no ordinance that provided the foregoing distinction between an addition and an accessory building. When asked for the source of the information, he cited "just the past history of what [he has] done in the city with – with the accessory buildings and additions." (*Id.*, p. 10.) As previously stated, the term "addition" does not appear in any of the city's zoning ordinances.

{¶32} Cook further conceded that the city never considered the new construction to be an accessory building because "[i]t was part of the main structure with the footers." (*Id.*, p. 18.) He further testified, "I don't know what that integral – * * * Yeah, I don't understand the word integral to begin with. All's [sic] I know is an accessory building attached with a breezeway is all I've witnessed in the city. If they ran footers, they called them an addition, okay?" (*Id.*, p. 19-20.) Cook testified that there are two detached garages in the city connected by breezeways with no footers.

{¶33} The sole attachment to Appellants' Memorandum in Response to Appellees' Motion for Summary Judgment is the affidavit of Theodore Dunchak, a professional engineer. In a report attached to his affidavit, Dunchak asserts that he reviewed the zoning permit issued by the city "for a 24' by 42' two story Garage located at 100 Montgomery Drive. The structure has a total permitted area of 2,016 square feet [24 x 42 = 1008 x 2 = 2,016]." According to Dunchak, the main building has a first floor area measuring 1,162 square feet based on the Mahoning County's Auditor's website. As a consequence, Dunchak avers that the new structure is 173% (2,016/1,162) of the area

of the first floor of the main building. He further asserts that the new structure occupies at the very least 41% of the building area in the rear yard.

{¶34} In a judgment entry dated January 23, 2021, the trial court entered summary judgment in favor of Appellees on all claims. Following the entry granting summary judgment to Appellees on all claims, a hearing on damages was set. The parties stipulated to the reasonableness of attorneys' fees in the amount of $10,760.75 constituting damages on the abuse of process claim. This timely appeal followed.

STANDARD OF REVIEW

{¶35} This appeal is from a trial court judgment resolving a motion for summary judgment. An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶36} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a

reasonable factfinder could rule in that party's favor. *Doe v. Skaggs*, 7th Dist. No. 18 BE 0005, 2018-Ohio-5402, ¶ 11.

{¶37} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, *supra,* at 327.

ANALYSIS

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN FINDING THAT APPELLANT'S [SIC] CLAIMS WERE AN ABUSE OF PROCESS.

{¶38} "Ohio law, like the English common law before it, has long recognized a right to recover in tort for the misuse of civil and criminal actions as a means of causing harm." *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 297, 626 N.E.2d 115, (1994), quoting *Trussell v. Gen. Motors Corp.,* 53 Ohio St.3d 142, 144, 559 N.E.2d 732, (1990). Abuse of process is a tort recognized in the State of Ohio that addresses such misuse of the legal process. *Id.* at 298.

{¶39} "Abuse of process must initially be distinguished from malicious prosecution. The tort of abuse of process arises when one maliciously misuses legal process to accomplish some purpose not warranted by law. American Jurisprudence 2d (1962) 250, Abuse of Process, Section 1. * * * Abuse of process does not lie for the wrongful bringing of an action, but for the improper use, or abuse, of process." *Clermont Environmental Reclamation Co. v. Hancock*, 16 Ohio App.3d 9, 11, 474 N.E.2d 357, 361 (12th Dist. 1984).

{¶40} The three elements of the tort of abuse of process are: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. *Yaklevich* at paragraph one of the syllabus. "'Probable cause' means a

reasonable belief, supported by trustworthy information and circumstances, that the defendant's prior [proceeding] was legally just and proper." *Turkoly v. Gentile*, 7th Dist. Mahoning No. 20 MA 0043, 2021-Ohio-965, ¶ 17, appeal not allowed, 163 Ohio St.3d 1505, 2021-Ohio-2401, 170 N.E.3d 896, ¶ 17, quoting Ohio Jury Instructions, CV Section 435.01 (Rev. Feb. 16, 2013), *citing Huber v. O'Neill*, 66 Ohio St.2d 28, 29-30 (1981).

{¶41} In order to establish the second element of abuse of process, "a claimant must show that one used process with an 'ulterior motive,' as the gist of [the] offense is found in the manner in which process is used. * * * There must also be shown a further act in the use of process not proper in the regular conduct of the proceeding." *Clermont*, *supra*, at ¶ 11. "The gravamen of the misconduct for which the liability * * * is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." Restatement of the Law 2d, Torts, Section 682, Comment a. "Ulterior purpose" or "motive" has been interpreted as "an attempt to gain an advantage outside the proceeding, such as payment of money or surrender of a claim, using the process itself as the threat." *Thomason v. AT&T*, 7th Dist. Belmont No. 18 BE 0016, 2018-Ohio-4914, 2018 WL 6446485, ¶ 31.

{¶42} The key factor in an abuse-of-process lawsuit "is whether an improper purpose was sought to be achieved by the use of a lawfully brought previous action." *Yaklevich*, *supra*, at 300. "[T]here is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Yaklevich* at 298, quoting Prosser & Keeton, The Law of Torts 898 (5th Ed.1984).

{¶43} The Eighth District has opined that abuse of process cannot stand where the litigant uses the court to pursue a legal remedy that the court is empowered to give. *Sivinski v. Kelley*, 8th Dist. Cuyahoga No. 94296, 2011-Ohio-2145, ¶ 37. The Eighth District has further opined that the pursuit of claims which are meritless and made in bad faith are insufficient to establish the second element of an abuse of process claim. *Id.* at ¶ 38.

{¶44} The parties do not dispute that this action was lawfully brought. The trial court found that Appellants' actual complaint regarding the new construction in filing this

action (height) was not accurately reflected in the claims asserted in the amended complaint (square footage and proximity to Appellants' property line).

{¶45} However, there is no evidence in the record that Appellants sought to gain an advantage outside of this proceeding. Their objectives have remained the same since this action began, that is, to prevent Appellees from completing the new construction or to be awarded damages based on the diminution in value of their residence. In other words, there is no evidence in the record that Appellants have done anything more than "carry out the process to its authorized conclusion, even with bad intentions." *Yaklevich* at 298, quoting Prosser & Keeton, The Law of Torts 898 (5th Ed.1984).

{¶46} Stated another way, the trial court relies on Appellants' motive in bringing this action, that is, they were motivated by the height of the new construction, but asserted claims based on square footage and proximity to their property line. Therefore, the trial court predicated the entry of summary judgment in favor of Appellees on Appellants' motive at the commencement of the lawsuit, rather than a perversion of the lawsuit during its pendency to gain an advantage outside of the proceeding.

{¶47} Accordingly, we find that Appellants' first assignment of error has merit. We reverse the entry of summary judgment by the trial court on Appellees' abuse of process claim and vacate the judgment entry awarding attorneys' fees to Appellees.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN ITS ABROGATING THE TRIAL COURT'S OBLIGATION TO INTERPRET THE CANFIELD ZONING ORDINANCES BY DEFERRING TO THE LEGAL INTERPRETATIONS OF THE CANFIELD ZONING INSPECTOR.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED IN FINDING THAT THE APPELLEE 'S [SIC] GARAGE COMPLIED WITH CANFIELD ZONING.

{¶48} As an initial matter, Appellees argue for the first time on appeal that Appellants' zoning claims should have been dismissed because Appellants did not join

the city in this action. However, issues that are not raised before the trial court cannot be raised for the first time on appeal and are waived. *Vari v. Coppola*, 7th Dist. Mahoning No. 18 MA 0114, 2019-Ohio-3475, ¶ 12, appeal not allowed, 157 Ohio St.3d 1523, 2019-Ohio-5327, 137 N.E.3d 106, ¶ 12 (2019).

{¶49} The trial court provided the following analysis of Appellants' zoning ordinance claim:

> The party in the best position and most qualified to make determinations regarding Zoning Violations is indeed the Zoning Department. The Court finds that the Zoning Inspector determined that [Appellees'] property is not in violation of a Zoning Ordinance. Defendant offered no evidence contrary, and the Court will not disturb that determination.

(1/25/21 J.E., p. 2.)

{¶50} The interpretation of a zoning ordinance raises a question of law that appellate courts review independently and without deference to the trial court. *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 25; *Lang v. Ohio Dept. of Job & Family Servs.*, 134 Ohio St.3d 296, 2012-Ohio-5366, 982 N.E.2d 636, ¶ 12 (noting that "[a] question of statutory construction presents an issue of law that we determine de novo on appeal").

{¶51} Courts that review the meaning of a zoning ordinance apply the "standard rules of statutory construction." *Gesler v. Worthington Income Tax Bd. of Appeals*, 138 Ohio St.3d 76, 2013-Ohio-4986, 3 N.E.3d 1177, ¶ 12; accord *Shampton v. Springboro*, 98 Ohio St.3d 457, 2003-Ohio-1913, 786 N.E.2d 883, ¶ 30. A court's primary goal when determining the meaning of a zoning ordinance is to give effect to the enacting body's intent. *State v. Bryant*, 160 Ohio St.3d 113, 2020-Ohio-1041, 154 N.E.3d 31; *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 29. To determine intent, appellate courts "first look to the text of the [ordinance]." *State v. Pendergrass*, 162 Ohio St.3d 25, 2020-Ohio-3335, 164 N.E.3d 306, ¶ 5.

{¶52} When the ordinance's text clearly and unambiguously reveals intent, courts must apply the ordinance as written. *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242, ¶ 11; *Wingate v. Hordge*, 60 Ohio St.2d 55, 58, 396 N.E.2d 770 (1979), citing *Provident Bank v. Wood*, 36 Ohio St.2d 101, 304 N.E.2d 378 (1973). Accordingly, a court's first step when considering the meaning of an ordinance "is always to determine whether the [ordinance] is 'plain and unambiguous.' " *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 8, quoting *State v. Hurd*, 89 Ohio St.3d 616, 618, 734 N.E.2d 365 (2000); see also *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, 910 N.E.2d 432, ¶ 15, quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus (stating that if words used in statute or administrative rule " 'be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation' "). " 'If [the ordinance] is not ambiguous, then [courts] need not interpret it; [courts] must simply apply it.' " *Wilson* at ¶ 11, quoting *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 13. When the language used in an ordinance " 'is plain and unambiguous, and conveys a clear and definite meaning, [courts] must rely on what the [legislative body] has said.' " *Id.*, quoting *Jones v. Action Coupling & Equip., Inc.*, 98 Ohio St.3d 330, 2003-Ohio-1099, 784 N.E.2d 1172, ¶ 12, citing *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553, 721 N.E.2d 1057 (2000).

{¶53} Additionally, courts must "give effect only to the words the legislature used, making neither additions to, nor deletions from, the statutory language." *Id.*, citing *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. Furthermore, " '[t]he interpretation of statutes and administrative rules should follow the principle that neither is to be construed in any way other than as the words demand.' " *State ex rel. Baroni v. Colletti*, 130 Ohio St.3d 208, 2011-Ohio-5351, 957 N.E.2d 13, ¶ 18, quoting *Morning View Care Ctr.-Fulton v. Ohio Dept. of Human Servs.,* 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300, ¶ 36 (10th Dist.). We also observe that when a legislative "definition is available, we construe the words of the statute accordingly." *State v. Gonzales*, 150 Ohio St.3d 276, 2017-Ohio-777, 81 N.E.3d 419, ¶ 4, citing R.C. 1.42; accord *Stewart v. Vivian*, 151 Ohio St.3d 574, 2017-Ohio-7526,

91 N.E.3d 716, ¶ 25. Moreover, R.C. 1.42 specifies that courts reviewing statutes and ordinances must read "[w]ords and phrases * * * in context" and "construe [them] according to the rules of grammar and common usage."

{¶54} When the language of an ordinance is ambiguous, a court may then consider rules of construction to determine legislative intent. *Turner v. Hooks*, 152 Ohio St.3d 559, 2018-Ohio-556, 99 N.E.3d 354, ¶ 10; *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553, 721 N.E.2d 1057 (2000). "A statute is ambiguous ' "if a reasonable person can find different meanings in the [ordinance] and if good arguments can be made for either of two contrary positions." ' " *Turner* at ¶ 12, quoting *Sunset Estate Properties, L.L.C. v. Lodi*, 9th Dist. Medina No. 12CA0023-M, 2013-Ohio-4973, ¶ 20, quoting *4522 Kenny Rd., L.L.C., v. Columbus Bd. of Zoning Adjustment*, 152 Ohio App.3d 526, 2003-Ohio-1891, 789 N.E.2d 246, ¶ 13 (10th Dist.).

{¶55} R.C. 1.49 lists several factors that a court may consider when determining the legislative intent of an ambiguous statute. *Symmes*, *supra,* at 556, (stating that R.C. 1.49 sets forth "specific guideposts for courts to follow when interpreting ambiguous statutes"). The statute provides as follows:

{¶56} If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

{¶57} A court that is determining the meaning of an ambiguous statute "may consider laws upon the same or similar subjects in order to determine legislative intent."

D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 20, citing R.C. 1.49(D). " 'Statutes relating to the same matter or subject, although passed at different times and making no reference to each other, are in pari materia and should be read together to ascertain and effectuate if possible the legislative intent.' " *Id.*, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph two of the syllabus. Additionally, a court that is considering statutes in pari materia "must arrive at a reasonable construction giving the proper force and effect, if possible, to each statute." *Id.*, citing *Maxfield v. Brooks*, 110 Ohio St. 566, 144 N.E. 725 (1924), paragraph two of the syllabus.

{¶58} Furthermore, "when applying a zoning provision, a court must not view the provision in isolation; rather, its 'meaning should be derived from a reading of the provision taken in the context of the entire ordinance.' " *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 35, quoting *Univ. Circle, Inc. v. Cleveland*, 56 Ohio St.2d 180, 184, 383 N.E.2d 139, (1978).

{¶59} Finally, when interpreting a zoning ordinance, courts must strictly construe restrictions on the use of real property in favor of the property owner. In *Terry v. Sperry*, 130 Ohio St.3d 125, 2011-Ohio-3364, 956 N.E.2d 276, ¶ 19, the Ohio Supreme Court explained:

> Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner. Restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed.

Accord Cleveland Clinic Found. at ¶ 34; *Univ. Circle*, *supra*, at 184, 383 N.E.2d 139. "In other words, [Ohio law] do[es] not permit zoning 'limitations by implication' " *Cleveland Clinic Found.* at ¶ 34, quoting *Henley v. Youngstown Bd. of Zoning*, 90 Ohio St.3d 142, 152, 735 N.E.2d 433 (2000).

{¶60} Appellants correctly argue the trial court provided no statutory analysis for its conclusion that the new construction was not an "accessory building," but instead, simply accepted the zoning inspector's conclusory averment in his affidavit that the new construction is an addition. Because the trial court abdicated its responsibility to interpret the zoning ordinances at issue to the zoning commissioner, we reverse the entry of summary judgment in favor of Appellees and remand this matter for further proceedings consistent with this opinion and judgment entry.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED IN HOLDING THAT THE APPELLANT'S [SIC] WERE BARRED FROM SEEKING TO ENJOIN THE GARAGE CONSTRUCTION BECAUSE THE APPELLANTS DID NOT APPEAL THE SIDELINE VARIANCE IN MAY 2019.

ASSIGNMENT OF ERROR NO. 5

THE TRIAL COURT ERRED IN FINDING THAT THERE IS NO ISSUE OF FACT IN APPLYING THE DOCTRINE OF WAIVER AS A BAR TO APPELLANT'S [SIC] CLAIMS.

ASSIGNMENT OF ERROR NO. 6

THE TRIAL COURT ERRED IN FINDING THAT APPELLANTS [SIC] CLAIMS WERE BARRED UNDER THE DOCTRINE OF LACHES.

{¶61} Appellants' third, fifth, and sixth assignments of error are based on the trial court's dismissal of their claims predicated upon the "size" of the new construction based on their failure to object to the sideline variance. Appellants fail to differentiate between the zoning violation claims and the deed restriction claims by referring generally to the "size" claims.

{¶62} It is important to note that the trial court dismissed the deed restriction sideline claim based on waiver and laches, and Appellants appeared to concede the same insofar as they did not advance any argument in their opposition to the summary

judgment motion regarding the ten-foot deed restriction. Appellants appear to misunderstand that the trial court dismissed their second deed restriction claim based on the number of automobiles that can be stored in the new construction for lack of evidence in the record, not waiver or laches.

{¶63} The only copies of the deed restrictions in the record are in a photocopy of a plat attached to the complaint and the amended complaint, and both photocopies are illegible. Appellants assert in the amended complaint, and Appellees do not dispute, that the pertinent deed restrictions read, as follows:

> 1. No structure shall be erected or allowed to remain on any lot included in said plat except as may be herein after provided for other than one private single family dwelling unit not to exceed 2 stories in height and a garage designed not [sic] for no less than two or more than 3 passenger vehicles.
>
> * * *
>
> 2. The two side lines shall be not less than 25 feet, minimum of 10 feet on either side.

(Amended Complt., ¶ 5-6.)

{¶64} In the amended complaint, Appellants allege that Appellees are "constructing a four car garage * * * in violation of the 10 foot Deed restriction sideline," and that the construction of the four-car garage "violates Section No. 1 of the Deed Restrictions." (Am. Complt., ¶ 7-9.) In the motion for summary judgment, Appellees asserted that Appellants waived their claim based on the ten-foot sideline due to their failure to challenge Appellees' request for a variance.

{¶65} With respect to the deed restriction claim based on the number of cars that can be stored in the garage, Appellees assert in their motion for summary judgment that there was no evidence in the record to support Appellants' claim that more than three automobiles could be stored in the garage. Appellants did not dispute this claim, but, instead, argue that they did not waive their "size" claims based on their failure to object

to the sideline variance. However, Appellees did not argue that Appellants waived their objection to the size of the garage based on the sideline variance, they argued that Appellants offered no testimony or evidence to establish that the new construction could house more than three automobiles.

{¶66} As a consequence, we find that Appellants abandoned the two deed restriction claims based on their failure to offer any evidence or argument in their opposition brief to Appellees' motion for summary judgment. First, Appellants abandoned their sideline variance argument, apparently conceding that their failure to voice any objection before the zoning board or to appeal the zoning board's decision granting the sideline variance constituted a waiver of that claim. Second, Appellants abandoned their "size" argument, to the extent that it was predicated upon the number of automobiles that can be stored in the new construction, because they offered no evidence or argument that more than three automobiles can be housed in the new construction.

{¶67} With the foregoing clarification in mind, the trial court writes that it "agrees with [Appellees] further in that Waiver or Latches would additionally apply to [the alleged zoning violations] for the reasons discussed above." (1/12/2021 J.E., p. 3.) Laches consists of four elements: (1) unreasonable delay or lapse of time in asserting a right; (2) absence of an excuse for the delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the other party. *V.T. Larney, Ltd. v. Locust St. Invest. Co., LP*, 7th Dist. Mahoning No. 17 MA 0101, 2019-Ohio-496, ¶ 40, citing *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 656 N.E.2d 1277 (1995). All four elements must exist for laches to apply.

{¶68} The party invoking the doctrine must show the delay caused material prejudice. *Miller v. Cloud*, 7th Dist. No. 15 CO 0018, 2016-Ohio-5390, 76 N.E.3d 297, ¶¶ 85-86, citing *Thirty-Four Corp. v. Sixty–Seven Corp.*, 15 Ohio St.3d 350, 354, 474 N.E.2d 295 (1984). Material prejudice requires actual proof that evidence was lost or the moving party suffered a detriment. *RHDK Oil & Gas, L.L.C. v. Dye*, 7th Dist. No. 14 HA 0019, 2016-Ohio-4654, ¶ 43, appeal not allowed, 147 Ohio St.3d 1506, 2017-Ohio-261, 67 N.E.3d 823, ¶ 43 (2017), see also *State ex rel. Donovan v. Zajac*, 125 Ohio App.3d 245, 250, 708 N.E.2d 254, 258 (11th Dist.1998).

{¶69} A decision whether or not to apply the defense of laches is within the discretion of the trial court and will not be overturned absent an abuse of discretion. *DeRosa v. Parker*, 7th Dist. No. 10 MA 84, 197 Ohio App.3d 332, 2011-Ohio-6024, 967 N.E.2d 767, ¶ 49. Abuse of discretion is more than an error of law or judgment; instead it is a finding that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶70} Waiver by estoppel exists when the acts and conduct of a party are inconsistent with his intent to claim a right. Where those acts have misled the opposing party to his prejudice, the party is estopped from enforcing the right. *Merriner v. Goddard*, 7th Dist. No. 08-MO-2, 2009-Ohio-3253, ¶ 99. In other words, waiver by estoppel relies upon a party's inconsistent conduct, rather than his or her intent, to establish a waiver of rights. *Phillips v. Farmers Ethanol, L.L.C.*, 7th Dist. No. 12 JE 27, 2014-Ohio-4043, ¶ 29, cause dismissed, 141 Ohio St.3d 1480, 2015-Ohio-658, 25 N.E.3d 1085, ¶ 29. An appellate court reviews a lower court's application of the doctrine of equitable estoppel for abuse of discretion. *DeRosa*, *supra*, at ¶ 50.

{¶71} We find that the trial court erred in concluding that Appellants' failure to challenge or appeal the sideline variance constitutes a waiver of their zoning violation claims. Appellees did not seek a variance regarding the square footage of the new construction because they believed that it was an addition and no variance was necessary. Accordingly, there was no request, hearing, or zoning board decision to which Appellants could object or from which Appellants could appeal.

{¶72} Accordingly, we find that Appellants conceded their deed restriction sideline argument when they failed to advance any argument or offer any evidence in their opposition to the summary judgment motion. We further find that Appellants have likewise abandoned their argument regarding the size of the new construction based on the number of automobiles that can be stored there. However, with respect to Appellants' zoning violation claims, we find that Appellants' third, fifth, and sixth assignments of error have merit insofar as Appellants did not abandon their zoning violation claims due to their failure to object to the sideline variance.

ASSIGNMENT OF ERROR NO. 7

THE TRIAL COURT ERRED IN FINDING THAT APPELLANTS PROVIDED NO EVIDENCE OF DAMAGES.

{¶73} Evid.R. 701 permits a lay witness to testify in the form of an opinion if the opinion is "rationally based on the perception of the witness" and is "helpful to a clear understanding of his testimony or the determination of a fact in issue." The Staff Note to the rule states that "[t]he rule is in accordance with Ohio law as it ha[d] developed prior to the adoption of the Rules of Evidence." The owner-opinion rule provides an exception to the general rule that only an expert may express an opinion of value. *Johnson v. Clark Cty. Bd. of Revision*, 155 Ohio St.3d 264, 2018-Ohio-4390, 120 N.E.3d 823, ¶ 21, citing *Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 140 Ohio St.3d 248, 2014-Ohio-3620, 17 N.E.3d 537, ¶ 18.

{¶74} And "Ohio law has long recognized that an owner of either real or personal property is, by virtue of such ownership, competent to testify as to the market value of the property." *Smith v. Padgett*, 32 Ohio St.3d 344, 347, 513 N.E.2d 737 (1987). Indeed, the Ohio Supreme Court has likewise recognized this rule in the context of valuing real property for tax purposes. *Amsdell v. Cuyahoga Cty. Bd. of Revision*, 69 Ohio St.3d 572, 574, 635 N.E.2d 11 (1994).

{¶75} "Important in the owner-opinion rule * * * is that the owner qualifies primarily as a fact witness giving information about his or her own property * * *." *Worthington City Schools* at ¶ 19. Consequently, the finder of fact "is vested with wide discretion in determining the weight to be given to evidence and the credibility of witnesses which come before [it]." *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision*, 44 Ohio St.2d 13, 336 N.E.2d 433 (1975), paragraph three of the syllabus. And "there is no requirement that the finder of fact accept [the owner's value] as the true value of the property." *WJJK Investments, Inc. v. Licking Cty. Bd. of Revsion,* 76 Ohio St.3d 29, 32, 665 N.E.2d 1111 (1996).

{¶76} The only evidence in the record regarding the alleged diminution of value of Appellants' property resulting from the new construction was offered by Ike in a response to an interrogatory. Ike asserted that his residence was valued at $400,000.00 prior to

the new construction, and $325,000.00 after the new construction. Based on the owner-opinion rule, we find that Appellants' seventh assignment of error has merit because Appellants have offered evidence of the diminution in value of their property sufficient to survive summary judgment.

CONCLUSION

{¶77} In summary, we reverse the entry of summary judgment in favor of Appellees on their abuse of process claim, as there is no evidence in the record that this proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed. Accordingly, the judgment entry awarding attorneys' fees is reversed and vacated. The entry of summary judgment in favor of Appellees on Appellants' zoning claims is likewise reversed and remanded for proceedings consistent with the opinion and judgment entry. Finally, the entry of summary judgment on Appellants' deed restriction claims in favor of Appellees is affirmed as Appellants conceded the claims when they failed to advance any argument in their opposition brief to the motion for summary judgment.

Donofrio, P.J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, we reverse the entry of summary judgment in favor of Appellees on the abuse of process claim. We reverse and vacate the entry awarding attorneys' fees. The entry of summary judgment in favor of Appellees on Appellants' zoning claims is hereby reversed and remanded to the Court of Common Pleas of Mahoning County, Ohio, for further proceedings according to law and consistent with this Court's Opinion. The entry of summary judgment on Appellants' deed restriction claims in favor of Appellees is affirmed. Costs to be split between the parties.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.