STATE OF MICHIGAN

COURT OF APPEALS

KEELER TOWNSHIP,

Plaintiff-Appellee,

v

JANET BACHLER,

Defendant,

and

PAUL CARON,

Intervening Defendant-Appellant.

UNPUBLISHED
December 21, 2010

No. 294323
Van Buren Circuit Court
LC No. 07-055820-CZ

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Intervening defendant Paul Caron appeals as of right the trial court's decision in favor of plaintiff Keeler Township, in which the trial court refused to allow Caron to present expert testimony allegedly showing that fill dirt is customarily used to bring a building artificially into compliance with height restrictions found in zoning ordinances like the Keeler Township Zoning Ordinance. We decide this appeal without oral argument pursuant to MCR 7.214(E). We affirm.

I. BASIC FACTS

In 2006, Caron, a general contractor, agreed to build an accessory building on Janet Bachler's property located in Keeler Township, Michigan. Caron's construction plans indicated that the building would have the following dimensions: a width of 26 feet, a depth of 34 feet, and a height of less than 14 feet pursuant to the Keeler Township Zoning Ordinance. In July 2007, Caron obtained a building permit. During the construction of the building, Caron allegedly placed a substantial amount of "fill dirt" around the structure to raise the average grade of the land so that it would be in compliance with Section 3.11(A)(11) of the Township's zoning ordinance, which provides:

> "No accessory building shall exceed fourteen (14) feet in height, as measured from the average grade to the midpoint of the roofline, except for those used in farming operations, which may be as high as reasonably necessary."

Without fill dirt, the completed building exceeded the ordinance's 14-foot height limit. However, with fill dirt, the building measured less than 14 feet in height from the ground level to the top of the structure. In February 2007, Keeler Township sued Bachler to enforce the height restrictions contained in the zoning ordinance.

In December 2007, the trial court held a bench trial to decide whether fill dirt could be used to artificially elevate the average grade of the land around Bachler's accessory building to satisfy the height restriction in the Keeler Township Zoning Ordinance. Section 2.01 of the zoning ordinance defines "average grade" as:

> "The average finished ground elevation at the center of all walls of a building established for the purpose of regulating the number of stories and the height of buildings. The building grade shall be the level of the ground adjacent to the walls of the building if the finished grade is level. If the ground is not entirely level, the grade shall be determined by averaging the elevation of the ground for each face of the building or structure being measured."

At this point in the proceedings, Caron had not yet sought to intervene in the lawsuit; he appeared only as a witness on behalf of Bachler. Caron testified that he placed fill dirt around the accessory building to meet the Keeler Township Zoning Ordinance's height restriction, to aid in proper water drainage, and to enhance the structure's aesthetic qualities. Caron also testified that Keeler Township approved the construction plans, inspected the project periodically throughout the building's construction, and ultimately issued a Certificate of Occupancy for the building. Caron asserted that Keeler Township's officials were aware of his construction plans and that the Township's building inspector approved the building even after it was apparent that fill dirt would be used to raise the ground level.

In response, Keeler Township argued that it was under the impression Caron would satisfy the ordinance's height requirement by digging deeper into the ground rather than by using fill dirt. Moreover, Keeler Township argued that there is a difference between "average grade" (which is grade without the fill dirt) and "average finished grade" (which is grade after the fill dirt is added). Keeler Township also stated that it believed the zoning ordinance used "average grade" and not "average finished grade" to determine compliance with the building height requirements. Accordingly, Keeler Township asked the trial court to find that Bachler could not alter the average grade by adding massive amounts of soil around the structure because the height restriction would be meaningless if property owners were allowed to construct a building as high as they wanted as long as they placed enough fill dirt around it.

The trial court ruled that Bachler could not use fill dirt to artificially adjust the grade surrounding the structure for the purpose of meeting the maximum height restrictions of Keeler Township's zoning ordinance. The trial court unambiguously stated, "You cannot comply with the height requirement by artificially enhancing the average finished grade and that's what happened here." Although the trial court found that Bachler's structure violated the Keeler Township Zoning Ordinance, it allowed Bachler to amend her responsive pleading to allege a theory of equitable estoppel as a defense to the application of the zoning ordinance.

Accordingly, Bachler amended her complaint to include an equitable estoppel defense. Bachler argued that Keeler Township was estopped from asserting a violation of the township ordinance because it approved of the construction plans, it inspected the building throughout its construction, and it issued a Certificate of Occupancy for the building despite knowing that Caron used fill dirt. Keeler Township responded to the motion and requested that the trial court grant summary disposition in its favor under MCR 2.116(I)(2).

On November 10, 2008, after hearing the parties' arguments on the summary disposition motions, the trial court denied both parties' motions. The trial court found that a question of fact remained regarding Keeler Township's understanding of the construction project. Further, the trial court scheduled the matter for a hearing to take proofs on Bachler's equitable estoppel defense. Caron also made an appearance at the motion hearing. During the hearing, Caron requested that he be allowed to intervene in the lawsuit, pursuant to MCR 2.209. Caron argued that permissive intervention was appropriate based on his declared interest in the alleged zoning violation as well as the potential future civil liability he would face if Bachler decided to sue him. The trial court indicated that it would allow Caron to intervene. On December 1, 2008, the trial court entered an order reflecting its decision to allow Caron's intervention. Specifically, the trial court granted Caron's motion to intervene with the "understanding" that Bachler, by stipulating to the motion, did not waive any claims she might have against Caron.

In July 2009, the trial court commenced the continuation of the December 2009 bench trial but focused only on Bachler's equitable estoppel defense. During the trial, Caron attempted to present expert testimony that artificial fill dirt is customarily used for the purpose of bringing a structure into compliance with the height restrictions contained in Michigan zoning ordinances. Keeler Township objected, arguing that Caron's testimony would reopen the proofs on the issue of whether Bachler's building complied with Keeler's zoning ordinance. Finding that there was no reason to reconsider its earlier ruling, the trial court sustained Keeler Township's objection. At the close of Bachler's proofs, Keeler moved for summary disposition and the dismissal of Bachler's equitable estoppel defense.

In August 2009, the trial court entered an order requiring Bachler to bring her accessory building into compliance with the zoning ordinance. Caron moved for reconsideration regarding his ability to present his expert's testimony. In his motion for reconsideration, Caron argued that his expert was prepared to testify to the following:

> 1) how in the construction industry there is a distinct difference between the term "average grade" and "finished grade;" 2) that the term "finished grade" as used in Keeler Township's Zoning Ordinance, is the grade created by the contractor after the application of fill dirt to bring the grade to a certain desired level; 3) how it is common practice to gain compliance with a zoning ordinance through the use of fill dirt; 4) how most municipalities will place restrictions on the use of fill dirt and how much it can effect grade if they have a concern over it; 5) that in most "walk-out" building projects, it is frequently necessary to use fill dirt to make certain that water disbursement and drainage requirements are met under the building code; and 6) to define "finished grade" as "actual grade before construction begins" is inconsistent with common construction practices in the State of Michigan.

In September 2009, the trial court denied Caron's motion for reconsideration. Caron now appeals the trial court's order.

II. CARON'S RIGHTS AS AN INTERVENING PARTY

A. STANDARD OF REVIEW

Caron argues that the trial court erred in refusing to allow him to present expert testimony on whether fill dirt is customarily used for the purpose of determining grade and artificially bring the structure into compliance with the Keeler Township Zoning Ordinance. We review a trial court's decision whether to admit evidence for an abuse of discretion.[1] Generally, an appellate court should defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion.[2] Likewise, we review a trial court's decision regarding a motion to intervene for an abuse of discretion.[3]

B. LEGAL STANDARDS

Under MCR 2.209(B), a trial court may grant permissive intervention if a party's application for intervention is timely made, if the applicant's claim or defense has a common question of law or fact with the main action, and if no prejudice or delay to the original parties will result.[4] In addition, a party's intervention into the lawsuit is only appropriate while the action is still pending in court.[5] Specifically, a party's application to intervene must be made "before an adjudication of the case on the merits."[6]

C. APPLYING THE STANDARDS

Caron argues that his intervention into the lawsuit was proper. We agree. At the motion hearing on November 10, 2008, the trial court unequivocally granted Caron's request for permissible intervention. Neither Keeler Township nor Bachler actually dispute the legitimacy of Caron's intervention into the lawsuit. Because Caron's intervention remains undisputed, the trial court did not abuse its discretion in allowing Caron to intervene timely in the lawsuit.

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[1] *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991).

[2] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

[3] *W A Foote Mem Hosp v Mich Dep't of Public Health*, 210 Mich App 516, 525; 534 NW2d 206 (1995).

[4] *Dean v Dept of Corr*, 208 Mich App 144, 150; 527 NW2d 529 (1994). See also MCR 2.209(B).

[5] *Dean*, 208 Mich App at 150 (citations omitted).

[6] *Id*. at 152.

Caron also argues that the trial court frustrated his rights as an intervenor when it sustained Keeler Township's objection and prevented him from presenting expert testimony regarding the use of fill dirt to bring the building on Bachler's property into compliance with the Township's zoning ordinance. It is important to note that Caron does not dispute the trial court's December 7, 2007 decision that the zoning ordinance's height restrictions cannot be met by artificially enhancing the average finished grade with fill dirt. He simply argues that he should have been allowed to present expert testimony to contrary. Caron contends that he is entitled to all of the rights of the original parties, including the right to defend actively against the allegations in the original complaint by presenting expert testimony.[7] Caron argues that allowing his expert to testify would not broaden the issues before the trial court but rather it would focus the court's attention on ascertaining the difference between "average grade" and "average finished grade." Caron believes that his expert would have identified the correct interpretation of "finished grade" as provided in the zoning ordinance and that the trial court would have determined that fill dirt could be used to bring the building into compliance with the zoning ordinance.

We agree that Caron had the same rights as the other parties to the lawsuit. However, we conclude that Caron cannot relitigate an issue that has already been decided, absent a change in law or a substantial change in circumstances.[8] To do so would "render nugatory any trial which has already begun[.]"[9] "'The general rule is that one coming in as an intervenor must take the case as he finds it . . . .'"[10] Further, the intervention procedure cannot be utilized to re-open a case for further evidence.[11] Clearly, the expert testimony that Caron sought to present supported an argument that the trial court had already rejected, and further evidence would not have necessarily changed the court's decision about how to interpret the language of the zoning ordinance. Therefore, we conclude that the trial court did not abuse its discretion in denying Caron the opportunity to reargue the matter.

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[7] See *Stratford Arms Hotel Co v General Cas & Sur Co*, 249 Mich 518, 524; 229 NW 506 (1930).

[8] See *Manley v Detroit Auto Inter-Insurance Exchange*, 425 Mich 140, 159-160; 388 NW2d 216 (1986) (where the court held that, "absent some evidence that there has been a substantial change in the facts and circumstances, the trial court would be acting within its discretion in refusing to set the matter down for a further evidentiary hearing"); *Elser v Auto-Owners Ins Co*, 253 Mich App 64, 66; 654 NW2d 99 (2002) (where the court determined that "because [the] plaintiff had not shown a substantial change in his condition or circumstances, he could not relitigate the issues of the reasonableness and necessity of his medical expenses").

[9] *City of Ferndale Sch Dist v Royal Oak Twp Sch Dist No 8*, 293 Mich 1, 11; 291 NW 199 (1940) (citation omitted).

[10] *Id*. at 12, quoting *Watkins v Donnell*, 189 Mo App 617; 175 SW 280 (1915).

[11] *Id*. at 10 (citation omitted).

Additionally, Caron argues that allowing him to present his evidence and fully participate in the lawsuit will result in judicial economy and fairness to all parties. Caron states that the trial court's preclusion of his expert's testimony denied him the opportunity to fully defend himself, and that he will most likely have to re-litigate the same issue if Bachelor loses this lawsuit and then sues him in a subsequent lawsuit. Caron claims that justice requires all pertinent evidence to be considered before the trial court makes its final decision. We disagree. A court abuses its discretion when it makes an error of law.[12] Moreover, "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome."[13] Thus, an abuse of the trial court's discretion occurs only if the trial court's judgment results in an outcome outside the range of principled outcomes.[14] Here, the trial court heard the evidence and testimony presented during Bachler's bench trial, and it came to the conclusion that fill dirt cannot be used to bring Bachler's accessory building into compliance with the Township's zoning ordinance. As a result, the trial court's judgment was not outside the range of principled outcomes and the trial court did not abuse its discretion.

We affirm.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood

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[12] *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009); *People v Giovanni*, 271 Mich App 409, 417; 722 NW2d 237 (2006).

[13] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[14] See *Maldonado*, 476 Mich at 388.