STATE OF MICHIGAN

COURT OF APPEALS

THOMAS RAPSKE and BEVERLY RAPSKE,

Plaintiffs/Counterdefendants-Appellants,

v

TIMOTHY MIGA and WENDY MIGA,

Defendants/Counterplaintiffs-Appellees.

UNPUBLISHED
April 29, 2021

No. 353258
Macomb Circuit Court
LC No. 2018-001928-CH

Before: O'BRIEN, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

In this dispute about a border fence, plaintiffs/counterdefendants, Thomas Rapske and Beverly Rapske (collectively, plaintiffs), appeal as of right the trial court's order granting a verdict of no cause of action in favor of defendants/counterplaintiffs, Timothy Miga and Wendy Miga (collectively, defendants), on plaintiffs' nuisance per se claim. On appeal, plaintiffs challenge both the trial court's no-cause ruling and the court's earlier order dismissing plaintiffs' "spite fence" nuisance claim under MCR 2.116(C)(10). We affirm.

I. FACTUAL BACKGROUND

Plaintiffs and defendants own adjacent properties in Bruce Township, Michigan. Over the course of several years, the relationship between the parties soured. In the spring of 2017, defendants erected a privacy fence on the common border separating the parties' properties. The border fence blocks plaintiffs' view of a nearby lake, and plaintiffs believed that the fence was erected by defendants as a means to harass plaintiffs.

In May 2018, plaintiffs filed a complaint against defendants in which plaintiffs asserted that the border fence constituted a spite fence and a nuisance per se, as well as other claims not relevant to this appeal.

Defendants eventually moved for summary disposition under MCR 2.116(C)(10) on plaintiffs' spite-fence claim, and the trial court granted the motion. In so doing, the trial court

reasoned that, even if installation of the fence was partially motivated by spite, plaintiffs' spite-fence claim could not stand because the fence was clearly intended to serve—and did serve—the useful purpose of privacy.

Plaintiffs' nuisance per se claim eventually proceeded to a bench trial. The basis for plaintiffs' claim was that defendants' fence exceeded six feet in height in violation of a Bruce Township zoning ordinance. The court pointed out that plaintiffs only presented evidence that defendants' fence may have exceeded six feet in height when measured from the "existing grade," but the at-issue ordinance only prohibited fences that exceeded six feet in height when measured from the "established grade." Accordingly, the trial court reasoned that plaintiffs failed to establish their case and granted a verdict of no cause of action in favor of defendants.

This appeal followed.

II. NUISANCE PER SE

On appeal, plaintiffs first argue that the trial court erred as a matter of law when it reasoned that the Bruce Township zoning ordinance required fence height to be measured from the "established grade." We disagree.

The issue raised by plaintiffs is strictly a question of law, which this Court reviews de novo. *Chelsea Investment Group, LLC v Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010).

When the border fence was constructed, the provisions of the Bruce Township zoning ordinance at issue provided as follows:

> Section 2.09 BUILDING GRADES.
>
> 1. Grade elevations shall be determined by using the elevation at the center line of the road in front of the lot as the established grade.
>
> * * *
>
> Section 2.18 FENCES, WALLS AND PROTECTIVE BARRIERS.
>
> All fences of any nature, type or description located in the Township shall conform to the following regulations:
>
> * * *
>
> 3. Fences erected along the boundary line dividing lots or parcels, or located within any required side or rear yard areas, shall not exceed six (6') feet in height. In addition, double faced fences are encouraged when such fence is constructed within a required side or rear yard. In those instances, when a double[-]faced fence is not constructed, such fence shall be constructed so that the non-post side of the fence faces adjacent properties.
>
> * * *

> 7. For the purposes of this Section of the Zoning Ordinance, *the height of a fence shall be measured from the established grade of the property*. If such fence is to be constructed on top of a berm or other modification to the existing grade the total height of the fence shall also include the height of the berm or other modification to the existing grade. [Bruce Township Ordinances, §§ 161-2.09, 161-2.18 (1990) (emphasis added).]

"Municipal ordinances are interpreted and reviewed in the same manner as statutes." *Sau-Tuk Industries, Inc v Allegan Co*, 316 Mich App 122, 136; 892 NW2d 33 (2016). "[T]he goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body." *Id*. at 137 (quotation marks and citation omitted). "The most reliable evidence of that intent is the language of the ordinance itself, which must be given its plain and ordinary meaning." *Id*. "When the words used in a statute or an ordinance are clear and unambiguous, they express the intent of the legislative body and must be enforced as written." *Id*.

On appeal, plaintiffs argue that the trial court erred by interpreting section 2.18 as requiring border fences to be measured from the "established grade," and that the trial court should have interpreted section 2.18 as requiring that border fences be measured from the "existing grade." Yet section 2.18 of the Bruce Township zoning ordinance clearly limits the height of border fences to 6 feet "as measured from the *established grade* of the property." Bruce Township Ordinances, § 161-2.18 (1990) (emphasis added). That section uses both "existing grade" and established grade," suggesting that the terms have different meanings, see *United States Fid & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009) ("When the Legislature uses different words, the words are generally intended to connote different meanings."), and section 2.09 of the Bruce Township zoning ordinance defines "established grade," further suggesting that the term has its own distinct meaning under the ordinance. See Bruce Township Ordinances, § 161-2.09 (1990). Because section 2.18 of the Bruce Township Ordinance clearly and unambiguously provides that border fences shall not exceed a height of 6 feet as measured from the *established grade*, and, when that section is read within the ordinance as a whole, there is no plausible reading of section 2.18 that permits "established grade" to mean "existing grade," the trial court did not err by applying the zoning ordinance as written.[1]

In arguing that the trial court did err by applying the zoning ordinance as written, plaintiffs first argue that the trial court should have rejected the plain meaning of the ordinance because applying the ordinance as written will lead to absurd results. The validity of the absurd results

[1] Plaintiffs do not contest that they failed to present any evidence that the border fence exceeded six feet in height if measured from the established grade. That is, plaintiffs do not argue that the trial court reached the wrong result if its interpretation of the ordinance was correct. Even if they did make such an argument, it would be without merit. The record clearly demonstrates that plaintiffs only provided the fence height as measured from the "existing grade," and they produced no evidence establishing the fence height as measured from the established grade. Plaintiffs claim therefore fails because they did not establish an element of their claim. See *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994) (explaining that all plaintiffs in tort actions have the burden of proving the elements of their claims).

doctrine has been called into question by our Supreme Court, see, .e.g., *Johnson v Recca*, 492 Mich 169, 193; 821 NW2d 520 (2012), but this Court need not discuss whether the doctrine remains a valid tool of statutory interpretation because, assuming it does, the result reached in this case was clearly not absurd. Plaintiffs concede that fence height can be measured from the established grade, but contend that the legislative body could not have intended this because measuring a fence from the established grade requires "great effort and expenditure." This is simply not a reason to conclude that the legislative body did not intend for fence height to be measured from the established grade—it is entirely possible that the legislative body intended for fence height to be measured from the established grade even though doing so would take "great effort and expenditure." Accord *id*. (explaining that a result is only absurd if it is "quite impossible" that the legislative body could have intended the result).

Next, plaintiffs seem to contend that the intent of the ordinance should be derived from the testimony of a Bruce Township supervisor, who testified that he measured fences from the existing grade as opposed to the established grade. This argument is meritless because it is a foundational principle of statutory interpretation that the most reliable evidence of the legislative body's intent is the words of the ordinance. See *Sau-Tuk Industries*, 316 Mich App at 137. When an ordinance is clear, courts must apply the ordinance as written. See *id*. That a township supervisor may have had a different interpretation of the ordinance is not an exception to this rule—courts must still apply the text as plainly written.

In its final argument on this issue, plaintiffs contend that a subsequent amendment to the Bruce Township zoning ordinance reflects the township's true intent for the ordinance. For context, after the trial court's ruling, the Bruce Township Board of Trustees voted in favor of amending the Bruce Township zoning ordinance governing fence-height measurements, which now provides:

> For the purposes of this Section of the Zoning Ordinance, *the height of a fence shall be measured from the existing grade* of the subject property at the base of the fence at the time of installation. Where minor variations of grade at the base of the fence exist, the height of the fence shall be determined by the average height of the posts. If such fence is to be constructed on top of a berm or other modification to the existing grade the total height of the fence shall also include the height of the berm or other modification to the existing grade. [Bruce Township Ordinances § 161-5.7 (emphasis added).]

Plaintiffs argue that this "clarifying amendment . . . eliminates any doubt that the Township and its legislature intended the system of measurement" to be "from the existing grade." Plaintiffs, however, misinterpret the import of this amendment. The legislative body changing the pertinent ordinance text from stating that fence height must be measured from the "established grade" to now stating that fence height must be measured from the "existing grade" reinforces that "established grade" and "existing grade" have different meanings. The text as originally written intended for fence height to be measured from the "established grade"—not the "existing grade"—

as plainly expressed in the language of the ordinance.[2] The trial court properly applied the plain language of the ordinance, and plaintiffs' contention that the trial court should not have done so is without merit.

III. SPITE FENCE

Next, plaintiffs argue that the trial court erred by granting summary disposition in favor of defendants under MCR 2.116(C)(10) on plaintiffs' spite-fence claim. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 160. When considering a motion under MCR 2.116(C)(10), the trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. "A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact." *Id*. This Court's review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009).

In order to recover on the basis of a spite-fence claim, the plaintiff must establish that the defendant erected a fence or other obstruction that was constructed solely for malicious purposes. *Kuzniak v Kozminski*, 107 Mich 444, 445-446; 65 NW 275 (1895). However, a fence that serves a useful purpose to the property owner cannot form the basis of a spite-fence nuisance claim, even if its construction was partially motivated by malice. *Id*. at 446.

Based upon the record evidence at the time defendants' summary disposition motion was decided, plaintiffs failed to create a genuine issue of material fact regarding whether the border fence was constructed solely for malicious purposes. During their depositions, plaintiffs both testified that defendants constructed the border fence in an attempt to harass plaintiffs by blocking their view of a nearby lake. However, defendants both testified that they erected the border fence in an attempt to prevent plaintiffs from harassing them and to gain privacy. According to defendants, the border fence was necessary because Beverly insulted them and photographed them

[2] Plaintiffs also at one point contend that this Court should "remand for reconsideration by the trial court under" the ordinance as amended, but they do not argue that the amendment applies retroactively. Even if they did, such an argument would lack merit. "Statutes and statutory amendments are presumed to operate prospectively." *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155; 725 NW2d 56 (2006). "Indeed, statutes and amended statutes are to be applied prospectively unless the [l]egislature manifests an intent to the contrary." *Id*. "The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Id*. at 155-156. As amended, the Bruce Township zoning ordinance governing building and fence standards does not contain any language suggesting a legislative intent that the amendment should apply retroactively. Considering that the amended ordinance does not contain a clear, direct, and unequivocal expression of an intent to have the amended ordinance apply retroactively, it must be presumed that the amended ordinance applies prospectively.

while defendants were in their own backyard. Beverly corroborated defendants' testimony by admitting that she had multiple verbal altercations with Wendy before the border fence was erected. Beverly also acknowledged that she photographed Wendy after observing Wendy discharge grass clippings on plaintiffs' property on multiple occasions. Further, the evidence showed that the border fence served its intended purpose—Beverly and Wendy both testified that they did not have any additional verbal altercations after the border fence was erected. In light of the foregoing, even if the construction of the border fence was partially motivated by malice, there was no genuine issue of material fact regarding whether the border fence served the useful purposes of abating altercations between the neighbors and increasing privacy. Accordingly, the trial court did not err when it granted summary disposition in favor of defendants on plaintiffs' spite-fence claim.

On appeal, plaintiffs contend that the trial court should not have addressed whether the fence served a useful purpose, but whether "the Fence, as constructed, exceed[ed] any useful purposes." Plaintiffs cite no caselaw to support their assertion that this was how the trial court should have framed the issue. More importantly, even if this was how the issue should have been framed, plaintiffs point to nothing in the record that would create a question of fact whether "the Fence, as constructed, exceed[ed] any useful purposes." Accordingly, plaintiffs have not established that they are entitled to relief.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra