

STATE OF MICHIGAN
COURT OF APPEALS

TOWNSHIP OF WILCOX,

Plaintiff-Appellee,

v

FORREST D. NELSON and COLLEEN S.
NELSON,

Defendants-Appellants.

UNPUBLISHED

June 21, 2005

No. 260697

Newaygo Circuit Court

LC No. 04-018731-CZ

Before: Owens, P.J., and Cavanagh and Neff, JJ.

MEMORANDUM.

Defendants appeal as of right from a judgment granting summary disposition in favor of plaintiff and ordering defendants to remove a backyard deer blind that they built within the thirty-foot zoning setback. The court also ordered that defendants pay plaintiff's "ordinary taxable costs" of \$929.41 and granted plaintiff's motion for sanctions under MCR 2.114, ordering defendants to pay \$4,791 for its "additional fees and costs." We affirm.

Defendants first argue that the trial court's grant of summary disposition was premature because discovery was not completed. After de novo review, we disagree. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Contrary to defendants' argument on appeal, the court did not terminate discovery abruptly. Rather, although it had once granted plaintiff summary disposition, the court then allowed defendants to file an amended answer, depose six township officials, and respond to plaintiff's second motion for summary disposition. It was only after the second motion for summary disposition that the court again dismissed the case, a month before the scheduled end of discovery and seven months after the case began. Defendants simply have not shown a fair chance that further discovery would have aided their case. See *Coblentz v Novi*, 264 Mich App 450, 455; 691 NW2d 22 (2004).

Defendants next argue that summary disposition was premature because the court had not held an evidentiary hearing on whether defendants' deer blind was a "permanent" structure forbidden by the zoning ordinance. We disagree. The crux of this argument is that the term "permanent" as used in the disputed zoning ordinance was unduly vague. Because this issue does not implicate First Amendment freedoms, this vagueness challenge is analyzed in light of the facts of this particular case. See *Ray Twp v B & BS Gun Club*, 226 Mich App 724, 732; 575

NW2d 63 (1997). Apart from First Amendment concerns not relevant here, a statute may be declared void for vagueness if (1) it fails to provide fair notice of the conduct it regulates or (2) gives a factfinder unstructured and unlimited discretion in determining whether a statute has been violated. *Id.*

This Court has concluded that a term as used in a statute was not unduly vague where the meaning of the term could be determined from “commonly accepted meanings as found in the dictionary.” *People v Wilson*, 230 Mich App 590, 594; 585 NW2d 24 (1998). The definition of “permanent” in a common dictionary includes “intended to serve, function, etc., for a long, indefinite period.” *Random House Webster’s College Dictionary* (1997), p 971. It is apparent that the deer blind at issue was intended to be in place for a long, indefinite period. Accordingly, the term “permanent” as used in the zoning ordinance clearly applied to the deer blind and that term is not unduly vague as applied to the circumstances of this case. Thus, defendants have not established any error based on this issue.

Defendants next claim that the court erred by taking judicial notice of the township zoning ordinance. We disagree. A court may, on its own motion, take judicial notice of “ordinances and regulations of governmental subdivisions or agencies of Michigan.” MRE 202(a). Further, such notice is conditionally mandatory on request of a party. MRE 202(b). Although defendants later argued that the zoning ordinance book was incomplete, they never identified any omissions or addressed their waiver of any objections to it, either in the court below or on appeal here. Accordingly, we conclude that the trial court did not err in taking judicial notice of the relevant township ordinance.

Defendants next argue that plaintiff lacked the capacity to bring this action, either because the township board did not pass a resolution to initiate the suit in an open meeting or because plaintiff did not follow the zoning ordinance. Neither argument has merit. Defendants’ arguments are those of MCR 2.116(C)(5), i.e., that the “party asserting the claim lacks the legal capacity to sue.” Defendants allege that the township failed to follow the zoning ordinance. However, defendants fail to cite the zoning ordinance section allegedly violated. That ordinance, which the court recognized by judicial notice, explicitly authorizes suits to enforce its provisions:

In addition to criminal sanctions, the Township or any owner(s) of land or a structure within the zoning district in which such land or structure is situated, *may institute any appropriate action or proceeding to prevent, enjoin, abate or remove any unlawful erection, construction, maintenance* or use of such land or structure. The rights or remedies provided herein are cumulative and in addition to all other remedies provided by law. [Wilcox Township Zoning Ordinance, § 16.6.2 (emphasis added).]

Therefore, defendants’ argument here is entirely without merit and vexatious because it was made “without any reasonable basis for belief that there was a meritorious issue to be determined on appeal,” MCR 7.216(C)(1)(a). Further, defendants failed to preserve any argument that the township lacked capacity because of any alleged violations of the Open Meetings Act.

Defendants’ last argument is that the court erred by sanctioning defendants without considering their evidence or explaining its reasons. We disagree. “A trial court’s finding that

an action is frivolous is reviewed for clear error. A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002).

MCR 2.114 provides:

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

(F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages. [MCR 2.114.]

In *Klco v Dynamic Training Corp*, 192 Mich App 39, 42; 480 NW2d 596 (1991), this Court noted that an evidentiary hearing is not always required where there has been sufficient notice and opportunity to be heard on the issues in dispute. In this case, the trial court implicitly found that all the responses defendants added to their amended answer related to the Open Meetings Act were frivolous. This was not error, much less clear error, given the lack of arguable legal merit of those claims.

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff