STATE OF MICHIGAN

COURT OF APPEALS

MILTON TOWNSHIP, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED November 15, 2012
v	No. 307682 Cass Circuit Court
DAVID KAMINSKY, and 5-STAR L.L.C., Defendants/Counter-Plaintiffs-Appellants.	LC No. 11-000376-CZ

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

In this zoning and nuisance case, defendants/counter-plaintiffs David Kaminsky and 5-Star L.L.C. appeal as of right the trial court's judgment in favor of plaintiff/counter-defendant Milton Township (hereafter "the township"). For the reasons stated in this opinion, we affirm.

On May 18, 2011, the township filed a complaint for injunctive relief that alleged defendants' use of the property was in violation of local zoning and nuisance ordinances. The property at issue is a 16-acre parcel, zoned rural-residential, located at 30761 Redfield Road, in Niles, Michigan. The township's zoning ordinance provides the following permitted uses for property in the rural-residential district:

> Section 3.02 PERMITTED USES
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> A. Agricultural production including the raising or growing of forages and sod crops; grains and feed crops; dairy and dairy products; livestock, including breeding and grazing; fruits, plants, shrubs, and nursery stock; vegetables; and other similar agricultural uses, but not including slaughtering of animals for other than home use on the premises.
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> B. Single family dwellings, including modular homes, which serve as the principal residence for the owner, operator, and employees of the farm and their immediate families.
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> C. Home occupations.

D. Roadside stands for the sale of farm products produced on the premises owned and operated by the owner or operator of the farm, provided that off-highway parking facilities be provided, and that entrance and exit facilities be approved in writing by the County or State Road Commission in the interest of public safety.

E. Uses or structures customarily incidental to the operation of a farm and permitted dwellings.

F. Accessory uses or buildings.

G. Essential Services.

H. Single Family dwellings.

I. Modular Home.

The only buildings on the property are a barn/out-building and smaller shed-type structure; there is no residence present. Kaminsky purchased the property in 2007, and he and his family use the property for recreational purposes, consisting primarily of the riding of off-road motorcycles and other vehicles on a track that Kaminsky defined and improved for that purpose. After receiving numerous complaints about this use of the property, and particularly about the resultant noise and dust, the township notified defendants, on multiple occasions, that the use of the property in this manner violated the township's zoning and nuisance abatement ordinances. Defendants continued to use the property for riding off-road vehicles thereafter. The township then commenced the instant action seeking injunctive relief prohibiting defendants from continuing this use of the property. The trial court held a contested hearing on the merits of the township's claim, following which it concluded that defendants' use of the property violated the zoning ordinance, thus constituting a nuisance per se under MCL 125.3407, and also constituted a nuisance as defined by the township's nuisance abatement ordinance. Accordingly, the trial court ordered defendants to cease the offending use of the property and return the property to its historical condition.

On appeal, defendants argue that the trial court erred by concluding that recreational use of the property for the riding of motorcycles and other off-road vehicles was not a permissible "accessory use" to the permitted use of the property as a single family dwelling under the township zoning ordinance. We disagree.

We review de novo the interpretation or construction of zoning ordinances. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003). We review the trial court's findings of fact for clear error. MCR 2.613(C); *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). When reviewing the trial court's findings of fact, this Court will give regard to the special opportunity of the trial court to judge the credibility of witnesses appearing before it. MCR 2.613(C); *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006). "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, 661-662; 641 NW2d 245 (2002).

The rules of statutory construction apply to the interpretation of the township's zoning ordinance. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 568 n 15; 737 NW2d 476 (2007); *Macenas v Michiana*, 433 Mich 380, 395; 446 NW2d 102 (1989). Where the language of the ordinance is clear and unambiguous, it must be enforced as written; judicial interpretation of plain language is improper. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995). "[U]nless explicitly defined . . . every word or phrase . . . should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Yudashkin v Linzmeyer*, 247 Mich App 642, 650; 637 NW2d 257 (2001) (internal quotation marks and citation omitted). Where terms are undefined, it is proper to consult a dictionary to ascertain their plain and ordinary meaning. *Robinson v Ford Motor Co*, 277 Mich App 146, 152; 744 NW2d 363 (2007).

At issue here is whether the riding activities at the property constitute an "accessory use" within the meaning of the township's zoning ordinance. The ordinance does not define "accessory use." Black's Law Dictionary (7th ed) defines "accessory" as "[s]omething of secondary or subordinate importance," and it defines "accessory use" as "[a] use that is dependent on or pertains to a main use." Thus, to be an accessory use, a use must be subordinate to and dependent on, or pertain to, the main use of the property. Moreover, this Court has previously explained that an accessory use must be factually subordinate, auxiliary or ancillary to the principal use of a property, and it must "enhance the principal use of the property." *Lerner v Bloomfield Twp*, 106 Mich App 809, 813-814; 308 NW2d 701 (1981). Accordingly, where the principal use of the property is residential, to constitute an accessory use, a use must "further [the] use of the property as a residence." *Id*. Further, and of particular import here, an "accessory use" must be "something less" than a primary use of the property, which "must be and must continue to be dominant to an accessory use." *Twp of Groveland v Jennings*, 106 Mich App 504, 512-513; 308 NW2d 259 (1981), affirmed 419 Mich 719 (1984). To qualify as an "accessory use," then, defendants' riding of off-road vehicles on a course constructed for that purpose must be subordinate to the use of the property as a single family residence, must be dependent on or pertain to the use of the property as a single family residence, and must enhance or further the use of the property as a single family residence. *Lerner*, 106 Mich App at 813-814; *Groveland*, 106 Mich App at 512-513; Black's Law Dictionary (7th ed).

The evidence presented before the trial court established that the *only* use of the property made by defendants was recreational use, dominated by the riding of off-road vehicles on the defined course or track established for that purpose. Defendants make no residential use of the property whatsoever. Thus, plainly, defendants' use of the property for riding activities is not factually subordinate, ancillary or auxiliary to any residential use of the property, but instead is the predominant, primary use of the property within the context of the zoning ordinance. Consequently, as a factual matter, it cannot be said that defendants' use of the property for riding off-road vehicles enhances or furthers the use of the property as a residence. Therefore, we conclude that the trial court did not clearly err by concluding that defendants' use of the property does not constitute a permissible "accessory use" under the township's zoning ordinance. *Lerner*, 106 Mich App at 813-814; *Groveland*, 106 Mich App at 512-513.

Defendants argue that this Court's decision in *Thomas v New Baltimore*, 254 Mich App 196; 657 NW2d 530 (2002), requires a different result. At issue in *Thomas* was whether a property owner was prohibited from storing a boat on his vacant property. The ordinance

sections at issue provided that the storage of boats and other items was not permissible "within the front yard," but was permissible in "a garage, enclosed building, or in the rear yard, or located behind the front building line of the main structure . . . ." *Id.* at 206-207. The trial court concluded that a structure or building was required to be present on the property "to satisfy the storage requirements of the ordinance." However, this Court concluded otherwise, noting that the ordinance provided that "words used in the present tense shall include the future," and concluding, that "the structure on the property need not exist at the present moment, but may exist in the future. Accordingly, the [trial] court erred in concluding that the ordinance prohibits the storage of a boat on a vacant lot," merely because no building was currently present. *Id*. at 207-208. Instead, this Court explained, the pertinent inquiry under the plain language of that ordinance was whether the boat was being stored "behind the front building line or in the rear yard," of the lot, considering "where the front of the future building may be legally located." *Id*. at 208-209.

Defendants are correct that the township's zoning ordinance in this case, like the ordinance in *Thomas*, provides that "[w]ords used in the present tense shall include the future . . . unless the context clearly indicates the contrary." However, *Thomas* did not involve any determination of what constitutes an "accessory use"; the issue in *Thomas* was simply whether a vacant lot has "a rear yard" in which the plaintiff could store his boat. Accordingly, *Thomas* does not offer any guidance regarding the determination of whether a purported accessory use predominates over, or is subordinate to, a potential future primary use of property for residential purposes. To the extent that it is pertinent in any respect here, *Thomas* merely instructs that, to determine whether a use violates an ordinance, a court must undertake the same analysis of that use regardless of whether the primary structure is then present or whether it may be present at some point in the future. Consequently, to determine whether a use of the property qualifies as an "accessory use," courts must determine whether that use is factually subordinate, ancillary, or auxiliary to, and whether it enhances or furthers the use of the property as a single family residence. *Lerner*, 106 Mich App at 813-814; *Groveland*, 106 Mich App at 512-513. In this context, the evidence presented to the trial court supported the conclusion that the use made of the property was not accessory to a primary use of the property as a residence, but rather, was itself the primary, predominant use of the property.

Defendants also point this Court to two cases, from foreign jurisdictions, that determined that recreational off-road riding was permitted on residential property. Judicial decisions from foreign jurisdictions are not binding on Michigan courts, but may be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006). However, we find both cases to be factually distinguishable and thus, find neither to be persuasive or instructive here. First, in *Matter of Spinella v Town of Paris Zoning Bd of Appeals*, 191 Misc 2d 807; 744 NYS2d 310, 312-314 (NY Sup 2002), a New York appellate court found that "[t]here can be no question based upon the testimony of various town residents that it is a customary use of property in the [Rural Residential] District of the Town of Paris to have and use off-road vehicles," and that use of those vehicles on "the concomitant worn paths left by their use" was permissible. Here, however, defendants did not provide the trial court with any evidence to establish that the riding recreational riding of off-road vehicles, to the extent engaged in here, was common in the township's rural-residential district, or that there are a "significant number of worn paths," or riding courses on rural-residential property within the township comparable to that on defendants' property. Additionally, unlike in the instant case, the *Spinella* property owners

resided on the property, making primary use of the property as a residence and their recreational use of the property was factually subordinate to their residential use.

Defendants also cite *In re Laberge Moto-Cross Track*, 15 A3d 590, 591, 595 (Vt, 2011), in which the Vermont Supreme court held that the landowners' private recreational moto-cross track did not constitute a "structure" within the meaning of the zoning ordinance, so as to be prohibited absent a permit for its construction. However, because the issue in *In re Laberge* was not whether the construction and use of the moto-cross track was an "accessory use" of the property, the reasoning underlying the decision in that case has no bearing on the issue before us here.

Based on the evidence presented before it, we conclude that the trial court did not clearly err by determining that defendants' use of the property for riding off-road vehicles on a defined track constructed for that purpose failed to constitute a permissible accessory use of the property under the township's zoning ordinance. Plainly, the riding activities were the predominant, and not a factually subordinate or ancillary, use of the property. Consequently, by definition, those activities cannot constitute a permissible "accessory use." *Lerner*, 106 Mich App at 813-814; *Groveland*, 106 Mich App at 512-513.

Having found that defendants' use of the property violated the township's zoning ordinance, the trial court properly concluded that it also constituted a nuisance per se under MCL 125.3407. MCL 125.3407 provides in pertinent part:

> Except as otherwise provided by law, *a use of land* or a dwelling, building, or structure, including a tent or recreational vehicle, used, erected, altered, razed, or converted *in violation of a zoning ordinance* or regulation adopted under this act *is a nuisance per se*. The court shall order the nuisance abated, and the owner or agent in charge of the dwelling, building, structure, tent, recreational vehicle, or land is liable for maintaining a nuisance per se. [Emphasis added.]

Accordingly, we find no error in the trial court's order requiring defendants to abate the nuisance, as mandated by that statutory provision.[1]

Defendants also argue that the trial court abused its discretion, resulting in unfair prejudice, by admitting into evidence aerial photographs that were not identified or provided to

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[1] Having determined that defendants' use of the property constituted a nuisance per se under MCL 125.3407, we need not determine whether that use also constituted a nuisance in fact under the township's nuisance abatement ordinance. Were we to reach this issue, however, we would conclude that there was ample testimony before the trial court establishing that defendants' use of the property for the riding of multiple off-road vehicles on a defined track "annoy[ed], injure[d] or endanger[ed] the peace, welfare, order, health or safety of the public in their persons or property," by rendering neighboring property owners "insecure in . . . the use and enjoyment of their property," and by creating a "condition which is . . . obnoxious or offensive to the senses," as required by the nuisance abatement ordinance.

defendants before the contested hearing. This Court reviews this preserved challenge to the trial court's decision to admit the evidence for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). An abuse of discretion exists if the results are outside the range of principled outcomes. *Id*. at 158.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Morales v State Farm Mut Automobile Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Dep't of Transp v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999); *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 564 n 6; 766 NW2d 896 (2009). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002); *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008). "Unfair prejudice" does not mean merely "damaging"; any relevant evidence will be damaging to some extent. *Lewis v Legrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003). Rather, unfair prejudice exists where "there is danger that the marginally probative evidence will be given undue or preemptive weight" by the trier of fact, *Waknin*, 467 Mich at 335 n 3, quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998), "or when it would be inequitable to allow the use of such evidence," *Taylor*, 279 Mich App at 315. Further, error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected, MRE 103(a); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004), or unless the failure to grant relief would be inconsistent with substantial justice, MCR 2.613(A); *Lewis*, 258 Mich App at 200.

Even were we to agree with defendants that admission of these particular photographs, as opposed to the photographs attached to the complaint and/or identified on the township's witness list, was an abuse of discretion, we find no resultant unfair prejudice nor any effect on defendants' substantial rights arising from the trial court's decision. There was extensive photographic evidence admitted at trial showing the condition of the property, including the riding track and the use of a Bobcat to modify that track, about which defendants have no complaint. Further, during his testimony Kaminsky admitted that there was a designated riding track or course on the property, from which grass had been removed and debris cleared, and which included hills created to be used as "jumps" and the establishment of "bases" for landing. Additionally, there was ample testimony that historically the property was flat and sloping, without defined hills, and that the portion of the property used for riding was previously an alfalfa field maintained for grazing by horses. Admission of the aerial photographs was cumulative to this evidence, establishing only that there was no riding course visible in such photographs in April 1996, but that such a course was plainly visible by April 2010. Considering the cumulative nature of the aerial photographs, and the ample testimony establishing that Kaminsky defined and improved the riding track, changing the condition and contour of the property after purchasing it, admission of the photographs did not affect defendants' substantial rights. Accordingly, reversal is not warranted. MRE 103(a); *Craig*, 471 Mich at 76.

Finally, defendants assert, for the first time on appeal, that the aerial photographs should not have been admitted because they were not properly authenticated. Because defendants did not object to the admission of the photographs on this basis below, we review this claim for plain

error affecting defendants' substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

Defendants are correct that, generally, "[t]o lay a proper foundation for the admission of photographs, a person familiar with the scene depicted in the photograph must testify, on the basis of personal observation, that the photograph is an accurate representation" of that which it purports to depict. *Knight v Gulf & Western Props Co*, 196 Mich App 119, 133; 492 NW2d 761 (1992). Defendants are also correct that no such testimony was offered here. However, any plain error in admitting the photographs does not warrant reversal, because, considering the plentitude of other photographic and testimonial evidence establishing that Kaminsky created and improved the riding course on the property, the admission of the photographs did not affect defendants' substantial rights. *Hilgendorf*, 245 Mich App at 700.

Affirmed. The township, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro