STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2259

Robert Gundstrom, Sr., et al.,
Appellants,

vs.

Kyle Zweifel, et al.,
Respondents.

Filed September 1, 2009
Affirmed
Toussaint, Chief Judge

St. Louis County District Court
File No. 69DU-CV-08-1321

William D. Paul, 1217 East First Street, Duluth, MN 55805 (for appellants)

Steven L. Reyelts, Michael J. McNamara, Reyelts & Bateman, Ltd., 332 West Superior Street, Suite 700, Duluth, MN 55802-1801 (for respondents)

Considered and decided by Bjorkman, Presiding Judge; Toussaint, Chief Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Chief Judge

Appellants Robert Gundstrom, Sr. and Lois L. Gundstrom challenge the district court order granting summary judgment in favor of respondents Kyle and Julie Zweifel

and dismissing appellants' private-nuisance claim. Because the district court did not err in granting summary judgment in favor of respondents, we affirm.

D E C I S I O N

Appellants and respondents own adjacent lakeshore properties on Fish Lake near Duluth. Respondents' house and lot are immediately to the west of appellants' property. In May 2006, respondents built a mound of dirt, or berm, eight-to-ten feet tall on their property along the eastern property line. The berm stretches from the back of respondents' property to within approximately 20 feet of the lakeshore. It is located between 3 and 15 feet away from appellants' property line and creates no drainage problems. Respondents erected two fences constructed of fence posts and chicken wire on top of the berm. They concede that the berm is a physical barrier between their property and appellants' property and that the berm limits appellants' view of their property. Respondents erected the berm "because they enjoy the privacy it affords and the beauty that it adds to their backyard." They describe the berm as a "garden wall."

Appellants filed suit, alleging that the berm was a private nuisance because it "is awkwardly constructed and unsightly" and interferes with their enjoyment of their property and view of the lake. They sought damages, alleging that their property diminished in value as a result of the berm.

When respondents moved for summary judgment, appellants submitted an affidavit alleging that respondents erected the berm in order "to harass and irritate" them. The district court granted respondents' summary-judgment motion, finding that appellants failed to raise a genuine issue of material fact, "failed to put forth any evidence

to show that the berm is a material and substantial interference by the standard of ordinary people in the area," and did not "show that the berm was erected maliciously to annoy them."

On an appeal from summary judgment, this court asks whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "We review legal issues de novo." *Pollock-Halvarson v. McGuire*, 576 N.W.2d 451, 454 (Minn. App. 1998), *review denied* (Minn. May 28, 1998). We view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [the moving] party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. When a motion for summary judgment is made, an adverse party may not rest on mere averments or denials but must present specific facts showing that there is a genuine issue for trial. Minn. R. Civ. P. 56.05.

A "nuisance" is defined by statute as "[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Minn. Stat. § 561.01 (2008). "An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the

nuisance may be enjoined or abated, as well as damages recovered." *Id.*

"For an interference with the enjoyment of life or property to constitute a nuisance, it must be material and substantial." *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.,* 624 N.W.2d 796, 803 (Minn. App. 2001). "A court measures the degree of discomfort by the standards of ordinary people in relation to the area where they reside." *Id.* The degree of discomfort is not measured "by the standards of persons of delicate sensibility." *Jedneak v. Minneapolis Gen. Elec. Co.,* 212 Minn. 226, 229, 4 N.W.2d 326, 328 (1942) (quotation omitted).

Appellants claim that their submitted photographs and affidavit create an issue of material fact because, in their view, "most people would find the dirt pile, built between two lakeshore properties, to be so unsightly and so uncalled for as to be offensive and an obstruction to the free use of Appellants' lakeshore property."

But appellants' submissions establish neither the standards of ordinary people living near Fish Lake nor any violation of those standards by the berm. Without such evidence, no issue of material fact is created regarding whether the alleged indecency and offensiveness of respondents' berm is material and substantial. The photographs alone do not establish a material and substantial interference with appellants' property enjoyment, and appellants failed to submit any evidence establishing that respondents' berm diminished their property value. Appellants' opinions are simply insufficient to create a fact issue. *See Urbaniak Implement Co. v. Monsrud,* 336 N.W.2d 286, 287 (Minn. 1983) (stating that affidavit opposing summary judgment is not adequate if it only recites argumentative and conclusory allegations). The district court did not err in

concluding that appellants failed to raise an issue of material fact establishing a nuisance.

Neither did the district court err in its application of the law. "The owner of land cannot object . . . that a view from his premises is cut off" by "an erection on adjacent land." *McCarthy v. City of Minneapolis,* 203 Minn. 427, 430, 281 N.W. 759, 761 (1938) (holding that railroad bridge did not create nuisance for adjacent homeowner because "no easement appurtenant to plaintiffs' lot entitled them to a view, limited only by human vision, over the whole reach of the boulevard in front of their lot"); *see also Asche v. Bloomquist,* 133 P.3d 475, 483 (Wash. App. 2006) (holding that plaintiffs' private-nuisance claim, that neighbors' house blocked their mountain view, failed as matter of law because "person has no property right in the view across their neighbor's land," and "general rule is that a structure is not a nuisance merely because it obstructs the view of neighboring property"), *review denied* 53 P.3d 195 (Wash. Jan. 30, 2007); *Bubis v. Kassin,* 733 A.2d 1232, 1240 (N.J. App. 1999) ("[I]n the absence of a restrictive covenant, a property owner has no right to an unobstructed view across a neighbor's property.").

The district court also did not err in finding that appellants failed to create a fact issue establishing that respondents maliciously erected the berm. *See* Minn. Stat. § 561.02 (2008) ("Any fence, or any other structure, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance."); Minn. Stat. § 561.03 (2008) ("Any such owner or occupant injured, either in comfort or in the enjoyment of an estate by such fence, or any other structure, may have an action of tort for the damage sustained thereby and may have such

nuisance abated.”). Appellants submitted no evidence other than their own unsupported opinions that respondents maliciously erected and maintained their berm for the purpose of annoying appellants.

The district court did not err in granting summary judgment in favor of respondents and dismissing appellants’ nuisance claim.

Affirmed.