[Cite as *Walas v. Leone*, 2024-Ohio-4791.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

GLORIA A. WALAS,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	No. 113473
v.	:	
CRAIG LEONE, ET AL.,	:	
Defendants-Appellants/ Cross-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 3, 2024

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-22-961775

Appearances:

Meyers, Roman, Friedberg & Lewis, Ronald P. Friedberg, R. Scott Heasley, and Amily A. Imbrogno, *for appellees/cross-appellants*.

Thrasher, Dinsmore & Dolan, LPA, Dale H. Markowitz, Todd C. Hicks, and Elizabeth E. Collins, *for appellants/cross-appellees*.

EILEEN T. GALLAGHER, J.:

{¶ 1} Defendants-appellants and cross-appellees, Craig Leone, et al. ("Leone") appeal from the judgment of the trial court that struck his counterclaim against plaintiff-appellee and cross-appellant, Gloria A. Walas ("Walas"). Leone raises the following assignment of error for review:

> 1. The trial court abused its discretion when it issued a journal entry granting appellee's motion to strike appellant's counterclaim without a legal basis for doing so.

{¶ 2} Walas cross-appeals from the trial court's judgment granting Leone's motion to dismiss pursuant to Civ.R. 12(B)(6). Walas raises the following assignments of error:

> 1. The trial court erred in granting Leone's and the Village's motion to dismiss Walas' claims against Leone and the Village for injunctive relief pursuant to R.C. 713.13.
>
> 2. The trial court erred in granting Leone's motion to dismiss Walas' claim against Leone for damages pursuant to R.C. 713.13.
>
> 3. The trial court erred in granting Leone's motion to dismiss Walas' claim against Leone for injunctive relief for private nuisance.
>
> 4. The trial court erred in granting Leone's motion to dismiss Walas' claim against Leone for damages for private nuisance.

{¶ 3} After careful review of the record and relevant case law, we affirm the trial court's judgments.

I. Procedural and Factual History

{¶ 4} Leone and Walas each own residential properties located in the Village of Gates Mills, Ohio ("the Village"). This appeal stems from a dispute arising from Leone's construction of a fence on the border of the parties' properties.

{¶ 5} On April 7, 2022, Walas filed a complaint against Leone and the Village, setting forth claims for private nuisance, declaratory judgment, and injunctive relief. Therein, Walas alleged that the Village failed to comply with Gates Mills Cod. Ord. ("C.O.") 1313.09(A) and 1313.10 when it issued Leone a permit to erect the fence without having the Village's Architectural Board of Review ("ABR") first review and approve the permit application. Walas further alleged that Leone's construction of the fence will negatively affect both the value of her property and her use and enjoyment of her property because it (1) is "unsightly," and (2) "does not comport with the character of the Gates Mills Historic District or the surrounding neighborhood."

{¶ 6} On the same day the original complaint was filed, Walas filed a motion for an emergency temporary restraining order ("emergency TRO") pursuant to Civ.R. 65(A). The emergency TRO sought an order from the court forbidding Leone from constructing a fence on his property in violation of local ordinances.

{¶ 7} On April 11, 2022, Leone filed a brief in opposition to the motion for an emergency TRO, arguing that Walas could not prevail on her declaratory judgment claim because C.O. 1313.09(A), when read in context, "has no application to a fence being installed on the boundary of adjoining property owners." According to Leone:

> Village officials who have been elected and appointed to protect the public interest, have determined, for decades, that fences do not need to be reviewed by the [ABR] and that the regulations that apply to fences, such as height, location, and exterior views are more than adequate to protect the public interest.

Finally, Leone asserted that "fences, and in particular, well-maintained fences, cannot be a private nuisance when installed near the common property line of residential housing in Cuyahoga County."

{¶ 8} The Village also filed a brief in opposition to the emergency TRO. Consistent with Leone's interpretation of C.O. 1313.09(A), the Village argued that Walas's "claims rest on a flawed legal premise: that Gates Mills was required to refer the subject fence application . . . to the [ABR] before it issued Leone a permit to construct the fence." The Village maintained that "fences are not subject to the mandatory ABR review." Rather, the architecture, appearance, and construction of fences in the Village is regulated by C.O. 1163.11. Under this section, ABR review is only necessary for the construction of "front gate, entryway, or driveway structures."

{¶ 9} Following an evidentiary hearing, the trial court denied Walas's motion for an emergency TRO, finding that she failed to demonstrate a substantial likelihood of success on the merits by clear and convincing evidence. Relevant to this appeal, the court began its analysis by rejecting Walas's interpretation of the Village's codified ordinances. The court explained as follows:

> The issue before the court was whether or not the codified ordinances of the Village of Gates Mills required defendant Craig Leone's fence to be submitted to the [ABR] under C.O. 1313.09(A) prior to its building permit being issued.
>
> . . .
>
> C.O. 1313.09(A) specifies that new construction must "affect the exterior architectural feature of any such structure or building." The use of the word "affect" implies a change to the outside of an existing structure or building, which the fence does not. While, in a sense, the fence has an "exterior architectural feature" in a similar way that a new

> standalone building would, the ordinance is more plainly read as an ordinance preserving that which is already standing prior to the building permit's issuance.
>
> In the absence of any language of fencing in C.O. 1313.09(A), the court finds C.O. 1163.11's list of regulations without mentioning the [ABR] to be of consequence. Either of these ordinances would have clarified, with a short sentence, that the review process included fences. They did not.

{¶ 10} Finally, the court determined that Walas failed to demonstrate that the public interest would be served by granting the relief requested, stating:

> While the court can debate the language of the Ordinances, the Village of Gates Mills acted with a specific and consistent interpretation in never requiring such a review for fences. [Leone] did everything required of him in obtaining the permit and has undergone great cost to improve his property. While the placement of the fence may upset [Walas], the property lines existed at the time of purchase. This court cannot punish [Leone] for simply asserting his legal rights to purchase his property in a reasonable manner. Based on the foregoing, [Walas's] motion for temporary restraining order is denied.

{¶ 11} On June 6, 2022, Walas filed an amended complaint, reiterating her claim that the Village did not follow the proper procedures when it issued a building permit to Leone. Again, Walas argued the Village was required to obtain the approval of the ABR before issuing the permit pursuant to the plain language of C.O. 1313.09 and 1313.10. The amended complaint also set forth a claim for injunctive relief against the defendants pursuant to R.C. 713.13, a claim for compensatory damages against Leone pursuant to R.C. 713.13, and claims for injunctive relief and compensatory damages against Leone for private nuisance. The private nuisance claims included new allegations that the fence (1) unduly interferes with the

migration of wildlife in violation of C.O. 1163.11(g), and (2) emits . . . excessive, and often blinding, sunlight glare and reflection.

{¶ 12} On June 17, 2022, Leone filed a motion to dismiss the amended complaint pursuant to Civ.R. 12(B)(6). Leone argued the amended complaint "contains nothing more than bare legal assertions without alleging facts necessary to state valid claims against Leone." Leone further asserted that Walas's claims failed as a matter of law because the Village was not required to submit the permit to the ABR for review, Leone obtained permission to construct his fence by the Village, and a neighbor has no right to enjoin a neighbor's construction of a fence on his or her own property.

{¶ 13} The Village also filed a motion to dismiss pursuant to Civ.R. 12(B)(6), arguing that the amended complaint "fails to allege the facts requisite to sustain a claim under R.C. 713.13." Applying the plain language of the statute, the Village maintained that R.C. 713.13 only provides injunctive relief for violations of a zoning ordinance and not alleged violations of the Village's Building and Housing Code. The Village further noted that the trial court "already determined that no provision of the codified ordinances governing the ABR were violated by [the Village] by issuing a permit for the fence without referring the matter to the ABR prior to construction." Lastly, the Village argued that the amended complaint offers mere legal conclusions and failed to state how the fence prevents or otherwise interferes with the migration of wildlife.

{¶ 14} While the motions to dismiss were pending, Leone filed a stand-alone counterclaim against Walas on August 3, 2023. The counterclaim set forth causes of action for trespass, private nuisance, and injunctive relief pursuant to R.C. 713.13. The claims stemmed from allegations that Walas improperly modified the stormwater drainage on her property by (1) filling in a riparian buffer on her property without approval from the Village, and (2) inserting a smaller drainage pipe into a larger clay pipe designed to accept storm water naturally flowing from the Leone property to the Walas property. Leone alleged that Walas's negligent or reckless conduct impeded the natural flow of storm water and resulted in the artificial saturation of water on his property, causing damages thereto.

{¶ 15} On August 28, 2023, Walas moved to strike the counterclaim, arguing the counterclaim was improperly filed without obtaining leave of court in violation of Civ.R. 15(A). Alternatively, Walas argued the trial court lacked jurisdiction to resolve Leone's counterclaim because he "was already pursuing the storm-water claims . . . elsewhere, to wit, through a stormwater complaint made to the Village."

{¶ 16} On November 13, 2023, the trial court issued a journal entry, summarily granting Walas's motion to strike Leone's counterclaims. On the same day, the trial court issued a separate journal entry granting each defendant's motion to dismiss the amended complaint.

{¶ 17} The parties now appeal from the trial court's judgments rendered on November 13, 2023. The Village is not a party to this appeal.

II. Law and Analysis

A. Leone's Direct Appeal

{¶ 18} In the sole assignment of error, Leone argues the trial court committed reversible error by granting Walas's motion to strike his counterclaim without a legal basis for doing so.

1. Standard of Review

{¶ 19} This court reviews a ruling on a motion to strike under an abuse-of-discretion standard. *Hudson v. FPT Cleveland L.L.C.*, 2024-Ohio-2904, ¶ 66 (8th Dist.), citing *State ex rel. Ebbing v. Ricketts*, 2012-Ohio-4699, ¶ 13, and *State ex rel. Mora v. Wilkinson*, 2005-Ohio-1509, ¶ 10. A court abuses its discretion when it exercises its judgment in an unwarranted way with respect to a matter over which it has discretionary authority. *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35. An abuse of discretion may be found where a trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 2008-Ohio-1720, ¶ 15 (8th Dist.). An abuse of discretion also implies a decision that is unreasonable, arbitrary, or unconscionable. *State ex rel. DiFranco v. S. Euclid*, 2015-Ohio-4915, ¶ 13. When applying the abuse-of-discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Vannucci v. Schneider*, 2018-Ohio-1294, ¶ 22 (8th Dist.).

2. Civ.R. 15

{¶ 20} In this case, Walas's motion to strike argued that Leone's counterclaim was untimely because it was filed without leave of court or consent in violation of Civ.R. 15(A). Walas summarizes her position on appeal as follows:

> Pursuant to the plain language of [Civ.R. 15(A)], after filing and serving his Civ.R. 12(B)(6) motion to dismiss on June 17, 2022, Leone had a period of 28 days thereafter, or until July 15, 2022, to file his counterclaim as a matter of course. Since, however, Leone sought to bring his counterclaim on August 3, 2023 — more than 13.5 months after filing and serving his motion to dismiss — he was first required to seek and obtain leave of court (or Walas's written consent) in order to do so. Since Leone failed to obtain leave of court before filing and serving his counterclaim, the trial court's granting of Walas's motion to strike [the] counterclaim was not an abuse of discretion.

{¶ 21} Alternatively, Walas argues the trial court's judgment was reasonable because the court lacked jurisdiction to consider Leone's counterclaim where Leone had previously "filed a storm-water complaint with the Village, through its engineer."

{¶ 22} In contrast, Leone argues that Walas's reliance on Civ.R. 15(A) is misplaced because the rule governs "amendments" to a pleading, and the counterclaim "did not 'amend' any pleading he had previously filed, as no pleading had yet been filed." Leone asserts that his counterclaim was timely where, as here, the deadline for filing a responsive pleading was tolled pending the trial court's resolution of his motion to dismiss. Alternatively, Leone contends that if Civ.R. 15(A) is applicable, the trial court should have granted him leave to file his counterclaim because the rule "favors a liberal policy" of amendment. Finally, Leone denied Walas's assertion that he filed a storm-water complaint with the Village,

stating "there is no administrative proceeding pending in the Village or before any government body."

{¶ 23} Preliminarily, we find nothing in this record to support Walas's suggestion that Leone filed a formal storm-water complaint with the Village. Accordingly, we reject Walas's jurisdictional arguments and turn to the parties' competing interpretations of Civ.R. 15.

{¶ 24} Civ.R. 15(A) provides in relevant part that

> [a] party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave.

{¶ 25} "[T]he language of Civ.R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party." *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6 (1984). However, "where leave is required to file a pleading, and a party files its pleading without the requisite leave, a trial court may treat it as a legal nullity." *PNC Bank, N.A. v. J & J Slyman, L.L.C.,* 2015-Ohio-2951, ¶ 20 (8th Dist.).

{¶ 26} To understand the implications of Civ.R. 15(A) as applicable to the circumstances of this case, it is important to give context to the terms used therein. Civ.R. 7, titled "Pleadings and Motions," expressly "distinguishes a pleading from a motion." *State v. Wilkins*, 127 Ohio App.3d 306, 310 (2d Dist. 1998). The rule provides, in relevant part:

> (A) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Civ.R. 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.
>
> (B) Motions.
>
> (1) An application to the court for an order shall be by motion which, unless made during a hearing or a trial, shall be made in writing. A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. A written motion, and any supporting affidavits, shall be served in accordance with Civ.R. 5 unless the motion may be heard ex parte.

Civ.R. 7(A) and (B).

{¶ 27} Interpreting Civ.R. 7(A), Ohio courts have recognized that "only complaints, answers and replies constitute pleadings." *State ex rel. Hanson v. Guernsey Cty. Commrs.*, 65 Ohio St.3d 545, 549 (1992); *Hrynik v. Nicole Brayden Real Estate*, 2012-Ohio-3822, ¶ 25 (8th Dist.). Thus, a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim is not a "pleading" as contemplated under Civ.R. 15(A). Rather, it constitutes a "motion" as defined by Civ.R. 7(B). It reasonably follows that because Civ.R. 15(A) only relates to the amendment of a "pleading," and not a "motion," the rule is not applicable to the procedural facts of this case. Here, Leone never filed a "pleading" during the pendency of the proceedings below, i.e., a complaint, answer, or reply. Rather, as discussed further below, he filed a motion to dismiss pursuant to Civ.R. 12(B)(6), in lieu of a responsive answer.

{¶ 28} Under these circumstances, we find no merit to Walas's reliance on Civ.R. 15(A) for the proposition that Leone's counterclaim constituted an untimely

amendment to the Civ.R. 12(B)(6) motion that required leave of court or the consent of the opposing party to be filed. *See Wilkins* at 311 ("[A] Civ.R. 12(B)(6) motion to dismiss is not a pleading for purposes of Civ.R. 15(A)"), citing *Steiner v. Steiner*, 85 Ohio App.3d 513 (4th Dist. 1993.). However, our resolution of Walas's reliance on Civ.R. 15(A) does not end our inquiry.

3. Counterclaim's Compliance with Ohio Rules of Civil Procedure

{¶ 29} Having determined that Leone was not required to seek leave of court to file his counterclaim, the remaining issue before this court is whether the filing constituted an appropriate responsive pleading under the Ohio Rules of Civil Procedure.

{¶ 30} Ordinarily, Civ.R. 12(A)(1) requires a defendant to serve his or her answer to a complaint within 28 days of service of the summons and complaint. However, Ohio courts, including this court, have explained that "'Civ.R. 12(B) specifically allows some defenses, including the defense of . . . failure to state a claim from which relief can be granted, to be raised by motion prior to the filing of an answer or other responsive pleading.'" *Pryor v. St. Colman*, 2024-Ohio-2810, ¶ 12 (8th Dist.), quoting *Guillory v. Ohio Dept. of Rehab. & Corr.*, 2008-Ohio-2299, ¶ 5 (10th Dist.), citing *Temple v. Ohio Atty. Gen.*, 2007-Ohio-1471, ¶ 11 (10th Dist.). Thus, parties are "not required to file an answer . . . prior to filing their motion to dismiss for lack of subject matter jurisdiction and for failure to sta[t]e a claim for which relief can be granted." *Temple* at *id.*

{¶ 31} Because a Civ.R. 12(B) motion is an alternative to answering the complaint, a defendant who files such a motion need not answer the complaint until after the motion is decided. *Baker v. Ohio Dept. of Rehab. & Corr.*, 144 Ohio App.3d 740, 754 (4th Dist. 2001); *Crenshaw v. Cleveland Law Dept.*, 2020-Ohio-921, ¶ 30 (8th Dist.) ("Where a defendant files a motion pursuant to Civ.R. 12, the time for filing a responsive pleading is postponed until after the court rules on the motion."). If the defendant prevails on the motion, he or she may never have to answer. *Id.*

{¶ 32} In this case, Leone exercised his right to file a motion to dismiss under Civ.R. 12(B)(6) as an alternative to filing a responsive answer. However, before the motion to dismiss was decided, Leone determined it was necessary to file a counterclaim to address his ongoing concerns with the storm-water drainage on his property. The counterclaim was not incorporated into an answer, but was included in a stand-alone filing titled, "Counterclaim."

{¶ 33} Counterclaims in Ohio are governed by Civ.R. 13. The rule, which directs that a counterclaim be stated in a "pleading," provides as follows:

> (A) Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .
>
> (B) Permissive counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

{¶ 34} Applying the foregoing, Ohio Courts have recognized that, "generally, a counterclaim, whether compulsory or permissive, must be filed in an answer."

Mulhollen v. Angel, 2005-Ohio-578, ¶ 27 (10th Dist.); *State ex rel. Collier v. Farley*, 2006-Ohio-4901, ¶ 40 (4th Dist.); *Holland v. Estate of McGraw,* 1988 Ohio App. LEXIS 4120, 4 (8th Dist. Oct. 6, 1988) ("[A] defendant must assert any counterclaim with the original answer.").

{¶ 35} After careful consideration, we find Leone's decision to file a stand-alone counterclaim did not comply with the Ohio Rules of Civil Procedure. Here, Leone has not directed this court to any persuasive authority to suggest that a counterclaim can be filed without being incorporated into an answer that either admits, denies, or denies for lack of knowledge the averments in the complaint. Civ.R. 8(B). We reiterate that "a counterclaim, whether compulsory or permissive, *must* be filed in an answer." (Emphasis added.) *Id.* This requirement is consistent with Civ.R. 8(A), which illustrates that "a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim," must be set forth in a recognized "pleading." It is equally consistent with Civ.R. 13, which requires the *pleading*, i.e. the answer, to "state" the counterclaim.

{¶ 36} Because the claims for relief asserted in the counterclaim were not filed in a responsive answer, we find the trial court did not abuse its discretion by striking Leone's counterclaim. *See, e.g., Langer v. Monarch Life. Ins. Co.*, 966 F.2d 786, 811 (3d Cir.1992) (reasoning that the analogous "Federal Rules of Civil Procedure 12(b) and 13(g) require that cross-claims be stated in a pleading, and under Rule 7(a) cross-claims should be contained in a defendant's answer"); *Bernstein v. IDT Corp.*, 582 F.Supp. 1079, 1089 (D.Del. 1984) (holding that

counterclaims and cross-claims filed independently from an answer were not pleadings and therefore were subject to dismissal). *See also Natl. Assn. of Govt. Emps., Inc. v. Natl. Emergency Med. Servs. Assn., Inc.*, 969 F. Supp.2d 59, 67 (D.Mass. 2013) ("The filing of a motion to dismiss does not allow a defendant to file counterclaims as a stand-alone filing.").

{¶ 37} In reaching this decision, we recognize that Leone has argued, both in his brief in opposition below and now on appeal, that he was permitted to file a stand-alone counterclaim under the civil rules of procedure because Ohio courts have previously stated that "counterclaims and answers are separate pleadings." *EMC Mtge. Corp. v. Atkinson*, 2015-Ohio-1800, ¶ 12 (9th Dist.), citing *Abram & Tracy, Inc. v. Smith*, 88 Ohio App.3d 253, 263 (10th Dist. 1993); *see also Timock v. Bolz*, 1995 Ohio App. LEXIS 2172, *3 (8th Dist. May 25, 1995). Without addressing the accuracy of these decision's characterization of a counterclaim as a "pleading," we find their analysis to be irrelevant to the particular circumstances of this appeal. Significantly, *EMC, Abram,* and *Timok* did not involve the filing of a stand-alone counterclaim or otherwise address the language used in Civ.R. 7(A), 8(A), or 13. Rather, the holdings were limited to the determination that an amended answer only supersedes the original answer and not the counterclaim or third-party complaint raised therein. Given these procedural and factual distinctions, the trial court did not abuse its discretion in rejecting Leone's reliance on *EMC*, *Abram,* or *Timok* for the proposition that he was permitted to file a counterclaim without filing a responsive pleading to Walas's complaint.

{¶ 38} Leone's sole assignment of error is overruled.

B. Walas's Cross-Appeal

{¶ 39} Collectively, Walas's cross-appeal challenges the trial court's judgment granting Leone's and the Village's motions to dismiss pursuant to Civ.R. 12(B)(6).

1. Standard of Review

{¶ 40} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim tests the sufficiency of the complaint. *Antoon v. Cleveland Clinic Found.*, 2015-Ohio-421, ¶ 7 (8th Dist.). In deciding whether a complaint should be dismissed pursuant to Civ.R. 12(B)(6), the court's review is limited to the four corners of the complaint along with any documents properly attached to or incorporated within the motion to dismiss. *High St. Properties, L.L.C. v. Cleveland*, 2015-Ohio-1451, ¶ 17 (8th Dist.), citing *Glazer v. Chase Home Fin., L.L.C.,* 2013-Ohio-5589, ¶ 38 (8th Dist.). The court accepts as true all the material factual allegations of the complaint and construes all reasonable inferences to be drawn from those facts in favor of the nonmoving party. *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 667 (1995); *Brown v. Carlton Harley-Davidson, Inc.*, 2013-Ohio-4047, ¶ 12 (8th Dist.), citing *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 104 (8th Dist. 1995).

{¶ 41} To prevail on a Civ.R. 12(B)(6) motion, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. If there is "'a set of facts, consistent with the plaintiff's complaint,

which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.'" *High St. Properties* at ¶ 16, quoting Y*ork v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145 (1991).

{¶ 42} A Civ.R. 12(B)(6) motion does not test the merits of a claim. *Filo v. Liberato*, 2013-Ohio-1014, ¶ 15 (7th Dist.). Thus, "'[a] court cannot dismiss a complaint under Civ.R. 12(B)(6) merely because it doubts the plaintiff will prevail.'" *Bono v. McCutcheon*, 2005-Ohio-299, ¶ 8 (2d Dist.), quoting *Leichtman v. WLW Jacor Communications, Inc.*, 92 Ohio App.3d 232, 234 (1st Dist. 1994).

{¶ 43} An appellate court conducts a de novo review of a trial court's ruling on a Civ.R. 12(B)(6) motion to dismiss. *Perrysburg Twp. v. Rossford*, 2004-Ohio-4362, ¶ 5. Accordingly, we undertake an independent analysis without deference to the trial court's decision. *Hendrickson v. Haven Place, Inc.*, 2014-Ohio-3726, ¶ 12 (8th Dist.).

2. Counts 1 and 2 — Relief under R.C. 713.13

{¶ 44} In this case, Counts 1 and 2 of Walas's amended complaint sought injunctive and monetary relief against Leone and the Village pursuant to R.C. 713.13. Specifically, Walas alleged that because the Village failed to comply with C.O. 1313.09 and 1313.13 before issuing the permit to Leone, she sustained compensatory damages and was entitled to injunctive relief. Alternatively, Walas asserted that she was entitled to relief under R.C. 713.13 based on the fence's alleged interference with the migration of wildlife in violation of C.O. 1163.11(g).

{¶ 45} R.C. 713.13 allows neighboring property owners to seek an injunction to prevent or terminate violations of its zoning ordinances or regulations. The statute provides as follows:

> No person shall . . . construct . . . any . . . structure . . . in violation of any zoning ordinance or regulation enacted pursuant to sections 713.06 to 713.12, inclusive, of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution. In the event of any such violation, or imminent threat thereof, the municipal corporation, or the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation.

{¶ 46} Chapter 1313 of the Codified Ordinances of Gates Mills, titled the "Building and Housing Code," broadly regulates the construction of buildings and similar structures within the Village. C.O. 1313.09 is titled "Review Procedure for the Historic District and Historic Landmarks." The ordinance states, in relevant part:

> No building permit for the construction, erection, alteration, removal, moving or demolition of any structure or building in the Historic District . . . shall be issued where such action will affect the exterior architectural feature[1] of any such structure or building, unless and until such application has been approved by the Board.

{¶ 47} In turn, C.O. 1313.10, titled "Building Permit Applications," provides that "[e]very building permit application for a structure to be built or remodeled in

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[1] C.O. 1313.02(i) states, "Exterior architectural feature" means the architectural style and general arrangement of the exterior of a structure, including the type and texture of building materials, all windows, doors, lights and signs, and other fixtures appurtenant thereto.

the Village shall be made in writing upon printed forms to be furnished by the Building Official and shall be approved by both the Building Official and the Board."

{¶ 48} Finally, C.O. 1163.11(g), located in the Village's "Planning and Zoning Code," provides as follows: "No fence shall be erected or permitted which unduly interferes with the migration of wildlife."

{¶ 49} On appeal, Walas argues she is expressly entitled to injunctive and monetary relief under the plain language of R.C. 713.13 because she has been especially damaged by Leone's violations of C.O. 1313.09, 1313.10, and 1163.11(g). Thus, Walas contends that, accepting her allegations as true, "it simply cannot be said that it 'appears beyond a doubt that [she] can prove no sets of facts'" in support of Counts 1 and 2 of the amended complaint.

{¶ 50} In reviewing an ordinance, we apply the same rules we apply when reviewing a statute. We give the words their plain, ordinary and customary meaning. *Cleveland v. Go Invest Wisely, L.L.C.*, 2011-Ohio-3242, ¶ 9 (8th Dist.). We give effect to all of the words used and may not "'restrict, constrict, qualify, narrow, enlarge or abridge'" the plain language of the ordinance. *Sivit v. Village Green of Beachwood, L.P.*, 2016-Ohio-2940, ¶ 28 (8th Dist.), quoting S*tate ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 2012-Ohio-1484, ¶ 18; *see also Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 53-54 (1988). If the plain language of the ordinance conveys a clear, unequivocal, and definite meaning, we apply the language as stated without interpretation or construction. *See, e.g., Georgetown of the Highlands v. Cleveland Div. of Water*, 2016-Ohio-8039, ¶ 21

(8th Dist.), citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545 (1996); *Cleveland v. Elkins*, 2008-Ohio-6288, ¶ 19 (8th Dist.). If, however, an ordinance is ambiguous, i.e., if the language of the ordinance is susceptible to more than one reasonable interpretation, we must apply rules of construction to interpret the ordinance. *Columbus v. Reiner*, 2018-Ohio-975, ¶ 33 (10th Dist.).

{¶ 51} After careful review of R.C. 713.13 and the Village's local ordinances, we find Walas's amended complaint fails to make the requisite allegations to prevail on a claim under R.C. 713.13 based on either of the alternative theories raised therein. Applying the plain language of R.C. 713.13, this court has recognized that "a plaintiff seeking relief under R.C. 713.13 bears the burden of showing that he or she would be . . . 'especially damaged' *by a 'zoning violation*.'" (Emphasis added.) *Murray Energy Corp. v. Pepper Pike*, 2008-Ohio-2818, ¶ 15 (8th Dist.). In this case, Walas's allegations relating to the Village's failure to submit the permit application to the ABR for review fails to identify any "zoning" ordinance that was violated prior to the issuance of the permit and the construction of the fence. As mentioned, the provisions governing the ABR review process are governed by the Building and Housing Code. Any alleged violation of that process does not involve a zoning ordinance and, therefore, the relief afforded to neighboring property owners under R.C. 713.13 is not applicable. Consequently, to the extent Walas relies on C.O. 1313.09 and 1313.10, Walas's claims under R.C. 713.12 fail to state a claim upon which relief can be granted.

{¶ 52} We are equally unpersuaded by Walas's reliance on C.O. 1163.11(g). Civ.R. 8(A) provides, in relevant part, that "[a] pleading that sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the party is entitled to relief[.]" However, even under the notice-pleading standard, a complaint must consist of more than "'bare assertions of legal conclusions.'" *Fisher v. Ahmed*, 2020-Ohio-1196, ¶ 8 (9th Dist.), quoting *Copeland v. Summit Cty. Probate Court*, 2009-Ohio-4860, ¶ 10 (9th Dist.). Allegations in a complaint must be supported by facts. *Minaya v. NVR, Inc.*, 2017-Ohio-9019, ¶ 15, 17 (8th Dist.).

{¶ 53} Thus, "[c]onclusions not supported by factual allegations in the complaint cannot be deemed admitted and are insufficient to withstand a motion to dismiss." *Krohn v. Ostafi*, 2020-Ohio-1536, ¶ 10 (6th Dist.), citing *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324 (1989); *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193 (1988) ("Unsupported conclusions that appellant committed an intentional tort are not taken as admitted by a motion to dismiss and are not sufficient to withstand such a motion.") (Emphasis deleted.); *Godwin v. Facebook, Inc.*, 2020-Ohio-4834, ¶ 14 (8th Dist.) ("'[E]ven under Ohio's notice-pleading standard, a cause of action must be factually supported and courts need not accept bare assertions of legal conclusions.' . . . [U]nsupported legal conclusions are not accepted as true for purposes of a motion to dismiss."), quoting *Enduring Wellness, L.L.C. v. Roizen*, 2020-Ohio-3180, ¶ 24 (8th Dist.).

{¶ 54} In this case, we find Walas's claim under C.O. 1163.11(g) amounts to an unsupported legal conclusion. The amended complaint merely concludes,

without stating more, that "Leone's fence also violates C.O. section 1163.11(G), in that the fence unduly interferes with the migration of wildlife." The claim is not supported by any factual allegations and does not otherwise explain how the fence is unduly interfering with the migration of wildlife or what wildlife is being affected by the installation of the fence. Thus, we find the conclusory claim is insufficient to satisfy notice pleading requirements and fails to state a claim upon which relief can be granted.

3. Counts 3 and 4 — Private Nuisance

{¶ 55} Counts 3 and 4 of the amended complaint set forth claims for private nuisance, alleging that Leone's construction of the fence unreasonably interfered with Walas's use and enjoyment of her property. According to Walas, the fence (1) emits excessive, and often blinding, sunlight glare and reflection, and (2) its "highly reflective solid white vinyl causes significant annoyance, disruption, and health hazards." The amended complaint sought compensatory damages and injunctive relief ordering that the fence be removed.

{¶ 56} Nuisance is a term used to designate "the wrongful invasion of a legal right or interest." *Brackett v. Moler Raceway Park, L.L.C.*, 2011-Ohio-4469, ¶ 15, (12th Dist.). Nuisance may be public, i.e., an unreasonable interference with a right common to the general public, or it may be private. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 712 (4th Dist. 1993). "A 'private nuisance' is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Nithiananthan v. Toirac*, 2015-Ohio-1416, ¶ 32 (12th Dist.).

{¶ 57} A public or private nuisance may be further classified as either an "absolute" nuisance, or nuisance per se, or a "qualified" nuisance. *Taylor v. Cincinnati,* 143 Ohio St. 426 (1944), paragraphs two and three of the syllabus. An absolute nuisance involves a wrongful act that is either intentional or unlawful. *Kratochvil v. Mayfield Bd. of Edn.*, 2003-Ohio-1360, ¶ 32 (8th Dist.). The wrongful act at issue "is so inherently dangerous that it cannot be conducted without damaging someone else's property rights, no matter the care utilized, and strict liability attaches notwithstanding the absence of fault . . . ." *Temple v. Fence One, Inc.*, 2005-Ohio-6628, ¶ 41 (8th Dist.), citing *Taylor* at paragraph two of the syllabus. In other words, "no matter how careful one is, such activities are inherently injurious and cannot be conducted without [causing damage]." *Ogle v. Ohio Power Co.*, 2012-Ohio-4986, ¶ 10 (4th Dist.), quoting *Brown* at 713. The damage, or injury, must be "real, material, and substantial." *Banford v. Aldrich Chem. Co., Inc.*, 2010-Ohio-2470, ¶ 17.

{¶ 58} A qualified nuisance, however, concerns a lawful act "so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another." *Temple* at ¶ 41, quoting *Taylor* at paragraph two of the syllabus. In essence, an action for qualified nuisance is an action for the negligent maintenance of a condition that creates an unreasonable risk of harm that results in injury. *Kratochvil* at ¶ 32; *Allen Freight Lines, Inc. v. Consol. Rail Corp.*, 64 Ohio St.3d 274, 275 (1992).

{¶ 59} Upon review, we find the trial court did not err in dismissing private nuisance claims that are premised on a neighbor's installation of a fence on his own property after obtaining the necessary permit. In this case, there is no allegation in the complaint to suggest that the installation of the fence was reckless or inherently dangerous. While the amended complaint does allege that Leone breached a duty of care owed to Walas, the claim merely relies on Walas's dissatisfaction with the appearance of the fence and the material used to construct the fence. *See Antonik v. Chamberlain*, 81 Ohio App. 465, 476 (9th Dist. 1947) ("The question for decision is not simply whether the neighbor is annoyed or disturbed, but is whether there is an injury to a legal right of the neighbor."). In this narrow factual context, we find no cognizable claim for private nuisance where the permit for the installation of the fence, which included a description of the color and materials to be used, was approved by the Village prior to its construction. Regardless of Walas's dissatisfaction with the process used by the Village to approve the permit, there is no dispute that Leone did not construct the fence until his permit was approved by the Village. Nor did Walas demonstrate that the use of white, vinyl fence material is uncommon or otherwise prohibited by the Village. Thus, Walas can prove no set of facts demonstrating that Leone acted intentionally but unreasonably or unintentionally but negligently. *See Woods v. Sharkin*, 2022-Ohio-1949, ¶ 94 (8th Dist.). As recognized by the Ohio Supreme Court, because Leone had a legal right to erect and maintain a fence on his property, neither law nor equity can compel its removal. *Letts v. Kessler*, 54 Ohio St. 73 (1896).

{¶ 60} Walas's first, second, and third cross-assignments of error are overruled.

{¶ 61} Judgment affirmed.

It is ordered that appellee and appellant share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR