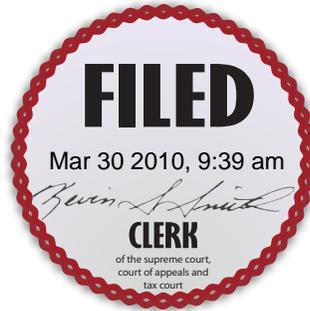


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**IN THE
COURT OF APPEALS OF INDIANA**

ROLAND BARKER, GLORIA BARKER,)
BARKER POOL SUPPLY, INC., R.L. BARKER)
CONSTRUCTION CO., INC., and F & F)
CONSTRUCTION CO., INC.,)

Appellants-Defendants,)

vs.)

No. 49A02-0909-CV-872)

JESUS THE MESSIAH CHURCH,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM 13
The Honorable S.K. Reid, Judge
Cause No. 49D13-0410-PL-2035

March 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellants-Defendants, Gloria Barker (Gloria) , Barker Pool Supply, Inc., Barker Pool Center, Inc., (collectively Appellants),¹ appeal the trial court’s judgment awarding damages to the Appellee-Plaintiff, Jesus the Messiah Church (Church), on its claims for nuisance, breach of contract, express warranty, and fraud.

We affirm.

ISSUES

Appellants present two issues for our review, which we restate as:

- (1) Whether the Church presented sufficient evidence to prove that Gloria knew that dumping had occurred on a parcel of land that she and her husband Roland Barker (Roland) sold to the Church; and
- (2) Whether the Church presented sufficient evidence to prove that either Barker Pool Center, Inc., or Barker Pool Supply, Inc., could be held liable for nuisance.

FACTS AND PROCEDURAL HISTORY

In 2003, Gloria and Roland sold a parcel of land located in Marion County, Indiana, to the Church. On July 17, 2003, Gloria and Roland executed a “Vendor’s Affidavit” which expressly provided, among other things, that the property “is not, and has not been used, as a landfill or dump.” (Appellee’s App. p. 90). Additionally, Gloria and Roland had previously submitted a letter in response to an inquiry by the Church about the history of the land: “To

¹ Gloria, Barker Pool Supply, Inc., and Barker Pool Center appeal the judgments against them. Roland Barker, F & F Construction Co., Inc., and R.L. Barker Construction Co., Inc., acquiesce in the judgments against them and do not challenge the same on appeal.

Whom it may concern, since date of purchase December 4, 1980. Other than mowing and clean fill dirt in low areas, the above mentioned property has not been used for any other purpose[.]” (Appellee’s App. p. 89).

Later that year, the Church hired Yeager Construction (Yeager) to build a sanctuary on the property. When Yeager began digging for the footers of the building, it discovered debris and trash beginning approximately three feet under the ground surface. There was brick, concrete, “some tires and logs and different pipings [sic].” (Transcript p. 163). To prevent problems with the foundation of the sanctuary, Yeager was required to excavate the trash. The excavated materials filled approximately fifteen to twenty truck loads which had to be hauled to the landfill since the material contained tires and other trash. When digging trenches for the utilities, Yeager found the “same type of debris . . . your bricks and your blocks, and not only that but your trash, from tires to pipes to trash in general.” (Tr. p. 174).

In 2007, the Church decided to build a community center on the property to provide educational and mentoring activities and programs. When trenches were dug for the utilities, more debris was encountered and the utility companies could not backfill the trenches with the debris. Additionally, the company hired to build the community center, found debris where the community center was to be built and advised the Church that they would have to excavate all of the debris and replace it with clean fill because they could not build over the debris. The debris uncovered at this time included wood materials, fuel tanks, plastics, tires, and a pool cover that was manufactured in 1991 according to a label still affixed after excavation. In addition, a Coca-Cola Classic can was excavated from approximately five or

six feet underground. The Church Pastor testified that he recollected that the Coca-Cola Classic container was not introduced until 1985.

On October 27, 2004, the Church filed a Complaint alleging that Roland and Gloria engaged in illegal dumping, breached the Purchase Agreement for the sale of the property, breached an express warranty given to the Church, created a private nuisance, and trespassed upon the property of the Church. The Church later amended its complaint to add F & F Construction, Inc., R.L. Barker Construction, Inc., Barker Pool Supply, Inc., and Barker Pool Center, Inc., as defendants, and added a claim for fraud against Roland and Gloria. On February 1, 2005, the Barkers brought a third-party complaint against Donald DeBello (DeBello), who previously had been buying the property on contract from the Barkers, alleging that if any dumping had occurred, it occurred while DeBello was in control of the land and DeBello is liable for any damages.

On November 5 and 6, 2008, and January 29, 2009, the trial court conducted a bench trial on the Church's complaint and the Barkers third party complaint against DeBello. At the trial, Eugene Gray (Gray) testified that he had previously owned the Church property, prior to Roland and Gloria. When Gray purchased the property there was a twenty-four foot by twenty-four foot garage on it. Around 1966, Gray had somebody dig a pond on the property. In about 1971, Gray contacted Roland, who at that time owned F & F Construction Company. Gray wanted the pond filled because he was concerned that kids who were playing around it were going to get hurt and asked Roland to provide solid fill that his company would accumulate when installing pools and driveways. They "had an

understanding, that there was no construction equipment or lumber, no trees, only solid fill,” which was to consist of “[m]ostly dirt and gravel.” (Tr. p. 263). Gray was on the property frequently and was able to view what was dumped into the pond; he never saw Roland dump anything into the pond that he objected to. Roland testified that his actions to fill the pond were done on behalf of F & F Construction. Roland stated that the pond was filled with concrete, asphalt, and dirt, and Gray never objected to any of the fill being placed in the pond. At some point, Gray gave the garage away, and someone came and hauled it off leaving only the slab.

In 1979 or 1980, Gray sold the property to Roland and his then business partner, Dale Carter (Carter). During the 1980’s, Roland sold his interest in the property to Carter, and then Carter sold a one-half interest back to Roland, who had it titled in Gloria’s name. Gray did not see any dumping occur after he sold the property to Roland and Gloria until DeBello took control over the property while buying it on contract from Roland and Gloria. During one four or five day period while DeBello was purchasing the property on contract, Gray observed trucks dump several loads on the property. Gray approached one of the drivers who identified himself as being from the gas company and said he had instructions to dump on the property.

DeBello did not appear at the trial despite having been subpoenaed. However, John Malicoat (Malicoat), who had done some work for DeBello, testified at the trial. Malicoat recollected that in the late 1980’s, DeBello hired Malicoat to do some excavation and hauling work for a condominium project. DeBello instructed Malicoat to clean up “excess dirt and

gravel and things of that nature” and dump it on the Church property. Malicoat noticed bricks stacked on the property when he went there to dump the loads. Additionally around this time, DeBello authorized the Indianapolis Airport to dump material from a retention pond it was digging on the property and spread it out. Malicoat witnessed “[p]robably greater” than a hundred tri-axle truck loads of material being dumped on the property. (Tr. p. 293). Malicoat testified that the loads from the condo project “could have [contained] a chunk of concrete, [or] a busted pallet, [but was] mainly dirt.” (Tr. p. 294). He estimated that the loads from the airport were “mainly 99% dirt.” (Tr. p. 294).

Gary Newlin (Newlin), a former driver who did work for Malicoat, testified that he worked on the condominium project that Malicoat had described. Newlin stated that materials were stock piled at the Church property and he would dump dirt and debris from grading the ground at the condominium project at the Church property. The debris consisted of “maybe pieces of concrete or brick or piece of wood or shingle or something laying on the ground that gets mixed up on the dirt.” (Tr. p. 328). Additionally, Newlin cleaned out a water drainage ditch that had run along a former railroad line. To clean out the ditch, Newlin excavated items that had washed into it, including “hubcaps, tin cans, pop bottles, paper, [and] . . . whatever fell off somebody’s car.” (Tr. p. 332). Newlin took that debris to the Church property to stock pile it.

After a two or three year period, DeBello “went bankrupt and quitclaimed [the property] back.” (Tr. p. 367). A notice sent to DeBello by Gloria on February 27, 1989, stated that he was in breach for the following reasons:

1. FAILURE TO PAY OR OFFER TO PAY FOR THE STAKE SURVEY PER YOUR AGREEMENT AT THE TIME OF THE INITIAL CLOSING.
2. LOST INTEREST ON THE CONTRACT FROM THE DATE OF THE SECOND CLOSING APPOINTMENT.
3. UNAUTHORI[Z]ED DUMPING ON THE ABOVE MENTIONED PROPERTY.

(Defendant's Exhibit 27(a)). Gloria testified that she had no knowledge of "[w]hat I think of as dumping" on the property until after the lawsuit was filed. (Tr. p. 445). She acknowledged that she had sent notices to DeBello asking him to remove equipment and materials from the property after he had quitclaimed the property to her and Carter. She believed that DeBello complied with her request. When directly questioned by the trial court as to whether she knew of dumping on the property while DeBello had control of the property, she contradicted herself:

[TRIAL COURT]: I'm asking you, the question is did you know about the dumping or didn't you know about the dumping prior to this lawsuit?

[Gloria]: I did know about the dumping.

* * *

[TRIAL COURT]: That isn't exactly, my question is what did you know. Either you knew about the dumping or you didn't prior to the lawsuit?

[Gloria]: I did not.

(Tr. pp. 462-63).

Roland testified that he knew about the dumping on the property while DeBello had control over it. However, his direct testimony during the trial contradicted itself as to when

he learned about the dumping. He initially testified that Malicoat and Newlin had spoken to him “while DeBello was still on it or was still purchasing it.” (Tr. p. 368). But later Roland testified that he learned of the dumping “at some point after [he] sold the property to the Church.” (Tr. p. 370).

When Roland was caring for the property, he mowed it approximately once every two months in the summer time. While doing so, he would find that people had dumped trash onto the property, and he would have to clean it up prior to mowing. Eventually, Roland put a chain across the entryway to the property to prevent persons from dumping trash on to it. Regarding the pool cover that was found buried on the property, Roland testified that his company never worked with that brand and that he never dumped a pool cover on the property. Gloria testified that Barker Pool Center sometimes sold similar types of pool covers, but did not install them.

Roland testified that when filling the pond, he would dump what he considered to be “clean-fill” into the area, consisting of mainly dirt with some concrete and asphalt. (Tr. p. 399). Roland also explained that although he dumped the “biggest part” of the material that filled in the pond, he noticed that someone else also left piles of material to fill in the pond, which may have included metal and pipe. (Tr. p. 407). He also acknowledged that the concrete which he dumped could have contained rebar, and that other materials that he dumped could have contained some broken pieces of pipe.

The trial court took the evidence under consideration and on June 15, 2009, entered its Order and Judgment. The trial court awarded the Church \$136,920.12 in damages and pre-

judgment interest on the Church's nuisance claim against all defendants, and awarded the Church \$240,143.51 in attorneys fees and expenses for breach of contract, express warranty, and fraud against only Roland and Gloria pursuant to a provision in the Purchase Agreement.

The Appellants now appeal. Additional facts will be presented as necessary.

DISCUSSION AND DECISION

I. Standard of Review

Neither party requested, nor did the trial court issue upon its own motion, special findings of fact or statements of conclusions. Therefore, we apply the general judgment standard, under which we will affirm the judgment "if it can be sustained upon any legal theory consistent with the evidence." *UFG v. Southwest Corp.*, 784 N.E.2d 536, 543 (Ind. Ct. App. 2003), *trans. denied*. We do not reweigh the evidence or judge witness credibility, but we consider only the evidence most favorable to the judgment along with all reasonable inferences that can be drawn therefrom. *Id.*

II. Liability for Roland, R.L. Barker Construction, Co., and F & F Construction

We first note that the Appellants explicitly "acquiesce in the judgments against [Roland, R.L. Barker Construction Co., F & F Construction Co.] and do not raise those judgments on appeal." (Appellant's Br. p. 2). Therefore, we summarily affirm the trial court's judgment in respect to those defendants.

III. *Gloria's Liability*

A. *Nuisance*

The Appellants contend that there was “no evidence . . . that Gloria knew about, or participated in anything like ‘dumping’ on the property.” (Appellant’s Br. p. 16). Therefore, Appellants argue, Gloria cannot be liable for nuisance because the Church failed to prove that she either created the nuisance or substantially participated in its creation.

To begin, we note that a nuisance is “[w]hatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property.” Ind. Code § 34-1-52-1. Typically, the law of nuisance is applied to intangible invasions, such as noise, odor, and light, while physical invasions, such as the placement of debris and trash upon the property of another, is characterized as a trespass. *See San Diego Gas & Elec. Co. v. Superior Court*, 13 Cal. 4th 893, 935-38, 920 P.2d 669, 750-51 (1996); *see also Dore v. Jefferson Guar. Bank*, 543 So.2d 560 (La. Ct. App. 1989). However, we have noted that our statutory definition of nuisance is broad, and the invasion by the defendants here was clearly “an obstruction to the free use of property.” *See Wernke v. Halas*, 600 N.E.2d 117, 120 (Ind. Ct. App. 1992). In light of our standard of review for general judgments, and the fact that the Church properly preserved both nuisance and trespass claims, we will consider the parties contentions as presented which focus on the application of nuisance law.

To support its contention that the Church was required to prove that Gloria knew about or participated in the dumping, Appellants cite to *City of Bloomington v. Westinghouse*

Elec. Corp., 891 F.2d 611, 614 (7th Cir. 1989). In *City of Bloomington*, the Seventh Circuit Court of Appeals considered the district court’s dismissal of a claim against a manufacturer, Monsanto, for a nuisance that was caused by the purchaser’s, Westinghouse, failure to dispose of a product safely. The Seventh Circuit affirmed the dismissal for two primary reasons: (1) “Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product;” and (2) “[t]he allegations do not support the proposition that Monsanto participated in carrying on the nuisance[; w]ithout such participation, Monsanto cannot be liable.” *Id.* In coming to this holding, the court noted the Restatement of Torts (Second) § 834, which provides: “One is subject to liability for nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on.” *Id.* n.5.

We first note that the facts from *City of Bloomington* are readily distinguishable from the facts here. Monsanto sold a product to Westinghouse, and lost all control over the manner of use and disposal of that product after the sale. Here, Gloria owned the property and maintained a level of control over the property throughout as evidenced by her letter informing DeBello that he had engaged in unauthorized dumping on February 27, 1989.

Moreover, the Appellants’ claim fails because there was evidence from which the trial court could have concluded that Gloria was aware of the dumping on the property. As we have noted above, Gloria sent a certified letter to DeBello on February 27, 1989 complaining about three grievances, the third being “unauthori[z]ed dumping” on the property. (Defendant’s Ex. 27(a)). At trial, Gloria claimed she had no knowledge of what she would

consider to be dumping having transpired on the property.² However, when the trial court directly questioned Gloria to determine when she learned of the dumping, she gave conflicting answers:

[TRIAL COURT]: I'm asking you, the question is did you know about the dumping or didn't you know about the dumping prior to this lawsuit?

[Gloria]: I did know about the dumping.

* * *

[TRIAL COURT]: That isn't exactly, my question is what did you know. Either you knew about the dumping or you didn't prior to the lawsuit?

[Gloria]: I did not.

(Tr. pp. 462-63). Furthermore, Gloria acknowledged instances where either Roland or she had found trash dumped on the property. When asked if she knew why a chain had been

² Specifically, with respect to DeBello, the following exchange took place during the trial:

[Defendant's Counsel]: [T]o your knowledge did . . . Mr. DeBello ever dump stuff on the property? Did you ever know of him dumping stuff before the lawsuit?

[Gloria]: Dumping, what I think of dumping no.

* * *

[Defendant's Counsel]: And when you signed [the Vendor's Affidavit], had you had any knowledge of any dumping whatsoever on that property?

[Gloria]: No.

* * *

[Defendant's Counsel]: Do you recall what you meant by unauthorized dumping?

[Gloria]: I quite honestly don't recall exactly what it was but I would say it was probably something above ground that caught our attention, whatever. [] He had building materials, he had pipe, he had shingles; all this stuff that he used in constructing the doubles nearby.

[Defendant's Counsel]: Do you think that's what you were referring to by dumping?

[Gloria]: Yes, yes, I'm not referring to trash. I think I'm referring to his excess material.

(Tr. pp. 444, 450, 460).

placed across the ingress and egress area of the property, Gloria responded: “There were people dumping stuff there and to the best of my memory it seemed like somebody had dumped some shrubbery in there.” (Tr. p. 436).

It is apparent from the record that the trial court was presented with conflicting evidence as to whether Gloria had knowledge of dumping on the property prior to selling it to the Church with an assurance that only clean fill had been placed upon the property. We do not make decisions on witness credibility, and cannot reweigh the evidence. *UFG*, 784 N.E.2d at 543. The Appellants’ only basis for challenging their liability for nuisance was Gloria’s lack of knowledge of the dumping prior to the lawsuit. Therefore, we must affirm the trial court’s judgment for nuisance against Gloria.

B. Breach of Contract, Express Warranty, and Fraud

Appellants also contend that Gloria cannot be held liable for the other legal theories which the trial court found her liable for: “breach of contract, express warranty, and fraud.” (Appellants’ App. p. 154). Specifically, Appellants’ contend that the Church failed to prove that she had knowledge of dumping on the property, and, therefore, Gloria could not be held liable for making false representations to the Church. The Church responds that, “[a]t the very least, [Gloria] acted with reckless disregard of the truth or falsity.” (Appellee’s Br. p. 13).

The trial court lumped liability for each of these three legal theories together to support an award of attorney’s fees. The Purchase Agreement provided that: “Any party to this Agreement who is the prevailing party in any legal or equitable proceeding against any

other party brought under or with relation to the Agreement or transaction shall be additionally entitled to recover court costs and reasonable attorney's fees from the non-prevailing party." (Appellee's App. p. 79). Therefore, if the Church is successful under any of these theories, it would support the trial court's award of attorneys' fees. Because the Church focuses its contentions upon the premise that Gloria at least made assurances with a reckless disregard for the truth, we will review the record to determine if it supports the Church's claim for fraud as the trial court found.

[T]o establish a cause of action for fraudulent misrepresentation, the plaintiff must demonstrate: (1) that the defendant made false statements of past or existing material facts; (2) that the defendant made such statements knowing them to be false or recklessly without knowledge as to their truth or falsity; (3) that the defendant made the statements to induce the plaintiff to act upon them; (4) that the plaintiff justifiably relied and acted upon the statements; and (5) that the plaintiff suffered injury.

Dickerson v. Strand, 904 N.E.2d 711, 715 (Ind. Ct. App. 2009), *reh'g denied*.

In addition to the elements for fraudulent misrepresentation, there is an additional legal proposition which we apply to claims of fraudulent misrepresentations involving sales of property: "[A] purchaser of property has no right to rely upon the representations of the vendor of the property as to its quality, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities." *Id.* (quoting *McCutchan v. Blanck*, 846 N.E.2d 256, 265 (Ind. Ct. App. 2006)). In applying this rule in *Dickerson*, we traced it to *Cagney v. Cuson*, 77 Ind. 494, 1881 WL 6689 (1881), wherein our supreme court applied this legal proposition to "*fraudulent* representations operating as an inducement to the sale or exchange of property." *Id.* at 715 (citing *Cagney*, 77 Ind. at 497, 1881 WL 6689 *2)

(emphasis in original). Both the majority and dissenting opinions in *Dickerson* encouraged our supreme court to reevaluate the social value of the rule, and Judge Vaidik, dissenting, noted that we may not have always strictly abided by such a strict rule of *caveat emptor*:

[I]n some cases, we have recognized that a seller has the duty to disclose material facts about the property “where the buyer makes inquiries about a condition on, the qualities of, or the characteristics of the property,” *Fimbel v. DeClark*, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998), *trans. denied*, and that, once a seller undertakes to disclose facts within his or her knowledge, the seller must disclose the whole truth, *Thompson v. Best*, 478 N.E.2d 79, 84 (Ind. Ct. App. 1985) (citing *Ind. Bank & Trust Co. v. Perry*, 467 N.E.2d 428, 431 (Ind. Ct. App. 1984)), *reh’g denied*.

Id. at 716-17.

Nevertheless, we find that a harsh application of *caveat emptor* is inapplicable here. The legal proposition from *Cagney* is expressly qualified to situations where the buyer “has a reasonable opportunity of examining the property and judging for himself as to its qualities.” *Id.* at 715. In a case written shortly after *Cagney*, our supreme court approved a jury instruction that provided “the vendor could not defeat a recovery by showing an inspection of the land, if it appeared that an inspection would not disclose the deceit in the alleged false representations[.]” *Shepard v. Goben*, 142 Ind. 318, 322, 39 N.E. 506, 507 (1895). Here, the representative for Yeager Construction testified that the debris was found beginning in the range of three feet below the surface, likely buried under the more than 100 dump trucks worth of dirt from the airport which Malicoat testified was dumped on the property. Therefore, we are firmly convinced that a reasonable inspection of the property would not have exposed the subsurface debris.

Moving on to the elements of fraud, Gloria assured the Church that the property had only been mowed and used for clean fill dirt in low areas since 1980. However, the Church presented as evidence a letter from Gloria dated February 27, 1989, wherein she notified DeBello that she was aware of his “unauthori[z]ed dumping.” (Defendant’s Ex. 27(a)). The trial court could have easily found that Gloria’s assurance to the Church was a false statement, or at least a statement made in reckless disregard of the truth or falsity made to induce the Church into buying the property. The Church presented overwhelming evidence that it was injured by the debris left on the property. Therefore, the evidence supported the trial court’s general judgment on the issue of fraud, and we need not consider whether the Gloria’s assurances were a breach of contract or express warranty.

III. *Liability of Barker Pool Supply, Inc. or Barker Pool Center, Inc. for Nuisance*

Appellants contend that no direct evidence was presented connecting either Barker Pool Supply, Inc., or Barker Pool Center, Inc. to the nuisance. The Church replies that, to the contrary, a pool cover dated 1991 was discovered buried with the other debris. Based upon this fact, the Church contends that “[A] reasonable inference is that it was buried by a Barker Pool Center, Inc. employee (after being discarded by a Barker Pool Company customer who had purchased a new pool cover).” (Appellee’s Br. p. 16). There was testimony, aside from the simple fact that the pool cover was discovered, which tends to support such an inference.

Roland testified that Barker Pool Center, Inc. sold and installed pool covers, and even sold the type of pool cover that was found buried on the property. Roland testified extensively about his dumping of materials on the property, although he attempted to characterize the

materials he dumped as clean fill. Nevertheless, he admitted that during a deposition he had testified that he had dumped “virtually trash.” (Tr. p. 409). Roland was an employee of Barker Pool Center, Inc., and also operated a general contracting business as a branch of Barker Pool Center, Inc.

Under the doctrine of *respondeat superior*, an employer is liable for the acts of its employees which were committed within the course and scope of their employment. *Southport Little League v. Vaughan*, 734 N.E.2d 261, 268 (Ind. Ct. App. 2000). An employee acts within the scope of employment when he is acting, at least in part, to further the interests of his employer. *Id.* Based on Roland’s testimony, the trial court could have concluded that Roland or another employee of Barker Pool Center, Inc. more probably than not disposed of the pool cover on the property and that Barker Pool Center, Inc., was liable for that act by way of *respondeat superior*.

Appellants also contend that Barker Pool Supply, Inc., cannot be held liable because it is a nonentity that was never fully incorporated. The undisputed testimony was that Gloria attempted to incorporate Barker Pool Supply, Inc., for insurance purposes, but later learned that such a separate entity was unnecessary. However, we fail to see how this is an issue which merits in depth consideration because the trial court held the defendants jointly and severally liable for the nuisance. Therefore, the other defendants, which include both Gloria

and the Barker Pool Center, Inc., can pay the judgment in full, leaving no remaining liability to Barker Pool Supply, Inc.

CONCLUSION

Based on the foregoing, we conclude that the Church presented sufficient evidence to prove that Gloria knew of dumping that had occurred on the property, and that Gloria made a fraudulent misrepresentation to the Church. Furthermore, the Church presented sufficient evidence that Barker Pool Center, Inc., should be held liable for nuisance as well.

Affirmed.

VAIDIK, J., and CRONE, J., concur.