

Ted Parker (“Parker”) appeals from the trial court’s judgment awarding damages to Randall J. Bonewitz (“Bonewitz”) and Russell Todd Dellinger (“Dellinger”) in the amount of \$108,500 on their nuisance action against Parker. Parker raises the following restated issue: whether the trial court erred in its award of damages because insufficient evidence supported the amount awarded.

We affirm.

FACTS AND PROCEDURAL HISTORY

Bonewitz and Dellinger bought a farm house (“the Bonewitz/Dellinger property”) in 1997, which was located next to land owned by Parker. At that time, Parker used the land for farming, but, in 2003, he started a new business on his property, which specialized in drying mycelium¹ to be sold for use in animal feed. In order to dry the mycelium, a furnace was used, which utilized sawdust as fuel. On October 10, 2007, Bonewitz and Dellinger filed a complaint for injunctive relief and damages, alleging that Parker’s business constituted a nuisance. On October 21, 2008, the trial court entered its judgment on the complaint, declining to grant a total permanent injunction and only permanently enjoining Parker from unloading sawdust outside of his pole building. The trial court did not award damages to Bonewitz and Dellinger.

Bonewitz and Dellinger appealed the trial court’s decision, and a panel of this court issued a published opinion on August 26, 2009. In *Bonewitz v. Parker*, 912 N.E.2d 378 (Ind. Ct. App. 2009), *trans. denied*, this court reversed the trial court and held that Parker’s

¹ Mycelium is a byproduct of the manufacture of food grade citric acid.

mycelium drying business constituted a nuisance and that, if Bonewitz and Dellinger could not be made whole with money damages, the trial court was instructed to issue a permanent injunction. *Id.* at 385. In calculating damages, this court stated that “[a] proper measure of damages shall be calculated as the difference between the market value of the Bonewitz/[Dellinger property] if the . . . mycelium-drying operation ceased and its current market value with an active nuisance next door.” *Id.* It further stated that Bonewitz and Dellinger may be entitled to damages for their “discomfort and annoyance” and that the damages award should also include consequential damages, such as moving expenses. *Id.*

Following remand from this court, a hearing was held, where evidence regarding damages was heard. The evidence showed that the drying process created emissions of steam or smoke, which would surround the Bonewitz/Dellinger home. The wet mycelium had an odor described as a rotten sour smell, like the stench of fermenting yeast, and would become more pungent as it baked in the sun. The wet mycelium also acted as a breeding ground for flies, which were not otherwise a problem. There was also an odor produced during the drying process, which was described as similar to “a rendering plant when they’re burning dead animals.” *Tr.* at 59. As a result of the odors, Bonewitz and Dellinger could not open their windows, use their swimming pool, deck, or recreation room, or enjoy any activities outside. The odor would cling to the upholstery in their vehicles and would seep into their home despite their efforts to prevent it.

The sawdust used to fuel the furnace would blow around and onto the Bonewitz/Dellinger property, where it would collect on the vehicles and exterior of the

house. The sawdust would also collect in the swimming pool and would get tracked into the house. Additionally, the drying process would cause vibrations constantly while in operation, and these vibrations could be felt in the house and caused items in the house to shake and fall off of shelves. Further, trucks were constantly coming and going from Parker's property at all hours, and the noises associated with this would wake Bonewitz, Dellinger, and their children.

Suzanne Metz ("Metz"), a licensed real estate broker, inspected the Bonewitz/Dellinger property, and in her opinion, with Parker's business in operation or with the possibility of it operating, the Bonewitz/Dellinger property had zero marketability. *Id.* at 88-89. She based this opinion on the noise, the residue deposited on the property, health concerns, and resale concerns. *Id.* at 89. It was Metz's opinion that Bonewitz and Dellinger would have to disclose the issues associated with Parker's business to any potential buyer if they wished to attempt to sell the property. *Id.* She also stated that she would not list the house for sale due to liability concerns. *Id.* Without Parker's business in operation, Metz would list the Bonewitz/Dellinger property in the range of \$79,900 to \$89,900. *Id.* at 90. Metz was also familiar with the rental market in the area and opined that with Parker's business in existence, the rental value of the Bonewitz/Dellinger property was zero, but without it, the fair rental value was \$550 per month. *Id.* at 91. Additionally, Parker had an expert testify that the appraised value of the Bonewitz/Dellinger property, without taking into account Parker's business operation, was \$100,000. *Id.* at 235. Another real estate broker, Carol Butler ("Butler"), performed a market analysis on the Bonewitz/Dellinger property in

October 2006, which estimated the value of the property to be \$180,000 without considering Parker's business operation. *Pl's 1/5/11 Ex 2*.²

While the case was pending, Bonewitz and Dellinger purchased a new house and incurred \$5,559.27 in closing costs, when they thought that Parker was willing to purchase their original property. When Parker failed to purchase the home, Bonewitz and Dellinger were responsible for two mortgages. Bonewitz and Dellinger entered into a listing agreement with Butler and listed the original property for sale in 2009 for \$139,900, but received no offers. They were able to enter an agreement for the possible sale of the property to family friends. The friends began renting the Bonewitz/Dellinger property in April 2009, but by April 2010, the friends had breached the agreement and stopped making payments. At the time of the damage hearing, the Bonewitz/Dellinger property was in foreclosure.

After the evidentiary hearing, the trial court entered judgment against Parker and ordered him to pay Bonewitz and Dellinger \$108,500 in damages. Parker now appeals.

DISCUSSION AND DECISION³

Our review of an award of damages is limited. *Crider & Crider, Inc. v. Downen*, 873 N.E.2d 1115, 1118 (Ind. Ct. App. 2007). "A judgment is not excessive unless the amount cannot be explained upon a basis other than prejudice, passion, partiality, corruption, or

² The exhibit volume contains the exhibits admitted both at the bench trial concerning the original complaint filed by Bonewitz and Dellinger requesting injunctive relief and damages on October 9, 2008 and the January 5, 2011 bench trial conducted to determine damages. We therefore refer to the exhibits with the date of the bench trial for ease of reference.

³ Parker filed a motion for oral argument, which we deny in an order issued simultaneously with this decision.

another improper element.” *Id.* We do not reweigh the evidence or judge the credibility of witnesses, and we will consider only the evidence favorable to the award. *Id.* A damage award must be supported by probative evidence and cannot be based upon mere speculation, conjecture, or surmise. *Id.* We reverse an award of damages only when it is not within the scope of the evidence before the finder of fact. *Id.*

Parker argues that the trial court erred when it awarded Bonewitz and Dellinger damages in the amount of \$108,500. He contends that this amount was excessive because there was no evidence presented to show that his business operation caused any diminution in the value of the Bonewitz/Dellinger property. Parker also claims that there was no evidence presented to support any award of damages for discomfort or annoyance or for loss of use of the real estate. Parker further asserts that the closing costs paid by Bonewitz and Dellinger for their new home should not have been included in the damages award because the closing costs were not consequential damages flowing from the operation of his business.

At the evidentiary hearing, the evidence most favorable to the damages award showed, with regard to the fair market value of the Bonewitz/Dellinger property, several varying opinions ranging from \$79,900 to \$180,000. All of the opinions were given as values without taking into consideration the nuisance of Parker’s business. The only opinion given as to the value of the Bonewitz/Dellinger property taking into consideration the existence of Parker’s business and its effect on the property was testimony by Metz. She testified that the property had zero marketability with Parker’s business in existence. *Tr.* at 88-89. Therefore, even considering the lowest opinion as to the value of the Bonewitz/Dellinger property

without the presence of the nuisance, the evidence showed that the depreciation in the fair market value of the property was at least \$79,900, the difference between the property before the harm and after the harm.

Additionally, evidence was presented to clearly establish that Bonewitz and Dellinger were not able to enjoy the full use of their property no later than early 2005. Although Parker discontinued the operation of the business in February 2007, the nuisance remained because of Parker's ability and intention to continue the operation of his business. In terms of the loss of use of the property, Bonewitz and Dellinger presented evidence that their property had a fair market rental value of \$550 per month without the presence of the nuisance and that the rental value was zero with the nuisance present. Further, the evidence presented showed that, as to damages for discomfort and annoyance due to Parker's business, Bonewitz's and Dellinger's enjoyment of their home was substantially affected by the emissions of smoke and steam that would surround the house, the rotten, sour smell from the wet mycelium that would permeate the house, the odor from the drying process that was similar to "a rendering plant when they're burning dead animals," sawdust that blew onto their property and covered everything, the vibrations that could be felt in the house whenever the dryers were running, and the trucks that would come and go at all hours. For these discomforts and annoyances, Bonewitz and Dellinger sought \$5,000 per year that the business was in operation or a total of \$10,000.

Lastly, as to consequential damages, Bonewitz and Dellinger moved from the subject property due to the nuisance of Parker's business. They presented evidence that they

incurred \$5,459.27 in closing costs when they purchased their new home. Based on the evidence presented, we conclude that the trial court's damages award was supported by probative evidence and was not based upon mere speculation, conjecture, or surmise. *Downen*, 873 N.E.2d at 1118. Therefore, Parker has failed to show that the damages award was excessive. The trial court did not err in its award of damages to Bonewitz and Dellinger.

Affirmed.

BAKER, J., and BROWN, J., concur.