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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL and JULIA FRANCIS,)	
)	
Appellants-Defendants,)	
)	
vs.)	No. 55A01-0701-CV-4
)	
JOAN HEINZ, LARRY and ELLEN BLAZIK,)	
ROBERT and LISA YOUNG, MATTHEW and)	
DEBORAH HANSON, TERRY and)	
PAULA CLOW,)	
)	
Appellees-Plaintiffs.)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable David H. Coleman, Special Judge
Cause No. 55D01-0310-PL-585

August 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Michael and Julia Francis (collectively, the “Francises”) appeal the trial court’s grant of punitive damages to Matthew and Deborah Hanson (collectively, the “Hansons”) and Terry and Paula Clow (collectively, the “Clows”). The Francises raises one issue, which we restate as whether the trial court’s award of punitive damages to the Hansons and the Clows is clearly erroneous. We reverse and remand.

The relevant facts follow. The Francises, Hansons, and Clows are owners of residential property in Foxcliff Estates North Subdivision in Morgan County, Indiana. While constructing a new driveway, the Francises removed trees from properties belonging to the Hansons and the Clows. The Hansons, the Clows, and other property owners filed a petition for an emergency temporary restraining order and a petition for a temporary restraining order against the Francises and their contractor, which the trial court granted.

They also filed a complaint for a permanent injunction and damages against the Francises and their contractor. The second amended complaint for a permanent injunction and damages alleged:

8. That at this time, the Court should enter a Permanent Injunction enjoining the [Francises] from further excavation work or removal of trees, should issue a judgment in favor of the Plaintiffs for damages proven by the Plaintiffs that they have suffered as a result of the [Francises’] activities, and further, should it be determined at Trial that the [Francises] have removed trees from the Plaintiff’s [sic] properties, award treble damages as a result of the [Francises’] trespass, which was done without authority or permission of the Plaintiffs, and award attorney’s fees as a result of removal of such trees and the trespassing on Plaintiffs[’] property.

WHEREFORE, Plaintiffs pray that this Court, find, at the hearing, that the [Francises] are liable to the Plaintiffs, for a permanent injunction [en]joining the Defendants from any further excavation or removal of trees

or construction of driveway on their property, for damages, including, if proven at Trial, treble damages, for attorney's fees, for costs, and for all other relief just and proper in the premises.

Appellants' Appendix at 42-43.

After a trial, the trial court entered findings of fact and conclusions thereon concluding that the Francises' contractor "recklessly" entered the property owned by the Hansons and the Clows upon the direction of the Francises and "removed trees and dirt without permission." Id. at 27. Further, the trial court found that the Francises were liable for damages to restore the Hansons and Clows' properties. However, the trial court denied the request for treble damages because it found no "criminal trespass." Id. at 28. In addition to restoration damages, the trial court awarded punitive damages to the Hansons and Clows. Thus, the trial court awarded judgment to the Hansons and against the Francises in the amount of \$4,062.49 plus punitive damages in the amount of \$10,000.00 and judgment to the Clows and against the Francises in the amount of \$9,755.00 plus punitive damages of \$10,000.00.

The issue is whether the trial court's findings of fact and conclusions thereon awarding punitive damages are clearly erroneous. We may not set aside the findings or judgment unless they are clearly erroneous. Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210 (Ind. 2000), reh'g denied. In our review, we first consider whether the evidence supports the factual findings. Id. Second, we consider whether the findings support the judgment. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Quillen v. Quillen, 671 N.E.2d

98, 102 (Ind. 1996). A judgment is clearly erroneous if it relies on an incorrect legal standard. Menard, 726 N.E.2d at 1210. We give due regard to the trial court’s ability to assess the credibility of witnesses. Id. While we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Yoon v. Yoon, 711 N.E.2d 1265, 1268 (Ind. 1999).

First, we note that the Hansons and Clows have not filed an appellees’ brief. When the appellee fails to submit a brief, we need not undertake the appellee’s burden of responding to arguments that are advanced for reversal by the appellant. Hamiter v. Torrence, 717 N.E.2d 1249, 1252 (Ind. Ct. App. 1999). Rather, we may reverse the trial court if the appellant makes a prima facie case of error. Id. “Prima facie” is defined as “at first sight, on first appearance, or on the face of it.” Id.

The Francises argue that the trial court’s award of punitive damages is clearly erroneous because the Hansons and the Clows did not request punitive damages in their second amended complaint. In support of their argument, the Francises rely upon 1st Source Bank v. Rea, 559 N.E.2d 381 (Ind. Ct. App. 1990), trans. denied. There, the bank challenged the trial court’s award of punitive damages. 559 N.E.2d at 388-389. We reversed, noting that the plaintiffs had not requested punitive damages in their counterclaim and that the trial court had not granted a motion to amend the pleading to conform to the evidence. Id.; see Ind. Trial Rule 15(B) (“When issues not raised by the

pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”).

Similarly, here, the complaint did not contain a request for punitive damages and there is no indication in the record provided to us¹ that a request for punitive damages was made at trial or that a motion to amend the pleading to conform to the evidence was filed. We conclude that the Francises have made a prima facie showing that the trial court erred by awarding punitive damages. Consequently, we reverse the trial court’s award of punitive damages and remand for the trial court to amend the judgment to eliminate the award of punitive damages. See, e.g., 1st Source Bank, 559 N.E.2d at 389.

For the foregoing reasons, we reverse the trial court’s award of punitive damages and remand for proceedings consistent with this opinion.

Reversed and remanded.

MAY, J. and BAILEY, J. concur

¹ Appellants did not submit a transcript.