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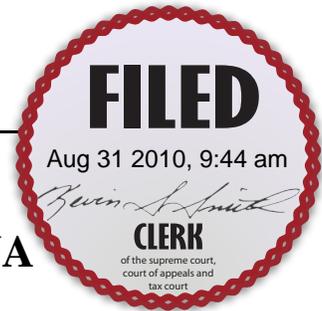
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**IN THE  
COURT OF APPEALS OF INDIANA**

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DENNIS MORROW and LISA MORROW, )

Appellants-Defendants, )

vs. )

No. 45A03-0911-CV-509 )

WALTER KUCHARSKI and )  
LOIS KUCHARSKI, )

Appellees-Plaintiffs. )

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Robert Kennedy, Special Judge  
Cause No. 45D03-9710-CP-3192

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**August 31, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Appellants-Defendants Dennis Morrow and Lisa Morrow (“the Morrows”) appeal a \$45,025.56 judgment in favor of their former neighbors, Appellees-Plaintiffs Walter Kucharski and Lois Kucharski n/k/a Lois Evans (“the Kucharskis”), upon the Kucharskis’ private nuisance claim. We affirm.

## **Issues**

The Morrows articulate three issues, which we consolidate and restate as a single issue: whether the judgment is clearly erroneous.

Additionally, the Kucharskis request appellate attorney’s fees.

## **Facts and Procedural History**

In 1990, the Kucharskis purchased property located on Joliet Street in St. John, Indiana, in an area zoned for residential uses.<sup>1</sup> The Morrows purchased adjoining property in 1992 and sometime later began to operate a home-based business, Contrak Courier, Inc.<sup>2</sup> The Kucharskis contacted St. John’s attorney to complain of alleged zoning violations by the Morrows relative to business traffic, use of invasive outdoor lighting, and re-direction of water flow.

The Kucharskis reported that the Morrows had employees arriving intermittently, day and night, sometimes idling trucks at length and conducting audible conversations on two-way radios or cellular devices. They also asserted that the Morrows had installed motion

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<sup>1</sup> Minor business uses were permissible, such as child care for fewer than six children or sales of Mary Kay cosmetics.

<sup>2</sup> The business involved the pick-up and delivery of medical specimens.

detection lights and that Dennis Morrow had trimmed leaves away from a pre-existing mercury vapor light. This flooded the Kucharskis' house with light at night and brightly illuminated their backyard when there was movement there, even by pets. Lois Kucharski, a migraine sufferer, was particularly affected by the light.

Finally, the Kucharskis claimed that the Morrows had conducted excavation and fill activities, causing water that previously pooled in a saucer-like depression across both properties and continued to flow after the saucer was filled to pool exclusively on the Kucharski property and remain stagnant. At times, approximately 20% of the Kucharski property was under water. The Kucharskis waded through water to reach their vegetable garden and were required to contend with a significant increase in mosquitoes.

At the direction of St. John's zoning officials, the city attorney declined to sue the Morrows on behalf of the city, but he conducted limited inspections and attempted to negotiate a solution satisfactory to both of the neighboring couples. The dispute resolution efforts were unsuccessful and the contentious relationship between the neighbors remained unresolved. On October 7, 1997, the Kucharskis filed a complaint seeking injunctive relief and private nuisance damages. On July 10, 2000, the Kucharskis filed an amended complaint alleging nuisance and violations of the St. John Zoning Ordinance, and seeking damages and injunctive relief.

Over the next several years, the matter was repeatedly continued.<sup>3</sup> On August 8 and 9, 2006, a bench trial was conducted. Over three years later, on September 30, 2009, the trial

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<sup>3</sup> The Morrows sold their property and moved away. The Kucharskis divorced and Walter Kucharski remained in possession of the subject property.

court entered its Findings of Fact, Conclusions of Law, and Order. The trial court found the Morrows liable for a private nuisance and awarded the Kucharskis damages as follows: \$9,020.56 for out-of-pocket expenses, \$9,465 for damages “relating to the time, frustration, annoyance, and interference with the use of their property ... in connection with the operation of the home business,” \$18,930 “relating to the time, frustration, annoyance and interference with the use of their property ... in connection with the glare cast from the Morrow property onto the Kucharski property,” and \$7,610.00 “relating to the time, frustration, annoyance, and interference with the use of their property as a result of the Morrows’ re-grading of the property to the detriment of the Kucharski property.” (App. 41.) The trial court found that a violation of the St. John Zoning Ordinance had not been established and also denied the Kucharskis an award of attorney’s fees. The Morrows now appeal.

## **Discussion and Decision**

### **I. Standard of Review**

At the parties’ request, the trial court issued findings of fact and conclusions of law pursuant to Indiana Trial Rule 52. When reviewing a judgment based upon findings, we first determine whether the evidence supports the findings and then determine whether the findings support the judgment. Atterholt v. Robinson, 872 N.E.2d 633, 638-39 (Ind. Ct. App. 2007). We will set aside a trial court’s findings of fact and judgment only if they are clearly erroneous. Id. at 639. Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them and the judgment is clearly erroneous

if it is unsupported by the findings and conclusions thereon. Id. In assessing whether findings are clearly erroneous, we will not reweigh the evidence nor judge the credibility of the witnesses. Id. Instead, we consider the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. Id. A finding or conclusion is clearly erroneous when our review of the record leaves us with a firm conviction that a mistake has been made. Id. We defer to the trial court’s findings of fact, but do not defer to its conclusions as to the applicable law. Id.

## II. Analysis

Bolstered by the trial court’s conclusion that a zoning violation was not established, the Morrows claim that they did nothing illegal. Challenging some of the trial court’s findings but not others, the Morrows assert that the evidence as a whole fails to support a finding that any of the conduct at issue – operating a business, re-directing water flow, or utilizing outdoor lighting – was unreasonable or intrusive to such a degree that it amounted to a nuisance.<sup>4</sup> As such, they contend that the trial court clearly erred in finding for the Kucharskis upon their nuisance claim.

In Indiana, nuisances are defined by statute. Indiana Code Section 32-30-6-6 defines an actionable nuisance as: “Whatever is (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with

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<sup>4</sup> The Morrows also present a cursory argument that they should not be held personally liable for claims more properly directed to Contrak Courier, Inc., an Illinois corporation. They assert that the Kucharskis failed to present evidence to support the piercing of the corporate veil. However, the Morrows did not file a motion for dismissal for failure to name the real party in interest nor did they present an argument in this regard to the trial court. The Morrows may not raise the issue for the first time upon appeal. Nance v. Miami Sand & Gravel, LLC, 825 N.E.2d 826, 834 (Ind. Ct. App. 2005), trans. denied.

the comfortable enjoyment of life or property[.]” A public nuisance is that which affects an entire neighborhood or community while a private nuisance affects only one individual or a determinate number of people. Wernke v. Halas, 600 N.E.2d 117, 120 (Ind. Ct. App. 1992). A private nuisance arises when it has been demonstrated that one party has used his property to the detriment of the use and enjoyment of another’s property. Id.

A nuisance may be a nuisance per se, something which cannot be lawfully conducted or maintained (such as a house of prostitution or an obstruction encroaching upon a public highway) or may be nuisance per accidens, where an otherwise lawful use may become a nuisance by virtue of the circumstances surrounding the use. Id. Whether something is a nuisance per se is a question of law, and whether something is a nuisance per accidens is a question for the trier of fact. Id.

Here, the Kucharskis prevailed upon their allegation of a private, per accidens nuisance.<sup>5</sup> “[T]he relevant inquiry is whether the thing complained of produces such a condition as in the judgment of reasonable persons is naturally productive of actual physical discomfort to persons of ordinary sensibility, tastes, and habits.” Wendt v. Kerkhof, 594 N.E.2d 795, 797 (Ind. Ct. App. 1992), trans. denied.

With regard to the operation of their home business, the Morrows argue that the evidence does not support a finding that the “increase in activity, traffic, noise and fumes . . . interfered with the Kucharskis’ use of their property.” (App. 21.) However, the Kucharskis presented evidence that there was day and night traffic “in no real pattern” by vehicles

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<sup>5</sup> They did not likewise prevail upon their claim that the Morrows used their property in an illegal manner, i.e., in violation of the St. John Zoning Ordinance.

including box trucks, vans, and cars. (Tr. 51.) They testified that they could smell diesel fumes and hear communications between the drivers and Dennis Morrow. Walter stated that headlights were “rarely” turned off and “it got to be almost like a game” with employees “mouthing off.” (Tr. 49.) There is evidence from which the trial court could find that the Morrows used their property to the detriment of the Kucharskis’ property. The Morrows’ claim that the Contrak Courier home office did not generate unreasonable noise “in frequency or in degree,” Appellant’s Brief at 44, is an invitation to reweigh the evidence. This we cannot do. See Atterholt, 872 N.E.2d at 639.

As for the pooling of water onto the Kucharski property, the Morrows contend that their excavation and redistribution of dirt was permissible under the common enemy doctrine. The rule known as the “common enemy doctrine” provides that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Argyelan v. Haviland, 435 N.E.2d 973, 975 (Ind. 1982). The common enemy doctrine may apply regardless of whether the plaintiff has asserted his claim in negligence, trespass, or nuisance. Long v. IVC Indus. Coatings, Inc., 908 N.E.2d 697, 702 (Ind. Ct. App. 2009). However, it applies only to surface water as opposed to a natural watercourse. Id.

“Surface water” may be defined as that which is diffused over the natural slope of the ground, but not following a defined course or channel. Id. at 703. A natural watercourse is established when the surface water begins to flow in a definite direction and a regular channel is formed. Id. The size of the watercourse is immaterial, as is the necessity of a

constant water flow. Id. It is sufficient that water from heavy rain is regularly discharged through a well defined channel; a defined bed and banks made by the action of the water is not dispositive. Id. Rather, the essential characteristics of a watercourse are substantial existence and unity, regularity, and dependability of flow along a definite course. Id. Whether a flow of water is a watercourse or mere surface water is an issue of fact. Id.

Walter Kucharski, who is an engineer, testified that the Morrows had essentially built an earthen dam to “block the natural water course.” (Tr. 83.) He described the watercourse as running across the Kucharski property, then across the Morrow property, to a drainage ditch “feeding into” the St. John Ditch, eventually ending up in the Kankakee River in Illinois. (Tr. 86.) Thus, there is evidence from which the trial court could properly make the factual determination that a watercourse was involved such that the Morrows were not shielded by the common enemy doctrine.

The Morrows nonetheless contend that they moved only a small amount of dirt, they had obtained professional opinions indicating a lack of substantial impact to the surrounding area, and such ordinary landscaping could not have constituted a nuisance. They find Walter Kucharski’s testimony that his property was flooded by their actions to be speculative. However, the Kucharskis testified that approximately 20% of their property was flooded after the Morrows engaged in excavation activities on the Morrow property. The Morrows’ argument that their activity was so minimal that no significant re-direction of water could have occurred is an invitation to reweigh the evidence.<sup>6</sup> Again, we cannot do so. See

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<sup>6</sup> The Morrows also claim that damages related to the water re-distribution are not recoverable because “no

Atterholt, 872 N.E.2d at 639.

Finally, with regard to intrusive lighting, the Morrows claim that there was no nuisance because their predecessor installed the mercury vapor light and the additional light that the Morrows had installed – the motion detector light – was removed in response to complaints. The Morrows ignore Walter Kucharski’s testimony that tree limbs had partially shaded the mercury vapor light in the past, but after Walter asked Dennis to provide additional shade, Dennis “trimmed back any possible limb[.]” (Tr. 56.) According to Walter’s testimony, the motion detector light (described as similar to “having a 1,000 watt flashlight shining in your eyes”) was removed after several months of complaints but the light intrusion into “about every portion of [the Kurcharski] home” continued from the mercury vapor light until the Morrows moved. (Tr. 59, 62.) He likened sitting in his backyard to trying to sit in a department store parking lot. Walter’s testimony and the photographic evidence are sufficient to support the trial court’s finding of a nuisance from intrusive lighting. The judgment is not clearly erroneous.

#### Appellate Attorney’s Fees

The Kucharskis request an award of damages pursuant to Indiana Appellate Rule 66(E), which provides, “The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court’s discretion and may

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evidence was presented [as] to the diminution of fair market value of the property.” Appellant’s Brief at 48. However, the Morrows fail to develop a corresponding argument with citation to authority supporting the proposition that such evidence is a prerequisite for recovery of the damages awarded herein for annoyance and loss of use. See Bonewitz v. Parker, 912 N.E.2d 378, 385 (Ind. Ct. App. 2009) (recognizing that the measure of damages for an unabated nuisance is the depreciation of market value by reason of the continuance of a permanent nuisance but also acknowledging the availability of “damages for discomfort and annoyance as occupants.”), trans. denied.

include attorneys' fees. The Court shall remand the case for execution.”

Our discretion to award attorney's fees pursuant to this Rule is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. Poulard v. Laporte County Election Bd., 922 N.E.2d 734, 737 (Ind. Ct. App. 2010). Moreover, although we have discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal. Id. A sanction will not be imposed merely to punish a lack of merit; something more egregious is required. Id.

Claims for appellate attorney's fees may be categorized as “substantive” or “procedural” bad faith claims. Id. To prevail upon a substantive bad faith claim, the party must show that the appellant's contentions and arguments are utterly devoid of all plausibility. Id. Substantive bad faith “implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.” Wallace v. Rosen, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002). Procedural bad faith involves such things as a flagrant disregard for the form and content requirements of the Rules of Appellate Procedure, the omission and misstatement of relevant facts in the record, or filing of briefs appearing to have been written in a manner calculated to require the maximum expenditure of time by the opposing party and the reviewing court. Watson v. Thibodeau, 559 N.E.2d 1205, 1211 (Ind. Ct. App. 1990).

Here, the Kucharskis allege procedural bad faith, claiming that the Morrows' appellate brief omitted evidence supporting the judgment and misstated some of the testimony and one of the trial court's findings. Although we agree that the Morrows did not fully comply with

Appellate Rule 46(A)(6)(b), which requires the appellant to state the facts in accordance with the standard of review appropriate to the judgment or order being appealed, we do not conclude that the violations are so flagrant that an award of damages is warranted.

### **Conclusion**

The trial court's judgment awarding damages for a private nuisance is not clearly erroneous. We find an award of appellate attorney's fees to be unwarranted.

Affirmed.

RILEY, J., and KIRSCH, J., concur.