COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP802 **Cir. Ct. No. 2006CV758**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

GREG SMART AND ELAINE SMART,

PLAINTIFFS-APPELLANTS,

V.

JAIMIE SOKOLSKI AND JULIE SOKOLSKI,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Greg and Elaine Smart appeal from an order dismissing their complaint against Jaimie and Julie Sokolski alleging that the manner in which the Sokolskis use their property constitutes a private nuisance.

We agree with the circuit court that dismissal of the complaint was appropriate, and we affirm.

¶2 The Smarts purchased their property in 2001; the Sokolskis purchased the property next door in 2002. Both properties are located in a conservancy management district that permits agricultural uses.[1] It is undisputed that the properties are rural in character. A dairy farm and a horse stable are located in the immediate vicinity of the parties' properties. The Sokolskis keep a variety of animals on their property for their traveling petting zoo.

¶3 The Smarts alleged that the odor and manure run off from the Sokolskis' property constituted a private nuisance. Although the Smarts claimed that the manure runoff could contaminate their well water, the Smarts presented no evidence during the court trial that the runoff was tested for contaminants. And, according to Greg Smart, tests of the Smarts' well water showed "[n]o significant findings."

¶4 The court found that the Kenosha County Department of Planning and Development had responded to the Smarts' complaints about the Sokolskis' property. In February and March 2006, the department investigated reports of contaminated runoff, tree damage and potential well contamination. After seeing evidence of runoff, the department advised the Sokolskis to graze their animals away from a pond that straddles both properties. The Sokolskis entered into a

[1] In the circuit court's decision, the court found that the property was zoned agricultural. On reconsideration, the court clarified that the property was zoned conservancy with agricultural uses. As the court noted on reconsideration, the rural character of the property was undisputed and that rural character remained a central part of the circuit court's determination that the Sokolskis did not create a private nuisance.

program to install a runoff control system and to maintain a vegetation buffer. The court found that these efforts "appear to have adequately addressed the issues of potential well contamination and water runoff. There is no evidence upon which the court can conclude that something more or something different should be required of the Sokolskis to address those issues."

¶5 On appeal, the Smarts argue that the circuit court should have concluded that the Sokolskis' property constituted a private nuisance. "A private nuisance is an unreasonable interference with the interests of an individual in the use and enjoyment of land." ***Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen***, 129 Wis. 2d 129, 138 n.2, 384 N.W.2d 692 (1986) (citation omitted). A person is liable for conduct causing a private nuisance if the resulting invasion of another's property interests is intentional and unreasonable. ***Id.*** at 138-39. The reasonableness of the property owner's use of his or her land must be assessed "in light of the nature of the area, the use permitted in that area in a legal sense," the efforts made by the property owner to keep the property in a reasonably proper condition, and the effect of the property owner's use on the right to use nearby property. *See* ***Abdella v. Smith***, 34 Wis. 2d 393, 399-400, 149 N.W.2d 537 (1967).

¶6 Whether the facts found by the circuit court fulfill the legal standard for a private nuisance presents a question of law that we review without deference to the circuit court. ***Vogel v. Grant-Lafayette Elec. Co-op.***, 201 Wis. 2d 416, 422, 548 N.W.2d 829 (1996). We will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2007-08).[2]

[2] All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶7 On appeal, the Smarts argue that their ability to use and enjoy their property was negatively affected by the Sokolskis' use of theirs. They complain of runoff, odor and general unsightliness.

¶8 With regard to the runoff emanating from the Sokolskis' property, the Smarts do not dispute the circuit court's finding that the Sokolskis have taken steps to correct the situation and that there was no evidence of what other steps the Sokolskis should take to address the runoff problem.

¶9 With regard to the odor emanating from the Sokolskis' property, the Smarts ask us to reweigh the evidence, which we cannot do. The credibility and weight of evidence before the circuit court is for the circuit court to determine. ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988).

¶10 The circuit court found credible the testimony of witnesses living in the immediate vicinity regarding the strength of the odor and the Sokolskis' compliance with a 2006 directive from the town of Bristol with regard to animal odor. The court relied upon evidence at trial that the odor emanating from the Sokolskis' property was neither unreasonably intense nor the most intense animal odor in the neighborhood. As the circuit court succinctly stated:

> The evidence presented does not support a conclusion that the Sokolskis' activities constitute a private nuisance. This is rural property in an agricultural zone. The keeping and raising of animals is permitted and not an unexpected activity in a rural area. Animal odors may be offensive in varying degrees to any individual person. While it is possible that the Sokolskis' use of their property may not comport with life in a rural setting which some might expect, it does not constitute a private nuisance.

¶11 With regard to the unsightly nature of the Sokolskis' property, the Smarts do not cite any law deeming unsightliness alone to constitute a private nuisance. We will not address arguments unsupported by legal authority. ***Riley v. Town of Hamilton***, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989).

¶12 The record does not support the Smarts' claim that the Sokolskis' have interfered with their enjoyment of their property to the level required for a private nuisance. As the circuit court rightly pointed out, the properties are located in a rural area and other neighboring properties have animal populations with attendant odors. The court noted that a property owner "has the right to make reasonable use of his own property and to use his own land for whatever lawful purpose he pleases if he does not unreasonably interfere with the rights of others to use their property." ***Abdella***, 34 Wis. 2d at 399.

¶13 The Smarts argue that even a lawful activity can be a nuisance, citing cases in which burning junked vehicles and operating a coal yard were lawful uses that were nevertheless private nuisances. ***Sohns v. Jensen***, 11 Wis. 2d 449, 461-62, 105 N.W.2d 818 (1960) (burning junked vehicles); ***Dolata v. Berthelet Fuel & Supply Co.***, 254 Wis. 194, 36 N.W.2d 97 (1949) (operating a coal yard).

¶14 ***Sohns*** is distinguishable because the burning of junked vehicles was not permitted under the applicable ordinance, ***Sohns,*** 11 Wis. 2d at 461, whereas here, the Sokolskis' use of their property was lawful. In ***Dolata***, the lawful use caused coal dust to infiltrate neighboring properties. ***Dolata,*** 254 Wis. at 198. Here, in contrast, the circuit court found that the Sokolskis' use of their property was consistent with its rural setting and not unreasonable.

¶15 The circuit court's findings of fact are not clearly erroneous. WIS. STAT. § 805.17(2). Because we affirm the circuit court's determination that the

Sokolskis' property did not constitute a private nuisance, we do not reach the Smarts' other appellate issues relating to remedies. The Smarts are not entitled to a remedy in the absence of a private nuisance.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.