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**DISTRICT II**

April 22, 2015

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Frederick C. Lander

You are hereby notified that the Court has entered the following opinion and order:

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2014AP2126 Frederick C. Lander v. Samuel Gomez (L.C. #2013CV858)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Frederick C. Lander appeals from an order dismissing his tort claims filed against Samuel Gomez. In turn, Gomez argues that Lander's appeal is frivolous and requests attorney fees and costs pursuant to WIS. STAT. § 809.25(3) (2013-14).[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 We affirm the order but deny Gomez's motion for attorney fees and costs.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Lander owned property which he later divided into two parcels. On one parcel, Lander converted an existing building to a six-family rental unit, and on the other, he built a single-family residence. Lander created a swale on the single-family residential property so that both parcels would drain water. Gomez purchased the residential property in 2012. Lander still owns the rental property.

In September 2013, Lander filed suit against Gomez alleging that Gomez had filled the swale and created water problems on Lander's property, thereby creating an "intentional private nuisance" or, in the alternative, a "negligent/reckless private nuisance."[2] The parties appeared for a bench trial on Lander's nuisance claims. Gomez testified that around May 2013, due to issues with standing water on his property, he added some dirt to the swale. Lander testified that he began experiencing water on his property[3] and complained to the city of Delavan. In response, the city sent a letter to Gomez stating:

> It appears that a substantial amount of dirt fill has been placed which may impede the natural flow of water from the southern portion of the multi-family lot.
>
> This situation must be addressed by either complete removal of the placed soil, or installation of a storm drain meeting the written approval of the City engineer.

[2] As part of his lawsuit, Lander also requested injunctive relief. The trial court denied Lander's request for a temporary injunction. At the parties' request, the court bifurcated the injunctive and tort claims for trial purposes and agreed to first hear Lander's injunctive claim. Prior to the injunction hearing, the parties reached a settlement wherein Gomez agreed to pay up to $1000 toward the cost of a landscaper of Lander's choice to restore the swale on Gomez's property. The parties agreed that the trial on the tort claims should be held after the restoration was complete.

[3] Lander testified that he had this same problem in 2008, when a prior owner of the single-family home filled the swale. Lander testified that with the owner's consent, he had a landscaper remove the dirt from the swale and no longer experienced flooding issues. Lander confirmed that the swale was located entirely on Gomez's property and that he did not recall if he ever looked into obtaining an easement with regard to the swale.

Gomez testified that he hired a landscaping company to address the water problems and that after receiving the city's letter, he met with the city to find out if the landscapers' plans were "correct or not." The landscapers had informed Gomez that they would put in a plastic hose for drainage. Gomez testified that along with a police officer, a representative from the city came to his property and told him that the landscaping plan could proceed as long as drain tile was installed and that no additional permit was needed to complete the project. He testified that he paid the landscaping company $1700 and believed it would do the job properly:

> Because before going ahead with that, after the problem we had with the letter, the people from the city came out; and they talked to the people that were gonna do the landscaping job and explained how it needed to be done; so they were gonna carry it out as they had been told it needed to be done.

After the work was complete, Lander continued to experience flooding and filed suit. Gomez testified that he agreed to pay Lander's landscaper to remove the drain tile and restore the swale "[b]ecause I don't want to have any issues with anyone who lives near me, and I thought it might be the best thing for both of us."[4] After hearing the evidence, the trial court dismissed Lander's complaint on the ground that Lander failed to meet his burden of proving that Gomez had either intentionally or negligently created the private nuisance. Lander appeals.

Whenever a case is tried without a jury, the trial court "shall find the ultimate facts and state separately its conclusions of law thereon." WIS. STAT. § 805.17(2). On appeal, a party may raise "the question of the sufficiency of the evidence to support the findings" but this court shall not set aside such finding of fact "unless clearly erroneous, and due regard shall be given to the

[4] Lander testified that he no longer has water problems. Gomez testified that the new swale is even deeper and that he continues to have problems with standing water on his property.

opportunity of the trial court to judge the credibility of the witnesses." Sec. § 805.17(2), (4). A factual finding is not clearly erroneous unless—after accepting all credibility determinations made and reasonable inferences drawn by the fact finder—the great weight and preponderance of the evidence supports a contrary finding. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

We conclude that the trial court properly dismissed Lander's claims. In order to prevail on the tort of intentional private nuisance, Lander needed to prove by the greater weight of the credible evidence that Gomez intentionally caused the private nuisance.[5] Citing to WIS JI—CIVIL 1926, the trial court determined that Lander failed to meet his burden to prove Gomez acted for the purpose of causing the nuisance or knowing that the nuisance was resulting or was substantially certain to result from Gomez's conduct.[6] The trial court found that Gomez's testimony was credible and that after receiving the city's letter, he discovered that filling the swale might cause problems on Lander's property. The court found that Gomez took steps to try and make sure Lander's property was not affected. Relying on the landscapers' expertise and statements from the city, Gomez thought that the methods employed would cure his standing water problems and comply with the city's letter without adversely affecting Lander. The trial court found that there was no evidence Gomez received any additional warnings or citations from the city and that he hired a landscaper in an attempt to avoid causing harm to Lander. The

[5] The first two elements of both torts are identical. *See* WIS JI—CIVIL 1922, 1926. The trial court determined that as to both the intentional and negligent causes of action, Lander established the first two elements, namely that (1) there was an interference with Lander's interest in the private use of his land and (2) the interference resulted in significant harm. Lander does not dispute these determinations.

[6] Having determined that Lander failed to prove the third element, the trial court did not reach the fourth element, whether Gomez's conduct was unreasonable.

trial court's findings are not clearly erroneous and we agree that based on these findings, Lander failed to prove that Gomez acted with the requisite intent.

Similarly, the trial court's findings of fact are not clearly erroneous and support its determination that Gomez did not act negligently.[7] The trial court found credible Gomez's statements that he was trying to be cooperative and took action once he understood the gravity of the water problems on Lander's property.[8] The trial court found that Gomez exercised ordinary care and "took the reasonable approach for neighbors to take":

> He gets water in his yard. He goes, I don't like water in my yard. I'm gonna see if I can get a landscaper. I'm not gonna do the work myself.… We put in a drainpipe. I don't know where the drainpipe goes. I'm not the landscaper. They tell me this will fix it. The city does no more. That's what I think 99 percent of people would do.

We also reject Lander's contention that ***Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen***, 129 Wis. 2d 129, 384 N.W.2d 692 (1986), commands a different result. In ***Crest***, Willemsen owned A.O. Bauer Glass and purchased a parcel of land adjacent to and lower than the Crest property knowing that surface water tended to accumulate on the Bauer Glass parcel. ***Id.*** at 133. Bauer Glass added landfill to its property with the knowledge that its actions were

[7] As defined in WIS JI—CIVIL 1922, Lander needed to prove that Gomez failed to exercise ordinary care. "Ordinary care is the care that a reasonable person would use in similar circumstances."

[8] The parties testified that they had one conversation about the swale, shortly after the city's letter. Lander testified that Gomez told him the city had visited his property and told him he could continue with his landscaping project as modified. Lander testified that he told Gomez this would not work and that if he could not get relief from the city, he would sue Gomez. According to Lander, Gomez said "do what you got to do." Gomez disagreed with Lander's characterization and testified that he told Lander he would work with him: "All I said to him was that if the things that we had done didn't work out, there was no problem; we could change them. I had not done it with the intent of harming anybody." The trial court found Gomez's version more credible.

likely to cause a surface water problem on the Crest property. ***Id.*** at 133-34. ***Crest*** is inapplicable based on the trial court's finding that Gomez lacked any prior knowledge that filling the swale would flood Lander's property.

Finally, we deny Gomez's motion for attorney fees and costs under WIS. STAT. RULE 809.25(3) because we are not persuaded that Lander's appeal was either filed in bad faith or frivolous. An appeal is not frivolous merely because the court does not agree with the appellant's argument. ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis. 2d 605, 614, 345 N.W.2d 874 (1984). Given that the trial court found that Lander proved the existence of a private nuisance that resulted in significant harm, it was not wholly frivolous for Lander to contend that, despite the trial court's factual findings, a reviewing court might determine that Gomez's actions constituted negligence.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the respondent's motion for attorney fees and costs is denied. WIS. STAT. RULE 809.25(3).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*