

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Town of Cedar Lake Unsafe  
Building Commission,

*Appellant-Plaintiff,*

v.

Stanley T. Bird; Jane G. Bird;  
Wells Fargo Bank, N.A., and All  
Unknown Occupants of 8816 W.  
141<sup>st</sup> Avenue, Cedar Lake, Lake  
County, Indiana,

*Appellees-Defendants.*

June 15, 2022

Court of Appeals Case No.  
21A-MI-2823

Appeal from the Lake Superior  
Court

The Honorable Bruce D. Parent,  
Judge

Trial Court Cause No.  
45D11-2108-MI-720

**Najam, Judge.**

## Statement of the Case

[1] The Town of Cedar Lake Unsafe Building Commission (the “Commission”) appeals the trial court’s denial of its complaint in which it sought to have Stanley Bird’s residence declared to be an unsafe building. The Commission raises two issues for our review:

1. Whether the court erred when it did not declare the residence to be an unsafe building.
2. Whether the court erred when it did not determine that the residence is a public nuisance.

[2] We affirm.

## Facts and Procedural History

[3] Bird owns a residence in Cedar Lake.<sup>1</sup> Bird is on a limited income and is “in a wheelchair twenty-four seven.” Tr. at 22. Todd Wilkening, the Cedar Lake Fire Chief and the Commissioner of the Cedar Lake Unsafe Building Commission visited Bird’s house approximately a “dozen” times in response to emergency calls or “complaints from the neighborhood.” *Id.* at 5. As a result of his visits, Chief Wilkening first issued an “unsafe premises report” in September 2017. Ex. at 3 (emphasis removed). In that report, Chief Wilkening stated that the home had not been “properly maintained” for more than five

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<sup>1</sup> Bird owns the home with his wife, Jane Bird. However, Jane no longer lives in the residence, and she did not participate in the underlying proceedings.

years, which caused it to become “so dilapidated that it constitutes a hazard to public health, safety, and welfare.” *Id.* Specifically, Chief Wilkening stated that the “roofing and siding are severely deteriorated with holes and collapsing in several areas” and that “[e]xtensive areas have sustained water damage[.]” *Id.* at 4. Chief Wilkening stated that, due to the deterioration of the home, it was “out of compliance with a variety of applicable laws, codes and ordinances.” *Id.* Accordingly, in 2017, Chief Wilkening “deemed” the home to be “unsafe” and “a public nuisance.” *Id.*

[4] On May 20, 2021, Chief Wilkening updated his report. In the update, Chief Wilkening stated that the Commission had worked with Bird for two years to “help clean up the property.” *Id.* However, he stated that medical personnel had responded to the residence “numerous times” and found that the conditions “have deteriorated.” *Id.* In particular, he stated that the house has an “infestation of [r]oaches, [m]aggots, and other bugs”; that there was a bed-ridden woman in a bed that was “saturated in waste”; and that the ceiling in that woman’s room was “falling in and leaking on her.” *Id.* Chief Wilkening also noted “extreme filth,” an “overflowing feces[-]filled toilet,” “hoarding conditions,” “structure issues with the ceiling” and “spongy floors saturated with waste.” *Id.* As a result, Chief Wilkening determined that the “house has become unfit for human occupancy[.]” *Id.*

[5] On August 31, the Commission filed a verified complaint against Bird and alleged that the residence was an “unsafe building.” Appellant’s App. Vol. 2 at

10.<sup>2</sup> In particular, the Commission alleged that the residence “has not been properly maintained for a period in excess of five (5) years,” which resulted in it “becoming dilapidated” and “posing a danger to the health, safety, and welfare of its residents, of the general public, and of emergency responders called upon to provide emergency services to residences” of the house. *Id.*

[6] The court held the first hearing on the Commission’s complaint on September 15. Chief Wilkening testified that the Commission had previously attempted to work with Bird to clean the property and that it had provided him dumpsters “on numerous occasions.” Tr. at 7. He testified that there were “some improvements,” but that the home then deteriorated “even more.” *Id.* Chief Wilkening testified: “There’s holes in the roof. There’s been holes in the ceiling. Holes in the floor. The decking area which somebody recently fell through it, was repaired I understand, but those are issues.” *Id.* at 6. He further testified that there was “deterioration of the siding and other parts of the home.” *Id.* He also testified that the bathroom floor was “saturated with urine and water,” and there was a “possible infestation” of “cockroaches or some sort of bugs” in the home. *Id.* at 8.

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<sup>2</sup> The Commission also named as a defendant Wells Fargo Bank, N.A., which did not participate in the proceedings. The CCS, the complaint, all orders from the trial court, and the notice of appeal all listed Wells Fargo as a defendant. But in the caption in its brief on appeal, the Commission identifies the Wilmington Savings Fund Society, FSB, as Trustee of Stanwich Mortgage Loan Trust 1 as an appellee-defendant instead of Wells Fargo. It is unclear if or when that entity became a party to the proceedings.

- [7] Pat Scoleri, the EMS Division Chief for the Cedar Lake Fire Department also testified. Chief Scoleri testified that the fire department had been to Bird's home approximately fifty times in the past two or three years and that he had personally been to the residence about two months prior. He testified that the kitchen and bathroom floors are "spongy," that the ceiling was "sagging" due to water damage, and that there was water damage to the drywall. *Id.* at 14. He also testified that his crew members must wear Tyvex suits to enter the property "because of concerns of lice" and that they could not take gear into the home because it could "get infected with things[.]" *Id.* And he testified that one of his crew members had fallen in the home a few years prior and "came home with MERSA on his arm and on his face." *Id.* He then testified that he had concerns for Bird's safety as well as the safety of his crew.
- [8] Bird testified that he had the roof "redone" two years ago and that it no longer leaks. *Id.* at 20. Bird's daughter, Megan Bird, acknowledged that the house was "bad," but she testified that a company was "going to be able to spray and hopefully take care of [the insect] situation." *Id.* at 21, 23. Megan then testified that, during the time her aunt was living at the house with Bird, her aunt "was literally laying in bed p\*\*\*ing and s\*\*\*ing herself." *Id.* at 21. But Megan testified that she had since placed her aunt in a nursing home. *Id.* And she testified that she has "been working on getting the house cleaned up." *Id.* At the conclusion of that hearing, the court determined that the home "isn't safe," but allowed Bird to remain there. *Id.* at 26.

[9] The court held a second hearing on September 27. An individual named Richard Sims informed the court, without first being sworn, that he had been working on the house “for like two weeks,” that he “literally went through the whole house,” “did drywall work,” and took out “twenty tons” of garbage. *Id.* at 35. Megan then made unsworn statements to the court that “[t]hings have changed a lot.” *Id.* at 39. Specifically, she stated that she has been cleaning the place “every week,” that there “weren’t holes in the ceiling” or “animals coming in,” and that she “had all the plumbing redone[.]” *Id.* at 39-40. She acknowledged that the house had roaches but stated that her insurance would pay for a company to spray the property. The court ordered Bird and Megan to grant the Commission access to the property to inspect it.

[10] The court held another hearing on October 19. The Commission informed the court that, despite having scheduled a time to inspect the property, no one was present to grant representatives from the Commission access. And the Commission stated that it had not seen “anything to indicate that significant or substantial work has been completed” on the home. *Id.* at 55.

[11] The court held the final hearing on the Commission’s complaint on November 18. During that hearing, Megan stated that they “did have Terminex come out and they’re going to continue to come out.” *Id.* at 67. The court then acknowledged that the house was not a “particularly good place for” Bird but

found that Bird had “made some efforts to make it better.” *Id.* at 67-68. The court then denied the Commission’s motion.<sup>3</sup> This appeal ensued.

## Discussion and Decision

[12] The Commission appeals the court’s denial of its complaint. In denying the Commission’s motion, the court entered findings of fact and conclusions thereon following an evidentiary hearing. In such appeals,

we review the court’s judgment under our clearly erroneous standard. *E.g., Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020). We “neither reweigh evidence nor judge witness credibility.” *R.L. v. Ind. Dep’t of Child Servs. & Child Advocates, Inc.*, 144 N.E.3d 686, 689 (Ind. 2020). Rather, a judgment is clearly erroneous only when there are no record facts that support the judgment or if the court applied an incorrect legal standard to the facts. *Id.*

*Jones v. Gruca*, 150 N.E.3d 632, 640 (Ind. Ct. App. 2020).

[13] Initially, we note that Bird has not filed an appellee’s brief.

When an appellee fails to file a brief, we apply a less stringent standard of review. We are under no obligation to undertake the burden of developing an argument for the appellee. We may, therefore, reverse the trial court if the appellant establishes prima

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<sup>3</sup> Throughout the proceedings, the court took numerous steps to help Bird get assistance. In particular, the court ordered the Commission to contact Adult Protective Services and the Veteran’s Administration (“VA”). The court also personally called the VA and assisted Bird with completing forms that would allow a representative from the VA to speak with the court. And the court contacted the VASIA program, which assists “persons of Mr. Bird’s age who are in need of services[.]” Tr. at 52. However, none of those programs was able to assist Bird.

facie error. “Prima facie” is defined as “at first sight, on first appearance, or on the face of it.”

*Deckard v. Deckard*, 841 N.E.2d 194, 199 (Ind. Ct. App. 2006) (citations omitted).

### ***Issue One: Unsafe Building***

[14] The Commission first asserts that the court erred when it did not determine that Bird’s house is an unsafe building. A building is considered an “unsafe building” if it is “in an impaired structural condition that makes it unsafe to a person or property”; a “fire hazard”; a “hazard to the public health”; “dangerous to a person or property because of a violation of a statute or ordinance concerning building condition or maintenance”; or “vacant or blighted and not maintained in a manner that would allow human habitation, occupancy, or use[.]” Ind. Code § 36-7-9-4(a) (2021).

[15] On appeal, the Commission contends that the court erred when it did not declare the home to be unsafe because “the undisputed evidence demonstrated that the property was unsafe.” Appellant’s Br. at 16. To support its assertion, the Commission directs us to Chief Wilkening’s testimony about the holes in the roof and floor, that the bathroom floor was “saturated with water and urine,” and that there was evidence of a “possible infestation[.]” *Id.* And the Commission cites to Chief Scoleri’s testimony that the floor was “spongy,” the bathroom floor was “damp,” and the ceiling was “sagging.” *Id.* at 17.

[16] However, Bird testified at the first hearing that he had replaced the roof “about two years ago” and that it no longer leaks. Tr. at 20. In addition, Megan testified at that hearing that she has “been working on getting the house cleaned up.” *Id.* at 21. She also testified that she had removed her aunt from the home and that a company was “going to be able to spray and hopefully take care of the bug situation.” *Id.*

[17] Further, at the second hearing, both Sims and Megan informed the court of improvements they had made. In particular, Sims stated that he had “done repairs on the house”; that he had “been over there for like two weeks”; that he “literally went through the whole house,” did “drywall work” and took out “twenty tons of garbage.” *Id.* at 35. And Megan stated that things “have changed a lot.” *Id.* at 39. Specifically, she stated that the drywall and a floor joist had been “repaired,” there are no longer “holes in the ceiling” or “animals coming in,” and she had all of the plumbing “redone.” *Id.* at 39-40. She also stated that she has been “cleaning that place every week[.]” *Id.* at 40. And while she conceded that there were roaches in the home, Megan confirmed at the final hearing that they “did have Terminex come out” and that Terminex is “going to continue to come out.” *Id.* at 67.

[18] The commission acknowledges those statements but asserts that the court was unable to rely on them because they were not made under oath. Indiana Evidence Rule 603 provides that “a witness must give an oath or affirmation to testify truthfully.” This follows the statutory requirement that, before testifying, “every witness shall be sworn to testify the truth, the whole truth, and nothing

but the truth.” I.C. § 34-45-1-2. The Commission is correct that neither Megan nor Sims had been sworn in before making those statements. However, “Indiana courts have held that the statutory requirement that testimony be given under oath or affirmation may be waived by failing to object.” *Griffith v. State*, 898 N.E.2d 412, 414 (Ind. Ct. App. 2008). The Commission did not object to any of the unsworn statements by either Megan or Sims. As such, the Commission has waived any purported issue regarding the admissibility of those statements, and the court properly considered them.

[19] In sum, Bird, Megan, and Sims all testified or otherwise stated to the court that there have been improvements to the home, including a new roof, new plumbing, drywall work, floor repairs, insect remediation, and that a large quantity of “garbage” had been removed. We decline to reweigh the evidence. Because there is evidence to support the court’s judgment, we cannot say that, after conducting four hearings, the court clearly erred when it denied the Commission’s complaint to have the property declared unsafe.

### ***Issue Two: Public Nuisance***

[20] The Commission next asserts that the court erred when it did not declare the home to be a common law public nuisance.<sup>4</sup> This Court has recently outlined the elements for a common law action for a public nuisance:

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<sup>4</sup> We note that the Commission did not allege that the home was a public nuisance either in its complaint or during any of the hearings. But the Commission asserts that “the underlying public nuisance claim was wrapped within” its complaint such that it was not required to have filed a separate claim. Appellant’s Br. at

The Restatement (Second) of Torts § 821B provides the common law action for a public nuisance and states:

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

A public right is one that is common to all members of the general public, but it is not “necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large.” *Id.* at cmt. g.

*VanHawk v. Town of Culver*, 137 N.E.3d 258, 268 (Ind. Ct. App. 2019).

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20. However, we need not determine whether the Commission was required to file a separate claim because we hold that, even if properly pled, the court did not err when it denied the Commission’s complaint.

[21] The Commission asserts that the court erred when it denied its complaint on a public-nuisance ground because the residence “has been in a state of disrepair for numerous years,” the yard “is riddled with discarded items and trash,” and Bird “has shown no indication that a plan exists to remedy these issues or that any substantive change in living habits will occur.” Appellant’s Br. at 21. And the Commission asserts that “no improvements have been made and the condition has only continued to deteriorate.” *Id.*

[22] But, again, the Commission relies only on its own evidence and disregards the evidence most favorable to the judgment. As discussed above, Bird, Megan, and Sims all informed the court of various improvements that have been made, including repairs to the roof, drywall, and plumbing; the removal of a substantial amount of garbage; and having the home sprayed for insects. Based on that evidence, the court’s order denying the Commission’s complaint is not clearly erroneous.

[23] In sum, the court did not err when it denied the Commission’s complaint. We therefore affirm the trial court.

[24] Affirmed.

Bradford, C.J., and Bailey, J., concur.