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IN THE COURT OF APPEALS OF INDIANA

Randall R. Kirk Revocable Trust (Randall R. Kirk, Trustee), and Brenda Rae Kirk Revocable Trust (Brenda Rae Kirk, Trustee),

Appellants-Plaintiffs,

v.

John Brown and Annetta Brown,

Appellees-Defendants.

January 26, 2023

Court of Appeals Case No. 22A-PL-1984

Appeal from the Brown Circuit Court

The Honorable Mary H. Wertz, Judge

Trial Court Cause No. 07C01-2203-PL-78

Brown, Judge.

[1] The Randall R. Kirk Revocable Trust (Randall R. Kirk, Trustee) and the Brenda Rae Kirk Revocable Trust (Brenda Rae Kirk, Trustee) (together, "Plaintiffs") appeal the dismissal of their Amended Complaint. We reverse.

Facts and Procedural History

[2] On March 22, 2022, Randall R. Kirk and Brenda Rae Kirk filed a Complaint for Preliminary Injunction and Permanent Injunctive Relief against John Brown and Annetta Brown ("Defendants"). On May 12, 2022, Defendants filed a motion to dismiss stating in part that Plaintiffs did not attach a recorded plat or a deed indicating they are proper parties in interest. On May 18, 2022, Plaintiffs filed an Amended Complaint for Preliminary Injunction and Permanent Injunctive Relief naming the Randall R. Kirk Revocable Trust and the Brenda Rae Kirk Revocable Trust as the plaintiffs. The Amended Complaint alleges:

> 1. Plaintiffs and Defendants are adjoining landowners of the Tee Pee Point Subdivision of Lake Lemon in Brown County, Indiana.
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> 2. As shown on the recorded plat map attached hereto and made a part hereof as Exhibit A, there is a dedicated walkway that directly affects Lots 16 and 17 and a road that directly affects Lots 17-24.
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> 3. Plaintiffs own the following affected Lots: #19, #18, the north 25 feet of #17, #23, and the north 25 feet of #24.
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> 4. Defendants own the following Lots: #16, the south 20 feet of #17, #25, and the south 25 feet of #24.
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> 5. Defendants are building a house on Lots #24 and #25.

6. Defendants have plans to install an above ground septic system for the house at and around the intersections of Lots #16, #17, #24, and #25 that would encroach on the dedicated walkway which provides public access to Lake Lemon and the end of the plotted road.

7. Plaintiffs' and their trustees' access to the walkway and access to Lake Lemon would be severely and negatively impacted by the installation of the above ground septic system as it is currently planned, which would affect their right to access and enjoyment of the lake and the enjoyment of their property.

8. Plaintiffs would be irreparably damaged if the septic system is installed where it is currently planned, and Plaintiffs would have no adequate remedy at law if the septic system is installed.

WHEREFORE, Plaintiffs . . . request that a preliminary injunction be issued to halt the installation of the septic system where planned, and a permanent injunction be issued so that the septic system is not installed where it is currently planned. Plaintiffs also request all other relief deemed proper in the premises.

Appellants' Appendix Volume II at 8-9.

[3] On May 26, 2022, Defendants filed a Motion to Dismiss Plaintiffs' Amended Complaint. The motion cited Ind. Trial Rule 12(B)(6) and argued Plaintiffs "fail to make any allegations as to how or even whether their alleged irreparable damage would be special or peculiar to Plaintiffs from that of the injury that the general public would suffer by reason of an encroachment on the dedicated public walkway and road." *Id*. at 14. Plaintiffs filed a response arguing:

> [Plaintiffs] can establish a special and peculiar injury because their path of travel to and from their lots to the lake would be impacted by the

> installation of a septic system on the public walkway. [Plaintiffs] own Lots 18, 19, 23, the northern half of 17, and the northern half of 24. Their Lots 17, 19, 23, and 24 do not have direct access to Lake Lemon, which likely is the reason that a 10-foot walkway was provided and recorded on the 1954 plat (Exhibit A to the Amended Complaint). If [Defendants] are permitted to interfere with that walkway by installing their septic system that includes a large mound, [Plaintiffs] will not have direct access to the lake via those lots. Thus, [Plaintiffs] would have a special and peculiar injury if the septic system is installed as planned. The value of [Plaintiffs'] lots would be severely and negatively impacted by an inability to gain access to the lake.

Id. at 18.

[4] On July 19, 2022, the court held a hearing. Plaintiffs' counsel argued that Plaintiffs owned Lot No. 23 and part of Lot No. 24 and that those lots "do not have direct access to Lake Lemon," and "because of that, if [Plaintiffs] were to . . . sell that lot . . . , that lot would go without access to Lake Lemon, if this walk way is interfered with." Transcript Volume II at 12. On July 21, 2022, the court issued an Order Granting Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. The order provided:

> The Plaintiffs seek to bring an action based on an alleged public nuisance to enjoin the nuisance. The Defendants argue that the Plaintiffs have failed to state a claim for which relief can be granted because Plaintiffs have no private right of action for relief from the alleged public nuisance. The Plaintiffs must allege "a special and particular injury apart from the injury suffered by the general public." *Blair v. Anderson*, 570 N.E.2d 1337, 1339-40 (Ind. Ct. App. 1991). The injury must be of a different kind, not merely a difference in degree. *Id*. at 1340. The Court finds that the Plaintiffs have failed to allege that

> they will suffer from a harm of a kind different from that suffered by members of the public who exercise the common right.

Appellants' Appendix Volume II at 6.

Discussion

[5] A motion to dismiss under Ind. Trial Rule 12(B)(6) tests the legal sufficiency of the complaint. *Price v. Ind. Dep't of Child Servs.*, 80 N.E.3d 170, 173 (Ind. 2017). We accept as true the facts alleged in the complaint. *Id*. When ruling on a motion to dismiss, the court must view the pleadings in the light most favorable to the nonmoving party with every reasonable inference construed in the non-movant's favor. *Thornton v. State*, 43 N.E.3d 585, 587 (Ind. 2015). We review a trial court's grant or denial of a Trial Rule 12(B)(6) motion *de novo*. *Id*. We will not affirm such a dismissal unless it is apparent that the facts alleged in the challenged pleading are incapable of supporting relief under any set of circumstances. *Id*. "Trial Rule 12(B)(6) is based on a notice pleading system, where functionalism is prized over formalistic recitations." *Thomson Consumer Elecs., Inc. v. Wabash Valley Refuse Removal, Inc.*, 682 N.E.2d 792, 793 (Ind. 1997) (citations omitted). Dismissals under Trial Rule 12(B)(6) are rarely appropriate. *King v. S.B.*, 837 N.E.2d 965, 966 (Ind. 2005).

[6] Plaintiffs argue "the alleged planned obstruction of the direct connection between [their] plot 23 and their part of plot 24 to the lake is a special and peculiar injury entitling them to bring a private action for the public nuisance." Appellants' Brief at 13. They argue that, viewing the alleged facts and

inferences in the light most favorable to them, their property will be less valuable if the direct access connecting the property to the lake is cut off. Defendants argue that Plaintiffs have failed to allege they will suffer from a harm different in kind from that suffered by members of the public exercising the common right.

[7] The parties direct us to *Blair v. Anderson*, in which the Blairs appealed the trial court's determination that a landfill on their property was a nuisance. 570 N.E.2d 1337, 1338 (Ind. Ct. App. 1991). The trial court awarded the Andersons, who were the adjoining property owners, a permanent injunction. *Id*. On appeal, this Court stated:

> Generally, a public nuisance is caused by an unreasonable interference with a common right. *Restatement (2d) of Torts*, § 821B. A private party generally has no right of action under a public nuisance, because "[i]t is the province of the public authorities to procure redress for public wrongs." *Adams v. Ohio Falls Car Co.* (1891) 131 Ind. 375, 379, 31 N.E. 57. However, a party may bring a successful private action to abate or enjoin a public nuisance if the aggrieved party demonstrates special and peculiar injury apart from the injury suffered by the public. *Spurrier v. Vater* (1916) 62 Ind. App. 669, 113 N.E. 732. *See also, Adams, supra,* 131 Ind. at 379, 31 N.E. 57; *Town of Rome City v. King* (1983) 3d Dist. Ind. App., 450 N.E.2d 72, 77; *Restatement (2d) of Torts*, § 821C; 58 Am.Jur.2d, *Nuisances*, § 49, at 70-79.
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> . . . . [T]he Andersons must demonstrate special injury distinct from the public injury the provisions are designed to prevent in order to be

> entitled to bring a private nuisance action.[1] Moreover, the injury must be different in kind and not merely different in degree. *Adams, supra*, 131 Ind. at 380, 31 N.E. 57. Generally, the determination of whether a party has shown sufficient special injury varies from case to case. *See* Annotation, *What Constitutes Special Injury that Entitles Private Party to Maintain Action Based on Public Nuisance—Modern Cases*, 71 A.L.R.4th 13.

Id. at 1339-1340. We held that "[t]he court's findings of fact reflect[ed] that the creek on the Blair property was filling and had shut off the flow of water from some of the spring openings" and that "[s]uch water flow blockage to the creek on Anderson's property [was] sufficient special injury to give standing to bring a private action to abate and enjoin the nuisance." *Id*. at 1340 (internal quotations omitted).

[8] The parties also cite *O'Brien v. Cent. Iron & Steel Co*., in which the complaint alleged the defendants erected a building about 200 feet east of the plaintiffs' residence, effectually barring passage in that direction and resulting in the depreciation in value of the plaintiffs' property. 158 Ind. 218, 223, 63 N.E. 302, 304 (1902). The Indiana Supreme Court held, "[i]f appellees may close this street on the east within the same square, without special injury to appellants, why may they not also close it on the west within the same square, and completely fence appellants in and render valueless their property without special injury," and "[i]n such case it seems

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[1] The provisions discussed in *Blair* related to the disposal of waste. *See* 570 N.E.2d at 1339.

absurd to say that the injury sustained by appellants in their property rights would be the same, but only greater in degree, as that sustained by the community in general." *Id*. at 223-224, 63 N.E. at 304.

[9] Here, the Amended Complaint reveals Plaintiffs alleged that Defendants have plans to install an above ground septic system that would encroach on the dedicated walkway providing access to the lake and the end of the plotted road and that their access to the walkway and the lake would be negatively impacted. Plaintiffs attached an exhibit showing the location of their parcels relative to each other and the walkway. Plaintiffs argue the value of their property would be severely and negatively impacted by an inability to access the lake.

[10] We view the pleadings in the light most favorable to Plaintiffs as the nonmoving parties, with every reasonable inference construed in their favor. *See Thornton*, 43 N.E.3d at 587. Accepting as true the facts alleged in the Amended Complaint, the injury to Plaintiffs and their property rights caused by the planned septic system installation may be different in kind and not merely different in degree as that sustained by the public in general. Indeed, Plaintiffs own Lot Nos. 18, 19, and 23 as well as the northern portions of Lot Nos. 17 and 24, and Lot Nos. 23 and 24 are located on the opposite side of the road as the lake. The exhibit attached to the Amended Complaint shows a walkway which appears to be near the end of the road providing lake access. This access offers Plaintiffs a valuable right. Plaintiffs allege the location of the planned installation would affect their

access to the lake and their enjoyment of their property, and the reasonable inference is that this is so. We will affirm the dismissal only if it is apparent that the facts alleged in the Amended Complaint are incapable of supporting relief under any set of circumstances. *See id*. We cannot say Defendants have made such a showing. *See Holz v. Lyles*, 287 Ala. 280, 284-285, 251 So. 2d 583, 587-588 (1971) ("No private action will lie for the obstruction of a highway, unless plaintiff has suffered injury peculiar to himself and not that similar to that suffered by the public . . . . In the instant case, appellee owns two adjoining lots, one of which fronts on Magnolia Street. Thus, he and the occupants of his lots have a convenient access to Palmetto Creek merely by crossing Magnolia Street. This access offers them a valuable right. Without the obstruction here involved, they would be privileged to go directly across Magnolia Street to Palmetto Creek. We do not think appellee or his occupants should be required to take a more circuitous route to reach the creek because of the arbitrary and unlawful acts of appellants. This inconvenience, we think, is peculiar and special to appellee in view of the proximity of his lots and premises to Palmetto Creek. He is entitled conveniently to enjoy the recreational advantages of his lots in their geographical proximity to Palmetto Creek. We hold that he is entitled to the injunction that the trial court granted him."), *reh'g denied*.

[11] For the foregoing reasons, we reverse the trial court's order granting Defendants' Motion to Dismiss Plaintiffs' Amended Complaint.

[12] Reversed.

Bradford, J., and Pyle, J., concur.