MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

Harold C. Merchant
Debrah M. Merchant
Appellants-Defendants,

v.

Michael Ashley
Anita Ashley
Appellees-Plaintiffs.

May 23, 2022

Court of Appeals Case No. 21A-PL-2874

Appeal from the Randolph Circuit Court

The Honorable Jay Toney, Judge

Trial Court Cause No. 68C01-2004-PL-211

Bailey, Judge.

Case Summary

[1] Harold and Debrah Merchant ("the Merchants") appeal the trial court's judgment, following a bench trial, denying their claims against Michael and Anita Ashley ("the Ashleys") for allegedly violating restrictive covenants and maintaining a nuisance.

[2] We affirm.

Issues

[3] The Merchants raise two issues which we restate as follows:

I. Whether the trial court clearly erred when it determined that the Ashleys did not violate restrictive covenants on their real property.

II. Whether the trial court clearly erred when it determined that the Ashleys did not maintain a nuisance on their real property other than markings on a tree.

Facts and Procedural History

[4] The Merchants have lived at 1167 West 250 North, Winchester, Indiana ("Merchant Real Estate") for over forty-nine years. Over ten years ago, the Ashleys moved onto the real estate located at 1145 West 250 North Winchester, Indiana ("Ashley Real Estate"), which is located immediately east of the Merchant Real Estate. The Ashleys were deeded the Ashley Real Estate on June 10, 2019, and the deed was recorded in the Randolph County Recorder's

Office. Both parties' real estate is located in a subdivision that has restrictive covenants as to the usage of their property.

[5] The warranty deed that granted the Merchants ownership of the Merchant Real Estate contains the following restrictive covenants:

> 1. No junk cars are to be parked on the above described real estate.
>
> 2. Said lot shall not be used at any time for the purpose of any trade whatsoever, such as maintenance of a professional business in the home, trade or manufacturing establishment, mercantile or retail business, hotel, filling station, restaurant, motel, place of sale of alcoholic beverages, playground, place of public resorts, public gathering place and any other purpose or use other than that of a private residential dwelling, or trailer. No more than two trailers shall be set on the above real estate.
>
> 3. No part of parcel of the above described real estate shall be used for a commercial place to keep and maintain livestock and/or bees, except for family use. Household pets are accepted [sic] from this restriction.
>
> 4. The violation of any of the restrictions hereinabove set forth shall not cause said real estate to revert to the grantor, but the grantor or the owners of any part or parcel of real estate adjoining said lot may maintain an action in Court for either damages or injunctive proceedings.

Ex. at 8. The Ashley's deed does not contain the specific restrictive covenants set forth in the Merchant deed, above, but states that it is "[s]ubject to restrictions, easements[,] and covenants of record." *Id*. at 5.

[6] In letters dated August 16, 2019, and October 5, 2019, the Merchants—through their legal counsel—informed the Ashleys that the Ashley Real Estate was subject to the same restrictions as those placed on the Merchant Real Estate and attached a copy of the restrictions. The Merchants requested that the Ashleys remove from their property alleged "junk and trash" and the following animals: "goats, horses, chickens, turkeys and cows." *Id*. at 11.

[7] On April 1, 2020, the Merchants filed a complaint against the Ashleys. The complaint alleged the Ashleys had breached real estate covenants and maintained a nuisance by using the Ashley Real Estate "for a commercial place to keep and maintain livestock," having "more than two trailers" on the real estate, and having "trash and rubbish" on the real estate. App. at 11. The Merchants alleged the Ashleys' breach of the covenants and violation of "the county nuisance ordinance" caused damage to the Merchant Real Estate, and they requested injunctive relief and damages. *Id*. at 12. The Ashleys filed a counterclaim alleging harassment and seeking their fees and costs.

[8] Following a bench trial at which both parties presented testimony and other evidence, the trial court issued a judgment with findings of fact and conclusions thereon, per the parties' requests. In addition to the above, the trial court made the following relevant findings:

8. [The Ashleys] have owned and kept horses, goats, chickens and a turkey on their property.

9. [The Ashleys] have a granddaughter, Taylor Wilson, who resided in their home for a period of time.

10. Taylor operates a horse training business called "Bad Luck Ranch."

11. Some of the photographs contained in the social media postings for Bad Luck Ranch are horses that were located on [the Ashleys'] property.

12. Some of the photographs in the social media postings were [of] Taylor's personal horse.

13. None of the training that Taylor did for Bad Luck Ranch took place on [the Ashleys'] property.

14. [The Merchants] had taken actions to file a complaint with the Randolph County Building Commissioner as to [the Ashleys] owning the goats, chickens and turkey on their real estate.

15. Both Debrah Merchant and Anita Ashley testified that no one from the Randolph County Building Commissioner or the zoning office acted upon the complaint.

16. [The Ashleys], throughout the years, have owned horse trailers and a fifth wheel camper trailer, and [the Ashleys] have kept these trailers on their property.

17. All of these trailers have wheels and have been moved.

18. There is no foundation or permanent anchoring regarding any of these trailers.

19. At times there was trash and rubbish on [the Ashleys'] real estate.

20. The Ashleys have taken actions to remove tires from their property[] and have removed trash and/or buried the same.

21. On at least one occasion, [the Ashleys] had water running down their driveway due to a broken water line or pipe.

22. Anita Ashley wrote or painted "FU" on a tree facing the [Merchants'] property, claiming it to be a reference to a college.

Appealed Order at 2-3.

[9] The trial court entered the following conclusions thereon:

1. That restrictive covenants on real estate have a strong presumption of validity and will be enforced if they are unambiguous and do not violate public policy. *Holliday v. Crooked Creek Villages Homeowners Assoc., Inc.* (2001), Ind. App., 759 N.E. 2d 1088, at 1092 [sic].

2. Although [the Ashleys] have kept various types of animals on their property, they have not kept them for a commercial purpose, but only for family use.

3. That the [Ashleys'] granddaughter also did not keep any animals or livestock on the property for commercial use[] and did not operate her business at the property.

4. That a nuisance is defined under [I.C. §] 32-30-6-6, which states:

   "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 the comfortable enjoyment of life or property, is a nuisance, and the subject of an action."

5. That no condition has been allowed to continue to exist on the [Ashleys'] property which would be a nuisance by law, with one exception, which will be indicated below.

6. That [the Ashleys'] writing or painting of "FU" on a tree facing [the Merchants'] property is indecent or offensive and must be covered or otherwise eliminated by [the Ashleys] within three days of the filing of this Judgment.

7. Merriam-Webster Dictionary defines the verb "set" as "to cause to sit," or "to place with care or deliberate purpose and with relative stability."

8. "Set" is also defined by Merriam-Webster as "to fix firmly or make immobile."

9. [The Ashleys] have not violated the covenant by having more than two trailers "set" on their property.

10. [The Ashleys'] chickens have not done damage to the property of [the Merchants] to warrant the award of damages.

11. The [Merchants'] actions in seeking to enforce the covenants as they believed them to be have not damaged [the Ashleys], and [the Ashleys] should take nothing by way of their Counterclaim.

Id. at 3-4.

[10] The trial court entered judgment ordering: (1) the Ashleys to "cover or otherwise eliminate" a "writing or painting of 'FU' on a tree facing [the Merchant's] property;" (2) denying the Merchants' complaint in all other respects; and (3) denying the Ashleys' counterclaim. *Id*. at 4. The Merchants now appeal.

Discussion and Decision

Standard of Review

[11] The Merchants challenge some of the trial court's findings and conclusions. When a party requests findings pursuant to Indiana Trial Rule 52,

> our standard of review is two-tiered. *In re Paternity of B.M.*, 93 N.E.3d 1132, 1135 (Ind. Ct. App. 2018). "First, we determine

> whether the evidence supports the findings, and second whether the findings support the judgment." *Id.* "The trial court's findings and conclusions will be set aside only if they are clearly erroneous." *Id.* "In reviewing the trial court's entry of special findings, we neither reweigh the evidence nor reassess the credibility of the witnesses." *Id.* "Rather we must accept the ultimate facts as stated by the trial court if there is evidence to sustain them." *Id.* "Conclusions of law are reviewed de novo." *11438 Highway 50, LLC v. Luttrell*, 81 N.E.3d 261, 265 (Ind. Ct. App. 2017), *trans. denied*.

Knob Hill Dev., LLC v. Town of Georgetown, 133 N.E.3d 729, 735-36 (Ind. Ct. App. 2019), *trans. denied*. Findings are clearly erroneous "only when the record contains no facts to support them either directly or by inference." *In re Paternity of B.R.H.*, 166 N.E.3d 915, 923 (Ind. Ct. App. 2021), *trans. denied*.

[12] In addition, the Merchants appeal from a negative judgment, i.e., a judgment entered against the party bearing the burden of proof. *See Burnell v. State*, 56 N.E.3d 1146, 1149-50 (Ind. 2016). On appeal from a negative judgment, we will reverse the trial court only if the judgment is contrary to law. *Id.* at 1150. A judgment is contrary to law if the evidence leads to but one conclusion and the trial court reached an opposite conclusion. *Id.*

[13] We also note that the Ashleys have not filed an appellee brief.

> Where the appellee fails to file a brief on appeal, we may, in our discretion, reverse the trial court's decision if the appellant makes a prima facie showing of reversible error. *McGill v. McGill*, 801 N.E.2d 1249, 1251 (Ind. Ct. App. 2004). In this context, prima facie error is defined as error "at first sight, on first appearance,

> or on the face of it." *Orlich v. Orlich*, 859 N.E.2d 671, 673 (Ind. Ct. App. 2006).

Jacob v. Vigh, 147 N.E.3d 358, 360 (Ind. Ct. App. 2020).

Breaches of Covenants Claim

[14] The Merchants maintain the trial court erred when it found the Ashleys did not violate the restrictive covenants[1] against having more than two trailers "set" on their property and operating a business on their property.[2]

[15] The trial court determined that, "throughout the years," the Ashleys "have owned horse trailers and a fifth wheel camper trailer" and have "kept these trailers on their property." Appealed Order at 3. However, the court noted that the covenant only prohibited "setting" more than two trailers on the property. The trial court looked to the dictionary definitions of the word "set" and determined that, in the context of the restrictive covenant, the word means "to fix firmly or make immobile." *Set*, Merriam-Webster.com, http://merriam-webster.com/dictionary/set (last visited May 9, 2022). The court further noted that the Ashleys' trailers were not "set" on the property within the meaning of the restrictive covenant because the trailers had wheels, had been moved, and were not anchored to a foundation. Those findings are not clearly erroneous, as

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[1] The trial court implicitly found—and the Ashleys do not dispute on appeal—that the restrictive covenants contained in the Merchants' Warranty Deed apply equally to the Ashley Real Estate.

[2] On appeal, the Merchants do not challenge the trial court finding and/or conclusion that the Ashleys' animals were kept on the property only for family use, not commercial use.

they are supported by witness testimony and based on a reasonable inference drawn from the context of the warranty deed and a definition of the word "set."

[16] The Merchants also challenge the court's findings and conclusions related to whether the Ashleys were allowing their granddaughter to operate a business on the Ashley Real Estate in violation of a restrictive covenant. The trial court found that "[n]one of the [horse] training that Taylor did for Bad Luck Ranch took place on [the Ashleys'] property," and concluded that the granddaughter "did not keep any animals or livestock on the property for commercial use[] and did not operate her business at the property." Appealed Order at 3, 4. The finding is supported by Anita Ashley's and Taylor Wilson's testimony and supports the conclusion that the Ashleys did not violate the relevant covenant. The Merchants' contentions to the contrary are requests that we reweigh the evidence and judge witness credibility, which we will not do. *See Knob Hill*, 133 N.E.3d at 735-36.

[17] The trial court did not clearly err when it denied the Merchant's claims regarding alleged breaches of covenants.

Nuisance Claim

[18] The Merchants also maintain that the trial court erred when it ruled that the Ashleys did not maintain a nuisance on their property.[3] However, that

[3] The court determined that the Ashleys did maintain a nuisance with the carving "FU" on a tree facing the Merchants' property, and it ordered the same removed. No one appeals that ruling.

determination was based on the findings that, while the Ashleys had some trash and rubbish on their property at some point, it had been removed and/or buried. And those findings are supported by the testimony at trial. Again, the Merchants' contentions to the contrary are improper requests that we reweigh the evidence and judge witness credibility. *Id*.

[19] The trial court did not clearly err when it denied the Merchants' nuisance claim.

[20] Affirmed.

Najam, J., and Bradford, C.J., concur.