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.

APPELLANT *PRO SE*

John J. Cergnul
South Bend, Indiana

IN THE COURT OF APPEALS OF INDIANA

John J. Cergnul,
Appellant-Plaintiff,

v.

Paul W. Bradfield,
Appellee-Defendant.

April 9, 2021

Court of Appeals Case No. 20A-SC-2139

Appeal from the St. Joseph Superior Court

The Honorable Elizabeth A. Hardtke, Magistrate

Trial Court Cause No. 71D03-2009-SC-5059

Bailey, Judge.

Case Summary

[1] Paul Bradfield ("Bradfield") removed underbrush and some trees located within a conservation easement[1] around the perimeter of a subdivision. John Cergnul ("Cergnul"), an adjoining neighbor outside the subdivision, brought a pro-se small claims action for $8,000.00 to pay for shrubbery to restore an aesthetic barrier. Cergnul did not prevail upon his claim and he appeals, presenting the single, consolidated issue of whether the judgment is contrary to law. We affirm.

Facts and Procedural History

[2] On March 21, 2002, after remonstrance by local farmers, the developer of Farmington Hills Subdivision in South Bend ("Farmington") agreed to record a conservation easement twenty feet wide along the western and southern boundaries of Farmington. On June 14, 2004, Farmington's restrictive covenants were recorded. The covenants lacked an explicit reference to the conservation easement, but included language suggesting that a final and superseding document might be forthcoming. On April 11, 2005, the developer of Farmington recorded a final plat with the following language:

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[1] A "conservation easement" is "a nonpossessory interest of a holder in real property that imposes limitations or affirmative obligations with the purpose of: (1) retaining or protecting natural, scenic, or open space values of real property; (2) assuring availability of the real property for agricultural, forest, recreational, or open space use; (3) protecting natural resources; (4) maintaining or enhancing air or water quality; or (5) preserving the historical, architectural, archeological, or cultural aspects of real property." Ind. Code § 32-23-5-2.

> The Conservation Easement delineated on this subdivision is an easement reserved to the developer of said subdivision, its successors and assigns. The specific right to use said easement is outlined within the covenants that are to be recorded for this subdivision once this secondary plat is approved and recorded. There shall be erected no building structure or fence on, across, or through said easement unless otherwise outlined within said recorded covenants. The owners of the lots containing said easement, their successors and assigns shall take their titles subject to said use of the conservation easement.

(Appealed Order at 1.)

[3] On May 1, 2020, Bradford purchased Lot 61 in Farmington. In September of 2020, Bradford used a chainsaw to remove trees, shrubs, and brush from the conservation easement bordering his lot. Cergnul observed Bradford working and objected that the conservation easement was to remain unaltered. Bradford reviewed the restrictive covenants, which had not been updated after the final plat was recorded. He also met with a representative of Farmington's homeowner's association, who reportedly advised that Bradford could continue with his clearing work so long as he did not change the grade of the land. Bradford continued his work but left some of the trees.

[4] On September 8, 2020, Cergnul filed his claim. The parties appeared for a hearing on October 8, 2020. At the outset, Cergnul stated that he was seeking injunctive relief, but the trial court advised Cergnul that injunctive relief was not available to him in small claims court. Cergnul then stated that he was seeking damages for the loss of quiet enjoyment of his property. In order to block the "sight line" for 200 feet, he requested $6,900.00 for two rows of

shrubs to be planted four feet apart and $1,100.00 for planting labor and fertilizer. (Tr. at 20.)

[5] The trial court heard testimony from Daniel Rupert ("Rupert"), another adjoining landowner who had initially opposed the development of Farmington and had fought for the conservation easement. Rupert testified that several properties bordering Farmington were beneficiaries of the easement. According to Rupert, its purpose was to promote the presence of wildlife, including deer, and to preserve the visual aesthetic for residents who had enjoyed a rural setting and did not welcome suburban congestion. Rupert testified that, after Bradford's clearing work, he could look through the trees to see a raked lot, water runoff, and a subdivision street. Bradford then testified that the conservation easement "belongs to the neighborhood," of which Cergnul is not a part, and that he was "allowed" by the Farmington homeowner's association to perform the work he had undertaken. (*Id.* at 40.)

[6] On October 16, 2020, the trial court entered an order denying Cergnul damages. The trial court's order stated that Cergnul lacked standing to legally challenge activity within the easement and "[he] has failed to demonstrate that he has been denied a property right." (Appealed Order at 2.) Cergnul now appeals.

Discussion and Decision

[7] Cergnul concedes that he cannot obtain injunctive relief in small claims court and that he lacks standing to enforce the subject easement.[2] Rather, he argues that he is entitled to damages to ameliorate a nuisance. Bradfield did not file an appellee's brief. Accordingly, we will not undertake the burden of developing arguments for the appellee, and we may reverse the lower court if the appellant can establish prima facie error. *Seger v. Seger*, 780 N.E.2d 855, 857 (Ind. Ct. App. 2002). Prima facie, in this context, is defined as "at first sight, on first appearance, or on the face of it." *Id.* (internal citation omitted). Where an appellant is unable to meet that burden, however, we will affirm. *Id.*

[8] Indiana Small Claims Rule 8(A) provides that a small claims trial:

> shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law, and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except provisions relating to privileged communications and offers of compromise.

[9] However, the burden of proof in a small claims civil lawsuit is the same as the burden in a civil action not on the small claims docket. *Harris v. Lafayette LIHTC, LP*, 85 N.E.3d 871, 876 (Ind. Ct. App. 2017). "It is incumbent upon

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[2] Indiana Code Section 32-23-5-6 provides that an action that affects a conservation easement may be brought by "an owner of an interest in the real property burdened by the easement, a holder of the easement, a person having a third party right of enforcement; or a person authorized by other law." Indiana Code Section 32-23-5-4 grants a third party right of enforcement only to "a governmental body, charitable corporation, charitable association, or charitable trust that is eligible to be a holder but is not a holder."

the party who bears the burden of proof to demonstrate that it is entitled to the recovery sought." *Id.* When we review claims tried by the bench without a jury, we will not set aside the judgment "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A). When an issue of law is presented, our review is de novo. *Harris*, 85 N.E.3d at 876.

[10] Because Cergnul had the burden of proof at trial, he appeals from a negative judgment. *Mominee v. King*, 629 N.E.2d 1280, 1282 (Ind. Ct. App. 1994). We will reverse a negative judgment only when it is contrary to law, that is, when the undisputed evidence and reasonable inferences to be drawn therefrom point unerringly to a conclusion different from that reached by the trial court. *Id.*

[11] Cergnul contends that Bradford's conduct amounted to a nuisance per se, "something which should not be permitted to exist," or a nuisance per accidens, that is, a nuisance "by nature of use." Appellant's Brief at 22.

> "In Indiana, nuisances are defined by statute." *Wernke v. Halas*, 600 N.E.2d 117, 120 (Ind. Ct. App. 1992). Pursuant to Indiana Code section 32-30-6-6, "[w]hatever is [...] injurious to health[,] indecent[,] offensive to the senses[,] or [ ] an obstruction to the free use of property [ ] so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance[.]" Nuisances may be categorized as public or private. A public nuisance is that which affects an entire neighborhood or community, while a private nuisance affects only one individual or a determinate number of persons. *Hopper v. Colonial Motel Props., Inc.*, 762 N.E.2d 181, 186 (Ind. Ct. App. 2002). A private nuisance arises when it has been demonstrated that one party has used his property to the detriment of the use and enjoyment of

> another's property. *Id.* Moreover, a nuisance may be a nuisance per se, something which cannot be lawfully conducted or maintained, or may be nuisance per accidens, where an otherwise lawful use becomes a nuisance by virtue of the circumstances surrounding the use. *Id*. Whether something is a nuisance per se is a question of law, and whether something is a nuisance per accidens is a question for the trier of fact. *Wernke*, 600 N.E.2d at 120. "[T]he relevant inquiry is whether the thing complained of produces such a condition as in the judgment of reasonable persons is naturally productive of actual physical discomfort to persons of ordinary sensibility, tastes, and habits." *Wendt v. Kerkhof*, 594 N.E.2d 795, 797 (Ind. Ct. App. 1992).

Centennial Park, LLC v. Highland Park Estates, LLC, 151 N.E.3d 1230, 1234 (Ind. Ct. App. 2020), *trans. denied*.

[12] At the small claims hearing, Cergnul produced exhibits to show that the developer of Farmington set aside a conservation easement pursuant to Indiana Code Section 32-23-5-2. He now seems to suggest that any alteration to an easement authorized by statute – whether destructive or beneficial – is "something which cannot be lawfully conducted," a nuisance per se. *Hopper*, 762 N.E.2d at 186. But the conservation easement enabling statute does not expressly provide Cergnul with a private right of enforcement and he develops no argument that the Legislature intended such.[3] Nor does the enabling statute

[3] The Legislature at times explicitly provides that persons with appropriate standing are entitled to go to court and ask for enforcement of a statute's provisions. *Blanck v. Ind. Dep't of Corr.*, 829 N.E.2d 505, 509 (Ind. 2005). These provisions are often referred to as "private rights of action" or "private causes of action." *Id.* Where a legislative body does not explicitly provide a private right of action to enforce the provisions of a particular statute, courts are frequently asked to find that the Legislature intended that a private right of action be implied. *Id.*

by its terms provide for damages to an individual. The small claims court did not clearly err in not awarding damages for a nuisance per se.

[13] With regard to whether a nuisance per accidens was created under the circumstances surrounding Bradford's use of the easement, Cergnul asserts that "dozens of trees were removed" and Cergnul now views from his property "more than twelve houses, backyards, streets, and automobiles." Appellant's Brief at 14. He considers the diminished barrier, allowing a view of suburban sprawl, as the "destruction of his right to quiet enjoyment of his property." *Id.*

[14] The small claims court was the factfinder, tasked with determining whether Bradford's conduct produced "a condition as in the judgment of reasonable persons is naturally productive of actual physical discomfort to persons of ordinary sensibility, tastes, and habits." *Wendt*, 594 N.E.2d at 797. Cergnul did not testify at the hearing; the details of his personal backyard view are first described in his appellate brief. That said, Rupert's testimony made plain the general opinion of the farm owners that their quality of life and enjoyment of their property was diminished when an adjacent subdivision was developed. Undoubtedly, the grant of the conservation easement gave rise to the expectation of some insulation from suburban sprawl. But notwithstanding frustrated hopes, there was no evidence before the trial court of actual physical discomfort to a person of ordinary sensibilities. Cergnul has not shown that the evidence points solely to a conclusion other than that reached by the trial court.

Conclusion

[15] The decision of the small claims court, denying nuisance damages to Cergnul, is not contrary to law.

[16] Affirmed.

May, J., and Robb, J., concur.