ATTORNEY FOR APPELLANT:

NATALIE R. LOUNSBERY
Eberhard & Gastineau, P.C.
LaGrange, Indiana

ATTORNEY FOR APPELLEE:

TIM J. CAIN
Williams & Cain
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MARK LESH,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 44A04-0609-CV-499
	)	
RICHARD CHANDLER and	)	
MARILYN CHANDLER,	)	
	)	
Appellees-Petitioners.	)	

APPEAL FROM THE LAGRANGE CIRCUIT COURT
The Honorable Howard E. Petersen, Judge Pro-Tempore
Cause No. 44C01-0605-PL-11

June 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Mark Lesh appeals the trial court's "Partial Ruling," denying his motion to dismiss for lack of subject matter jurisdiction, consolidating the hearing on a preliminary injunction with the hearing on the permanent injunction, and extending a temporary restraining order and a protective order. Lesh raises five issues, and the appellees, Richard and Marilyn Chandler, raise two issues in their appellate brief. We consolidate these issues and restate them as: 1) whether the trial court's "Partial Ruling" constitutes a preliminary injunction; 2) if so, whether the trial court properly issued the preliminary injunction; 3) whether the trial court lacks subject matter jurisdiction over the Chandlers' motion for preliminary injunction; and 4) whether either party is entitled to trial or appellate attorney fees. We conclude that the trial court did indeed issue a preliminary injunction, and that it did so improperly. Therefore, we reverse the trial court's grant of the preliminary injunction. We also conclude that the trial court has jurisdiction over the Chandlers' complaint, and therefore remand for proceedings consistent with this opinion. Finally, we conclude that neither party is entitled to attorney fees at this point.

Facts and Procedural History

Lesh lives near the Chandlers on a lake in LaGrange County, Indiana. On April 26, 2006, the Chandlers obtained an Ex Parte Order for Protection (the "Protective Order"), prohibiting Mr. Lesh from "shouting obscenities, calling names, making bizarre noises or playing music that can be heard outside of home." Appellant's Appendix at 21. On May 23, 2006, the Chandlers filed a complaint alleging that Lesh's use of his land constitutes a

nuisance.[1] The substance of this claim is that Lesh plays loud music, yells derogatory terms, aims his security light toward the Chandlers' home, and in general, interferes with the Chandlers' enjoyment and use of their property. Apparently, it is not merely the volume of Lesh's music, but also the selection that bothers the Chandlers. Particularly troubling to the Chandlers is Jimi Hendrix's version of "The Star-Spangled Banner," which they believe is "sacrilegious to the American flag." Transcript at 68.

On May 23, 2006, the Chandlers filed a motion for a preliminary injunction, requesting that the trial court enjoin Lesh from the activities described above. On June 12, 2006, Lesh filed a Motion to Consolidate Hearing on Plaintiff's Motion for Preliminary Injunction with the Trial of the Action on the Merits Pursuant to Trial Rule 65(A)(2). On June 15, 2006, the trial court held a hearing on the Chandlers' motion for preliminary injunction. On August 2, 2006, the trial court denied Lesh's motion to consolidate, and set a final hearing on the preliminary injunction for August 9, 2006, and set trial on the remaining issues for September 13, 2006. At the August 9 hearing, Lesh filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, alleging that the Chandlers lacked standing based on their alleged failure to exhaust administrative remedies. Following the August 9 hearing, the trial court requested that the parties file briefs regarding the preliminary injunction. On September 8, 2006, the trial court issued a "Partial Ruling," stating:

> 1. The Motion based on preemption of remedy is denied without prejudice to the defendants neglect to plead the LaGrange County Zoning Ordinance as some evidence of the community standard on noise. The Court holds that the legislature did not repeal the common law and statutory cause of action for

[1] The Chandlers obtained the Protective Order in the LaGrange County Superior Court, and filed their Complaint in the LaGrange County Circuit Court. The Superior Court eventually transferred the case before it to the Circuit Court.

> nuisance per accidens when it gave local government units the option to enact zoning ordinances.
> 2. Pursuant to T.R. 65 (2) the hearing on the preliminary injunction with the final hearing should have been granted. The Court corrects the previous error. All evidence heretofore heard will be considered with any new evidence on September 13, 2006.
> 3. The temporary restraining order heretofore issued is extended through and including the (10) days after evidence is closed in this case, unless dissolved sooner.[2]
> 4. Judge Brown's[3] protective Order is likewise extended to preserve the status quo pending final decision.
> 5. No further surety is required.
> 6. Counsels are again requested to exhaust settlement options prior to the next hearing as fees/costs could be affected.

Appellant's Appendix at 6. More facts will be added as needed. Lesh now appeals.

Discussion and Decision

I. Nature of the Trial Court's "Partial Ruling"

As the trial court's "Partial Ruling" is not a final judgment, see Ind. Appellate Rule 2(H), our jurisdiction over this appeal is governed by Indiana Appellate Rule 14. See Bayless v. Bayless, 580 N.E.2d 962, 964 (Ind. Ct. App. 1991), trans. denied. Under this Rule, we may accept jurisdiction over interlocutory orders that the trial court has certified for appeal. Ind. Appellate Rule 14(B). However, Lesh did not seek certification of this appeal, so we will have jurisdiction only if the trial court's order falls within Indiana Appellate Rule 14(A). See Bayless, 580 N.E.2d at 964. Under this rule, a party may appeal as a matter of right a trial court's grant of a preliminary injunction. App. R. 14(A)(5).

The language of the trial court's "Partial Ruling" implies that the trial court is not

[2] The record does not indicate that a Temporary Restraining Order was granted in addition to the Protective Order.

[3] Judge Brown was the presiding Judge in the LaGrange County Superior Court.

ruling on the motion for preliminary injunction, and instead, is granting Lesh's previously denied motion to consolidate under Trial Rule 65(A)(2). However, "[i]t is the substance of the order which controls, not its caption." Indiana Alcoholic Beverage Comm'n v. Progressive Enterprises, Inc., 259 Ind. 315, 317, 286 N.E.2d 836, 837 (Ind. 1972). Here, the trial court had notified the parties that the August 9 hearing would be the final hearing on the Chandlers' motion for preliminary injunction, had actually held this hearing, and had requested briefs on the matter. Therefore the trial court's order purporting to merely extend the Protective Order was in fact a grant of the motion for a preliminary injunction. Id.; Rogers v. Noble County ex rel. Noble County Bd. of Comm'rs., 679 N.E.2d 158, 160 n.2 (Ind. Ct. App. 1997), trans. denied ("Because the TRO was issued after notice and a hearing at which both parties were present, we conclude the order is in fact a preliminary injunction properly appealable as an interlocutory order.").

Our conclusion that the substance of the trial court's order is a grant of a preliminary injunction is also supported by the text of Trial Rule 65(A)(2), which states: "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." (Emphasis added). Here, the trial on the merits was not advanced or consolidated with the hearing on the preliminary injunction, as the hearing on the preliminary injunction had already been held, and the trial on the merits was not advanced from its already-scheduled date of September 13. The practical effect of the trial court's order was to avoid ruling on the motion for preliminary injunction by extending the Protective Order until after the trial court heard the evidence regarding the permanent

injunction. A grant of the Chandlers' motion for a preliminary injunction would have had the same effect. By extending the Protective Order, the trial court issued a preliminary injunction, an appealable interlocutory order. Therefore, this appeal is properly before this court.

II. Propriety of the Preliminary Injunction

When issuing or refusing to issue a preliminary injunction, a trial court is required to issue special findings of fact, whether or not a party requests the trial court to do so. Ind. Trial Rules 52(A)(1), 65(D). "A trial court's failure to enter findings of fact and conclusions of law, as required by Ind. Trial Rule 52 and Ind. Trial Rule 65, in an order granting a preliminary injunction constitutes reversible error." GKC Indiana Theatres, Inc. v. Elk Retail Investors, LLC, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002). Although sometimes an appellate court will review a trial court's grant of a preliminary injunction despite the trial court's failure to enter the mandatory findings, we will do so "only when the facts are simple and uncontested, and only a question of law is presented for review." Whiteco Indus., Inc. v. Nickolick, 549 N.E.2d 396, 398 (Ind. Ct. App. 1990).

In determining whether a use of property constitutes a nuisance, the trial court should conduct a "balancing of competing interests of the landowners, using a common sense approach." Keane v. Pachter, 598, N.E.2d 1067, 1073 (Ind. Ct. App. 1992), trans. denied. As in this case, where the Chandlers do not allege that Lesh is using his land in an illegal manner, this balancing inherently involves a factual inquiry. Indiana Michigan Power Co. v. Runge, 717 N.E.2d 216, 228-29 (Ind. Ct. App. 1999) (recognizing that the issue of whether a lawful use of land constitutes a nuisance is a question of fact); Sand Creek Partners, L.P. v.

Finch, 647 N.E.2d 1149, 1152 (Ind. Ct. App. 1995) ("Whether an otherwise lawful use is a nuisance in fact is a question for the trier of fact."). Specifically, whether the noise and light produced through Lesh's use of his property are reasonable are questions primarily of fact. See Muehlman v. Keilman, 257 Ind. 100, 103, 272 N.E.2d 591, 593 (1971) (recognizing that noise is a sufficient reason to constitute a nuisance, but that whether the noise produced is unreasonable is a question of fact); Bagko Dev. Co. v. Damitz, 640 N.E.2d 67, 72, 73 (Ind. Ct. App. 1994) (examining trial court's findings of fact to determine whether the evidence supported trial court's conclusion that lights on a baseball field did not constitute a nuisance). Because the ultimate outcome of this case will be determined by primarily factual determinations, the complete absence of factual findings by the trial court leaves us unable to determine if the Chandlers have demonstrated a likelihood that they will prevail on the merits. See Whiteco Idus., 549 N.E.2d at 399. We conclude that appellate review of the trial court's preliminary injunction is precluded, and we dissolve the preliminary injunction and remand with instructions that the trial court issue a new order including the requisite findings of fact. See id.

III. Subject Matter Jurisdiction

Lesh next argues that the trial court has no subject matter jurisdiction over the Chandlers' Complaint, as the Chandlers have failed to exhaust their administrative remedies. Specifically, he points out that the LaGrange Zoning Ordinance (the "Ordinance") proscribes property owners from creating noise above a certain level and from using exterior lights that shine on other property. See LaGrange Zoning Ordinance Article 5 § A(6), available at:

http://www.lagrangecounty.org/index.php?option=com_docman&task=cat_view&gid=122 (last visited May 21, 2007) ("[N]o uses or activities shall create noise levels for more than 5 minutes in any hour that exceed those shown on the following table." This table indicates that properties in the L-1 district, of which Lesh's property is a part, have a maximum noise level of 75 (dBA) at the property line); id. at Article 5 § A(7)(a) ("No exterior lighting used for . . . security shall be permitted to spill over on operators of motor vehicles, pedestrians, and uses of land in the vicinity of the light source."). The Ordinance also provides:

> Whenever a violation of this Ordinance occurs or is alleged to have occurred, any person may file a written complaint. Such complaint stating fully the causes and basis thereof shall be filed with the staff. The staff shall properly record such complaint and investigate in a timely manner. If acts elicited by such investigation are sufficient to establish a reasonable belief that a violation has occurred on the part of the party investigated, such official shall issue a citation in accordance with this Section and/or file with the County Attorney a complaint against such person requesting action thereon as provided by this Ordinance and in accordance with law.

Id. at Article 8 § B(1). Lesh argues that the Chandlers' failure to first file a written complaint with the LaGrange County staff deprives the trial court of jurisdiction to hear their Complaint. We disagree.

Lesh supports his argument by citing Indiana Code section 4-21.5-5-4(a), which states: "A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review." The fundamental problem with Lesh's reliance on this statute is apparent from its text: there has been no administrative action taken here for the Chandlers to challenge or for this court to

review. See also Ind. Code §§ 4-21.5-5-1, ("[T]his chapter establishes the exclusive means for judicial review of an agency action.") (emphasis added), -5 ("[A] petition for review is timely only if it is filed within thirty (30) days after the date that notice of the agency action that is the subject of the petition for judicial review was served.") (emphasis added). Therefore, "the exhaustion doctrine does not apply because there was no administrative decision from which [the Chandlers] could have appealed." T.W. Thom Const., Inc. v. City of Jeffersonville, 721 N.E.2d 319, 322 (Ind. Ct. App. 1999). Even if the Chandlers did file a complaint, they would not be a party to the administrative action, which would involve the LaGrange County Staff and Lesh, and would not be required to exhaust administrative remedies following any action or inaction taken on behalf of their complaint. See Bixler v. LaGrange County Bldg. Dept., 730 N.E.2d 818, 820-21 (Ind. Ct. App. 2000) (party was not required to exhaust administrative remedies where it was not a party to the administrative action). The mere fact that the Ordinance permits any person to file a complaint, which in turn will be investigated by the Staff, does not preclude the Chandlers from filing a suit in the trial court against Lesh.

An even more apparent reason that Lesh's argument fails is that under Indiana statute, "[a]n action to abate or enjoin a nuisance may be brought by any person whose . . . (1) property is injuriously affected; or (2) personal enjoyment is lessened . . . by the nuisance." Ind. Code § 32-30-6-7.[4] The Ordinance itself also indicates that a suit may be brought to

[4] Indiana courts have long recognized the distinction between a public and private nuisance. See Hutchens v. MP Realty Group-Sheffield Square Apartments, 654 N.E.2d 35, 39 (Ind. Ct. App. 1995), trans. denied ("A public nuisance is one which affects an entire neighborhood or community, while a private nuisance affects only a single person or a determinate number of people."). It has long been the rule that a private individual generally may not bring an action for a public nuisance. Haggart v. Stehlin, 137 Ind. 43, 35

enjoin a property owner in violation of the Ordinance.[5] We recognize that the legislature has permitted the plan commission, or any enforcement official identified in a zoning ordinance, to file a suit to enforce a provision of the ordinance. Ind. Code § 36-7-4-1014. However, Lesh has pointed to no authority, and research has disclosed none, divesting an individual of his or her statutory right to file a suit to enjoin a nuisance affecting his or her property.

We conclude that the Ordinance's section indicating that any person "may" file a complaint does not require one to file a complaint in lieu of filing a suit in the trial court. Instead, we conclude that the specific statutory provision allowing one whose property is affected to seek an injunction gives the trial court jurisdiction over the Chandler's complaint. See Benjamin v. City of W. Lafayette, 701 N.E.2d 1268, 1271-72 (Ind. Ct. App. 1998), trans. denied (holding that exhaustion of administrative remedies was not required and noting that a statute specifically allows a city to seek enforcement of an ordinance in a trial court); cf. Brendanwood Neighborhood Ass'n, Inc. v. Common Council of City of Lebanon, 167 Ind. App. 253, 255, 338 N.E.2d 695, 696 (1975) (recognizing that a suit to abate a nuisance is "clearly within the jurisdiction of the [trial court]").

N.E. 997, 1000 (1893). A private party may bring an action to enjoin a public nuisance only "if the party demonstrates special and peculiar injury apart from the injury suffered by the general public . . . [and] the injury [is] a different kind and not merely a different degree." Indiana Limestone Co., v. Staggs, 672 N.E.2d 1377, 1384 (Ind. Ct. App. 1996), trans. denied. As Lesh has not raised the issue, we make no statement as to whether or not the alleged nuisance in this case is a private or public nuisance. See Town of Rome City v. King, 450 N.E.2d 72, 78 (Ind. Ct. App. 1983) (where several of the plaintiff's neighbors also noticed odor and noise coming from the defendant's property, "the noise and odor, while it may annoy the Kings, does not constitute an actionable nuisance").

[5] Article 8 § B(2) provides:

> Any buildings erected, raised or converted, or land or premises used in violation of any section of this Ordinance or regulation thereof is hereby declared to be a common nuisance and the owner thereof shall be liable for maintaining a common nuisance which may be restrained or enjoined or abated in any appropriate action or proceeding.

We further recognize that the Chandlers' complaint does not allege that Lesh's use of his land violates the Ordinance. Instead, the Chandlers allege that Lesh's use of his property "constitutes a nuisance under I.C. § 32-30-6 and Indiana common law." Under Indiana Code section 32-30-6-6, "[w]hatever is (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as to essentially interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." Although the Ordinance identifies specific volume levels and lighting uses that constitute nuisances, it is not necessary that one's use of land violate the Ordinance in order for it to constitute a nuisance. That is, one could use his or her land consistently with the Ordinance's provisions, and still use the land in a manner that obstructs another's use of property so as to constitute a nuisance under Indiana law. See Wendt v. Kerkhof, 594 N.E.2d 795, 797 (Ind. Ct. App. 1992), trans. denied (recognizing that whether a landowner's use complied with applicable regulations and statutes was not dispositive as to whether the use constituted a nuisance).

Although the Chandlers were free to file a complaint with the LaGrange County staff alleging that Lesh was violating the Ordinance, they were not required to do so before pursuing the remedy specifically permitted under Indiana Code section 32-30-6-7. Cf. Bixler, 730 N.E.2d at 821. We conclude that the trial court properly denied Lesh's motion to dismiss for lack of jurisdiction.

IV. Attorney Fees

A. The Chandlers' Request for Appellate Attorney Fees

The Chandlers argue that they "are entitled to appellate attorney fees for defending this baseless interlocutory appeal," that Lesh's "contentions and argument are utterly devoid of all plausibility and thus are brought in substantive bad faith," and that his "issue that the trial court wrongfully entered a preliminary injunction lacks any basis in law or fact." Appellee's Brief at 22. As we have concluded that the trial court did indeed wrongfully enter a preliminary injunction, we necessarily conclude that Lesh's argument has basis in law and fact, and that he did not bring this suit in bad faith. We decline the Chandlers' request to award them appellate attorney fees.

B. Lesh's Request for Attorney Fees

Indiana Trial Rule 65(C) allows a party to recover costs and damages, including attorney fees, associated with its defense of a wrongful injunction. GKC Indiana Theatres, 764 N.E.2d at 654. When "a preliminary injunction is dissolved and is not replaced by a permanent injunction, 'the enjoined party is generally entitled to compensation for damages he incurred.'" Hampton v. Morgan, 654 N.E.2d 8, 9 (Ind. Ct. App. 1995) (quoting Laux v. Chopin Land Assocs., Inc., 615 N.E.2d 902, 905 (Ind. Ct. App. 1993), trans. denied). When an action consists of more than an injunction, the damages awarded under Indiana Trial Rule 65(C) "should be restricted to the fees necessarily incurred in defending against the injunction." Id. at 10. However, the mere fact that we are reversing the trial court's grant of the preliminary injunction does not mean that Lesh is entitled to attorney fees. Lesh will be entitled to attorney fees only "when he proves that it has been finally or ultimately determined that injunctive relief was not warranted on the merits." Indiana High Sch. Athletic Ass'n v. Casario, 726 N.E.2d 325, 335 (Ind. Ct. App. 2000), trans. denied. As we

are dissolving the preliminary injunction based on the trial court's failure to enter the requisite findings of fact and conclusions of law, and are making no holding regarding the ultimate validity of an injunction, Lesh is not entitled to an award of attorney fees at this time.

Conclusion

We conclude that the trial court improperly issued a preliminary injunction, as it failed to issue the requisite findings, and we remand with instructions that the trial court issue an order with such findings. We further conclude that the trial court does have jurisdiction over this action, as the Chandlers were not required to exhaust administrative remedies before filing this suit. Finally, we conclude that neither party is entitled to attorney fees at this time.

Affirmed in part, reversed in part, and remanded.

SULLIVAN, J., and VAIDIK, J., concur.