MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

FED Investments, and Carolyn and William Moore,

Appellants-Plaintiffs,

v.

Paula Basch-Austin, and Bruce Austin,

Appellees-Defendants.

October 18, 2023

Court of Appeals Case No. 22A-PL-3070

Appeal from the Hamilton Superior Court

The Honorable Andrew R. Bloch, Special Judge

Trial Court Cause No. 29D01-1905-PL-4360

Memorandum Decision by Chief Judge Altice
Judges May and Foley concur.

Altice, Chief Judge.

Case Summary

[1] Fed Investments, LLC (FED) and Carolyn and William Moore (the Moores) (FED and the Moores are collectively referred to as "the Owners") appeal the trial court's judgment in favor of Paula Basch-Austin and Bruce Austin (collectively, the Austins) on the Owners' complaint for a declaratory judgment and injunctive relief. The Owners argue that the trial court erred in determining that they lacked standing to bring the action against the Austins and pursue injunctive relief, and that they should be liable for attorney's fees for bringing frivolous and baseless claims against the Austins.

[2] We affirm and remand for further proceedings consistent with this opinion.

Facts and Procedural History

[3] Three neighboring parcels of real estate (the Geist Pointe Plat), owned by FED[1] (Lot 1), the Austins (Lot 2), and the Moores (Lot 3), are involved in this litigation. **Prior to FED's acquisition of its property, the then-owner of Lot 1 issued a deed which transferred a portion of the westernmost portion of Lot 1 to the Tamenend Boat Dock Owner's Association (Tamenend). Tamenend's parcel sits adjacent to a small inlet in Geist Reservoir where Tamenend provides a dozen boat docks to neighborhood residents.**

[1] FED is an entity owned solely by Fadi Abdallah for the sole purpose of holding this real estate. FED's principal office is located in Carmel.

[4] All three lots are part of the Geist Pointe Plat that was originally established in 1986. The Geist Pointe Plat contains covenants, restrictions, and conditions that run with the land until at least 2072. The restrictions provide that "no structure shall be erected, altered, placed or permitted to remain on any residential lot herein, *other than one detached single-family dwelling not to exceed two and one-half stories in height* and residential accessory buildings." *Exhibit A* (emphasis added). The restrictions also require that any building in Lot 2 have a minimum front building setback of sixty-five feet and a minimum rear setback line of at least twenty feet from the rear lot line. If an additional building or structure is to be erected on the lots, the Indiana Department of Natural Resources (DNR) must provide written approval before construction can commence. The restrictions further provide that any "accessory building erected shall be of a residential type of construction and shall conform to the general architecture and appearance of such residence." *Id.* It is undisputed that the Tamenend deed altered Lot 1's boundary lines and the setback restrictions in the Geist Pointe Plat. Tamenend has made extensive upgrades and repairs to the property without objection or challenges from any other lot owner.

[5] On February 22, 2019, the Austins filed for a temporary plat permit with the Fishers Department of Planning and Zoning. The Austins sought to subdivide Lot 2 into two lots and build an additional residence on the property. The Austins also filed a request with the City of Fishers (Fishers), inquiring whether the necessary variances could be obtained for the subdivision.

[6] Before any governmental agency acted on the proposed construction, the Owners filed a verified complaint against the Austins on May 7, 2019, for injunctive relief. The Owners sought a preliminary injunction to prevent the Austins from building an additional residence on their lot because the Geist Pointe Plat restrictions and covenants permitted only one such structure. The Owners also sought an order compelling the Austins to remove an existing shed from their property because that structure does not "conform to the general architecture and appearance" of their residence, and the DNR never issued approval for the shed's placement or construction on the property. *Appellant's Appendix Vol. II* at 28.

[7] In response, the Austins filed a motion to dismiss the action for failure to state a claim pursuant to Indiana Trial Rule 12(B)(6). Following a hearing on September 6, 2019, the trial court granted the motion to dismiss as to all claims other than the injunction seeking removal of the shed. The trial court determined that the Owners' claims were "premature, failing to plead the present existence of an actual threat in that the City of Fishers has not granted relief to the Austins' pending petitions." *Appellants' Appendix Vol. II* at 44. The trial court further determined that "only if the Austins' petitions are granted will the details be known as to how the Austins' then approved plans might violate existing covenants and restrictions." *Id.*

[8] Ten days later, the Owners moved for a change of judge that was subsequently granted. The Owners then filed an amended verified complaint for injunctive relief and declaratory judgment, again requesting the trial court to halt the

construction of a second residence on the Austins' lot, and for the removal of the shed. The Austins filed a counterclaim, alleging that the Owners' amended complaint amounted to frivolous and baseless litigation because the circumstances had not changed since the dismissal of the original complaint. Both parties filed motions for summary judgment, which the trial court denied.

[9] Following a two-day bench trial that concluded on August 31, 2022, the trial court issued its judgment and entered findings of fact and conclusions of law as follows:

> 3. Geist Pointe is made up of three residential lots with improvements, that are only accessible from Fall Creek Road through a single easement driveaway that splits into three separate driveways and proceeds up to three individual single-family homes.
>
> 4. The three lots of Geist Pointe are owned by the parties.
>
> 8. All three lots are governed by certain restrictive covenants laid out in a document titled the Secondary Plat Geist Pointe (the Plat or the Covenants) which were filed on May l2, 1986.
>
> 9. The Plat and its restrictive covenants run with the land.
>
> 10. At their core, the Covenants require Geist Pointe to be a residential neighborhood. Section 2 of the Plat, which discusses dwelling size and use, begins with the following sentence: 'All lots in this subdivision shall be known and designated as residential lots.'

11. The Plat goes on to prohibit 'business buildings' or any other 'structure,' other than 'one single-family dwelling not to exceed two-and-one-half stories in height and residential accessory buildings.'

12. The Plat permits boat houses that do 'not exceed one story 110 feet in height and shall not exceed 900 square feet under roof.'

13. Section 1 of the Plat contains front, rear, and side setback requirements, and begins by stating that 'unless otherwise provided in these restrictions or on the recorded plat, no dwelling house or above grade structure shall be constructed or placed on any residential lot in the Development except a provided herein.'

14. Each lot must have an aggregate of 20 feet of side setback, with no side being any less than 9 feet.

. . .

17. On April 8, 1988, prior to FED's ownership of Lot 1, the then-current owner of Lot 1 issued a deed (the 'Tamenend Deed') which transferred a portion of the far west side of Lot 1 to the Tamenend Boat Dock Association ('Tamenend').

. . .

19. Tamenend thereafter, up until the present day, has conducted and continues to conduct extensive upgrades and repair work to the western roughly one-third of Lot 1, and which today contains over ten (10) boat dock structures . . . along the west side of Lot 1.

20. Other than the boat docks owned or leased by FED, all the boat docks now on Lot 1 are owned, leased, and/or operated by parties who do not live in Geist Pointe.

. . .

24. Prior to this action, none of the parties had been involved in any legal, governmental, or other enforcement proceedings related to Geist Pointe or the Covenants.

25. The Austins became interested in the idea of subdividing Lot 2, into two lots for the purpose of building a second home.

26. On or about February 22, 2019, the Austins filed requests with the City of Fishers ('City') which sought approval to subdivide the Plat and obtain the variances necessary to build a second home.

. . .

30. The Austins testified that *if* they were able to obtain approval to subdivide and the necessary variances from the City, they then intended to engage their neighbors and/or the appropriate authority per the Covenants to determine if construction of a second home would be possible under the Plat.

31. The Austins believed approval from the City would be a condition precedent to their engagement of neighbors and investigation of the Plat because such work would be unnecessary if the City would not approve their requests for subdivision or variance.

32. The Austins were prepared to present their request for subdivision to the Plat Committee of the Fishers Department of Planning & Zoning on April 25, 2019.

33. They had similarly prepared their setback variance request to be heard by the Fishers Board of Zoning Appeals on or about that same date.

34. FED and the Moores remonstrated against both requests, as is their right.

35. Before the Plat Committee or Board of Zoning Appeals could receive and consider the Austins' requests, FED and the Moores threatened to file and indeed did file the present lawsuit.

36. The filing of this lawsuit, or threat of the same, was the controlling reason for the City's refusal to hear or rule on the Austins' subdivision and variance requests.

37. FED filed the lawsuit, at least in part, to thwart the Austins' efforts to acquire the approvals and variances from the City.

38. The Austins never took any affirmative steps which would have displayed an imminent intention to begin construction of the proposed second home.

CONCLUSIONS OF LAW

l. Plaintiffs here seek a preliminary injunction and declaratory relief as to the rights and obligations of the residents of Geist Pointe as they relate to the Plat.

Frivolous Lawsuit

2. Indiana Code § 34-52-1-1 allows a trial court to award attorney's fees to a prevailing party in a civil case if the losing party brought a claim or defense that is "frivolous, unreasonable, or groundless," or "continued to litigate the action or defense after it became clear that the claim or defense was frivolous, unreasonable, or groundless." (Citation omitted).

. . .

4. A preliminary injunction will not be issued where the applicant cannot demonstrate "the present existence of an actual threat that the action sought to be enjoined will come about. Injunctive relief may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights." Adams v. Ft. Wayne, 423 N.E.2d 647, 651-52 (Ind. Ct. App. 1981).

5. The circumstances outlined in the complaint do not establish "the present existence of an actual threat." They allege only that the Austins might soon take the steps necessary to subdivide their property and build a second home in violation of the Plat.

6. There was no contention that the Austins ever took affirmative steps (i.e., moving dirt, bringing in heavy machinery, seeking build permits from the City, etc.) which showed an imminent intent to build a second home.

7. The only actions taken by the Austins was to petition the City of Fishers for subdivisions and variances, which they had an absolute right to do. Plaintiffs, in turn, had a right to remonstrate which they did.

8. *To request an injunction at such a preliminary stage, with the future course of action to build a second home so speculative, was premature and unreasonable. Even at the time of this Order the City of Fishers has*

not formally ruled on Defendants' variance request because of the present litigation.

9. *At the time the Plaintiffs filed their complaint and request for preliminary injunction, there was no actual controversy between the parties,* and a request for an injunction was not appropriate given the lack of any evidence of the Austins' imminent intent to build or otherwise violate the Covenants.

10. Despite this case originally being dismissed for these reasons, and notwithstanding the e-mails from opposing counsel indicating that the Covenant issue would be addressed if the City approved the Austins' plan to build, *the Plaintiffs filed an amended complaint, changed judge, and proceeded to prosecute the action without regard for its lack of ripeness.*

11. The Austins were within their rights to petition the City for variances and plat subdivisions. In essence, the Austins were doing exactly what they should do if they wanted to seek a variance and were precluded from seeking an answer from the City of Fishers which declined to hear the matter because of the threat of this lawsuit. *Thus, the original filing of this case was frivolous unless until such time as the Austins expressed or displayed an intent to violate the Plat. The Austins have never made any indication that they seek to violate the Plat.*

Restrictive Covenants / Unclean Hands / Acquiescence

13. It is . . . a maxim of law that one who seeks relief in a court of equity must be free from wrongdoing in the matter before the court.

. . .

30. The deeding of a large section of Lot l to a non-profit association, which then constructed nearly a dozen boat docks for sale or lease, is not consistent with the Restrictions statement that the Lots are to be residential in nature.

. . .

33. *Tamenend is not a residential entity, and its activity is both commercial (i.e., paying maintenance fees, leasing slips, etc.) and wholly inconsistent with the desire of the Plat's creators to have three lots which contain only single-family homes and structures related to the same.*

. . .

35. While the Covenants may apply to Lot 2, no owner of Lot 1 has standing to enforce them unless and until Lot 1 comes into compliance with those same Covenants.

36. Unfortunately, the Moores lack standing as well. . . . For 24 years they have taken no action to defend or sustain the Covenants despite open, obvious, and ongoing breaches of the same by Lot l.

. . .

38. The Moores and Austins either knew or should have known that there were a dozen new docks on the western portion of Lot 1, along with additional foot traffic, erosion, and the occasional stray car pulling into park and access the boat docks.

39. *Their failure to seek enforcement of any of the Restrictions during their years of owning and living in Lots 2 and 3 prevent them from having standing to now enforce the same against any other lot owner.*

ORDER

For the reasons set forth above, Plaintiffs FED Investments LLC and Carolyn and William Moore are not entitled to a preliminary injunction and filed that request prematurely. *They likewise continued to pursue such action even after it was originally dismissed due to its speculative nature, given that approvals had not yet been obtained from the City of Fishers and there was no evidence of an imminent threat to build.*

Moreover, the Plaintiffs lack standing to enforce any claim they may have under the Geist Pointe Plat and its restrictive covenants as FED's property remains in violation of those covenants and the Moores lack standing under the doctrine of acquiescence. The Austins equally lack standing to enforce the Covenants against FED under the doctrine of acquiescence as applied to the Moores.

Therefore, the Court orders as follows:

1. Plaintiffs' request for a preliminary injunction is DENIED.

2. Plaintiffs' request for a declaratory judgment is DENIED.

3. Defendants' counterclaim for an injunction is DENIED.

4. *Defendants counterclaim for frivolous, baseless, and unreasonable litigation per Ind. Code § 34-52-1-1 is GRANTED.*

5. A hearing is set . . . to determine what damages, if any, the Defendants have suffered.

Appellant's Appendix Vol. II at 13-23 (emphases added).

[10] The Owners now appeal.

Discussion and Decision

I. Standard of Review

[11] When a trial court enters findings of fact and conclusions of law pursuant to Trial Rule 52, we apply the following two-tiered standard of review: (1) whether the evidence supports the findings; and (2) whether the findings support the judgment. *Alifimoff v. Stuart*, 192 N.E.3d 987, 998 (Ind. Ct. App. 2022), *trans. denied*. We will only set aside the trial court's findings and conclusions if they are clearly erroneous. *Id.* A judgment is clearly erroneous when it is unsupported by the findings and conclusions. *Hrisomalos v. Smith,* 600 N.E.2d 1363, 1366 (Ind. Ct. App. 1992). Findings of fact are clearly erroneous if the record fails to disclose any facts in evidence or any reasonable inferences from the evidence in support of the findings. *Id*. They are also clearly erroneous if they are insufficient to disclose a valid basis for the legal result reached in the judgment. *Bowling v. Nicholson*, 51 N.E.3d 439, 443 (Ind. Ct. App. 2016), *trans. denied*. We will not reweigh the evidence and we will affirm the trial court unless the evidence, when viewed in a light most favorable to the judgment, points uncontrovertibly to an opposite conclusion. *Hrisomalos,* 600 N.E.2d at 1366.

II. FED's Contentions

A. Issuance of Injunctive Relief

[12] The Owners argue that the trial court erred in determining that they lacked standing to enforce Geist Pointe Plat's covenants and restrictions against the Austins. The Owners further maintain that they satisfied the requirements for the issuance of a preliminary injunction that would prevent the Austins from building a second residence on their lot.

[13] A plaintiff is required to show that they have standing to present the contested issue and to invoke a court's adjudicative power. *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood,* 211 N.E.3d 957, 966 (Ind. 2023). That means a plaintiff must demonstrate a personal stake in the outcome of the litigation and that they have suffered, or are in imminent danger of suffering, a direct injury as a result of the complained-of conduct. *See id.* The standing requirement restrains the judiciary to resolve only those cases and controversies in which the complaining party has a demonstrable injury. *Hulse v. Indiana State Fair Bd.,* 94 N.E.3d 726, 730 (Ind. Ct. App. 2018). Whether a party has standing is a pure question of law that we review de novo. *Hoosier Contractors, LLC v. Gardner,* 212 N.E.3d 1234, 1238 (Ind. 2023).

[14] In addition to the requirement of standing, we note that the power to issue a preliminary injunction should be used sparingly, and such relief should not be granted except in rare instances in which the law and facts are clearly within the moving party's favor. *Crowe v. Drenter,* 215 N.E.3d 1107, 1114 (Ind. Ct. App. 2023). Injunctive relief will not be issued where the applicant cannot demonstrate "the present existence of an actual threat that the action sought to be enjoined will come about." *Highland Springs S. Homeowners Ass'n v.*

Reinstatler, 907 N.E.2d 1067, 1073 (Ind. Ct. App. 2009), *trans. denied*. Injunctive relief may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights. *Crossmann Cmtys., Inc. v. Dean*, 767 N.E.2d 1035, 1042 (Ind. Ct. App. 2002).

[15] In this case, the trial court found—and we agree—that the circumstances here do not establish the present existence of an actual threat to the Owners. It is alleged in the complaint only that the Austins might soon be taking steps to subdivide their lot and build a second residence in potential violation of the Geist Pointe Plat. There was no contention that any governmental agency would be considering the issuance of a permit or that it would actually issue a permit after considering such a request. There is also no evidence establishing that the Austins took affirmative steps such as seeking building permits, bringing heavy machinery onto their property or clearing an area, that would suggest an immediate intent to construct a second residence. In short, to issue injunctive relief at such a preliminary stage, with a speculative future course of action to build a second residence, was entirely premature. For these reasons, we conclude that the trial court properly determined that the Owners failed to satisfy the requirements for injunctive relief. [2]

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[2] The trial court also determined that the "clean hands doctrine" and "acquiescence" prevent the Owners from prevailing on their claims because the Owners never challenged Tamenend's undisputed violations of the Geist Pointe Plat's covenants and restrictions. *See Appellant's Appendix Vol. II* at 19-22. We do not address the application and propriety of these theories, however, in light of our affirmance of the trial court's determination that the Owners failed to satisfy the requirements for injunctive relief. We express no opinion—and do not affirm that portion of the trial court's order—regarding the applicability of these doctrines as they relate to Tamenend's violations of the Geist Pointe Plat's restrictions and/or covenants.

B. Frivolous and Baseless Litigation

[16] The Owners argue that the trial court erred in determining that their claims against the Austins amounted to frivolous and baseless litigation that entitles the Austins to recover attorney's fees. I.C. § 34-52-1-1 permits a trial court to award attorney's fees to a prevailing party in a civil case if the losing party brought a claim or defense that is "frivolous, unreasonable, or groundless," or "continued to litigate the action or defense after it became clear that the claim or defense was frivolous, unreasonable, or groundless." *County Materials Corp. v. Ind. Precast*, 187 N.E.3d 253, 260-61 (Ind. Ct. App. 2022), *trans. denied*.

[17] The terms "frivolous," "unreasonable," and "groundless" are defined as follows:

> A claim is "frivolous" if it is made primarily to harass or maliciously injure another; if counsel is unable to make a good faith and rational argument on the merits of the action; or if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law. A claim is "unreasonable" if, based upon the totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider the claim justified or worthy of litigation. A claim or defense is groundless if no facts exist which support the legal claim relied on and presented by the losing party.

Dunno v. Rasmussen, 980 N.E.2d 846, 850-51 (Ind. Ct. App. 2012) (citations omitted). We will not reverse the trial court's decision with respect to an award of attorney's fees for clear error "unless we are left with a firm and definite

conviction that a mistake has been made." *County Materials Corp.,* 187 N.E.3d at 261.

[18] As discussed above, the allegations set forth in the Owners' complaint do not establish the present existence of an actual threat. The Owners alleged only that the Austins might take necessary steps at a future time to subdivide their property and build a second home that would potentially violate the Geist Pointe Plat restrictions. There was no contention that the Austins took affirmative steps to build a residence including moving dirt on their lot, bringing in heavy machinery, or seeking building permits from the City. Instead, the Austins merely petitioned Fishers for subdivisions and variances, which they had an absolute right to do. The Owners, in turn, had a right to remonstrate which they did.

[19] The Owners' request for an injunction at such a preliminary stage was premature and unreasonable. The City of Fishers had not formally ruled on the variance request because of the present litigation. In short, when the Owners filed their complaint, there was no actual controversy between the parties, and their request for injunctive relief was not appropriate, given the lack of any evidence of the Austins' imminent intent to build or otherwise violate the restrictions and covenants of the Geist Pointe Plat.

[20] Even more compelling, the trial court's order dismissing the Owners' initial complaint stated that "the motion to dismiss is"

A) DENIED as to the claims for injunctive relief regarding "The Austins' Shed,";

And

B) GRANTED as to all other claims for injunctive relief at this time, as they are premature, *failing to plead the present existence of an actual threat in that the City of Fishers has not granted relief to the Austins' pending petitions.* Further, only if the Austins' petitions are granted will the details be known as to how the Austins' then approved plans might violate existing covenants and Restrictions.

Appellant's Appendix Vol. II at 44 (emphasis added).

[21] Notwithstanding the trial court's dismissal of the complaint and the reasoning it set forth in its order, the Owners immediately sought—and were granted—a change of judge with the intention of filing an amended complaint that set forth the same request for the same relief. And just before the Owners filed their amended complaint, the Austins' counsel sent the Owners' attorney an email stating:

> I think you will be subjected to the same fate if you amend the complaint. My clients do not intend to build without relief from the requisite zoning requirements. . . . I'm not sure how else I can state it. *If you require us to defend another action where there is no controversy, we will seek fees. This e-mail should serve as notice.*

Appellant's Appendix Vol. II at 85 (emphasis added).

[22] Upon failing to heed the warnings from either the trial court or opposing counsel, the Owners continued to prosecute the action even though it was previously determined that there was no actual controversy between the parties. Had Fishers denied the Austins' request for a variance to build the additional residence on their lot, the present litigation would have been unnecessary. The Owners, however, refused to wait and the Austins were compelled to defend a four-year-long action that the Owners had prematurely pursued against them. Under these circumstances, we cannot say that the trial court erred in determining that the Owners are entitled to attorney's fees in accordance with I.C. § 34-52-1-1.

[23] Judgment affirmed and remanded for further proceedings consistent with this opinion.

May, J. and Foley, J., concur.