

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2510

Cir. Ct. No. 2006CV70

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STAR AVIATION, INC. AND KEITH MYERS,

PLAINTIFFS-RESPONDENTS,

V.

BRUCE GEBHARDT AND SHARON GEBHARDT,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Green Lake County:
RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. In this private nuisance action, Bruce and Sharon Gebhardt appeal pro se from an order permanently enjoining them from erecting or maintaining any type of obstruction in the vicinity of a neighboring, private airport and awarding costs and attorney's fees to Star Aviation, Inc. and Keith

Myers. We affirm the circuit court's decision on summary judgment and the award of costs to Star Aviation and Myers.

¶2 The Gebhardts own property across County Road PP from Myers Field, a private airport operated by Star Aviation and located on property owned by Keith Myers. The airport received a conditional use permit in 1989 and the Wisconsin Department of Transportation gave site approval in 1990. The airport has operated since that time. Planes take off toward the Gebhardts' property and gain altitude over a farm field owned by the Gebhardts.

¶3 In 2003, the Gebhardts planted fast-growing trees on the airport side of their property along County Road PP.¹ The trees grew and eventually became tall enough to interfere with air traffic; one plane clipped a tree. In 2005 the Gebhardts installed two tall metal poles among the trees.²

¶4 Star Aviation and Myers brought a private nuisance claim and sought to enjoin the creation and maintenance of obstructions on the Gebhardts' property in the vicinity of the airport. Thereafter, Star Aviation and Myers sought summary judgment. In his affidavit in support of summary judgment, Keith Myers averred that Myers Field has the necessary permit and authorizations and

¹ In their summary judgment submissions, the Gebhardts offered an explanation for the presence of the trees: to create a substitute tree line in the event the county decided to remove trees within the County Road PP right-of-way and to further their plans to improve the property. As we discuss later in this opinion, the Gebhardts' intentions did not preclude summary judgment on the private nuisance claim.

² The Gebhardts justified these metal poles in their summary judgment materials. As stated in footnote 1, above, the Gebhardts' justifications did not preclude summary judgment on the private nuisance claim. The Gebhardts removed the metal poles sometime before the circuit court granted summary judgment to Star Aviation and Keith Myers on their private nuisance claim.

has operated as a private airport since 1990. Planes taking off from Myers Field cross over County Road PP at low altitude and gain altitude over the Gebhardts' farm field. When Myers Field was sited and approved, the field had been used for farming, and that use continued until the Gebhardts planted trees on the side of their property bordering County Road PP. Planes must now surmount the trees. Myers averred that the trees created a dangerous hazard and an unreasonable risk, jeopardized aviation safety and could lead to great bodily harm or even death. Myers averred that Myers Field could not safely operate with these trees in place.

¶5 In opposition to the summary judgment motion, the Gebhardts conceded that they planted the trees and erected the metal poles, but offered reasons for doing so and denied having any intent to cause a private nuisance.

¶6 At the summary judgment hearing, the circuit court clarified that the case sounded in private nuisance, and that Myers Field is a private airport. The court concluded that it was undisputed in the summary judgment record that the Gebhardts planted trees and erected metal poles in the area of the runway approach, and the trees and poles obstructed the runway approach, constituted an unreasonable use of the Gebhardts' property, and endangered life and property. In light of these undisputed, material facts, the Gebhardts were liable for a private nuisance. The court ruled that the private nuisance action was not the proper forum for the Gebhardts to challenge the existence and operation of the airport. After granting summary judgment, the court held an evidentiary hearing to address the scope of the permanent injunction against obstructions affecting the runway. After that hearing, the court entered a permanent injunction and awarded Myers and Star Aviation attorney's fees and costs totaling \$3091. The Gebhardts appeal.

¶7 We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often, and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶8 Once the moving party has made a prima facie case, the opposing party must set forth specific facts showing that there is a genuine issue for trial. *Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 291, 507 N.W.2d 136 (Ct. App. 1993). The “mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991).

¶9 A party is subject to “liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is ... intentional and unreasonable.” *Milwaukee Metropolitan Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶32, 277 Wis. 2d 635, 691 N.W.2d 658 quoting RESTATEMENT (SECOND) OF TORTS § 822. “[L]iability is ‘founded on the wrongful act in ... creating or maintaining [the nuisance].’” *Id.*, ¶32. A private nuisance also arises when one landowner causes an invasion of another’s interest in the private use and enjoyment of land which is “unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.” *Stunkel v. Price Elec. Coop.*, 229 Wis. 2d 664, 668-69, 599 N.W.2d 919 (Ct. App. 1999).

¶10 It is undisputed that the Gebhardts planted the trees and erected the metal poles. Furthermore, it is beyond dispute that erecting obstructions on the runway glide path created an abnormally dangerous condition.³

¶11 The Gebhardts argue that they did not intend to create a nuisance and that they did not act with malice. Placing the trees and poles was an affirmative act that satisfied the requirement of intentional conduct under the law of private nuisance, and the act created an abnormally dangerous condition. We agree with the circuit court that the creation of the obstructions was the material, undisputed fact on summary judgment.

¶12 The Gebhardts argue that the trees and metal poles did not obstruct the airport, did not jeopardize the safety of pilots and did not pose an unreasonable risk. As foundation for this claim, Bruce averred that he took flying lessons at Myers Field. This averment was insufficient to counter Myers' showing on summary judgment of an aviation hazard because Bruce did not allege that he took flying lessons in the same time period as Myers and Star Aviation alleged that the trees were a private nuisance. The Gebhardts did not create a factual issue to survive summary judgment.

¶13 Not only were there no material factual disputes on summary judgment relating to the presence and hazardous nature of the trees and poles, a former airport inspector and current operations manager at Whitman Regional Airport in Oshkosh testified at the permanent injunction hearing that he was

³ We reject the Gebhardts' argument that the injunction petition did not allege an abnormally dangerous condition. The petition alleged that the trees and poles were an aviation hazard. The petition satisfied the notice pleading rules, and "magic words" were not required. *Farr v. Alternative Living Servs., Inc.*, 2002 WI App 88, ¶11, 253 Wis. 2d 790, 643 N.W.2d 841.

familiar with Myers Field. He opined that the Gebhardts' trees were an aviation hazard. The court's permanent injunction reflected this witness's opinion about the area that needed to be cleared of trees and other obstructions for safe flight.

¶14 The Gebhardts claim that there are factual issues relating to the existence and operation of the airport and its compliance with applicable statutes and regulations.⁴ The circuit court declared these claims to be outside the scope of the private nuisance action. The Gebhardts reiterate these claims on appeal. However, they do not cite any authority for their implicit contention that the circuit court erred in deeming these arguments outside the scope of this private nuisance action. Therefore, we address this issue no further. *Vesely v. Security First Nat'l Bank*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we will not independently develop a litigant's argument).

¶15 The Gebhardts argue that the circuit court should have stricken portions of Keith and Carol Myers' affidavits in support of summary judgment. It is not necessary to expend scarce judicial resources to address this argument. In the context of private nuisance law, the relevant facts are whether the Gebhardts planted the trees and erected the poles and whether they created an abnormally

⁴ Myers Field, a private airport, operates under a conditional use permit and with the approval of the Wisconsin Department of Transportation and the Federal Aviation Administration. It is undisputed that the department's 1990 site approval designated Myers Field as a private facility. Therefore, we reject the Gebhardts' reliance on WIS. STAT. § 114.135 (2007-08), airport and spaceport protection, because that statute applies to public airports. Sec. 114.135(1).

dangerous condition. The summary judgment record supports the absence of a genuine factual dispute.⁵

¶16 The Gebhardts argue that the scope of the permanent injunction exceeded that needed to abate the private nuisance. At the permanent injunction hearing, the court heard testimony about the area that needed to be kept free of trees and other obstructions for safe flight at Myers Field. The court based its order on this testimony, the credibility of which was for the circuit court as the fact finder. *Micro Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). The circuit court properly exercised its discretion in granting injunctive relief. See *Forest County v. Goode*, 219 Wis. 2d 654, 670, 579 N.W.2d 715 (1998).

¶17 The Gebhardts protest the \$3091 in costs and attorney's fees awarded to Myers and Star Aviation. The Gebhardts did not object in the circuit court to the costs and fees. Because they did not object, the Gebhardts forfeited any challenge to costs and fees. See *State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (a party can forfeit claims by failing to object); *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (we generally do not consider issues raised for the first time on appeal).⁶

⁵ In addition, this issue is inadequately briefed. The Gebhardts do not identify which portions of the Myers' affidavits were objectionable, and we will not cull the record to locate facts to support their argument. See *Keplin v. Hardware Mut. Casualty Co.*, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

⁶ To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

