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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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DEAN M. WOODY and VIRGINIA ANN WOODY, Plaintiffs-Appellants, vs. **HARVEY MACHIN and PHYLLIS MACHIN,** Defendants-Appellees.	Filed June 24, 1987
HARVEY MACHIN and PHYLLIS MACHIN, Third-Party Plaintiffs, vs. **SUTTON COAL COMPANY, INC.,** Third-Party Defendant.	7-145 86-1334

Appeal from the Iowa District Court for Jasper County (93-240), Gene L. Needles, Judge.

Plaintiffs appeal from the trial court's denial of their application for an abatement of a nuisance. **AFFIRMED.**

Clifford D. Wendel of Walker, Knopf & Billingsley, Newton, for plaintiffs-appellants.

Donald C. Wilson of Wilson, Hall & Craig, Eldora, and Gilbert R. Caldwell III of Caldwell, Caldwell & Caldwell, Newton, for defendants-appellees.

Considered by Snell, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Plaintiffs appeal from the trial court's denial of their application for an abatement of a nuisance. The trial court reconsidered the abatement issue following the Supreme Court reversing and remanding solely on that point. See Woody v. Machin, 380 N.W.2d 727 (Iowa 1986). We agree with the trial court's denial of abatement and affirm.

The Supreme Court outlined the first appeal as follows:

> Plaintiffs Dean and Virginia Woody brought the action against defendants Harvey and Phyllis Machin on a theory of nuisance based on negligence. . . . Plaintiffs alleged that soil erosion and waste run-off from a coal mine on defendant's property created a nuisance that damaged their adjacent farm. They sought actual and punitive damages as well as injunctive relief. In addition to denying material allegations of plaintiffs' petition, defendants asserted defenses of contributory negligence and failure to mitigate damages. A third-party action by defendants against the coal company is not involved in this appeal.
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> The parties pursued extensive discovery and each side depended heavily at trial on expert testimony. The case was submitted on special verdicts. The jury found plaintiffs proved a nuisance existed, proximately caused by negligence of plaintiffs and defendants. Plaintiffs were assigned forty percent and defendants sixty percent of the casual negligence. Actual damages were determined to be $20,000, and no punitive damages were found. The jury found the nuisance to be continuing in nature and subject to abatement.
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> Subsequently the trial court awarded plaintiffs judgment against defendants for $12,000. Responding to defendants' motion to set costs, the court ordered each side to assume its own costs for depositions and expert witnesses. Remaining costs were taxed forty percent to plaintiffs and sixty percent to defendants.
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> After receiving proposed orders of abatement from each side, the court entered an order substantially as proposed by defendants. Defendants were ordered to construct and maintain a check dam and retaining pond in an area of sulfur water seep on their land and to construct and maintain an underground tile line from the seep area across plaintiffs' land to a creek running through that property.
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> Plaintiffs filed a motion asking the court to reconsider the orders on costs and abatement. They alleged that the costs should all have been taxed to defendants and that their deposition costs should have been included. They also alleged that the abatement order was inadequate to eliminate the nuisance and that the court lacked

> authority to give defendants an easement to construct and maintain a tile line on plaintiffs' property.
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> The court overruled the motion. In rejecting plaintiffs' contentions concerning costs, the court relied on Iowa Code section 625.3 (1983) as authority for their apportionment and Iowa Rule of Civil Procedure 157(a) as authority for excluding deposition expense. In rejecting the contentions concerning the abatement order, the court found that the method of abatement was both sufficient and reasonable.

Woody v. Machin, 380 N.W.2d at 728-29.

Plaintiffs filed a notice of appeal on December 7, 1984. In its decision filed January 15, 1986, the Supreme Court reversed and remanded the abatement order to allow the trial court to create a different remedy based upon supreme court cases. On August 12, 1986, the trial court issued its order, on remand, denying the plaintiffs' request for abatement. Plaintiffs filed their notice of appeal on September 9, 1986.

Plaintiffs contend the trial court erred in denying their application for an order of abatement of the nuisance. Along with this plaintiffs contend the court erred in not granting them the opportunity to present evidence as to alternative methods of abating the nuisance.

Pursuant to Iowa Code section 657.1 (1985), a party may bring an action to enjoin a nuisance and for damages either in equity or at law. Woody v. Machin, 380 N.W.2d at 731. The plaintiffs in the present case brought the present action at law. Our scope of review is therefore limited to the correction of errors at law and not de novo. Iowa R. App. P. 4. The trial court's findings are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We view the evidence in a light most consistent with the judgment. Menzel v. Morse, 362 N.W.2d 465, 470 (Iowa 1985). Our deference to the trial court's findings of fact does not, however, extend to its determination of law. Id.

In a nuisance action, two determinations must be made: (1) whether a nuisance actually exists, and (2) whether injunctive relief is appropriate. Valasek v. Baer, 401 N.W.2d 33, 34 (Iowa 1986). On this appeal neither party questions the existence of the nuisance; the only issue is the appropriate relief.

As already mentioned, the trial court on remand denied the plaintiff's application for abatement. The court found: sulfuric runoff to be common in the area, no potential harm to livestock, it is not practical to construct a quarter-mile check dam, and because he had no power to order an easement across plaintiff's land for drainage tile, the current drainage ditch would have to suffice.

In a nuisance action, brought at law, damages shall be determined by the jury and the court shall construct the appropriate injunctive relief. Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126, 130 (Iowa 1974). In fashioning the injunctive relief, the court must make a comparative appraisal of all the factors in the case. Woody, 380 N.W.2d at 731. The Restatement Second of Torts section 936(1) provides the following factors:

> (1) The appropriateness of the remedy of injunction against a tort depends upon a comparative appraisal of all of the factors in the case, including the following primary factors:
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> (a) the nature of the interest to be protected,
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> (b) the relative adequacy to the plaintiff of injunction and of other remedies,
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> (c) any unreasonable delay by the plaintiff in bringing suit,
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> (d) any related misconduct on the part of the plaintiff,
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> (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
>
> (f) the interests of third persons and of the public, and
>
> (g) the practicability of framing and enforcing the order or judgment.

(These factors adopted in Helmkamp, 214 N.W.2d at 130). In the final analysis the determination of whether injunctive relief should be granted or the objectors shall be relegated to the damages is ultimately a judgment call. Helmkamp, 214 N.W.2d at 130.

In the present case, the jury determined that the nuisance could be abated. Once this determination was made the trial court was required to fashion an appropriate abatement. The trial court ordered the following:

> The defendants are ordered to construct and maintain a check dam and retaining pond in the area of the sulfur water seep on their land and construct and maintain an underground tile line from the seep area through and across the plaintiffs' property to outlet in the creek on plaintiffs' property. Such construction and maintenance shall be done at defendants' expense and defendants shall select a contractor of their choice to do the work. Defendants or their agents shall have the right to go on plaintiffs' land for the purpose of constructing such tile line and defendants or their agents and their successors or their agents shall have the right to go on plaintiffs'; land for the purpose of maintaining such tile line.

Regarding this solution, the Supreme Court concluded the court had no authority to give defendant an easement across plaintiff's land. The Supreme Court, in its order, requested a different remedy. On remand the trial court concluded abatement was not necessary and therefore denied plaintiffs' application.

Upon considering evidence in a light most consistent with the judgment and noting the trial court's broad discretion in fashioning injunctive relief, we affirm. In its order on remand the trial court considered the correct legal principles. The court was fully aware of the facts of the case and determined that without a tile across plaintiffs' land this nuisance could not be abated. This decision is supported by the evidence presented on appeal. The trial court's determination will not be disturbed.

In its decision the Supreme Court directed the trial court "to order a different remedy, based on principles in our cases." When an appellate court

remands with directions, the trial court must carry out those directions. Schnebly v. Baker, 221 N.W.2d 739, 740 (Iowa 1974); Helmkamp v. Clark Ready Mix Co., 249 N.W.2d 655, 656 (Iowa 1977). We find the district court followed the instructions of the Supreme Court and provided the remedy it considered correct under the specified legal principles. Plaintiffs contend the trial court should have granted them an opportunity to present additional evidence on alternative methods of abatement. We disagree. First, the only request for a hearing on remand was made by defendant and that request was through an informal letter to the court. Secondly, plaintiffs cite no authority to support their contention that a hearing is required. "Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed a waiver of that issue." Iowa R. App. P. 14(a)(3). We do not consider an argument which here consists of nothing more than a bald assertion without any elaboration. Kellar v. Peoples Natural Gas Co., 352 N.W.2d 688, 693 (Iowa App. 1984). We deem this argument waived and therefore do not address it.

AFFIRMED.