

## NEWSLETTERS

### Indiana Court Addresses A Nuisance Claim Based On The Lawful Operation Of A Heating System

June 16, 2016 | [Atlanta](#) | [Chicago](#) | [Columbus](#) | [Dallas](#) | [Delaware](#) | [Elkhart](#) | [Fort Wayne](#) | [Grand Rapids](#) | [Indianapolis](#) | [Los Angeles](#) | [Minneapolis](#) | [South Bend](#)

Note: This article appears in the June 2016 edition of Barnes & Thornburg LLP's Commercial Litigation Update e-newsletter.

*Bowling v. Nicholson*, - N.E.3d -, 2016 WL 743473 (Ind. Ct. App. Feb. 25, 2016) provides legal ammunition for the successful prosecution of a private nuisance claim against a neighbor even though the neighbor is using their property in full compliance with the law.

The Bowlings and Nicholsons were rural neighbors. Their residences were constructed on 2.6 acres and 4 acres, respectively. The Nicholsons replaced a central heating system with an outdoor wood boiler (OWB) to heat their home. OWBs differ from wood stoves and similar devices in that OWBs are manufactured without emission control devices, employ lower combustion temperatures and have higher fuel loading capacity. As a result, OWBs can create heavy smoke and are said to be more polluting than other home heating devices. That said, there was nothing illegal about the OWB installed by Nicholsons.

The Bowlings were bothered by plumes of thick, acrid smoke, foul odors and air particulates from the OWB, all of which the Bowlings said significantly interfered with the use and enjoyment of their property. The Bowlings contacted the county police 197 times and caused the local fire department to be dispatched to the Nicholsons' home nearly 60 times. The Bowlings also contacted the Indiana Department of Environmental Management (IDEM) and other state and local agencies to complain about the Nicholsons' OWB. IDEM and other agencies performed surveillance inspections, though only one violation was ever recorded. Unsatisfied with response of the government agencies, the Bowlings commenced a private nuisance cause of action seeking injunctive relief. The trial court denied the injunction and this decision was reversed on appeal.

Indiana law defines a nuisance as "whatever is (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property." The Bowlings presented evidence to establish that the OWB was offensive to the senses and/or an obstruction to the free use of the Bowlings' property. The court of appeals determined that the trial court must balance the loss of use and enjoyment claimed by the Bowlings, resulting from an environmental condition alleged to have been created by the Nicholsons, against the harm to the Nicholsons, which the court found to be "the nature of higher electric heating bills." The trial court was found to have applied the wrong standard in determining whether to issue an injunction, and to have mistakenly concluded that the harm to the Bowlings was in the form of diminution in the value of their property rather

## RELATED PEOPLE



**Stephen L. Fink**  
Of Counsel (Retired)

P 260-425-4664  
[stephen.fink@btlaw.com](mailto:stephen.fink@btlaw.com)

## RELATED PRACTICE AREAS

Commercial Litigation

than an interference with the use and enjoyment of the property.

The court of appeals held that the Nicholsons' operation of their OWB does not violate any law or regulation, but that is not dispositive of whether a preliminary injunction was appropriate. The case was remanded back to the trial court to balance the competing interests of the Bowlings' right to quietly enjoy their property against the Nicholsons' right to operate their OWB.

Steven L. Fink, a member of the firm's Commercial Litigation Practice Group, is a partner in the Fort Wayne office whose practice is divided equally among commercial litigation, real estate matters and bankruptcy. Steve can be reached by telephone at (260) 425-4664 or by email at [stephen.fink@btlaw.com](mailto:stephen.fink@btlaw.com).

Visit us online at [www.btlaw.com](http://www.btlaw.com).

*© 2016 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Barnes & Thornburg LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg.*

*This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.*