STATE OF MICHIGAN

COURT OF APPEALS

AMARIONETTE J. RUTLEDGE, by Next Friend ANTIONETTE RUTLEDGE,

Plaintiff-Appellant,

v

SUFFOLK COURT APARTMENTS, TOWNSHIP OF MOUNT MORRIS, MISTY HILLAKER, and JOHN AND/OR JANE DOE 1-10,

Defendants-Appellees.

UNPUBLISHED
November 26, 2019

No. 345752
Genesee Circuit Court
LC No. 18-110663-NI

Before: BORRELLO, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. Because the trial court correctly dismissed all of plaintiff's claims against all of the defendants, we affirm.

I. Facts

This matter arises from an unfortunate accident in which thirteen-year-old plaintiff, Amarionette J. Rutledge, was hit by a car and injured while walking across Pierson Road to his and his mother's apartment at Suffolk Court Apartments. Plaintiff was crossing the road to enter the apartment complex's driveway, but there was no sidewalk or pedestrian crossing signal where plaintiff crossed. Plaintiff was hit while in the turn lane of five-lane Pierson Road. Plaintiff initiated an action against Suffolk Court Apartments, Misty Hillaker and "John Doe and/or Jane Doe 1-10," representing up to 10 unidentified complex employees ("the Suffolk defendants"), alleging that they were liable to plaintiff for his injuries under theories of "premise negligence," violation of statutory duties, nuisance, and ordinary negligence. Plaintiff's action also included a claim of nuisance against Mount Morris Township ("the Township"). The Suffolk defendants moved for summary disposition pursuant to MCR 2.116(C)(10), primarily contending that this thinly veiled premises liability action fails because the accident occurred off

the premises at issue and the Suffolk defendants thus had no possession or control over the premises. The Township also moved for summary disposition in its favor, citing MCR 2.116(C)(7), and asserting governmental immunity. In an August 29, 2018 opinion and order, the trial court ruled that the Suffolk defendants owed plaintiff no cognizable duty and that plaintiff's claim against the Township was either barred by governmental immunity or, alternatively, failed for the same reasons his claims against the Suffolk defendants failed. Accordingly, the trial court dismissed plaintiff's complaint in its entirety. This appeal followed.

II. Standards of Review

We review "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id*. at 120. "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "The moving party may . . . satisfy its burden under MC 2.116(C)(10) by 'submit[ting] affirmative evidence that negates an essential element of the nonmoving party's claim,' *or* by 'demonstrat[ing] to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.' " *Id*. at 7, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

"This Court reviews de novo questions of law regarding governmental immunity" and "motions for summary disposition under MCR 2.116(C)(7)." *Tellin v Forsyth Twp*, 291 Mich App 692, 698; 806 NW2d 359 (2011). "When a motion is premised on subrule (C)(7) the court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties." *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

Finally, we review issues of statutory interpretation de novo. *Universal Underwriters Ins Group v Auto Club Ins Assn*, 256 Mich App 541, 544; 666 NW2d 294 (2003). Our purpose is to discern and give effect to the legislators' intent and we do so by first examining the plain language of the statute. *Detroit Edison Co v Celadon Trucking Co*, 248 Mich App 118, 120–21; 638 NW2d 169 (2001). "[T]he words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent." *Id*.

III. Claims Against the Suffolk Defendants

At the outset, plaintiff asserts that the trial court did not view the evidence in light most favorable to him and that summary disposition was premature because discovery not complete. However, "summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Caron v Cranbrook Ed Cmty*, 298 Mich App 629, 645–46; 828 NW2d 99 (2012), quoting *Prysak v R L Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992). We agree with the trial court that no amount of discovery could change that defendants owed no duty to plaintiff, and plaintiff has provided no independent evidence that a factual dispute exists. We

also find that the trial court properly viewed the evidence in the light most favorable to plaintiff in rendering its decision.

A. Premises Liability/Negligence

Plaintiff first claims on appeal that he did not plead or claim premises liability, but instead just ordinary negligence, and that the trial court improperly "restated" his argument as sounding in premises liability. However, "[c]ourts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691; 822 NW2d 254 (2012). Rather, "the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Id*. at 691-692 (citation and internal quotation marks omitted). And, in Michigan there is a distinction "between claims arising from ordinary negligence and claims premised on a condition of the land." *Id*. at 692. "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id*.

Here, plaintiff's first claim is labeled "premise negligence," concerns the apartment complex, and sets forth allegations that plaintiff's injury arose from a condition on the land (a purportedly faulty sidewalk or driveway), which constitutes a premises-liability claim. Plaintiff's separate count, labeled "negligence" and pertaining to employees of the apartment complex, essentially restates the allegation in first claim, albeit a bit more narrowly. Both the "premise negligence" and "negligence" claims assert failures on the part of the Suffolk defendants to maintain the premises and to make available a safe crossing into its driveway for pedestrians. Accordingly, regardless of plaintiff's labels, we treat the "premise negligence" and "negligence" claims as a single premises-liability claim.

" 'In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages.' " *Buhalis*, 296 Mich App at 693, quoting *Benton v Dart Props Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). Whether a legal duty exists is a question of law for courts to decide. *Id*. " 'In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.' " *Royce v Chatwell Club Apartments*, 276 Mich App 389, 391-392; 740 NW2d 547 (2007), quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

In this matter, plaintiff cannot establish even the first element necessary for a premises liability action—a duty owed by the Suffolk defendants. "A defendant's duty, for purposes of premises liability, ends with the boundaries of the premises, and an injury caused by a dangerous condition located outside those boundaries is not the legal responsibility of that defendant." *Johnson v Bobbie's Party Store*, 189 Mich App 652, 660; 473 NW2d 796 (1991). Stated differently, "for a party to be subject to premises liability in favor of persons coming on the land, the party must possess *and* control the property at issue . . . ." *Finazzo v Fire Equip Co*, 323 Mich App 620, 627; 918 NW2d 200 (2018) (emphasis in original). "However, this general principle does not necessarily preclude liability where a passerby is injured outside the premises,

but as a result of a danger posed by a condition existing on the defendant's premises." *Johnson*, 189 Mich App at 660-661.

It is undisputed that the accident did not occur directly on the Suffolk defendants' premises, but instead occurred in the turn lane of a public road. There is no argument made that the Suffolk defendants possessed and controlled the turn lane. While plaintiff contends that the location of the driveway into the apartment complex and the lack of available crosswalk there were a dangerous condition, the driveway (and crosswalk if it were there) merely *led to* a potentially dangerous condition—a busy road. A defendant may not be held liable for injuries caused by a hazard outside of its premises and outside of its control simply because the means of egress from the defendant's premises led to the hazard. This is because the dangerous condition was not the driveway or the potential sidewalk but, instead, the traffic on the road that both led to. Indeed, even by plaintiff's own admission, the driveway and the sidewalk were not dangerous in and of themselves; rather, they merely led him to "enter a dangerous condition." The Suffolk defendants simply did not have control or possession over that danger, thus, plaintiff's injury is not the legal responsibility of the Suffolk defendants'; their duty ended at the boundaries of the premises that they owned, possessed, and/or controlled. *Id*. at 660.

Even if the Suffolk defendants owed some conceivable duty to plaintiff under the facts presented, we would still find them not liable to plaintiff because the danger presented was open and obvious. A premises possessor's duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land does not extend to open and obvious dangers. See, e.g., *Royce*, 276 Mich App at 392, citing *Lugo*, 464 Mich at 517. "An open and obvious danger exists where the dangers are known to the invitees or are so obvious that the invitee might reasonably be expected to discover them, i.e., an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection." *Richardson v Rockwood Ctr*, 275 Mich App 244, 247; 737 NW2d 801 (2007).[1]

The risk of being struck by a vehicle while walking through traffic is an open and obvious risk. See, e.g., *Richardson*, 275 Mich App at 249 ("Equally obvious is that a pedestrian in a parking lot should look both ways before crossing the driving lane to ensure that he or she is not about to be struck by a vehicle."). Even more apparent than traffic in a parking lot, the dangerousness of traffic on a five-lane highway is obvious even without "signs or any traffic control devices or markings." *Richardson*, 275 Mich App at 248. Here, an average user—even an average 13-year-old user—with ordinary intelligence would have been able to discover that

[1] Plaintiff argues that the Suffolk Court Apartments defendants owed him an elevated duty of care because he was 13 years old at the time of the accident. We do look at the danger from the eyes of "a *reasonably careful minor* of the age, mental capacity and experience of other similar situated minors . . . ." *Estate of Goodwin v NW Mich Fair Ass'n*, 325 Mich App 129, 158; 923 NW2d 894 (2018) (internal quotation marks omitted; emphasis in original). However, this Court still applies the open-and-obvious-danger doctrine to children of a certain age—that age includes 13-year-olds. See, *id*. at 159-161.

crossing a five-lane heavily-trafficked highway was dangerous and presented a risk upon casual inspection. Accordingly, the dangerous condition was open and obvious.

Plaintiff argues that the Suffolk defendants are nevertheless responsible for plaintiff's injuries because plaintiff could not avoid the route; in other words, the condition was effective unavoidable. In Lugo, 464 Mich at 517, our Supreme Court held that "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." The two recognized instances in which the special aspects of an open and obvious hazard could give rise to liability are (1) when the danger is unreasonably dangerous or (2) when the danger is effectively unavoidable. *Hoffner v Lanctoe*, 492 Mich 450, 463; 821 NW2d 88 (2012). " 'Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome.' " *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 411-412; 864 NW2d 591 (2014) (emphasis in original), quoting *Hoffner*, 492 Mich at 468. Accordingly, "[a]n effectively unavoidable hazard . . . 'must truly be, for all practical purposes, one that a person *is required to confront* under the circumstances.' " *Id*., quoting *Hoffner*, 492 Mich at 472. That is, it is necessary that a plaintiff demonstrate that he or she was "effectively trapped" by a condition to show that it was effectively unavoidable. *Id*, citing *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002).

Here, plaintiff was not "effectively trapped" into deciding to walk across a five-lane road to and from a Dollar General. He could have walked to the crosswalk, and plaintiff's argument that walking the 7/10ths of a mile to the crosswalk rendered it "effectively unavoidable" is not persuasive. Even if walking to the nearest crosswalk was too much, as plaintiff suggests, he could have gotten a ride to and from the store. Or he could have stayed home, went another time, waited until traffic cleared, or not gone at all; he was not compelled to go to Dollar General and back home. Stated simply, plaintiff had numerous options. Thus, the dangerous condition was not "effectively unavoidable."[2] Accordingly, the trial court correctly dismissed plaintiff's "premise negligence" and "negligence" (premises liability) claims against the Suffolk defendants.

B. Violation of Statutory Duty

Plaintiff next asserts that the Suffolk defendants owed plaintiff a duty under MCL 554.139 and breached that duty. While the Suffolk defendants may have owed plaintiff a duty under the cited statute, they did not breach that duty.

MCL 554.139(1) provides, in relevant part, as follows:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:

[2] Plaintiff does not contend that the condition leading to his injuries was unreasonably dangerous, despite the hazard's open and obvious nature.

> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.

Only subsection (a) applies to common areas. See *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 432; 751 NW2d 8 (2008) ("the covenant to repair under MCL 554.139(1)(b) does not apply to 'common areas' "). The entryway to the apartment complex was a "common area" for purposes of MCL 554.139(1). See *id.* at 428 (explaining that "common areas" are parts of apartment complexes that are "accessed by two or more, or all, of the tenants and the lessor retains general control"). Thus, the Suffolk defendants had a duty to ensure that the entryway to the apartment complex was fit for the use intended by the parties.

Much like "the intended use of a parking lot includes the parking of vehicles," *Allison*, 481 Mich at 429, the intended use of the entrance and exit to an apartment complex includes the entering and exiting of vehicles. "A parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles." *Id*. In a similar vein, an entrance and exit to an apartment complex is suitable for the entering and exiting of vehicles as long as tenants are able to drive their vehicles in and out of the complex. Because plaintiff has not identified any evidence to show that vehicles were not able to enter into and exit from the complex, there is no viable path for plaintiff to survive summary disposition on this claim under *Allison*.

C. Nuisance

Plaintiff next claims that the trial court erred in dismissing his nuisance claim against the Suffolk defendants. We disagree.

Nuisance claims usually involve "a nontrespassory invasion of another's interest in the private use and enjoyment of land" (private nuisance) or "the unreasonable interference with a right common to all members of the general public" (public nuisance). *Adkins v Thomas Solvent Co*, 440 Mich 293, 302, 304 n 8; 487 NW2d 715 (1992). "[U]nreasonable interference includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995) (internal quotation marks omitted). "A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public." *Id*.

Michigan law recognizes two classifications of nuisances: nuisance per se and nuisance in fact. *Bluemer v Saginaw Cent Oil & Gas Serv, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959) (citation and internal quotation marks omitted). "A nuisance per se is an act, occupation, or

structure which is a nuisance at all times and under any circumstances." *Wagner v Regency Inn Corp*, 186 Mich App 158, 164; 463 NW2d 450 (1990). A nuisance in fact is a nuisance by reason of circumstances and surroundings. *Id*. "Whether an allegedly injurious condition constitutes a nuisance per se is a question of law. However, whether an allegedly injurious condition constitutes a nuisance in fact is a question of fact." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 269; 761 NW2d 761 (2008) (internal citations omitted). Ultimately, "[t]he difference between a nuisance per se and one in fact is not in the remedy but only in the proof of it." *Id*. at 269-270 (citation, internal quotation marks, and emphasis omitted).

The dangerous condition at issue here was clearly not a nuisance per se. A condition cannot be a nuisance per se unless it is a "nuisance at all times and under any circumstances." *Wagner*, 186 Mich App at 164. The purportedly dangerous nature of the intersection of the Suffolk Court Apartment complex entrance and exit and Pierson Road is only potentially a nuisance when it is coupled with drivers (or, more precisely, drivers who are not paying adequate attention) and pedestrians (or, more precisely, pedestrians who are jaywalking).

With respect to nuisance in fact, in *Veremis v Gratiot Place, LLC*, 495 Mich 938; 843 NW2d 211 (2014), the Supreme Court reversed this Court's opinion "with respect to the negligent nuisance in fact claim . . . for the reasons stated in the Court of Appeals dissenting opinion[.]" In that case, the plaintiff was injured as a result of a car accident that took place in an unmarked intersection of a business-plaza parking lot. *Veremis v Gratiot Place, LLC*, unpublished per curiam opinion of the Court of Appeals, issued June 4, 2013 (Docket No. 302658), unpub op at 1-2. The plaintiff alleged, in relevant part, that the unmarked intersection was partially obstructed by a building, a federal mailbox, a newspaper box, and a mailbox bank constituted a nuisance in fact. *Id*. at 4. The dissenting judge concluded that the nuisance in fact claim failed as a matter of law, explaining as follows:

> As the majority correctly held, defendant did not owe a duty to warn plaintiff as a licensee on the premises because the condition was not a hidden danger on the land. Because defendant did not violate a duty owed to plaintiff that resulted in a nuisance, the claim for negligent nuisance in fact should have been dismissed. The trial court should have granted defendant's motion for directed verdict on the nuisance in fact claim. [*Veremis*, unpub dissenting op at 3-4.]

The same analysis applies here. The danger of crossing Pierson Road where plaintiff crossed it "was not a hidden danger on the land." Moreover, it cannot be said that the complex's driveway location "significantly interfere[d] with the public's health, safety, peace, comfort, or convenience . . . ." *Cloverleaf Car Co*, 213 Mich App at 190. The Suffolk Court Apartments' entrance and exit is an ordinary driveway along a five-lane highway. Accordingly, the trial court correctly dismissed plaintiff's nuisance-in-fact claim as well.

IV. CLAIM OF NUISANCE AGAINST THE TOWNSHIP

We note that plaintiff did not, in its statement of issues presented, assert that the trial court erred in finding that his nuisance claim against the Township was precluded due to governmental immunity. And, in his brief on appeal, plaintiff mentions the Township only once in its analysis of a nuisance cause of action and only then in a conclusory statement. It is not

enough for a party to simply announce a position or assert an error "and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 518; 885 NW2d 861 (2016) (internal quotation marks and citations omitted). Therefore plaintiff has abandoned this claim on appeal and we need not address it. *Id*. at 519.

V. CONCLUSION

Because we conclude that the trial court correctly dismissed all of plaintiff's claims against all of the defendants, we affirm the trial court's opinion and order.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto