STATE OF MICHIGAN

COURT OF APPEALS

LINDA CARLTON and ANTHONY CARLTON,

Plaintiffs-Appellants,

v

JIM D'ALESANDRO, Personal Representative of the Estate of VIDA BILLINGS, Deceased, DALE BILLINGS, SANDRA BILLINGS and LLOYD BILLINGS,

Defendants-Appellees.

UNPUBLISHED
March 4, 1997

No. 183942
Macomb Circuit Court
LC No. 93-003325-NO

Before: Markman, P.J., and Smolenski and G.S. Buth,* JJ.

PER CURIAM.

Plaintiffs Linda and Anthony Carlton appeal as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm.

While on defendants' premises and after it had rained, plaintiff Linda Carlton[1] slipped in the muddy landing area at the end of a ramp constructed by defendant Lloyd Billings on the stairway exterior of the residence located on the premises. Because plaintiff was injured when she fell, she filed a complaint for damages against defendants, alleging claims sounding in intentional nuisance and negligent nuisance.[2] As subsequently developed, the crux of plaintiff's nuisance theory was that the ramp and landing area constituted a dangerous condition because the ramp was constructed without a permit and did not have adequate handrailings, contrary to city code, and the landing area was not cement, again, contrary to city code, and became slippery when wet.

Defendants subsequently moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that under the law of negligence, specifically premises liability, there was no question of fact that the ramp was an open and obvious danger and that plaintiff knew about the dangerous condition of the ramp. Plaintiff answered and also moved for summary disposition, contending that the complaint set

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* Circuit judge, sitting on the Court of Appeals by assignment.

forth claims of nuisance, not negligence, and that the theory of open and obvious danger was not applicable to a nuisance action. Defendants replied, arguing that they were entitled to summary disposition pursuant to MCR 2.116(C)(8) because plaintiff's complaint failed to state a claim for nuisance.

The trial court granted defendants' motion on the grounds (1) that plaintiff had not pled a viable claim for nuisance under the definition of nuisance enunciated in *Awad v McCollan*, 357 Mich 386; 98 NW2d 571 (1959),[3] superceded by statute on another ground as stated in *Mobil Oil Corp v Thorn*, 401 Mich 306, 310; 258 NW2d 30 (1977), and; (2) that plaintiff had failed to create a question of fact concerning whether the ramp was an intentional nuisance in fact or a negligent nuisance in fact.

Plaintiff first argues that the trial court erred in concluding that the complaint did not plead viable claims of nuisance. We initially believe that we would be remiss if we did not note that generally we "may and should penetrate the formal label to discover the actualities of the case." *Young v Groenendal*, 10 Mich App 112, 117; 159 NW2d 158 (1968), aff'd 382 Mich 456 (1969). The actualities of this case constitute a claim for premises liability. However, plaintiff has argued emphatically, both below and on appeal, that her claims sound in nuisance. Accordingly, we will hold plaintiff to her theories.

Specifically, plaintiff contends that *Awad*, the decision relied on by the trial court, limited the definition of nuisance to public and private nuisance.[4] Plaintiff contends that this limited definition is no longer the law in Michigan in light of subsequent caselaw that defines nuisance broadly. In so contending, plaintiff particularly relies on Justice Fitzgerald's lead opinion in *Rosario v City of Lansing*, 403 Mich 124, 140; 268 NW2d 230 (1978), overruled in part by *Li v* Feldt, 434 Mich 584; 456 NW2d 55 (1990), and *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), which states that the term nuisance "now applies to include members of the public injured on the landowner's premises." Plaintiff argues that, therefore, the complaint adequately pleaded nuisance because pleading nuisance now "simply involves making an allegation of a dangerous condition on the premises," and the complaint in this case alleged a hazardous condition on defendants' premises.

We review a motion for summary disposition de novo. A motion for summary disposition based upon the failure to state a claim relies upon the pleadings alone, and all well-pleaded allegations in the complaint are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. The motion should be granted only if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. MCR 2.116(C)(8); *Peters v Dep't of Corrections*, 215 Mich App 485, 486-487; 546 NW2d 668 (1996).

Our Supreme Court has "repeatedly recognized the difficulty in defining the concept of nuisance." *Adkins v Thomas Solvent Co*, 440 Mich 293, 305; 487 NW2d 715 (1992). In *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630, 636; 178 NW2d 476 (1970), our Supreme Court stated:

> Primarily, nuisance is a condition. Liability is not predicated on tortious conduct through action or inaction on the part of those on the part of those responsible for the condition. Nuisance may result from want of due care (like a hole in a highway), but may still exist as a dangerous, offensive, or hazardous condition with the best of care.

See also *Wagner v Regency Inn* Corp, 186 Mich App 158, 163; 463 NW2d 450 (1990); *Stevens v Drekich*, 178 Mich App 273, 277; 443 NW2d 401 (1989).

In *Rosario*, Justice Fitzgerald relied on the above quotation from *Buckeye* to state that "[u]nder our case law liability for nuisance is predicated on the existence of a dangerous condition." *Id*. at 132.

However, we find plaintiffs' reliance on *Rosario* for the proposition that pleading nuisance now only involves pleading a dangerous condition of the premises unpersuasive for several reasons. First, Justice Fitzgerald's lead opinion in *Rosario* is not binding authority because a majority of the Court did not join in its reasoning. *Summers v Detroit*, 206 Mich App 46, 50; 520 NW2d 356 (1994). Second, the issue considered in *Rosario* was the nuisance exception to governmental immunity. In this case, defendants are not governmental entities claiming immunity. Third, the broad reading given the nuisance exception to governmental immunity in *Rosario* was subsequently rejected by our Supreme Court. See *Hadfield, supra*.

Fourth, even in *Buckeye*, on which Justice Fitzgerald relied in *Rosario*, our Supreme Court, although noting that nuisance is primarily a condition, stated that nuisance is variously described by the interest invaded. *Buckeye*, *supra* at 634-635. Fifth, in stating in *Rosario* that "[u]nder our case law liability for nuisance is predicated on the existence of a dangerous condition," Justice Fitzgerald cited for comparison to an excerpt from Prosser on Torts stating that "[nuisance] has reference to the interests invaded . . . ." *Rosario, supra* at 132, n 6 (quoting Prosser, Torts [4th ed], § 87, p 573). And, finally, even under *Rosario*, plaintiff would have to allege more than just a defect in the premises to plead nuisance. Rather, she would also have to plead that she was a "member of the public." *Rosario, supra* at 124.

Thus, as indicated previously, we are unpersuaded by plaintiff's contention that pleading nuisance simply involves pleading a defect in the premises. Rather, we believe that not only must there be a defect, but there also must be an invasion of either of two distinct interests. See *Hadfield, supra* at 205 (Boyle, J., concurring). Under our caselaw, "[a] nuisance involves not only a defect, but threatening and impending danger to the public, or, if a private nuisance, to the property rights or health of persons sustaining peculiar relations to the same." *McDonell v Brozo*, 285 Mich 38, 43; 280 NW 100 (1938), quoting *Kilts v Bd of Supervisors of Kent Co*, 162 Mich 646, 651; 127 NW 821 (1910); see also *Adkins, supra* at 303. "Historically, Michigan has recognized two distinct versions of nuisance, public nuisance and private nuisance." *Adkins, supra* at 302. In this case, plaintiff's complaint failed to specify whether her claims were founded on public or private nuisance. However, in granting summary disposition for failure to state a claim, the trial court considered both public and private nuisance.[5] Accordingly, in determining whether plaintiff stated nuisance claims upon which relief

may be granted, we will do so with reference to whether plaintiff pleaded claims for either public nuisance or private nuisance.

A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. *Adkins, supra* at 302. A public nuisance involves the unreasonable interference with a right common to all members of the general public, such as public safety, public morals, public peace, public comfort, and public convenience in travel. *Adkins, supra* at 304, n 8; *Bronson v Oscoda Twp (On Second Remand)*, 188 Mich App 679, 684; 470 NW2d 688 (1991). The term "unreasonable interference" include the following:

> [C]onduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) 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).]

In order for a private citizen to file an action for public nuisance, the private citizen "must show harm of a kind different from that suffered by other members of the general public exercising the right common to the general public that was the subject of the interference." *Adkins, supra* at 306, n 11; *Cloverleaf, supra*.

A public nuisance or a private nuisance may be either a nuisance per se or a nuisance in fact. See, e.g., *Wagner, supra* at 164. A nuisance per se is an act, occupation, structure or condition that constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained. *Fox v Ogemaw Co*, 208 Mich App 697, 700; 528 NW2d 210 (1995); *Wagner, supra*. Unlike the nuisance in fact, nuisance per se is not predicated on the want of care but is unreasonable by its very nature. *Fox, supra*. In contrast, a nuisance in fact is a nuisance by reason of circumstances and surroundings. An act may be found to be a nuisance in fact when its natural tendency is to create danger and inflict injury on person or property. *Wagner, supra*. A nuisance in fact may be either an intentional nuisance or a negligent nuisance. *Wagner, supra* at 164. The terms nuisance per se and nuisance in fact refer to the quantity of proof needed to establish a nuisance. *Hadfield, supra* at 207 (Boyle, J., concurring); *Bluemer v Saginaw Oil & Gas Service, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959); *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990); *Bruggeman v Minster*, 42 Mich App 177, 178-179; 201 NW2d 344 (1972).

In this case, plaintiff's complaint alleged that defendants own the property on which the ramp was located, that the ramp was attached to the stairway exterior of a house on the property and used for entering and exiting the house, that the ramp was constructed without a permit and in violation of city code, and that plaintiff was on defendants' property when she slipped and fell on the ramp. Plaintiff did not plead that defendants' conduct or their ramp resulted in or caused an invasion of or intrusion upon private property. See *Adkins*, supra at 307-309; *Cloverleaf, supra* at 193. Accordingly, there was no invasion of a private property interest. Thus, even accepting as true plaintiff's well-pleaded allegations and the inferences arising therefrom, a claim for private nuisance is so clearly unenforceable

as a matter of law that no factual development could justify recovery. *Peters, supra*. Thus, we conclude that plaintiff's complaint failed to state claims for private nuisance. *Peters, supra*. The trial court did not err in so holding.

Concerning whether plaintiff stated claims for public nuisance, we note that a defectively constructed ramp could interfere with public safety. Although the complaint alleged that plaintiff was on defendants' property when her injury occurred, the complaint did not specify plaintiff's status while on defendants' property. In addition, although the complaint alleged that defendants owned the property, the complaint did not specify the manner in which defendants used the property. Moreover, the complaint could be construed in alleging that plaintiff suffered special damages. Thus, taking as true plaintiff's well-pleaded factual allegations and the reasonable inferences arising therefrom, a claim for public nuisance is not so clearly unenforceable as a matter of law that no factual development could justify recovery. *Peters, supra*. Thus, we will assume for the purpose of the following analysis that plaintiff's complaint stated claims for public nuisance.

Next, plaintiff raises several grounds for her argument that the trial court erred in granting summary disposition on the basis of MCR 2.116(C)(10). Specifically, plaintiff argues that material issues of fact existed concerning whether defendants' ramp was an intentional nuisance or a negligent nuisance. However, plaintiff concedes that in establishing an intentional nuisance or a negligent nuisance, a plaintiff must first establish that the condition is a nuisance. As further conceded by plaintiff, then and only then is the question reached concerning whether the nuisance was intentionally or negligently created. We certainly agree with plaintiff that questions of fact existed concerning whether defendants intended to or negligently created the condition of the ramp. However, we focus our initial analysis on whether plaintiff has created a question of fact concerning whether the condition of the ramp constituted a public nuisance.

In this case, plaintiff argues that a question of fact exists concerning whether the ramp was a "nuisance arising from a violation of law." Plaintiff cites *Denny v Garavaglia*, 333 Mich 317, 331; 52 NW 521 (1952), in which our Supreme Court stated that "nuisances resulting in personal injury fall into 3 general classes," one of which is nuisances that result from conduct that "is in itself a violation of law . . . ."[6] We note that subsequent cases have explained this classification in *Denny* as referring to a nuisance per se. See the concurring opinion of Justice Moody, Jr., in *Gerzeski v Dep't of State Highways*, 403 Mich 149, 160-161; 268 NW2d 525 (1978), overruled in part by *Li, supra*, and *Hadfield, supra*; see also *Keiswetter v Petoskey*, 124 Mich App 590, 595; 335 NW2d 94 (1983). Plaintiff also relies on the following portion of Justice Brickley's opinion in *Hadfield*:

> "At common law, acts in violation of law constitute a public nuisance. Harm to the public is presumed to flow from the violation of a valid statute enacted to preserved the public health, safety and welfare." [*Id.* at 152 (quoting *Attorney General v Peterson*, 381 Mich 445, 465; 164 NW2d 43 (1969).]

In *Peterson*, our Supreme Court affirmed an injunction against the unlicensed practice of optometry on the ground that such unlicensed practice constituted a public nuisance. *Id.* at 465-466.

The implication of plaintiff's argument is that defendants' ramp was a nuisance simply because it violated the law. However, in *Garfield Twp v Young*, 348 Mich 337; 82 NW2d 876 (1957), our Supreme Court expressly rejected a similar argument.

In *Young*, a junkyard was operating without a license required by a resolution adopted by the plaintiff township. *Id*. at 339. The township sought to enjoin the junkyard's operation on the ground that it was a public nuisance. *Id*. The circuit court dismissed the township's action on the ground that the township's claim of public nuisance was not supported by the evidence. *Id*. at 339, 344. The township appealed.

Our Supreme Court affirmed. *Id*. at 344. The Court noted that operating a junkyard was not a public nuisance per se under previous case law. *Id*. at 340. The Court also noted that the township had made no attempt to establish that operating the junkyard was classified as a nuisance per se either under any statute or the particular resolution at issue. *Id*. However, the plaintiff township argued that simply operating the junkyard in violation of the resolution constituted a nuisance per se. *Id*. The Court rejected this argument:

> "The erection of a wooden building within the limits of a city or village is not in and of itself a nuisance. Neither does the fact that the erection of such is prohibited by ordinance make it a nuisance. If this were so, then the doing of any act prohibited by law would, upon the same reasoning, be a nuisance. The act, if prohibited, would be illegal; but something more than mere illegality is required to give this court [equitable] jurisdiction. [*Id*. (quoting *Village of St. Johns v McFarlan*, 33 Mich 72; 20 Am Rep 671 (1875)].

In this case, plaintiff has not argued that the ramp is denominated a nuisance under any statute in general or the particular city code relied on by plaintiff. Cf. *Hadfield, supra* (Brickley, J., with Riley, C.J., and Cavanagh, J., concurring) (citing the public nuisance act, MCL 600.3801 *et seq.*; MSA 27A.3801 *et seq*.); *Towne, supra* (citing § 24 of the township rural zoning act, MCL 125.294; MSA 5.2963[24], which makes structures erected in violation of ordinances or regulations adopted under the authority of the act a nuisance per se). Nor has plaintiff cited any caselaw for the proposition that defendants' ramp constitutes a public nuisance per se. Indeed, plaintiff's argument is not that defendants' ramp is unreasonable by its very nature, but, rather, that defendants' ramp became unreasonable because of defendants' want of care. *Fox, supra*. Thus, we conclude that defendants' ramp does not constitute a public nuisance per se. *Id*.

We thus turn to the question whether the condition of defendants' ramp constituted a public nuisance in fact. Pursuant to *Young*, we do not believe that the ramp's illegality, alone, is sufficient to create a question of fact concerning whether the condition of the ramp constituted a public nuisance in fact. See also *Adkins, supra* at 314. Plaintiff has not alleged that the condition of the ramp interfered with any right common to the general public. Plaintiff has cited numerous cases involving actions for nuisance where the plaintiff was injured on a defendant's premises. However, in those cases the defendant was either a governmental entity or an entity whose premises were open to the general public.

See, e.g., *Bluemer, supra*; *Wagner, supra*. In this case, the record below indicates that defendants' property was private residential property. No question of fact was raised below concerning whether defendants' property was open to the general public. Plaintiff was not on defendants' premises as a member of the general public, but rather was on defendants' premises as a social guest. Simply put, plaintiff has failed to offer any evidence that the condition of defendants' ramp interfered with an interest, i.e., a right common to the general public, that is protected by a claim for public nuisance.

In summary, plaintiff failed to state a claim for private nuisance and failed to create a material issue fact concerning any claim public nuisance. In light of these conclusions, we find it unnecessary to address plaintiff's remaining arguments. Accordingly, we conclude that the trial court did not err in granting defendants' motion for summary disposition.

Defendants argue sanctions were warranted in this case pursuant to MCR 2.114. However, we decline to address this issue because defendants did not cross-appeal. MCR 7.207; *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993).

Affirmed. Defendants being the prevailing parties, they may tax costs pursuant to MCR 7.219.

/s/ Stephen J. Markman
/s/ Michael R. Smolenski
/s/ George S. Buth

[1] Because plaintiff Anthony Carlton's claims are derivative of plaintiff Linda Carlton's claims, we will refer only to plaintiff, meaning plaintiff Linda Carlton, throughout the remainder of this opinion.

[2] We realize that count one of the complaint was labeled negligent nuisance while count two was unlabeled. However, the allegations of count one sound in intentional nuisance while the allegations of count two sound in negligent nuisance.

[3] Specifically, the trial court relied on the follow excerpt from *Awad:*

> [Nuisance] comprehends interference with an owner's reasonable use and enjoyment of his property by means of smoke, noise, or vibration; the obstruction of private easements and rights of support; interference with public rights, such as free passage along streams and highways, the enjoyment of public parks and places of recreation, and, in addition, activities and structures prohibited as statutory nuisances. [*Id*. at 389.]

[4] After enumerating the various ways in which a nuisance occurs, see note 3, *supra*, our Supreme Court in *Awad* stated that a nuisance "may be either public or private . . . ." *Id*.

[5] See note 3, *supra*.

[6] The other two classes of nuisance noted in *Denny* were intentional nuisance and negligent nuisance. *Id*. See also the concurring opinion of Justice Moody, Jr., in *Gerzeski v Dept' of State Highways*, 403 Mich 149, 160-161; 268 NW2d 525 (1978), overruled in part by *Li, supra*, and *Hadfield, supra*.