

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN RAAB and AMBER RAAB,

Plaintiffs-Appellants/Cross-
Appellees,

v

RIVER RIDGE-SALINE, LLC,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

May 12, 2009

No. 280335

Washtenaw Circuit Court

LC No. 05-000326-CE

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Plaintiffs Steven and Amber Raab (the Raabs) appeal by leave granted from the circuit court's order granting in part and denying in part defendant River Ridge-Saline, L.L.C.'s motion for summary disposition, transferring the case to the district court, and finding that the Raabs' claim failed to present damages in excess of \$25,000 as a matter of law. River Ridge-Saline cross-appeals from the same order, arguing that the circuit court should have fully granted its motion for summary disposition and dismissed the Raabs' claims in their entirety. We affirm.

I. Basic Facts And Procedural History

In November 2000, the Raabs purchased a new manufactured home in River Ridge-Saline's manufactured housing community and entered into a lease agreement with River Ridge-Saline for the lot upon which their home was situated. The Raabs noticed that the home was located at the bottom of a hill when they purchased it. On July 19, 2003, in preparation for their daughter's outdoor birthday party, the Raabs discovered a drainage problem on the lot. The grass surrounding their home was saturated and there was a 10-foot puddle of water in the yard flowing under their home, forming a "small pond" beneath their house. The Raabs attempted to have the birthday party in their yard but it was ruined when their guests' feet became drenched in the "soggy yard," causing the Raabs to suffer mental stress and anguish when their guests commented on the conditions and began to leave the party early.

The Raabs informed River Ridge-Saline of the problem, and River Ridge-Saline directed its maintenance staff to place dirt beneath the home in order to "dam it up against the skirting on the inside as a dam to hold the water out." The Raabs believed that it was not an effective solution, but River Ridge-Saline told them to "give it some time" to see if it would work. River

Ridge-Saline's maintenance staff returned to the Raabs' home in the fall of 2003 to inspect the work it had completed; they informed the Raabs that it appeared to be holding up, and that they would return to check on it again in the spring of 2004. In the spring of 2004, the Raabs saw water underneath their home by looking through three access panels and notified River Ridge-Saline's maintenance staff, which sent someone to look at the problem.

The Raabs then contacted Jerry Drake at the Michigan Department of Environmental Quality (MDEQ) to inspect their premises. Upon inspection, Drake instructed River Ridge-Saline to create a swale or berm on the side of the house to assist the water to drain away from the Raabs' home. River Ridge-Saline built the swale or berm, but Drake returned to inspect the Raabs' home in May 2004 and found that the problem was not resolved. Drake directed River Ridge-Saline to install drain tiles along one side of the Raabs' home to prevent water from going beneath the home. River Ridge-Saline installed the drain tiles and a four-foot trench. Approximately one year later, in April 2005, Drake returned to the Raabs' home for a follow-up inspection on River Ridge-Saline's work. Drake found the following:

It was verified that fill had been placed under the home to fill the low areas, so drainage (water) would no longer pond under the home. We would have liked to have seen the area under the home crowned a little better to ensure that any water that would happen to get under the home would run to the outside of the skirting. The soil under the home was noted to be only slightly damp, but no ponded water was observed.

A swale that had been constructed along the west side of the lot and a French Drain along the north side of the home near the skirting appeared to be functioning satisfactorily. They both appeared to be carrying the exterior drainage away from the home.

Continued vigilance on the homeowners' part must be maintained to keep the gutters and downspouts on the home in good condition and in place, so that runoff from the roof is collected and directed away from the home.

In my professional opinion, the drainage problem under the home has been satisfactorily resolved as best we could tell.

During the year prior to Drake's return for the follow-up inspection, the Raabs had believed that River Ridge-Saline's work did not resolve the problem and had retained an attorney to file suit and contacted a number of contractors and a mold expert to inspect their property and give them estimates. During this time, the Raabs also claimed to have experienced structural problems with their home, and they believed that their home was sinking. Plaintiff Amber Raab stated, "I open a kitchen window it doesn't slam all the way down. Three of my four kitchen windows do that. I have doors that don't shut" and "I have walls that are coming apart."

The Raabs first contacted Forrester Construction to inspect their home in August 2004. Before Forrester Construction arrived, the Raabs removed the skirting from the home so that Forrester Construction could have access to the crawl space below the home. According to the Raabs, upon removing the skirting, they were "hit by a horrendous, musty, moldy odor" coming from beneath their home that took their "breath away." The inspector from Forrester

Construction examined the home and verbally reported his findings, but he never gave the Raabs an estimate or contacted them again. According to the Raabs, the inspector from Forrester Construction “looked at it. He said it definitely needs to be relevelled. The ground needs to be dried. It needs to be built up underneath and you need to have the drain tile fixed in a better means.”

The Raabs next contacted Alan Peterson from Alan Construction Company to inspect the home and provide an estimate in September 2004. Peterson recommended that the Raabs (1) remove the siding to allow a full airing out of the undercarriage of the home; (2) consult a mold remediation company to determine the extent of possible contamination; (3) bring in fill sand underneath the home to deter water from ponding; (4) hire a manufactured home moving company to re-level the home, in order to adjust the window misalignments and to determine if there was any settling of the support pillars; (5) install a channel drain grid along the home to drain surface water to the road; and (6) adjust landscaping along this channel drain.

Steven Raab testified at his deposition regarding the issue of re-leveling the home. Steven Raab knew the meaning of re-leveling: “[i]t means any settlement done to anything under the house. That the house is sitting on a foundation, gets jacked up, shimmed up to make the house back to the way it was put in.” He testified that he had never had the home re-leveled, but was aware that most manufacturers recommend that the home be re-leveled on an annual basis for the first five years, and then every two to three years as needed after that; and that it cost approximately \$600 each year. Steven Raab stated that he did not choose to re-level his home because he did not have the money to do it and because he never had any structural problems with the home until they encountered the drainage problems. Amber Raab similarly testified at her deposition that the home had never been re-leveled and that she too was aware that most manufacturers recommend that homes be re-leveled on an annual basis. She further stated that they did not have the home re-leveled because she was concerned that they would have to do it frequently, because in her opinion their drainage problem had not been resolved.

Peterson provided the Raabs with an estimate of \$2,300 for all of the work except for re-leveling of the home and inspecting the home for mold, which he was not capable of doing. The Raabs did not hire Peterson because they “didn’t have the money” and because Peterson told them that there may be mold under the home. The Raabs acknowledged that Peterson could have dealt with the “external drainage” issue, could have kept “the water from coming back underneath” the home, and could have “rectif[ied] the water drainage issue.”

On September 30, 2004, a certified mold inspector, Dr. Mark Banner of Mold Free, conducted a mold investigation of the Raabs’ home. Regarding the inside of the Raabs’ home, Dr. Banner used a Protimeter Survey Master Machine and found no areas of elevated moisture, and no indications of water intrusion, water damage, or mold growth within the living areas of the home. Dr. Banner “did not detect a microbial volatile odor in the house.” He found that, since his interior readings showed no greater than 20 percent moisture in the home, mold “will not grow.” Dr. Banner reported that the Raabs would have a mold problem if their indoor mold tests reported mold levels higher than the outdoor mold levels, or if mold was found present indoors but was absent from the outdoors, or if the indoor mold was pathogenic. Dr. Banner reported finding airborne mold spores by the name of “Cladisporium” in the Raabs’ family area, in the amount of 381 colony forming units per cubic liter of air. Dr. Banner’s outdoor control test of the air 15 feet away from the home revealed 1,310 colony forming units of Cladisporium

per cubic liter of air. According to Dr. Banner, even though the level of Cladisporium was four times greater outside than inside of the home, he was “still of the opinion that the number that was [inside of the home] was excessive for the health of the individuals.” The guidelines used by Dr. Banner to determine whether mold levels are high, low, or borderline come from a 1993 technical guide from Health Canada entitled “Indoor Air Quality in Office Building.” On page 60 of that guide, it states that “[u]p to 500 Colony Forming Units per cubic meter is acceptable in the summer when the species present are primarily Cladisporium, other tree and leaf fungi. Values higher than this may indicate failure of the filters or a contamination in the building.” Regarding the levels found in the Raabs’ family area, Dr. Banner determined that “381 is a substantial number in my opinion, okay? In my opinion, that’s a substantial amount, enough for some individuals to suffer health consequences. Again, my opinion.” Dr. Banner confirmed that the airborne mold could be brought into the home from the shoes of people walking in and out of the home. He also confirmed that taking only two samples, one inside the home and one outside, was not an ideal situation to obtain a fair representation of the levels of mold in the air indoors or outdoors.

Regarding the outdoor conditions, Dr. Banner found that “the conditions under the house and what I saw under and around the house indicated excessive mold.” On the outside of the home, Dr. Banner observed that the property had a negative slope going towards the home on the south side. He observed that the Raabs’ lawn was blackened and had a musty odor in one area near the east side; there were water droplets seeping from between the vinyl strips on the south side of the home; and mold was present on the inside pieces of vinyl which had been removed by the Raabs when they opened an entry into the crawl space under the home.

Upon inspecting the crawl space underneath the home, Dr. Banner discovered an elevated moisture level of 99 percent on the “ground under most areas under the trailer” and further found:

The sub floor of the trailer was covered with heavy black plastic. The Inspector observed heavy mold on the plastic on the middle sections, which were over the ground where it was moist. The level of mold was lighter along the edges of the trailer, where the ground was drier.

The Inspector observed heavy mold on the wood supports (for leveling the trailer) in the Southeast and Southwest corners.

The cardboard wrappers around the support beams have heavy water stains, mold and rot.

The ground slopes toward the middle of the trailer; the ground appears to have sunk around the support posts.

An area of black plastic sheeting had been torn, allowing the Inspector to observe light mold on the OSB sub floor directly under the trailer.

Dr. Banner confirmed that the purpose of the black plastic sheeting or vapor barrier is to keep moisture from entering the home from underneath should water pool or collect beneath the home. According to Dr. Banner, as long as the vapor barrier had not been torn and was a “solid

unbroken sheet,” there would be no scientific way that moisture could permeate the barrier. Steven Raab believed that it was his responsibility, not River Ridge-Saline’s responsibility, to maintain the vapor barrier.

Dr. Banner recommended a number of things for the area outside and underneath the Raabs’ home, including that the lot’s drainage system be corrected; the vinyl siding be examined for defects because water and mold were found beneath many panels; the crawl space be repaired and cleaned and disinfected; and, the top layer of dirt under the trailer be replaced because it was heavily contaminated and not properly graded. With regard to the inside of the home, Dr. Banner recommended only the replacement of the carpet because that is where he believed the airborne mold spores would have probably drifted to and rested. He followed that by confirming, however, that he never actually tested the carpet itself for mold, so he had no scientific basis for determining whether there was any mold in the carpet. Dr. Banner’s report also included a general description of the health effects associated with mold exposure.

In June 2005, the Raabs contacted Dennis Durandetto of Denco Home Inspection, a certified home inspector and licensed builder with experience in residential and commercial construction, remodeling, and restoration, and certified in advanced water damage restoration by the Institute of Inspection Cleaning and Restoration Certification. Durandetto inspected the Raabs’ home and prepared a detailed seven-page estimate “to remove and replace” every damaged and contaminated building material on the premises. Durandetto estimated that it would cost the Raabs approximately \$48,870.83 to remediate the entire structure. Datacomp Appraisal Services appraised the Raabs’ home at \$35,500. Dr. Banner of Mold Free testified at his November 30, 2005 deposition that he reviewed Durandetto’s estimate and “my own opinion is I didn’t recommend these kinds of extensive demolition.” Dr. Banner agreed that Durandetto is “basically suggesting that every piece of drywall be ripped out of that house and replaced,” and stated that “in my observations . . . I wouldn’t have recommended that, myself,” and “my opinion was that the carpeting was the area that I would have the greatest concern about. I didn’t see indications that warranted that kind of demolition.”

The Raabs also retained Larry Paxton, a consulting engineering expert “with experience in soils, drainage, construction and in the design and construction of mobile home and manufactured housing sites.” Paxton went to the Raabs’ home, interviewed the Raabs, read “pertinent documents, conducted the investigations[,] and examined records of the River Ridge-Saline on file with the Michigan Mobile Home Commission in Lansing.” Paxton prepared a memorandum dated July 21, 2005, stating that he found two problems needing corrective attention based on a “conversation with Mrs. Raab along with a review of photos taken under the home.”

Regarding the first problem, Paxton found that the ground beneath the Raabs’ home needed to be raised to prevent the lot’s underside from collecting water during rainfall or lawn watering. According to Paxton, the current drain system was ineffective because it was covered with topsoil and grass, “which allows water to flow freely over the pipe without entering the pipe,” and the pipe had no effective outlet. He stated that the sidewalk needed to be removed to create a watercourse “through the sidewalk” that would be “covered with a grating.” Paxton noted that the photographs he observed indicated that the problem persisted through the winter months; therefore, the ground under the home would have to be filled to an elevation equal to or

above the surrounding yard. The second problem, according to Paxton, was that there was differential settlement of the home's support piers, which required re-leveling. He stated:

the pictures presented by Mrs. Raab show cracking at corners and where the wall meets the ceiling along with the fact that doors are not closing properly, windows are either sticking or falling closed after opening and doors are closing on their own are indicators of differential settlement.

Paxton believed the settlement was likely caused by the ponding of water around the piers, and concluded that the filling under the home should precede any re-leveling to provide a proper long-term solution.

On June 15, 2007, Paxton prepared a second memorandum after reviewing the Park Design and Grading Plans and Soils Report on file with the Manufactured Housing Division of the Michigan Department of Consumer and Industry Services (MDCIS). Paxton stated that a review of these documents indicated that extensive fill was needed on the Raabs' lot in order to bring it up to design grade, and a review of the March 15, 1996 soils report prepared by McDowell & Associates suggested that improper compaction of the soil may be the cause of the home's settlement problem. Paxton found a recommendation on page 5 of the 1996 soils report that stated:

It is recommended that the services of McDowell & Associates be engaged to observe the soils in the foots or pier prior to concreting in order to test the soils for the required bearing capacities. Testing should also be performed to check that suitable materials are being used for controlled fills and that they are properly placed and compacted.

Paxton stated that he contacted McDowell & Associates to determine whether these recommendations were followed and was informed that McDowell & Associates had never been retained for any of the suggested services. Paxton noted that the soil on the Raabs' site had shrink-swell tendencies, and he concluded that another reason for the settlement problems found at the Raabs' home was the site's drainage problem and the swelling of the soil during periods when water was ponding under the home. Finally, Paxton concluded that two soil borings needed to be done at the site to determine if the soil was properly compacted before a solution to the settlement problem could be determined.

The Raabs assert they have suffered the loss of use and enjoyment of their home; they have two small children who can no longer play in the yard; they are fearful of adverse health effects due to their children's exposure to the mold contamination around the property; and they have stopped inviting and entertaining friends and family due to the health risks and associated mental stress and embarrassment caused by the conditions in their home and in the park. The Raabs further assert that they are distressed and annoyed that they have lost the entire value of their biggest marital asset, and that they have attempted to alleviate the problems by consulting with private contractors but it was too late because the mold damage had already occurred due to River Ridge-Saline's failure to make timely repairs. Finally, the Raabs claimed that they lived with the fear and concern for the health and safety of their family due to the mold contamination; they would frequently agonize over whether they should just abandon the property and destroy their credit; and they considered selling their home but could never do so in good conscience.

(The Raabs have since abandoned the manufactured home and relinquished possession of the home to the bank, which is not a party to this action.)

The Raabs sued River Ridge-Saline for nuisance, negligence, and wrongful eviction. The Raabs claimed that River Ridge-Saline knew or should have known of a drainage problem on their lot and failed to maintain the premises in a reasonably safe manner, resulting in flooding around and underneath their home after heavy rainfalls and winter thaws beginning in 2003 and causing their home to settle unevenly into the lot. The Raabs alleged that the flooding caused structural damage and mold contamination to the home. Accordingly, the Raabs' complaint alleged that River Ridge-Saline failed to maintain the premises in a reasonably safe condition; failed to adequately inspect, test, evaluate and/or assess the grounds for hazards; violated MCL 554.139 *et seq.*; violated the Housing Law of Michigan¹ by failing to keep the dwelling and all its parts in good repair; violated the Michigan Administrative Code, Department of Public Health, Mobile Home Park Standards, Part 4 and Part 6 concerning drainage and insect control; failed to warn, advise and/or instruct the Raabs of the drainage problem and the means to minimize the risks and damages associated with said condition; and failed to make necessary repairs after having actual and/or constructive knowledge of the existence of the drainage problem and the need to make necessary repairs to the property's drainage system. The Raabs did not allege any claims for personal injury. The Raabs claimed economic and non-economic damages in excess of \$25,000.

The case was submitted to case evaluation, and it was evaluated at \$5,000. River Ridge-Saline accepted it, but the Raabs rejected it.

River Ridge-Saline moved for summary disposition pursuant to MCR 2.116(C)(10), arguing there were no genuine issues of material fact. The Raabs responded that there were genuine issues of material fact and again claimed damages "in excess of \$25,000." After oral arguments on the motion, the circuit court denied River Ridge-Saline's motion, finding that genuine issues of material facts existed but also finding that the Raabs' damages did not exceed \$25,000 as a matter of law. Accordingly, the circuit court ordered that the case be remanded to district court. The circuit court denied the Raabs' subsequent motion for reconsideration.

The Raabs filed an application for leave to appeal to this Court arguing two issues: (1) the circuit court erred because the question of subject matter jurisdiction was raised by the court on its own initiative and the Raabs were not afforded notice or an opportunity to be heard as mandated by MCR 2.227(A)(1); and (2) the Raabs properly pleaded subject-matter jurisdiction and established a genuine issue of material fact regarding whether their damages met the jurisdictional amount requirement of \$25,000. This Court granted the Raabs' application for leave to appeal, but limited the appeal to only the issues raised in the Raabs' application and their supporting brief. River Ridge-Saline cross-appealed, raising two issues related to the circuit court's denial of its motion for summary disposition. The Raabs moved in this Court to dismiss the cross-appeal on the ground that it exceeded the scope of the issue on which leave was granted. A panel of this Court denied the motion without explanation.

¹ MCL 125.401 *et seq.*

II. Jurisdiction

A. Standard Of Review

Whether a trial court has subject matter jurisdiction presents a question of law, which we review de novo.²

B. MCR 2.227(A)(1)

The Raabs claim the circuit court erred in finding that it lacked subject-matter jurisdiction because the issue of whether their damages met the jurisdictional requirement was raised by the circuit court on its own initiative and they were not afforded notice or an opportunity to be heard on that jurisdictional issue as mandated by MCR 2.227(A)(1). We disagree.

MCR 2.227(A)(1) states the following regarding subject-matter jurisdiction and the transfer of civil actions:

When the court in which a civil action is pending determines that it lacks jurisdiction of the subject matter of the action, but that some other Michigan court would have jurisdiction of the action, the court may order the action transferred to the other court in a place where venue would be proper. *If the question of jurisdiction is raised by the court on its own initiative, the action may not be transferred until the parties are given notice and an opportunity to be heard on the jurisdictional issue.* [Emphasis added.]

The Raabs argue that because River Ridge-Saline moved for summary disposition pursuant to MCR 2.116(C)(10), for lack of a genuine issue of material fact, rather than MCR 2.116(C)(4), for lack of subject-matter jurisdiction, the circuit court clearly raised the question of jurisdiction on its own initiative. Therefore, according to the Raabs, they were not given an opportunity to be heard on the jurisdictional issue as mandated by MCR 2.227(A)(1).

Although the Raabs are correct in asserting that the circuit court raised the jurisdictional issue on its own initiative, the issue was based on the amount of the Raabs' damages, and the Raabs were afforded notice and an opportunity to be heard regarding the issue. In their response to River Ridge-Saline's motion for summary disposition, the Raabs argued that they suffered both economic and non-economic damages in an amount greater than \$25,000. They argued that they lost the value of their home, which was appraised at \$35,500, based on a mold remediation estimate of \$48,870.83 they received from Denco Home Inspection. The Raabs also claimed in their answer to River Ridge-Saline's motion that there was structural damage to the home caused by the home settling unevenly or "sinking" into the lot, and that they suffered from (1) the loss of use and enjoyment of their home, (2) mental anguish because they lived in constant fear of health consequences from mold contamination, mental stress and embarrassment caused by the conditions in their home and in the park, and (4) distress and annoyance they experienced from losing the entire value of their biggest marital asset. In support of their arguments and damages,

² *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 472; 628 NW2d 577 (2001).

the Raabs attached to their answer multiple exhibits (including affidavits and depositions), timelines describing when water was present on their lot, many photographs of the property, and reports and estimates from contractors and mold experts.

The Raabs again had the opportunity to be heard regarding their damages at the hearing on River Ridge-Saline's motion. At the hearing, the Raabs argued that their manufactured home is not real estate but personal property and that the measure of its value is,

whatever it would cost to fix it or the value of the home, whichever is less. So we have estimates of what it would cost to fix it, we have estimates of the value, the value turns out to be less than it would cost to repair it so that's the measure of damages in this case.

The Raabs further argued at the hearing that there were questions of fact in the case and that they had "established that through multiple exhibits, and affidavits, and reports."

Thus, pursuant to MCR 2.227(A)(1), the Raabs were afforded notice and an opportunity to be heard regarding the issue of damages; that is, the jurisdictional issue.

C. Jurisdictional Amount

The Raabs also argue that the trial court abused its discretion and clearly erred in holding that as a matter of law, their damages did not exceed \$25,000 because they properly pleaded subject-matter jurisdiction and established that a genuine issue of material fact existed as to whether their damages met the jurisdictional amount requirement. We disagree.

Administrative Order No. 1998-1 provides in pertinent part,

A circuit court may not transfer an action to district court under MCR 2.227 based on the amount in controversy unless: (1) The parties stipulate to the transfer and to an appropriate amend of the complaint, see MCR 2.111 (B)(2); or (2) From the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court.^[3]

"[T]he mediation evaluation may provide some guidance regarding a decision to transfer an action," but it is not dispositive.⁴ "AO 1998-1 clearly provides that the allegations of the complaint must be considered in determining whether the amount in controversy appears to a legal certainty to be within the jurisdictional limit of the district court."⁵

According to the Raabs, they are entitled to economic damages for their nuisance and negligence claims in the amount of their mold testing expenses and repair estimate costs, and in

³ See *id.* at 473.

⁴ *Id.* at 474-475.

⁵ *Id.* at 475.

the amount of Denco Home Inspection's estimate of \$48,870.83 to remediate the structure, which they assert is greater than the appraised value of their home (that is, \$35,500). Citing *Ziegler v Predmore*,⁶ the Raabs argue that reparable damage is compensable on the basis of the cost of the repair or the value of the property, whichever is less; thus, they would at least be entitled to the value of their home, \$35,500, which satisfied the circuit court's jurisdictional requirement of \$25,000.

However, we conclude that the circuit court correctly transferred this case to the district court because there is no evidence supporting damages in excess of \$25,000 in relation to any of the Raabs' claims. With regard to the issue of mold contamination, Denco Home Inspection's estimate of \$48,870.83 involved the removal and replacement of every item of building material in the Raabs' home, including the removal and replacement of all carpeting, padding, flooring, walls and ceilings, and vinyl flooring, in order to determine the extent of mold growth and remediate the structure. However, the Raabs' mold expert tested the Raabs' home for mold and, although he did find mold outside and underneath the home, and airborne mold spores in the living areas of the home, he did not find any indication of mold growth inside the home. The mold expert testified in a deposition that he did not believe Denco Home Inspection's recommendation for "extensive demolition" was necessary and would not recommend it himself. The mold expert recommended the replacement of the carpet alone because that is where he felt the airborne mold spores would have settled. Thus, the mold expert essentially negated the estimate to repair the home given by Denco Home Inspection. If the mold expert found no indication of mold growth in the living areas of the home, then the Denco Home Inspection removal and replacement of every item of building material in the home would be unnecessary, and their estimate of \$48,870.83 cannot be used to support the Raabs' damage claims. Accordingly, there is no evidence supporting damages in excess of \$25,000 in relation to the Raabs' issue of mold contamination.

With regard to any damages relating to the drainage issues on the Raabs' lot, the MDEQ inspector found that both the swale and the French drain running along the north side of the Raabs' home "appeared to be functioning satisfactorily" and "appeared to be carrying the exterior drainage away from the home." Alan Construction had suggested the removal of the drain tile that the MDEQ inspector had directed River Ridge-Saline to install, and the installation of a "high density vinyl drain grid" along the same area of the drain tile at a cost of approximately \$2,300. The Raabs did not hire Alan Construction to do any work but admitted that, if they had done so, it would have likely resolved the drainage problems on the lot. Accordingly, there is no evidence supporting damages in excess of \$25,000 in relation to the Raabs' drainage issues.

The Raabs claimed that the "sinking" of their home caused structural damage, leaving them unable to open and close doors and windows properly, and also causing their walls to fall apart. But the Raabs did not plead any specific amount or provide any repair estimates for the structural damage. Their engineering expert found that there "are indicators of differential settlement" but based his conclusions upon a review of documents and photographs, and

⁶ *Ziegler v Predmore*, 341 Mich 639, 640; 68 NW2d 130 (1955).

conversations with the Raabs, rather than an actual inspection of the home. Both Forrester Construction and Alan Construction inspected the Raabs' home; Alan Construction suggested that the Raabs hire "a manufactured home moving company to relevel the home, in order to adjust the window misalignments, and to determine if there is any settling of the support pillars," and Forrester Construction "said [the home] definitely needs to be relevelled." The Raabs both testified that they had never had the home re-leveled, but were aware that most manufacturers recommend that the home be re-leveled on an annual basis for the first five years, and then every two to three years as needed; and that it cost approximately \$600 each year. Thus, the Raabs never re-leveled their home, nor have they done any testing or soil boring to confirm their belief that their home is structurally damaged or sinking. Accordingly, there is no evidence supporting damages in excess of \$25,000 in relation to the Raabs' claim of structural damages to their home.

The Raabs argue, citing *Adkins v Thomas Solvent Co.*,⁷ and *Obrecht v National Gypsum Co.*,⁸ that they are also entitled to non-economic damages peculiar in nuisance actions, including the loss of normal use and enjoyment of one's premises, annoyance, inconvenience and discomfort, and mental anguish or stress associated with these elements. According to the Raabs, they are entitled to between \$10,000 and \$15,000, for the loss of the use and enjoyment of a substantial portion of their home for a period of 50 months; between \$10,000 and \$40,000 for suffering of annoyance, inconvenience, and discomfort over a period of 50 months; and between \$25,000 and \$30,000 for suffering mental anguish and stress, also over a period of 50 months. The Raabs provided a timeline as evidence to demonstrate how often they had water on their lot, which they claim resulted in the loss of the use and enjoyment of their home each time. They also provided precipitation logs for their area covering the years 2003 through 2006 to demonstrate when heavy rainfalls occurred. The Raabs claim that the water would pool on their lot after there had been heavy or extended rainfalls for several days. But the Raabs failed to present evidence showing in what manner and for how long they lost the use and enjoyment of their home and lot. Thus, there was no evidence establishing that they suffered damages in excess of \$25,000 for the loss of normal use and enjoyment of their home, annoyance, inconvenience, discomfort, or mental anguish and stress.

The circuit court correctly transferred this case to the district court because the Raabs failed to demonstrate that their damages exceeded \$25,000.

III. Statutory Damages

A. Standard Of Review

The Raabs assert that they are entitled to statutory damages pursuant to MCL 600.2918(2). We review de novo questions regarding interpretation and application of a statute.⁹

⁷ *Adkins v Thomas Solvent Co.*, 440 Mich 293; 487 NW2d 715 (1992).

⁸ *Obrecht v National Gypsum Co.*, 361 Mich 399; 105 NW2d 143 (1960).

⁹ *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

B. Analysis

MCL 600.2918(2) provides:

Any tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner, lessor, licensor, or their agents shall be entitled to recover the amount of his actual damages or \$200, whichever is greater, for each occurrence and, where possession has been lost, to recover possession. Unlawful interference with a possessory interest shall include:

* * *

(g) Introduction of noise, odor or other nuisance.

The Raabs allege that in total they have suffered actual losses in an amount between \$45,250 and \$52,750 each. They further claim that their possessory interest has been interfered with an average of 10 days per month for 48 months which, under the above statute granting them \$200 for each repeated occurrence, would entitle them to statutory damages in the amount of \$96,800 each, for a total of \$193,600. We disagree.

The Raabs have not presented any evidence demonstrating an “occurrence” or describing an experience when they suffered from an alleged “unlawful interference” with their possessory interest. As previously stated, the Raabs’ timeline demonstrates that they observed standing water on their lot or under their home after heavy or extended rainfalls on a number of dates. However, the Raabs failed to present any evidence of an alleged “unlawful interference” with their possessory interest occurring on these dates. Moreover, there was no evidence that the Raabs’ possessory interest had been interfered with an average of 10 days per month for 48 months. Accordingly, there is no evidence supporting damages in excess of \$25,000 in relation to the Raabs’ statutory claim.

IV. River Ridge-Saline’s Cross-Appeal

A. Standard of Review

We review de novo the trial court’s decision on a motion for summary disposition.¹⁰

B. Support For Issue Of Damages

On cross-appeal River Ridge-Saline argues that the trial court erred in failing to grant its motion for summary disposition because the Raabs failed to establish a genuine issue of material fact for any recoverable damages. We disagree with River Ridge-Saline and conclude that the Raabs did establish a genuine issue of material fact that they sustained some damages as a result of the recurring flooding of their property. Specifically, the Raabs provided numerous dates on which flooding prevented them from the use and enjoyment of their property. They also submitted proofs that the home suffered some mold contamination and structural and non-

¹⁰ *Renny v Dep’t of Transportation*, 478 Mich 490, 495; 734 NW2d 518 (2007).

structural damages. When the evidence is viewed in a light most favorable to the non-moving party (that is, the Raabs), there was a genuine issue of material fact as to whether they suffered damages so that the circuit court was precluded from granting judgment to River Ridge-Saline as a matter of law.¹¹

C. Support For Substantive Claims

The Raabs also established genuine issues of material fact to support their claims of nuisance, wrongful eviction, and negligence. Contrary to River Ridge-Saline's assertions, a nuisance claim may be based on negligent conduct as well as intentional conduct.¹² Further, the Raabs' proofs established that the periodic flooding of their property unreasonably interfered with their use and enjoyment of it. The flooding need not result in the permanent interference of the Raabs' use and enjoyment to establish a claim for private nuisance.¹³

Further, because the Raabs alleged sufficient facts to avoid summary disposition on their nuisance claim, their claim for wrongful eviction under MCL 600.2918(2)(g) should also survive summary disposition.

Finally, for many of the same reasons supporting the nuisance claim, the Raabs also established a genuine issue of material fact for their negligence claim. Specifically, the Raabs alleged that River Ridge-Saline caused or exacerbated the flooding by not properly grading the adjacent but higher elevated properties, by not compacting the fill on their property, by using expansive and unstable clay as the fill material on their property, and by not ameliorating the flooding when given notice of it when River Ridge-Saline had a duty to do so. Thus, the circuit court could not decide the Raabs' negligence claim as a matter of law.¹⁴

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck

¹¹ MCR 2.116(G)(5); *Cowles v Bank West*, 476 Mich 1, 32; 719 NW2d 94 (2006).

¹² See *McDowell v Detroit*, 264 Mich App 337; 349; 690 NW2d 513 (2004), rev'd on other grds 477 Mich 1079 (2007); *Wagner v Regency Inn Corp*, 186 Mich App 158, 163, 165; 463 NW2d 450 (1990).

¹³ See *Traver Lakes v Douglas Co*, 224 Mich App 335, 347; 568 NW2d 847 (1997).

¹⁴ *Cowles, supra*.