S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PATRICK L. JUNE and MOLLY M. JUNE, Plaintiffs-Appellants,	UNPUBLISHED May 15, 2018
v	No. 339597 Calhoun Circuit Court LC No. 16-003222-NI
JEFFREY DOUGLAS TUTTLE and STEPHANIE TUTTLE, Defendants, and QUALITY CONVERTERS, INC. and QUALITY CAMPING, INC., Defendants-Appellees.	

Before: METER, P.J., and GADOLA and TUKEL, JJ.

PER CURIAM.

Plaintiffs, Patrick L. June and Molly M. June, appeal as of right the order of the trial court granting summary disposition to defendants Quality Converters, Inc. and Quality Camping, Inc. (jointly Quality) pursuant to MCR 2.116(C)(8). We affirm.

I. FACTS

This case arises from an automobile accident that occurred on May 23, 2015. On that day, defendant Jeffrey Tuttle was driving an automobile owned by Jeffery and his wife, defendant Stephanie Tuttle, northbound on Old US 27 in Calhoun County, Michigan. Jeffrey began to make a left turn into the driveway of a campground owned by defendant Quality Converters, Inc., and operated by defendant Quality Camping, Inc. Being unfamiliar with the campground, Jeffrey began to turn into the campground's exit driveway, which was just south of the entrance driveway. According to Jeffrey, the sun was very bright, making it difficult to see.

He then noticed a spike strip on the pavement of the driveway, and to avoid the strip veered back onto the highway and into the path of oncoming southbound traffic. Plaintiff Patrick June was driving a motorcycle southbound on the highway with his wife, plaintiff Molly June, who was a passenger on the motorcycle. When Jeffrey Tuttle pulled into the path of oncoming traffic, the Junes' motorcycle struck the Tuttles' vehicle head-on. Plaintiffs were seriously injured as a result of the crash.

Plaintiffs brought this action before the trial court, alleging negligence and nuisance. Quality moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that plaintiffs had failed to state a claim upon which relief could be granted. Plaintiffs responded to Quality's motion for summary disposition, and requested leave to amend their complaint. The trial court did not specifically address plaintiffs' request to amend, but granted Quality's motion for summary disposition. In its opinion from the bench, the trial court concluded that Quality did not owe a duty of care to plaintiffs, that Quality did not cause an unreasonable risk of harm, and that the spike strip on the campground driveway did not cause the accident.[1] Plaintiffs now appeal to this Court.

II. ANALYSIS

Plaintiffs contend that the trial court erred in granting Quality summary disposition pursuant to MCR 2.116(C)(8) because plaintiffs' complaint stated claims for negligence and nuisance. Plaintiffs argue that Quality owed them a duty of care to design, develop, and maintain their entrances and exits to minimize the possibility of an accident involving motor vehicles entering and leaving the property and that Quality breached that duty by creating an unreasonable risk of harm with its hazardous entrance/exit system, which was a direct proximate cause of plaintiffs' injuries. Plaintiffs also argue that Quality's entrance/exit system was a nuisance per se, or alternatively, a nuisance in fact. We disagree.

We review de novo a trial court's grant or denial of summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). A motion for summary disposition pursuant to MCR 2.116(C)(8) "tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A motion for summary disposition under this section is properly granted when, considering only the pleadings, the alleged claims are clearly unenforceable as a matter of law and no factual development could justify recovery. *Id*.

A. NEGLIGENCE

The elements of negligence are duty, breach, causation, and damages. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012). To establish a prima facie case of negligence, the plaintiff must establish that (1) the defendant owed a duty to the

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[1] The trial court also entered a stipulated order for dismissal with prejudice as to defendants Jeffrey and Stephanie Tuttle.

plaintiff, (2) the defendant breached that duty, (3) the breach of duty was a proximate cause of the plaintiff's damages, and that (4) the plaintiff suffered damages. *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000).

The threshold inquiry in a negligence action is whether the defendant owed a legal duty to the plaintiff. *Johnson v Bobbie's Party Store*, 189 Mich App 652, 659; 473 NW2d 796 (1991). The element of duty in a negligence action ordinarily is a question of law for the court to decide. *Moning v Alfono*, 400 Mich 425, 436-437; 254 NW2d 759 (1977). By contrast, once it has been established that a duty existed, whether a defendant breached its duty is generally a question of fact. *Boumelhem v Bic Corp*, 211 Mich App 175, 181; 535 NW2d 574 (1995), citing *Moning*, 400 Mich at 438.

"The determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person." *Hill v Sears, Roebuck and Co*, 492 Mich 651, 661; 822 NW2d 190 (2012) (citation omitted). The court determines whether a duty exists by assessing competing policy considerations and weighing whether "the social benefits of imposing a duty outweigh the social costs of imposing a duty." *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 505; 740 NW2d 206 (2007). "Only if the law recognizes a duty to act with due care arising from the relationship of the parties does it subject the defendant to liability for negligent conduct." *Id*. at 506.

"Factors relevant to the determination whether a legal duty exists include the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Hill*, 492 Mich at 661 (quotation marks and citation omitted). Our Supreme Court has identified the most important factor to consider in this analysis as the relationship between the parties, but the foreseeability of the harm is also essential to impose duty. *Id*. Our Supreme Court has also opined that "[t]he duty to protect others against harm from third persons is based on a relationship between the parties." *In re Certified Question*, 479 Mich at 506.

Generally, there is no duty to protect a person from the acts of a third person. *Johnson*, 189 Mich App at 660. And generally, a property owner's duty ends at the boundary of his or her premises. *Stevens v Drekich*, 178 Mich App 273, 276; 443 NW2d 401 (1989). Typically, an adjacent landowner will only become liable for a condition in a public right-of-way if he or she has physically intruded upon the road in some manner, has increased an existing hazard in the roadway, or has created a new hazard. *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 132; 463 NW2d 442 (1990).

This Court has held, however, that a landowner owes a duty to motorists on an adjacent highway to design, develop, and maintain a parking area to prevent unreasonable risk of harm to the motorists. *Langen v Rushton*, 138 Mich App 672; 360 NW2d 270 (1985). In *Langen*,[2]

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[2] *Langen* is not binding precedent upon this Court under MCR 7.215(J)(1), which provides that published opinions of this Court issued on or after November 1, 1990 are precedential. See *Sumner v General Motors Corp*, 245 Mich App 653, 661; 633 NW2d 1 (2001).

Nancy Rushton was pulling out of the parking lot of a shopping center owned by the defendant and onto an adjacent road. Although the parking lot had a stop sign directing traffic leaving the parking lot to stop before entering the roadway, Rushton's view of oncoming traffic was obscured by a small tree in a median that was within the control of the defendant shopping center. Rushton pulled out into the roadway and into the path of the plaintiff's motorcycle, causing a collision. This Court held that, balancing the societal interest involved in safe travel upon the highways, it was not unjust to impose upon the defendant landowner the burden to design, develop, and maintain the parking area to prevent unreasonable risk of harm to motorists on adjacent highways. *Id*. at 678. This Court later stated, however, that the duty imposed upon the adjacent property owner in *Langen* "stretched the duty concept to its outer limit." *Swartz v Huffmaster Alarms Systems, Inc*, 145 Mich App 431, 437; 377 NW2d 393 (1985).

Relying on *Langen*, plaintiffs alleged in their complaint that Quality owed plaintiffs the duty to design, develop, and maintain their campground, including the entrance and exit, to prevent unreasonable risk of harm to motorists on the adjacent highway. Plaintiffs alleged that installing the spike strip, and failing to install signs warning of the spike strip, breached the duty of care owed to plaintiffs. Plaintiffs further alleged that the risk that the spike strip would cause an accident on the highway was foreseeable and that Quality's negligence was the proximate cause of plaintiffs' damages. Plaintiffs argue that when Jeffrey saw the spike strip while pulling into the exit drive, it startled him to the extent that he veered back onto the highway and into the path of oncoming traffic in his effort to avoid the spike strip. Plaintiffs argue that Jeffrey's reaction, and the resulting harm to plaintiffs, were reasonably foreseeable to Quality, and that Quality therefore had a duty to plaintiffs to prevent the unreasonable risk of harm.

The facts of this case are less compelling than those of *Langen*. Unlike *Langen*, where the tree obstructed the view of the motorist leaving the parking lot, the spike strip in this case did not obstruct Jeffrey's view or otherwise directly interfere with his ability to safely avoid oncoming traffic. There is no allegation that the design, development, or maintenance of the driveway compelled him to veer back onto the road, or that there was no way for Jeffrey to stop and to wait for traffic to clear. Rather, the risk of harm in this case arose not from the spike strip, but from Jeffrey's response to it, which was to veer back into traffic. To attribute a duty to Quality under these facts would be to conclude that Quality should have been able to foresee that the spike strip would so startle some drivers that they would veer into traffic even though there was ample room to avoid the spike strip. This conclusion would be an expansion of the reasoning of *Langen*, which this Court already noted "stretched the duty concept to its outer limit." *Swartz*, 145 Mich App at 437.

Quality argues, and the trial court concluded, that this case is akin not to *Langen*, but to *Cavaliere v Adults for Kids*, 149 Mich App 756; 386 NW2d 667 (1986). In *Cavaliere*, the plaintiff was working with a construction crew in a roadway. Meanwhile, on adjacent property, the county parks department had permitted the defendant organization to hold an exhibit of military equipment. A motorist driving on the roadway became distracted by a military helicopter landing at the exhibit, and collided with the plaintiff, causing the plaintiff serious injuries. The plaintiff argued that the county parks department had negligently created a roadside distraction by permitting the helicopter to land near the roadway, and that the negligence was the proximate cause of his injuries. The trial court granted the defendant summary disposition, and this Court affirmed, reasoning that it was not foreseeable that a person

would become so distracted by the landing of a helicopter under the circumstances of that case that they would neglect their driving responsibilities. *Id*. at 759. This Court stated that "we find that the conduct attributed by plaintiffs to the driver . . . was well beyond that which defendants, as reasonable persons, could be required to anticipate under the circumstances." *Id*. at 761.

Plaintiffs argue that this case is more analogous to *Langen* because in both *Langen* and this case, a design flaw in the landowner's property caused an accident to occur on the adjacent highway. We conclude that the facts of this case are more closely analogous to those of *Cavaliere* than of *Langen*.[3] Unlike *Langen*, this is not a case in which a condition on the landowner's property obstructed a driver's view of the adjacent roadway. Instead, in this case, as in *Cavaliere*, the question is to what extent a landowner will be held responsible for a driver, startled or distracted by an activity or condition upon the landowner's property, who then causes a collision on the adjacent highway due to their reaction to the startling or distracting condition.

This Court in *Cavaliere*, weighing the level of distraction in that case, observed as follows:

> At the outset, it is important to recognize precisely what plaintiffs are alleging, as well as what plaintiffs are not alleging. Plaintiffs have not alleged that the helicopter which distracted the driver Minauro descended into the traffic on Sixteen Mile Road. Nor have plaintiffs alleged that the helicopter as it landed physically obstructed traffic, or even roared across the road in an unanticipated or a terrifying manner. Plaintiffs have similarly not alleged that the military equipment physically interfered with traffic on the road. They have also not alleged that the landing of the helicopter or the presence of the military exhibition violated any ordinance or statute. The complaint alleges that the mere landing of a helicopter amidst other military equipment in a park adjacent to a public roadway is itself a negligent act on the part of defendants. [*Cavaliere*, 149 Mich App at 759-760.]

Similarly in this case, plaintiffs argue that Quality's placement of the spike strip in the driveway was a negligent act that constituted a breach of duty to plaintiffs. There is no allegation that the spike strip was about to come into contact with Jeffrey's car. Nor is it alleged that the only way to avoid the spike strip was to veer into the highway; there is no suggestion that there was not space or time to stop and to proceed with caution into the highway. In fact, there is nothing to indicate that the spike strip was any more threatening than a closed gate or some other sort of barricade to traffic. A car failing to heed the barricade presented by a spike strip would likely damage its tires; a car failing to heed a closed gate would similarly be likely to sustain damage. Applying plaintiffs' reasoning, a closed gate similarly could be so alarming to a driver as to produce a panicked reaction and result in liability for a property owner. In comparison to the facts of *Cavaliere*, in which the landing of a military helicopter was not

[3] *Langen* would only be analogous if the spike strip in this case physically interfered with Tuttle's ability to safely enter the roadway, or if, instead of having her view obscured by the tree, the motorist in *Langen* had become so alarmed by the tree that she veered into the roadway.

considered to be a sufficient distraction to impose liability, it is difficult to conclude that a motionless spike strip placed on a driveway is alarming enough to justify the imposition of liability upon the landowner. As in *Cavaliere*, the conduct of the driver in this case was well beyond that which Quality could be required to anticipate under the circumstances.

As noted, the threshold question in any negligence action is whether the defendant owed a legal duty to the plaintiff, focusing the inquiry upon the relationship of the parties and the foreseeability of the harm. *Johnson*, 189 Mich App at 659. In this case, to conclude that Quality owed a duty to plaintiffs under the facts of this case would be an expansion of the obligation described in *Langen*, and in contrast to *Cavaliere*, which concluded that a military helicopter landing near the highway was not sufficiently distracting to impose liability. We therefore conclude that the trial court properly granted Quality's motion for summary disposition as to plaintiffs' claim of negligence.

B. NUISANCE

Plaintiffs' complaint also alleged that the spike strip was a nuisance per se, or alternatively, a nuisance in fact. "In Michigan, a nuisance is predicated upon the existence of a dangerous condition." *Cavaliere*, 149 Mich App at 763. A nuisance per se is an activity or condition that constitutes a nuisance at all times and under all circumstances, regardless of the location or surroundings. *Bluemer v Saginaw Central Oil & Gas Service, Inc*, 356 Mich 399, 413-414; 97 NW2d 90 (1959). By contrast, "nuisance in fact is a nuisance by reason of circumstances and surroundings and may be found where its natural tendency is to create danger and inflict injury on a person or property." *Cavaliere*, 149 Mich App at 763-764, citing *Bluemer*, 356 Mich at 411.

"A public nuisance[4] involves the unreasonable interference with a right common to all members of the general public." *Sholberg v Truman*, 496 Mich 1, 6; 852 NW2d 89 (2014). A defendant is liable for a nuisance when either the defendant created it, the nuisance arose on land owned or controlled by the defendant, or the defendant employed a person to do work that the defendant knew was likely to create a nuisance. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 191; 540 NW2d 297 (1995). Whether a nuisance exists is a question of fact, except where reasonable minds cannot differ. *Cavaliere*, 149 Mich App at 764.

Here, summary disposition was granted pursuant to MCR 2.116(C)(8) for failure to state a claim. Although the trial court did not specify which of its findings applied to the granting of the motion with respect to the nuisance claim, the trial court found that the spike strip did not cause the accident, thereby concluding necessarily that plaintiffs did not plead facts sufficient to establish that a nuisance existed. This conclusion is supported. Although plaintiffs alleged that the existence of the spike strip was a nuisance per se and a nuisance in fact, there were no facts sufficient to demonstrate that the spike strip created an unreasonable interference with rights

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[4] By contrast, a private nuisance involves the interference of another's interest in the private use and enjoyment of land. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992).

common to members of the general public. Plaintiffs' only allegation in this regard is that the spike strip so startled Jeffrey Tuttle that he abandoned the caution required of a motorist and veered into oncoming traffic. Because the alleged facts fail to establish that the spike strip unreasonably interfered with the rights of the public, summary disposition pursuant to MCR 2.116(C)(8) of plaintiffs' alternative claims for nuisance per se or nuisance in fact was appropriate. See *Cavaliere*, 149 Mich App at 763-764.

C. AMENDMENT OF COMPLAINT

Plaintiffs also argue that the motion for summary disposition was premature because it is possible that factual development could have justified recovery. We disagree. This Court, in conducting its de novo review of the grant of summary disposition under MCR 2.116(C)(8), draws all inferences in the light most favorable to the plaintiff, and determines whether the plaintiff pleaded facts that constitute a valid claim. See *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). Here, if no factual development could possibly justify recovery, Quality was entitled to summary disposition. *Maiden*, 461 Mich at 120. Plaintiffs' complaint alleged that Quality is liable under theories of negligence and nuisance. Plaintiffs' claims fail not because the facts alleged are not fully developed to describe what occurred, but because the facts, and all reasonable inferences from those facts, fail to establish that Quality owed a duty to plaintiffs under a theory of negligence or that Quality created a nuisance. Therefore, Quality was entitled to summary disposition under MCR 2.116(C)(8) because plaintiffs' claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.

We also reject plaintiffs' contention that the trial court erred in denying plaintiffs request to amend their complaint. This Court reviews a trial court's decision on a motion to amend a complaint under MCR 2.116(I)(5) for an abuse of discretion. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2004). Under MCR 2.116(I)(5), if a trial court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), the trial court is required to give the parties the opportunity to amend their pleadings "unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5); *Long v Liquor Control Comm*, 322 Mich App 60, ___; ___ NW2d ___ (2017), slip op at 2 (citation omitted). A trial court ordinarily should permit a party to amend a complaint when justice so requires, unless amendment would be futile. *Sanders v Perfecting Church*, 303 Mich App 1, 9; 840 NW2d 401 (2013). "A determination of futility must be based on the legal insufficiency of the claim on its face." *Liggett*, 260 Mich App at 139. "An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 9; 772 NW2d 827 (2009).

In their memorandum in opposition to Quality's motion for summary disposition, plaintiffs requested that they be allowed to amend their complaint, stating "[i]f this Court were to determine that Plaintiffs' Complaint could be construed to allege that Defendant Tuttle 'did not look for oncoming traffic before beginning his turn' as alleged by [Quality] within their Motion, and this Finding impacted this Court's decision on [Quality's] Motion, then Plaintiffs would request leave to file an Amended Complaint to conform to the evidence in this case." Plaintiffs, in their memorandum before the trial court, then refer to the deposition testimony of Jeffrey

Tuttle and of their expert witness, James Valenta. Plaintiffs' memorandum further stated that "to the extent that Plaintiffs' Complaint is not clear with respect to [Quality's] duty to comply with MMUTCD and [Quality's] subsequent breach of that duty, Plaintiffs would request that they be afforded leave to amend their Complaint to include Mr. Valenta's findings of duty and breach, which are set forth herein for this Court's information." Attached as Exhibits A and B to plaintiffs' memorandum are the Deposition of Jeffrey Tuttle and the Affidavit of James Valenta. The trial court therefore had before it the information that plaintiffs would have added to the complaint if given leave to amend.

As discussed, whether Quality owed a duty to plaintiffs under a theory of negligence is a question of law for determination by the court. *Moning*, 400 Mich at 436-437. Because duty is a question of law, the opinion of an expert witness is not relevant to that inquiry, nor is the testimony of Jeffrey Tuttle that he did or did not look for oncoming traffic before beginning his turn relevant to that inquiry. Similarly, although whether a nuisance exists is a question of fact, summary disposition is appropriate when reasonable minds cannot differ. *Cavaliere*, 149 Mich App at 764. Here, the proposed amendment of the complaint did not provide additional factual information on whether a nuisance existed. Summary disposition was therefore appropriate given that the proposed amendment would have been futile. See, e.g., *Capitol Properties Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 427; 770 NW2d 105 (2009).

Because the trial court properly determined that plaintiffs failed to state a claim under a theory of either negligence or nuisance, and because the amendment of the complaint would have been futile, we conclude that the trial court did not err in granting summary disposition, nor did it abuse its discretion in failing to grant plaintiffs leave to amend their complaint.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael F. Gadola
/s/ Jonathan Tukel