STATE OF MICHIGAN

COURT OF APPEALS

MYRON BUCKLEY,

Plaintiff-Appellant,

v

HATIHAM ALKASMIKHA and DANNY KASHMIKHA, d/b/a STAR PARTY STORE,

Defendants-Appellees.

UNPUBLISHED
May 25, 2001

No. 221021
Oakland Circuit Court
LC No. 98-006969-NI

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

In this premises liability action, plaintiff sued defendants under theories of negligence and nuisance for injuries that he sustained when he was shot by an unknown assailant in the parking lot of the Star Party Store. The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

We review de novo the trial court's grant of summary disposition under MCR 2.116(C)(10) to determine whether plaintiff met his burden of showing a genuine issue of material fact for trial. *Graham v Ford*, 237 Mich App 670, 672-673; 604 NW2d 713 (1999). Our review is limited to the documentary evidence presented by the parties to the trial court in support of their respective positions. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Although we must consider the evidence in a light most favorable to the nonmoving party, *Krass v Tri-County Security, Inc*, 233 Mich App 661, 667 n 4; 593 NW2d 578 (1999), it is necessary that a disputed issue of fact, or the lack thereof, be established by admissible evidence. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 366; 480 NW2d 275 (1991).

As a threshold matter, we determine that plaintiff has not demonstrated a proper basis for using the "CFS" designations (e.g., "ASSLT" and "DISORD") contained within the documentary evidence listing the police runs at the Star Party Store during the year preceding the alleged shooting incident as probative evidence of the number of actual assaults or disorderly conduct incidents. Although the "CFS" designations may have some significance within the police department, plaintiff has not shown that they would be admissible to prove the truth of the matter asserted. See *Maiden, supra* at 124-125.

The parties do not dispute that defendants owed plaintiff a duty, as a business invitee, to protect him from an unreasonable risk of harm caused by a dangerous condition of the land. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). The disputed issue before us concerns the scope of that duty or, stated differently, the specific standard of care. A jury generally decides the specific standard of care in a negligence action unless all reasonable persons would agree on this issue or matters of public policy cause the court to limit the scope of the duty. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614, 537 NW2d 185 (1995); see also *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977), supplemental order 402 Mich 958 (1978).

As a matter of public policy, defendants had no duty to protect plaintiff from an unforeseeable assault by a third party. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 401-402; 566 NW2d 199 (1997); *Williams*, *supra* at 501-504. Hence, to establish a cognizable duty of care, it was incumbent on plaintiff to show that the harm suffered (i.e., the gunshot in the parking lot) was foreseeable. *Mason, supra* at 393. Viewed in a light most favorable to plaintiff, the submitted evidence failed to establish a genuine issue of material fact for trial in this regard.[1] While the proofs may infer nonfeasance on the part of defendants, neither the circumstances present when plaintiff was shot, nor the evidence presented concerning the parking lot's past use, would permit reasonable minds to conclude ~~that~~ it was foreseeable that plaintiff would be shot.

Turning to plaintiff's nuisance theories, we decline to consider plaintiff's argument that he was entitled to go forward with a claim of nuisance under MCL 600.3801 *et seq*.; MSA 27A.3801 *et seq.* Plaintiff has not shown that this statutory nuisance theory was raised in the trial court, and he has failed to brief such a claim in this appeal with appropriate citation to supporting authority. Therefore, consideration of this statutory nuisance theory is not warranted. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

We note that that the public nuisance count alleged in the complaint sounds only in common-law nuisance. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). A public nuisance is an unreasonable interference with a common right of the general public. *Id*. A private citizen may file a public nuisance action when he or she suffers a type of harm that differs from that of the general public. *Id*. A public nuisance is distinguishable from a private nuisance in that the public nuisance involves interference with the rights of the community at large, and not a civil wrong based on a disturbance in a plaintiff's rights in land. *Williams v Primary School District # 3, Green Twp*, 3 Mich App 468, 475-476; 142 NW2d 894 (1966); see also *Adkins v Thomas Solvent Co*, 440 Mich 293, 303; 487 NW2d 715 (1992) (gist of the private nuisance, historically, was "interference with occupation or use of land or an interference with servitudes relating to land"). In any event, while many wrongs may be denoted a "nuisance," the thrust of such a claim is that, "for one or another widely varying reasons the thing stigmatized as a nuisance violates the rights of others." *Hadfield v Oakland Co*

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[1] The record reflects that, unlike defendants, plaintiff did not file the quoted deposition excerpts upon which he relies with his brief. However, we have considered the deposition testimony on which plaintiff relies because its accuracy is not challenged by defendants.

Drain Comm'r, 430 Mich 139, 150; 422 NW2d 205 (1988), quoting *Awad v McColgan*, 357 Mich 386, 389-390; 98 NW 571 (1959).

In the case at bar, we hold that, even assuming that admissible evidence concerning the claimed drug use, drinking, and "hanging out" activities in the parking lot reasonably infer the existence of a common-law public nuisance, plaintiff's nuisance claim fails, as a matter of law, because he did not present evidence that these activities caused him harm different from that of the general public. Moreover, none of these activities were shown to involve firearms. Further, while there was evidence that plaintiff was shot in a congested parking lot, plaintiff failed to present any evidence linking the unknown assailant to the activities that were alleged to constitute a nuisance.

A nuisance claim does not obviate a plaintiff's obligation to prove causation. *Brown v Nichols*, 337 Mich 684, 689-690; 60 NW2d 907 (1953). Where, as in this case, the matter remains one of speculation and conjecture, summary disposition is appropriate. See *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). While it is not clear from the trial court's opinion whether the court considered defendants' causation arguments, we conclude that plaintiff's failure to show a causative link between the shooting and the conditions alleged to constitute the nuisance entitle defendants to summary disposition.

In view of this holding, it is unnecessary to consider whether plaintiff could establish the separate counts in his complaint involving nuisance per se (at law) or nuisance in fact. Because all of the nuisance theories are based on the same proofs, and relate to the same type of nuisance, namely, a public nuisance, our resolution of the causation issue applies to all of the nuisance theories.

In any event, we note that the nuisance per se and nuisance in fact theories do not differ in remedy, but rather, in the proof that establishes the nuisance. *Bluemer v Saginaw Central Oil & Gas Svc, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959). In the case at bar, plaintiff's nuisance per se theory for proving the claimed public nuisance fails, as a matter of law, because plaintiff did not present evidence that the Star Party Store and its adjacent parking lot was incapable of being operated in a manner so as not to pose any nuisance. *Palmer v Western Michigan Univ*, 224 Mich App 139, 144; 568 NW2d 359 (1997); see also *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992). Further, while circumstances may give rise to a nuisance in fact, we are unpersuaded that the admissible evidence in this case establishes a genuine issue of fact regarding the existence of a nuisance in fact, negligently or intentionally created by defendants. *Wagner v Regency Inn Corp*, 186 Mich App 158, 164; 463 NW2d 450 (1990). The admissible evidence presented to the trial court does not establish the type of "crime magnet" that existed in *Wagner, supra* at 165.

Regardless of defendants' actions, we note that the nuisance itself is the condition, and not the act or failure to act; liability is predicated on defendants' ownership or control of property from which the claimed nuisance arose, and does not require that defendants created the nuisance. *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 345-346; 568 NW2d 847 (1997). See also *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630, 636; 178 NWS2d 476 (1970) ("[p]rimarily, nuisance is a condition"). Nevertheless, even assuming that the evidence of the activities in the parking lot are sufficient to infer a nuisance in

fact, regardless of defendants' acts or inaction, plaintiff's nuisance in fact theory for proving the claimed public nuisance still fails, as a matter of law, because plaintiff did not present evidence indicating that the activities alleged to be the public nuisance involved firearms, or otherwise establish a causative link between the unknown assailant who shot him plaintiff and the alleged activities. Thus, as previously discussed, plaintiff's failure to establish a genuine issue of material fact with regard to causation is dispositive of his nuisance claim, regardless of whether we analyze the claim in the context of a public nuisance, nuisance per se, or nuisance in fact.

Affirmed.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ Patrick M. Meter